TABLE OF AUTHORITIES

Beckman v. Little Salmon/Carmacks First Nation, [2010] S.C.J. No. 53

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: November 12, 2009;

Judgment: November 19, 2010.

File No.: 32850.

[2010] S.C.J. No. 53 | [2010] A.C.S. no 53 | 2010 SCC 53 | [2010] 3 S.C.R. 103 | [2010] 3 R.C.S. 103 | [2011] 1 C.N.L.R. 12 | J.E. 2010-2043 | 295 B.C.A.C. 1 | 2010EXP-3771 | 408 N.R. 281 | EYB 2010-182306 | 97 R.P.R. (4th) 1 | 10 Admin. L.R. (5th) 163 | 326 D.L.R. (4th) 385 | 55 C.E.L.R. (3d) 1 | 2010 CarswellYukon 140 | 196 A.C.W.S. (3d) 74

David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy, Mines and Resources, Minister of Energy, Mines and Resources, and Government of Yukon, Appellants / Respondents on cross-appeal, and Little Salmon/Carmacks First Nation and Johnny Sam and Eddie Skookum, on behalf of themselves and all other members of the Little Salmon/Carmacks First Nation, Respondents / Appellants on cross-appeal, and Attorney General of Canada, Attorney General of Quebec, Attorney General of Newfoundland and Labrador, Gwich'in Tribal Council, Sahtu Secretariat Inc., Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority, Council of Yukon First Nations, Kwanlin Dün First Nation, Nunavut Tunngavik Inc., Tlicho Government, Te'Mexw Nations and Assembly of First Nations, Interveners.

(206 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR THE YUKON TERRITORY

Case Summary

Aboriginal law — Treaties and agreements — Agreements — Land claims agreements — Appeal and cross-appeal from a judgment of the Yukon Court of Appeal setting aside a decision quashing the approval of an application for a land grant dismissed — The government was required to consult with First Nation to determine the nature and extent of the adverse effects of approving land grants — First Nation received ample notice of the application, an adequate information package, and the means to make known its concerns to the decision maker — In light of the consultation provisions contained in the treaty, neither the honour of the Crown nor the duty to consult were breached.

Aboriginal law — Aboriginal lands — Types — Surrendered lands — Duties of the Crown — Fair dealing and reconciliation — Consultation and accommodation — Honour of the Crown — Appeal and cross-appeal from a judgment of the Yukon Court of Appeal setting aside a decision quashing the approval of an application for a land grant dismissed — The government was required to consult with First Nation to determine the nature and extent of the adverse effects of approving land grants — First Nation received ample notice of the application, an adequate information package, and the means to make known its concerns to the decision maker — In light of the consultation provisions contained in the treaty, neither the honour of the Crown nor the duty to consult were breached.

Appeal and cross-appeal from a judgment of the Yukon Court of Appeal setting aside a decision quashing the approval of an application for a land grant. The treaty at issue here was the Little Salmon/Carmacks First Nation Final Agreement (LSCFN Treaty). The dispute related to an application for judicial review of a decision by the Yukon territorial government to approve the grant of 65 hectares of surrendered land to Paulsen, a Yukon resident. The plot bordered on the settlement lands of the Little Salmon/Carmacks First Nation, and formed part of its traditional territory, to which its members had a treaty right of access for hunting and fishing for subsistence. The LSCFN Treaty provided that surrendered land could be taken up from time to time for other purposes, including agriculture. However, the First Nation contended that the territorial government proceeded without proper consultation and without proper regard to relevant First Nation's concerns. The Yukon Court of Appeal held, as had the trial judge, that the LSCFN Treaty did not exclude the duty of consultation. The Court of Appeal went on to hold, disagreeing in this respect with the trial judge, that on the facts, the government's duty of consultation had been fulfilled.

HELD: Appeal and cross-appeal dismissed.

While the LSCFN Treaty did not prevent the government from making land grants out of the Crown's land holdings, and indeed it contemplated such an eventuality, it was obvious that such grants could adversely affect the traditional economic activities of the First Nation, and the territorial government was required to consult with the First Nation to determine the nature and extent of such adverse effects. Given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more general consultation process in the LSCFN Treaty itself, the content of the duty of consultation was at the lower end of the spectrum. In this case, the First Nation received ample notice of the Paulsen application, an adequate information package, and the means to make known its concerns to the decision maker. The First Nation's objections were made in writing and they were dealt with at a meeting at which the First Nation was entitled to be present, but failed to show up. Both the First Nation's objections and the response of those who attended the meeting were before the Director when, in the exercise of his delegated authority, he approved the Paulsen application. In light of the consultation provisions contained in the treaty, neither the honour of the Crown nor the duty to consult were breached. Nor was there any breach of procedural fairness. Nor could it be said that the Director acted unreasonably in making the decision that he did.

Statutes, Regulations and Rules Cited

Assessable Activities, Exceptions and Executive Committee Projects Regulations, SOR/2005-379,

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Canadian Environmental Assessment Act, S.C. 1992, c. 37,

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, Part VI

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 25, s. 35, s. 52, Part V

Environmental Assessment Act, S.Y. 2003, c. 2 [rep. O.I.C. 2005/202, (2006) 25 Y. Gaz. II, 32],

Indian Act, R.S.C. 1985, c. I-5,

Lands Act, R.S.Y. 2002, c. 132,

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1,

Territorial Lands (Yukon) Act, S.Y. 2003, c. 17,

Wildlife Act, R.S.Y. 2002, c. 229,

Yukon Environmental and Socio-economic Assessment Act, S.C. 2003, c. 7, s. 2, s. 5, s. 8, s .47(2)(c), s. 63, s. 134

Yukon First Nations Land Claims Settlement Act, S.C. 1994, c. 34,

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Aboriginal peoples -- Aboriginal rights -- Land claims -- Duty of Crown to consult and accommodate in the context of a modern comprehensive land claims treaty -- Treaty provides Aboriginal right of access for hunting and fishing for subsistence in their traditional territory -- Application by non-Aboriginal for an agricultural land grant within territory approved by Crown -- Whether Crown had duty to consult and accommodate Aboriginal peoples -- If so, whether Crown discharged its duty -- Constitution Act, 1982, s. 35.

Crown law -- Honour of the Crown -- Duty to consult and accommodate Aboriginal peoples -- Whether Crown has duty to consult and accommodate prior to making decisions that might adversely affect Aboriginal rights and title claims.

Administrative law -- Judicial review -- Standard of review -- Whether decision-maker had duty to consult and accommodate -- If so, whether decision-maker discharged this duty -- Lands Act, R.S.Y. 2002, c. 132; Territorial Lands (Yukon) Act, S.Y. 2003, c. 17.

Little Salmon/Carmacks entered into a land claims agreement with the governments of Canada and the Yukon Territory in 1997, after twenty years of negotiations. Under the treaty, Little Salmon/Carmacks members have a right of access for hunting and fishing for subsistence in their traditional territory, which includes a parcel of 65 hectares for which P submitted an application for an agricultural land grant in November 2001. The land applied for by P is within the trapline of S, who is a member of Little Salmon/Carmacks.

Court Summary:

Little Salmon/Carmacks disclaim any allegation that a grant to P would violate the treaty, which itself contemplates that surrendered land may be taken up from time to time for other purposes, including agriculture. Nevertheless, until such taking up occurs, the members of Little Salmon/Carmacks attach importance to their ongoing treaty interest in surrendered Crown lands (of which the 65 acres forms a small part). Little Salmon/Carmacks contend that in considering the grant to P the territorial government proceeded without proper consultation and without proper regard to relevant First Nation's concerns.

The Yukon government's Land Application Review Committee ("LARC") considered P's application at a meeting to which it invited Little Salmon/Carmacks. The latter submitted a letter of opposition to P's application prior to the meeting, but did not attend. At the meeting, LARC recommended approval of the application and, in October 2004, the Director, Agriculture Branch, Yukon Department of Energy, Mines and Resources, approved it. Little Salmon/Carmacks appealed the decision to the Assistant Deputy Minister, who rejected its review request. On judicial review, however, the Director's decision was quashed and set aside. The chambers judge held that the Yukon failed to comply with the duty to consult and accommodate. The Court of Appeal allowed the Yukon's appeal.

Held: The appeal and cross-appeal should be dismissed.

Per McLachlin C.J. and **Binnie**, Fish, Abella, Charron, Rothstein and Cromwell JJ.: When a modern land claim treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. While consultation may be shaped by agreement of the parties, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people -- it is a doctrine that applies independently of the intention of the parties as expressed or implied in the treaty itself.

In this case, a continuing duty to consult existed. Members of Little Salmon/Carmacks possessed an express treaty right to hunt and fish for subsistence on their traditional lands, now surrendered and classified as Crown lands. While the Treaty did not prevent the government from making land grants out of the Crown's holdings, and indeed it contemplated such an eventuality, it was obvious that such grants might adversely affect the traditional economic and cultural activities of Little Salmon/Carmacks, and the Yukon was required to consult with Little Salmon/Carmacks to determine the nature and extent of such adverse effects.

The treaty itself set out the elements the parties regarded as an appropriate level of consultation (where the treaty requires consultation) including proper notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter; a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and full and fair consideration by the party obliged to consult of any views presented.

The actual treaty provisions themselves did not govern the process for agricultural grants at the time. However, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more elaborate consultation process in the Treaty itself, the scope of the duty of consultation in this situation was at the lower end of the spectrum.

Accordingly, the Director was required, as a matter of compliance with the legal duty to consult based on the honour of the Crown, to be informed about and consider the nature and severity of any adverse impact of the proposed grant before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate. The purpose of consultation was not to re-open the Treaty or to re-negotiate the availability of the lands for an agricultural grant. Such availability was already established in the Treaty. Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown and promoted the objective of reconciliation.

In this case, the duty of consultation was discharged. Little Salmon/Carmacks acknowledges that it received appropriate notice and information. The Little Salmon/Carmacks objections were made in writing and they were dealt with at a meeting at which Little Salmon/Carmacks was entitled to be present (but failed to attend). Both Little Salmon/Carmacks's objections and the response of those who attended the meeting were before the Director when, in the exercise of his delegated authority, he approved P's application. Neither the honour of the Crown nor the duty to consult required more.

Nor was there any breach of procedural fairness. While procedural fairness is a flexible concept, and takes into account the Aboriginal dimensions of the decision facing the Director, it is nevertheless a doctrine that applies as a matter of administrative law to regulate relations between the government decision makers and all residents of the Yukon, Aboriginal as well as non-Aboriginal.

While the Yukon had a duty to consult, there was no further duty of accommodation on the facts of this case. Nothing in the treaty itself or in the surrounding circumstances gave rise to such a requirement.

In exercising his discretion in this case, as in all others, the Director was required to respect legal and constitutional limits. The constitutional limits included the honour of the Crown and its supporting doctrine of the duty to consult. The standard of review in that respect, including the adequacy of the consultation, is correctness. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness.

In this case, the Director did not err in law in concluding that the level of consultation that had taken place was adequate. The advice the Director received from his officials after consultation is that the impact of the grant of

65 hectares would not be significant. There is no evidence that he failed to give full and fair consideration to the concerns of Little Salmon/Carmacks. The material filed by the parties on the judicial review application does not demonstrate any palpable error of fact in his conclusion. Whether or not a court would have reached a different conclusion is not relevant. The decision to approve or not to approve the grant was given by the legislature to the Minister who, in the usual way, delegated the authority to the Director. His disposition was reasonable in the circumstances.

Per LeBel and **Deschamps** JJ.: Whereas past cases have concerned unilateral actions by the Crown that triggered a duty to consult for which the terms had not been negotiated, in the case at bar, the parties have moved on to another stage. Formal consultation processes are now a permanent feature of treaty law, and the Little Salmon/Carmacks Final Agreement affords just one example of this. To give full effect to the provisions of a treaty such as the Final Agreement is to renounce a paternalistic approach to relations with Aboriginal peoples. It is a way to recognize that Aboriginal peoples have full legal capacity. To disregard the provisions of such a treaty can only encourage litigation, hinder future negotiations and threaten the ultimate objective of reconciliation.

To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.

In concluding a treaty, the Crown does not act dishonourably in agreeing with an Aboriginal community on an elaborate framework involving various forms of consultation with respect to the exercise of that community's rights. Nor does the Crown act dishonourably if it requires the Aboriginal party to agree that no parallel mechanism relating to a matter covered by the treaty will enable that party to renege on its undertakings. Legal certainty is the primary objective of all parties to a comprehensive land claim agreement.

Legal certainty cannot be attained if one of the parties to a treaty can unilaterally renege on its undertakings with respect to a matter provided for in the treaty where there is no provision for its doing so in the treaty. This does not rule out the possibility of there being matters not covered by a treaty with respect to which the Aboriginal party has not surrendered possible Aboriginal rights. Nor does legal certainty imply that an equitable review mechanism cannot be provided for in a treaty.

Thus, it should be obvious that the best way for a court to contribute to ensuring that a treaty fosters a positive long relationship between Aboriginal and non-Aboriginal communities consists in ensuring that the parties cannot unilaterally renege on their undertakings. And once legal certainty has been pursued as a common objective at the negotiation stage, it cannot become a one-way proposition at the stage of implementation of the treaty. On the contrary, certainty with respect to one party's rights implies that the party in question must discharge its obligations and respect the other party's rights. Having laboured so hard, in their common interest, to substitute a well-defined legal system for an uncertain normative system, both the Aboriginal party and the Crown party have an interest in seeing their efforts bear fruit.

It is in fact because the agreement in issue does provide that the Aboriginal party has a right to various forms of consultation with respect to the rights the Crown wishes to exercise in this case that rights and obligations foreign to the mechanism provided for in the treaty must not be superimposed on it, and not simply because this is a "modern" treaty constituting a land claims agreement.

Even when the treaty in issue is a land claims agreement, the Court must first identify the common intention of the parties and then decide whether the common law constitutional duty to consult applies to the Aboriginal party. Therefore, where there is a treaty, the common law duty to consult will apply only if the parties to the treaty have failed to address the issue of consultation.

The consultation that must take place if a right of the Aboriginal party is impaired will consist in either: (1) the measures provided for in the treaty in this regard; or (2) if no such measures are provided for in the treaty, the consultation required under the common law framework.

Where a treaty provides for a mechanism for consultation, what it does is to override the common law duty to consult Aboriginal peoples; it does not affect the general administrative law principle of procedural fairness,

which may give rise to a duty to consult rights holders individually.

The courts are not blind to omissions, or gaps left in the treaty, by the parties with respect to consultation, and the common law duty to consult could always be applied to fill such a gap. But no such gap can be found in this case.

These general considerations alone would form a sufficient basis for dismissing the appeal.

But the provisions of the Final Agreement also confirm this conclusion. The Final Agreement includes general and interpretive provisions that are reproduced from the Umbrella Agreement. More precisely, this framework was first developed by the parties to the Umbrella Agreement, and was then incorporated by the parties into the various final agreements concluded under the Umbrella Agreement. Where there is any inconsistency or conflict, the rules of this framework prevail over the common law principles on the interpretation of treaties between governments and Aboriginal peoples.

These general and interpretive provisions also establish certain rules with respect to the relationships of the Umbrella Agreement and any final agreement concluded under it, not only the relationship between them, but also that with the law in general. These rules can be summarized in the principle that the Final Agreement prevails over any other non-constitutional legal rule, subject to the requirement that its provisions not be so construed as to affect the rights of "Yukon Indian people" as Canadian citizens and their entitlement to all the rights, benefits and protections of other citizens. In short, therefore, with certain exceptions, the treaty overrides Aboriginal rights related to the matters to which it applies, and in cases of conflict or inconsistency, it prevails over all other non-constitutional law.

Regarding the relationship between the treaty in issue and the rest of our constitutional law other than the case law on Aboriginal rights, such a treaty clearly cannot on its own amend the Constitution of Canada. In other words, the Final Agreement contains no provisions that affect the general principle that the common law duty to consult will apply only where the parties have failed to address the issue of consultation. This will depend on whether the parties have come to an agreement on this issue, and if they have, the treaty will -- unless, of course, the treaty itself provides otherwise -- override the application to the parties of any parallel framework, including the common law framework.

In this case, the parties included provisions in the treaty that deal with consultation on the very question of the Crown's right to transfer Crown land upon an application like the one made by P.

P's application constituted a project to which the assessment process provided for in Chapter 12 of the Final Agreement applied. Although that process had not yet been implemented, Chapter 12, including the transitional legal rules it contains, had been. Under those rules, any existing development assessment process would remain applicable. The requirements of the processes in question included not only consultation with the First Nation concerned, but also its participation in the assessment of the project. Any such participation would involve a more extensive consultation than would be required by the common law duty in that regard. Therefore, nothing in this case can justify resorting to a duty other than the one provided for in the Final Agreement.

Moreover, the provisions of Chapter 16 on fish and wildlife management establish a framework under which the First Nations are generally invited to participate in the management of those resources at the pre-decision stage. In particular, the invitation they receive to propose fish and wildlife management plans can be regarded as consultation.

The territorial government's conduct raises questions in some respects. In particular, there is the fact that the Director did not notify the First Nation of his decision of October 18, 2004 until July 27, 2005. Under s. 81(1) of the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*"), the "designated office" and, if applicable, the executive committee of the Yukon Development Assessment Board would have been entitled to receive copies of that decision and, one can only assume, to receive them within a reasonable time. Here, the functional equivalent of the designated office is the Land Application Review Committee ("LARC"). Even if representatives of the First Nation did not attend the August 13, 2004 meeting, it would be expected that the Director would inform that First Nation of his decision within a reasonable time. Nonetheless, the time elapsed after the decision did not affect the quality of the prior consultation.

The territorial government's decision to proceed with P's application at the "prescreening" stage despite the requirement of consultation in the context of the First Nation's fish and wildlife management plan was not an exemplary practice either. However, the First Nation did not express concern about this in its letter of July 27, 2004 to Yukon's Lands Branch. And as can be seen from the minutes of the August 13, 2004 meeting, the concerns of the First Nation with respect to resource conservation were taken into consideration. Also, the required consultation in the context of the fish and wildlife management plan was far more limited than the consultation to which the First Nation was entitled in participating in LARC, which was responsible for assessing the specific project in issue in this appeal. Finally, the First Nation, the renewable resources council and the Minister had not agreed on a provisional suspension of the processing of applications for land in the area in question.

Despite these aspects of the handling of P's application that are open to criticism, it can be seen from the facts as a whole that the respondents received what they were entitled to receive from the appellants where consultation as a First Nation is concerned. In fact, in some respects they were consulted to an even greater extent than they would have been under the *YESAA*.

The only right the First Nation would have had under the *YESAA* was to be heard by the assessment district office as a stakeholder. That consultation would have been minimal, whereas the First Nation was invited to participate directly in the assessment of P's application as a member of LARC.

It is true that the First Nation's representatives did not attend the August 13, 2004 meeting. They did not notify the other members of LARC that they would be absent and did not request that the meeting be adjourned, but they had already submitted comments in a letter.

Thus, the process that led to the October 18, 2004 decision on P's application was consistent with the transitional law provisions of Chapter 12 of the Final Agreement. There is no legal basis for finding that the Crown breached its duty to consult.

Cases Cited

By Binnie J.

Considered: *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Badger*, [1996] 1 S.C.R. 771; **applied:** *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; **referred to:** *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227, leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256.

By Deschamps J.

Considered: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; **referred to:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v.*

British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911; *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613, aff'd (1965), 52 D.L.R. (2d) 481; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746.

Statutes and Regulations Cited

Assessable Activities, Exceptions and Executive Committee Projects Regulations, SOR/2005-379.

Canadian Charter of Rights and Freedoms.

Canadian Environmental Assessment Act, S.C. 1992, c. 37.

Constitution Act, 1867, Part VI.

Constitution Act, 1982, ss. 25, 35, 52, Part V.

Environmental Assessment Act, S.Y. 2003, c. 2 [rep. O.I.C. 2005/202, (2006) 25 Y. Gaz. II, 32].

Indian Act, R.S.C. 1985, c. I-5.

Lands Act, R.S.Y. 2002, c. 132.

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.

Territorial Lands (Yukon) Act, S.Y. 2003, c. 17.

Wildlife Act, R.S.Y. 2002, c. 229.

Yukon Environmental and Socio-economic Assessment Act, S.C. 2003, c. 7, ss. 2, 5, 8, 47(2)(*c*), 63, 134.

Yukon First Nations Land Claims Settlement Act, S.C. 1994, c. 34.

Treaties and Agreements

James Bay and Northern Québec Agreement (1975).

Little Salmon/Carmacks First Nation Final Agreement, July 1, 1997, preamble, c. 1, ss. 2.2.4, 2.2.15, 6.2.3, 6.2.7, 12.3.4

(online: http://www.eco.gov.yk.ca/pdf/little_salmon_carmacks_fa.pdf).

Treaty No. 8 (1899).

Treaty No. 11 (1921).

Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon (1993).

Authors Cited

Canada. Indian and Northern Affairs. *Federal Policy for the Settlement of Native Claims*. Ottawa: Indian and Northern Affairs Canada, 1993.

Grammond, Sébastien. *Aménager la coexistence: Les peuples autochtones et le droit canadien*. Cowansville, Qué.: Yvon Blais, 2003.

Newman, Dwight G. *The Duty to Consult: New Relationships with Aboriginal Peoples*. Saskatoon: Purich Publishing, 2009.

Saint-Hilaire, Maxime. "La proposition d'entente de principe avec les Innus: vers une nouvelle génération de traités?" *(2003), 44 C. de D. 395*.

Stevenson, Mark L. "Visions of Certainty: Challenging Assumptions", in Law Commission of Canada, *Speaking Truth to Power: A Treaty Forum*. Ottawa: Minister of Public Works and Government Services Canada, 2001, 113.

Williams, Robert A., Jr. *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*. New York: Oxford University Press, 1997.

Yukon. *Agriculture for the 90s: A Yukon Policy*. Whitehorse: Yukon Government, 1991.

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Yukon Court of Appeal (Newbury, Kirkpatrick and Tysoe JJ.A.), *2008 YKCA 13*, 296 D.L.R. (4) 99, *258 B.C.A.C. 160*, 434 W.A.C. 160, *[2008] 4 C.N.L.R. 25*, 71 R.P.R. (4) 162, *[2008] Y.J. No. 55* (QL), *2008 CarswellYukon 62*, setting aside the decision of Veale J., *2007 YKSC 28*, *[2007] 3 C.N.L.R. 42*, *[2007] Y.J. No. 24* (QL), 2007 CarswellYukon 18, quashing the approval of application for land grant. Appeal and cross-appeal dismissed.

Counsel

Brad Armstrong, *Q.C.*, *Keith Bergner*, *Penelope Gawn* and *Lesley McCullough*, for the appellants/respondents on cross-appeal.

Jean Teillet, *Arthur Pape* and *Richard B. Salter*, for the respondents/appellants on cross-appeal.

Mitchell R. Taylor, *Q.C.*, for the intervener the Attorney General of Canada.

Hugues Melançon and *Natacha Lavoie*, for the intervener the Attorney General of Quebec.

Rolf Pritchard and *Justin S.C. Mellor*, for the intervener the Attorney General of Newfoundland and Labrador.

Brian A. Crane, *Q.C.*, for the interveners the Gwich'in Tribal Council and Sahtu Secretariat Inc.

Jean-Sébastien Clément and *François Dandonneau*, for the intervener the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority.

James M. Coady, *Dave Joe* and *Daryn R. Leas*, for the intervener the Council of Yukon First Nations.

Joseph J. Arvay, *Q.C.*, and *Bruce Elwood*, for the intervener the Kwanlin Dün First Nation.

James R. Aldridge, *Q.C.*, and *Dominique Nouvet*, for the intervener Nunavut Tunngavik Inc.

John Donihee, for the intervener the Tlicho Government.

Robert J.M. Janes and *Karey M. Brooks*, for the intervener the Te'Mexw Nations.

Peter W. Hutchins and *Julie Corry*, for the intervener the Assembly of First Nations.

The judgment of McLachlin C.J. and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

BINNIE J.

1 This appeal raises important questions about the interpretation and implementation of modern comprehensive land claims treaties between the Crown and First Nations and other levels of government.

2 The treaty at issue here is the Little Salmon/Carmacks First Nation Final Agreement (the "LSCFN Treaty"), which was finalized in 1996 and ratified by members of the First Nation in 1997. The LSCFN Treaty is one of eleven that arose out of and implement an umbrella agreement signed in 1993 after twenty years of negotiations between representatives of all of the Yukon First Nations and the federal and territorial governments. It was a monumental achievement. These treaties fall within the protection of s. 35 of the *Constitution Act, 1982*, which gives constitutional protection to existing Aboriginal and treaty rights.

3 The present dispute relates to an application for judicial review of a decision by the Yukon territorial government dated October 18, 2004, to approve the grant of 65 hectares of surrendered land to a Yukon resident named Larry Paulsen. The plot borders on the settlement lands of the Little Salmon/Carmacks First Nation, and forms part of its traditional territory, to which its members have a treaty right of access for hunting and fishing for subsistence. In the result, Mr. Paulsen still awaits the outcome of the grant application he submitted on November 5, 2001.

4 The First Nation disclaims any allegation that the Paulsen grant would violate the LSCFN Treaty, which itself contemplates that surrendered land may be taken up from time to time for other purposes, including agriculture. Nevertheless, until such taking up occurs, the members of the LSCFN have an ongoing treaty interest in surrendered Crown lands (of which the 65 hectares form a small part), to which they have a treaty right of access for hunting and fishing for subsistence. The LSCFN contends that the territorial government proceeded without proper consultation and without proper regard to relevant First Nation's concerns. They say the decision of October 18, 2004, to approve the Paulsen grant should be quashed.

5 The territorial government responds that no consultation was required. The LSCFN Treaty, it says, is a complete code. The treaty refers to consultation in over 60 different places but a land grant application is not one of them. Where not specifically included, the duty to consult, the government says, is excluded.

6 The important context of this appeal, therefore, is an application for judicial review of a decision that was required to be made by the territorial government having regard to relevant constitutional as well as administrative law constraints. The Yukon Court of Appeal held, as had the trial judge, that the LSCFN Treaty did not exclude the duty of consultation, although in this case the content of that duty was at the lower end of the spectrum (*2007 YKSC 28*; *2008 YKCA 13*). The Court of Appeal went on to hold, disagreeing in this respect with the trial judge, that on the facts the government's duty of consultation had been fulfilled.

7 I agree that the duty of consultation was not excluded by the LSCFN Treaty, although its terms were relevant to the exercise of the territorial government discretion, as were other principles of administrative and Aboriginal law, as will be discussed. On the facts of the Paulsen application, however, I agree with the conclusion of the Court of Appeal that the First Nation did not make out its case. The First Nation received ample notice of the Paulsen application, an adequate information package, and the means to make known its concerns to the decision maker. The LSCFN's objections were made in writing and they were dealt with at a meeting at which the First Nation was entitled to be present (but failed to show up). Both the First Nation's objections and the response of those who attended the meeting were before the appellant when, in the exercise of his delegated authority, he approved the Paulsen application. In light of the consultation provisions contained in the treaty, neither the honour of the Crown nor the duty to consult were breached. Nor was there any breach of procedural fairness. Nor can it be said that the appellant acted unreasonably in making the decision that he did. I would dismiss the appeal and cross-appeal.

I. Overview

8 Historically, treaties were the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations. The objective was not only to build alliances with First Nations but to keep the peace and to open up the major part of those territories to colonization and settlement. No treaties were signed with the Yukon First Nations until modern times.

9 Unlike their historical counterparts, the modern comprehensive treaty is the product of lengthy negotiations between well-resourced and sophisticated parties. The negotiation costs to Yukon First Nations of their various treaties, financed by the federal government through reimbursable loans, were enormous. The LSCFN share alone exceeded seven million dollars. Under the Yukon treaties, the Yukon First Nations surrendered their Aboriginal rights in almost 484,000 square kilometres, roughly the size of Spain, in exchange for defined treaty rights in respect of land tenure and a quantum of settlement land (41,595 square kilometres), access to Crown lands, fish and wildlife harvesting, heritage resources, financial compensation, and participation in the management of public resources. To this end, the LSCFN Treaty creates important institutions of self-government and authorities such as the Yukon Environmental and Socio-economic Assessment Board and the Carmacks Renewable Resources Council, whose members are jointly nominated by the First Nation and the territorial government.

10 The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. Thoughtful administration of the treaty will help manage, even if it fails to eliminate, some of the misunderstandings and grievances that have characterized the past. Still, as the facts of this case show, the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.

11 Equally, however, the LSCFN is bound to recognize that the $34 million and other treaty benefits it received in exchange for the surrender has earned the territorial government a measure of flexibility in taking up surrendered lands for other purposes.

12 The increased detail and sophistication of modern treaties represents a quantum leap beyond the pre-Confederation historical treaties such as the 1760-61 Treaty at issue in *R. v. Marshall*, *[1999] 3 S.C.R. 456*, and post-Confederation treaties such as Treaty No. 8 (1899) at issue in *R. v. Badger*, *[1996] 1 S.C.R. 771*, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *2005 SCC 69*, *[2005] 3 S.C.R. 388*. The historical treaties were typically expressed in lofty terms of high generality and were often ambiguous. The courts were obliged to resort to general principles (such as the honour of the Crown) to fill the gaps and achieve a fair outcome. Modern comprehensive land claim agreements, on the other hand, starting perhaps with the *James Bay and Northern Québec Agreement* (1975), while still to be interpreted and applied in a manner that upholds the honour of the Crown, were nevertheless intended to create some precision around property and governance rights and obligations. Instead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability. It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way. To the extent the Yukon territorial government argues that the Yukon treaties represent a new departure and not just an elaboration of the *status quo*, I think it is correct. However, as the trial judge Veale J. aptly remarked, the new departure represents but a step -- albeit a very important step -- in the long journey of reconciliation (para. 69).

13 There was in this case, as mentioned, an express treaty right of members of the First Nation to hunt and fish for subsistence on their traditional lands, now surrendered and classified as Crown lands. While the LSCFN Treaty did not prevent the government from making land grants out of the Crown's land holdings, and indeed it contemplated such an eventuality, it was obvious that such grants might adversely affect the traditional economic activities of the LSCFN, and the territorial government was required to consult with the LSCFN to determine the nature and extent of such adverse effects.

14 The delegated statutory decision maker was the appellant David Beckman, the Director of the Agriculture Branch of the territorial Department of Energy, Mines and Resources. He was authorized, subject to the treaty provisions, to issue land grants to non-settlement lands under the *Lands Act*, *R.S.Y. 2002, c. 132*, and the *Territorial Lands (Yukon) Act*, *S.Y. 2003, c. 17*. The First Nation argues that in exercising his discretion to approve the grant the Director was required to have regard to First Nation's concerns and to engage in consultation. This is true. The First Nation goes too far, however, in seeking to impose on the territorial government not only the procedural protection of consultation but also a substantive right of accommodation. The First Nation protests that its concerns were not taken seriously -- if they had been, it contends, the Paulsen application would have been denied. This overstates the scope of the duty to consult in this case. The First Nation does not have a veto over the approval process. No such substantive right is found in the treaty or in the general law, constitutional or otherwise. The Paulsen application had been pending almost three years before it was eventually approved. It was a relatively minor parcel of 65 hectares whose agricultural use, according to the advice received by the Director (and which he was entitled to accept), would not have any significant adverse effect on First Nation's interests.

15 Unlike *Mikisew Cree* where some accommodation was possible through a rerouting of the proposed winter road, in this case the stark decision before the appellant Director was to grant or refuse the modified Paulsen application. He had before him the relevant information. Face-to-face consultation between the First Nation and the Director (as decision maker) was not required. In my view, the decision was reasonable having regard to the terms of the treaty, and in reaching it the Director did not breach the requirements of the duty to consult, natural justice, or procedural fairness. There was no *constitutional* impediment to approval of the Paulsen application and from an *administrative* law perspective the outcome fell within a range of reasonable outcomes.

II. Facts

16 On November 5, 2001, Larry Paulsen submitted his application for an agricultural land grant of 65 hectares. He planned to grow hay, put up some buildings and raise livestock. The procedure governing such grant applications

was set out in a pre-treaty territorial government policy, *Agriculture for the 90s: A Yukon Policy* (1991) (the "1991 Agriculture Policy").

17 The Paulsen application (eventually in the form of a "Farm Development Plan") was pre-screened by the Agriculture Branch and the Lands Branch as well as the Land Claims and Implementation Secretariat (all staffed by territorial civil servants) for completeness and compliance with current government policies.

18 The Paulsen application was then sent to the Agriculture Land Application Review Committee ("ALARC") for a more in-depth technical review by various Yukon government officials. ALARC was established under the 1991 Agriculture Policy. It predates and is completely independent from the treaty. The civil servants on ALARC recommended that Mr. Paulsen reconfigure his parcel to include only the "bench" of land set back from the Yukon River for reasons related to the suitability of the soil and unspecified environmental, wildlife, and trapping concerns. Mr. Paulsen complied.

19 On February 24, 2004, ALARC recommended that the Paulsen application for the parcel, as reconfigured, proceed to the next level of review, namely, the Land Application Review Committee ("LARC"), which includes First Nation's representatives. LARC also functioned under the 1991 Agriculture Policy and, as well, existed entirely independently of the treaties.

20 Reference should also be made at this point to the Fish and Wildlife Management Board -- a treaty body composed of persons nominated by the First Nation and Yukon government -- which in August 2004 (i.e. while the Paulsen application was pending) adopted a Fish and Wildlife Management Plan ("FWMP") that identified a need to protect wildlife and habitat in the area of the Yukon River, which includes the Paulsen lands. It proposed that an area in the order of some 10,000 hectares be designated as a Habitat Protection Area under the *Wildlife Act*, *R.S.Y. 2002, c. 229*. The FWMP also recognized the need to preserve the First Nation's ability to transfer its culture and traditions to its youth through opportunities to participate in traditional activities. The FWMP did not, however, call for a freeze on approval of agricultural land grants in the area pending action on the FWMP proposals.

21 Trapline #143 was registered to Johnny Sam, a member of the LSCFN. His trapline is in a category administered by the Yukon government, not the First Nation. It helps him to earn a livelihood as well as to provide a training ground for his grandchildren and other First Nation youth in the ways of trapping and living off the land. The trapline covers an area of approximately 21,435 hectares. As noted by the Court of Appeal, the 65 hectares applied for by Mr. Paulsen is approximately one-third of one percent of the trapline. A portion of the trapline had already been damaged by forest fire, which, in the LSCFN view, added to the significance of the loss of a further 65 hectares. The severity of the impact of land grants, whether taken individually or cumulatively, properly constituted an important element of the consultation with LARC and, ultimately, a relevant consideration to be taken into account by the Director in reaching his decision.

22 The LARC meeting to discuss the Paulsen application was scheduled for August 13, 2004. The First Nation received notice and was invited to provide comments prior to the meeting and to participate in the discussion as a member of LARC.

23 On July 27, 2004, the First Nation submitted a letter of opposition to the Paulsen application. The letter identified concerns about impacts on Trapline #143, nearby timber harvesting, the loss of animals to hunt in the area, and adjacent cultural and heritage sites. No reference was made in the First Nation's letter to Johnny Sam's concerns about cultural transfer or to the FWMP. The letter simply states that "[t]he combination of agricultural and timber harvesting impacts on this already-damaged trapline would certainly be a significant deterrent to the ability of the trapper to continue his traditional pursuits" (A.R., vol. II, at p. 22).

24 Nobody from the LSCFN attended the August 13, 2004 meeting. Susan Davis, its usual representative, was unable to attend for undisclosed reasons. The meeting went on as planned.

25 The members of LARC who were present (mainly territorial government officials) considered the Paulsen

application and recommended approval in principle. The minutes of the August 13 meeting show that LARC *did* consider the concerns voiced by the LSCFN in its July 27, 2004 letter. Those present at the meeting concluded that the impact of the loss of 65 hectares on Trapline #143 would be minimal as the Paulsen application covered a very small portion of the trapline's overall area and noted that Johnny Sam could apply under Chapter 16 of the LSCFN Treaty for compensation for any diminution in its value. LARC recommended an archaeological survey to address potential heritage and cultural sites. (An archaeological assessment was later conducted and reported on September 2, 2004, that is was unable to identify any sites that would be impacted adversely by the grant.)

26 On September 8, 2004, the First Nation representatives met with Agriculture Branch staff who were conducting an agricultural policy review. The meeting did not focus specifically on the Paulsen application. Nevertheless, the First Nation made the general point that its concerns were not being taken seriously. Agriculture Branch officials replied that they consult on such matters through LARC but they were not required by the Final Agreement to consult on such issues. Meetings and discussions with the First Nation had been conducted, they said, only as a courtesy.

27 On October 18, 2004, the Director approved the Paulsen application and sent a letter to Larry Paulsen, informing him of that fact. He did not notify the LSCFN of his decision, as he ought to have done.

28 Apparently unaware that the Paulsen application had been approved, the First Nation continued to express its opposition by way of a series of letters from Chief Eddie Skookum to the Yukon government. Johnny Sam also wrote letters expressing his opposition. It seems the government officials failed to disclose that the Director's decision to approve the grant had already been made. This had the unfortunate effect of undermining appropriate communication between the parties.

29 In the summer of 2005, Susan Davis, representing the First Nation, made enquiries of the Agriculture Branch and obtained confirmation that the Paulsen application had already been approved. She was sent a copy of the October 18, 2004 approval letter.

30 In response, by letter dated August 24, 2005, the First Nation launched an administrative appeal of the Paulsen grant to the Assistant Deputy Minister.

31 On December 12, 2005, the request to review the decision was rejected on the basis that the First Nation had no right of appeal because it was a member of LARC, and not just an intervener under the LARC Terms of Reference. The Terms of Reference specify that only applicants or interveners may initiate an appeal. The Terms of Reference had no legislative or treaty basis whatsoever, but the Yukon government nevertheless treated them as binding both on the government and on the First Nation.

32 Frustrated by the territorial government's approach, which it believed broadly misconceived and undermined relations between the territorial government and the LSCFN, the First Nation initiated the present application for judicial review.

III. Analysis

33 The decision to entrench in s. 35 of the *Constitution Act, 1982* the recognition and affirmation of existing Aboriginal and treaty rights, signalled a commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal. At the same time, Aboriginal people do not, by reason of their Aboriginal heritage, cease to be citizens who fully participate with other Canadians in their collective governance. This duality is particularly striking in the Yukon, where about 25 percent of the population identify themselves as Aboriginal. The territorial government, elected in part by Aboriginal people, represents Aboriginal people as much as it does non-Aboriginal people, even though Aboriginal culture and tradition are and will remain distinctive.

34 Underlying the present appeal is not only the need to respect the rights and reasonable expectations of Johnny Sam and other members of his community, but the rights and expectations of other Yukon residents, including both Aboriginal people *and* Larry Paulsen, to good government. The Yukon treaties are intended, in part, to replace expensive and time-consuming *ad hoc* procedures with mutually agreed upon legal mechanisms that are efficient but fair.

35 I believe the existence of Larry Paulsen's stake in this situation is of considerable importance. Unlike *Mikisew Cree*, which involved a dispute between the Federal government and the Mikisew Cree First Nation over the route of a winter road, Mr. Paulsen made his application as an ordinary citizen who was entitled to a government decision reached with procedural fairness within a reasonable time. On the other hand, the entitlement of the trapper Johnny Sam was a derivative benefit based on the collective interest of the First Nation of which he was a member. I agree with the Court of Appeal that he was not, as an individual, a necessary party to the consultation.

A. *The LSCFN Treaty Reflects a Balance of Interests*

36 Under the treaty, the LSCFN surrendered all undefined Aboriginal rights, title, and interests in its traditional territory in return for which it received:

* title to 2,589 square kilometres of "settlement land" (cc. 9 and 15);
* financial compensation of $34,179,210 (c. 19);
* potential for royalty sharing (c. 23);
* economic development measures (c. 22);
* rights of access to Crown land (except that disposed of by agreement for sale, surface licence, or lease) (c. 6);
* special management areas (c. 10);
* protection of access to settlement land (s. 6.2.7);
* rights to harvest fish and wildlife (c. 16);
* rights to harvest forest resources (c. 17);
* rights to representation and involvement in land use planning (c. 11) and resource management (cc. 14, 16-18).

These are substantial benefits, especially when compared to the sparse offerings of earlier treaties such as those provided to the *Mikisew Cree* in Treaty No. 8. With the substantive benefits, however, came not only rights but duties and obligations. It is obvious that the long-term interdependent relationship thus created will require work and good will on both sides for its success.

37 The reason for the government's tight-lipped reaction to the unfolding Paulsen situation, as explained to us at the hearing by its counsel, was the fear that if the duty of consultation applies "these parties will be in court like parties are in areas where there are no treaties, and there will be litigation over whether the consultation applies; what is the appropriate level of the consultation? Is accommodation required? It is all under court supervision" (tr., at p. 18). The history of this appeal shows, however, that taking a hard line does not necessarily speed matters up or make litigation go away.

38 The denial by the Yukon territorial government of any duty to consult except as specifically listed in the LSCFN Treaty complicated the Paulsen situation because at the time the Director dealt with the application the treaty implementation provision contemplated in Chapter 12 had itself not yet been implemented. I do not believe the Yukon Treaty was intended to be a "complete code". Be that as it may, the duty to consult is derived from the

honour of the Crown which applies independently of the expressed or implied intention of the parties (see below, at para. 61). In any event, the procedural gap created by the failure to implement Chapter 12 had to be addressed, and the First Nation, in my view, was quite correct in calling in aid the duty of consultation in putting together an appropriate procedural framework.

39 Nevertheless, consultation *was* made available and *did* take place through the LARC process under the 1991 Agriculture Policy, and the ultimate question is whether what happened in this case (even though it was mischaracterized by the territorial government as a courtesy rather than as the fulfilment of a legal obligation) was sufficient. In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, the Court held that participation in a forum created for other purposes may nevertheless satisfy the duty to consult if *in substance* an appropriate level of consultation is provided.

B. *The Relationship Between Section 35 and the Duty to Consult*

40 The First Nation relies in particular on the following statements in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 20:

> It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

Further, at para. 32:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. [Emphasis added.]

41 Reference should also be made to *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6, where the Court said:

> The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. [Emphasis added.]

42 The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples. The honour of the Crown has since become an important anchor in this area of the law: see *R. v. Taylor* (1981), 62 C.C.C. (2d) 227, (Ont. C.A.), leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; as well as *Badger*, *Marshall*, and *Mikisew Cree*, previously referred to. The honour of the Crown has thus been confirmed in its status as a constitutional principle.

43 However, this is not to say that every policy and procedure of the law adopted to uphold the honour of the Crown is itself to be treated as if inscribed in s. 35. As the Chief Justice noted in *Haida Nation*, "[t]he honour of the Crown gives rise to different duties in different circumstances" (para. 18). This appeal considers its application in the modern treaty context; its application where no treaty has yet been signed was recently the subject of this Courts decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43.

44 The respondents' submission, if I may put it broadly, is that because the *duty* to consult is "constitutional", therefore there must be a reciprocal constitutional *right* of the First Nation to be consulted, and constitutional rights of Aboriginal peoples are not subject to abrogation or derogation except as can be justified under the high test set out in *Sparrow*. On this view, more or less every case dealing with consultation in the interpretation and implementation of treaties becomes a constitutional case. The trouble with this argument is that the content of the duty to consult varies with the circumstances. In relation to what *Haida Nation* called a "spectrum" of consultation (para. 43), it cannot be said that consultation at the lower end of the spectrum instead of at the higher end must be justified under the *Sparrow* doctrine. The minimal content of the consultation imposed in *Mikisew Cree* (para. 64), for example, did not have to be "justified" as a limitation on what would otherwise be a right to "deep" consultation. The circumstances in *Mikisew Cree* never gave rise to anything more than minimal consultation. The concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.

45 The LSCFN invited us to draw a bright line between the duty to consult (which it labelled constitutional) and administrative law principles such as procedural fairness (which it labelled unsuitable). At the hearing, counsel for the LSCFN was dismissive of resort in this context to administrative law principles:

> [A]dministrative law principles are not designed to address the very unique circumstance of the Crown-Aboriginal history, the Crown-Aboriginal relationship. Administrative law principles, for all their tremendous value, are not tools toward reconciliation of Aboriginal people and other Canadians. They are not instruments to reflect the honour of the Crown principles. [tr., at p. 62]

However, as Lamer C.J. observed in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, "aboriginal rights exist within the general legal system of Canada" (para. 49). Administrative decision makers regularly have to confine their decisions within constitutional limits: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Little Sisters Book and Art Emporium v. Canada* (*Minister of Justice*), 2000 SCC 69, [2000] 2 S.C.R. 1120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; and *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256. In this case, the constitutional limits include the honour of the Crown and its supporting doctrine of the duty to consult.

46 The link between constitutional doctrine and administrative law remedies was already noted in *Haida Nation*, at the outset of our Court's duty to consult jurisprudence:

> In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law. [Emphasis added; para. 41.]

The relevant "procedural safeguards" mandated by administrative law include not only natural justice but the broader notion of procedural fairness. And the content of meaningful consultation "appropriate to the circumstances" will be shaped, and in some cases determined, by the terms of the modern land claims agreement. Indeed, the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown.

47 The parties in this case proceeded by way of an ordinary application for judicial review. Such a procedure was perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation. There is no need to invent a new "constitutional remedy". Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation. Moreover, the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual (including Larry Paulsen) may be relevant.

C. *Standard of Review*

48 In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, *2008 SCC 9*, *[2008] 1 S.C.R. 190*, and *Canada (Citizenship and Immigration) v. Khosa*, *2009 SCC 12*, *[2009] 1 S.C.R. 339*. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?

D. *The Role and Function of the LSCFN Treaty*

49 The territorial government and the LSCFN have very different views on this point. This difference lies at the heart of their opposing arguments on the appeal.

50 The territorial government regards the role of the LSCFN Treaty as having nailed down and forever settled the rights and obligations of the First Nation community as Aboriginal people. The treaty recognized and affirmed the Aboriginal rights surrendered in the land claim. From 1997 onwards, the rights of the Aboriginal communities of the LSCFN, in the government's view, were limited to the treaty. To put the government's position simplistically, what the First Nations negotiated as terms of the treaty is what they get. Period.

51 The LSCFN, on the other hand, considers as applicable to the Yukon what was said by the Court in *Mikisew Cree*, at para. 54:

> Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

And so it is, according to the First Nation, with the treaty-making process in the Yukon that led in 1997 to the ratification of the LSCFN Treaty.

52 I agree with the territorial government that the LSCFN Treaty is a major advance over what happened in Fort Chipewyan in 1899, both in the modern treaty's scope and comprehensiveness, and in the fairness of the procedure that led up to it. The eight pages of generalities in Treaty No. 8 in 1899 is not the equivalent of the 435 pages of the LSCFN Treaty almost a century later. The LSCFN Treaty provides a solid foundation for reconciliation, and the territorial government is quite correct that the LSCFN Treaty should not simply set the stage for further negotiations from ground zero. Nor is that the First Nation's position. It simply relies on the principle noted in *Haida Nation*, that "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples" (para. 16 (emphasis added)). Reconciliation in the Yukon, as elsewhere, is not an accomplished fact. It is a work in progress. The "complete code" position advocated by the territorial government is, with respect, misconceived. As the Court noted in *Mikisew Cree*: "[t]he duty to consult is grounded in the honour of the Crown ... . The honour of the Crown exists as a source of obligation independently of treaties as well, of course" (para. 51).

53 On this point *Haida Nation* represented a shift in focus from *Sparrow*. Whereas the Court in *Sparrow* had been concerned about sorting out the consequences of infringement, *Haida Nation* attempted to head off such confrontations by imposing on the parties a duty to consult and (if appropriate) accommodate in circumstances where development might have a significant impact on Aboriginal rights when and if established. In *Mikisew Cree*, the duty to consult was applied to the management of an 1899 treaty process to "take up" (as in the present case) ceded Crown lands for "other purposes". The treaty itself was silent on the process. The Court held that on the facts of that case the content of the duty to consult was at "the lower end of the spectrum" (para. 64), but that nevertheless the Crown was wrong to act unilaterally.

54 The difference between the LSCFN Treaty and Treaty No. 8 is not simply that the former is a "modern comprehensive treaty" and the latter is more than a century old. Today's modern treaty will become tomorrow's historic treaty. The distinction lies in the relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork: *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557.

55 However, the territorial government presses this position too far when it asserts that unless consultation is specifically required by the Treaty it is excluded by negative inference. Consultation in some meaningful form is the necessary foundation of a successful relationship with Aboriginal people. As the trial judge observed, consultation works "to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address" (para. 82).

56 The territorial government would have been wrong to act unilaterally. The LSCFN had existing treaty rights in relation to the land Paulsen applied for, as set out in s. 16.4.2 of the LSCFN Treaty:

> Yukon Indian People shall have the right to harvest for Subsistence within their Traditional Territory ... all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0, subject only to limitations prescribed pursuant to Settlement Agreements.

The Crown land was subject to being taken up for other purposes (as in *Mikisew Cree*), including agriculture, but in the meantime the First Nation had a continuing treaty interest in Crown lands to which their members continued to have a treaty right of access (including but not limited to the Paulsen plot). It was no less a treaty interest because it was defeasible.

57 The decision maker was required to take into account the impact of allowing the Paulsen application on the concerns and interests of members of the First Nation. He could not take these into account unless the First Nation was consulted as to the nature and extent of its concerns. Added to the ordinary administrative law duties, of course, was the added legal burden on the territorial government to uphold the honour of the Crown in its dealings with the First Nation. Nevertheless, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more general consultation process in the LSCFN Treaty itself, the content of the duty of consultation (as found by the Court of Appeal) was at the lower end of the spectrum. It was not burdensome. But nor was it a mere courtesy.

E. *The Source of the Duty to Consult Is External to the LSCFN Treaty*

58 The LSCFN Treaty dated July 21, 1997, is a comprehensive lawyerly document. The territorial government argues that the document refers to the duty to consult in over 60 different places but points out that none of them is applicable here (although the implementation of Chapter 12, which was left to subsequent legislative action, did not foreclose the possibility of such a requirement).

59 There was considerable discussion at the bar about whether the duty to consult, if it applies at all, should be considered an implied term of the LSCFN Treaty or a duty externally imposed as a matter of law.

60 The territorial government takes the view that terms cannot be implied where the intention of the parties is plainly inconsistent with such an outcome. In this case, it says, the implied term is negated by the parties' treatment of consultation throughout the treaty and its significant absence in the case of land grants. The necessary "negative inference", argues the territorial government, is that failure to include it was intentional.

61 I think this argument is unpersuasive. The duty to consult is treated in the jurisprudence as a means (in

appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.

62 The argument that the LSCFN Treaty is a "complete code" is untenable. For one thing, as the territorial government acknowledges, nothing in the text of the LSCFN Treaty authorizes the making of land grants on Crown lands to which the First Nation continues to have treaty access for subsistence hunting and fishing. The territorial government points out that authority to alienate Crown land exists in the general law. This is true, but the general law exists outside the treaty. The territorial government cannot select from the general law only those elements that suit its purpose. The treaty sets out rights and obligations of the parties, but the treaty is part of a special relationship: "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably" (*Haida Nation*, at para. 17 (emphasis added)). As the text of s. 35(3) makes clear, a modern comprehensive land claims agreement is as much a treaty in the eyes of the Constitution as are the earlier pre- and post-Confederation treaties.

63 At the time the Paulsen application was pending, the implementation of the LSCFN Treaty was in transition. It contemplates in Chapter 12 the enactment of a "development assessment process" to implement the treaty provisions. This was ultimately carried into effect in the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*"). The territorial government acknowledges that the *YESAA* would have applied to the Paulsen application. Part 2 of the Act (regarding the assessment process) did not come into force until after the Paulsen application was approved (s. 134). The treaty required the government to introduce the law within two years of the date of the settlement legislation (s. 12.3.4). This was not done. The subsequent legislative delay did not empower the territorial government to proceed without consultation.

64 The purpose of the *YESAA* is broadly stated to "[give] effect to the Umbrella Final Agreement respecting assessment of environmental and socio-economic effects" by way of a "comprehensive, neutrally conducted assessment process" (s. 5) where "an authorization or the grant of an interest in land" would be required (s. 47(2)(*c*)). The neutral assessor is the Yukon Environmental and Socio-economic Assessment Board, to which (excluding the chair) the Council for Yukon Indians would nominate half the members and the territorial government the other half. The Minister, after consultation, would appoint the chair.

65 The territorial government contends that this new arrangement is intended to satisfy the requirement of consultation on land grants in a way that is fair both to First Nations and to the other people of the Yukon. Assuming (without deciding) this to be so, the fact remains that no such arrangement was in place at the relevant time.

66 In the absence of the agreed arrangement, consultation was necessary in this case to uphold the honour of the Crown. It was therefore imposed as a matter of law.

F. *The LSCFN Treaty Does Not Exclude the Duty to Consult and, if Appropriate, Accommodate*

67 When a modern treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. If a process of consultation has been established in the treaty, the scope of the duty to consult will be shaped by its provisions.

68 The territorial government argues that a mutual objective of the parties to the LSCFN Treaty was to achieve certainty, as is set out in the preamble:

> ... the parties to this Agreement wish to achieve certainty with respect to the ownership and use of lands and other resources of the Little Salmon/Carmacks First Nation Traditional Territory; the parties wish to achieve certainty with respect to their relationships to each other ... .

Moreover the treaty contains an "entire agreement" clause. Section 2.2.15 provides that:

> Settlement Agreements shall be the entire agreement between the parties thereto and there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them.

69 However, as stated, the duty to consult is not a "collateral agreement or condition". The LSCFN Treaty *is* the "entire agreement", but it does not exist in isolation. The duty to consult is imposed as a matter of law, irrespective of the parties' "agreement". It does not "affect" the agreement itself. It is simply part of the essential legal framework within which the treaty is to be interpreted and performed.

70 The First Nation points out that there is an express exception to the "entire agreement" clause in the case of "existing or future constitutional rights", at s. 2.2.4:

> Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

Section 2.2.4 applies, the LSCFN argues, because the duty of consultation is a new constitutional duty and should therefore be considered a "future" constitutional right within the scope of the section.

71 As discussed, the applicable "existing or future *constitutional* right" is the right of the Aboriginal parties to have the treaty performed in a way that upholds the honour of the Crown. That principle is readily conceded by the territorial government. However, the honour of the Crown may not *always require consultation*. The parties may, in their treaty, negotiate a different mechanism which, nevertheless, in the result, upholds the honour of the Crown. In this case, the duty applies, the content of which will now be discussed.

G. *The Content of the Duty to Consult*

72 The adequacy of the consultation was the subject of the First Nation's cross-appeal. The adequacy of what passed (or failed to pass) between the parties must be assessed in light of the role and function to be served by consultation on the facts of the case and whether that purpose was, on the facts, satisfied.

73 The Yukon *Lands Act* and the *Territorial Lands (Yukon) Act* created a discretionary authority to make grants but do not specify the basis on which the discretion is to be exercised. It was clear that the Paulsen application might *potentially* have an adverse impact on the LSCFN Treaty right to have access to the 65 hectares for subsistence "harvesting" of fish and wildlife, and that such impact would include the First Nation's beneficial use of the surrounding Crown lands to which its members have a continuing treaty right of access. There was at least the possibility that the impact would be significant in economic and cultural terms. The Director was then required, as a matter of both compliance with the legal duty to consult based on the honour of the Crown *and* procedural fairness to be informed about the nature and severity of such impacts before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate. The purpose of consultation was not to reopen the LSCFN Treaty or to renegotiate the availability of the lands for an agricultural grant. Such availability was already established in the Treaty. Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown.

74 This "lower end of the spectrum" approach is consistent with the LSCFN Treaty itself which sets out the elements the parties themselves regarded as appropriate regarding consultation (where consultation is required) as follows:

> "Consult" or "Consultation" means to provide:

(a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;

(b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and

(c) full and fair consideration by the party obliged to consult of any views presented.

(LSCFN Treaty, c. 1)

At the hearing of this appeal, counsel for the First Nation contended that the territorial government has "to work with the Aboriginal people to understand what the effect will be, and then they have to try and minimize it" (tr. p. 48 (emphasis added)). It is true that these treaties were negotiated prior to *Haida Nation* and *Mikisew Cree*, but it must have been obvious to the negotiators that there is a substantial difference between imposing on a decision maker a duty to provide "full and fair consideration" of the First Nation's "views" and (on the other hand) an obligation to try "to understand what the effect will be" *and then to "try and minimize it*". It is the former formulation which the parties considered sufficient and appropriate. Even in the absence of treaty language, the application of *Haida Nation* and *Mikisew Cree* would have produced a similar result.

75 In my view, the negotiated definition is a reasonable statement of the content of consultation "at the lower end of the spectrum". The treaty does not apply directly to the land grant approval process, which is not a treaty process, but it is a useful indication of what the parties themselves considered fair, and is consistent with the jurisprudence from *Haida Nation* to *Mikisew Cree*.

H. *There Was Adequate Consultation in This Case*

76 The First Nation acknowledges that it received appropriate notice and information. Its letter of objection dated July 27, 2004, set out its concerns about the impact on Trapline #143, a cabin belonging to Roger Rondeau (who was said in the letter to have "no concerns with the application") as well as Johnny Sam's cabin, and "potential areas of heritage and cultural interest" that had not however "been researched or identified". The letter recommended an archaeological survey for this purpose (this was subsequently performed *before* the Paulsen application was considered and approved by the Director). Nothing was said in the First Nation's letter of objection about possible inconsistency with the FWMP, or the need to preserve the 65 hectares for educational purposes.

77 The concerns raised in the First Nation's letter of objection dated July 27, 2004, were put before the August 13, 2004 meeting of LARC (which the First Nation did not attend) and, for the benefit of those not attending, were essentially reproduced in the minutes of that meeting. The minutes noted that "[t]here will be some loss of wildlife habitat in the area, but it is not significant." The minutes pointed out that Johnny Sam was entitled to compensation under the LSCFN Treaty to the extent the value of Trapline #143 was diminished. The minutes were available to the LSCFN as a member of LARC.

78 The First Nation complains that its concerns were not taken seriously. It says, for example, the fact that Johnny Sam is eligible for compensation ignores the cultural and educational importance of Trapline #143. He wants the undiminished trapline, not compensation. However, Larry Paulsen also had an important stake in the outcome. The Director had a discretion to approve or not to approve and he was not obliged to decide this issue in favour of the position of the First Nation. Nor was he obliged as a matter of law to await the outcome of the FWMP. The Director had before him the First Nation's concerns and the response of other members of LARC. He was entitled to conclude that the impact of the Paulsen grant on First Nation's interests was not significant.

79 It is important to stress that the First Nation does not deny that it had full notice of the Paulsen application, and an opportunity to state its concerns through the LARC process to the ultimate decision maker in whatever scope and detail it considered appropriate. Moreover, unlike the situation in *Mikisew Cree*, the First Nation here was consulted *as a First Nation* through LARC and not as members of the general public. While procedural fairness is a flexible concept and takes into account the Aboriginal dimensions of the decision facing the Director, it is nevertheless a doctrine that applies as a matter of administrative law to regulate relations between the government

decision makers and all residents of the Yukon, Aboriginal as well as non-Aboriginal, Mr. Paulsen as well as the First Nation. On the record, and for the reasons already stated, the requirements of procedural fairness were met, as were the requirements of the duty to consult.

80 It is impossible to read the record in this case without concluding that the Paulsen application was simply a flashpoint for the pent-up frustration of the First Nation with the territorial government bureaucracy. However, the result of disallowing the application would simply be to let the weight of this cumulative problem fall on the head of the hapless Larry Paulsen (who still awaits the outcome of an application filed more than eight years ago). This would be unfair.

I. *The Duty to Accommodate*

81 The First Nation's argument is that in this case the legal requirement was not only procedural consultation but substantive accommodation. *Haida Nation* and *Mikisew Cree* affirm that the duty to consult *may* require, in an appropriate case, accommodation. The test is not, as sometimes seemed to be suggested in argument, a duty to accommodate to the point of undue hardship for the non-Aboriginal population. Adequate consultation having occurred, the task of the Court is to review the exercise of the Director's discretion taking into account all of the relevant interests and circumstances, including the First Nation entitlement and the nature and seriousness of the impact on that entitlement of the proposed measure which the First Nation opposes.

82 The 65-hectare plot had already been reconfigured at government insistence to accommodate various concerns. The First Nation did not suggest any alternative configuration that would be more acceptable (although it suggested at one point that any farming should be organic in nature). In this case, in its view, accommodation must inevitably lead to rejection of the Paulsen application. However, with respect, nothing in the treaty itself or in the surrounding circumstances gave rise to a requirement of accommodation. The government was "taking up" surrendered Crown land for agricultural purposes as contemplated in the treaty.

83 The concerns raised by the First Nation were important, but the question before the Director was in some measure a policy decision related to the 1991 Agricultural Policy as well as to whether, on the facts, the impact on the First Nation interests were as serious as claimed. He then had to weigh those concerns against the interest of Larry Paulsen in light of the government's treaty and other legal obligations to Aboriginal people. It is likely that many, if not most, applications for grants of remote land suitable for raising livestock will raise issues of wildlife habitat, and many grants that interfere with traplines and traditional economic activities will also have a cultural and educational dimension. The First Nation points out that the Paulsen proposed building would trigger a "no-shooting zone" that would affect Johnny Sam's use of his cabin (as well as his trapline). However, where development occurs, shooting is necessarily restricted, and the LSCFN Treaty is not an anti-development document.

84 *Somebody* has to bring consultation to an end and to weigh up the respective interests, having in mind the Yukon public policy favouring agricultural development where the rigorous climate of the Yukon permits. The Director is the person with the delegated authority to make the decision whether to approve a grant of land already surrendered by the First Nation. The purpose of the consultation was to ensure that the Director's decision was properly informed.

85 The Director did not err in law in concluding that the consultation in this case with the First Nation was adequate.

86 The advice the Director received from his officials after consultation is that the impact would not be significant. There is no evidence that he failed to give the concerns of the First Nation "full and fair consideration". The material filed by the parties on the judicial review application does not demonstrate any palpable error of fact in his conclusion.

87 It seems the Director was simply not content to put Mr. Paulsen's interest on the back burner while the

government and the First Nation attempted to work out some transitional rough spots in their relationship. He was entitled to proceed as he did.

88 Whether or not a court would have reached a different conclusion on the facts is not relevant. The decision to approve or not to approve the grant was given by the Legislature to the Minister who, in the usual way, delegated the authority to the Director. His disposition was not unreasonable.

IV. Conclusion

89 I would dismiss the appeal and cross-appeal, with costs.

The reasons of LeBel and Deschamps JJ. were delivered by

DESCHAMPS J.

90 The Court has on numerous occasions invited governments and Aboriginal peoples to negotiate the precise definitions of Aboriginal rights and the means of exercising them. To protect the integrity of the negotiation process, the Court developed, on the basis of what was originally just one step in the test for determining whether infringements of Aboriginal rights are justifiable, a duty to consult that must be discharged before taking any action that might infringe as-yet-undefined rights. It later expanded the minimum obligational content of a treaty that is silent regarding how the Crown might exercise those of its rights under the treaty that affect rights granted to the Aboriginal party in the same treaty.

91 In Yukon, the parties sat down to negotiate. An umbrella agreement and 11 specific agreements were reached between certain First Nations, the Yukon government and the Government of Canada. Through these agreements, the First Nations concerned have taken control of their destiny. The agreements, which deal in particular with land and resources, are of course not exhaustive, but they are binding on the parties with respect to the matters they cover. The Crown's exercise of its rights under the treaty is subject to provisions on consultation. To add a further duty to consult to these provisions would be to defeat the very purpose of negotiating a treaty. Such an approach would be a step backward that would undermine both the parties' mutual undertakings and the objective of reconciliation through negotiation. This would jeopardize the negotiation processes currently under way across the country. Although I agree with Binnie J. that the appeal and cross-appeal should be dismissed, my reasons for doing so are very different.

92 Mr. Paulsen's application constituted a project to which the assessment process provided for in Chapter 12 of the Little Salmon/Carmacks First Nation Final Agreement ("Final Agreement") applied. Although that process had not yet been implemented, Chapter 12, including the transitional legal rules it contains, had been. Under those rules, any existing development assessment process would remain applicable. The requirements of the processes in question included not only consultation with the First Nation concerned, but also its participation in the assessment of the project. Any such participation would involve a more extensive consultation than would be required by the common law duty in that regard. Therefore, nothing in this case can justify resorting to a duty other than the one provided for in the Final Agreement.

93 The Crown's constitutional duty to specifically consult Aboriginal peoples was initially recognized as a factor going to the determination of whether an Aboriginal right was infringed (*Guerin v. The Queen*, *[1984] 2 S.C.R. 335*), and was later established as one component of the test for determining whether infringements of Aboriginal rights by the Crown were justified: *R. v. Sparrow*, *[1990] 1 S.C.R. 1075*. The Court was subsequently asked in *Haida Nation v. British Columbia (Minister of Forests)*, *2004 SCC 73*, *[2004] 3 S.C.R. 511*, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, *2004 SCC 74*, *[2004] 3 S.C.R. 550*, whether such a duty to consult could apply even before an Aboriginal or treaty right is proven to exist. The Court's affirmative answer

was based on a desire to encourage the Crown and Aboriginal peoples to negotiate treaties rather than resorting to litigation.

94 I disagree with Binnie J.'s view that the common law constitutional duty to consult applies in every case, regardless of the terms of the treaty in question. And I also disagree with the appellants' assertion that an external duty to consult can never apply to parties to modern comprehensive land claims agreements and that the Final Agreement constitutes a complete code. In my view, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *2005 SCC 69*, *[2005] 3 S.C.R. 388*, stands for the proposition that the common law constitutional duty to consult Aboriginal peoples applies to the parties to a treaty only if they have said nothing about consultation in respect of the right the Crown seeks to exercise under the treaty. Moreover, it is essential to understand that in this context, the signature of the treaty entails a change in the nature of the consultation. When consultation is provided for in a treaty, it ceases to be a measure to prevent the infringement of one or more rights, as in *Haida Nation*, and becomes a duty that applies to the Crown's exercise of rights granted to it in the treaty by the Aboriginal party. This means that where, as in *Mikisew*, the common law duty to consult applies to treaty rights despite the existence of the treaty -- because the parties to the treaty included no provisions in this regard -- it represents the minimum obligational content.

95 Binnie J. has set out the facts. I will return to them only to make some clarifications I consider necessary. For now, I will simply mention that the appellants' position is based on the fact that this case concerns a modern treaty. The appellants argue that in a case involving a modern treaty, the duty to consult is strictly limited to the terms expressly agreed on by the parties and there is no such duty if none has been provided for. In their view, a duty to consult can be found to exist only if the parties have expressly provided for one. The appellants seek not a reversal of the Court of Appeal's ultimate conclusion, but a declaration on the scope of the duty to consult. The respondents, who are also cross-appellants, are asking us to overturn the Court of Appeal's decision and affirm the judgment of the Supreme Court of the Yukon Territory quashing the decision to approve the grant of land to Mr. Paulsen. The respondents submit that the source of the Crown's duty to consult them lies outside the treaty, that is, that the duty derives exclusively from constitutional values and common law principles. According to the respondents, the treaty does not purport to define their constitutional relationship with the Crown, nor does the constitutional duty apply in order to fill a gap in the treaty (R.F., at para. 11). They submit that the common law duty to consult applies because Mr. Paulsen's application would affect their interests. They invoke three interests: a right of access for subsistence harvesting purposes to the land in question in the application, their interest under the treaty in fish and wildlife management, and the reduced value of the trapline of the respondent Johnny Sam.

96 In my view, the answers to the questions before the Court can be found first in the general principles of Aboriginal law and then in the terms of the treaty. To explain my conclusion, I must review the origin, the nature, the function and the specific purpose of the duty being relied on, after which I will discuss what can be learned from a careful review of the treaty.

I. General Principles

97 In *Reference re Secession of Quebec*, *[1998] 2 S.C.R. 217*, at paras. 48-82, this Court identified four principles that underlie the whole of our constitution and of its evolution: (1) constitutionalism and the rule of law; (2) democracy; (3) respect for minority rights; and (4) federalism. These four organizing principles are interwoven in three basic compacts: (1) one between the Crown and individuals with respect to the individual's fundamental rights and freedoms; (2) one between the non-Aboriginal population and Aboriginal peoples with respect to Aboriginal rights and treaties with Aboriginal peoples; and (3) a "federal compact" between the provinces. The compact that is of particular interest in the instant case is the second one, which, as we will see, actually incorporates a fifth principle underlying our Constitution: the honour of the Crown.

98 The Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*. The framers of the Constitution also considered it advisable to specify in s. 25 of that same Act that the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to

be inherently incompatible with the recognition of special rights for Aboriginal peoples. In other words, the first and second compacts should be interpreted not in a way that brings them into conflict with one another, but rather as being complementary. Finally, s. 35(4) provides that, notwithstanding any other provision of the *Constitution Act, 1982*, the Aboriginal and treaty rights recognized and affirmed in s. 35(1) "are guaranteed equally to male and female persons". The compact relating to the special rights of Aboriginal peoples is therefore in harmony with the other two basic compacts and with the four organizing principles of our constitutional system.

99 In the case at bar, all the parties are, in one way or another, bound by the Final Agreement, which settles the comprehensive land claim of the Little Salmon/Carmacks First Nation. Section 35(3) of the *Constitution Act, 1982* provides that "in subsection (1)" the expression "treaty rights" includes "rights that now exist by way of land claims agreements or may be so acquired." The appellants' position is based on one such agreement.

100 The respondents, intending to rely on *Mikisew*, invoke only the Crown's common law duty to consult Aboriginal peoples, and not the agreement, which, as can be seen from the transcript of the hearing (at p. 46), they do not allege has been breached; they submit that the purpose of the agreement in the instant case was not to define the parties' constitutional duties.

101 Prior consultation was used originally as a criterion to be applied in determining whether an Aboriginal right had been infringed (*Guerin*, at p. 389), and then as one factor in favour of finding that a limit on a constitutional right -- whether an Aboriginal or a treaty right -- of the Aboriginal peoples in question was justified (*Sparrow*, at p. 1119). The Crown failed to consult Aboriginal peoples at its own risk, so to speak, if it took measures that, should Aboriginal title or an Aboriginal or treaty right be proven to exist, infringed that right.

102 Then, in *Haida Nation* and *Taku River*, it was asked whether such a duty to consult exists even though the existence of an Aboriginal right has not been fully and definitively established in a court proceeding or the framework for exercising such a right has not been established in a treaty. Had the answer to this question been no, this would have amounted, in particular, to denying that under s. 35 of the *Constitution Act, 1982* the rights of Aboriginal peoples are protected by the Constitution even if no court has yet declared that those rights exist and no undertaking has yet been given to exercise them only in accordance with a treaty. A negative answer would also have had the effect of increasing the recourse to litigation rather than to negotiation, and the interlocutory injunction would have been left as the only remedy against threats to Aboriginal rights where the framework for exercising those rights has yet to be formally defined. It was just such a scenario that the Court strove to avoid in *Haida Nation* and *Taku River*, as the Chief Justice made clear in her reasons in *Haida Nation* (at paras. 14 and 26).

103 Thus, the constitutional duty to consult Aboriginal peoples involves three objectives: in the short term, to provide "interim" or "interlocutory" protection for the constitutional rights of those peoples; in the medium term, to favour negotiation of the framework for exercising such rights over having that framework defined by the courts; and, in the longer term, to assist in reconciling the interests of Aboriginal peoples with those of other stakeholders. As one author recently noted, the raison d'être of the constitutional duty to consult Aboriginal peoples is to some extent, if not primarily, to contribute to attaining the ultimate objective of reconciliation through the negotiation of treaties, and in particular of comprehensive land claims agreements (D. G. Newman, *The Duty to Consult*: *New Relationships with Aboriginal Peoples* (2009), at pp. 18 and 41). This objective of reconciliation of course presupposes active participation by Aboriginal peoples in the negotiation of treaties, as opposed to a necessarily more passive role and an antagonistic attitude in the context of constitutional litigation (*Haida Nation*, at para. 14; S. Grammond, *Aménager la coexistence: Les peuples autochtones et le droit canadien* (2003), at p. 247). The duty to consult can be enforced in different ways. However, the courts must ensure that this duty is not distorted and invoked in a way that compromises rather than fostering negotiation. That, in my view, would be the outcome if we were to accept the respondents' argument that the treaties, and the Final Agreement in particular, do not purport to define the parties' constitutional duties, including what the Crown party must do to consult the Aboriginal party before exercising its rights under the treaty.

104 The short-, medium- and long-term objectives of the constitutional duty to consult Aboriginal peoples are all rooted in the same fundamental principle with respect to the rights of Aboriginal peoples, namely the honour of the

Crown, which is always at stake in relations between the Crown and Aboriginal peoples (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 24). Obviously, when these relations involve the special constitutional rights of Aboriginal peoples, the honour of the Crown becomes a source of constitutional duties and rights, such as the Crown's duty to consult Aboriginal peoples with respect to their Aboriginal or treaty rights (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6).

105 This Court has, over time, substituted the principle of the honour of the Crown for a concept -- the fiduciary duty -- that, in addition to being limited to certain types of relations that did not always concern the constitutional rights of Aboriginal peoples, had paternalistic overtones (*St. Ann's Island Shooting and Fishing Club Ltd. v. The King*, [1950] S.C.R. 211, at p. 219; *Guerin*; *Sparrow*; *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159, at p. 183; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation*; *Taku River Tlingit First Nation*; *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9, *per* McLachlin C.J.; *Mikisew*, at para. 51). Before being raised to the status of a constitutional principle, the honour of the Crown was originally referred to as the "sanctity" of the "word of the white man" (*R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), at p. 649, aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.); see also *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1041, and *Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at pp. 511-12, *per* Gwynne J. (dissenting)). The honour of the Crown thus became a key principle for the interpretation of treaties with Aboriginal peoples (*R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 24 and 46; *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 78, *per* McLachlin J., dissenting, but not on this issue; *Mikisew*, at para. 51).

106 Associating the honour of the Crown with the observance of duly negotiated treaties implies that some value is placed on the treaty negotiation process. But for the treaty to have legal value, its force must be such that neither of the parties can disregard it. The principle of the honour of the Crown does not exempt the Aboriginal party from honouring its own undertakings. What is in question here is respect for the ability of Aboriginal peoples to participate actively in defining their special constitutional rights, and for their autonomy of judgment.

107 To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to me to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.

108 The Crown does indeed act honourably when it negotiates in good faith with an Aboriginal nation to conclude a treaty establishing how that nation is to exercise its special rights in its traditional territory. Adhering to the principle of the honour of the Crown also requires that in the course of negotiations the Crown consult the Aboriginal party, to an extent that can vary, and in some cases find ways to "accommodate" it, before taking steps or making decisions that could infringe special constitutional rights in respect of which the Crown has already agreed to negotiate a framework for exercising them (*Haida Nation*; *Taku River*). Since the honour of the Crown is more a normative legal concept than a description of the Crown's actual conduct, it implies a duty on the part of the Crown to consult Aboriginal peoples not only with respect to the Aboriginal rights to which the negotiations actually relate, but also with respect to any Aboriginal right the potential existence of which the Crown can be found to have constructive knowledge, provided, of course, that what it plans to do might adversely affect such rights (*Haida Nation*, at para. 35). As we have seen, this principle also requires that the Crown keep its word and honour its undertakings after a treaty has been signed.

109 In concluding a treaty, the Crown does not act dishonourably in agreeing with an Aboriginal community on an elaborate framework involving various forms of consultation with respect to the exercise of that community's rights: consultation in the strict sense, participation in environmental and socio-economic assessments, co-management, etc. Nor, in such cases -- which are the norm since the signing of the *James Bay and Northern Québec Agreement* in 1975 -- does the Crown act dishonourably in concluding a land claim agreement based on Aboriginal rights if it requires the Aboriginal party to agree that no parallel mechanism relating to a matter covered by the treaty will

enable that party to renege on its undertakings. Legal certainty is the primary objective of all parties to a comprehensive land claim agreement.

110 It has sometimes been asserted, incorrectly in my opinion, that in treaty negotiations, the Crown and Aboriginal parties have deeply divergent points of view respecting this objective of legal certainty, which only the Crown is really interested in pursuing. Excessive weight should not be given to the arguments of the parties to this case, as their positions have clearly become polarized as a result of the adversarial context of this proceeding.

111 In fact, according to studies commissioned by the United Nations, (1) lack of precision with respect to their special rights continues to be the most serious problem faced by Aboriginal peoples, and (2) Aboriginal peoples attach capital importance to the conclusion of treaties with the Crown (M. St-Hilaire, "La proposition d'entente de principe avec les Innus: vers une nouvelle génération de traités?" *(2003), 44 C. de D. 395*, at pp. 397-98). It is also wrong, in my opinion, to say that Aboriginal peoples' relational understanding of the treaty is incompatible with the pursuit of the objective of legal certainty. On this understanding, that of "treaty making", the primary purpose of these instruments is to establish a relationship that will have to evolve (M. L. Stevenson, "Visions of Certainty: Challenging Assumptions", in Law Commission of Canada, ed., *Speaking Truth to Power: A Treaty Forum* (2001), 113, at page 121; R. A. Williams, *Linking Arms Together* (1997)). The concept of an agreement that provides certainty is not synonymous with that of a "final agreement", or even with that of an "entire agreement". Legal certainty cannot be attained if one of the parties to a treaty can unilaterally renege on its undertakings with respect to a matter provided for in the treaty where there is no provision for its doing so in the treaty. This does not rule out the possibility of there being matters not covered by a treaty with respect to which the Aboriginal party has not surrendered possible Aboriginal rights. Nor does legal certainty imply that an equitable review mechanism cannot be provided for in a treaty.

112 Thus, it should be obvious that the best way for a court to contribute to ensuring that a treaty fosters, in the words of Binnie J., "a positive long relationship between Aboriginal and non-Aboriginal communities" (at para. 10) consists first and foremost in ensuring that the parties cannot unilaterally renege on their undertakings. And once legal certainty has been pursued as a common objective at the negotiation stage, it cannot become a one-way proposition at the stage of implementation of the treaty. On the contrary, certainty with respect to one party's rights implies that the party in question must discharge its obligations and respect the other party's rights. Having laboured so hard, in their common interest, to substitute a well-defined legal system for an uncertain normative system, both the Aboriginal party and the Crown party have an interest in seeing their efforts bear fruit.

113 Except where actions are taken that are likely to unilaterally infringe treaty rights of an Aboriginal people, it is counterproductive to assert, as the respondents do, that the common law duty to consult continues to apply in all cases, even where a treaty exists. However, the appellants' argument goes much too far. As I explain more fully below, the fact that a treaty has been signed and that it is the entire agreement on some aspects of the relationship between an Aboriginal people and the non-Aboriginal population does not imply that it is a complete code that covers every aspect of that relationship. It is in fact because the agreement in issue does provide that the Aboriginal party has a right to various forms of consultation with respect to the rights the Crown wishes to exercise in this case that rights and obligations foreign to the mechanism provided for in the treaty must not be superimposed on it, and not simply, as the appellants submit, because this is a "modern" treaty constituting a land claims agreement.

114 It is true that s. 35(3) of the *Constitution Act, 1982* recognizes the existence of a category of treaties, called "land claims agreements", which, in constitutional law, create treaty "rights" within the meaning of s. 35(1). Thus, although the courts will certainly take the context of the negotiation of each treaty into consideration, they will avoid, for example, developing rules specific to each category of treaty identified in the legal literature or by the government (e.g., "peace and friendship" treaties, "pre-Confederation" treaties, "numbered" treaties and "modern" treaties).

115 In *Quebec (Attorney General) v. Moses*, *2010 SCC 17*, *[2010] 1 S.C.R. 557*, LeBel J. and I rejected the date of signature as the criterion for determining the rules of interpretation applicable to treaties entered into with Aboriginal peoples: "the issue relates to the context in which an agreement was negotiated and signed, not to the date of its

signature" (para. 114). We arrived at that conclusion because we did not believe that distinct legal meanings flowed from the identification in the legal literature and by the government of various categories of treaties on the basis of the historical periods in which the treaties were signed. This approach was also taken by McLachlin J., dissenting on a different issue, in *Marshall*, as she said that "each treaty must be considered in its unique historical and cultural context", which "suggests" that the practice of "slot[ting] treaties into different categories, each with its own rules of interpretation ... should be avoided" (para. 80).

116 If, in a given case, a court feels freer to maintain a certain critical distance from the words of a treaty and can as a result interpret them in a manner favourable to the Aboriginal party, this will be because it has been established on the evidence, including historical and oral evidence, that the written version of the exchange of promises probably does not constitute an accurate record of all the rights of the Aboriginal party and all the duties of the Crown that were created in that exchange. It is true that, where certain time periods are concerned, the context in which the agreements were reached will more readily suggest that the words are not faithful. But this is a question that relates more to the facts than to the applicable law, which is, in the final analysis, concerned with the common intention of the parties. From a legal standpoint, a comprehensive land claim agreement is still a treaty, and nothing, not even the fact that the treaty belongs to a given "category", exempts the court from reading and interpreting the treaty in light of the context in which it was concluded in order to identify the parties' common intention. This Court has had occasion to mention that, even where the oldest of treaties are involved, the interpretation "must be realistic and reflect the intention of both parties, not just that of the [First Nation]" (*Sioui*, at p. 1069). I would even say that it would be wrong to think that the negotiating power of Aboriginal peoples is directly related to the time period in which the treaty was concluded, as certain Aboriginal nations were very powerful in the early years of colonization, and the European newcomers had no choice but to enter into alliances with them.

117 My finding with regard to the interpretation of treaties is equally applicable to the relationship between treaties and the law external to them or, in other words, to the application to treaties of the rules relating to conflicting legislation: the mere fact that a treaty belongs to one "category" or another cannot mean that a different set of rules applies to it in this regard. The appellants' invitation must therefore be declined: even when the treaty in issue is a land claims agreement, the Court must first identify the common intention of the parties and then decide whether the common law constitutional duty to consult applies to the Aboriginal party.

118 Thus, the basis for distinguishing this case from *Mikisew* is not the mere fact that the treaty in issue belongs to the category of modern land claims agreements. As Binnie J. mentions in the case at bar (at para. 53), the treaty in issue in *Mikisew* was silent on how the Crown was to exercise its right under the treaty to require or take up tracts "from time to time for settlement, mining, lumbering, trading or other purposes". This constituted an omission, as, without guidance, the exercise of such a right by the Crown might have the effect of nullifying the right of the Mikisew under the same treaty "to pursue their usual vocations of hunting, trapping and fishing". Therefore, where there is a treaty, the common law duty to consult will apply only if the parties to the treaty have failed to address the issue of consultation.

119 Moreover, where, as in *Mikisew*, the common law duty to consult must be discharged to remedy a gap in the treaty, the duty undergoes a transformation. Where there is a treaty, the function of the common law duty to consult is so different from that of the duty to consult in issue in *Haida Nation* and *Taku River* that it would be misleading to consider these two duties to be one and the same. It is true that both of them are constitutional duties based on the principle of the honour of the Crown that applies to relations between the Crown and Aboriginal peoples whose constitutional -- Aboriginal or treaty -- rights are at stake. However, it is important to make a clear distinction between, on the one hand, the Crown's duty to consult before taking actions or making decisions that might infringe Aboriginal rights and, on the other hand, the minimum duty to consult the Aboriginal party that necessarily applies to the Crown with regard to its exercise of rights granted to it by the Aboriginal party in a treaty. This in my opinion is the exact and real meaning of the comment in *Mikisew* that the "honour of the Crown exists as a source of obligation independently of treaties as well" (para. 51). This is also the exact meaning of the comment in *Haida Nation* that the "jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution" (para. 32).

120 Where the Crown unilaterally limits a right granted to an Aboriginal people in a treaty in taking an action that does not amount to an exercise of one of its own rights under that treaty, the infringement is necessarily a serious one, and the Crown's duty is one of reasonable accommodation. This principle is very similar to that of minimal impairment, with respect to which a duty to consult was held to exist in *Sparrow*.

121 The consultation that must take place if the Crown's exercise of its own rights under a treaty impairs a right of the Aboriginal party will consist in either: (1) the measures provided for in the treaty in this regard; or (2) if no such measures are provided for in the treaty, the consultation required under the common law framework, which varies with the circumstances, and in particular with the seriousness of any potential effects on the Aboriginal party's rights under the treaty (*Haida Nation*, at para. 39; *Mikisew*).

122 One thing must be made clear at this point, however. Where a treaty provides for a mechanism for consulting the Aboriginal party when the Crown exercises its rights under the treaty -- one example would be the participation of the Aboriginal party in environmental and socio-economic assessments with respect to development projects -- what the treaty does is to override the common law duty to consult the Aboriginal people; it does not affect the general administrative law principle of procedural fairness, which may give rise to a duty to consult rights holders individually. The constitutional duty to consult Aboriginal peoples is rooted in the principle of the honour of the Crown, which concerns the special relationship between the Crown and Aboriginal peoples as peoples (*Rio Tinto Alcan v. Carrier Sekani Tribal Council*, *2010 SCC 43*, at paras. 59-60). It is as a result of this special relationship, originally based on the recognition of Aboriginal institutions that existed before the Crown asserted its sovereignty, that Aboriginal peoples, as peoples, can enter into treaties with the Crown. The general rules of administrative law do not normally form part of the matters provided for in comprehensive land claims agreements.

123 When all is said and done, the fatal flaw in the appellants' argument that the duty to consult can never apply in the case of a modern treaty is that they confuse the concept of an agreement that provides certainty with that of an "entire agreement". The imperative of legal certainty that is central to the negotiation of a modern treaty and that requires a court to defer to the will of the parties must not blind the courts to omissions by the parties. That an agreement is complete cannot be presumed; it must be found to be complete.

124 The Court obviously cannot bind itself in future cases by assuming that every modern treaty is free of omissions or other gaps with respect to consultation. The possibility of so important a matter being omitted from a modern treaty may at first blush seem unlikely, but as can be seen from the instant case, it is very real. Were it not for the transitional law provisions in Chapter 12, there would probably have been a gap in this case and, on an exceptional basis, in the legal context of the modern treaty, the common law duty to consult could duly have been applied to fill that gap. But no such gap can be found in this case. Yet it is in fact just such a "procedural gap" that Binnie J. finds (at para. 38) to be confirmed here, but he reaches this conclusion without considering the treaty's transitional law provisions, which, in my view, contain the answers to the questions raised in this case. I disagree with the argument that such a procedural gap exists in this case, and I also disagree with superimposing the common law duty to consult on the treaty. These, therefore, are the basic differences between us.

125 Yukon also submits that the existence of a duty to consult may be inferred from a treaty only in accordance with its express terms. Once again, this is an argument that goes too far and is in no way consistent with the general principles of interpretation of treaties with Aboriginal peoples, even when those principles are applied to modern treaties. As we will see, the treaty itself contains interpretive provisions to the effect that an interpretation should not be limited to the express terms of the treaty, and in particular that its provisions must be read together and that any ambiguities should be resolved in light of the objectives set out at the beginning of each chapter.

126 These general considerations alone would form a sufficient basis for dismissing the appeal. But the provisions of the Final Agreement also confirm this conclusion, and they must, in any event, be reviewed in order to assess the respondents' argument.

II. Treaty in Issue

127 The analysis of the treaty that must be conducted in this case has three steps. To begin, it will be necessary to review the general framework of the treaty and highlight its key concepts. The next step will be to identify the substantive treaty rights that are in issue here, namely, on the one hand, the Crown's right the exercise of which raises the issue of consultation and, on the other hand, the right or rights of the Aboriginal party, which could be limited by the exercise of the Crown's right. Finally, and this is the determining factor, it will be necessary to discuss the formal rights and duties that result from the consultation process provided for in the treaty.

A. *General Framework*

128 "Comprehensive" Aboriginal land claims agreements form part of the corpus of our constitutional law. And the effect of the implementing legislation of such agreements is that they are usually binding on third parties. The agreements are most often the fruit of many years of intense negotiations. The documents in which they are set out therefore command the utmost respect.

129 This Court was recently asked to interpret the *James Bay and Northern Québec Agreement* for the first time, some 35 years after it was signed in 1975. Since that year, 19 other similar agreements have been concluded across the country. Subsequently, to take the most striking example, although only one comprehensive claim in British Columbia has resulted in a final settlement and only seven others in that province are currently at relatively advanced stages of negotiation, no fewer than 52 other claims there have been accepted for negotiation by the Treaty Commission.

130 It was after 20 years of negotiations that the Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon ("Umbrella Agreement") was signed on May 29, 1993. At that time, the Little Salmon/Carmacks First Nation was a member of the Council for Yukon Indians, and it still is today, along with nine other First Nations. The *Umbrella Agreement* provided for the conclusion, in accordance with its terms, of specific agreements with the various Yukon First Nations (s. 2.1.1).

131 Although the Umbrella Agreement "does not create or affect any legal rights" (s. 2.1.2), it provides that "Settlement Agreements shall be land claims agreements within the meaning of section 35 of the *Constitution Act, 1982*" (s. 2.2.1). Moreover, according to the Umbrella Agreement, "[a] Yukon First Nation Final Agreement shall include the provisions of the Umbrella Final Agreement and the specific provisions applicable to that Yukon First Nation" (s. 2.1.3). It can be seen from the final agreements in question that the parties have given effect to this undertaking. Even the numbering of the Umbrella Agreement's provisions has been reproduced in the 11 final agreements that have been concluded under it so far. These 11 final agreements represent over half of all the "comprehensive" land claims agreements (that is, agreements resulting from claims that Aboriginal rights exist) signed across the country. The Final Agreement in issue here was signed near Carmacks on July 21, 1997 and was subsequently ratified and implemented by enacting legislation; this last step was a condition of validity (ss. 2.2.11 and 2.2.12).

132 The Umbrella Agreement, as a whole, is founded on a few basic concepts. It should be noted from the outset that this agreement applies to a larger territory than the land claims settlement concluded under it actually does. The agreement refers to "Settlement Land", which is defined as "Category A Settlement Land, Category B Settlement Land or Fee Simple Settlement Land", and to "Non-Settlement Land", which is defined as "all land and water in the Yukon other than Settlement Land" and as including "Mines and Minerals in Category B Settlement Land and Fee Simple Settlement Land, other than Specified Substances" (ch. 1). The nature of this distinction will be helpful in our analysis of the provisions relating to legal certainty (Division 2.5.0). But one point that should be made here is that the framework provided for in the agreement varies considerably depending on which of these two broad categories the land in question belongs to. It should also be pointed out that, under the agreement, "Crown land" -- such as the land in issue here that was transferred to Mr. Paulsen on October 18, 2004 -- is land that, as defined, is not settlement land. Another concept used in the Umbrella Agreement is that of "traditional territory", which transcends the distinction between settlement land and non-settlement land (ch. 1 and Division

2.9.0). This concept of "traditional territory" is relevant not only to the possibility of overlapping claims of various Yukon First Nations, but also to the extension of claims beyond the limits of Yukon and to the negotiation of transboundary agreements (Division 2.9.0). As we will see, it is also central to the fish and wildlife co-management system established in Chapter 16 of the Final Agreement. The land that was in question in the decision of the Director of Agriculture dated October 18, 2004 in respect of Mr. Paulsen's application is located within the traditional territory of the Little Salmon/Carmacks First Nation, and more specifically in the northern part of that territory, in a portion that overlaps with the traditional territory of the Selkirk First Nation.

133 The appellants' argument is based entirely on the principle that the agreement provides certainty. More precisely, it is based on an interpretation according to which that principle is indistinguishable from the principle of the "entire agreement". As a result, they have detached a key general provision of the Final Agreement from its context and interpreted it in a way that I do not find convincing. The "entire agreement clause" (s. 2.2.15), the actual source of which is the Umbrella Agreement and on which the appellants rely, provides that "Settlement Agreements shall be the entire agreement between the parties thereto and [that] there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them". This clause is consistent with the "out-of-court settlement" aspect of comprehensive land claims agreements. But it is not the only one, which means that such clauses must be considered in the broader context of the Final Agreement, and in particular of the provisions respecting legal certainty, which are set out under the heading "Certainty" (Division 2.5.0).

134 On this key issue of legal certainty, the Umbrella Agreement and, later, all the final agreements negotiated under it were entered into in accordance with the 1986 federal policy on comprehensive claims (St-Hilaire, at pp. 407-08, note 45). It is actually possible to refer to the 1993 policy, as the 1986 policy was not modified on this point. Since 1986, the official federal policy has stated in this respect that rights with respect to land that are consistent with the agreement and "Aboriginal rights which are not related to land and resources or to other subjects under negotiation will not be affected by the exchange" (Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims* (1993), at p. 9). In short, in the 1986 policy, the government announced that its conduct would be honourable in that it would aim for equitable, or "orthodox", exchanges (St-Hilaire, at p. 407). In other words, the principle endorsed in the federal policy since 1986 has involved a distinction between the agreement that provides certainty and the "entire agreement". So much for the general principle behind the division of the agreement in issue entitled "Certainty". Let us now consider in greater detail the specific provisions applicable to the exchange of rights established in the Final Agreement.

135 The Umbrella Agreement provides (in s. 2.5.1) that, in consideration of the promises, terms, conditions and provisos in a Yukon First Nation's final agreement,

> 2.5.1.1 subject to 5.14.0 [which sets out a procedure for designating "Site Specific Settlement Land" to which s. 2.5.0 will not apply], that Yukon First Nation and all persons who are eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada, all their aboriginal claims, rights, titles, and interests, in and to,
>
> (a) Non-Settlement Land and all other land and water including the Mines and Minerals within the sovereignty or jurisdiction of Canada, except the Northwest Territories, British Columbia and Settlement Land,
>
> (b) the Mines and Minerals within all Settlement Land, and
>
> (c) Fee Simple Settlement Land; [and]
>
> 2.5.1.2 that Yukon First Nation and all persons eligible to be Yukon Indian People it represents, as of the Effective Date of that Yukon First Nation's Final Agreement, cede, release and surrender to Her Majesty the Queen in Right of Canada all their aboriginal claims, rights, titles and interests in and to Category A and Category B Settlement Land and waters

> therein, to the extent that those claims, rights, titles and interests are inconsistent or in conflict with any provision of a Settlement Agreement ... .

According to the agreement settling its comprehensive land claim, the Little Salmon/Carmacks First Nation therefore "surrender[ed]" any Aboriginal rights it might have *in respect of land, water, mines and minerals*, (1) subject to the procedure for designating "site specific settlement land" (of which two parcels were located near the land in question in Mr. Paulsen's application), (2) except insofar as those rights extended into the Northwest Territories or British Columbia, and (3) except for those relating to settlement land and waters therein, but only to the extent that the rights in question were not inconsistent with the settlement and provided that they extended neither to land held in fee simple nor to mines and minerals -- as is specified in the definition of non-settlement lands. For greater certainty, the Final Agreement accordingly adds that

> 2.5.1.4 neither that Yukon First Nation nor any person eligible to be a Yukon Indian Person it represents, their heirs, descendants and successors, shall, after the Effective Date of that Yukon First Nation's Final Agreement, assert any cause of action, action for declaration, claim or demand of whatever kind or nature, which they ever had, now have, or may hereafter have against Her Majesty the Queen in Right of Canada, the Government of any Territory or Province, or any person based on,
>
> (a) any aboriginal claim, right, title or interest ceded, released or surrendered pursuant to 2.5.1.1 and 2.5.1.2; [or]
>
> (b) any aboriginal claim, right, title or interest in and to Settlement Land, lost or surrendered in the past, present or future ... .

136 It is also important to consider general provision 2.2.4, which reflects the new orthodox exchange principle introduced by the 1986 federal policy that applied to the negotiation of the Umbrella Agreement:

> Subject to 2.5.0, 5.9.0 [effects of the registration, granting, declaration or expropriation of any interest in a Parcel of Settlement Land less than the entire interest], 5.10.1 [effects of the registration, granting or expropriation of the fee simple title in a Parcel of Settlement Land] and 25.2.0 [negotiation of the transboundary aspect of claims], Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

137 The spirit of the Final Agreement is apparent on the very face of these provisions respecting legal certainty: except where otherwise provided in the agreement itself, the agreement replaces the common law Aboriginal rights framework with the one it establishes for the matters it covers. But that is not all.

138 The Final Agreement also includes general and interpretive provisions, such as general provision 2.2.5, which, like so many others, is reproduced from the Umbrella Agreement. This provision states that "Settlement Agreements shall not affect the rights of Yukon Indian People as Canadian citizens and their entitlement to all of the rights, benefits and protection of other citizens applicable from time to time". There are also relevant provisions in Division 2.6.0 of the Umbrella Agreement:

> 2.6.1 The provisions of the Umbrella Final Agreement, the specific provisions of the Yukon First Nation Final Agreement and Transboundary Agreement applicable to each Yukon First Nation shall be read together.
>
> 2.6.2 Settlement Legislation shall provide that:

> 2.6.2.1 subject to 2.6.2.2 to 2.6.2.5, all federal, territorial and municipal Law shall apply to Yukon Indian People, Yukon First Nations and Settlement Land;
>
> 2.6.2.2 where there is any inconsistency or conflict between any federal, territorial or municipal Law and a Settlement Agreement, the Settlement Agreement shall prevail to the extent of the inconsistency or conflict;
>
> 2.6.2.3 where there is any inconsistency or conflict between the provisions of the Umbrella Final Agreement and the specific provisions applicable to a Yukon First Nation, the provisions of the Umbrella Final Agreement shall prevail to the extent of the inconsistency or conflict; [and]
>
> 2.6.2.4 where there is any inconsistency or conflict between Settlement Legislation and any other Legislation, the Settlement Legislation shall prevail to the extent of the inconsistency or conflict;
>
> ...
>
> 2.6.3 There shall not be any presumption that doubtful expressions in a Settlement Agreement be resolved in favour of any party to a Settlement Agreement or any beneficiary of a Settlement Agreement.
>
> ...
>
> 2.6.5 Nothing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations.
>
> 2.6.6 Settlement Agreements shall be interpreted according to the Interpretation Act, R.S.C. 1985, c. I-21, with such modifications as the circumstances require.
>
> 2.6.7 Objectives in Settlement Agreements are statements of the intentions of the parties to a Settlement Agreement and shall be used to assist in the interpretation of doubtful or ambiguous expressions.
>
> 2.6.8 Capitalized words or phrases shall have the meaning assigned in the Umbrella Final Agreement.

These interpretive provisions establish, *inter alia*, a principle of equality between the parties (s. 2.6.3) and a principle of contextual interpretation based on the general scheme of the provisions, divisions and chapters and of the treaty as a whole in accordance with its systematic nature (s. 2.6.1). The latter principle is confirmed by the rule that in the event of ambiguity, the provisions of the treaty are to be interpreted in light of the objectives stated at the beginning of certain chapters of the treaty (s. 2.6.7). The systematic nature of the treaty is also confirmed by the rule that when defined words and phrases are used, they have the meanings assigned to them in the definitions (s.

2.6.8). In other cases, the rules set out in the federal *Interpretation Act* apply (s. 2.6.6). This, then, is the framework for interpretation agreed on by the parties to the treaty. More precisely, this framework was first developed by the parties to the Umbrella Agreement, and was then incorporated by the parties into the various final agreements concluded under the Umbrella Agreement. Where there is any inconsistency or conflict, the rules of this framework prevail over the common law principles on the interpretation of treaties between governments and Aboriginal peoples.

139 These general and interpretive provisions also establish certain rules with respect to the relationships of the Umbrella Agreement and any final agreement concluded under it, not only the relationship between them, but also that with the law in general. One of these rules is that in the event of inconsistency or conflict, the Umbrella Agreement prevails over the agreements concluded under it (s. 2.6.2.3). At first glance, this rule is surprising, since the parties to the Umbrella Agreement were very careful to specify that, on its own, that agreement "does not create or affect any legal rights" (s. 2.1.2). Section 2.6.2.3 is therefore somewhat imprecise. It can only refer to the provisions of the final agreement whose substance (and not form) derives from the Umbrella Agreement, and which prevail over the "specific" provisions. The implementing legislation, the *Yukon First Nations Land Claims Settlement Act*, S.C. 1994, c. 34, provides that "[i]n the event of a conflict or inconsistency between provisions of the Umbrella Final Agreement incorporated in a final agreement that is in effect and provisions of the final agreement that are specific to the first nation, the provisions of the Umbrella Final Agreement prevail to the extent of the conflict or inconsistency" (s. 13(4)). The other provisions of the treaty that relate to this issue of conflicting legislation have also been drawn from the federal implementing legislation (s. 13) and from its territorial equivalent (s. 5). The rules can therefore be summarized in the principle that the Final Agreement prevails over any other non-constitutional legal rule, subject to the requirement that its provisions not be so construed as to affect the rights of "Yukon Indian people" as Canadian citizens and their entitlement to all the rights, benefits and protections of other citizens (s. 2.2.5). In short, therefore, with certain exceptions, the treaty overrides Aboriginal rights related to the matters to which it applies, and in cases of conflict or inconsistency, it prevails over all other non-constitutional law.

140 It should be noted that in certain circumstances, the principle applied in the treaty with respect to particular non-constitutional legislation -- the *Indian Act*, R.S.C. 1985, c. I-5, where reserves are concerned -- is that the treaty replaces that legislation rather than prevailing over it (s. 4.1.2).

141 Regarding the relationship between the treaty in issue and the rest of our constitutional law other than the case law on Aboriginal rights, such a treaty clearly cannot on its own amend the "Constitution of Canada" within the meaning of s. 52 and Part V of the *Constitution Act, 1982*. Thus, to give one example, it cannot on its own alter either the protections of rights and freedoms provided for in Part I of that Act, the *Canadian Charter of Rights and Freedoms* (support for this can be found in s. 2.2.5 of the Final Agreement, which was discussed above), or the constitutional division of powers established in Part VI of the *Constitution Act, 1867*. Next, on the specific issue before us in the instant case, since the right to be consulted that corresponds to the common law duty to consult (1) transcends the distinction between Aboriginal rights and treaty rights, (2) is therefore not an Aboriginal right and even less so an Aboriginal right related to land and resources, and (3) accordingly cannot be surrendered under Division 2.5.0, it must be asked whether there is anything explicit in the treaty in issue about how the parties intended to deal with this duty. In other words, does the Final Agreement contain provisions that affect the general principle discussed above that the common law duty to consult will apply only where the parties have failed to address this issue? I see none.

142 It should be borne in mind that an Aboriginal people cannot, by treaty, surrender its constitutional right to be consulted before the Crown takes measures in a manner not provided for in the treaty that might violate, infringe or limit a right that Aboriginal people is recognized as having in the same treaty. By analogy, in contract law, such a surrender would constitute an unconscionable term. But it is not this rule that is in issue here so much as the minimum required content of the duty in the context of treaties with Aboriginal peoples. As set out above, s. 2.6.5 of the Final Agreement, which was reproduced from the Umbrella Agreement, provides that "[n]othing in a Settlement Agreement shall be construed to preclude any party from advocating before the courts any position on the existence, nature or scope of any fiduciary or other relationship between the Crown and the Yukon First Nations". However, the fiduciary duty is not always constitutional in nature. Nor is it equivalent to the duty to consult implied

by the principle of the honour of the Crown that the Crown must maintain in its relations with Aboriginal peoples as holders of special constitutional rights. The fiduciary duty may arise, for example, from relations the Crown maintains with Indians in managing reserve lands and, more generally, in administering the *Indian Act* (*Guerin*; *Osoyoos Indian Band v. Oliver (Town)*, *2001 SCC 85*, *[2001] 3 S.C.R. 746*).

143 In actual fact, two points are made in s. 2.6.5. First, the settlement of an Aboriginal nation's comprehensive claim does not automatically entail the settlement of any specific claim -- based not on Aboriginal rights but rather on the *Indian Act* -- that this nation might have, generally on the strength of the Crown's fiduciary duty. A specific claim could also be based on a "historical" treaty. In the instant case, however, the Little Salmon/Carmacks First Nation expressly ceded, released and surrendered, in the agreement to settle its comprehensive land claim, namely the Final Agreement, any "claims rights or causes of action which they may ever have had, may now have or may have hereafter" as a result of Treaty 11 (ss. 2.5.1.3, 2.5.1.4(c) and 2.5.2). Finally, unlike a comprehensive claim, a specific claim is not necessarily limited to land or resources. It was therefore quite natural to specify that the mere existence of a settlement of a Yukon First Nation's comprehensive land claim did not, without further verification, support a conclusion that any specific claim the First Nation might have had been settled.

144 Second, s. 2.6.5 also evokes a more general principle. It provides that a final agreement does not preclude any party from advocating before the courts the existence of not only fiduciary, but also "other", relationships between the Crown and the Yukon First Nations. This, in reality, is but one manifestation of the equitable principle involving a higher standard for exchanges of rights between Aboriginal peoples and the Crown -- which the Crown aimed to make more orthodox -- that was first mentioned in the federal policy of 1986.

145 Thus, s. 2.6.5 of the Final Agreement is not at all inconsistent with the general principle discussed above that the common law duty to consult, in its minimum required obligational form, will apply -- despite the existence of a treaty -- only if the parties to the treaty have clearly failed to provide for it. This will depend on whether the parties have come to an agreement on the issue, and if they have, the treaty will -- unless, of course, the treaty itself provides otherwise -- override the application to the parties of any parallel framework, including the common law framework.

146 In short, in providing in s. 2.2.4 that, subject to certain restrictions, "Settlement Agreements shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them", the parties could only have had an orthodox exchange of rights in mind. They most certainly did not intend that a consultation framework would apply in parallel with the one they were in the process of establishing in the treaty. If the treaty in issue establishes how the Crown is to exercise its rights under the treaty by providing for a given form of consultation with the Aboriginal party, then the effect of the entire agreement clause in s. 2.2.15 will be to override any parallel framework, including the one developed by this Court.

B. *Substantive Rights in Issue*

(1) Right to Transfer and Right of Access to Crown Land

147 In the case at bar, it is Chapter 6 on rights of access that must be considered first in respect of the right of the Crown the exercise of which could affect the exercise of rights of the Aboriginal party. As I mentioned above, the agreement in issue establishes two broad categories of land: settlement land and non-settlement land. The category of non-settlement land includes Crown land, and the land in question in Mr. Paulsen's application was Crown land. Chapter 6 is structured on the basis of the principle that the Aboriginal party and third parties have rights of access to unoccupied Crown land, on the one hand, and that the Crown and third parties have rights of access to undeveloped settlement land, on the other. This is a general principle to which there may, of course, be exceptions.

148 It is in Division 6.2.0 that the parties to the Umbrella Agreement -- Canada, Yukon and the Council for Yukon

Indians -- provided for the right of access to Crown land -- to be confirmed in the final agreements -- of every Yukon Indian person and Yukon First Nation. The effect of the reproduction of that provision in the various final agreements was to grant every Yukon Indian person and Yukon First Nation to which those agreements applied a right of access for non-commercial purposes (s. 6.2.1), which is the right being relied on in this case. However, a review of that right leads to the right of the Crown the exercise of which is in issue here and which constitutes an exception to the right of access.

149 The right of access of First Nations to Crown land for non-commercial purposes is subject to strict limits, and also to conditions and exceptions. It is limited in that the access in question is only "casual and insignificant" (s. 6.2.1.1), or "is for the purpose of Harvesting Fish and Wildlife in accordance with Chapter 16 -- Fish and Wildlife" (s. 6.2.1.2), which is a chapter I will discuss below. The applicable conditions are set out in s. 6.2.4 -- one example is a prohibition against significant interference with the use and peaceful enjoyment of the land by other persons. Finally, regarding the exceptions that are relevant here, the right of access in issue does not apply to Crown land "where access or use by the public is limited or prohibited" (s. 6.2.3.2), or "which is subject to an agreement for sale or a surface licence or lease", except "to the extent the surface licence or lease permits public access" or "where the holder of the interest allows access" (s. 6.2.3.1 (emphasis added)).

150 This last provision is the very one on which the decision on Mr. Paulsen's application was based. It must therefore be determined whether the treaty requires the Crown to consult the Aboriginal party before exercising its right to transfer land belonging to it in a way that could limit one or more rights granted to the Aboriginal party in the treaty. As I explain below, there are provisions in the treaty in question that govern this very issue.

151 The Crown's right is clear, however. This exception to the right of access of First Nations to Crown land obviously implies that the Crown's general right to transfer land belonging to it continues to exist. Crown land, in respect of which Yukon's Aboriginal peoples have surrendered all Aboriginal rights and all rights arising out of Treaty No. 11, and which is not included in the land covered by the settlement of their comprehensive land claims, is defined in the agreement itself as land "vested from time to time in Her Majesty in Right of Canada, whether the administration and control thereof is appropriated to the Commissioner of the Yukon or not" (ch. 1). Ownership of property implies, with some exceptions, the right to dispose of the property. The Crown's right to transfer land belonging to it is confirmed not only by s. 6.2.3.1 of the treaty, but also by s. 6.2.7, which limits that right by indicating that "Government shall not alienate Crown Land abutting any block of Settlement Land so as to deprive that block of Settlement Land of access from adjacent Crown Land or from a highway or public road". The treaty right being specifically invoked by the Little Salmon/Carmacks First Nation in respect of access to Crown land clearly ends where the Crown's right to transfer such land begins.

152 Moreover, in invoking the right granted in s. 6.2.1.2 to every Yukon Indian person and Yukon First Nation, that of access to Crown land for the purpose of "Harvesting Fish and Wildlife in accordance with Chapter 16", the respondents are also engaging that chapter on fish and wildlife management. They further submit that the transfer of the land in question would reduce the value of the trapline held by one of them, Johnny Sam, under the *Wildlife Act*, R.S.Y. 2002, c. 229, and -- in a more direct, but certainly no less significant, manner -- under the same Chapter 16 of the Final Agreement. Chapter 16 is accordingly in issue in this case and will have to be considered in greater detail.

(2) Fish and Wildlife Management

153 Chapter 16 of the Final Agreement establishes a co-management framework with respect to fish and wildlife. It generally confirms the right of Yukon Indian people

> to harvest for Subsistence within their Traditional Territory, and with the consent of another Yukon First Nation in that Yukon First Nation's Traditional Territory, all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0 ... . [s. 16.4.2]

However, the actual scope of this general principle is limited in that the same provision concludes with the following words: "... subject only to limitations prescribed pursuant to Settlement Agreements" (s. 16.4.2). Those limitations are significant and they go beyond the exception to the right of access granted in Division 6.2.0, namely the Crown's exercise of its right to transfer land belonging to it. The exercise of the rights granted to the Aboriginal party in Chapter 16 is subject to limitations provided for not only in the final agreements, but also in "Legislation enacted for purposes of Conservation, public health or public safety" (s. 16.3.3); limitations provided for in legislation "must be consistent with this chapter, reasonably required to achieve those purposes and may only limit those rights to the extent necessary to achieve those purposes" (s. 16.3.3.1).

154 There are other provisions in Chapter 16 of the Final Agreement, aside from s. 16.3.3, that regulate, in various ways, the right of Yukon Indian people to harvest fish and wildlife by, in particular, authorizing the fixing of quotas -- referred to as "total allowable harvest[s]" -- "[w]hen opportunities to harvest Freshwater Fish or Wildlife are limited for Conservation, public health or public safety" (s. 16.9.1.1). Chapter 16 also establishes principles for sharing such harvests "between Yukon Indian People and other harvesters" (s. 16.9.1). Overall, the logic behind the principles used to allocate quotas is to "give priority to the Subsistence needs of Yukon Indian People while providing for the reasonable needs of other harvesters" (s. 16.9.1.1).

155 Another goal of Chapter 16 of each of the final agreements, in addition to the simple fixing and allocation of quotas, is to regulate the exercise by Yukon Indian people of their rights to harvest fish and wildlife by setting up a multi-level management framework that combines the principle of participation of the First Nations in question and that of decentralization. Those with responsibilities in the context of that framework are, in each case, the First Nation in question, the renewable resources council ("council"), which has jurisdiction in respect of that First Nation's traditional territory, the Fish and Wildlife Management Board ("Board") (and its Salmon Sub-Committee), which has jurisdiction throughout the Yukon Territory, and, finally, the Minister responsible for the matter in issue. There is equal representation on the councils and the Board: thus, "[s]ubject to Transboundary Agreements and Yukon First Nation Final Agreements, each Council shall be comprised of six members consisting of three nominees of the Yukon First Nation and three nominees of the Minister" (s. 16.6.2), and "[t]he Board shall be comprised of six nominees of Yukon First Nations and six nominees of Government" (s. 16.7.2). Regarding the composition of the councils, the specific provisions of the final agreements add only that the First Nation and the Minister may each nominate one additional member as an alternate member (ss. 16.6.2.1-16.6.2.3). The chairperson of each council, and of the Board, is selected from the membership of the body in question in accordance with procedures it has established for itself (ss. 16.6.3 and 16.7.3). If no chairperson is selected within 30 days in the case of a council, or 60 days in the case of the Board, the Minister must, after consulting the council or the Board, as the case may be, appoint one from its membership (ss. 16.6.3.1 and 16.7.3.1).

156 There are very few instances in which the organs referred to in Chapter 16, other than the Minister, are given decision-making powers. In one of the rare cases, the First Nation is given, "for Category 1 Traplines, the final allocation authority" (ss. 16.11.10.6 and 16.5.1.2) -- I should mention that this is not the category to which Johnny Sam's trapline belongs. The First Nation also has sole authority to "align, realign or group Category 1 Traplines where such alignments, realignments or groupings do not affect Category 2 Traplines" (s. 16.5.1.3).

157 More generally, the First Nation also has the following decision-making powers:

> ... [to] manage, administer, allocate or otherwise regulate the exercise of the rights of Yukon Indian People under 16.4.0 [concerning the harvesting of fish and wildlife] within the geographical jurisdiction of the Council established for that Yukon First Nation's Traditional Territory by,
>
> (a) Yukon Indian People enrolled pursuant to that Yukon First Nation Final Agreement,
>
> (b) other Yukon Indian People who are exercising rights pursuant to 16.4.2, and
>
> (c) except as otherwise provided in a Transboundary Agreement, members of a transboundary claimant group who are Harvesting pursuant to that Transboundary Agreement in that Yukon First Nation's Traditional Territory ... . [s. 16.5.1.1]

However, the final paragraph of this provision contains the following clarification: "... where not inconsistent with the regulation of those rights by Government in accordance with 16.3.3 and other provisions of this chapter" (s. 16.5.1.1, final portion). The reality is that, aside from the allocation of individual rights from a group harvesting allocation, Chapter 16 mainly concerns management activities that ultimately fall under the Minister's authority. The organs mentioned in Chapter 16 other than the Minister have in most cases -- with some exceptions where they are given a form of decision-making authority -- a power limited to holding consultations before a decision is made.

158 It is in this context that the respondents' argument regarding the *Community-Based Fish and Wildlife Management Plan: Little Salmon/Carmacks First Nation Traditional Territory, 2004-2009* (2004) must be considered. Management plans such as this one are referred to in Chapter 16 of the various final agreements and more specifically, for our purposes, in ss. 16.6.10. and 16.6.10.1, which read as follows:

> Subject to Yukon First Nation Final Agreements, and without restricting 16.6.9 [on the Councils' general powers], each Council:
>
> 16.6.10.1 may make recommendations to the Minister on the need for and the content and timing of Freshwater Fish and Wildlife management plans, including Harvesting plans, Total Allowable Harvests and the allocation of the remaining Total Allowable Harvest [under 16.9.4], for species other than the species referred to in 16.7.12.2 [species included in international agreements, threatened species declared by the Minister as being of territorial, national or international interest, and Transplanted Populations and Exotic Species] ... .

159 A management plan such as the one relied on by the respondents is a policy statement regarding proposed legal acts, in particular decision making and the making of regulations under statutory authority. As its title indicates, therefore, this plan only sets out an administrative agreement on how the partners plan to exercise their legal powers.

160 The passage from the management plan to which the respondents refer reads as follows:

> Concern: There is a need to protect the Yukon River from Tatchun Creek to Minto as important habitat for moose, salmon, and other wildlife. This section of the Yukon River contains a number of sloughs and islands, and was identified as important habitat for moose during calving, summer and winter. Moose were commonly seen in this area back in the 1960s, but fewer have been seen in recent years. "Dog Salmon Slough" was one area noted in particular as an important habitat area ... . Bears use Dog Salmon Slough for fishing. Moose might be staying away from river corridors now with the increased river travel traffic during summer. The review process for land applications in this area needs to consider the importance of these habitat areas to fish and wildlife.
>
> Solution: Conserve the important moose and salmon habitat along the Yukon River from Tatchun Creek to Minto. Pursue designating the area between Tatchun Creek and Minto along the Yukon River as a Habitat Protection Area under the Wildlife Act. The community and governments need to get together to decide what kind of activities should happen in this important wildlife habitat. This is an overlap area with Selkirk First Nation, and the CRRC [Carmacks Renewable Resource Council] needs to consult with them. A [Little Salmon/Carmacks First Nation] Game Guardian could also assist in evaluating the area for designation and providing management guidelines. [pp. 32-33]

161 Two concerns can therefore be identified: the protection of fish and wildlife and the designation of areas. As I will explain below, the protection of fish and wildlife could be, and in fact was, taken into consideration in the process leading to the transfer of land. As for the designation of a protected area, which could have prevented any transfer of the land in question in Mr. Paulsen's application from occurring, it was a complex process. Such a designation would have required that three steps be completed successfully: (1) the Little Salmon/Carmacks First

Nation would have to recommend the designation after consulting the Selkirk First Nation and the renewable resources council, in accordance with the relevant provisions of the management plan; (2) the Commissioner in Executive Council would have to designate the area by making a regulation under s. 187 of the *Wildlife Act*, the effect of which would simply be to make it possible to withdraw the lands in question from disposition; and (3) the Commissioner in Executive Council would have to actually withdraw the lands from disposition by making an order under s. 7(1)(a) of the Yukon *Lands Act*, *R.S.Y. 2002, c. 132*, which would be done if the Commissioner in Executive Council considered it advisable to do so in the public interest. These steps had not yet been taken, and in the meantime no provisional suspension of the processing of applications for land in the area in question had been agreed upon, despite the fact that such a suspension had been suggested in September 2004, a few weeks before the decision on Mr. Paulsen's application, at a meeting concerning an agricultural policy review that was attended by representatives from the First Nation and the Agriculture Branch.

162 In sum, the provisions of Chapter 16 on fish and wildlife management establish a framework under which the First Nations are generally invited to participate in fish and wildlife management at the pre-decision stage. In particular, the invitation they receive to propose fish and wildlife management plans can be regarded as consultation.

(3) Trapline

163 The respondents submit that the land transfer in issue will reduce the value of the trapline held by Johnny Sam under the *Wildlife Act*, to which Division 16.11.0 of the Final Agreement on trapline management and use applies. In addition to the principles on the allocation of possible quotas between the First Nations and other harvesters, Chapter 16 of the Yukon final agreements includes specific rules for the trapping of furbearers. Division 16.11.0 incorporates, with necessary changes, the framework for granting individual traplines, or "concessions", established in the *Wildlife Act*. The changes made to that general framework in the final agreements relate primarily to the allocation of traplines in the First Nations' traditional territory.

164 Section 16.11.2 of the final agreements concluded with the Yukon First Nations under the Umbrella Agreement reads as follows:

> In establishing local criteria for the management and Use of Furbearers in accordance with 16.6.10.6 [which delegates the authority to adopt bylaws under the *Wildlife Act*] and 16.6.10.7 [which grants the authority to make recommendations to the Minister and the First Nation], the Councils shall provide for:
>
> 16.11.2.1 the maintenance and enhancement of the Yukon's wild fur industry and the Conservation of the fur resource; and
>
> 16.11.2.2 the maintenance of the integrity of the management system based upon individual trapline identity, including individual traplines within group trapping areas.

165 The Final Agreement contains a specific provision concerning the allocation of traplines between Aboriginal and non-Aboriginal people in the traditional territory of the Little Salmon/Carmacks First Nation, namely s. 16.11.4.1, which provides that "[t]he overall allocation of traplines which have more than 50 percent of their area in that portion of the Traditional Territory of the Little Salmon/Carmacks First Nation which is not overlapped by another Yukon First Nation's Traditional Territory is 11 traplines held by Yukon Indian People and three traplines held by other Yukon residents". This allocation does not apply to Johnny Sam's trapline, since it is located entirely within the portion of the traditional territory of the Little Salmon/Carmacks First Nation that overlaps the traditional territory of the Selkirk First Nation.

166 Furthermore, as I mentioned above, the Final Agreement establishes two categories of traplines. After being

granted to an individual, a trapline located in the traditional territory of a First Nation may, with the written consent of its registered holder, be designated a Category 1 trapline (s. 16.11.8). Otherwise, it will be a Category 2 trapline. Such a designation gives the First Nation the authority -- particularly if the trapline is vacant or underused -- to reallocate it (ss. 16.5.1.2 and 16.11.10.6), or to align it, realign it or group it with another line "where such alignments, realignments or groupings do not affect Category 2 Traplines" (s. 16.5.1.3). Authority over Category 2 lines rests not with the First Nation, but with the Minister (ss. 16.3.1 and 16.11.10.7 and Division 16.8.0). In their decisions, the courts below indicated that Johnny Sam's trapline is a Category 2 trapline.

167 Section 16.11.13 establishes the right of "Yukon Indian People holding traplines whose Furbearer Harvesting opportunities will be diminished due to other resource development activities [to] be compensated". This right is broader than the right to compensation the holder of a trapline has under s. 82 of the *Wildlife Act*, which is limited to situations in which a concession is revoked or the re-issuance of a concession is refused for purposes related to the conservation of wildlife or to protection of the public interest, but without giving two years' notice. Regarding the consequences the transfer of land to one person might have on another person's right to trap, I would point out that the *Wildlife Act* (s. 13(1)) provides that "[a] person shall not hunt or trap wildlife within one kilometre of a building which is a residence, whether or not the occupants are present in the building at the time, unless the person has the permission of the occupants to do so".

168 Having discussed the granting of rights and establishment of duties in Chapter 16 of the Final Agreement, on which the respondents are relying, I must now ask whether this chapter establishes a specific procedure to be followed by the Yukon government to consult the signatory First Nation before exercising its right to transfer Crown land under the (Yukon) territory's jurisdiction. The answer is no. The consultation provided for in ss. 16.3.3.2, 16.5.4 and 16.7.16 relates to the management of fish and wildlife, not to the impact an action might have in relation to fish and wildlife. However, ss. 16.5.3, 16.6.11 and 16.7.13 provide that the First Nation, the renewable resources council and the Fish and Wildlife Management Board, respectively, have standing as interested parties to participate in the public proceedings of any agency, board or commission on matters that affect the management and conservation of fish and wildlife and their habitats in the particular traditional territory. But the terms "agency", "board" or "commission" refer, in particular, to the bodies in question in Chapter 12 of the Final Agreement, which establishes a procedure for consulting the First Nations signatories by ensuring their participation in the environmental and socio-economic assessment of development activities such as the one that resulted from the approval of Mr. Paulsen's application.

169 I would nevertheless like to point out that Johnny Sam had rights as the holder of the trapline. He had the same rights as anyone else where procedural fairness is concerned. He also had the right to be compensated in accordance with s. 16.11.13. But the respondents are neither arguing that there has been a breach of procedural fairness nor asserting their right to compensation. What they are seeking is to have the decision on Mr. Paulsen's application quashed on the ground that the Crown had a common law duty to consult them (respondent's factum on cross-appeal, at para. 86). It is my view, therefore, that a review of the rights granted in the Final Agreement with respect to consultation prior to a decision such as the one in issue in this case is indispensable.

C. *Formal Rights and Duties in Issue*

170 The appellants argue that Chapter 12 is not applicable on the ground that it had not yet been implemented at the relevant time. According to the respondents, the process provided for in Chapter 12 would have been applicable had it been implemented, but it is only one form of consultation among all those that would be applicable -- in their view, the common law duty is not excluded. Binnie J. also proposes that the common law duty to consult should apply where the Crown exercises a right granted to it in the treaty, even if the treaty provides for consultation in relation to that right. I disagree with him on this point. As I mentioned above, respect for the autonomy of the parties implies that effect must be given to the provisions they have agreed on in finalizing the relationship between them on a given matter. I cannot therefore agree with disregarding provisions adopted by the parties with respect to the transitional law.

171 The Umbrella Agreement and the Final Agreement in issue here state that the "settlement legislation" must

provide that a settlement agreement is binding on third parties (s. 2.4.2.3), and the *Yukon First Nations Land Claims Settlement Act* provides that "[a final agreement or transboundary agreement that is in effect] is binding on all persons and bodies that are not parties to it" (s. 6(2)). Both these agreements are binding not only on the parties, but also on third parties. Therefore, in my opinion, it is necessary for this Court to review the provisions of Chapter 12.

172 Chapter 12 of the Umbrella Agreement, which can also be found in the final agreements, did not simply lay the foundations for an environmental and socio-economic assessment process that was to be implemented by means of a statute other than the general implementing legislation for those agreements -- which was done by enacting the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*") -- it also contains transitional law provisions regarding the duties of the parties to the Umbrella Agreement and the final agreements that would apply even before the enactment of that statute implementing the process in question.

173 In reality, the Yukon final agreements provided that they would be implemented and would come into effect by way of legislation or of an order-in-council, as the case may be, and that their coming into effect was a condition precedent to their validity (ss. 2.2.11-2.2.12). This could be understood to mean that, since Chapter 12 required the enactment of specific implementing legislation, it constituted an exception to the general implementation of a final agreement and created no legal rights or duties until that legislation was enacted. But that is not what the Final Agreement says.

174 In Division 12.2.0 of the Final Agreement, the expression "Development Assessment Legislation" is defined as "Legislation enacted to implement the development assessment *process* set out in this chapter" (emphasis added). This definition therefore does not concern special implementing legislation for Chapter 12 as a whole, but legislation to implement the *process* provided for in that chapter. This is confirmed by s. 12.3.1, which provides that "Government shall implement a development assessment process consistent with this chapter by Legislation". Logically, therefore, when a final agreement concluded under the Umbrella Agreement with the Yukon First Nations comes into effect, the result, even if the assessment process has not yet been implemented, is to give effect to several provisions of Chapter 12 that are common to all the final agreements, including those that establish the applicable transitional law.

175 Section 12.19.5 provides that "nothing in [Chapter 12] shall be construed to affect any existing development assessment process in the Yukon prior to the Development Assessment Legislation coming into effect". This provision sets out the transitional law that would apply until the *YESAA* came into force, establishing that until then, existing statutes and regulations with respect to development assessment would constitute the minimum to which Yukon First Nations were entitled, which meant that those statutes and regulations could not be amended so as to reduce the level of protection enjoyed by the First Nations. Chapter 12 does not require that any amendments be made to that existing law in the meantime.

176 In addition, s. 12.3.4 provides that "Government shall recommend to Parliament or the Legislative Assembly, as the case may be, the Development Assessment Legislation consistent with this chapter as soon as practicable and in any event no later than two years after the effective date of Settlement Legislation". The "settlement legislation" referred to here is clearly not the implementing legislation for the process contemplated in Chapter 12, but the "settlement legislation" provided for in Division 2.4.0 -- the legislation to implement the particular final agreement. Both the territorial settlement legislation and the corresponding federal legislation came into force in 1995. As for the specific process contemplated in Chapter 12, it was ultimately implemented by Parliament by means of the *YESAA*.

177 The transitional law, that is, the law that applied before the *YESAA* came into force, included, in addition to s. 12.19.5, which was discussed above, s. 12.3.6 of the Final Agreement, which read as follows:

> Prior to the enactment of Development Assessment Legislation, the parties to the Umbrella Final Agreement shall make best efforts to develop and incorporate in the implementation plan provided for in

> 12.19.1, interim measures for assessing a Project which shall be consistent with the spirit of this chapter and within the existing framework of Law and regulatory agencies. [Emphasis added.]

No implementation plan of the type provided for in s. 12.19.1 was produced in this case. Moreover, s. 12.19.4 provided that Chapter 12 was not to "be construed to prevent Government, in Consultation with Yukon First Nations, from acting to improve or enhance socio-economic or environmental procedures in the Yukon in the absence of any approved detailed design of the development assessment process". No evidence of any such action was adduced in the case at bar. By virtue of s. 12.19.5, therefore, the applicable interim framework corresponded to the "existing development assessment process in the Yukon prior to the Development Assessment Legislation coming into effect".

178 However, it should be mentioned that the interim framework, which was intended to apply for only a relatively short period, was ultimately in effect longer than planned. This is because the bill that became the implementing legislation for the process contemplated in Chapter 12 was not introduced until October 3, 2002, that is, over five and a half years after the February 14, 1997 deadline provided for in s. 12.3.4 of the Final Agreement. In fact, that deadline had already passed when the *Final Agreement* was signed in 1997. Since it is clear from the provisions of Chapter 12 that before the *YESAA* came into force, the parties to the Umbrella Agreement were required to "make best efforts" to ensure that the Yukon First Nations received the benefit of the spirit of that chapter as soon as was practicable, it is important to begin -- not in order to apply the *letter* of the *YESAA*, but in order to clearly understand the *spirit* of Chapter 12, of which certain other provisions that were applicable expressly stated that, in the interim, best efforts were to be made to honour that spirit -- by determining what the Little Salmon/Carmacks First Nation would have been entitled to under the *YESAA* if the process implemented in that Act had applied to Mr. Paulsen's application.

(1) Permanent Process: *YESAA*

179 One objective of Chapter 12 of the final agreements concluded with the Yukon First Nations is to ensure the implementation of a development assessment process that "provides for guaranteed participation by Yukon Indian People and utilizes the knowledge and experience of Yukon Indian People in the development assessment process" (s. 12.1.1.2). This framework was designed to incorporate both the participation of the First Nations and a certain degree, if not of decentralization, at least of administrative deconcentration. These objectives are achieved through the membership of the bodies established in Chapter 12 of the final agreements and the *YESAA*, and through the oversight by those bodies of development activities planned for the territory in question. This integrated mechanism was intended, with some exceptions, to become Yukon's default assessment procedure. The relationship between the process established in Chapter 12 and the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, is made clear in s. 63 of the *YESAA*. In addition to the principle of a *single* assessment, Chapter 12 (ss. 12.14.1.2 and 12.14.3.2) and its implementing legislation (ss. 82(1), 83(1) and 84(1)) confirm the principle of *prior* assessment (prior to the authorization of any project).

180 The process for which Chapter 12 lays the foundations involves two main organs: the Yukon Development Assessment Board and all the "designated offices" at the local level. The *YESAA* also refers to them as the "Board" and the "designated offices". The membership of the Board is established in s. 8 of the *YESAA*. The basis for its membership is equal representation. The Board's executive committee consists of one member nominated by the Council for Yukon Indians, one member nominated by the government and a chairperson appointed by the Minister after consultation with the first two members. The Minister then appoints additional members such that, excluding the chairperson, half the members are nominees of the Council for Yukon Indians and the other half are nominees of the government. As for the designated offices, they are, pursuant to the *YESAA*, outposts of the Board. Their staff "shall be composed of employees of the Board assigned to that office by the Board" (s. 23(1)).

181 Chapter 12 establishes two broad categories of assessments -- mandatory assessments and optional assessments -- which are conducted upon request by the government or by a First Nation, but when the request is made by a First Nation, the government's consent is required, with some exceptions that are subject to specific

conditions (ss. 12.8.1.4, 12.8.1.5., 12.8.1.8., 12.8.1.9 and 12.8.1.10 of the Final Agreement, and s. 60 of the *YESAA*). The Board is responsible for optional assessments. It is possible to simply except a project from assessment (s. 47(2) *YESAA*). As for mandatory assessments, they are the responsibility of the designated office for the assessment district in which the project is to be undertaken, or of the Board if the assessment district office refers the assessment to it (s. 50(1) *YESAA*) or if such projects have been classified by way of regulations as requiring submission to the Board (s. 122(*c*) *YESAA*). In short, if a project (1) is not excepted from assessment, (2) is not the subject of an accepted optional assessment, or (3) is not one that is required by regulations to be assessed by the Board or that has been referred to the Board by the office for the project's assessment district, it will be assessed by the assessment district office.

182 If the environmental and socio-economic assessment process provided for in Chapter 12 -- and in fact in the *YESAA*, which implements the process -- had applied at the time of the events in this case, Mr. Paulsen's application would have had to be assessed by the designated office for the Mayo assessment district, which was established along with five others (for a total of six) by order of the Minister under s. 20(1) of the *YESAA*. Projects like the one in question in Mr. Paulsen's application were neither excepted by regulations nor required to be assessed by the Board. Section 2 of the *Assessable Activities, Exceptions and Executive Committee Projects Regulations*, SOR/2005-379, refers to Schedule 1 to those regulations concerning "activities that may ... be made subject to assessment" within the meaning of s. 47 of the *YESAA*. The following activity is listed as Item 27 of Part 13 -- entitled "Miscellaneous" -- of Schedule 1:

> On land under the administration and control of the Commissioner of Yukon or on settlement land, the construction, establishment, modification, decommissioning or abandonment of a structure, facility or installation for the purpose of agriculture, commercial recreation, public recreation, tourist accommodation, telecommunications, trapping or guiding persons hunting members of a species prescribed as a species of big game animal by a regulation made under the *Wildlife Act*, R.S.Y. 2002, c. 229.

183 Finally, s. 5 of the *Assessable Activities, Exceptions and Executive Committee Projects Regulations* provides that "[p]rojects for which proposals are to be submitted to the executive committee under paragraph 50(1)(*a*) of the [*YESAA*] are specified in Schedule 3". Since nothing in that schedule corresponds to Mr. Paulsen's application, it must be concluded that the assessment would have been the responsibility of the Mayo designated office, although that office could have referred the project to the Board.

184 Since Mr. Paulsen's project falls into the category of projects for which an assessment by an assessment district office is mandatory, it is possible to give a precise answer to the question of what measures the respondents would have been entitled to had the letter of the process provided for in Chapter 12 of the Final Agreement applied in the case of Mr. Paulsen's application.

185 It should first be observed that neither the Final Agreement nor the *YESAA* provides for direct participation by the First Nation in the assessment itself. It is only through the Council for Yukon Indians, or more precisely through those of the Board's members assigned to the Mayo office who were appointed after being nominated by the Council, that the First Nation would have *participated* in the assessment of Mr. Paulsen's application. Furthermore, no provisions regarding the proportion of Aboriginal assessors required for assessments by the designated offices can be found either in the final agreements or in the *YESAA*. All that we know in this respect is that the Final Agreement and the *YESAA* require equal representation in the Board's *overall* membership.

186 Regarding the right of interested parties, not to actively take part in the assessment itself, but to be heard, the Final Agreement provides that "[i]n accordance with the Development Assessment Legislation, a Designated Office ... shall ensure that interested parties have the opportunity to participate in the assessment process" (s. 12.6.1.3). Moreover, as I mentioned above, the organs -- the First Nations, the renewable resources council and the Fish and Wildlife Management Board -- that make up the co-management framework for fish and wildlife established in Chapter 16 of the Final Agreement have standing as interested parties to participate in public proceedings of any agency, board or commission on matters that affect the management and conservation of fish and wildlife and their habitats in the traditional territory in question (ss. 16.5.3, 16.6.11 and 16.7.13). Also, s. 55(1)(*b*) of the *YESAA*

provides that "[w]here a proposal for a project is submitted to a designated office under paragraph 50(1)(*b*), the designated office shall ... determine whether the project will be located, or might have significant environmental or socio-economic effects, in the territory of a first nation" (55(1)(*b*)). The word "territory" is defined as follows in s. 2(1) of the *YESAA*: "in relation to a first nation for which a final agreement is in effect, that first nation's traditional territory and any of its settlement lands within Yukon that are not part of that traditional territory". After it has been determined under s. 55(1)(*b*) that the project will be so located or that it might have such effects, s. 55(4) of the *YESAA* applies. It reads as follows:

> Before making a recommendation ... a designated office shall seek views about the project, and information that it believes relevant to the evaluation, from any first nation identified under paragraph (1)(*b*) and from any government agency, independent regulatory agency or first nation that has notified the designated office of its interest in the project or in projects of that kind.

Therefore, under the process provided for in Chapter 12 of the Final Agreement and in the *YESAA*, the Little Salmon/Carmacks First Nation would have had the right only to be heard in the assessment of Mr. Paulsen's application, and not to actively take part in it by delegating assessors.

187 This, therefore, is the collective consultation measure to which the respondents would have been entitled in the case of Mr. Paulsen's application had the process provided for in Chapter 12 of the Final Agreement and implemented by the *YESAA* applied to it. This should enable us now to answer the ultimate question in the case at bar: whether, given that the letter of that process does not apply, the respondents could receive the benefit of the spirit of the process, as was their right under the transitional provisions of Chapter 12 of the Final Agreement. For this purpose, we must reiterate that although those transitional provisions did impose a particular responsibility on the Crown party, they were nevertheless not silent with respect to the participation of the Aboriginal party. Thus, s. 12.3.6 refers in this regard to efforts on the part not only of "government", but of the parties to the Umbrella Agreement.

(2) Transitional Law: Any "Existing Process" Before the Coming into Force of the *YESAA*

188 As far as Mr. Paulsen's application is concerned, the "existing process" within the meaning of the transitional law provisions, that is, of ss. 12.3.6 and 12.19.5 of the Final Agreement, was the process provided for in the *Environmental Assessment Act*, S.Y. 2003, c. 2, and Yukon's 1991 agriculture policy, which, moreover, also referred to the environmental legislation (*Agriculture for the 90s: A Yukon Policy* (1991) (the "agriculture policy"), Section II, at para. 6(1)). Since the parties did not rely on that Act, I will merely mention that the assessment provided for in it was completed, but more than five months after the date of the decision on Mr. Paulsen's application, despite the fact that it was a mandatory prior assessment.

189 Under the 1991 agriculture policy, Mr. Paulsen's application first had to undergo a "prescreening" by the Land Claims and Implementation Secretariat, the Lands Branch and the Agriculture Branch. The prescreening process involved determining whether the application was eligible for consideration, and in particular whether the application was complete, whether the land in question was available, whether that land was under territorial jurisdiction, whether there was a possibility that the land would be subject to Aboriginal land claims, whether the land had agronomic capability and, more specifically, whether the application was, at first glance, consistent with the policy then in effect.

190 Mr. Paulsen's application then had to undergo a more technical review by the Agriculture Land Application Review Committee ("ALARC"). ALARC is a cross-sector, interdepartmental committee that, among other things, reviews the farm development plan that every applicant for agricultural land must submit (agriculture policy, Section II, at subpara. 9(1)(c)). ALARC's review of Mr. Paulsen's application was originally scheduled for June 26, 2002, but it could not proceed on that date because the applicant had not yet submitted a farm development plan.

191 On June 10, 2002, an analysis by the Agriculture Branch showed that if Mr. Paulsen's application were

accepted as configured, it would not represent the most efficient use of the land. On October 20, 2003, Mr. Paulsen reconfigured the parcel in question in his application. On February 24, 2004, ALARC recommended that his application proceed to an assessment by the Land Application Review Committee ("LARC").

192 LARC is a body whose membership consists of representatives of the Yukon government and, depending on the case, of Yukon First Nations, Yukon municipalities and/or the federal Department of Fisheries and Oceans (*Land Application Review Committee (LARC): Terms of Reference*, Section 4.0: Membership/Public Participation, A.R., vol. II, at p. 29). It is chaired by a territorial government official. A First Nation will be represented on LARC if, as was the case here, the application to be reviewed has potential consequences for the management of its "traditional territory".

193 LARC's mandate is, in particular, to "review matters concerning land applications from a technical land-management perspective, in accordance with legislation, First Nation Final & Self Government Agreements and criteria in specific land application policies" (*Land Application Review Committee (LARC): Terms of Reference*, Section 6.0: Land Application & Policy Development Procedures -- Mandate, A.R., vol. II, at p. 32).

194 A notice concerning Mr. Paulsen's application was published on March 26, 2004, and the public were invited to submit written comments within 20 days. On April 28, 2004, the Agriculture Branch sent a summarized version of the application to the Little Salmon/Carmacks First Nation (A.R., vol. II, at p. 6) together with a letter notifying the First Nation that the application was to be reviewed by LARC and asking it to submit its written comments within 30 days. The First Nation was also sent an information package, which included notice that the LARC meeting was scheduled for August 13, 2004.

195 On July 27, 2004, Susan Davis, the Director of Land and Resources of the Little Salmon/Carmacks First Nation, sent Yukon's Lands Branch a letter in which she expressed the First Nations' concerns about Mr. Paulsen's application (A.R., vol. II, at p. 22). Those concerns were threefold. First of all, the First Nation was concerned about the impact of the application on the trapline. It was also concerned about the anticipated impact on settlement land under its comprehensive land claim agreement, and in particular on two parcels of site specific settlement land (a concept referred to above in para. 46) as well as on the cabin of the holder of the trapline concession, which was located on one of those parcels. Finally, the First Nation asked the Yukon government to take into consideration the fact that there might be sites of heritage or archaeological interest, including a historical trail, on the land in question in the agriculture land application.

196 LARC met to review Mr. Paulsen's application on August 13, 2004. For reasons that are not explained in the record of this case, the Little Salmon/Carmacks First Nation, without notifying the other members in advance, did not attend the meeting and did not request an adjournment of the August 13, 2004 review, to which it had been invited as a member of LARC. However, it can be seen from the minutes of that meeting that even though no representatives of the First Nation attended, its concerns had been taken into account even before the meeting. The following passages are relevant:

> The original rectangular parcel was reconfigured in October, 2003. The NRO [Natural Resources Officer] inspection report in April this year recommended it be reconfigured again to remove a portion, which is a potential timber allocation area for point source premits [*sic*]. Opposition from the First Nation has caused the abandonment of that plan.
>
> ...
>
> Little Salmon Carmacks First Nation [LSCFN] express concern that the application is within Trapline Concession Number 143, held by an elder [Johnny Sam]. Forestfire burns have impacted this trapline, and the only area left is a small strip of land between the Klondike Highway and the Yukon River, which is considered to be suitable land for farming. As a result of the report, there have been several agriculture land applications requesting land in the area for raising livestock and building houses. The combination of agriculture and timber harvesting impacts on this already damaged trapline would be a significant deterrent

> to the ability of the trapper to continue his traditional pursuits. There are two site specifics, personal/traditional use areas considered to be LSCFN settlement lands in the area in question, S-4B and S-127B. Both of these locations are in close proximity to the point source timber permit application. The impact on these sites and users would be the loss of animals to hunt in the area. S-4B is also the site of Concession 143's base camp and trapper cabin.
>
> ...
>
> Other LSCFN concerns relatied [*sic*] to cultural sites: There are potential areas of heritage and cultural interests which may be impacted by point source timber harvesting. An historic First Nation trail follows the ridge in the area. [A]t present these sites have not been researched or identified, and there would need to be an archaeological survey carried out in order to confirm the prescence [*sic*] or lack thereof of any such sites.
>
> Environment advised they walked the site and discovered an old trap on top of the bluff, facing the Yukon River. The owner of Trapline #143 will have the right to seek compensation. An appropriate 30-metre setback is recommended from the bluff. There was evidence of bears and moose. There will be some loss of wildlife habitat in the area, but it is not significant.
>
> ...
>
> Recommendation: Approval in principle. Setback from the bluff 30 meters ... . Subdivision approval will be required. Trapper, based on reduced trapping opportunities, has opportunity to seek compensation.

197 On September 2, 2004, the territorial government's archaeologist reported that no evidence of prehistoric artifacts had been found on the land in question in the agriculture land application, but as a precaution he also recommended a 30-metre buffer between the bluff and the land that was to be transferred.

198 The territorial government's conduct raises questions in some respects. In particular, there is the fact that the appellant David Beckman, in his capacity as Director of Agriculture, did not notify the respondent First Nation of his decision of October 18, 2004 until July 27, 2005. Under s. 81(1) of the *YESAA*, the designated office and, if applicable, the executive committee of the Board would have been entitled to receive copies of that decision and, one can only assume, to receive them within a reasonable time. Here, the functional equivalent of the designated office is LARC. Even if representatives of the respondent First Nation did not attend the August 13 meeting, it would be expected that the Director of Agriculture would inform that First Nation of his decision within a reasonable time. Nonetheless, the time elapsed after the decision did not affect the quality of the prior consultation.

199 The territorial government's decision to proceed with Mr. Paulsen's application at the prescreening stage despite the requirement of consultation in the context of the respondent First Nation's fish and wildlife management plan was not an exemplary practice either. In that respect, Yukon's 1991 agriculture policy provided that "[a]pplications to acquire land for agriculture will be reviewed by the Fish and Wildlife Branch to safeguard wildlife interests", that "[m]easures will be taken to avoid overlap between allocation of lands for agriculture and key wildlife habitat" and that, in particular, all "key wildlife habitat will be excluded from agricultural disposition except where the Fish and Wildlife Branch determines that adverse effects upon wildlife interests can be successfully mitigated" (Section II, subpara. 6(3)(b)). As we have seen, however, Susan Davis did not express concern about this in her letter of July 27, 2004 to Yukon's Lands Branch. And as can be seen from the minutes of the August 13, 2004 meeting, the concerns of the Little Salmon/Carmacks First Nation with respect to resource conservation were taken into consideration. Also, the required consultation in the context of the fish and wildlife management plan was far more limited than the consultation to which the First Nation was entitled in participating in LARC, which was responsible for assessing the specific project in issue in this appeal. Finally, the First Nation, the renewable resources council and the Minister had not agreed on a provisional suspension of the processing of applications for land in the area in question.

200 Despite these aspects of the handling of Mr. Paulsen's application that are open to criticism, it can be seen from the facts as a whole that the respondents received what they were entitled to receive from the appellants where consultation as a First Nation is concerned. In fact, in some respects they were consulted to an even greater extent than they would have been under the *YESAA*. As we saw above, the only right the First Nation would have had under the *YESAA* was to be heard by the assessment district office as a stakeholder (s. 55(4)). That consultation would have been minimal, whereas in the context of the 1991 agriculture policy, the First Nation was invited to participate directly in the assessment of Mr. Paulsen's application as a member of LARC.

201 It is true that the First Nation's representatives did not attend the August 13, 2004 meeting. They did not notify the other members of LARC that they would be absent and did not request that the meeting be adjourned, but they had nonetheless already submitted comments in a letter.

202 Thus, the process that led to the October 18, 2004 decision on Mr. Paulsen's application was consistent with the transitional law provisions of Chapter 12 of the Final Agreement. There is no legal basis for finding that the Crown breached its duty to consult.

III. Conclusion

203 Whereas past cases have concerned unilateral actions by the Crown that triggered a duty to consult for which the terms had not been negotiated, in the case at bar, as in the Court's recent decision regarding the *James Bay and Northern Québec Agreement*, the parties have moved on to another stage. Formal consultation processes are now a permanent feature of treaty law, and the Final Agreement affords just one example of this. To give full effect to the provisions of a treaty such as the Final Agreement is to renounce a paternalistic approach to relations with Aboriginal peoples. It is a way to recognize that Aboriginal peoples have full legal capacity. To disregard the provisions of such a treaty can only encourage litigation, hinder future negotiations and threaten the ultimate objective of reconciliation.

204 The appellants seek a declaration that the Crown did not have a duty to consult under the Final Agreement with respect to Mr. Paulsen's application. Their interpretation of the Final Agreement is supported neither by the applicable principles of interpretation nor by either the context or the provisions of the Final Agreement. The cross-appellants argue that the common law duty to consult continued to apply despite the coming into effect of the Final Agreement. As I explained above, it is my view that there is no gap in the Final Agreement as regards the duty to consult. Its provisions on consultation in relation to the management of fish and wildlife were in effect. And the Little Salmon/Carmacks First Nation had in fact submitted comments in the process provided for in that respect. Moreover, the administrative law rights of Johnny Sam are governed neither by the common law duty to consult nor by the Final Agreement. Although the Little Salmon/Carmacks First Nation's argument that it had a right to be consulted with respect to Mr. Paulsen's application is valid, the source of that right is not the common law framework. The fact is that the transfer to Mr. Paulsen constituted an agricultural development project that was subject to Chapter 12 of the Final Agreement and that that chapter's transitional provisions established the applicable framework.

205 In this case, given that Mr. Paulsen's application would have been subject to a mandatory assessment by the local assessment district office, the fact that recourse was had to the existing process to assess the application supports a conclusion that the actual consultation with the respondents was more extensive than the consultation to which they would have been entitled under the *YESAA*.

206 For these reasons, I would dismiss the appeal and the cross-appeal, both with costs.

Appeal and cross-appeal dismissed with costs.

Solicitors:

Solicitors for the appellants/respondents on cross-appeal: Lawson Lundell, Vancouver.

Solicitors for the respondents/appellants on cross-appeal: Pape Salter Teillet, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the interveners the Gwich'in Tribal Council and Sahtu Secretariat Inc.: Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority: Gowling Lafleur Henderson, Montréal.

Solicitors for the intervener the Council of Yukon First Nations: Boughton Law Corporation, Vancouver.

Solicitors for the intervener the Kwanlin Dün First Nation: Arvay Finlay, Vancouver.

Solicitors for the intervener Nunavut Tunngavik Inc.: Rosenbloom Aldridge Bartley & Rosling, Vancouver.

Solicitor for the intervener the Tlicho Government: John Donihee, Calgary.

Solicitors for the intervener the Te'Mexw Nations: Janes Freedman Kyle Law Corporation, Victoria.

Solicitors for the intervener the Assembly of First Nations: Hutchins Caron & Associés, Montréal.

End of Document

Dene Tha' First Nation v. Canada (Minister of Environment)], [2007] 1 C.N.L.R. 1

Canadian Native Law Reporter

Federal Court

Phelan J.

November 10, 2006.

Court File Number: T-867-05

[2007] 1 C.N.L.R. 1

Dene Tha' First Nation (Applicant) v. Minister of Environment, Minister of Fisheries and Oceans, Minister of Indian and Northern Affairs Canada, Minister of Transport, Imperial Oil Resources Ventures Limited, on behalf of the Proponents of the Mackenzie Gas Project, National Energy Board, and Robert Hornal, Gina Dolphus, Barry Greenland, Percy Hardisty, Rowland Harrison, Tyson Pertschy and Peter Usher, all in their capacity as panel members of a Joint Review Panel established pursuant to the Canadian Environmental Assessment Act to conduct an environmental review of the Mackenzie Gas Project (Respondents)

Case Summary

The Dene Tha' First Nation is an Aboriginal group within the meaning of s.35 of the *Constitution Act, 1982*. It has seven reserves, all located in Alberta. The Dene Tha' defines its traditional territory as lying primarily in Alberta but also as extending into northeastern British Columbia and the southern Northwest Territories (NWT). The Dene Tha' claims that its traditional territory in the NWT overlaps with that of the Deh Cho First Nation. The Dene Tha' is a party to Treaty 8, which was signed in 1899, and has rights to hunt, fish and trap under the treaty. The territory defined by Treaty 8 does not extend into the NWT. The Dene Tha' assert that they have unextinguished Aboriginal rights in the NWT.

In 2000, various regulatory agencies and Aboriginal groups began to consult with one another about how to coordinate the regulatory and environmental impact review processes associated with the construction of the proposed Mackenzie Gas Pipeline (MGP), which will stretch from Inuvik in the far north of the NWT to just south of the Alberta border. At that point, the MGP will connect with another proposed pipeline (the Connecting Facilities), which will run for another sixty-five kilometres and will link up with existing pipelines. The regulators and authorities involved in these discussions included Indian and Northern Affairs Canada, the Canadian Environmental Assessment Agency, the National Energy Board (NEB), the Mackenzie Valley Environmental Impact Review Board (MVEIRB), the Mackenzie Valley Land and Water Board, the Gwich'in Land and Water Board, the Sahtu Land and Water Board, the Inuvialuit Land Administration and the Inuvialuit Game Council. The governments of the Yukon and the NWT were observers. The Deh Cho First Nation also had observer status.

As a result of the meetings of this group and their information-gathering sessions, the parties entered into a Cooperation Plan in 2002. The goal of the Cooperation Plan was to reduce duplication of the environmental and regulatory processes. A Regulators Agreement was entered into in April 2004 to implement the provisions of the Cooperation Plan and to ensure compliance with applicable legislation. In August 2004 the Minister of Environment, the MVEIRB and the Inuvialuit Game Council concluded an Agreement for an environmental impact review of the MGP, which provided for the appointment of a Joint Review Panel (JRP) and set out its mandate. The JRP consists of members appointed or recommended by the Minister and the Gwich'in, Sahtu, Deh Cho and Inuvialuit. The terms of reference for the environmental impact review specifically include the effects of the Connecting Facilities. The JRP began public hearings in February 2006. The JRP has a wide mandate to consider the effects of the MGP and Connecting Facilities on the current use of lands and

resources for traditional purposes by Aboriginal persons but it has no mandate to conduct Aboriginal consultation.

The proponent of the pipeline is Imperial Oil Resources Venture Limited (IORVL) and it made an application to the NEB in October 2004 for permission to construct the pipeline. The NEB is responsible for deciding whether to recommend the issuance of a Certificate of Public Convenience and Necessity (CPCN) to the proponent. To determine this, the NEB has scheduled public hearings. These hearings also began in early 2006 and are scheduled in a coordinated fashion with those of the JRP. The NEB's hearing will continue after the JRP process has concluded. The ultimate decision of the NEB will be informed by the report from the JRP. If the NEB decides that the granting of a CPCN is warranted, then the federal cabinet must still approve the actual issuance of the certificate.

The Dene Tha' were largely excluded from the discussions and decision making that lead to the design of the regulatory and environmental review processes for the MGP and Connecting Facilities. The Dene Tha' were excluded because Canada does not recognize that they have any Aboriginal or treaty rights exercisable in the NWT or any regulatory or environmental assessment jurisdiction in relation to the project. The Dene Tha' were provided with limited opportunities to comment on some aspects of the plan as part of broader public consultations.

The Dene Tha' alleged that Canada failed to fulfill its constitutional duty to consult with them with respect to the creation of the regulatory and environmental review processes related to the MGP and Connecting Facilities and it sought judicial review of these decisions.

Held: Judicial review granted with costs. Declaration granted that Canada has a duty to consult with the Dene Tha' in respect of the MGP and Connecting Facilities and that this duty has been breached; JRP enjoined from considering any aspect of the MGP that affects lands over which the Dene Tha' assert either Aboriginal or treaty rights and enjoined from issuing a report of its proceedings to the NEB; directions given for the holding of a remedies hearing.

1. There is no need to make a determination about the Dene Tha's rights in the NWT in these proceedings. The mandate of the JRP includes the Connecting Facilities in the province of Alberta. The proposed course of the Connecting Facilities passes through lands over which the Dene Tha' have acknowledged treaty rights and this is sufficient to trigger a duty to consult.
2. Canada argued that the NEB, as part of its mandate, was required to consider the adequacy of consultations with Aboriginal groups and that this jurisdiction either ousted the jurisdiction of the Federal Court or required the Court to defer to the NEB's expertise. Canada also argued that only the Federal Court of Appeal can hear applications for judicial review made in respect of the NEB. These arguments were rejected. The NEB has not made a "decision or order", which is required to invoke the exclusive jurisdiction of the Federal Court of Appeal. It has no expertise with respect to Aboriginal consultation. Also, the NEB does not have jurisdiction over consultation efforts (or lack thereof) pre-application, which is precisely the time frame of the Dene Tha's issues.
3. Different First Nations have different Aboriginal and treaty rights and these differences may justify different treatment with respect to the duty to consult. First Nations with substantially similar rights should be treated similarly. The primary difference between the Dene Tha' and the other First Nations involved are: (1) the Dene Tha' has no settled land claim agreement and are not in the process of negotiating one, and (2) the Dene Tha's uncontested territory lies south of the NWT--Alberta border. Neither difference is legally relevant as to the existence of the duty to consult with the Dene Tha'. Treaty 8 is the constitutional equivalent of the modern land claims agreements with the other First Nations. The scope of the JRP includes the Connecting Facilities, which will pass through land over which the Dene Tha' have undisputed treaty rights.
4. The duty to consult is part of a more general duty owed by the Crown to Aboriginal people arising out of the honour of the Crown. The Crown must consult whenever its honour is engaged and this does not require a specific "Aboriginal interest" to be affected so as to give rise to a fiduciary duty or

an infringement of an Aboriginal right.

5. In assessing whether the Crown has fulfilled its duty to consult, the goal of consultations must be kept in mind. The goal is not simply to mitigate adverse effects on Aboriginal rights. The goal is to facilitate the reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown. The goal of consultations does not require any specific result in any particular case. It does not mean that the Crown must accept any particular position put forward by First Nations.

6. The trigger for the Crown's duty to consult has two key aspects. First, there must be either an existing or potentially existing Aboriginal right or title that might be adversely affected by the Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and that the contemplated conduct might adversely affect it.

7. The question of whether there is or is not a duty to consult attracts a yes or no answer. The question of what the duty consists of, on the other hand, is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are factors used to determine the content of the duty. At the lowest end of the spectrum, the duty requires the Crown to give notice, disclose information and discuss any issues raised in response to the notice. At the highest end of the spectrum, the duty requires the opportunity to make submissions for consideration, formal participation in the decision-making process and the provision of written reasons that reveal that Aboriginal concerns were considered and affected the decision.

8. Questions concerning the existence of a duty to consult and its scope are questions of law and the appropriate standard of review is correctness. The further question of whether the duty has been met in a particular case attracts a different analysis. The standard of review is reasonableness. The burden on government is to demonstrate that the process it adopted was reasonable. The process does not have to be perfect.

9. In determining whether a duty to consult existed in this case, the Court must consider the construction of the MGP, not simply the creation of the regulatory and environmental review processes that may ultimately lead to a decision to approve its construction. These processes must be seen as part of an overall plan to construct the MGP. It is not necessary for decisions to have an impact on the ground in order to trigger a duty to consult. It is sufficient if those decisions are part of the strategic planning that may lead to decisions having impacts on the Aboriginal on treaty rights. Accordingly, in this case, the duty to consult arose when the Cooperation Plan was first contemplated prior to 2002.

10. The ability of the Dene Tha' to participate in public comment processes concerning the Cooperation Plan and other aspects of the regulatory and environmental processes adopted with respect to the MGP is not a substitute for consultation. The Dene Tha's right to consultation takes priority over the rights of other users. Public consultation processes cannot be sufficient proxies for Aboriginal consultation responsibilities.

11. Consultation is not consultation absent the intent to consult. Consultation cannot be meaningful if it is inadvertent or *de facto*. Consultation must represent the good faith effort of the Crown (reciprocated by the First Nation) to attempt to reconcile its sovereignty with pre-existing claims of rights or title by the First Nation. The Crown Consultation Unit (CCU) met the Dene Tha' in July 2004 to discuss the draft JRP Agreement, which was to be finalized the next day. At the time, the CCU asserted that it was not engaged in consultations. The Crown cannot now argue that this meeting constituted consultations. In any event, providing the Dene Tha' with twenty-four hours to respond to a process created over a period of months, which involved input from virtually every other effected Aboriginal group, cannot fulfill the duty to consult.

12. The determination of an appropriate remedy in cases where the Crown has breached its duty to consult must be tied to the ultimate goal of Aboriginal-Crown relations, namely, reconciliation. In this case, the Crown failed to adequately consult with the Dene Tha' concerning the establishment of the

regulatory and environmental processes concerning the MGP. These processes are already in operation. It is not obvious that undoing these processes and requiring the parties to start over is a just remedy in the circumstances. A remedies hearing should be held to address the problem and to determine the ways to fix the problem to the extent possible in a real, effective and fair way.

R.J.M. Janes and *R. Freedman*, for the applicant.

K. Lambrecht, Q.C., for the respondent, Attorney General of Canada.

M.E. Comeau, for the respondent, Imperial Oil Resources Ventures Limited.

A. Hudson, for the respondent, National Energy Board.

G. Chase, for the respondent, Joint Review Panel for the Mackenzie Gas Project.

INDEX

PHELAN J.

I. *Introduction*

1 A massive industrial project like the Mackenzie Gas Pipeline (MGP), one that anticipates the creation of a corridor of pipeline originating in Inuvik in the far north of the Northwest Territories and terminating 15 metres south of the Northwest Territories and Alberta border, where a proposed connecting pipeline will link it up with existing provincial pipelines for southern distribution (the "Connecting Facilities"), attracts a myriad of government obligations. The issues of environmental review go beyond the physical pipeline from the north to this connection point. Government must deal with the proponents of the project, detractors of the project, regulatory review boards, environmental review boards, and affected First Nations. The alleged failure of the Government of Canada to fulfill

its obligations toward this last group, specifically the Dene Tha' First Nation (Dene Tha'), forms the subject matter of this judicial review.

2 The Dene Tha' alleges that the Government of Canada through the Minister of Environment, the Minister of Fisheries and Oceans, the Minister of Indian and Northern Affairs Canada and the Minister of Transport (the Ministers) breached its constitutionally entrenched duty to consult and accommodate the First Nations people adversely affected by its conduct. Specifically, the Dene Tha' identifies as the moment of this breach as its exclusion from discussions and decisions regarding the design of the regulatory and environmental review processes related to the MGP. The Ministers deny that any duty arose at this point and, in any event or in the alternative, asserts that its behavior with respect to the Dene Tha' was sufficiently reasonable to discharge its duty to consult and thus withstands judicial scrutiny. The so-called discharge of the duty to consult and accommodate consisted of (1) including the Dene Tha' in a single media release of June 3, 2004 inviting public consultation on a draft Environment Impact Terms of Reference and Joint Review Panel Agreement and (2) a 24-hour deadline on July 14, 2004 to comment on these documents. That is not sufficient to meet the duty to consult and accommodate.

3 This Court's conclusion is that the Ministers breached their duty to consult the Dene Tha' in its conduct surrounding the creation of the regulatory and environmental review processes related to the MGP from as early as the first steps to deal with the MPG in late 2000 through to early 2002 and continued to breach that duty to the present time. The Dene Tha' had a constitutional right to be, at the very least, informed of the decisions being made and provided with the opportunity to have its opinions heard and seriously considered by those with decision-making authority. The Dene Tha' were never given this opportunity, the Ministers having taken the position that no such duty to consult had arisen yet.

4 Quite remarkably, when the Ministers did decide to "consult" with the Dene Tha', upon the establishment of the process for the Joint Review Panel, the Dene Tha' were given 24 hours to respond to a process which had taken many months and years to establish and had involved substantial consultation with everyone potentially affected but for the Dene Tha'. This last gasp effort at "consultation" was a case of too little, too late.

5 To arrive at this conclusion, this Court has considered the following matters: (1) the factual background relating to the regulatory and environmental processes underlying the MGP; (2) the particular facts relating to the Dene Tha'; (3) the current state of the law relating to Aboriginal consultation; and (4) how the law applies to the situation of the Dene Tha'.

6 At the outset, it should be noted that the issue of remedy in this case is not straightforward. Hence, it will receive special attention in the final section of these Reasons. At the very least, any of the current procedures which may affect the Dene Tha' must be stayed until other remedial provisions can be completed.

II. *Facts*

A. *Dene Tha'*

(1) *Dene Tha' People and Territory*

7 The Dene Tha' is an Aboriginal group within the meaning of section 35 of the *Constitution Act, 1982* and an Indian Band under the *Indian Act*. Currently, there are approximately 2500 members of the Dene Tha', the majority of which resides on the Dene Tha's seven Reserves. All Dene Tha' Reserves are located in Alberta. The three most populous Reserve communities are Chateh, Bushe River, and Meander.

8 The Dene Tha' defines its "Traditional Territory" as lying primarily in Alberta, but also extending into northeastern British Columbia and the southern Northwest Territories (NWT). In the NWT, the Dene Tha' claims that its territory overlaps with that of the Deh Cho First Nation, with whom the Dene Tha' shares significant familial and cultural relationships. The Crown asserts that the phrase "Traditional Territory" imports no legal significance with respect to the Aboriginal rights claimed by the Dene Tha' north of the 60 parallel -- the division between the NWT and the

Province of Alberta.

(2) *Dene Tha' -- Treaty 8 Rights in Alberta*

9 In 1899 the Dene Tha' signed Treaty 8. Treaty 8 is a classic surrender treaty whereby the Government promised payment and various rights, including the rights to hunt, trap, and fish in exchange for the surrender of land. The territory defined by Treaty 8 does not extend into the traditional territory claimed by the Dene Tha' in the NWT. The Dene Tha' asserts that this means its rights in the NWT remain unextinguished as they are outside the bounds contemplated by Treaty 8. Conversely, if the Ministers are correct and the Dene Tha's rights in the NWT are extinguished by Treaty 8, the Dene Tha' submits that this is an admission by the Ministers that the Dene Tha' has Treaty 8 rights in the NWT. Dene Tha's allegation of unextinguished Aboriginal rights in the NWT is discussed more fully later in these Reasons.

10 The proposed course of the MGP travels through the NWT, ending just south of the NWT and Alberta border. The portion of the pipeline stemming from the Alberta border to its southern terminus runs through territory of the Dene Tha' defined by Treaty 8. The proposed Connecting Facilities pass through Bitscho Lake which runs through Trap Line 99, a trap line owned by a Dene Tha' member. None of that pipeline runs directly through Dene Tha' Reserves.

11 The NGTL pipeline which connects the southern terminus of the MGP with the existing Nova Gas Transmission Line also runs through territory over which the Dene Tha' has Treaty 8 rights to hunt, trap, fish, and gather plants for food.

12 That the pipeline does not run through a reserve, contrary to the Ministers' implied submission, is insignificant. A reserve does not have to be affected to engage a Treaty 8 right as held in *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, *[2005] 3 S.C.R. 388* [*259 D.L.R. (4th) 610*, *[2006] 1 C.N.L.R. 78*, *342 N.R. 82*]. What is important is that the pipeline and the regulatory process, including most particularly environmental issues, are said to affect the Dene Tha'.

(3) *Dene Tha' -- Aboriginal Rights in NWT*

13 The Dene Tha' posits unrecognized Aboriginal rights to hunt, trap, fish, and gather plants for food in the southern portion of the NWT. As proof of Government recognition of said rights, the Dene Tha' points to government archives from the 1930's regarding the proposal for a creation of an Indian Hunting Preserve for the Dene Tha' in this area.

14 The Court was not asked to determine the legitimacy of the Dene Tha's claim to Aboriginal rights in the NWT. Moreover, as the Dene Tha's Treaty 8 rights in Alberta are sufficient to trigger a duty to consult, there is no need to make such a determination in order to resolve this judicial review.

B. *Mackenzie Gas Pipeline -- Regulatory and Environmental Matrices*

15 The MGP is an enormous and complex industrial undertaking. Its proposed routing envisions a starting point in the gas fields and central processing facilities near Inuvik in the northwest corner of the Northwest Territories. From these collecting facilities, the envisioned pipeline will transport the extracted natural gas through the NWT to just south of the Alberta border. At this point, Nova Gas Transmission Limited (NGTL) in Alberta will build the Connecting Facilities up from its existing facilities to connect with the MGP. In this manner, natural gas can be transported from the northern gathering facilities to a southern distribution terminus.

16 Initially the participants in the project envisaged the MGP extending 65 kilometres to the connecting point with NGTL's distribution system. It appears that in the hopes of keeping the gas which flows into Alberta within Alberta

jurisdiction, it was decided to have the connection point with NGTL be located just 15 metres inside the NWT-Alberta border.

17 The Dene Tha's initial judicial review application had sought to raise the constitutional issue of the original proposal as a single federal work or undertaking. This aspect of judicial review has been discontinued.

18 Given the enormity of this project and its inherent cross-jurisdictional character, its conception triggered the involvement of a multitude of regulatory mechanisms. As the Dene Tha's case rests on its exclusion from the discussions and processes surrounding this regulatory machinery, it is necessary to describe in some detail the respective geneses of the regulatory arrangements and mandates of each of these regulatory bodies. Hence, the purpose of this section is to outline the geographical, regulatory, and environmental matrices that overlay the MGP.

19 The backdrop of the MGP consists of seven major regulatory and environmental layers: (1) the Cooperation Plan, (2) the Regulators' Agreement, (3) the Joint Review Panel Agreement, (4) the Environmental Impact Terms of Reference, (5) the Joint Review Panel Proceedings, (6) the National Energy Board Proceedings, and (7) the Crown Consultation Unit. Each is discussed below in what is roughly chronological order -- from oldest to most recent.

(1) *The "Cooperation Plan"*

(a) *The Genesis*

20 Four years prior to the filing of an application for the MGP with the National Energy Board (NEB), representatives from various regulatory agencies began to consult with one another about how to coordinate the regulatory and environmental impact review process for such an application. The regulators and authorities involved included: Indian and Northern Affairs Canada (INAC), the Canadian Environmental Assessment Agency (CEAA), the NEB, the Mackenzie Valley Environmental Impact Review Board (MVEIRB), the Mackenzie Valley Land and Water Board (MVLWB), the Gwich'in Land and Water Board, the Sahtu Land and Water Board, the Inuvialuit Land Administration, and the Inuvialuit Game Council.

21 In addition to these core regulatory bodies, other parties were included in the development of the Cooperation Plan. Representatives from the Government of the Yukon and the Government of the NWT were included as observers in the negotiations. The Deh Cho First Nation (Deh Cho) also, through its MVEIRB delegate, obtained observer status. As it is a helpful counterpoint to the exclusion of the Dene Tha' from this stage of the process, a fuller discussion of the participatory role played by the Deh Cho will be developed later in these Reasons.

22 The parties involved with developing the Cooperation Plan also heard presentations from gas producers and potential proponents of the MGP. In particular, the parties met with the Mackenzie Delta Gas Producers Group in December 2000, with the Alaska Gas Producers Group in May of 2001, and with Imperial Oil Resources Ventures Limited (IORVL).

23 As a result of these meetings and information-gathering sessions, in June 2002, the *Cooperation Plan for Environmental Impact Assessment and Regulatory Review of a Northern Gas Project through the Northwest Territories* ("Cooperation Plan") was finalized. Suffice it to say that the Dene Tha' are noticeably absent from the list of persons, organizations and first nations people who were involved in the development of the regulatory framework.

(b) *The Mandate*

24 The Cooperation Plan had a laudable objective, namely, to reduce duplication of the environmental and regulatory processes. To this end, the Cooperation Plan set up a framework for the environmental and regulatory processes to follow. This framework focused on how these processes would be integrated, how joint hearings would be conducted, and how the terms of reference for any future environmental assessment process would be

developed.

(2) *The Agreement for Coordination of the Regulatory Review of the MGP ("Regulators' Agreement")*

(a) *The Genesis*

25 The Cooperation Plan recommended the filing of a Preliminary Information Package (PIP) by the proponents of the pipeline. On June 18, 2003, IORVL filed a PIP for the MGP. Subsequent to this filing, the parties to the Cooperation Plan resumed discussions on the review process for the MGP and on April 24, 2004, a number of government ministries and agencies entered into an *Agreement for Coordination of the Regulatory Review of the MGP*.

(b) *The Mandate*

26 In addition to implementing the provisions of the Cooperation Plan and ensuring compliance with applicable legislation, like the Cooperation Plan, the Regulators' Agreement contained as its mandate the avoidance of unnecessary duplication. In particular, the parties to the Regulators' Agreement agreed to incorporate the final Joint Review Panel Report and other relevant materials from this process into the record of their respective regulatory processes.

(3) *The Agreement for an Environmental Impact Review of the MGP (Joint Review Panel Agreement -- JRP Agreement)*

(a) *The Genesis*

27 On August 3, 2004, the federal Minister of the Environment, the MVEIRB, and the Inuvialuit Game Council concluded an *Agreement for an Environmental Impact Review of the Mackenzie Gas Project*. The JRP Agreement specified the mandate of the Joint Review Panel and the scope of the environmental impact assessment it would conduct. A further Memorandum of Understanding, executed between the Minister of the Environment and the Inuvialuit, bestowed upon the JRP the responsibility to address certain provisions of the *Inuvialuit Final Agreement* (IFA).

(b) *The Mandate*

28 The JRP Agreement sets out what bodies are responsible for selecting the members of the JRP. The MVEIRB (composed of delegates from the Gwich'in, Sahtu, and the Deh Cho) would appoint three members; the Minister of the Environment, four members (two of whom would be nominated by the Inuvialuit Game Council). The selection of a Chairperson would be approved by the Minister of the Environment, the MVEIRB, and the Inuvialuit Game Council. These panelists were appointed on August 22, 2004 and were: Robert Hornal (Chair), Gina Dolphus, Barry Greenland, Percy Hardistry, Rowland Harrison, Tyson Pertschy, and Peter Usher -- all named Respondents in this judicial review.

(4) *Environmental Impact Terms of Reference*

(a) *The Genesis*

29 The scope of the JRP's environmental assessment and the informational requirements that the proponent (applicant, IORVL) needed to provide for its Environmental Impact Statement (EIS) were defined on August 22, 2004 in the *Environmental Impact Review Terms of Reference for Review of the Mackenzie Gas Project* ("Environmental Impact (EI) Terms of Reference"). The EI Terms of Reference were issued by the Minister of the

Environment, the Chair of the MVEIRB, and the Chair of the Inuit Game Council.

(b) *The Mandate*

30 The EI Terms of Reference describe the MGP as including the Connecting Facilities for the purposes of the JRP process -- that is, for the purposes of the environmental assessment. The Terms of Reference also required IORVL to file an Environmental Impact Statement with the JRP. This it did in August 2004. As it was deficient for failing to include the Connecting Facilities, the JRP requested IORVL resubmit. This it did in December 2004 by way of a Supplemental Environmental Impact Statement.

(5) *The Joint Review Panel Proceedings*

(a) *The Genesis*

31 The Joint Review Panel was contemplated initially by the Cooperation Plan, agreed to be incorporated by the Regulators' Agreement, and implemented through the JRP Agreement. On July 18, 2005, the JRP concluded it had received sufficient information from the proponent (IORVL) to commence the public hearing process. These hearings began on February 14, 2006, are currently in process, and are scheduled to continue throughout the current calendar year and into the next.

(b) *The Mandate*

32 The JRP is assigned the task of conducting the environmental assessment for the project. The project for the purposes of the JRP encompasses both the environmental impact of the MGP and the NGTL Connecting Facilities.

33 It is important to realize that while the NEB would consider the pipeline regulatory process from the north through to the connection point 15 metres inside the Alberta border, the environmental review process takes into consideration the MGP and the Connecting Facilities to the existing NGTL facilities 65 kilometres long partially through territory in which the Dene Tha' had asserted treaty rights as well as Aboriginal rights.

34 The term "environment" comports a broad meaning. It includes the "cumulative effect" of the MGP and the NGTL Connecting Facilities and any other facilities to be developed in the future. The JRP is specifically mandated to consider effects on "health and socio-economic conditions, on physical and cultural heritage, on the current use of lands and resources for traditional purposes by aboriginal persons, or on any structure, site or thing that is of historical, archeological, paleontological or architectural significance".

35 The JRP has no mandate to conduct Aboriginal consultation. It can only consider Aboriginal rights in the context of factual, not legal, determinations. Since the JRP cannot evaluate the legal legitimacy of an Aboriginal rights claim, it can only make determinations in respect of adverse impact to current Aboriginal usage of territory. It cannot make a determination regarding the potential further use of land since this would not be based on a claim of current usage but on a claim of future use grounded in a claim of an Aboriginal right.

36 The JRP Report will inform the NEB decision with respect to whether or not to recommend the issuance of a Certificate of Public Convenience and Necessity. When the JRP issues its Report, the NEB will stay its public hearings. These hearings will then continue after the NEB has reviewed the Report and will thus provide the public with an opportunity to respond to its contents.

(6) *The National Energy Board Proceedings*

(a) *The Genesis*

37 IORVL made its application before the NEB in October of 2004. The NEB review arose as part of the

development of a coordinated process for environmental assessment and regulatory review of the MGP defined in the Cooperation Plan.

(b) *The Mandate*

38 The NEB is responsible for the decision of whether to recommend the issuance of a Certificate of Public Convenience and Necessity (CPCN) to the proponent of the pipeline project, IORVL. To determine this, the NEB has scheduled public hearings where this issue will be addressed. These hearings also began in early 2006 and are scheduled in a coordinated fashion with those of the JRP. The NEB's hearings will be continued after the JRP process has concluded. The ultimate decision of the NEB will be informed by the Report from the JRP. If the NEB decides that the granting of a CPCN is warranted, then the federal Cabinet still must approve the actual issuance of this Certificate.

(7) *The Crown Consultation Unit*

(a) *The Genesis*

39 The Crown Consultation Unit (CCU) is not the product of a statutory, regulatory, or prerogative exercise. It is essentially an administrative body within the federal government created unilaterally by the Government of Canada. Despite its name, one thing it had no authority to do was consult --- at least not with any Native group as to its rights, interests or other issues in respect of the very matters of concern to the Dene Tha'.

(b) *The Mandate*

40 The mandate of the CCU is to coordinate and conduct "consultation" with First Nations groups who believe that their proven or asserted rights under section 35 of the *Constitution Act, 1982* may be affected by the MGP. It was intended to serve as a medium through which the concerns of First Nations regarding the MGP could be brought to the specific relevant government Ministers. Pursuant to this overall purpose, the CCU was mandated to set up meetings, prepare a formal record of meetings, and present a record of consultation to the NEB, to Ministers, and to other Government of Canada entities with regulatory decision-making authority.

41 The CCU has no jurisdiction to deal with matters relating to the Cooperation Plan, the Regulators' Agreement, or the JRP Agreement. The mandate of the CCU, moreover, does not extend to the authority to determine the existence of an Aboriginal right; rather, it only can address the impact on an established right. It was for all intents and purposes a "traffic cop" directing issues to other persons and bodies who had the authority, expertise or responsibility to deal with the specific matters.

C. *Dene Tha's Involvement in these Processes*

(1) *Cooperation Plan*

42 The Government of Canada made no effort to consult the Dene Tha' in respect of the formulation of the Cooperation Plan. The Dene Tha' asserts and the evidence demonstrates that all the various proposed routings of the pipeline passed through territory in Alberta over which the Dene Tha' has recognized Treaty 8 rights. The federal government attempts to justify this exclusion on the basis that the Dene Tha' was not an agency with any regulatory or environmental assessment jurisdiction in relation to the pipeline projects -- no jurisdiction was provided by Treaty 8, by legislation, or by a Comprehensive Land Claim agreement. As such, the Crown argues that it was reasonable for the Dene Tha' to be excluded at this stage.

43 The federal government further argues that the Dene Tha' had the opportunity to comment on the draft of the Cooperation Plan as the Government of Canada released a draft to the public on January 7, 2002. Details of the public release of the Cooperation Plan and other evidence the federal government adduces to support the

argument that it has fully discharged its duty to consult will be discussed in a more in-depth fashion in a consideration of whether the Crown has fulfilled its duty to consult.

(2) *Regulators' Agreement, JRP Agreement, and Terms of Reference*

44 The Dene Tha' was not consulted in respect of the Regulators' Agreement, the JRP Agreement, or the Environmental Impact Terms of Reference. On July 14, 2004, the federal government, through its instrument, the CCU, provided the Dene Tha' with copies of the draft EI Terms of Reference and draft JRP Agreement, instructing that the deadline for input on both was the following day. The Dene Tha' asserts that this was the first time it obtained official knowledge of the contents of these drafts. The federal government further submits that on June 3, 2004 through select media releases and over the internet, it invited public consultation on drafts of the Environmental Impact Terms of Reference and JRP Agreement. This fact was also relied upon by the federal government to support its argument that, to the extent it had a duty to consult, it had carried out that duty.

(3) *NEB Proceedings and JRP Proceedings*

45 The Dene Tha' has intervener status for both the NEB and JRP hearings. As interveners, the Dene Tha' can provide oral and written submissions and can submit questions to other interveners and the proponents. The Dene Tha' has filed a plan for participation in the public hearings of the JRP and has actively engaged in the preparation and delivery of Information Requests pursuant to the JRP Rules of Procedure.

(4) *CCU*

46 In April of 2004, the Dene Tha' learned that the federal government intended to consult with the Dene Tha' about the MGP through the CCU. On July 14, 2004, the Dene Tha' met with representatives of the CCU. The Dene Tha' provided the CCU with information regarding its Aboriginal and Treaty Rights and made known its need of financial assistance to facilitate meaningful consultation efforts.

47 The Dene Tha' alleges that this July meeting marks the first time it was made aware of the imminent establishment of the JRP by receipt of the draft Environmental Impact Terms of Reference and draft JRP Agreement. The Dene Tha' claims the CCU representative informed it that it had until the following day (July 15, 2004) to provide comments on these documents. Not surprisingly, the Dene Tha' did not meet this deadline for public comment.

48 The Dene Tha' was also informed at this meeting that the CCU was not yet fully staffed or operational and had yet to develop its terms of reference. Moreover, up to and including October 2004, the Dene Tha' was informed that the CCU could only begin consulting with respect to the MGP once the proponent had filed an application for the project with the NEB.

49 The Dene Tha' consistently and continuously pestered the CCU regarding its claim for recognition of rights north of 60. This is a subject matter distinct from its treaty rights under Treaty 8 south of 60. On January 4, 2006, the Dene Tha' learned definitively that Canada's position was and always had been that these rights had been extinguished via Treaty 8. This position turned out to be intractable and was reiterated by CCU representatives in its further meetings with the Dene Tha' in 2006. The CCU stated Canada's position was that it would consider Dene Tha' "activities" in the NWT, but not rights.

50 There were no other impediments to consultation with the Dene Tha' other than the failure or refusal of the federal government to engage in consultation. The Dene Tha' put up no barriers to such consultation, despite the suggestion by the Ministers that the Dene Tha' had imposed some form of pre-conditions.

D. *Jurisdiction over Consultation*

51 It is necessary to consider the jurisdictions of the above institutional entities -- the JRP, the NEB, and the CCU -- over consultation with Native groups and specifically the Dene Tha'.

52 As this is a factual inquiry, several legally salient issues need not be considered for the moment. In particular, neither the necessity of express government delegation of its duty to consult nor the necessity of an intention to consult will be addressed. There is a significant gap in the mandates of JRP, NEB, and CCU -- a gap consisting of the jurisdiction to engage in Aboriginal consultation with the Dene Tha'.

53 The JRP has jurisdiction over the entire pipeline project, including both the MGP portion stemming from Inuvik to just south of the Alberta border and the Connecting Facilities that connect the southern terminus of the MGP with the existing NGTL pipeline facilities. The JRP has a broad mandate to consider a wide range of environmental effects, including adverse impact on First Nations activities and can make factual, but not legal determinations, regarding Aboriginal rights. The JRP has no mandate to engage in consultation. Furthermore, it cannot determine the existence of contested Aboriginal rights.

54 The NEB only has jurisdiction over what has been applied for pursuant to the *National Energy Board Act*. IORVL submitted an application for the MGP in October of 2004. NGTL has yet to submit an application for the Connecting Facilities and, when it does, this will not go before the NEB, but before the Alberta equivalent, the Alberta Energy and Utility Board (AEUB). As such, the NEB does not have jurisdiction to consider Aboriginal concerns south of the southern terminus of the MGP. In other words, it cannot consult meaningfully with the Dene Tha' regarding the area from the connecting point to the southern end of the Connecting Facilities. Furthermore, there is doubt that it can address concerns the Dene Tha' raises on this judicial review -- with the creation of the process itself -- as the NEB can be argued to have no jurisdiction pre-application date, that is, pre-October 2004. It is also questionable as to whether the NEB can or should deal with the creation of the process in which it was intimately involved.

55 It was submitted that the NEB, as part of its mandate, is charged with the ability and responsibility to consider the adequacy of consultation in its determination of whether to recommend the issuance of a CPCN. It seems that inadequate Aboriginal consultation would be a factor that would militate against the public benefit of the MGP. Aside from the problems of allowing a private right to trump the benefits that the MGP might provide to the general public (given the "public interest" mandate of the NEB), the NEB, as discussed above, does not have temporal jurisdiction over consultation efforts (or lack thereof) pre-application, that is, pre-October 2004. As this is precisely the time frame that the Dene Tha' has issues with federal government behaviour, the NEB's inability to include such behaviour in its evaluation of the adequacy of consultation is extremely problematic.

56 The federal government raised an argument regarding the exclusion of jurisdiction of the Federal Court by virtue of the jurisdiction of the NEB over Aboriginal consultation. The government's argument is that the NEB has a mandate to assess the adequacy of Aboriginal consultation as an issue it will consider in its ultimate decision of whether to issue a CPCN.

57 The submission is that either the NEB's jurisdiction over issues relating to Aboriginal consultation ousts the Federal Court's jurisdiction with respect to this judicial review or that it is more appropriate for this Court to defer to the NEB process given that board's expertise. However, that expertise is in the field of energy resources and undertakings, not Native consultation or, more importantly, whether there is a duty to consult, when the duty arose and whether it had been met.

58 It was further agreed that, pursuant to subsection 28(1)(f) of the *Federal Courts Act*, the Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of the NEB. Subsection 22(1) of the *National Energy Board Act* provides a right of appeal to the Federal Court of Appeal on questions of law and/or jurisdiction. Section 18.5 of the *Federal Courts Act* is thus engaged since if the Federal Court of Appeal has jurisdiction over the NEB, then the Federal Court, it was argued, should be deprived of its jurisdiction in reviewing

whether the consultation procedure, in part orchestrated by the NEB, is in compliance with section 35 of the *Constitution Act, 1982* and/or the honor of the Crown.

59 In sum, 18.5 does not apply to the case at hand. There has been no "*decision or order* of a federal board, commission, or other tribunal" as required for the exclusion envisioned by s.18.5 to operate (*Forsyth* v. *Canada (Attorney General) (T.D.)*, [2003] 1 F.C. 96; *Industrial Gas Users Assn.* v. *Canada (National Energy Board)* (1990), 43 Admin. L.R. 102).

60 Moreover, this argument is essentially a red herring as the scope of the project from the NEB perspective (that is, excluding the Connecting Facilities and pre-application behavior of the Crown) does not cover what the JRP does and what is of fundamental concern to the Dene Tha'. While the NEB can deal with recognized Aboriginal rights north of 60, it cannot address Dene Tha's Treaty 8 rights south of 60.

61 Hence, neither the JRP nor the NEB is competent to conduct Aboriginal consultation with the Dene Tha' in respect of its territory in Alberta. Consequently, one might suppose that the CCU, the Crown *Consultation* Unit, the only entity left to consider, would naturally fulfill this role. However, the CCU expressly states it is not doing consultation. Its mandate does not include the ability to recognize claims to unproven Aboriginal rights and, moreover, affidavit evidence reveals that the CCU has made up its mind on this point. The CCU had no jurisdiction to consult on matters relating to the Cooperation Plan, the Regulators' Agreement, the JRP Agreement, or the EI Terms of Reference.

62 To summarize, the only unit out of the CCU, the NEB, and the JRP that could wholly address the territorial and temporal areas of concern of the Dene Tha' is the JRP. However, the JRP is engaged in environmental assessment, not Aboriginal consultation. Although it will assess the effects the MGP and NGTL pipelines will have on Aboriginal communities, it does so through the lens of environmental assessment, focusing on activities, not rights. Further, an aspect of the subject matter of which the Dene Tha' say their rights to consultation and accommodation were ignored is the process by which the JRP itself was created.

E. *Comparison of Dene Tha' to other First Nations*

63 Against the background of the environmental and regulatory processes, it is necessary to consider the comparative treatment of the Dene Tha' by the federal government with that of other First Nations groups: the Inuvialuit, the Sahtu, the Gwich'in, and, in particular, the Deh Cho. If the Crown is correct that differences between First Nations groups can justify differential treatment in accordance with those differences, then logic and fairness demands that substantial similarities between these groups would require similar treatment.

(1) *The Inuvialuit, Gwich'in, and Sahtu*

64 In 1977, the Report of the Berger Commission was delivered. The Royal Commission, headed by Justice Thomas Berger, was appointed to assess proposed natural gas development in the Northwest and Yukon Territories. That Commission found that development in the North would likely lead to disruption of the traditional way of life of Aboriginal inhabitants of the area. As such, the Commission recommended any development of the area be preceded by land claims settlements with the local Aboriginal people.

65 As a consequence of Justice Berger's recommendation, the Inuvialuit, the Gwich'in, and the Sahtu each negotiated and entered into respective final land claims settlements with the Government of Canada: (1) *The Inuvialuit Final Agreement*, entered into in 1984; (2) the *Gwich'in Comprehensive Land Claim Agreement*; and (3) the *Sahtu Dene and Metis Comprehensive Land Claim Agreement*. These agreements recognized the rights and responsibilities of the Inuvialuit, Gwich'in, and Sahtu respectively.

66 In addition to recognizing rights, the agreements established means by which Aboriginal peoples could have an ongoing say in what was done to and on the lands stipulated by the agreements. In particular, various new

regulatory agencies were created by the agreements. The regulatory agencies of particular relevance in this matter are the Inuvialuit Game Council, the Gwich'in Land and Water Board, the Sahtu Land and Water Board, and the Mackenzie Valley Environmental Impact Review Board (MVEIRB).

67 Of these relevant agencies, the MVEIRB plays a crucial role in the establishment of the JRP. The MVEIRB, through its enabling statute the *Mackenzie Valley Resource Management Act*, anticipates the creation of joint panels to conduct environmental assessments. Pursuant to its enabling legislation, at least half of the MVEIRB's members must be nominated by the Sahtu, the Gwich'in, and the Tlicho First Nation Governments.

(2) *The Deh Cho*

68 The Deh Cho First Nation (Deh Cho) is the First Nation group whose territory lies directly north of the Dene Tha' in the NWT. The Deh Cho does not have a final land claim settlement with Canada; however, Canada and the Deh Cho are currently in negotiations to this end. Thus far, the Deh Cho has filed a comprehensive land claim agreement with Canada that Canada has accepted. Canada and the Deh Cho have entered into an Interim Measures Agreement and an Interim Resource Development Agreement that give the Deh Cho rights in respect of its claimed territory. Included in these rights is the right of the Deh Cho to nominate one member to the MVEIRB. As stated earlier, as result of its delegate to the MVEIRB, the Deh Cho was able to have observer status during the development of the Cooperation Plan.

69 As a result of litigation initiated by the Deh Cho alleging that Canada had failed to consult with it adequately regarding the MGP, the Deh Cho received a generous settlement agreement. Pursuant to this agreement, the Deh Cho obtained $5 million in settlement funds, $2 million for each fiscal year until 2008 to prepare for the environmental assessment and regulatory review of the MGP, $15 million in economic development funding for this same time period to facilitate the identification and implementation of economic development opportunities relating the MGP, and $3 million each fiscal year until 2008 for Deh Cho process funding.

F. *Summary of First Nations Comparison*

70 Unlike the Inuvialuit, the Sahtu, and the Gwich'in, the Dene Tha' has no settled land claim agreement with Canada. A salient consequence of a settled land claim agreement was the creation of new regulatory agencies: the Inuvialuit Game Council, the Gwich'in Land and Water Board, the Sahtu Land and Water Board, and the MVEIRB. These Boards were assigned the task of managing the use of the land and resources within the respectively defined territories. In this case these boards play an even more significant role in that in part through them the members of the JRP were selected. Thus, through these Boards and their representatives, the First Nations of the Inuvialuit, Sahtu, and Gwich'in were able to consult meaningfully with Canada about the anticipated effects of the MGP. The Dene Tha' has no settled land claim agreement, no regulatory board, and no representation on any Board.

71 The Deh Cho, like the Dene Tha', also has no settled land claim agreement. Unlike the Dene Tha', however, the Crown is in the process of negotiating such a final agreement. In the spirit of negotiation, Canada included the Deh Cho in the process for setting up the environmental and regulatory review process for the MGP by permitting them to nominate one member to the MVEIRB. Thus, through its representation on the MVEIRB, the Deh Cho may be in a position to be able to consult meaningfully with Canada.

72 The Dene Tha' has no such representation. Its status is purely that of intervener. Through its lack of representation on any boards or panels engaged in conducting the environmental and regulatory review processes themselves, it will always be an outsider to the process.

73 The Crown justifies this differential treatment on the basis that different First Nations will have different rights and thus it is reasonable to treat each differently in accordance with their differences. The primary differences

between the Dene Tha' and the other First Nations here are:

(1) the Dene Tha' has no settled land claim agreement and are not in the process of negotiating one, and

(2) the Dene Tha's uncontested territory lies south of the NWT -- Alberta border.

74 Neither difference is legally relevant as to the existence of the duty to consult the Dene Tha' or the time at which the duty arose. It may be relevant to how the consultations are carried out. That the Dene Tha' has no settled land claim agreement is not sufficient to exclude the duty to consult as it has, as a minimum, a constitutionally equivalent agreement with Canada about its rights as manifest in Treaty 8. The location of the Dene Tha's affected territory (south of 60) also is irrelevant to justification for exclusion because the scope of the JRP includes the Connecting Facilities as part of its consideration of the whole MGP.

75 The conduct of the federal government in involving and consulting every Aboriginal group affected by the MGP but the Dene Tha' undermines the Ministers' argument that it was premature to consult with the Dene Tha' when the regulatory/environmental processes were being created.

III. *Duty to Consult -- Timing and Content*

A. *Introduction*

76 The concept and recognition of the fiduciary duty owed by the Crown toward Aboriginal peoples was first recognized in *Guerin* v. *Canada*, *[1984] 2 S.C.R. 335*, *13 D.L.R. (4th) 321* [*[1984] 6 W.W.R. 481*, *[1985] 1 C.N.L.R. 120*, *59 B.C.L.R. 301*, *55 N.R. 161*]. The duty to consult, originally, was held by the Courts to arise from this fiduciary duty (see *R.* v. *Sparrow*, *[1990] 1 S.C.R. 1075* [*70 D.L.R. (4th) 385*, *[1990] 4 W.W.R. 410*, *46 B.C.L.R. (2d) 1*, *[1990] 3 C.N.L.R. 160*, *56 C.C.C. (3d) 263*, *111 N.R. 241*]).

77 The Supreme Court of Canada in three recent cases -- *Haida Nation* v. *British Columbia (Minister of Forests)*, *[2004] 3 S.C.R. 511*, *2004 SCC 73* [*(2004), 245 D.L.R. (4th) 33*, *[2005] 1 C.N.L.R. 72*]; *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, *[2004] 3 S.C.R. 550*, *2004 SCC 74* [*245 D.L.R. (4th) 193*, *[2005] 1 C.N.L.R. 366*]; and *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, *[2005] S.C.J. No. 71*, *2005 SCC 69* [*[2005] 3 S.C.R. 388*, *259 D.L.R. (4th) 610*, *[2006] 1 C.N.L.R. 78*, *342 N.R. 82*] -- has described a more general duty arising out of the honor of the Crown. This duty includes the duty to consult.

78 In *Guerin*, the Supreme Court of Canada held that a fiduciary obligation on behalf of the Crown arose when the Crown exercises its discretion in dealing with land on a First Nation's behalf. In *R.* v. *Sparrow*, *[1990] 1 S.C.R. 1075*, *70 D.L.R. (4th) 385* [*[1990] 4 W.W.R. 410*, *46 B.C.L.R. (2d) 1*, *[1990] 3 C.N.L.R. 160*, *56 C.C.C. (3d) 263*, *111 N.R. 241*], the Court expanded this duty to encompass protection of Aboriginal and treaty rights. Even with this expansion, however, the fiduciary duty did not fit many circumstances. For example, the duty did not make sense in the context of negotiations between the Crown and First Nations with respect to land claim agreements, as the Crown cannot be seen as acting as a fiduciary and the band a beneficiary in a relationship that is essentially contractual. The duty also encountered problems in conjunction with the Crown's obligations to the public as a whole. It is hard to justify the Crown acting only in the best interests of one group especially when this might conflict with its overarching duty to the public at large.

79 In *Wewaykum Indian Band* v. *Canada*, *[2002] 4 S.C.R. 245*, *220 D.L.R. (4th) 1*, *2002 SCC 79* [*[2003] 1 C.N.L.R. 341*, *297 N.R. 1*], Justice Binnie of the SCC noted that the fiduciary duty does not exist in every case but rather is limited to situations where a specific First Nation's interest arises. As Binnie explained at paragraph 81 of that judgment:

> But there are limits [to the fiduciary duty of the Crown]. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band

> relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

80 In light of the decision in *Wewaykum*, in order for the purpose of reconciliation which underpins s.35 of the *Constitution Act, 1982* to have meaning, there must be a broader duty on the Crown with respect to Aboriginal relations than that imposed by a fiduciary relationship. Hence, in *Haida Nation*, the Court first identified the honor of the Crown as the source of the Crown's duty to consult in good faith with First Nations, and where reasonable and necessary, make the required accommodation. As such, the Crown must consult where its honor is engaged and its honor does not require a specific Aboriginal interest to trigger a fiduciary relationship for it to be so engaged. Another way of formulating this difference is that a specific infringement of an Aboriginal right is no longer necessary for the Government's duty to consult to be engaged.

81 The major difference between the fiduciary duty and the honor of the Crown is that the latter can be triggered even where the Aboriginal interest is insufficiently specific to require that the Crown act in the Aboriginal group's best interest (that is, as a fiduciary). In sum, where an Aboriginal group has no fiduciary protection, the honor of the Crown fills in to insure the Crown fulfills the section 35 goal of reconciliation of "the pre-existence of aboriginal societies with the sovereignty of the Crown."

82 In assessing whether the Crown has fulfilled its duty of consultation, the goal of consultation -- which is reconciliation -- must be firmly kept in mind. The goal of consultation is not to be narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and/or title. Rather, it is to receive a broad interpretation in light of the context of Aboriginal-Crown relationships: the facilitation of reconciliation of the pre-existence of Aboriginal peoples with the present and future sovereignty of the Crown. The goal of consultation does not also indicate any specific result in any particular case. It does not mean that the Crown must accept any particular position put forward by a First Nations people.

B. *The Trigger for Consultation*

83 The trigger for the Crown's duty to consult is articulated clearly by Chief Justice McLachlin in *Haida Nation* at paragraph 35:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation* v. *British Columbia (Minister of Forest*s), *[1997] 4 C.N.L.R. 45* (B.C.S.C), at p. 71, *per* Dorgan J.

84 There are two key aspects to this triggering test. First, there must be either an existing or potentially existing Aboriginal right or title that might be affected adversely by Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and contemplate conduct might adversely affect it. There is nothing in the Supreme Court decisions which suggest that the triggers for the duty are different in British Columbia than in other areas of Canada where treaty rights may be engaged.

85 Thus, the question at issue here is *when* did the Crown have or can be imputed as having knowledge that its conduct might adversely affect the potential existence of the Dene Tha' Aboriginal right or title? In other words, did the setting up of the regulatory and environmental processes for the MGP constitute contemplation of conduct that could adversely affect a potential Aboriginal right of the Dene Tha'? Given the scope of the MGP and its impact throughout the area in which it will function, it is hardly surprising that the parties are in agreement that the construction of the MGP itself triggers the Crown's duty to consult. Indeed the Crown engaged in that duty with every other Aboriginal group.

C. *Content of the Duty to Consult and Accommodate*

86 Whenever the duty of consultation is found to have begun, whether the duty was breached depends on the scope and content of this duty. Again Chief Justice McLachlin's comments in *Haida Nation* are applicable:

> 39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. Hence, unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult.

87 Four paragraphs later, at 43--45, McLachlin C.J.C. invokes the image of a spectrum to illustrate the variable content of the duty to consult:

> Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. '"[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" *(2003), 41 Alta. L. Rev. 49*, at p. 61.
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

88 To summarize, at the lowest end of the spectrum, the duty to consult requires the Crown to give notice, disclose information, and discuss any issues raised in response to said notice. On the highest end of the spectrum, the duty to consult requires the opportunity to make submissions for consideration, formal participation in the decision-making process, and the provision of written reasons that reveal that Aboriginal concerns were considered and affected the decision.

D. *Standard of Review*

89 The Ministers identified as the theme of its submissions the overall reasonableness of the Crown's behavior, asserting that this was the appropriate standard of review for the Court to adopt on this judicial review.

90 The Ministers further used the language of deference, imposing the pragmatic and functional approach from *Dr. Q* v. *College of Physicians and Surgeons of British Columbia,* [2003] 1 S.C.R. 226 that dominates administrative law onto the case at hand. This approach is not particularly helpful in this case where the core issue is whether there was a duty to consult and when did it arise.

91 The pragmatic and functional approach and the language of deference are tools most often used by courts to establish jurisdictional respect *vis-à-vis* statutorily created boards and tribunals. The law of Aboriginal consultation thus far has no statutory source other than the constitutional one of s.35. Therefore, to talk of deference and/or impose a test, the goal of which is to determine the level of deference, is inappropriate in this context.

92 In respect of the Ministers' "theme" of reasonableness, comments by the Chief Justice in *Haida* are illuminating. At paragraph 60--63 of her judgment in *Haida Nation*, McLachlin C.J.C. concisely addresses the issue of administrative review of government decisions *vis-à-vis* first nations:

> Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.
>
> On questions of law, a decision-maker must generally be correct: for example, *Paul* v. *British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick* v. *Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748.
>
> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.
>
> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

93 It thus follows that as the question as to the existence of a duty to consult and or accommodate is one of law, then the appropriate standard of review is correctness. Often, however, the duty to consult or accommodate is premised on factual findings. When these factual findings can not be extricated from the legal question of consultation, more deference is warranted and the standard should be reasonableness.

94 These two standards of review dovetail onto the questions of whether there is a duty to consult and if so, what is its scope. The further question of whether the duty to consult has been met attracts a different analysis. From McLachlin C.J.C.'s reasons, it is clear that the standard of review for this latter question is reasonableness. To put that matter in slightly different terms, the government's burden is to demonstrate that the process it adopted concerning consultation with First Nations was reasonable. In other words, the process does not have to be perfect.

95 In this case, all parties agree that there is a duty to consult and accommodate the Dene Tha'. The disagreement centers on when this duty arose and whether the government's failure to consult the Dene Tha' on issues of design of the consultation process constituted a breach. The federal government's efforts made after the determination as to the scope and existence of the duty to consult may be reviewed on the reasonableness standard. The issue of when the duty to consult arose is, however, one that goes to the definition of the scope of this duty, as such, as it is considered a question of law, it would attract the correctness standard of review.

96 In my view, the question posed by the Dene Tha' is whether the duty to consult arose at the stage of process design -- that is, from late 2000 to early 2002. The questions of fact involved in this issue -- what the precise Aboriginal interests of the Dene Tha' are and what are the adverse effects of this failure to consult -- are better contemplated in determining the *content* of the duty to consult, not its bare existence. As the question posed by Dene Tha' is a question of law focused on whether the duty to consult extends to a time period prior to any decision-making as to land use, the appropriate standard of review for this inquiry is correctness.

97 Whether or not the government's actions/efforts after the duty to consult arose complied with this duty, however, would be judged on a reasonableness standard, assuming that it actually engaged in consultation. The issue would be whether it had engaged in reasonable consultation or made reasonable efforts to do so.

E. *Application of the Law to the Dene Tha'*

(1) *When did the Duty Crystallize?*

98 The issue is: at what time did the Crown possess actual or constructive knowledge of an Aboriginal or treaty right that might be adversely affected by its contemplated conduct? (No claim to Aboriginal title has been brought before this Court).

99 There are three components to this question: (1) did the Crown have actual or constructive knowledge of an Aboriginal or treaty right? (2) did it have actual or constructive knowledge that that right might be affected adversely by its contemplated conduct? and (3) what is the conduct contemplated?

100 Dealing with the third question first, the conduct contemplated here is the construction of the MGP. It is not, as the Crown attempted to argue, simply activities following the Cooperation Plan and the creation of the regulatory and environmental review processes. These processes, from the Cooperation Plan onwards, were set up with the intention of facilitating the construction of the MGP. It is a distortion to understand these processes as hermetically cut off from one another. The Cooperation Plan was not merely conceptual in nature. It was not, for example, some glimmer of an idea gestating in the head of a government employee that had to be further refined before it could be exposed to the public. Rather, it was a complex agreement for a specified course of action, a road map, which intended to *do* something. It intended to set up the blue print from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the construction of MGP.

101 Turning now to the first question, the right in question is the Dene Tha' Treaty 8 right. As it is a signatory to the treaty agreements, the federal government has imputed knowledge of the existence of treaty rights (*Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [259 D.L.R. (4th) 610, [2006] 1 C.N.L.R. 78, 342 N.R. 82]). There is no dispute that the Dene Tha' has Treaty 8 rights in the territory in which the MGP and Connecting Facilities will run, and the federal government has knowledge of these rights. At the time of

the Cooperation Plan, all versions of the proposed routing of the pipeline envisioned it going through Dene Tha' Treaty 8 territory in Alberta.

102 The *Mikesew* decision referred to above is particularly applicable and is virtually on "all fours" with this judicial review. The decision involved affected rights under Treaty 8 in respect of the Mikesew Cree First Nation. The subject matter was a new road to be built through the Mikesew's territory (but not through a reserve) and the failure of the government to consult despite a public comment process.

103 The Court held that any consultation must be undertaken with the genuine intention to address First Nation concerns. In the present case there was no intention to address the concerns before the environment and regulatory processes were in place.

104 The Court also held that a public forum process is not a substitute for formal consultation. That right to consultation takes priority over the rights of other users. Therefore the public comment process in January 2002 in respect of the Cooperation Plan and that of July 2004 in respect of the Regulators' Agreement, JRP Agreement and Terms of Reference is not a substitute for consultation.

105 Furthermore, there is no dispute that the federal government contemplated that the construction of the MGP had the potential of adversely affecting Aboriginal rights. It admitted on numerous occasions that it recognized it owed a duty of consultation to the Dene Tha' upon construction of the MGP.

106 The precise moment when the duty to consult was triggered is not always clear. In *Haida*, the Court found that the decision to issue a Tree Farm License (T.F.L) gave rise to a duty to consult. A T.F.L. is a license that does not itself authorize timber harvesting, but requires an additional cutting permit. The Court held that the "T.F.L. decision reflects the *strategic planning* for utilization of the resource" and that "[d]ecisions made during strategic planning may have potentially serious impacts on Aboriginal right and title". [Emphasis added. See *Haida* paragraph 76]

107 From the facts, it is clear that the Cooperation Plan, although not written in mandatory language, functioned as a blueprint for the entire project. In particular, it called for the creation of a JRP to conduct environmental assessment. The composition of the JRP was dictated by the JRP Agreement, an agreement contemplated by the Cooperation Plan. The composition of this review panel and the terms of reference adopted by the panel are of particular concern to the Dene Tha'. In particular, the Dene Tha had unique concerns arising from its unique position. Such concerns included: the question of the enforceability of the JRP's recommendations in Alberta and funding difficulties encountered by the Dene Tha' as result of its not qualifying for the "north of 60 funding programs" (a funding program apparently available only to those First Nations bands north of the 60 degrees parallel). The Dene Tha' also had other issues to discuss including effects on employment, skill levels training and requirements and other matters directly affecting the lives of its people.

108 The Cooperation Plan in my view is a form of "strategic planning". By itself it confers no rights, but it sets up the means by which a whole process will be managed. It is a process in which the rights of the Dene Tha' will be affected.

109 There can be no question that the Crown had, at the very least, constructive knowledge of the fact that the setting up of a Cooperation Plan to coordinate the environmental and regulatory processes was an integral step in the MGP, a project that the Crown admits has the potential to affect adversely the rights of the Dene Tha'.

110 The duty to consult arose at the earliest some time during the contemplation of the Cooperation Plan -- that is, before its finalization in 2002. At the latest before the JRP Agreement was executed. For purposes of this case, nothing turns on the fixing of a more precise date as no consultation occurred during the creation of the Cooperation Plan or indeed the other regulatory processes through to July 15, 2004.

(2) *What is the Content of the Duty?*

111 The Ministers submitted that the content of the duty in this case fell at the high end of the spectrum. The question here is whether the Crown in its behavior toward the Dene Tha' fulfilled the duty.

112 The Crown also asserted that the combination of the JRP, NEB, and CCU worked to discharge it of its duty to consult. As canvassed earlier, none of these entities possessed either separately or together the jurisdiction to engage in consultation.

113 The first time the Crown admits that what it was doing was consultation was the July 14, 2004 meeting between CCU and the Dene Tha', 24 hours before the JRP Agreement draft was finalized. Although there is evidence that the Dene Tha' had knowledge of the contents of the JRP draft Agreement prior to this meeting, this is not particularly significant. The first time that the Crown reached out to the Dene Tha' was at this meeting. Consultation is not consultation absent the intent to consult. Consultation cannot be meaningful if it is inadvertent or *de facto*. Consultation must represent the good faith effort of the Crown (reciprocated by the First Nation) to attempt to reconcile its sovereignty with pre-existing claims of rights or title by the First Nation. Thus it is relevant that at the time of this meeting the CCU asserted it was not engaged in Aboriginal consultation as no application for the MGP had been filed. The Ministers cannot now argue that the CCU was engaged in consultation.

114 By depriving the Dene Tha' of the opportunity to be a participant at the outset, concerns specific to the Dene Tha' were not incorporated into the environmental and regulatory process. Among the concerns cited by the Dene Tha', two stand out: its concern over the enforceability of the federal review process' conclusions *vis-à-vis* the Alberta portion of the pipeline (the "Connecting Facilities" to be operated and owned by Nova Gas Transmission Limited) and the absence of funding to be able to engage in meaningful consultation.

115 At the hearing, the Ministers and IORVL agreed that the construction of the MGP would demand the highest level of consultation from government. It is clear that during the period when the duty to consult first arose -- at the stage of the Cooperation Plan -- not even the most minimal threshold of consultation was met. To take one patent example, the Dene Tha' was not specifically notified of the creation of the Cooperation Plan. Public consultation processes cannot be sufficient proxies for Aboriginal Consultation responsibilities. As such, the Crown has clearly not fulfilled the content of its duty to consult.

116 Even if one were to take the view that the duty to consult arose when the JRP process was being created and finalized, the duty was not met. The duty to consult cannot be fulfilled by giving the Dene Tha' 24 hours to respond to a process created over a period of months (indeed years) which involved input from virtually every affected group except the Dene Tha'. It certainly cannot be met by giving a general internet notice to the public inviting comments.

117 This conduct would not even meet the obligation to give notice and opportunity to be heard which underlies the administrative law principle of fairness much less the more onerous constitutional and Crown duty to consult First Nations.

118 The Court's conclusion is that there was a duty to consult with respect to the MGP; that the duty arose between late 2000 and early 2002; that the duty was not met at this time because there was no consultation whatsoever; that the meetings in July 2004 cannot be considered reasonable consultation.

119 In the face of the Court's conclusion that the duty to consult had been breached, it is necessary to consider the remedy which should flow. The remedies must address the rights of the offended party, and be practical and effective and fair to all concerned including those who played no role in the Crown's breach of its duty.

IV. *Remedy*

120 The first remedy is a declaration that the Respondents Minister of Environment, Minister of Fisheries and Oceans, Minister of Indian and Northern Affairs Canada, and the Minister of Transport are under a duty to consult

with the Dene Tha' in respect of the MGP, including the Connecting Facilities. The Court further declares that the Ministers have breached their duty to consult.

121 The Dene Tha' requested that there be a "stick", an incentive, to goad the Crown into meaningful consultation. Specifically, the Applicant requested that the JRP hearing process be stayed pending further order of this Court, except insofar as the JRP may deliberate on matters unrelated to the Connecting Facilities or the territory within which the Dene Tha' have asserted Aboriginal or treaty rights. Moreover, the Applicant proposed that 120 days lapse following this order before a Party could apply to the Court without the consent of the other party for a lifting of this stay.

122 The Applicant further requested that the Court provide detailed direction to the Ministers about what constitutes consultation. Specifically, the Applicant requested that the Court order the Ministers consult with the Dene Tha' about the MGP, including the design of the environmental assessment process, the Terms of Reference for the environmental assessment, the treatment of the Connecting Facilities, and the provision of financial and/or technical support to assist the Dene Tha' in participating in the process.

123 In addition, the Applicant suggested the Court play an ongoing supervisory role in the consultation process to follow as evidenced by its suggestion that a party be able to apply to the Court on ten days notice to request further directions.

124 The remedy requested by the Dene Tha' is somewhat novel. As such, it is beneficial to search for some first principles regarding remedy in the context of Aboriginal law.

125 In *Haida* in the context of whether the Haida Nation were limited in respect of remedy to an interlocutory injunction of the government, McLachlin C.J.C. provided a glimpse at some general principles that might underlie the determination of an appropriate remedy in the event of a governmental breach of its duty to consult.

126 The Court tied the issue of remedy into the ultimate goal of Aboriginal-Crown relations, namely, reconciliation, finding that "the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations." (paragraph 14). The Court also noted that negotiation was preferable to litigation in respect of achieving this reconciliatory goal.

127 A striking feature of this present case is that while many government departments, agencies, entities and boards were involved, no one seemed to be in charge or at least responsible for consultation with First Nations. Clearly that was the case with Dene Tha'.

128 As a part of any remedy, it is necessary to fix some Minister or person with responsibility, whose actions are subject to accountability in meeting the duty to consult which has been breached.

129 The parties were at some disadvantage in making their arguments on remedies in that they did not know if and on what basis any liability or breach would be found. To that end, their submissions on remedy should be considered preliminary in nature.

130 The difficulty posed by this case is that to some extent "the ship has left the dock". How does one consult with respect to a process which is already operating? The prospect of starting afresh is daunting and could be ordered if necessary. The necessity of doing so in order to fashion a just remedy is not immediately obvious. However, it is also not immediately obvious how consultation could lead to a meaningful result.

131 The first priority has been to identify the problem (if any); the next priority is to fix the problem to the extent possible in a real, practical, effective and fair way. The parties should be given an opportunity to address some of the ways in which this can be achieved in a final order.

132 Therefore the Court will issue final orders of declaration and an order to consult upon terms and conditions to be stipulated following a remedies hearing.

133 To preserve the current situation until a final remedy order is issued, the members of the JPR shall be enjoined from considering any aspect of the MGB which affects either the treaty lands of the Dene Tha' or the Aboriginal rights claimed by the Dene Tha'. They shall be further enjoined from issuing any report of its proceedings to the National Energy Board.

134 The Court will hold a remedies hearing, after hearing from the parties as to the issues which should be addressed at that hearing. Those issues shall include but not be limited to:

- whether the Crown should be required to appoint a Chief Consulting Officer (similar to a Chief Negotiator in land claims) to consult with the Dene Tha';
- the mandate for any such consultation;
- the provision of technical assistance and funding to the Dene Tha' to carry out the consultation;
- the role, if any, that the Court should play in the supervision of the consultation; and
- the role that any entities including the JRP and NEB should have in any such consultation process.

135 Therefore, the application for judicial review will be granted with costs. A formal order will issue.

Judicial review granted with costs.

End of Document

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

Heard: March 24, 2004;

Judgment: November 18, 2004.

File No.: 29419.

[page512]

[2004] 3 S.C.R. 511 | *[2004] 3 R.C.S. 511* | *[2004] S.C.J. No. 70* | *[2004] A.C.S. no 70* | *2004 SCC 73*

Minister of Forests and Attorney General of British Columbia on behalf of Her Majesty The Queen in Right of the Province of British Columbia, appellants; v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation, respondents. And between Weyerhaeuser Company Limited, appellant; v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation, respondents, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General for Saskatchewan, Attorney General of Alberta, Squamish Indian Band and Lax-kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association and Village of Port Clements, interveners.

(80 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — Whether duty extends to third party.

Summary:

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm License" (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the

decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

Held: The Crown's appeal should be dismissed. Weyerhaeuser Co.'s appeal should be allowed.

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which [page513] may fail to adequately take account of their interests prior to final determination thereof. If they can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue other available remedies.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably [page514] with the potential impact of the decision on the asserted right or title and with other societal interests.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples.

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case. The Haida's claims to title and Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential Aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims.

Cases Cited

Applied: Delgamuukw v. British Columbia, *[1997] 3 S.C.R. 1010*; referred to: RJR -- MacDonald Inc. v. Canada (Attorney General), *[1994] 1 S.C.R. 311*; R. v. Van der Peet, *[1996] 2 S.C.R. 507*; R. v. Badger, *[1996] 1 S.C.R. 771*; R. v. Marshall, *[1999] 3 S.C.R. 456*; Wewaykum Indian Band v. Canada, *[2002] 4 S.C.R. 245*, *2002 SCC 79*; R. v. Sparrow, *[1990] 1 S.C.R. 1075*; R. v. Nikal, *[1996] 1 S.C.R. 1013*; R. v. Gladstone, *[1996] 2 S.C.R. 723*; [page515] Cardinal v. Director of Kent Institution, *[1985] 2 S.C.R. 643*; Baker v. Canada (Minister of Citizenship and Immigration), *[1999] 2 S.C.R. 817*; TransCanada Pipelines Ltd. v. Beardmore (Township) *(2000), 186 D.L.R. (4th) 403*; Mitchell v. M.N.R., *[2001] 1 S.C.R. 911*, *2001 SCC 33*; Halfway River First Nation v. British Columbia (Ministry of Forests), *[1997] 4 C.N.L.R. 45*, aff'd *[1999] 4 C.N.L.R. 1*; Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management) *(2003), 19 B.C.L.R. (4th) 107*; R. v. Marshall, *[1999] 3 S.C.R. 533*; R. v. Sioui, *[1990] 1 S.C.R. 1025*; R. v. Côté, *[1996] 3 S.C.R. 139*; R. v. Adams, *[1996] 3 S.C.R. 101*; Guerin v. The Queen, *[1984] 2 S.C.R. 335*; St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46; Paul v. British Columbia (Forest Appeals Commission), *[2003] 2 S.C.R. 585*, *2003 SCC 55*; Law Society of New Brunswick v. Ryan, *[2003] 1 S.C.R. 247*, *2003 SCC 20*; Canada (Director of Investigation and Research) v. Southam Inc., *[1997] 1 S.C.R. 748*.

Statutes and Regulations Cited

Constitution Act, 1867, s. 109.

Constitution Act, 1982, s. 35.

Forest Act, R.S.B.C. 1996, c. 157.

Forestry Revitalization Act, S.B.C. 2003, c. 17.

Authors Cited

Concise Oxford Dictionary of Current English, 9th ed. Oxford: Clarendon Press, 1995, "accommodate", "accommodation".

Hunter, John J. L. "Advancing Aboriginal Title Claims after Delgamuukw: The Role of the Injunction". Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000.

Isaac, Thomas, and Anthony Knox. "The Crown's Duty to Consult Aboriginal People" *(2003), 41 Alta. L. Rev. 49*.

Lawrence, Sonia, and Patrick Macklem. "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 Can. Bar Rev. 252.

New Zealand. Ministry of Justice. A Guide for Consultation with Maori. Wellington: The Ministry, 1997.

History and Disposition:

APPEALS from a judgment of the British Columbia Court of Appeal, *[2002] 6 W.W.R. 243*, *164 B.C.A.C. 217*, 268 W.A.C. 217, *99 B.C.L.R. (3d) 209*, *44 C.E.L.R. (N.S.) 1*, *[2002] 2 C.N.L.R. 121*, *[2002] B.C.J. No. 378* (QL), *2002 BCCA 147*, [page516] with supplementary reasons *(2002), 216 D.L.R. (4th) 1*, *[2002] 10 W.W.R. 587*, *172 B.C.A.C. 75*, 282 W.A.C. 75, *5 B.C.L.R. (4th) 33*, *[2002] 4 C.N.L.R. 117*, *[2002] B.C.J. No. 1882* (QL), *2002 BCCA 462*, reversing a decision of the British Columbia Supreme Court *(2000), 36 C.E.L.R. (N.S.) 155*, *[2001] 2*

C.N.L.R. 83, *[2000] B.C.J. No. 2427* (QL), *2000 BCSC 1280*. Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

Counsel

Paul J. Pearlman, Q.C., and Kathryn L. Kickbush, for the appellants the Minister of Forests and the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia.

John J. L. Hunter, Q.C., and K. Michael Stephens, for the appellant Weyerhaeuser Company Limited.

Louise Mandell, Q.C., Michael Jackson, Q.C., Terri-Lynn Williams-Davidson, Gidfahl Gudsllaay and Cheryl Y. Sharvit, for the respondents.

Mitchell R. Taylor and Brian McLaughlin, for the intervener the Attorney General of Canada.

E. Ria Tzimas and Mark Crow, for the intervener the Attorney General of Ontario.

Pierre-Christian Labeau, for the intervener the Attorney General of Quebec.

Written submissions only by Alexander MacBain Cameron, for the intervener the Attorney General of Nova Scotia.

Graeme G. Mitchell, Q.C., and P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Stanley H. Rutwind and Kurt Sandstrom, for the intervener the Attorney General of Alberta.

Gregory J. McDade, Q.C., and John R. Rich, for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band.

Allan Donovan, for the intervener the Haisla Nation.

[page517]

Hugh M. G. Braker, Q.C., Anja Brown, Arthur C. Pape and Jean Teillet, for the intervener the First Nations Summit.

Robert C. Freedman, for the intervener the Dene Tha' First Nation.

Robert J. M. Janes and Dominique Nouvet, for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief.

Charles F. Willms and Kevin O'Callaghan, for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia.

Thomas F. Isaac, for the intervener the British Columbia Cattlemen's Association.

Stuart A. Rush, Q.C., for the intervener the Village of Port Clements.

The judgment of the Court was delivered by

McLACHLIN C.J.

I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their [page518] lodges. The cedar forest remains central to their life and their conception of themselves.

3 The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second-growth forest. In some areas, old-growth forests can still be found.

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.'s. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, *R.S.B.C. 1996, c. 157*. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

5 In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land -- title which they are in the process of trying to prove -- and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the [page519] Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: *[2001] 2 C.N.L.R. 83*, *2000 BCSC 1280*. The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: *(2002), 99 B.C.L.R. (3d) 209*, *2002 BCCA 147*, with supplementary reasons *(2002), 5 B.C.L.R. (4th) 33*, *2002 BCCA 462*.

[page520]

10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

A. *Does the Law of Injunctions Govern This Situation?*

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR -- MacDonald Inc. v. Canada (Attorney General)*, *[1994] 1 S.C.R. 311*, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be [page521] suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, *[1996] 2 S.C.R. 507*, at para. 31, and *Delgamuukw v. British Columbia*, *[1997] 3 S.C.R. 1010*, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation,

negotiation is a preferable way of reconciling state [page522] and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

15 I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

B. *The Source of a Duty to Consult and Accommodate*

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act [page523] honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw, supra*, at para. 186, quoting *Van der Peet, supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

> ... "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship ... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall, supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by [page524] stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship ...".

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act

honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow, supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented".

22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, *[1996] 1 S.C.R. 1013*, where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement" (para. 110).

[page525]

23 In the companion case of *R. v. Gladstone*, *[1996] 2 S.C.R. 723*, Lamer C.J. referred to the need for "consultation and compensation", and to consider "how the government has accommodated different aboriginal rights in a particular fishery ..., how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users" (para. 64).

24 The Court's seminal decision in *Delgamuukw, supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[page526]

C. *When the Duty to Consult and Accommodate Arises*

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But,

depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only [page527] a broad, common law "duty of fairness", based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness: *Cardinal v. Director of Kent Institution*, *[1985] 2 S.C.R. 643*, at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, *[1999] 2 S.C.R. 817*, at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be "sound practical and policy reasons" to do so.

29 The government cites both authority and policy in support of its position. It relies on *Sparrow, supra*, at pp. 1110-13 and 1119, where the scope and content of the right were determined and infringement established, prior to consideration of whether infringement was justified. The government argues that its position also finds support in the perspective of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* *(2000), 186 D.L.R. (4th) 403*, which held that "what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1)" (para. 120).

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The [page528] government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, *[2001] 1 S.C.R. 911*, *2001 SCC 33*, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and [page529] title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow, Nikal*, and *Gladstone, supra*, where confirmation of the right and justification of an alleged

infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, *[1997] 4 C.N.L.R. 45* (B.C.S.C.), at p. 71, *per* Dorgan J.

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall, supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will [page530] frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest [page531] pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. *The Scope and Content of the Duty to Consult and Accommodate*

39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

40 In *Delgamuukw, supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith,

> and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

[page532]

41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, *[1999] 4 C.N.L.R. 1* (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* *(2003), 19 B.C.L.R. (4th) 107* (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty [page533] on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" *(2003), 41 Alta. L. Rev. 49*, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown [page534] may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information

obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Maori* (1997) provides insight (at pp. 21 and 31):

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ... .
>
> ...
>
> ... genuine consultation means a process that involves ...:
>
> - gathering information to test policy proposals
> - putting forward proposals that are not yet finalised
> - seeking Maori opinion on those proposals
> - informing Maori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Maori have to say
> - being prepared to alter the original proposal
> - providing feedback both during the consultation process and after the decision-process.

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, [page535] and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this -- seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised [page536] the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the

courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

[page537]

E. *Do Third Parties Owe a Duty to Consult and Accommodate?*

52 The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

53 It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

54 It is also suggested (*per* Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of "knowing receipt". However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. [page538] As noted earlier, the Court cautioned in *Wewaykum* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, made it clear that the "trust-like" relationship between the Crown and Aboriginal peoples is not a true "trust", noting that "[t]he law of trusts is a highly developed, specialized branch of the law" (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it [page539] a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government

"has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" (*(2002), 5 B.C.L.R. (4th) 33*, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

F. *The Province's Duty*

57 The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

58 The Province's argument rests on s. 109 of the *Constitution Act, 1867*, which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada ... at the Union ... shall belong to the several Provinces." The Province argues that this gives it exclusive right to the land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do [page540] so, it argues, would "undermine the balance of federalism" (Crown's factum, at para. 96).

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw, supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine's Milling, supra*. There is therefore no foundation to the Province's argument on this point.

G. *Administrative Review*

60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, *[2003] 2 S.C.R. 585*, *2003 SCC 55*. On questions of fact or [page541] mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, *[2003] 1 S.C.R. 247*, *2003 SCC 20*; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, *[1997] 1 S.C.R. 748*.

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play... . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts [page542] to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. *Application to the Facts*

(1) Existence of the Duty

64 The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. On the evidence before the Court in this matter, the answer must unequivocally be "yes".

65 The Haida have claimed title to all of Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 "[s]ince 1994, and probably much earlier". The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

[page543]

66 The Province raises concerns over the breadth of the Haida's claims, observing that "[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space... . The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space" (Crown's factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

67 The chambers judge ascertained that the Province knew that the potential Aboriginal right and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. On this basis, the honour of the Crown mandated consultation prior to making a decision that might adversely affect the claimed Aboriginal title and rights.

(2) Scope of the Duty

68 As discussed above, the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially

adverse effect upon the right or title claimed.

(i) *Strength of the Case*

69 On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their [page544] rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

70 The chambers judge's thorough assessment of the evidence distinguishes between the various Haida claims relevant to Block 6. On the basis of a thorough survey of the evidence, he found, at para. 47:

(1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;

(2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it "fair to say that the Haida claim goes far beyond the mere 'assertion' of Aboriginal title" (para. 50).

71 The chambers judge's findings grounded the Court of Appeal's conclusion that the Haida claims to title and Aboriginal rights were "supported by a good *prima facie* case" (para. 49). The strength of the case goes to the extent of the duty that the Province was required to fulfill. In this case the evidence clearly supports a conclusion that, pending a final resolution, there was a *prima facie* case in support of Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

[page545]

(ii) *Seriousness of the Potential Impact*

72 The evidence before the chambers judge indicated that red cedar has long been integral to Haida culture. The chambers judge considered that there was a "reasonable probability" that the Haida would be able to establish infringement of an Aboriginal right to harvest red cedar "by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply" (para. 48). The prospect of continued logging of a resource in limited supply points to the potential impact on an Aboriginal right of the decision to replace T.F.L. 39.

73 Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that "it [is] apparent that large areas of Block 6 have been logged off" (para. 59). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

74 To the Province's credit, the terms of T.F.L. 39 impose requirements on Weyerhaeuser with respect to Aboriginal peoples. However, more was required. Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular

T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida [page546] prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

[page547]

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

> [O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39.

In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that "[t]he Haida were and are consulted with respect to forest development plans and cutting permits... . Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting ..." (Crown's factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions.

79 It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.

III. Conclusion

80 The Crown's appeal is dismissed and Weyerhaeuser's appeal is allowed. The British Columbia Court of Appeal's order is varied so that the Crown's obligation to consult does not extend to Weyerhaeuser. The Crown has agreed to pay the costs of the respondents regarding the application for leave to appeal and the appeal. Weyerhaeuser shall be relieved of any obligation to pay the costs of the Haida in the courts below. It is not necessary to answer the constitutional question stated in this appeal.

[page548]

Solicitors:

Solicitors for the appellant the Minister of Forests: Fuller Pearlman & McNeil, Victoria.

Solicitor for the appellant the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the appellant Weyerhaeuser Company Limited: Hunter Voith, Vancouver.

Solicitors for the respondents: EAGLE, Surrey.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: Department of Justice, Halifax.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Department of Justice, Edmonton.

Solicitors for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band: Ratcliff & Company, North Vancouver.

Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the intervener the First Nations Summit: Braker & Company, West Vancouver.

[page549]

Solicitors for the intervener the Dene Tha' First Nation: Cook Roberts, Victoria.

Solicitors for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief: Cook Roberts, Victoria.

Solicitors for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the British Columbia Cattlemen's Association: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Village of Port Clements: Rush Crane Guenther & Adams, Vancouver.

End of Document

Halfway River First Nation v. British Columbia (Ministry of Forests), [1999] B.C.J. No. 1880

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

Southin, Finch and Huddart JJ.A.

Heard: January 19 - 22, 1999.

Judgment: filed August 12, 1999.

Vancouver Registry Nos. CA023526, CA023539

[1999] B.C.J. No. 1880 | *1999 BCCA 470* | *178 D.L.R. (4th) 666* | *[1999] 9 W.W.R. 645* | *129 B.C.A.C. 32* | *64 B.C.L.R. (3d) 206* | *[1999] 4 C.N.L.R. 1* | *90 A.C.W.S. (3d) 512*

Between Chief Bernie Metecheah, on his own behalf and on behalf of all other members of the Halfway River First Nation, and the Halfway River First Nation, petitioners (respondents), and David Lawson, District Manager, Fort St. John Forest District and the Ministry of Forests, respondents (appellants), and Canadian Forest Products Ltd., respondents (appellants)

(116 pp.)

Case Summary

Indians, Inuits and Metis — Treaties and proclamations — Breach, effect of — Fish and game — Indian, Inuit and Metis rights — Right to hunt off reserves — Treaty rights, proof of — Right to hunt for food — Crown lands, unoccupied — Administrative law — Natural justice — Constitution of board or tribunal (considerations incl. bias) — Bias, apprehension of — Policies or rules adopted by the board or tribunal — Procedure at hearing — Opportunity to present evidence.

This was an appeal by the Ministry of Forests and Canadian Forest Products from an order quashing a decision to grant a cutting permit. The district manager granted Canfor a timber harvesting license to log on Crown land adjacent to the Halfway River First Nation's reserve land. The Nation's members were descendants of signatories to a treaty that preserved its traditional right to hunt on Crown land adjacent to its reserve. The Nation's petition for judicial review was allowed, and the decision to grant the permit was quashed. The Chambers judge found that the permit and the logging it allowed infringed the Nation's hunting rights without justification. The Chambers judge also found that the permit was granted contrary to the district manager's duty of fairness, as he had fettered his discretion by applying government policy as to the encouragement of development. He further found that the district manager had prejudged Canfor's right to have the permit issued, failed to give adequate notice of his intention to decide the question, and failed to provide an adequate opportunity to be heard. In addition, the Chambers judge found that the district manager's decision was patently unreasonable because he had made factual findings without adequate evidence. The Minister argued that the Nation's right to hunt under the treaty was subject to the Crown's right to require or take up lands for purposes such as lumbering. Alternatively, the Minister argued that any breach of the treaty right to hunt was justified and that procedural fairness rules had been duly followed.

HELD: Appeal dismissed.

No curial deference was owed to the district manager's decision, as he must have been aware of his fiduciary

duty as an officer of the Crown with respect to the Nation's treaty rights. The matters were capable of disposition on affidavit evidence, and the Chambers judge did not err in proceeding by way of judicial review and not converting the proceedings into a trial. The Chambers judge did not err in quashing the district manager's approval of the permit application given that the issuance of the cutting permit infringed the Nation's right to hunt, and the Crown failed to show that the infringement was justified. The Chambers judge was correct in finding that any interference with the right to hunt was a prima facie infringement of the Nation's treaty right as protected by section 35 of the Constitution Act. The Crown did not show that the legislative or administrative objectives were of sufficient importance to warrant infringement; that the conduct infringed the treaty right as little as possible; that the effects outweighed the derived benefits; and that adequate meaningful consultation had taken place. The Chambers judge erred in finding that the district manager had fettered his discretion where the government policy considered did not preclude the consideration of aboriginal rights, but was one factor to be considered in the issuance of cutting permits. Nor did the district manager's decision give rise to a reasonable apprehension of bias. Given that the district manager played both an investigative and an adjudicative function, it could not be said that he prejudged the matter. However, the Chambers judge correctly found that the district manager had failed to provide a full opportunity to be heard, and thus breached the principles of procedural fairness.

Statutes, Regulations and Rules Cited

British Columbia Supreme Court Rules, Rule 52(11)(d).

Constitution Act, 1930.

Constitution Act, 1982, s. 35(1).

Forest Act, R.S.B.C. 1979, c. 140, ss. 9, 10, 158(2)(d.1).

Forest Practices Code of British Columbia Act, S.B.C. 1994, c. 41, ss. 238, 247.

Forest Practices Code Regulations, Reg. 165/95.

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, s. 2(a).

Ministry of Forests Act, R.S.B.C. 1979, c. 272, s. 2(1).

Public Service Act, R.S.B.C. 1979, c. 343.

Railway Belt Retransfer Agreement Act, S.B.C. 1930, c. 60.

Range Act, R.S.B.C. 1979, c. 35.

Counsel

M.W.W. Frey and H.M. Groberman, Q.C., for the appellant, District Manager and Ministry of Forests. S.B. Armstrong and J.M. Marks, for the appellant, Canadian Forest Products Ltd. C. Allan Donovan, for the respondents, Chief Bernie Metecheah and Halfway River First Nation.

[Ed. note: Corrigenda were released by the Court December 3, 1999; the corrections have been made to the text and the Corrigenda are appended to this document.]

Reasons for judgment were delivered by Finch J.A., concurred in by Huddart J.A. (para. 170). Dissenting reasons were delivered by Southin J.A. (para. 194).

FINCH J.A.

TABLE OF CONTENTS

I

Introduction

1 The Ministry of Forests ("the Ministry"), its District Manager at Fort St. John, David Lawson, ("the District

Manager") and Canadian Forest Products Limited ("Canfor") appeal the order of the Supreme Court of British Columbia pronounced 24 June, 1997, *[1997] B.C.J. No. 1494*, which quashed the decision of the District Manager on 13 September, 1996, approving Canfor's application for Cutting Permit 212. Canfor holds the timber harvesting licence for the wilderness area in which C.P.212 would permit logging. It is Crown land, adjacent to the reserve land granted to the Halfway River First Nation. The Halfway Nation are descendants of the Beaver People who were signatories to Treaty 8 in 1900.

2 The part of Treaty 8 that preserved the signatories right to hunt says:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.
>
> (my emphasis)

3 The petitioners claimed under the Treaty the traditional right to hunt on the Crown land adjacent to their reserve, which they refer to as the "Tusdzuh" area, including the areas covered by C.P.212. In addition, they have an outstanding Treaty Land Entitlement Claim (T.L.E.C.) against the federal Crown, and they say lands recoverable in that claim may be located in the Tusdzuh.

4 Among many other arguments advanced the petitioners said that issuance of the permit, and the logging it will allow, infringes their hunting rights under the Treaty, and that such infringement cannot be justified by the Crown. The petitioners also claimed that C.P.212 was granted by the District Manager in breach of his administrative law duty of fairness, in that he fettered his discretion by applying government policy, prejudged Canfor's right to have the permit issued, failed to give adequate notice of his intention to decide the question, and failed to provide an adequate opportunity for them to be heard. The petitioners also said the District Manager reached a patently unreasonable decision in deciding factual issues on an incomplete evidentiary base.

5 The learned chambers judge accepted all these submissions and held therefore that C.P.212 should be quashed. Other submissions were rejected.

6 On this appeal, the appellants say the learned chambers judge erred on all counts. They say that, properly construed, the plaintiffs' right under Treaty 8 to hunt is subject to the Crown's right to "require", or "take up" lands from time to time for, among other purposes, "lumbering"; and that the issuance of C.P.212 therefore did not breach or infringe the petitioners' treaty rights to hunt. Alternatively, the petitioners say that if the treaty right to hunt was breached, that breach was justified within the test laid down in R. v. Sparrow, *[1990] 1 S.C.R. 1075*, *[1990] 3 C.N.L.R. 160*, *[1990] 4 W.W.R. 410*.

7 As to the administrative law issues, the appellants say the learned chambers judge erred in finding that the District Manager had fettered his discretion, that his decision gave rise to a reasonable apprehension of bias, and that he failed to give adequate notice or opportunity to be heard. They also say the learned chambers judge erred in holding the District Manager's decision to be patently unreasonable.

8 For the reasons that follow, I have concluded that the only lack of procedural fairness in the decision-making process of the District Manager was the failure to provide to the petitioners an opportunity to be heard. In my respectful view, the learned chambers judge erred in holding that there was a lack of procedural fairness on the other three grounds that were raised. I have also concluded that the issuance of the cutting permit infringed the petitioners' treaty right to hunt, that the Crown has failed to show that infringement was justified, and that the learned chambers judge did not err in quashing the District Manager's approval of Canfor's permit application.

II

Background

9 Treaty 8 is one of 11 numbered treaties made between the federal government and various Indian bands between 1871 and 1923. B.C. joined confederation in 1871, but the provincial government was not represented in these treaty negotiations. Treaty 8 was negotiated in 1899, and was adhered to in that year by a number of bands who lived in what are now Alberta, Saskatchewan and the Northwest Territories. The first adherents, a band of Cree Indians, signed the treaty at Lesser Slave Lake in June, 1899. The Hudson Hope Beaver people, from whom the petitioners are descended, adhered to the treaty at Fort St. John in 1900. At that time there were 46 Beaver people living in the vicinity of Fort St. John. The Hudson Hope people are now spread between the Halfway River Nation and the West Moberley Band.

10 On this appeal, counsel for the Ministry of Forests told the Court that the British Columbia government acknowledged that it was bound by the provisions of Treaty 8 concerning the petitioners' rights to hunt and fish, but made no similar concession in respect of the petitioners' right to lands under the treaty.

11 The full provisions of the treaty are set out in the reasons of my colleague, Madam Justice Southin. The Indians could neither read nor write English, and the terms of the treaty were interpreted to them orally. There is a question in this case as to what extrinsic evidence, if any, is admissible in interpreting the treaty. The commissioners who acted on behalf of the federal government made a report concerning their discussions and negotiations with the original adherents to the treaty in 1899. There is no similar record of what was said to the Beaver people of Fort St. John in 1900. The appellant Minister says the extrinsic evidence of what occurred in 1899, and which was admitted and considered in R. v. Badger, *[1996] 1 S.C.R. 771*, is not admissible for the purposes of construing the treaty adhered to by the petitioners' ancestors in 1900.

12 In 1900 title to Crown land was vested in the provincial Crown by virtue of the terms of union between British Columbia and Canada in 1871. Treaty 8 provides for reserve lands to be set aside for the Indians, to the extent of one square mile for each family of five, or 160 acres per individual. The "selection" of such reserves was to be made in the manner provided for in the treaty.

13 On 15 May, 1907 the provincial government transferred administration and control of lands in the Peace River block to the federal government by Executive Order-in-Council. The transfer covered about 3.5 million acres of land, selected as agreed in 1884. By virtue of s. 91(24) of the Constitution Act, 1867, the federal government already had all jurisdiction to deal with "Indians and land reserved for Indians".

14 The reserve lands of the Halfway River Nation were not finally surveyed and located until 1914. The reserve is located on the north bank of the Halfway River, about 100 miles west of the city of Fort St. John. The reserve comprises about 9,880 acres.

15 The lands to the south and west of the Halfway River reserve were, in 1900 and 1914, unsettled and undeveloped wilderness. The Halfway River Nation referred to this area as the Tusdzuh. It is an area that the petitioners and their ancestors have used for hunting, fishing, trapping and the gathering of food and medicinal plants. The area was plentiful with game, and conveniently located for the purposes of the Halfway Nation. The petitioners or their forebears built cabins, corrals and meat drying racks in the area for use in conjunction with their hunting activities. The time of building, and the precise location of these structures, is not disclosed in the evidence.

16 In 1930 the federal government transferred administration and control of the lands in the Peace River block back to the provincial government by the Railway Belt Retransfer Agreement Act, S.B.C. 1930, c.60. Also in 1930, the Constitution Act, 1930 was enacted by the parliament of the United Kingdom giving effect to, inter alia, the agreement between the federal and B.C. provincial governments by which the retransfer of lands, including the

Peace River block, took place. There was an exception from the retransfer of the Indian reserve lands located in the Peace River block.

17 It is significant for the purposes of this case, and to understanding earlier jurisprudence interpreting Treaty 8 and other of the numbered treaties, that B.C. is not affected by the Natural Resources Transfer Agreement, S.S. 1930, c. 87 (confirmed by the Constitution Act, 1930, 120 & 21 Geo. 5, c. 26 (U.K.)), which was an important consideration in such cases as R. v. Badger, supra and R. v. Horse, *[1988] 1 S.C.R. 187*.

18 In 1982, the Constitution Act, 1982 was enacted. Section 35 of the Act provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

19 About 15 years ago, at a date not disclosed in the evidence, the Halfway River Nation entered into negotiations with both the federal and provincial governments to allow the expansion of its reserve lands. They subsequently advanced a Treaty Land Entitlement Claim (TLEC) against the Crown in Right of Canada asserting a shortfall of over 2,000 acres in the reserve lands allocated to them in 1914. In fact, the Nation has made a demand for over 35,000 acres of additional land, the basis for which claim was not made clear in the submissions of counsel. Whatever the area entitlement of the petitioners to further reserve lands may be, there is an unresolved issue as to their location. The petitioners claim that the entitlement may be located, in whole or in part, in the Tusdzuh, the wilderness area to the south of their present reserve lands.

20 There are now said to be 184 men, women and children in the Halfway River Nation. They are a poor people, economically, and have in general not adapted themselves to the agricultural lifestyle contemplated in those parts of Treaty 8 granting each family of five one square mile of land, or each individual 160 acres of land, as well as livestock, farm implements and machinery, and such seed as was suited to the locality of the Band. They have instead pursued their traditional means of support and sustenance, of which moose hunting is an important element. 75% of the members of the Halfway River Nation live on social assistance.

21 The lands referred to by the petitioners as the Tusdzuh are vast areas in which, until fairly recent times, there has been limited industrial use or development. There has been some mining since the early 1900s and, more recently, some oil and gas exploration. A network of seismic lines was cut for that purpose. The evidence does not disclose when the first timber harvesting licence was granted. Canfor obtained one part of its current timber harvesting licence in 1983, and a second part in 1989. These licences were amalgamated into Forest Licence No. A181154.

22 In 1991, Canfor first identified the areas covered by C.P.212 in its five year Forest Development Plan for 1991-96. Chief Metecheah wrote to the Minister of Forests on 20 January, 1992 requesting a meeting to discuss the development of lands in the Tusdzuh. On 30 June, 1992, Canfor wrote to the Treaty 8 Tribal Association (of which the Halfway River Nation is a member) advising of the proposed harvesting. From that time up to the present litigation there have been both correspondence and telephone communications between the parties to these proceedings: these are more specifically detailed in the reasons for judgment of the learned chambers judge, and in Appendix A to her reasons, setting out a "chronology of notices and consultation". Particular reference to some of these communications will be made later in these reasons, as may appear necessary.

III

The Legislative Scheme

23 The authority of the District Manager to issue a cutting a permit derives from the Forest Act, R.S.B.C. 1979, c. 140, as am. S.B.C. 1980, c. 14 (the Act), the Forest Practices Code of British Columbia Act, S.B.C. 1994, c. 41 (the Code, now *R.S.B.C. 1996, c. 159*) and subsequent regulations, and the Ministry of Forests Act, R.S.B.C. 1979, c.

272, as am. S.B.C. 1980, c. 14. That latter statute amended various aspects of the Forest Act, the Ministry of Forests Act, and the Range Act, R.S.B.C. 1979, c. 355. The 1980 amendment to s. 158(2) of the Forest Act provides:

> 158 (2) Without limiting ss. (1), the Lieutenant Governor in Council may make regulations respecting ...
>
> (d.1)the establishment of an area of the Province as a forest district, the abolition and variation in boundaries and name of a forest district and the consolidation of 2 or more forest districts; ...

Section 2(1) of the Ministry of Forests Act, R.S.B.C. 1979, c. 272 (now *R.S.B.C. 1996, c.300*) was amended to state:

> 2 (1) The following persons may be appointed under the Public Service Act: ...
>
> (d) a district manager for a forest district established under the Forest Act and the part of a range district established under the Range Act that covers the same area as the forest district; ...

24 That section, in combination with the Public Service Act, R.S.B.C. 1979, c.343, authorized the Lieutenant Governor in Council to appoint district managers for forest districts established under the Forest Act. Section 9 of the 1979 Forest Act (now section 11) specified that no rights to harvest Crown timber could be granted on behalf of the government except in accordance with the Act. Section 10 (now section 12) specified that a District Manager, a regional manager or the minister may enter into agreements granting rights to harvest timber in the form of licenses and/or permits subject to the provisions of the Act and the Regulations. In 1994, section 247 of the Code amended section 10 of the Forest Act, subjecting the District Manager's authority to enter into agreements granting rights to harvest timber to the requirements of the Code. Section 238 of the Code states that every cutting permit in existence at the time the Code came into force remains in existence, but ceases to have effect two years after the date the section came into force unless the District Manager determines that the operational planning requirements of the cutting permit are consistent with the requirements of the Code. With the exception of a few sections, the Code came into effect pursuant to Reg. 165/95 on June 15, 1995.

25 The relationship between the Forest Act and the Forest Practices Code with respect to the District Manager's authority to issue a cutting permit pursuant to a forest licence agreement is important. The Code regulates the actual practice of forestry as it occurs on the ground, whereas the Act governs matters such as the formation of forest licence agreements and the determination of the annual allowable cut. The Code does not replace the Act but supplements it, as contemplated by s. 10 of the Act (now s. 12) where the authority of officials (including the District Manager) in the Ministry of Forests to issue licenses is circumscribed by the Code insofar as the Code requires that certain operational plans receive approval before the granting of licenses or permits. The process by which those plans receive approval is set out in the Code and in the Regulations enacted pursuant to the Code. Sections 10 and 12 of the 1979 Act, as amended in 1980, provide:

> 10. Subject to this Act and the Regulations, a district manager, a regional manager or the minister, on behalf of the Crown, may enter into an agreement granting rights to harvest Crown timber in the form of a
>
> (a) forest licence;
>
> (b) timber sale licence;
>
> (c) timber licence;
>
> (d) tree farm licence; ...
>
> 12. A forest licence ...
>
> (f) shall provide for cutting permits to be issued by the Crown to authorize the allowable annual cut to be harvested, within the limits provided in the licence, from specific areas of land in the public sustained yield unit or timber supply area described in the licence;

. . .

26 The enactment of the Forest Practices Code further amended these provisions, so as to render the formation of agreements under section 10 of the Act subject to the provisions of the Code (s. 247 of the Code).

27 In addition, the preamble to the Code provides a broad set of principles to guide the actions of forestry officials, and by which the statute is to be interpreted.

28 The preamble to the Forest Practices Code is as follows:

> WHEREAS British Columbians desire sustainable use of the forests they hold in trust for future generations;
>
> AND WHEREAS sustainable use includes
>
> (a) managing forests to meet present needs without compromising the needs of future generations,
>
> (b) providing stewardship of forests based on an ethic of respect for the land,
>
> (c) balancing productive, spiritual, ecological and recreational values of forests to meet the economic and cultural needs of peoples and communities, including First Nations,
>
> (d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, and
>
> (e) restoring damaged ecologies;
>
> THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

29 The Code is to be interpreted so as to achieve the principles set out in the preamble: see Koopman v. Ostergaard *(1995), 12 B.C.L.R. (3d) 154* (S.C.); Chetwynd Environmental Society v. British Columbia *(1995), 13 B.C.L.R. (3d) 338* (S.C.). The preamble of the Code, therefore, is to receive a broad and liberal construction so as to best ensure the attainment of the Code's goals: International Forest Products v. British Columbia (Ministry of Forests) (unreported. 19 March, 1997. Forest Appeals Commission (Vigod, Chair), App. No. 96/02(b)) [affirmed by Bauman J., without comment on this issue, at *(1998) 12 Admin L.R. (3d) 45*.]

30 In addition to receiving guidance from the preamble's principles, the District Manager's authority to grant cutting permits is subject to certain specific operational planning requirements under the Code. These generally take the form of requiring the permit holder to demonstrate that the plans for harvesting conform to certain environmental standards. The operational planning requirements are set out in Part 3 of the Code, directing that the holder of an agreement under the Forest Act must carry out certain impact assessments of the proposed harvest area and integrate the findings of such an assessment into forest development plans (ss. 10, 17-19), logging plans (s. 11, 20-21), silviculture prescriptions and plans (s. 12, 14, 22-23, 25), and access management, stand management, and range use plans (ss. 13, 15-16, 24, 26-27). There are numerous provisions that allow for the holder of an agreement under the Forest Act to apply for exemptions from these requirements (Part 3, Division 3).

31 Finally, the District Manager's authority to grant cutting permits pursuant to forest licence agreements entered into under the Act is limited by many of the regulations enacted pursuant to the Code. Specifically, the Operational Planning Regulations [B.C. Reg. 174/95] identify areas where the District Manager must satisfy himself of the nature of the various kinds of public consultations that have occurred and need to occur. According to sections 5-8 of the Operational Planning Regulations the proponent of an operational plan or forest development plan is required to ensure that the best information available is used and that the District Manager approves of it.

32 Under the Regulations, before a person submits, or a District Manager puts into effect, a forest development

plan, they must publish notice of the plan to the public (s. 2). The District Manager must provide an opportunity for review and comment to an interested or affected person (s. 4(4)), and must consider all comments received (s. 4(5)).

33 Section 4(4) of the Regulations provides:

> An opportunity for review and comment provided to an interested or affected person under s-s. (1) will only be adequate for the purposes of that subsection if, in the opinion of the district manager, the opportunity is commensurate with the nature and extent of that person's interest in the area under the plan and any right that person may have to use the area under the plan.

34 Finally, under s. 6(1)(a) of the Regulations the District Manager has a discretion to require that operational plans be referred to any other resource agency, person, or other agency he may specify. I observe in passing that the District Manager's discretion to determine the adequacy of the opportunity to "review and comment" does not extend to that consultation required by the jurisprudence concerning the Crown's obligation to justify infringement of aboriginal or treaty rights.

35 The proponent of a plan is under an obligation to use the best information available (s. 11(1)) and to use all information known to the person (s. 11(2)(b)). These provisions confer a very broad discretion. It would appear, however, to be the sort of discretion calling for expertise beyond that of a professional forester. Whether a set plan of logging is acceptable to those members of the public who have a stake in it appears to be a question of judgment that any properly informed person would be as well able to answer as a forester.

36 In summary then, the District Manager's powers to issue cutting permits are found in s. 10 of the 1979 Forest Act as amended by s. 247 of the Code in 1994, and those powers are subject to the requirements of the Code. The preamble to the Code states the guiding principles for forest management which include meeting "the economic and cultural needs of First Nations". Section 4(4) to the Regulations gives the District Manager a discretion to determine the adequacy of consultation with interested parties, as specified in s. 4(1).

IV

The Decision of the District Manager

37 After investigation, reviews and discussion, the District Manager finally decided to issue C.P.212 on 13 September, 1996. His reasons for doing so are set out in a letter he wrote to Chief Metecheah on 3 October, 1996. In summary, the District Manager held:

1. Canfor's application for C.P.212 was consistent with Canfor's approved five year forest development plan;
2. C.P.212 was in substantial compliance with the requirements of the Forest Practices Code;
3. Canfor's harvesting operations would have minimal impacts on wildlife habitat suitability and capability for ungulates (moose and deer) and black bear in the area;
4. There would be minimal to no impact on fish habitat or fishing activities;
5. It was not the policy of the Provincial government to halt resource development pending resolution of a Treaty Land Entitlement Claim (TLEC) advanced by the petitioners against the federal Crown;
6. Canfor would be required to perform an Archeological Impact Assessment (AIA) in block 4 of C.P.212 where an old First Nations pack trail was located;
7. The proposed harvesting plan included sufficient measures to mitigate any concerns as to the trapping of fur bearing animals in the area;

8. Canfor's plan would deactivate all roads seasonally, to make them impassable, and on completion of harvesting, would deactivate the roads permanently.

9. Canfor's proposed harvesting activities would not infringe the petitioners' Treaty 8 rights of hunting, fishing and trapping.

38 There does not appear to be any statutory requirement for the giving of such reasons, either oral or written. The reasons are useful, however, because they record the factors the District Manager took into account in reaching his decision, and they lend an air of openness to the process he followed. On the other hand, the giving of reasons may suggest a more judicial or quasi-judicial process than is required by the legislative scheme.

V

The Decision of the Chambers Judge

39 The Halfway River First Nation brought an application for judicial review, seeking to quash the decision of the District Manager to issue C.P.212. That application was brought pursuant to the Judicial Review Procedure Act, which provides remedies for administrative actions in excess of statutory powers. Whether this was the proper form of proceedings to bring is considered more fully below. On that application, Madam Justice Dorgan granted certiorari and quashed the decision of the District Manager, citing reasons related to the various issues involved, which are outlined below.

A. Fettering:

40 The learned chambers judge held that the District Manager had fettered his discretion. She said at para.35:

> [35] Notwithstanding these references which indicate a notion of weighing various interests, on the whole of the record I am satisfied that Lawson fettered his discretion by treating the government policy of not halting development as a given and by simply following the direction of the Minister of Forests not to halt development. This is particularly evident from p.4 of his Reasons for Decision which reads:
>
> > ... in December 1995 the Minister of Forests advised both ourselves and the Halfway band that it is not the policy of the provincial government to halt resource development pending resolution of the Treaty Land Entitlement (TLE) claim and that we must honour legal obligations to both the Forest Industry as well as First Nations. This fact was again reiterated by Janna Kumi, Assistant Deputy Minister, Operations, upon her meeting with the Halfway Band in January 1996.

B. Bias

41 The learned chambers judge held that there was no actual bias in the District Manager's decision, but that there was a reasonable apprehension of bias. She said at paras. 48-9:

> [48] However, a further statement by Lawson is of concern. In his letter to Chief Metecheah dated August 29, 1996 Lawson states:
>
> > "I must inform you that if the application is in order and abides by all ministry regulations and the Forest Practices Code I have no compelling reasons not to approve their application."
>
> This statement strongly suggests that Lawson had already concluded that there was no infringement of Treaty or Aboriginal Rights. His only remaining concerns about the application were with respect to compliance with MOF and Code requirements. He requests information on Aboriginal and Treaty Rights with respect to future Canfor activities but makes no reference to such rights vis-a-vis CP212. The only conclusion to be drawn from this letter is that Lawson had already decided that there was no infringement of Halfway's rights.
>
> [49] As well, it should be noted that at paragraph 18 of the affidavit of David Menzies, he states:

> Approval to proceed with harvesting in Blocks 1, 2, 4, 5, 17 and 19 was granted by the District Manager on September 13, 1996 (attached as Exhibit 8). The formal application letter was only sent after the Ministry of Forests confirmed that the application would be granted, consistent with the approval already granted for the Development Plan.
>
> [emphasis added]

This evidence indicates that once the Development Plan was approved, all applications for cutting permits within it will likely be approved as well and is evidence which supports a finding of a reasonable apprehension of bias.

42 She held that the petitioners had not waived their right to rely on the allegation of apprehended bias.

C. The District Manager's "Errors of Fact"

43 The learned chambers judge held that it was patently unreasonable for the District Manager to conclude that there was no infringement of the petitioner's hunting rights under Treaty 8. In reaching this conclusion, she said in part at paras. 63, 66 and 68:

> [63] In the present case, it cannot be said that there was no evidence supporting Lawson's finding that Aboriginal and Treaty Rights would not be infringed. Lawson had the CHOA report and information provided by BCE staff regarding the impact of harvesting on the traditional activities of hunting, trapping and fishing.
>
> . . .
>
> [66] Given the limited evidence available to Lawson, the factual conclusions which he reached as to infringement of Treaty 8 or Aboriginal Rights is unreasonable. There was some evidence supporting his findings, however, Lawson had no information from Halfway. How can one reach any reasonable conclusion as to the impact on Halfway's rights without obtaining information from Halfway on their uses of the area in question? This problem was recognized in the CHOA report, which stated, at 33-34:
>
> > In summary, the Cultural Heritage (Ethnographic) Overview presented here provides a useful starting point for assessing the extent of the Halfway River First Nation's use of the Tusdzah study area. It demonstrates the area was, and continues to be, utilized for hunting, fishing, trapping and plant collecting, and provides a ranking of the use potential for each of these activities. However, these data alone are not sufficient to understanding the issues surrounding infringement of Treaty and/or Aboriginal rights of the Halfway River Peoples. It is my opinion that additional cultural and ecological studies of the Tusdzah study area are required before this issue can be adequately addressed.
> >
> > . . .
> >
> > However, as discussed above, there are numerous shortcomings with a study of this nature, from both a cultural and ecological perspective. In fact, I suggest that until more detailed information is obtained in both these areas, studies such as this will fail to adequately address the concerns and management needs of forest managers and First Nations.
>
> . . .
>
> [68] Given the importance attached to Treaty and Aboriginal Rights, in the absence of significant information and in the face of assertions by Halfway as to their uses of CP212, it was patently unreasonable for Lawson to conclude that there was no infringement.

D. Notice

44 The learned chambers judge held that the highest standard of fairness should apply in the circumstances of this case, and although the petitioners had some notice of Canfor's application for C.P.212, that notice was inadequate because the petitioners did not see Canfor's application in final form until after the Cutting Permit had been approved by the District Manager, and the petitioners had no specific notice that the District Manager would make his decision on 13 September, 1996 or on any other date. The history of the notice given to the petitioners is set out in para.73 of her reasons.

E. Infringement of Treaty 8 Right to Hunt

45 The learned chambers judge held that there was a prima facie infringement of the petitioners Treaty 8 right to hunt, as recognized and affirmed by s. 35(1) of the Constitution Act, 1982 which provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

46 She held that infringement was to be determined in accordance with the test laid down in R. v. Sparrow, supra. She said in part at paras. 91-93:

> [91] Pursuant to Treaty 8 the Beaver First Nation (of which Halfway is a member) agreed to surrender "all their rights, titles and privileges whatsoever" to the Tusdzuh area. Treaty 8 appears to have extinguished any non-Treaty Aboriginal Rights Halfway may have had prior to entering into the Treaty.
>
> See for example Ontario (Attorney General) v. Bear Island Foundation, *[1991] 2 S.C.R. 570* at 575; *83 D.L.R. (4th) 381*.
>
> [92] In return for the surrender of land, the government agreed that the Natives would have the "right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered." In R. v. Noel, *[1995] 4 C.N.L.R. 78* at 88 (N.W.T. Terr. Ct.), Halifax J. stated:
>
> There is no doubt that Treaty No. 8 provided a right to fish, hunt and trap to persons covered under that Treaty.
>
> [93] According to the Treaty, these rights were subject to "such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

47 She held, citing R. v. Badger, supra (at para.101):

> ... that any interference with the right to hunt, fish or trap constitutes a prima facie infringement of Treaty 8 rights.

48 She considered the availability to Canfor of other areas in which to log at para.108:

> [108] While the onus is on the petitioners to establish infringement, it is worth noting that there is no persuasive evidence to suggest that other areas do not exist which Canfor could log in place of CP212 to avoid interfering with aboriginal rights.

She said at para.114:

> [114] The MOF and Canfor argue that Halfway has the rest of the Tusdzuh area in which to enjoy the preferred means of exercising its rights. This again ignores the holistic perspective of Halfway. Their

preferred means are to exercise their rights to hunt, trap and fish in an unspoiled wilderness in close proximity to their reserve lands. In that sense, the approval of CP 212 denies Halfway the preferred means of exercising its rights.

F. Justification of Infringement

49 The learned chambers judge held that the Crown's infringement of the petitioners' Treaty 8 right to hunt was not justified because it had failed in its fiduciary duty to engage in adequate, reasonable consultation with the petitioners. She said, in part at paras. 140-142 and 158-159:

> [140] In summary, then, the following meaningful opportunities to consult were provided:
>
> (a) Fourteen letters from the MOF to Halfway during 1995 and 1996 requesting information and/or a meeting or offering consultation.
>
> (b) Three meetings between Lawson and Halfway: on November 27/28, 1995; and February 2 and May 13, 1996.
>
> (c) Five telephone calls between the MOF and Halfway in 1995 and 1996.
>
> (d) An opportunity to provide feedback on the CHOA.
>
> [141] The following reasonable opportunities to consult were denied to Halfway:
>
> (a) Halfway was not invited to attend the meeting between MOF and Canfor employees at which the cutting permit was approved.
>
> (b) The report "Potential Impacts to Fish & Wildlife Resources" was not provided to Halfway until August 26, 1996, despite that a draft copy was available January 4, 1996.
>
> (c) There was no real opportunity to participate in the CHOA.
>
> (d) Canfor's actual application for CP212 was not provided to Halfway until after the decision was made.
>
> [142] While the MOF did make some efforts to inform itself, by requesting information from and meetings with Halfway, I have concluded these measures were inadequate. Briefing notes prepared by the MOF indicate that there was inadequate information with respect to potential infringement of treaty and aboriginal rights.
>
> . . .
>
> [158] Finally, the present case is categorically different from Ryan in that in the present case the MOF failed to make all reasonable efforts to consult. In Ryan Macdonald J. stated, at 10, "I accept the submission that the M.O.F. more than satisfied any duty to consult which is upon it." While Halfway may not have been entirely reasonable, the fact remains that the MOF did not meet its fiduciary obligations.
>
> . . .
>
> [159] (1) Halfway has a treaty right to hunt, fish and trap in the Tusdzuh area. There is some evidence to suggest that the harvesting in CP212 will infringe upon this right, and in my view this evidence establishes prima facie infringement. The MOF has failed to justify this infringement under the second stage of the Sparrow test. Of particular significance is the fact that the MOF did not adequately consult with Halfway prior to approving Canfor's CP212 application.
>
> (2) The MOF owes a fiduciary duty to Halfway. As part of this duty, the MOF must consult with the Band prior to making decisions which may affect treaty or aboriginal rights. The MOF failed to make all reasonable efforts to consult with Halfway, and in particular failed to fully inform itself

respecting aboriginal and treaty rights in the Tusdzuh region and the impact the approval of CP212 would have on these rights. The MOF also failed to provide Halfway with information relevant to CP212 approval.

VI

Issues

50 The following issues are raised by this appeal:

1. Whether judicial review of the District Manager's decision to issue a cutting permit is a proper proceeding in which to consider the alleged infringement of treaty rights;
2. The standard of review to be applied by this Court in reviewing the chambers judge's decisions as to fettering, reasonable apprehension of bias, adequacy of notice, and opportunity to be heard;
3. Whether the chambers judge erred in deciding that the District Manager had fettered his discretion, that there was a reasonable apprehension of bias, or that there was inadequate notice, or opportunity to be heard;
4. Whether the chambers judge applied the correct standard of review to the District Manager's decision that treaty rights had not been infringed, and that the cutting permit should issue;
5. What is the true interpretation of Treaty 8, and the effect of s. 35 of the Constitution Act, 1982, and then, whether the petitioner's right to hunt under the Treaty has been infringed; and
6. If there is an infringement of treaty rights, whether that infringement is justified.

VII

Form of Proceedings

51 Madam Justice Southin takes the position that this Court should not decide the question of treaty rights or infringement on an application for judicial review, and that an action properly constituted is necessary for that purpose. With respect I take a different view of that matter.

52 Review of administrative decisions is traditionally challenged by way of judicial review: Judicial Review Procedure Act, *R.S.B.C. 1996, c. 241, s. 2*(a). The Halfway River First Nation was a party in the consultation process contemplated under the Forest Practices Code and by Ministerial policy guidelines. It brought a petition for certiorari, seeking to quash the District Manager's decision. Such proceedings are usually decided on affidavit evidence.

53 Where the issues raised on such an application are sufficiently complex, and are closely tied to questions of fact, a chambers judge has a discretion to order a trial of the proceedings. Under Supreme Court Rule 52(11)(d), "the court may order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application." The court's powers under this Rule can be invoked on the court's own motion or on an application of a party.

54 Here we are told by counsel for the Minister that he took the position in the court below that the issue of Treaty rights and their breach had not been properly raised in the petition, and could not properly be decided on affidavit evidence, and without pleadings. The chambers judge does not mention these matters in her reasons, and it is impossible to tell how strenuously the point was argued. In any event, counsel for the Minister does not appear to have moved under Rule 52(11)(d) to have the proceedings converted into a trial.

55 In considering whether to issue C.P.212, the District Manager must be taken to have been aware of his fiduciary duty to the petitioners, as an agent of the Crown, of the right the petitioners asserted under Treaty 8, and of the possibility that issuance of the permit might constitute an infringement of that right. Of necessity his decision included a ruling on legal and constitutional rights. On these matters his decision is owed no deference by the courts, and is to be judged on the standard of correctness.

56 Those matters are nonetheless capable of disposition on affidavit evidence on an application for judicial review. And the District Manager and the forest industry would be in an impossible situation if, before deciding to issue a cutting permit, the applicant was required to commence an action by writ for resolution of any dispute over treaty rights, and the District Manager was bound to wait for the disposition of such an action (and the appeals) before deciding to issue a permit.

57 The learned chambers judge had a discretion under Rule 52(11)(d) whether to have the proceedings converted into a trial, and I am not at all persuaded that she erred in the exercise of that discretion by proceeding as she did. Counsel for the minister did not make a motion under the Rule, and it would be unfair to all concerned to refuse now to decide the treaty issues dealt with by the chambers judge, and which the District Manager could not avoid confronting.

VIII

Standard of Review to be Applied to the Decision of the Chambers Judge Concerning Fettering, Bias, Notice and Hearing

58 The learned chambers judge held that the process followed by the District Manager offended the rules of procedural fairness in four respects: he fettered his decision by applying government policy; he pre-judged the merits of issuance of the cutting permit before hearing from the petitioners; he failed to give the petitioners adequate notice of his intention to decide whether to issue C.P.212; and he failed to provide an opportunity to be heard. These are all matters of procedural fairness, and do not go to the substance or merits of the District Manager's decision. There is, therefore, no element of curial deference owed to that decision by either the chambers judge or by this Court.

59 The chambers judge's decisions on fettering, apprehension of bias, inadequacy of notice and opportunity to be heard are all questions of mixed law and fact. To the extent that her decision involves questions of fact decided on affidavit and other documentary evidence, this Court would intervene only if the decision was clearly wrong, that is to say not reasonably supported by the evidence: see Placer Development Limited v. Skyline Explorations Limited *(1985), 67 B.C.L.R. 366* (C.A.) at 389; Colliers Macaulay Nichols Inc. v. Clarke, *[1989] B.C.J. No. 2455* (C.A.) at para. 13; Orangeville Raceway Limited v. Wood Gundy Inc. *(1995), 6 B.C.L.R. (3d) 391* (C.A.) at 400; and Rootman Estate v. British Columbia (Public Trustee), *[1998] B.C.J. No. 2823* (C.A.) at para. 26.

60 To the extent that her decision involves questions of law this Court would, of course, intervene if it were shown that the judge misapprehended the law or applied the appropriate legal principles incorrectly.

IX

Whether the Chambers Judge Erred in Deciding Those Issues

A. Fettering

61 The learned chambers judge held (para.35) that the District Manager fettered his discretion concerning issuance of the cutting permit by "treating the government policy of not halting development as a given and by simply following the direction of the Minister of Forests not to halt development."

62 The general rule concerning fettering is set out in Maple Lodge Farms Ltd. v. Canada, *[1982] 2 S.C.R. 2*, which holds that decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant. Other cases to the same effect are Davison v. Maple Ridge (District) *(1991), 60 B.C.L.R. (2d) 24* (C.A.) and T(C) v. Langley School District No. 35 *(1985), 65 B.C.L.R. 197* (C.A.). Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy: see Maple Lodge Farm, supra at pages 6-8 and Clare v. Thomson *(1993), 83 B.C.L.R. (2d) 263* (C.A.). It appears to me, with respect, that the learned chambers judge applied correct legal principles in her consideration of whether the District Manager fettered his discretion.

63 The question then is whether she applied those principles correctly in the circumstances of this case. In my respectful view she did not. Government policy, as expressed by the District Manager, was to not halt resource development pending resolution of the TLECs. In other words, such claims would not be treated as an automatic bar to the issuance of cutting permits. Even though such a claim was pending in respect of a potential logging area, the policy was to consider the application for a cutting permit in accordance with the requirements of the regulations, Act and Code.

64 A TLEC does not, on its face, require the cessation of all logging in the subject area. Such a claim does not impose any obligation on the District Manager, or on the Ministry generally. The claim is simply one factor for the District Manager to consider with respect to the land's significance as a traditional hunting area, and to potential land use.

65 The government policy in respect of TLECs does not preclude a District Manager from considering aboriginal hunting rights, and the effect that logging might have upon them. It is apparent in this case that the District Manager gave a full consideration to the information before him concerning those hunting rights. Cognisance by him of the government policy on TLECs did not give rise to the automatic issuance of a cutting permit without further consideration of other matters relevant to that decision.

66 I am therefore of the view that the learned chambers judge erred in applying the legal principles concerning fettering to the facts of this case. While the existence of TLEC was a factor for the District Manager to consider, the government policy of not halting resource development while such a claim was pending did not limit or impair the District Manager's discretion, or its exercise. Misapplication of the appropriate legal principle is an error of law that this Court can and should correct.

B. Reasonable Apprehension of Bias

67 The basic legal test on this issue is whether reasonable right-minded persons informed of the relevant facts, and looking at the matter realistically and practically, would consider that the District Manager had prejudged the question of whether to issue C.P.212: see Committee for Justice and Liberty v. Canada (National Energy Board), *[1978] 1 S.C.R. 369* at 394-95, and Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), *[1992] 1 S.C.R. 623*.

68 The matter is a little more complex in this case where the District Manager's role includes both an investigative and an adjudicative function. The expression of a tentative or preliminary opinion on what the evidence shows in the investigative stage does not necessarily amount to a reasonable apprehension of bias: see Emcom Services Inc. v. British Columbia (Council of Human Rights) *(1991), 49 Admin.L.R. 220* (B.C.S.C.) and United Metallurgists of America Local 4589 v. Bombardier-MLW Limited, *[1980] 1 S.C.R. 905*.

69 In a case such as this the District Manager has a continuing and progressive role to play in making the numerous enquiries required of him by the Regulations, Act and Code, and in communicating with the applicant and

others who have a stake in his decision. It is to be expected that his conclusions would develop over time as more information was obtained, and as interested parties made their positions known. His "decision letter" was written to Chief Metecheah on 3 October, 1996, but it is clear that the components of that decision were the result of previous investigations and deliberations.

70 In these circumstances I think one should be very cautious about inferring prejudgment or the appearance of bias to the District Manager.

71 The learned chambers judge's conclusion that there was a reasonable apprehension of bias is based primarily on the statement the District Manager made in his letter of 29 August, 1996 to Chief Metecheah, that if the appellants' application complied with the Ministry's regulations and the Code he had "no compelling reasons" not to approve their application.

72 Applying the legal test set out above, and having regard to the nature of the District Manager's investigative and adjudicative roles, it would, in my view, be unreasonable to infer from that letter that the District Manager had closed his mind to anything further the petitioners might wish to put forward. A fair reading of his statement is that he had formed a tentative view on the information then available that the permit should issue, but that the final decision had not been made, and he was prepared to refuse issuance of the permit if there was a good reason to do so.

73 Nor in my view does the statement from David Menzies' affidavit, quoted at para.49 of the chambers judge's reasons, support an inference of bias reasonably apprehended. Administrative procedures followed by the District Manager in confirming approval of the appellants' application, before the formal application was received, are consistent with the continuing nature of the District Manager's contact and dialogue with the applicants.

74 It may be that the District Manager held a mistaken view of the law concerning the Crown's duty to satisfy itself that there was no infringement of the aboriginal right to hunt, and that the onus did not lie upon the petitioners to assert and prove that right or infringement. But in my view a misapprehension of the law by an administrative officer does not necessarily demonstrate a failure by him to keep an open mind, or an unwillingness to decide the issues on the merits as he saw them. Even the most open minds may sometimes fall into legal error.

75 In my respectful view, the learned chambers judge erred in holding that the District Manager's conduct gave rise to a reasonable apprehension of bias.

C. Adequacy of Notice

76 The learned chambers judge held that the petitioners did not have adequate notice that the District Manager would make his decision on 13 September, 1996 (para.78 of her reasons). With respect, I think the learned chambers judge more closely equated the decision making process in this case with a purely adjudicative process than is warranted by the legislative scheme.

77 As indicated above, this is not a case where a formal hearing on a fixed date was held or required. The District Manager's job required him to develop information over time, and it was properly within his role as an administrator to make tentative decisions as he went along, up to the time when he was finally satisfied that a cutting permit should or should not issue in accordance with the requirements of the Regulations, Act and Code.

78 In para.73 of her reasons the learned chambers judge set out in detail the means by which the petitioners were made aware of Canfor's logging plans for the area covered by C.P.212. The first notice, on the chambers judge's findings of fact, occurred in 1991. On 8 November, 1995 the District Manager sent the petitioner a copy of Canfor's application for C.P.212, and on 5 March, 1996 the District Manager wrote to the petitioners' lawyer to advise that "a decision regarding C.P.212 would be made within the next couple of weeks". In fact, the decision was not made for another six months.

79 On 13 May, 1996 the District Manager provided the petitioners with a map of Canfor's proposed harvesting activities, including blocks in C.P.212. The map was colour-coded and clearly identified the cut blocks under consideration by the District Manager. The learned chambers judge described the meeting at which this map was presented to the petitioners as "the only true advance notice" of Canfor's plans, but she held it to be defective as notice because it did not give the date on which his decision would be made.

80 In my respectful view the learned chambers judge was plainly wrong to conclude that adequate notice had not been given in this case. Only if it could be said that notice of a fixed date for decision was required by law could her conclusion be justified. For the reasons expressed above, notice of such a fixed date was not required either by the statute, or by the requirements of procedural fairness. Imposing a requirement for such a fixed date would be inconsistent with the administrative regime under which the District Manager operated, and would unnecessarily restrict the flexibility that such a regime contemplates. The petitioners were well aware of Canfor's plans to log in the area covered by C.P.212 and had time to submit evidence and to make representations. The notice was adequate in the context of the legislative scheme, and the nature of the District Manager's duties.

D. The Right to be Heard

81 The learned chambers judge dealt with this issue at paras. 69-72. She held that the District Manager had not met the high standards of fairness in ensuring that the petitioners had an effective opportunity to be heard. She said the right to be heard was very similar to the consultation requirement encompassed by the Ministry's fiduciary duty to the petitioners.

82 Under the legislative scheme described above, there is no requirement for the District Manager to hold a formal "hearing", and in fact none was. However, the legislation and the Regulations do require consideration of First Nations' economic and cultural needs, and imply a positive duty on the District Manager to consult and ascertain the petitioners' position, as part of an administrative process that is procedurally fair. As the District Manager did not do this it is my view that the learned chambers judge was correct in holding there to have been a breach of the duty of procedural fairness.

E. Conclusion on Administrative Law Issues

83 In my respectful view, there was a failure to provide the petitioners an adequate opportunity to be heard. Otherwise, there was no lack of procedural fairness on any of the other grounds asserted by the petitioners, and found by the learned chambers judge.

X

The Standard of Review Applicable to the District Manager's Decision

84 The learned chambers judge treated the District Manager's decision as to treaty rights, and breach of same, as a question of fact (see para.37 above, quoting the chambers judge's reasons at paras. 63, 66 and 68). She appears to have concluded, or assumed, that it was within the statutory powers of the District Manager to decide such matters, and she therefore asked whether his decisions on those matters were patently unreasonable. She concluded that the District Manager's decisions on those matters were patently unreasonable (see her conclusion No. 5 at para.158), and she therefore held that she was justified in substituting her view on those matters for those of the District Manager.

85 With respect, interpreting the treaty, deciding on the scope and interplay of the rights granted by it to both the petitioners and the Crown, and determining whether the petitioners' rights under the treaty were infringed, are all questions of law, although the last question may be one of mixed fact and law. Even though he has a fiduciary duty, the District Manager had no special expertise in deciding any of these issues, and as I understand the legislation,

he has no authority to decide questions of general law such as these. To the extent that his decisions involve legal components, in the absence of any preclusive clause, they are reviewable on the standard of correctness: see Pezim v. British Columbia (Superintendent of Brokers), *[1994] 2 S.C.R. 557* at para.63; Zurich Insurance Company v. Ontario (Human Rights Commission), *[1992] 2 S.C.R. 321*; Canada (Attorney General) v. Mossop, *[1993] 1 S.C.R. 554*; and University of British Columbia v. Berg, *[1993] 2 S.C.R. 353*.

86 Moreover, as an agent of the Crown, bound by a fiduciary duty to the petitioners arising from the treaty in issue, the District Manager could not be seen as an impartial arbitrator in resolving issues arising under that treaty. To accord his decision on such questions the deference afforded by the "patently unreasonable" standard would, in effect, allow him to be the judge in his own cause.

87 As I consider these issues, characterized in the chambers judge's reasons as aboriginal issues, to be questions of law, the test applied to the District Manager's decision is that of correctness. Similarly, of course, the standard of correctness applies to her conclusions. In other words, the question for us is whether she erred in law.

XI

Treaty 8

A. Principles of Treaty Interpretation

88 The principles applicable in the interpretation of treaties between the Crown and First Nations have been discussed and expounded in a number of cases: see Calder v. Attorney General of British Columbia, *[1973] S.C.R. 313* at p.404; R. v. Sutherland, *[1980] 2 S.C.R. 451*; R. v. Taylor *(1981), 34 O.R. (2d) 360* (Ont.C.A.); R. v. Bartleman *(1984), 55 B.C.L.R. 78* (C.A.); Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*; Simon v. R., *[1985] 2 S.C.R. 387*; R. v. Horse, supra Saanichton Marina Ltd. et al v. Tsawout Indian Band *(1989), 36 B.C.L.R. (2d) 79* (C.A.); Mitchell v. Peguis Indian Band, *[1990] 2 S.C.R. 85*; R. v. Sioui, *[1990] 1 S.C.R. 1025*; R. v. Sparrow, supra; and R. v. Badger, supra.

89 In Saanichton v. Tsawout, supra, Mr. Justice Hinkson conveniently summarized the then principles of interpretation at pp. 84-85:

> (b) Interpretation of Indian treaties - general principles
>
> In approaching the interpretation of Indian treaties the courts in Canada have developed certain principles which have been enunciated as follows:
>
> (a) The treaty should be given a fair, large and liberal construction in favour of the Indians;
>
> (b) Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
>
> (c) As the Honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
>
> (d) Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible;
>
> (e) Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.

90 Paragraph (d) in that list should now be modified to include the statement of Mr. Justice Cory in R. v. Badger, supra at 794:

> Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.

91 And to para.(e) one might add the following, from R. v. Sioui, supra, at 1035, per Lamer, J. (as he then was):

> In particular, [Courts] must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration ....

92 Those are the principles which I consider applicable in the circumstances of this case.

B. The Parties' Positions

1. The Appellants' Position

93 The positions of the Ministry of Forests and of Canfor are very similar, if not identical, and I consider them together.

94 Both the Minister and Canfor say that the Indian right to hunt preserved in paragraph 9 of Treaty 8 (quoted above at para.2 of these reasons) is expressly made subject to two independent rights of the Crown which are of equal status to the Indian's rights. Those two Crown rights are the government power to regulate hunting etc. and the government right to "require" or "take up" parts of the Treaty lands for, inter alia, "lumbering". The appellants say that the Crown's right to require or take up lands for one of the listed purposes limits or qualifies the petitioners' right to hunt. The appellants say the Crown's right to acquire or take up land is clearly expressed, and is not ambiguous.

95 The appellants say that no extrinsic evidence is necessary or admissible to alter the terms of the treaty by adding to or subtracting from its express terms.

96 The appellants say the granting of C.P.212 was an exercise by the Crown of its express right to require or take up land, and there is therefore no infringement of the petitioners' treaty right to hunt.

97 The appellants say that the learned chambers judge erred when she held that any interference with the petitioners' right to hunt was a breach of Treaty 8, and say further that she erred in basing her decision on the petitioners' "holistic perspective" and in holding that they had the right to exercise their "preferred means" of hunting in an "unspoiled wilderness". The Minister says such conclusions are embarrassing as they do not reflect the historical realities of what had occurred in the Tusdzuh (mining and oil and gas exploration) before the granting of C.P.212.

98 The appellants say that s. 35 of the Constitution Act, 1982 gives the petitioners no better position than they held before 1982, because their right to hunt in the treaty lands was, and remains, a defeasible right subject to derogation by the Crown's exercise of its rights. The power to require and take up lands remains unimpaired by s. 35.

99 The appellants maintain that "taken up" includes designation of land by the Crown in a cutting permit, and that visible signs of occupation, or incompatible land use (see R. v. Badger, supra, at paragraphs 53, 54, and 66-68) are not necessary as indicia. The appellants say those considerations that are relevant where an Indian is charged with an offence as in Badger, are not relevant here where such an offence is not alleged, and the Crown is merely exercising its Treaty right.

100 So the appellants say that as a result of the "geographical limitation" in Treaty 8 the Crown is entitled to take up Treaty lands for "settlement, mining, lumbering, or other purposes" without violating any promise made by the Crown to the Indians. As there has been no infringement of Indian treaty rights, no "justification" analysis is

required.

2. The Petitioners' Position

101 The petitioners say that the Crown's (and Canfor's) approach to Treaty 8 would give the Crown "the unlimited and unfettered right to take up any land or all lands as it sees fit and does not have to justify its decision in any way". It says this approach would allow the Crown to ignore the impact of such conduct on the rights of aboriginal signatories and would render meaningless the 1982 constitutionalization of Treaty rights. The Crown's approach, say the petitioners, is therefore unreasonable and manifestly wrong. To give the Treaty such an interpretation would not uphold the honour and integrity of the Crown.

102 The petitioners say that the government power to require or take up land is not a separate right in itself. It is rather a limitation on the petitioners' right to hunt, etc. The petitioners say s. 35 guaranteed the aboriginal rights to hunt and fish. The Crown's right of defeasance is not mentioned in s. 35, and is therefore not subject to a similar guarantee.

103 Prior to 1982, before the right to hunt was guaranteed by s. 35, the Crown could have exercised its right of defeasance, and so overridden or limited the right to hunt. But since the enactment of s. 35 the Crown's right is not so unlimited. Now the Crown can only exercise its right after consultation with the Indians. The Treaty creates competing, or conflicting rights - the Indian right to hunt on the one hand, and the Crown's right to take up such hunting grounds for the listed purposes on the other. Such competing rights cannot be exercised in disregard of one another. If exercise of the Crown right will impair or infringe the aboriginal right, then such infringement must be justified on the analysis set out in Sparrow, supra (a non-Treaty case).

104 The petitioners say the meaning of the Treaty proviso allowing the Crown to require or take up lands is ambiguous and can be read in more than one way. It should therefore be read in the context of the Crown's oral promises at the time of Treaty negotiations. Extrinsic evidence, including the representations made by the Crown's negotiators to the signatories in 1899, as well as in 1900, is admissible for the purposes of construing the Treaty. The petitioners say the Treaty should be read in a broad, open fashion, and construed in a liberal way in favour of the Indians. All subsequent adhesions refer back to the Treaty made at Lesser Slave Lake with the Cree people in 1899, and the oral promises made there are essential to a true understanding of the Treaty made with the petitioners' forebears. C. The Admissibility of Extrinsic Evidence

105 In support of its argument against the admissibility of extrinsic evidence, The Ministry of Forests relies on R. v. Horse, supra, where Mr. Justice Estey, writing for the court, said at S.C.R. 201:

> I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.

And further at p.203:

> In my opinion there is no ambiguity which would bring in extraneous interpretative material. Nevertheless I am prepared to consider the Morris text, proffered by the appellants, as a useful guide to the interpretation of Treaty No. 6. At the very least, the text as a whole enables one to view the treaty at issue here in its overall historical context.

106 Those comments were made in a case involving Treaty 6, which has an identical "geographical limitation" to that contained in Treaty 8. Further, Horse was concerned with the interpretation of s. 12 of the Saskatchewan Natural Resources Transfer Agreement, which required interpretation of the words "unoccupied Crown land" and

"right of access", language not at issue in this case. Counsel for the Ministry also referred us to R. v. Sioui, supra and R. v. Badger, supra. In my respectful view, the conventional statement of the rule governing admissibility of extrinsic evidence enunciated in R. v. Horse has been somewhat relaxed by subsequent decisions. In R. v. Sioui, supra, after referring to R. v. Horse at p.1049, Mr. Justice Lamer (as he then was) said at p.1068:

> The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it. As MacKinnon J.A. said in Taylor and Williams, supra, at p.232:
>
> > Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

107 And in R. v. Badger, supra, Mr. Justice Cory for the majority held at pp.798-9:

> Third, the applicable interpretative principles must be borne in mind. Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (1880), at pp.338-42;Sioui, supra, at p.1068; Report of the Aboriginal Justice Inquiry of Manitoba (1991); Jean Fiesen, Grant me Wherewith to Make my Living (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted. See Nowegijick, supra, at p.36; Sioui, supra, at pp. 1035-36 and 1044; Sparrow, supra, at p.1107; and Mitchell, supra, where La Forest J. noted the significant difference that exists between the interpretation of treaties and statutes which pertain to Indians.

108 I observe in passing that R. v. Badger, like R. v. Horse also involved interpretation of s. 12 of the Natural Resources Transfer Agreement, 1930. But I understand the ruling concerning the admissibility of extrinsic evidence to be equally applicable in a case such as this one, where that agreement is not in issue.

109 In this case, the learned chambers judge held that extrinsic evidence was admissible to explain the "context" in which the Treaty was signed (at paras. 96-98 of her reasons). In my respectful view in so doing she did not err in principle. The passage quoted above from the judgment of Mr. Justice Cory in Badger at pp.798-9 is particularly apt in this case. The Treaty, written in English, purports to reflect the mutual understanding of the Crown and all aboriginal signatories. The understanding of the aboriginal peoples cannot be deduced from the language of the Treaty alone, because its meaning to the aboriginal signatories could only have been expressed to them orally by interpretation into their languages, and by whatever oral explanations were necessary to ensure their understanding.

D. What Extrinsic Evidence is Admissible

110 The Crown says, without admitting any ambiguity in the Treaty, that even if extrinsic evidence is admissible for the purpose of giving historical context, evidence of the Commissioner's Report on negotiations in 1899 is not admissible in this case, because there is no evidence that what was said by the government negotiators at Lesser

Slave Lake, and elsewhere in 1899, was also said at Fort St. John in 1900, when the Beaver people signed. In particular, the Crown says that the passage of the Commissioner's Report referred to by Mr. Justice Cory in Badger, and by the learned chambers judge in this case, is not evidence of what was said to the Beaver people at Fort St. John. In the Crown's submission, only the report of the Commissioners made in 1900 is admissible.

111 What the Commissioners report of 1889 said, as quoted in part by the learned chambers judge at para.98 of her reasons, is this:

> There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges,
>
> ... We pointed out ... that the same means of earning a livelihood would continue after the treaty as existed before it ...
>
> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

112 In my respectful view, the position of the Crown on this issue is not tenable. The adhesion signed by the representatives of the Beaver people at Fort St. John in 1900 contains this:

> The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.
>
> (my emphasis)

113 The terms of the Treaty signed by the Indians at Lesser Slave Lake had been explained to them orally, as indicated in the Commissioner's report in 1899, and it is therefore, in my view, a reasonable inference from the terms of the Beavers' adhesion in 1900 that the terms of the Treaty were explained to them in similar, if not identical, terms.

114 Moreover, it would not be consistent with the honour and integrity of the Crown to accept that the Treaty was interpreted and explained to the Indians at Lesser Slave Lake in one way, but interpreted and explained to the Beaver at Fort St. John in another less favourable and more limited way. To accept the proposition put forward by the Ministry would be to acknowledge that the same Treaty language is to be given different meanings in respect of different signatories. Only the clearest evidence could persuade me to such a conclusion, and such evidence is not present in this case.

115 The Ministry of Forests further objects to the admission of the affidavit evidence of Father Gabriel Breynat, an interpreter present at the signing of Treaty 8 in 1899 at Fort Chippewan, and Fond du Lac. This affidavit was sworn in 1937 at Ottawa, Ontario. The Ministry says the document is irrelevant, and in addition has not been properly proven as an ancient document.

116 The objection as to relevance is similar to the Crown's objection to the Commissioner's Report of 1899, as

relating to events at a different time and place, and with a different Indian people. I would not give effect to the objection based on relevance for the reasons expressed above.

117 Turning to the question of proof, the general rule in Canada governing the admissibility of ancient documents (a document more than thirty years old) is that any document "which is produced from proper custody, is presumed in the absence of circumstances of suspicion, to have been duly signed, sealed, attested, delivered, or published according to its purport": Sopinka, Lederman and Bryant, The Law of Evidence in Canada, (Toronto: Butterworths, 1992) at 955. If there are suspicious circumstances surrounding the origins of the document, the court will either require proof of the execution of it as being in a similar manner as the execution of a similar document of a more recent date. Further, documents are considered to have been in "proper custody" when they have been kept by someone in a place where the documents might reasonably and naturally be expected to be found: Sopinka et al, supra at 956, citing Doe d. Jacobs v. Phillips (1845), 8 Q.B. 158, 115 E.R. 835, and Thompson v. Bennett *(1872), 22 U.C.C.P. 393* (C.A.).

118 The affidavit of Father Breynat appears on its face to have been executed in a manner consistent with the execution of modern affidavits. The copy produced is not entitled in any particular cause or matter, and one cannot tell from the document itself the purpose for which it was sworn. I would not say that this gives rise to suspicions concerning its origins, but rather that there is an unanswered question as to why it was sworn.

119 The affidavit of Father Breynat was adduced in these proceedings as an exhibit to the affidavit of Michael Pflueger. He is Alberta counsel representing the Halfway River First Nation in its Treaty Land Entitlement Claim. His affidavit does not disclose in whose custody Father Breynat's affidavit has been kept. There is a notation at the top of page 1 of Father Breynat's affidavit, clearly not part of the original, which says "Anthropology UA", which I take to be a reference to the Anthropology Department at the University of Alberta. However, there is nothing to indicate whether the University was the custodian of the document. Mr. Pflueger deposes that the affidavit of Father Breynat is part of "the standard treaty package that is submitted with Treaty Land Entitlement Claims".

120 On the evidence as it stands, I do not think there is any indication of suspicious circumstances surrounding the document's origins. However, I think the evidence falls short of proving that the document was produced from "proper custody". Wigmore, Evidence in Trials at Common Law vol. 7 (Boston: Middlebound & Company, 1978) explains why evidence as to custody of such a document is important:

> A forger usually cannot secure the placing of a document in such custody; and hence the naturalness of its custody, being relevant circumstantially, is required in combination with the document's age.

I think therefore that Father Breynat's affidavit is inadmissible as not having been properly proven. The learned chambers judge did not refer to this affidavit, so she cannot be said to have made any error on that account.

E. R. v. Sparrow and its Application

121 In R. v. Sparrow, supra, the Supreme Court of Canada considered the effect of s. 35(1) of the Constitution Act, 1982 on the status of aboriginal rights, and set out a framework for deciding whether aboriginal rights had been interfered with, and if so, whether such interference could be justified. In Sparrow a native fisher was charged with an offence under the Fisheries Act, R.S.C. 1970, CF-14. In his defence, he admitted the constituent elements of the charge, but argued that he was exercising an existing aboriginal right to fish, and that the statutory and regulatory restrictions imposed were inconsistent with s. 35.

122 The court held that the words in s. 35 "existing aboriginal rights" must be interpreted flexibly, so as to permit their evolution over time, and that "an approach to the constitutional guarantee embodied in s. 35(1) that would incorporate 'frozen rights' must be rejected." It held that the Crown had failed to discharge the onus of proving that the aboriginal right to fish had been extinguished, and it held that the scope of the right to fish for food was not confined to mere subsistence, but included as well fishing for social and ceremonial purposes.

123 The court also considered the meaning of the words "recognized and affirmed" in s. 35. It held that a generous, liberal interpretation of those words was required. It held the relationship between government and aboriginal peoples was trustlike, rather than adversarial, and that the words "recognized and affirmed" incorporated a fiduciary relationship, and so imported some restraint on the exercise of sovereign power. Federal legislative powers continue to exist, but those powers "must be reconciled with the federal duty", and that reconciliation could best be achieved by requiring "justification" of any government regulation that infringed or denied aboriginal rights. Section 35 was therefore "a strong check on legislative power". The court emphasized the importance of "context" and the "case by case approach to s. 35(1)".

124 The court then set out the test for prima facie interference with an existing aboriginal right. First, does the impugned legislation have the effect of interfering with an existing aboriginal right, having regard for the character or incidence of the right in issue? Infringement may be found where the statutory limitations on the right are unreasonable, impose undue hardship, or deny the aboriginal the preferred means of exercising the right. The question is whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest.

125 The court then considered the question, if a prima facie infringement be found, of how the Crown could show that the infringement was justified. The justification analysis involved asking whether there is a valid legislative objective. In the context of Sparrow, conservation and resource management were considered to be valid legislative objectives. The Crown has a heavy burden on the justification issue because its honour is at stake. Justification also requires considering whether the aboriginal interest at stake has been infringed, "as little as possible", whether in cases of expropriation fair compensation is available, and whether the aboriginal group has been consulted with respect to conservation, or at least informed of the proposed regulatory scheme. This list of factors was said not to be exhaustive.

126 There are several features in the present case that differ from Sparrow, and the extent to which those differences may qualify or limit Sparrow's application to this case will have to be considered. First, there is the fact that the right to hunt in this case is based on Treaty 8. There was no treaty in Sparrow. Second, Sparrow is another case involving the allegation of an offence against a native person, in answer to which charge he has relied upon his aboriginal right. In this case there is no offence alleged. It is the provincial Crown which asserts a positive right under Treaty 8 to require or to take up land as the basis for its legislative scheme in respect of forestry. Third, in Sparrow the attack was made on the constitutional validity of federal legislation, the Fisheries Act. In this case the petitioners do not allege that any legislation is unconstitutional. The amended petition alleges that the decision of the District Manager in issuing C.P.212 was in breach of constitutional or administrative law duties. The attack is therefore on executive or administrative conduct rather than on any legislative enactment. Fourth, and finally, it is provincial legislation that authorizes the impugned conduct. In Sparrow, the attack was on federal legislation.

127 The fact that a treaty underlies the aboriginal right to hunt in this case does not, to my mind, render inapplicable the s. 35(1) analysis engaged in by the court in Sparrow. Section 35(1) gives constitutional status to both aboriginal and treaty rights. As indicated above, treaties with aboriginal peoples have always engaged the honour and integrity of the Crown. The fiduciary duties of the Crown are, if anything, more obvious where it has reduced its solemn promises to writing.

128 As noted above in discussing some of the other cases, there is in this case no allegation of an offence by an aboriginal person. The Crown asserts its positive rights under the Treaty as the basis for its forestry program. In Sparrow, the federal Crown relied on its enumerated powers in s. 91 of the Constitution Act, 1867 (the BNA Act) as the basis for its legislative and regulatory scheme in respect of fisheries. Here, even if one accepts that the Crown's right to require or take up land under Treaty 8 has achieved constitutional status under s. 35(1) (a position which the petitioners stoutly reject), its authority to act could be no higher than the constitutional powers the federal Crown sought to exercise in Sparrow.

129 In my view the fact that the Crown asserts its rights under Treaty 8 can place it in no better position vis-a-vis a

competing or conflicting aboriginal treaty right than the position the Crown enjoys in exercising the powers granted in either s. 91 or 92 of the Constitution Act, 1867.

130 There is also a distinction between the alleged unconstitutionality of legislation in Sparrow, and the attack here on the conduct of a government official; and the fact that the conduct was authorized under provincial legislation, whereas in Sparrow a federal statute was impugned. Here the petitioners do not challenge the validity of the provincial legislation concerning forestry. They seek to prohibit any activity in connection with C.P. 212 until the Ministry has fulfilled its "fiduciary and constitutional" duty to consult with the petitioners.

F. Interpretation of Treaty 8 and Infringement of the Right to Hunt

131 The appellants say the learned chambers judge erred in holding, at para.101, that: "...That any interference with the right to hunt, fish or trap constitutes a prima facie infringement of Treaty 8 rights" and further erred in holding (at para.114) that the issue was to be considered from the petitioners' "holistic perspective", and that the approval of C.P.212 denied the petitioners "their preferred means... to hunt... in an unspoiled wilderness in close proximity to their reserve lands." The appellants assert the Crown's independent right under the Treaty to require or take up lands as described above in these reasons.

132 I begin by observing that earlier cases involving the interpretation of the proviso in Treaty 8 (e.g. R. v. Badger, supra) or similar language in other treaties (e.g. R. v. Horse, supra) are of limited assistance for two reasons. First, they are cases involving a charge against an Indian for breach of a provincial statute, in answer to which the accused relied upon the treaty right to hunt. Second, they are cases involving the interpretation of s. 12 of the Natural Resources Transfer Agreement, in addition to the language of the treaty granting the right to hunt. The only case we were cited involving the interpretation of Treaty 8, and in which the Natural Resources Transfer Agreement was not a factor, is R. v. Noel, *[1995] 4 C.N.L.R. 78*, a decision of the Northwest Territories Territorial Court. As with the other cases, Noel was a charge against a native for breach of legislation in answer to which he relied on his Treaty 8 right to hunt.

133 A second observation I would make is that prior to the enactment of s. 35 of the Constitution Act, 1982, parliamentary sovereignty was not limited or restricted by treaties with aboriginal peoples, and the federal government had the power to vary or repeal treaty rights by act of parliament: see R. v. Sikyea, *[1964] S.C.R. 642*, and Daniels v. White, *[1968] S.C.R. 517* where the Migratory Birds Convention Act was held to supersede Indian treaty rights.

134 The third observation I would make is that the Indians' right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in R. v. Sundown, *[1999] S.C.J. No. 13* at paras. 42 and 43. The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless. Such a position cannot be asserted in conformity with the Crown's honour and integrity. So even before the enactment of s. 35 in 1982, a balancing of the competing rights of the parties to the Treaty was necessary.

135 Fourth, the enactment of s. 35 in 1982 has improved the position of the petitioners. Their right to hunt, and other treaty rights, now have constitutional status. They are therefore protected by the supreme law of Canada, and those rights cannot be infringed or restricted other than in conformity with constitutional norms.

136 I am therefore of the view that it is unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction on the Indians' right to hunt. In either case, however, the Crown's right qualifies the Indians' rights and cannot therefore be exercised without affecting those rights.

137 The effect of the decision to issue C.P.212, and the reasonableness of the District Manager's decision, must

be viewed in the context of the competing rights created by Treaty 8, namely the Indians' right to hunt, and the government's right to take up land for lumbering. The petitioners' interest in the logging activity proposed in the Tusdzuh was known from the outset, and it was recognized by both appellants. In his letter of 3 October, 1996, the District Manager recognized the petitioners' assertion of a Treaty Land Entitlement Claim (TLEC) in the area where C.P.212 was located, as well as the effect logging might have on wildlife habitat and hunting activities. His view was that Canfor's proposed logging plan would have "minimal impact" on those matters, and that the plan included elements that would "mitigate" the impact of logging.

138 In my view the District Manager effectively acknowledged that C.P.212 would affect the petitioners' hunting rights in some way. Given the fiduciary nature of the relationship between government and Indians, and the constitutional protection afforded by s. 35 over the treaty right to hunt, it seems to me that the interference contemplated by C.P.212 amounts to an infringement of the petitioners' right to hunt. The granting of C.P.212 was the de facto assertion of the government's right to take up land, a right that by its very nature limited or interfered with the right to hunt.

139 I do not think the learned chambers judge erred in holding that any interference with the right to hunt was a prima facie infringement of the petitioners' Treaty 8 right to hunt.

140 In my respectful view, the learned chambers judge overstated the petitioners' position in holding that they were entitled to exercise their "preferred means of hunting" by doing so in an "unspoiled wilderness". The Tusdzuh was not unspoiled wilderness in 1996 when the District Manager approved C.P.212, nor was it unspoiled wilderness in 1982 when treaty rights received constitutional protection. This was a wilderness criss-crossed with seismic lines, where oil and gas exploration and mining had taken place.

141 Nor do I think "preferred means" should be taken to refer to an area, or the nature of the area, where hunting or fishing rights might be exercised. Those words more correctly refer to the methods or modes of hunting or fishing employed.

142 But despite these disagreements with the reasons of the learned chambers judge, I do not think she erred in concluding that approval of C.P.212 constituted a prima facie infringement of the Treaty 8 right to hunt because the proposed activity would limit or impair in some degree the exercise of that right.

143 The appellants contend that in reaching that conclusion the learned chambers judge substituted her finding of fact for that of the District Manager. But the interpretation of Treaty rights, and a decision as to whether they have been breached, are not within any jurisdiction conferred on the District Manager by the Forest Act, Forest Practices Code or relevant regulations. They are questions of law and even the District Manager acknowledges that the proposed harvesting would have some effect on hunting. He said (at p.3 of the letter of 3 October, 1996) that:

> ...the proposed harvest areas would have minimal impacts on wildlife habitat suitability and capability for ungulates and black bear...

144 I respectfully agree with the learned chambers judge that any interference with the right to hunt is a prima facie infringement of the Indians' treaty right as protected by s. 35 of the Constitution Act, 1982.

XII

Justification

145 The analysis required in deciding whether infringement of a treaty right is justified is referred to above briefly in paragraph 83. Although Sparrow was not a treaty case, in my view the same approach is warranted here as in cases of aboriginal rights, as both treaty and aboriginal rights have constitutional protection under s. 35(1) of the Constitution Act, 1982.

146 Justification requires consideration of the following questions (said in Sparrow not to be an exhaustive or exclusive list):

1. Whether the legislative or administrative objective is of sufficient importance to warrant infringement;
2. Whether the legislative or administrative conduct infringes the treaty right as little as possible;
3. Whether the effects of infringement outweigh the benefits derived from the government action; and
4. Whether adequate meaningful consultation has taken place.

147 Overriding all these issues is whether the honour and integrity of the Crown has been upheld in its treatment of the petitioners' rights.

148 I will consider those issues in turn.

A. Importance of the Legislative Objective

149 The learned chambers judge does not appear to have addressed this question, nor does the petitioner appear to have led any evidence to suggest that the objectives of the Forest Act and Code are not of sufficient importance to warrant infringement of the petitioners right to hunt.

150 It would, in my view, be unduly limited, and therefore wrong, to consider the objective in issuing a cutting permit only from the perspective of Canfor's presumed goal to have a productive forest business with attendant economic benefits, or from the perspective of the Provincial Government to have a viable forest industry and a vibrant Provincial economy. The objectives of the forestry legislation go far beyond economics. The preamble to the Code (see para.28 above) refers to British Columbians' desire for sustainable use of the forests they hold in trust for future generations, and to the varied and sometimes competing objectives encompassed within the words "sustainable use".

151 In Sparrow the legislative objective was found to be conservation of the fishery, and the Court held that to be a sufficiently important objective to warrant infringement of the aboriginal right to fish for food. Viewing the legislative scheme in respect of forestry as a whole, and by a parity of reasoning with Sparrow, in my view the legislative objectives of the Forest Act and Code are sufficiently important to warrant infringement of the petitioners' treaty right to hunt in the affected area. Those objectives include conservation, and the economic and cultural needs of all peoples and communities in the Province.

B. Minimal Impairment

152 As with the first issue, the learned chambers judge does not appear to have addressed directly the question of minimal infringement. When dealing with the issue of infringement of the right to hunt, she did say (at para.108) that "there is no persuasive evidence to suggest that other areas do not exist which Canfor could log in place of C.P.212 to avoid interfering with aboriginal rights".

153 But the learned chambers judge stopped short of saying that minimal interference means no interference, and correctly so, for the law does not impose such a stringent standard. In R. v. Nikal, *[1996] 1 S.C.R. 1013* at 1065, the Court held that "[s]o long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test".

154 The onus for showing minimal impairment rests on the Crown. See Semiahmoo Indian Band v. Canada *(1997), 148 D.L.R. (4th) 523*, *[1998] 1 C.N.L.R. 250* at 268 (F.C.A.).

155 In this context, the findings of the District Manager are significant. He found (see para.37 above) that Canfor's proposed operations would have minimal impacts on wildlife habitat suitability and capability for moose, deer and bear, that there would be minimal to no impact on fish habitat or fishing activities, and that the proposed harvesting plan included sufficient measures to mitigate any concerns as to the trapping of fur bearing animals in the area.

156 In my respectful view, these findings, which are within the scope of the District Manager's authority to make, are sufficient to meet the tests for minimal impairment or infringement of the right to hunt.

C. Whether the Effects of Infringement Outweigh the Benefits to be Derived from the Government Action

157 Again, this issue was not addressed by the chambers judge. Given the minimal effects on hunting that the proposed logging would have, as found by the District Manager, and in the absence of any evidence to the contrary, it is in my view a fair inference that the benefits to be derived from implementation of the legislative scheme, and the issuance of cutting permits in accordance with its requirements, would outweigh any detriment to the petitioners caused by the infringement of the right to hunt.

D. Adequate Meaningful Consultation

158 The learned chambers judge found that there had been inadequate consultation with the petitioners, and it is upon this ground that she found the Crown had failed in its attempts to justify the infringement of the petitioners' right to hunt.

159 It is perhaps worth mentioning here the difference between adequate notice as a requirement of procedural fairness (considered above at paras. 76-80) and adequate consultation, which is a substantive requirement under the test for justification. The fact that adequate notice of an intended decision may have been given, does not mean that the requirement for adequate consultation has also been met.

160 The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action: see R. v. Sampson *(1995), 16 B.C.L.R. (3d) 226* at 251 (C.A.); R. v. Noel, *[1995] 4 C.N.L.R. 78* (Y.T.T.C.) at 94-95; R. v. Jack *(1995), 16 B.C.L.R. (3d) 201* at 222-223 (C.A.); Eastmain Band v. Robinson *(1992), 99 D.L.R. (4th) 16* at 27 (F.C.A.); and R. v. Nikal, supra.

161 There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see Ryan et al v. Fort St. James Forest District (District Manager), *[1994] B.C.J. No. 2642*, (25 January, 1994) Smithers No. 7855, affirmed *(1994), 40 B.C.A.C. 91*.

162 The chambers judge's findings as to what steps were taken by way of consultation are matters of fact that cannot be impugned unless there is no evidence to support them. In my view there is such evidence and we must accept the facts as found by her.

163 It remains to consider the adequacy or inadequacy of the Crown's efforts in that behalf.

164 The learned chambers judge found (at para.141) that:

> The following reasonable opportunities to consult were denied to Halfway:

(a) Halfway was not invited to attend the meeting between MOF and Canfor employees at which the cutting permit was approved.

(b) The report "Potential Impacts to Fish & Wildlife Resources' was not provided to Halfway until August 26, 1996, despite that a draft copy was available January 4, 1996.

(c) There was no real opportunity to participate in the CHOA.

(d) Canfor's actual application for CP212 was not provided to Halfway until after the decision was made.

165 These findings, particularly (b) and (c) support the conclusion that the Crown did not meet the first and second parts of the consultation test referred to, namely to provide in a timely way information the aboriginal group would need in order to inform itself on the effects of the proposed action, and to ensure that the aboriginal group had an opportunity to express their interests and concerns.

166 I respectfully agree with the learned chambers judge that given the positive duty to inform resting on the Crown, it is no answer for it to say that the petitioners did not take affirmative steps in their own interests to be informed, conduct that the learned chambers judge described as possibly "not ... entirely reasonable".

167 As laid down in the cases on justification, the Crown must satisfy all aspects of the test if it is to succeed. Thus, even though there was a sufficiently important legislative objective, the petitioners rights were infringed as little as possible, and the effects of the infringement are outweighed by the benefits to be derived from the government's conduct, justification of the infringement has not been established because the Crown failed in its duty to consult. It would be inconsistent with the honour and integrity of the Crown to find justification where the Crown has not met that duty.

XIII

Remedy

168 The learned chambers judge granted "an order quashing the decision made September 13, 1996 which approved the application for CP.212".

169 I would dismiss the appeal from that order for the reasons given above.

FINCH J.A.

The following is the judgment of:

HUDDART J.A. (concurring)

170 My approach to the issues on this appeal varies somewhat from those of my colleagues, whose reasons I have had the opportunity to read in draft. While I agree entirely with Mr. Justice Finch with regard to the administrative law issues, like Madam Justice Southin I part company with him on his application of the principles from Sparrow, supra, to the circumstances of this case.

171 The larger question may be whether the province's forest management scheme permits the accommodation of treaty and aboriginal rights with the perceived rights of licensees. However, the constitutionality of the legislative scheme governing the management of the province's forests is not in issue on this appeal. So we must accept, for the purposes of our analysis in this case, that the legislature and executive have provided an acceptable method of "recognizing and affirming" treaty and aboriginal rights of first nations in making the decisions required by that management scheme. The scheme obviously contemplates situations where shared use would be made of the

territory in question. Shared use was also envisaged by the treaty makers on both sides of Treaty 8. That is evident from the evidence in this case and from the discussion in Badger, supra, about the same Treaty 8. Thus accepting the adequacy of the legislative scheme to accommodate treaty and aboriginal rights is not necessarily offensive to the interests of the Halfway River First Nation.

172 I agree with Mr. Justice Finch that the District Manager's decision must be reviewed "in the context of the competing rights created by Treaty 8". On the facts as the District Manager found them, however, this is not a case of "visible incompatible uses" such as would give rise to the "geographical limitation" on the right to hunt as Cory J. discussed it in Badger, supra.

173 I do not think the District Manager for a moment thought he was "taking up" or "requiring" any part of the Halfway traditional hunting grounds so as to exclude Halfway's right to hunt or to extinguish the hunting right over a particular area, whatever the Crown may now assert in support of his decision to issue a cutting permit. At most the Crown can be seen as allowing the temporary use of some land for a specific purpose, compatible with the continued long-term use of the land for Halfway's traditional hunting activities. The Crown was asserting a shared use, not a taking up of land for an incompatible use. There was evidence before the District Manager to support a finding that the treaty right to hunt and Canfor's tree harvesting were compatible uses. That finding must underpin his conclusion that CP212 would not infringe the treaty right to hunt.

174 Nor do I agree with Canfor's argument that the test formulated by Cory J. in Badger is not applicable to a lumbering use. Justice Cory is clear that, "whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis" i.e. whether a proposed use is incompatible with the treaty right is a question of fact. The same can be said of "required or taken up ... for the purpose of ... lumbering", although I would compare lumbering more with the wilderness park use in R. v. Sioui *[1990] 1 S.C.R. 1025* and R. v. Sundown *[1999] S.C.J. No. 13*, than with settlement, or the use for a game preserve in Rex v. Smith, *[1935] 2 W.W.R. 433* (Sask. C.A.) or a public road corridor in R. v. Mousseau *[1980] 2 S.C.R. 89*.

175 The District Manager's task was to allocate the use of the land in the Timber Supply Area among competing, perhaps conflicting, but ultimately compatible uses among which the land could be shared; not unlike the sharing of herring spawn in R. v. Gladstone *[1996] 2 S.C.R. 723*.

176 Nevertheless, a shared use decision may be scrutinized to ensure compliance with the various obligations on the District Manager, including his obligation to "act constitutionally", as I recall Crown counsel putting it in oral argument. Counsel agreed Sparrow provided the guidelines for that scrutinization on judicial review if a treaty right was engaged and I will expand further on that analysis below.

177 Just as the impact of a statute or regulation may be scrutinized to ensure recognition and affirmation of treaty rights of aboriginal peoples, so may the impact of a decision made under such a statute or regulation by an employee of the Crown. The District Manager can no more follow a provision of a statute, regulation, or policy of the Ministry of Forestry in such a way as to offend the Constitution than he could to offend the Criminal Code or the Offence Act.

178 I share Mr. Justice Finch's view that the District Manager was under a positive obligation to the Halfway River First Nation to recognize and affirm its treaty right to hunt in determining whether to grant Cutting Permit 212 to Canfor. This constitutional obligation required him to interpret the Forest Act and the Forest Practices Code so that he might apply government forest policy with respect for Halfway's rights. Moreover, the District Manager was also required to determine the nature and extent of the treaty right to hunt so as to honour the Crown's fiduciary obligation to the first nation: Delgamuukw v. B.C.[1997] 3 S.C.R. 1010 at 1112-1113 per Lamer C.J.C.; and see the discussion by Williams C.J.S.C. in Cheslatta Carrier Nation v. B.C. *(1998), 53 B.C.L.R. 1* at 14-15.

179 Mr. Justice Finch points out that the District Manager's failure to consult adequately precluded justification under the second stage of the Sparrow analysis of the infringement of the Halfway treaty right to hunt he considered

was constituted by CP212. In my view this deficiency in the decision-making process is a breach of the Crown's fiduciary responsibilities that makes this Court's application of the Sparrow analysis premature.

180 Because only the first nation will have information about the scope of their use of the land, and of the importance of the use of the land to their culture and identity, if the Sparrow guidelines are to organize the review of an administrative decision it makes good sense to require the first nation to establish the scope of the right at the first opportunity, to the decision-maker himself during the consultation he is required to undertake, so that he might satisfy his obligation to act constitutionally. It is only upon ascertaining the full scope of the right that an administrative decision maker can weigh that right against the interests of the various proposed users and determine whether the proposed uses are compatible. This characterization is crucial to an assessment of whether a particular treaty or aboriginal right has been, or will be infringed. Thus, particularly in the context of a judicial review where the Court relies heavily upon the findings of the decision maker, a consideration of whether consultation has been adequate must precede any infringement/justification analysis using the Sparrow guidelines.

181 It is implicit in Halfway's submission that the proposed lumbering use is incompatible with its rights or at least would be found to be so if the District Manager had full information and properly considered the scope of its treaty right to hunt and of its aboriginal right to use the particular tract in question for religious and spiritual purposes.

182 The requirement that a decision-maker under the Forest Act and the Forest Practices Code consult with a first nation that may be affected by his decision does not mean the first nation is absolved of any responsibility. Once the District Manager has set up an adequate opportunity to consult, the first nation is required to co-operate fully with that process and to offer the relevant information to aid in determining the exact nature of the right in question. The first nation must take advantage of this opportunity as it arises. It cannot unreasonably refuse to participate as the first nation was found to have done in Ryan et al v. Fort St. James Forest District (District Manager), *[1994] B.C.J. No. 2642*, (25 January, 1994) Smithers No. 7855, affirmed *(1994), 40 B.C.A.C. 91*. In my view, a first nation should not be permitted to provide evidence on judicial review it has had an appropriate opportunity to provide to the decision-maker, to support a petition asserting a failure to respect a treaty right.

183 The District Manager's failure to consult adequately means that we cannot know what additional information might have been available to him regarding the nature and extent of the Treaty 8 right to hunt or of other aboriginal rights not surrendered by the treaty. Nor can we know how he might have weighed that information with information he might have sought regarding other possible cutting areas to meet Canfor's needs while minimizing the effects on the Halfway River First Nation's treaty right to hunt. Counsel adverted in argument to Canfor having obtained permits to cut in other areas to replace CP212 after the chambers judge made her order. Finally, any weighing of benefits is limited by the evidence, in this case almost entirely put forward by Canfor. Only when adequate consultation has taken place and both parties have fulfilled their respective consultation duties will the District Manager be in a position to determine whether the uses are compatible or a geographical limitation is being asserted, and the consequences in either event to the application for a cutting permit.

184 Halfway did not receive an appropriate opportunity to establish the scope of its right. Thus, the District Manager's decision must be set aside because it was made without the information about Halfway's rights he should have made reasonable efforts to obtain. The most that can be decided definitively on judicial review in such circumstances is whether the legislative objective was sufficiently important to warrant infringement. About that there has never been a question in this case.

185 This conclusion does not signify agreement with Canfor's submission that the interference by CP212 with Halfway's treaty right to hunt could not be elevated to an infringement of a constitutional right. There was evidence of a diminution of the treaty right in this case for the valid purpose of lumbering, a purpose recognized by the treaty itself as a reason for government encroachment on the treaty right to hunt. There was evidence the proposed lumbering activity would preclude hunting in an area considerably larger than the particular cutting blocks during active logging for two years. While mitigating steps were to be taken, there was also evidence of the detrimental effect of road construction on the long-term use of the area by native hunters. Common sense suggests these effects might be sufficiently meaningful, particularly when they are felt in an area near the first nation's reserve, to

require justification by the government of its action, depending on the nature of the hunting right. Had the District Manager understood the extent of his obligation to consult, he might have concluded the activities of Canfor authorized by CP212 would result in a meaningful diminution of the Treaty 8 right to hunt, just as he might have seen to the mitigation of such effects or to compensation for them as part of his analysis of how the proposed use and the treaty right could be accommodated to each other.

186 My difference with the reasoning of Mr. Justice Finch flows from my view that the chambers judge was wrong when she found that "any interference" with the right to hunt constituted an "infringement" of the treaty right requiring justification. I cannot read either Sparrow or Badger to support that view. As my colleague notes at para. 124, in Sparrow the court stated the question as "whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest." In Badger, at 818, in his discussion as to whether conservation regulations infringed the treaty right to hunt, Cory J. indicated the impugned provisions might not be permissible "if they erode an important aspect of the Indian hunting rights." In Gladstone, supra, Lamer C.J.C. indicated that a "meaningful diminution" of an aboriginal right would be required to constitute an infringement. Each of these expressions of the test for an "infringement" imports a judgment as to the degree and significance of the interference. To make that judgment requires information from which the scope of the existing treaty or aboriginal right can be determined, as well as information about the precise nature of the interference.

187 Incidentally, as an aside, given the significance of particular land to aboriginal culture and identity, I would not preclude "preferred means" from being extended to include a preferred tract of land. Proof may be available that use of a particular tract of land is fundamental to a first nation's collective identity, as it is to many indigenous cultures. While it may be that "preferred area" for hunting is not relevant, "preferred area" for religious and spiritual purposes is likely to be. Such rights do not appear to have been included in the treaty-making one way or the other.

188 If, after the requisite consultation has occurred, the District Manager confirms the nature of his decision is one involving compatible shared uses, modification of the Sparrow guidelines for review of his allocation of the resources is likely to be necessary. I find support for such modification in the following statement from Sparrow, at 1111 (per Dickson C.J.C. and La Forest J.):

> ... We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

189 As is apparent from the discussion in Gladstone, supra, it will be impossible to determine how the contours of the justificatory standard should be modified without an understanding of the existing treaty and aboriginal rights and the precise nature of the competing use or uses proposed. Lamer C.J.C. emphasized the distinction between a right with an internal limit such as the right to fish for social, ceremonial and food purposes in Sparrow and a right with an external, market-driven limit such as the right to sell herring spawn commercially at issue in Gladstone. As he noted, the scope of the aboriginal right can determine whether or not exclusive exercise of that right is warranted or how the doctrine of priority will be applied in a government decision on resource allocation. In the circumstances of the case at hand the scope of the Halfway nation's hunting right is yet to be fully determined. Thus it is impossible to reach a conclusion as to what justificatory standard would be applied to the issuance of the cutting permit.

190 Where the decision maker has determined the proposed uses are compatible with the aboriginal right, the question becomes one of accommodation as opposed to one of exclusive exercise of either the aboriginal right in question or the Crown's proposed use. In Sioui, supra, the Court held it was up to the Crown "to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Hurons' rights," if the Crown wanted to assert its occupancy of the land in question was incompatible with the Hurons' religious customs or rites. It may be that guidance can be found in this concept for the review of an administrative decision on the allocation of resources among compatible uses.

191 In summary, so as to fulfill the Crown's fiduciary and constitutional duties to Halfway, the District Manager is required to initiate a process of adequate and meaningful consultation with Halfway to ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. It will be that accommodation the court reviews within the contours of a justificatory standard yet to be determined.

192 If the District Manager determines the proposed use is incompatible with the treaty right, he will be asserting a geographical limitation on the treaty right. In that event, I agree with Mr. Justice Finch that his decision may be reviewed under the Sparrow analysis.

193 It follows from these reasons that I too would affirm the order of Dorgan J. setting aside the decision of the District Forest Manager to grant CP212.

HUDDART J.A.

The following is the judgment of:

SOUTHIN J.A. (dissenting)

194 This is an appeal by the respondents below from this judgment pronounced 24 June 1997:

> THIS COURT ORDERS that
>
> - the decision of the District Manager made September 13, 1996, approving the application for Cutting Permit 212 be quashed; and
> - costs be awarded to the Petitioner.

195 What led to this judgment was a petition for judicial review brought in late 1996 for an order:

> [1. Reviewing and setting aside the decision of the Ministry of Forests to allow forestry] activities within Cutting Permit 212;
>
> 2. Declaring that the Ministry of Forests has a fiduciary and constitutional duty to adequately consult with the Halfway River First Nation and declaring that the level of consultation to date is insufficient;
> 3. Compelling the Ministry of Forests to consult with the Halfway River First Nation with respect to the full scope, nature and extent of the impact of proposed forestry activities on the exercise of the Treaty and Aboriginal rights of the Halfway River First Nation in accordance with the reasons and directions of this Honourable Court, and compelling the Ministry of Forests to provide funding to the Halfway River First Nation to support this consultation process;
>
> [There is no "4." in the amended petition.]
>
> 5. Remitting the matter to the Respondent Ministry of Forests to complete the consultation process and then reconsider and determine whether to consent to the proposed cutting activities, and to determine appropriate conditions and requirements to be imposed upon any such cutting activities;
> 6. Prohibiting the Ministry of Forests from making any decision with respect to forestry activity within Cutting Permit 212 until completing the consultation process ordered by this Honourable Court.

7. Retaining jurisdiction over matters dealt within this application such that any party may return to the Court, by motion, for determination of any issue relating to the consultation or the implementation of this Order.

8. Such other relief as this Honourable Court may deem meet; and

9. Costs on a solicitor client basis.

196 The central point was an assertion by the respondents in this Court that rights preserved to them under s. 35 of the Constitution Act, 1982 were infringed by that act of the District Manager.

197 The learned judge below had before her not only this petition for judicial review but also an application by the respondent below, here the appellant, Canadian Forest Products Ltd., more familiarly known in this Province as Canfor, for an interlocutory injunction restraining the Chief and Halfway River First Nation from interfering with the implementation of the cutting permit.

198 The petition recites that in support of it will be read the affidavits of Chief Bernie Metecheah, Chief George Desjarlais, Stewart Cameron, Peter Havlik, Judy Maas, and Michael Pflueger. These affidavits and their exhibits comprise nearly 1,000 pages in the appeal book.

199 As both proceedings came on together, the learned judge below had affidavits from both sides in both proceedings. In its action, Canfor filed the affidavits of James Stephenson, Jill Marks and J. David Menzies, totalling 330 pages of the appeal book. The Crown in this proceeding filed, among others, two affidavits of Mr. Lawson, the District Manager, bearing date the 20th December, 1996, and amounting to 432 pages. There were some further shorter affidavits from both sides. Thus, the appeal book, excluding the reasons for judgment, judgment and notice of appeal, is 2,376 pages.

200 These proceedings engaged the chambers judge in eight days of hearing.

201 As I shall explain, I would allow the appeal on the simple footing that the central issue in this case concerning the existence or non-existence of rights in the Halfway River First Nation under s. 35 of the Constitution Act, 1982, ought to have been dealt with by action. For a precedent of an action on a treaty, see Saanichton Marina Ltd. v. Claxton *(1988), 18 B.C.L.R. (2d) 217*, aff'd. *(1989), 36 B.C.L.R. (2d) 79*, in which the learned trial judge, Mr. Justice Meredith, most usefully included in his reasons for judgment the Tsawout Indian Band statement of claim.

202 In revising these reasons, I have had the benefit of the draft reasons of my colleagues.

203 If this were not the first case on the implications for British Columbia of Treaty 8 and if these implications did not go far beyond whether Canfor can or cannot log these cut blocks, I would agree with Mr. Justice Finch that, as the parties did not object to the mode of proceeding, it must be taken to be satisfactory. But, in my opinion, the courts do have an obligation to ensure that a case the implications of which extend beyond the parties ─ and the implications of this case may extend not only to all the inhabitants of the Peace River but also, because the Peace River country is not poor in resources, to all the inhabitants of British Columbia ─ is fully explored on proper evidence. Furthermore, to my mind, the so-called administrative law issues in this case are nothing but distractions from the issues arising on the Treaty.

204 By s. 35(1), of the Constitution Act, 1982:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

205 Because Treaty No. 8 is central to this case and to all other cases which may arise in the Peace River between First Nations, on the one hand, and the Crown and the non-aboriginal inhabitants on the other, I set it out in full:

TREATY No. 8

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:-

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendent General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:-

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and

> every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.
>
> And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.
>
> THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.
>
> [Emphasis mine.]

206 The Beaver Indians, from whom the present respondents are descended, adhered to the Treaty in 1900:

> The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said treaty, and agree to adhere to the terms thereof, in consideration of the undertakings made therein.
>
> In witness whereof, Her Majesty's said Commissioner, and the following of the said Beaver Indians, have hereunto set their hands, at Fort St. John, on this the thirtieth day of May, in the year herein first above written.
>
> [Here followed the signatures.]

207 Canfor holds under the Crown a forest licence A18154 dated 28th June, 1993, which covers a very substantial area of northeastern British Columbia between the Rocky Mountains and 120[degrees] west longitude, being there the boundary between this Province and Alberta. Under such a licence the District Manager from time to time issues cutting permits. The issuance of such permits is governed not only by the terms of the licence but also by the terms of the Forest Act.

208 For the purposes of these reasons for judgment I accept:

1. The Halfway River First Nation, which has its reserve on the Halfway River, claims under Treaty 8 the right to hunt, fish and trap, particularly to hunt moose, in the area covered by the cutting permit, the logging of which may impede their hunting for moose.
2. The holder of a forest licence does not, under its licence, acquire any exclusive right of occupation of the lands encompassed in a cutting permit.
3. Neither the Wildlife Act, *R.S.B.C. 1996, c. 488*, nor any other statute of this Province forbids hunting on lands upon which logging is being carried on but it does prohibit the dangerous

discharge of firearms. It would be dangerous to discharge firearms where logging is being carried on and I do not think for one moment that any member of the Halfway River First Nation would do such a thing even if there were no statutory prohibition.

209 The respondents assert a breach of the Treaty in two ways:

1. When the reserve for the Halfway people was set up, which was said not to have happened until 1914, that is, some fourteen years after the Beaver had adhered to the Treaty, they received less than their entitlement under the Treaty. In its claim to the Federal Government, submitted in 1995 under the Federal Land Claims Process, the Halfway River First Nation calculated the shortfall thus:

> 15.1 The following is a summary of the key population figures indicating a shortfall at date of first survey. Detailed information concerning individual members of the Halfway River Band, absentees/arrears and late adherents is contained in the Genealogical Appendices.

Halfway River Band on Hudson Hope Band	
Paylist - Date of First Survey - 1914	77
Deduct Double Counts	0
Base Paylist	77
Absentees/Arrears	13
Late Adherents	4
Adjusted Date of First Survey Population	94

Calculation of Shortfall

94 x 128 acres - 9823 acres = Treaty Land Entitlement Shortfall of 2,139 acres

I do not pretend to have grasped the full import of this claim, nor the relationship to it, if any, of Section 13 of the British Columbia Terms of Union and the various events arising from that section, as to which see my judgment in British Columbia (Attorney General) v. Mount Currie Indian Band *(1991), 54 B.C.L.R. (2d) 156* at 176 (C.A.), where the whole sorry history of reserves in other parts of the Province is recounted and in which, in my opinion, the right clearly belonged to the Mount Currie Indian Band. If the Halfway River First Nation is right and the claim is not settled but must be pursued in an action, an interesting question of law will fall to be determined: Is British Columbia bound to provide further lands and, if so, who is to choose those lands, or is Canada bound to pay compensation and, in either event, to what ancillary remedies, if any, is the Halfway River First Nation entitled? At this stage, no authority with the power to resolve the claim as made in 1995 has made any findings of fact or law relating thereto.

2. Development in the area has deleteriously affected the hunting. Chief Metecheah deposes:

3. The Halfway River First Nation community is very poor. More than 75% of our members rely on social assistance and hunting to feed their families. Because we are so poor, the members of our community rely very much on hunting to feed their children.

4. All of the land within Cutting Permit 212 ("C.P. 212") is very good for hunting and is the land that is used the most by our people to feed their children. The C.P. 212 area is next to our reserve. Our members don't need to spend much money to get there to get food for their families.

5. all through C.P. 212, there is proof of this use. Our members' permanent camp sites, corrals and meat drying racks are everywhere in the area.

6. We have many religious, cultural and historical sites in C.P. 212.

7. I am told by one of our members that some of the cut blocks are right where important spiritual ceremonies are held.

8. We have told the Ministry of Forests ("Ministry") that we are willing to gather this information but we need money and help to do this.

9. I have hunted throughout the Treaty 8 territory all my life and I have seen the effects of forestry activities on wildlife and hunting. The land is not as good for hunting once the trees have been cut. Non-Native hunters use the roads left by the forestry people to hunt in our traditional territory and there is less game left to feed our families.

10. If the hunting in C.P. 212 is affected, children in our community will go hungry.

11. C.P. 212 is right next to our Reserve. Because of all of the things that the government has done to our traditional territory by allowing logging companies and oil and gas companies to cut trees and pollute the land without consulting us or respecting our rights, our people must go farther and farther from our Reserve to get to land where we can hunt and gather berries and medicine. We use the land in C.P. 212 for teaching our children about our spiritual beliefs and our way of life. If the trees in C.P. 212 are cut down and the animals are driven away we will not be able to teach our children how to hunt and how our ancestors lived.

210 The appellants do not accept that the development of the area has adversely affected the animal population or, more particularly, that cutting pursuant to this cutting permit will do so. There is some evidence that logging, because it results in fresh growth, ultimately produces good browse for ungulates, including moose.

211 The assertions by the Chief in paragraphs 9-11 are sweeping and I am sure he is profoundly convinced of their truth. But, in my opinion, assertions, even if contained in an affidavit, which are sweeping in scope but which the deponent does not support, to use Lord Blackburn's words in another context, by condescending to particulars, should be given little weight in a proceeding seeking a final, in contradistinction to an interlocutory, order.

212 As I understand Mr. Justice Finch's reasons, his central premise is set forth in this paragraph:

> [144] I respectfully agree with the learned chambers judge that any interference with the right to hunt is a prima facie infringement of the Indians' treaty right as protected by s. 35 of the Constitution Act, 1982.

213 That premise leads inexorably to the application of the doctrine of R. v. Sparrow, *[1990] 1 S.C.R. 1075*, *[1990] 3 C.N.L.R. 160*, *[1990] 4 W.W.R. 410*, *46 B.C.L.R. (2d) 1*.

214 It is upon that premise that my colleague and I part company.

215 I accept that the doctrine of the honour of the Crown applies to the interpretation of treaties which are within s. 35(1) of the Constitution Act. But I do not accept that the central words of the Treaty bear the construction put upon them by my colleague. To my mind, the words which, in the court below, ought to have been but were not addressed, except perhaps by a side wind, are "as may be required or taken up". Do the words empower the Crown, to whom all the lands covered by the Treaty were surrendered, to convey those lands away to others in fee simple? Such a conveyance would, of course, give exclusive possession to the grantee.

216 In the case at bar, the issuance of a cutting permit did not give exclusive possession to the appellant Canfor. It did not exclude the respondents from hunting. But if the Crown did grant all the lands away, it might be argued with some force that it had made the reservation nugatory. One might apply the common law doctrine of derogation from a grant, by analogy, to such a state of affairs.

217 In order that the significance of the principal issue to this Province may be understood, I must set out some history.

218 By the British Columbia Boundaries Act, 26 & 27 Vict., c. 83 (1863), Parliament at Westminster established the boundaries of then Colony of British Columbia thus:

> 3. British Columbia shall for the Purposes of the said Act, and for all other Purposes, be held to comprise all such Territories within the Dominions of Her Majesty as are bounded to the South by the Territories of the United States of America, to the West by the Pacific Ocean and the Frontier of the Russian Territories in North America, to the North by the Sixtieth Parallel of North Latitude, and to the East, from the Boundary of the United States Northwards, by the Rocky Mountains and the One hundred and twentieth Meridian of West Longitude, and shall include Queen Charlotte's Island and all other Islands adjacent to the said Territories, except Vancouver's Island and the Islands adjacent thereto.

219 When the Colony of British Columbia, which by then encompassed Vancouver Island as well, became part of Canada in 1871, it did so pursuant to the Terms of Union and the order in council of 16 May 1871. By the Terms of Union a substantial part of British Columbia known as the Railway Block was conveyed to the Dominion government. By subsequent statutes, other lands known as the Peace River Block were granted by the Province to Canada. These statutes are recited in the Railway Belt Retransfer Agreement Act, S.B.C. 1930, c. 60.

220 From the time that the Beaver adhered to this treaty in 1900 until after the Second World War, there was very little settlement in what British Columbians call the Peace River which, more sensibly, ought to have been part of Alberta, lying as it does east of the Rocky Mountains.

221 The introduction by Gordon E. Bowes to Peace River Chronicles (Prescott Publishing Co., 1963) gives a sufficient overview [p. 13 et seq]:

> The Hudson's Bay Company remained in undisturbed possession of its huge fur preserve until the gold rush to the Peace and the Finlay in 1862. Many of the gold-seekers turned to the fur trade themselves, and so ended the Company's monopoly. There was another gold rush in the years 1870-73, this time to the Omineca country. Klondikers passed through in 1898-99, and a few returned later as traders. In 1908-09, there was a smaller gold rush to McConnell Creek on the Ingenika River.
>
> Ignoring difficulties and hardships, the miners and the independent traders and trappers opened up the country and made it known to the outside world. They were soon followed by missionaries, travellers, and railway and geological survey parties. Their favourable reports drew attention to the agricultural advantages of the eastern part of the region.
>
> Land surveyors and settlers entered the Peace River region of British Columbia only a few years prior to the First World War. Until that time, the area from the Rockies east to the Alberta boundary had been kept under a provincial government reserve which prohibited homesteading. The purpose of this reserve was to permit the federal government to select 3,500,000 acres of unalienated arable land (the Peace River Block) in return for aid given earlier by Ottawa for railway construction elsewhere in the province. The long-delayed choice of the block was announced in 1907, and Ottawa threw open some of the lands for homesteading in 1912.
>
> Lack of transportation has been the great obstacle to development of the region. Some settlers came in on the mere rumour of a railway. In 1913 there were 40 settlers near Hudson Hope, 30 along the Peace down to Fort St. John, and about 400 in the Pouce Coupe prairie. Even Finlay Forks had two general stores in 1913, and hopes were high. The First World War pricked the bubble, leaving deserted cabins everywhere.
>
> The building of what is now the Northern Alberta Railways line in 1916 from Edmonton to Grande Prairie on the Alberta side facilitated some further settlement of the eastern half of the region. Following the war, the Soldier Settlement Board helped to establish veterans on the land. Another influx of land-hungry settlers

> occurred in 1928 and 1929, with the result that there were almost 7,000 persons in the eastern part of the region by 1931.
>
> The completion of the Northern Alberta Railways line to Dawson Creek in January 1931 marked the beginning of a new era. At long last the railway had arrived, if only just within the area's eastern boundary! During the depression years discouraged wheat farmers from the parched districts of southern Alberta and Saskatchewan swelled the migratory waves. The trek into the Promised Land with livestock and farm equipment sometimes took as long as three or four months.
>
> The arrival of bush pilots and the establishment of air lines in the thirties heralded the coming of further improvements in transportation. The Second World War, with its building of airports and the Alaska Highway and its forced economic expansion, played a sudden and spectacular part in the region's growth. Dawson Creek was given a highway to the Yukon and Alaska a full decade before it obtained one to the rest of the province! In the immediate post-war years, settlement continued in substantial volume. A major land boom occurred in 1948-49. Dawson Creek established itself in the front rank in all of Western Canada for grain shipments. The eastern part of the region is still the fastest-growing section of British Columbia.
>
> The initial exploitation of the oil and gas fields, the completion of the John Hart Highway from Prince George in 1952, the building in 1957 of Canada's first major natural gas pipeline, Westcoast Transmission Company's line from Taylor south to the American border, the long-delayed and eagerly-awaited extension of the Pacific Great Eastern Railway to Fort St. John and Dawson Creek in 1958, the completion of the Western Pacific Products and Crude Oil pipeline to Kamloops in 1961, and the construction, now under way, of the great hydro-electric power project near Hudson Hope, all represent other significant steps in the region's development in recent years.
>
> The present prosperity and the growing commercial importance of Dawson Creek, Fort St. John, Hudson Hope, Taylor, and Chetwynd contrast sharply with conditions two decades ago. Isolated no longer, and provided with air lines, highways, railways, and gas and oil pipelines, the region has overcome its transportation problems. Nature's lavish endowment of this corner of British Columbia is becoming evident to all. Not only one of the world's greatest power sites but also the untold wealth of natural gas, oil, coal, base metals, gold, timber, and millions of fertile acres for agriculture are beginning to make the pioneers' wildest dreams come true.

222 Thus, I think it fair to infer that from the time they adhered to the Treaty in 1900 until after the Second World War, the Beaver people, including the present respondents, were left with their hunting ranges largely free of the "taking up" for any purpose by the Crown of lands ceded to it and from intrusion by non-natives upon those lands for such purposes as hunting, fishing, exploring for minerals, and so forth. Thus, until then, no issue could have arisen of breach by the Crown.

223 Since the early 1960's, there has been in the Peace River further extensive taking up of land by the Crown, although to what extent that taking up has excluded the Beaver people from their traditional hunting ranges by the granting of exclusive possession to others, does not appear with any clarity in the evidence in this case.

224 In my opinion the issue is not whether there is an infringement and justification within the Sparrow test, but whether the Crown has so conducted itself since 1900 as to be in breach of the Treaty. The proper parties to a proceeding to determine that issue are in my opinion the Halfway River First Nation and the Attorney General for British Columbia, or, if monetary compensation is sought, Her Majesty the Queen in right of British Columbia, and the proper means of proceeding is an action.

225 The question in such an action would be whether what the Crown has done throughout the Halfway River First Nation's traditional lands by taking up land for oil and gas production, forestry, and other activities has so affected the population of game animals as to make the right of hunting illusory. "To make the right of hunting illusory" may be the wrong test. Perhaps the right test is "to impair substantially the right of hunting" or some other formulation of words.

226 Whatever is the correct formulation, it cannot be applied without addressing all that has been done by the Crown since the lands were ceded to it. The Beaver Indians have the right to hunt but that right is burdened or cut down by the right of the Crown to take up lands. There are many issues of fact to be addressed on proper evidence to answer the question in whatever terms one puts it.

227 My colleague, Madam Justice Huddart, approaches this case differently from Mr. Justice Finch. The culmination of her reasons is in this paragraph:

> [191] In summary, so as to fulfill the Crown's fiduciary and constitutional duties to Halfway, the District Manager is required to initiate a process of adequate and meaningful consultation with Halfway to ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. It will be that accommodation the court reviews within the contours of a justificatory standard yet to be determined.

228 Essentially, therefore, she accedes to the respondent's prayer for relief contained in the petition for judicial review.

229 With respect, to create a system in which those appointed to administrative positions under the Forest Act or any other statute of British Columbia regulating Crown land in the Peace River are expected to consult "to ascertain the nature and scope of the treaty right at issue" and to determine "whether the proposed use is compatible with the treaty right" is to place on our civil servants a burden they should not have to bear - a patchwork quilt of decision making by persons appointed not for their skill in legal questions but for their skill in forestry, mining, oil and gas, and agriculture.

230 A District Manager under the Forest Act is no more qualified to decide a legal issue arising under this treaty than my colleagues and I are qualified to decide how much timber Canfor should be permitted or required to cut in any one year in order to conform to the terms of its tenure.

231 Not only is this burden on the civil servants unfair to them, but also it ladens the people of British Columbia with burdens heavy to be borne, burdens which no other province's people have to bear, even though the other provinces, except Newfoundland, also have First Nations.

232 If my colleagues are right, British Columbia, which was once described as the spoilt child of Confederation, is about to become the downtrodden stepchild of Confederation.

233 This case has serious economic implications. To decide the issues arising on the evidence here adduced, which, as the parties chose to proceed, was not focused on that question only, is a course fraught with danger, especially to third parties. Those third parties include, as well as those who have rights acquired under the Forest Act, *R.S.B.C. 1996, c. 157*, and predecessor statutes, those who have rights acquired under the Petroleum and Natural Gas Act, *R.S.B.C. 1996, c. 361*, and predecessor statutes, the Mineral Tenure Act, *R.S.B.C. 1996, c. 292*, and predecessor statutes, and the Land Act, *R.S.B.C. 1996, c. 245*, and predecessor statutes.

234 If the Crown has so conducted itself that it has committed a breach of its obligations under the Treaty to the respondents, and, perhaps, other First Nations who are also Beaver Indians, then it is right that the Crown should answer for that wrong and pay up. The paying up will be done by all the taxpayers of British Columbia. But it is not right that Canfor and all others, who in accordance with the Statutes of British Columbia have obtained from the Crown rights to lands in the Peace River and conducted their affairs in the not unreasonable belief that they were exercising legal rights, should find themselves under attack in a proceeding such as this.

235 Canfor, a substantial corporation, presumably can afford this litigation. But others whose rights may be imperilled may not have Canfor's bank account.

236 I would allow the appeal and set aside the judgment below.

SOUTHIN J.A.

* * * * *

CORRIGENDA

Released: December 3, 1999

[1] The following corrections to my reasons for judgment of 12 August, 1999 are required:

In paragraph 17:

Delete "Natural Resources Transfer Act, 1930 (Constitution Act, 1930 Schedule II)" and substitute:

"Natural Resources Transfer Agreement, S.S. 1930, c. 87 (confirmed by the Constitutional Act, 1930, 120 & 21 Geo. 5, c. 26 (U.K.)).

In paragraph 29:

Add at the end of the paragraph:

"[affirmed by Bauman J., without comment on this issue, at *(1998) 12 Admin L.R. (3d) 45*.]"

In paragraph 62

Correct the citations of:

"Davison v. Maple Ridge (District) *(1991), 60 B.C.L.R. (2d) 24* (C.A.)

and

Clare v. Thomson *(1993), 83 B.C.L.R. (2d) 263* (C.A.)"

In paragraph 155:

The cross-reference should be to paragraph 37, not to paragraph 32.

In paragraph 159:

The cross-reference should be to paragraphs 76-80, not to paragraphs 66-70.

FINCH J.A.

End of Document

Ka'a'Gee Tu First Nation v. Canada (Attorney General), [2007] F.C.J. No. 1006

Federal Court Judgments

Federal Court

Vancouver, British Columbia

Blanchard J.

Heard: January 23, 2007.

Judgment: July 20, 2007.

Docket T-1379-05

[2007] F.C.J. No. 1006 | 2007 FC 763 | 30 C.E.L.R. (3d) 166 | [2007] 4 C.N.L.R. 102 | 315 F.T.R. 178 | 162 A.C.W.S. (3d) 522 | 2007 CarswellNat 2067

Between Chief Lloyd Chicot suing on his own behalf and on behalf of all members of the Ka'a'Gee Tu First Nation and the Ka'a'Gee Tu First Nation, Applicants, and The Attorney General of Canada and Paramount Resources Ltd. Respondents

(134 paras.)

Case Summary

Aboriginal law — Aboriginal rights — Infringement — Application by a First Nation for judicial review of a decision of the federal Crown that approved recommendations for an oil and gas project that affected their rights allowed — Crown breached its duty to consult with the First Nation before it approved the project — It did so by modifying the recommendations without consulting with the First Nation and by approving those recommendations — As a remedy Crown was to engage in meaningful consultation with the First Nation.

Administrative law — Judicial review and statutory appeal — Standard of review — Correctness — Reasonableness — Remedies — Application by a First Nation for judicial review of a decision of the federal Crown that approved recommendations for an oil and gas project that affected their rights allowed — Some aspects of the decision were reviewable on a standard of reasonableness and others were reviewable on a standard of correctness — Crown breached its duty to consult with the First Nation before it approved the project — It did so by modifying the recommendations without consulting with the First Nation and by approving those recommendations — As a remedy — Crown was to engage in meaningful consultation with the First Nation.

Natural resources law — Oil and gas — Aboriginal rights — Application by a First Nation for judicial review of a decision of the federal Crown that approved recommendations for an oil and gas project that affected their rights allowed — Crown breached its duty to consult with the First Nation before it approved the project — It did so by modifying the recommendations without consulting with the First Nation and by approving those recommendations — As a remedy Crown was to engage in meaningful consultation with the First Nation.

Application by the Ka'a'Gee Tu First Nation for judicial review of a decision of the federal Crown -- Crown approved recommendations for a project that involved extensive oil and gas development in the Northwest

Territories -- Project was located in land over which the First Nation claimed Aboriginal and treaty rights -- First Nation claimed that the project negatively impacted their established treaty rights and their asserted Aboriginal rights -- Crown breached its duty to consult and to accommodate before it approved the project.

HELD: Application allowed.

Crown breached its duty to consult with the First Nation before it decided to approve the project -- Parties were to engage in a process of meaningful consultation with the view of taking into account the First Nation's concerns and, if necessary, to accommodate those concerns -- Standard of review of government decisions which were challenged on the basis of allegations that the government failed to consult and accommodate depended on the question involved -- Question of whether the regulatory process at issue and its implementation discharged the Crown's duty to consult and accommodate was to be examined on the standard of reasonableness -- Questions that concerned the existence and content of the duty were to be reviewed on the standard of reasonableness -- Duty to consult and accommodate was founded on the honour of the Crown -- It required that the Crown, acting honourably, participate in the processes of negotiation with a view to effecting reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake -- Crown failed to set aside reserve lands as it was required to do so by a treaty -- Fact that the First Nation had this land claim elevated the content of the Crown's duty to consult -- Project would have a significant and lasting effect on the land over which the First Nation asserted Aboriginal title -- It would also have a significant impact on the First Nation's broad harvesting rights to hunt, trap and fish -- First Nation's right's imposed a greater duty on the Crown to consult -- Duty in these circumstances required the First Nation to participate in the decision-making process -- First Nation had many opportunities to express their concerns in writing or at public meetings -- They were also involved in the approval process -- Problem in this case was that the Crown decided to modify the recommendations for approval of the project without consulting with the First Nation -- Some of the recommendations were of particular importance to the First Nation -- Crown unilaterally changed what had been, up to that point, a meaningful process of consultation and by so doing it breached its duty to the First Nation -- It had a duty to consult with respect to the modifications it sought to make to the recommendations for approval of the project.

Counsel

Louise Mandell, Timothy Howard/Cheryl Sharvit for the Applicant.

Donna Tomljanovic for the Respondent Attorney General.

Everett Bunnell, Jung Lee for the Respondent Paramount.

Vickie Giannacopoulos, Ronald M. Kruhlak for the Respondent Mackenzie Valley.

REASONS FOR ORDER AND ORDER

INDEX

1. Introduction

1 This application for judicial review challenges the decision to approve a recommendation of a project involving oil and gas development in the Northwest Territories. The project, known as the Extension Project, proposed by Paramount Resources Ltd. (Paramount) is located in the Cameron Hills, over which the Ka'a'Gee Tu First Nation (KTFN) claims Aboriginal rights and treaty rights. The KTFN states that the project negatively impacts their

established treaty rights and their asserted Aboriginal rights and consequently argues that the Crown had a duty to consult and accommodate before approving the project. In this application the KTFN claims that the Crown failed to meet its duty to consult and accommodate.

2. Background Facts

- *The Parties*

2 The KTFN, a community of the Deh Cho First Nations (DCFN) who descend from the South Slavey people of the Dene Nation, and its Chief Lloyd Chicot are Applicants in this proceeding. On November 1, 1990, a sub-Band of the Fort Providence Band consisting of 36 members residing at Kakisa Lake formed the Kakisa Lake Band. In 1996, the Kakisa Lake Band Council resolved to be known as the Ka'a'Gee Tu First Nation. Currently there are approximately 55 people living at the Kakisa settlement on the east side of Kakisa Lake. There are now about 62 people on the KTFN Band list.

3 Paramount, a Respondent in this application, is a Calgary based energy company that explores, develops, processes, transports and markets oil and gas. Paramount has explored and developed oil and gas reserves in the Cameron Hills area since about 1979, after it acquired exploration licenses for approximately 80,800 acres in that area.

4 The "Responsible Ministers" pursuant to section 111 of the *Mackenzie Valley Resource Management Act*, 1998 c. 25 (the Act) are the Minister of Indian and Northern Affairs Canada (INAC), the Minister of Fisheries and Oceans, the Minister of the Environment Canada and Natural Resources Government of the Northwest Territories.

- *The Geography*

5 Cameron Hills is a remote area in the Northwest Territories just north of the Alberta border, consisting of a high plateau, which is south of Tathlina Lake and a collection of surrounding lower laying hills to the southwest and west of Tathlina Lake. Paramount's development project is located on the high plateau. The plateau is inaccessible from the north, northwest and southeast sides, and is accessible only by a winter road when the ground is frozen, via the southwest side where the terrain is not as steep. The Cameron River flows in a northwesterly direction off the plateau and eventually into Tathlina Lake which is located about 10 kilometers north of the plateau. Kakisa Lake lies approximately 70 kilometers north of the Cameron Hills plateau, and Kakisa settlement is situated on the east side of that lake.

6 The Applicants claim a deep spiritual and cultural connection, as well as an economic reliance on the Cameron Hills. In the words of Chief Chicot: "our culture, economy, spirituality and our way of life are intimately connected to our land, which supports and sustains us. Our land is the home of the Ka'a'Gee Tu people who are alive today as well as the home of our ancestors and the home for all future generations of Ka'a'Gee Tu". Prior to the arrival of settlers to the area, the KTFN have harvested animals, fish, trees and water from the area, and many families continue to hunt and trap in the Cameron Hills area.

7 The Applicants claim stewardship over the Cameron Hills area. However, other Aboriginal groups, including the Deh Cho members of the Deh Gah Got'ie, the Katlodeeche, the West Point and the Trout Lake First Nations; the Alberta First Nation Dene Tha'; the Fort Providence First Nation and the NWT Métis also claim Cameron Hills as part of their traditional territory. There is no consensus amongst these Aboriginal groups regarding this stewardship.

8 There is no dispute amongst the parties in this application that the lands subject to Paramount's proposed development are also the lands over which the Applicants claim treaty rights and assert Aboriginal rights. There is no agreement, however, concerning the seriousness of the impact of Paramount's proposed project on these rights. While the Respondents agree that the Crown owed a duty to consult to the Applicants, there is no agreement on the scope or content of that duty. The Respondents take the position that the Crown discharged its duty to consult in

the circumstances.

- *The Project*

9 Oil and gas development in the Cameron Hills proceeded in phases. Exploration for oil and gas began in the early 1960s. Paramount obtained long term mineral rights in the early 1980s and by 2004 had been granted several exploration, discovery and production licenses. Paramount's development in the Cameron Hills proceeded in three phases: the Drilling Project (August 2000), the Gathering and Pipeline System Project (April 2001), and the Extension Project (August 2003). These three projects are collectively referred to as the Cameron Hills Development. The development proposed at the outset consisted of setting up a trans-border pipeline, central battery and gathering facilities. Once the construction of the Gathering and Pipeline System had been completed in August 2002, Paramount sought land use permits and water licenses to access new well sites and tie-in the new wells to the newly constructed gathering system. This aspect of the development came to be known as the Extension Project. It signalled the beginning of Paramount's production work in the Cameron Hills. The approval of the Extension Project is the decision being reviewed in this application.

10 The Extension Project is significant in scope. Over time, the Project will include: drilling, testing and tie-in of up to 50 additional wells over a period of 10 years; oil and gas production over a 15 to 20 year period; excavation of 733 km of seismic lines; construction of temporary camps servicing up to 200 workers; the withdrawal of water from lakes; and the disposal of drill waste.

11 Before turning to the issues in this application, which essentially concern the Crown's duty to consult, it is necessary to understand the context in which the impugned decision was made. To that end, I propose to review background information in respect to the applicable treaties, the Deh Cho comprehensive land claims process, the regulatory approval process under the Act and how this process was applied in the circumstances of this case.

- *Treaties 8 and 11*

12 The Deh Cho First Nations fall within Treaty 8 and 11. Treaty 8 was signed on June 21, 1899, and Treaty 11 was signed on June 27, 1921 with an adherence agreement signed on July 17, 1922. At the time of the signing of Treaty 11, the KTFN was part of the community of Deh Cho First Nations and are consequently bound by that Treaty. Both Treaties contain cession of land and surrender of rights provisions. The Treaties also guarantee to its Aboriginal signatories the right to pursue "their usual vocations of hunting, trapping and fishing throughout the tract surrendered". Both Treaties also provided for the creation of reserve lands. However, in the Northwest Territories (the NWT), no reserves have been set aside pursuant to Treaty 11, the treaty at issue in this application.

13 The Crown in right of Canada and the Deh Cho First Nations disagree on whether Treaty 11 extinguished Aboriginal title. The Crown construes Treaty 11 as an extinguishment treaty while the Deh Cho and the Applicants understand Treaty 11 to be a peace and friendship treaty, whereby Aboriginal title was not surrendered. The Applicants contend that the Deh Cho did not allow reserve lands to be set aside pursuant to the Treaties because they did not want to submit to the Crown's interpretation of the Treaties.

14 While Aboriginal title in respect to the land under the treaties is disputed there is no dispute as to the existence of the Applicants' treaty rights to hunt, fish and trap in the Cameron Hills area.

- *Deh Cho Process*

15 In 1976 and 1977, on the basis that the land provisions of the Treaties had not been implemented, Canada accepted comprehensive land claims from the Dene and Métis of the Mackenzie Valley in the NWT. Ultimately, agreements were reached and implemented in respect of the Gwich'in, the Sahtu Dene and the Métis, all under Treaty 11, following which Canada passed the Act essentially to give effect to these agreements. The Act was

amended in August 2005 to reflect the requirements of the land claims and self-government agreement between Canada and the Tlicho.

16 The relevant outstanding comprehensive land claim relating to Treaty 11 is with respect to what is known as the Deh Cho region, which includes the Cameron Hills area. This claim was accepted for negotiation by the Crown in right of Canada in 1998. The negotiation process became known as the "Deh Cho Process". The parties to the negotiations are the Deh Cho First Nations, including the Applicants, the Government of Canada and the Government of the Northwest Territories. The process was to provide a forum for respectful interaction of Aboriginal and Crown titles and jurisdictions with the view of negotiating a final agreement.

17 Although negotiations are ongoing in the Deh Cho Process, various agreements have been reached along the way, including the Interim Measures Agreement of 2003, which contemplates collaborative land use planning for the Deh Cho territory in accordance with Deh Cho principles of respect for land. This agreement establishes the Deh Cho Land Use Planning Committee which provides for the conservation, development and utilization of the land, waters and other resources. Under this agreement, Canada and the Deh Cho First Nations have identified and negotiated the withdrawal of certain lands from disposal and mineral staking. Criteria agreed upon in identifying such lands include: lands used for the harvest of food and medicines; lands that are culturally and spiritually significant; lands which are ecologically sensitive as well as watersheds. Withdrawn lands remain subject to the continuing exercise of existing rights and interests.

- *Regulatory Approval Process*

18 Oil and gas development in the Mackenzie Valley is complex involving several pieces of legislation and engaging several administrative bodies. The text of pertinent statutory provisions is attached to these reasons as Appendix A.

19 Construction and operation of a pipeline and gathering system occurs under the authority of the National Energy Board (the NEB), pursuant to the *Canada Oil and Gas Operations Act*, R.S., 1985, c. O-7, and the *Canadian Petroleum Resources Act*, R.S., 1985, c. 36 (2nd Supp.). Following the Gwich'in and Métis Comprehensive Land Claim Agreements, the *Mackenzie Valley Resource Management Act* was enacted in 1998. It provides for two regulatory boards: the Mackenzie Valley Land and Water Board (the Land and Water Board) and the Mackenzie Valley Environmental Impact Review Board (the Review Board). These Boards are established pursuant to the Act as institutions of public government within an integrated and coordinated system of land and water management in the Mackenzie Valley.

20 The Land and Water Board and the Review Board are established for the purpose of regulating all land and water uses, including deposits of waste, in the Mackenzie Valley. Bill C-6, which preceded the legislation, took five years to complete, during which time there was considerable consultation with all affected groups, including affected First Nations who were funded to review the proposed Bill.

21 Under the Act, the Land and Water Board is responsible for issuing land use permits and water licences in the unsettled land claim areas within the Mackenzie Valley. A developer must apply to the Land and Water Board for a land use permit and water licence where the proposed activity is to be carried out in the Mackenzie Valley. Section 60.1 of the Act specifically requires that the Land and Water Board gives consideration to "the well-being and way of life of the Aboriginal peoples of Canada" in making its decisions. The section provides as follows:

> **60.1** In exercising its powers, a board shall consider
>
> (*a*) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley; and
>
> (*b*) any traditional knowledge and scientific information that is made available to it.

* * *

> **60.1** Dans l'exercice de ses pouvoirs, l'office tient compte, d'une part, de l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie et, d'autre part, des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

22 Pursuant to subsection 63(2) of the Act, the Land and Water Board is required to notify affected communities and First Nations upon receipt of an application for a permit or license.

23 Section 114 of the Act sets out the purpose of Part 5 of the Act, which is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review. The Review Board is established as the main instrument in the Mackenzie Valley for the environmental assessment and the environmental impact review and is mandated with ensuring that the concerns of Aboriginal people and the general public are taken into account in the process.

24 The guiding principles of Part 5, set out in section 115 of the Act, provide that the process shall have regard to the following: the protection of the environment from significant adverse effects of proposed developments; the protection of the social, cultural and economic well-being of the residents and communities in the Mackenzie Valley; and, the importance of conservation to the well-being and way of life of the Aboriginal peoples. Section 115.1 states specifically that the Review Board shall consider any traditional knowledge that is made available to it in exercising its powers.

25 Community consultation is integral to the processes undertaken by both the Land and Water Board and the Review Board. Section 3 of the Act governs how this consultation is to be carried out:

> **3**. Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised
>
> (*a*) by providing, to the party to be consulted,
>
> (i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,
>
> (ii) a reasonable period for the party to prepare those views, and
>
> (iii) an opportunity to present those views to the party having the power or duty to consult; and
>
> (*b*) by considering, fully and impartially, any views so presented.

* * *

> **3**. Toute consultation effectuée sous le régime de la présente loi comprend l'envoi, à la partie à consulter, d'un avis suffisamment détaillé pour lui permettre de préparer ses arguments, l'octroi d'un délai suffisant pour ce faire et la possibilité de présenter à qui de droit ses vues sur la question; elle comprend enfin une étude approfondie et impartiale de ces vues.

26 Both the Land and Water Board and the Review Board provide guidelines on how consultation is to be undertaken by developers when applications are made to the respective boards.

27 The Act provides for a three stage review process: a preliminary screening, an environmental assessment and an environmental impact review. Developers must consult with affected parties before submitting an application, and the consultation should involve notice of the matter in sufficient detail, a reasonable period for the party consulted to prepare their views, and the opportunity to present those views to the developer. Once the Land and Water Board is satisfied pre-application community consultation has taken place, it performs the preliminary

screening which involves determining whether the development might have a significant adverse impact on the environment. If development might have a significant adverse impact, then the Land and Water Board will refer the proposal to the Review Board for an environmental assessment under section 125 of the Act. Otherwise the application will proceed to the permitting phase.

28 Once an environmental assessment has been triggered by a referral from the Land and Water Board, the Review Board determine the scope of the environmental assessment and request a more detailed description of the development. Next, issues are identified by the Review Board and Terms of Reference (TOR) for the environmental assessment are determined. A draft version of the TOR is circulated to all parties for comments. After the TOR is finalized, the developer proceeds to prepare the Developer's Assessment Report (DAR). The DAR is circulated to all parties and undergoes a conformity check in which it is compared to the TOR. It then undergoes a Technical Review in which participants may present their views supported by facts and evidence in a forum that is open to the public. Questions arising from the Technical Review which require formal responses are issued by way of Information Requests (IRs), which may originate from any party, and are made accessible to everyone. The Review Board may order a hearing. Following the hearing, the Review Board will consider the DAR and the evidence and determine whether the development is likely to have significant adverse environmental impacts or be a cause of significant public concern. Under section 128, the Review Board may determine that no assessment need be performed, recommend that the approval of the proposal be made subject to the imposition of measures that the Review Board considers necessary to prevent an adverse impact, recommend the proposal be rejected without an environmental assessment, or, if the Review Board decides that the development is likely to cause significant public concern, order an environmental impact review. The decision of the Review Board is subject to section 130 of the Act which essentially places the ultimate decision in the hands of the Ministers.

29 Pursuant to section 130 of the Act, after having considered the environmental assessment report, the Ministers may order an environmental impact review even if the Review Board determined such a review need not be conducted (paragraph 130(1)(*a*)). Where the Review Board recommends the approval of a proposal subject to the imposition of certain measures or the rejection of a proposal because of its adverse impact on the environment, the Ministers may:

(1) adopt the recommendation or refer it back to the Review Board for further consideration (subparagraph 130(1)(*b*)(ii)) or

(2) after consulting the Review Board, reject the recommendation and order an environmental impact review of the proposal or adopt the recommendation with modifications

This latter option is known as the "consult to modify" process. The parties that participate in the consult to modify process are the representatives of the Responsible Ministers and representatives of the Review Board. The Act imposes no obligation on the Ministers to involve others in the process including the parties to the Environmental Assessment or Environmental Impact Review.

30 The third stage, the environmental impact review, consists of a review of the environmental assessment by a panel of three or more members appointed by the Review Board. The Panel is vested with the powers of a review board and the Act sets out a comprehensive process as to how the review is to be conducted. Pursuant to subsection 135(1) of the Act, after considering the report from the Review Panel, the Ministers may adopt the recommendations contained in the report with or without modifications, reject them or refer the proposal back to the Review Board.

- *Funding*

31 The Applicants contend that throughout the Review Board process concerning the Cameron Hills development they participated in each environmental assessment process to the extent permitted by their limited resources.

32 While the Applicants complain that their full and meaningful participation in the consultation process under the

Act was compromised by lack of resources, the evidence indicates that funding was made available by the Crown to assist the Applicants.

33 In fiscal year 2001-2002, the KTFN requested and received from INAC $40,000 to assist with costs associated with an Oral Traditional Knowledge Research Project. This resulted in the production of a documentary film, which is in evidence, entitled "Straight from the Heart". The film documents Elders speaking to KTFN regarding traditional knowledge, which included gathering stories, legends and knowledge of the land. The cost of the project was $30,844 resulting in a $9,166 surplus.

34 In fiscal year 2002-2003, the KTFN requested and received from INAC the sum of $40,000 to allow participation in land and resource management activities in the area. To this end an Oil and Gas Coordinator was hired to address environmental concerns and act as spokesperson for the KTFN. The Government of the Northwest Territories (GNWT) also provided $40,000 in funding for this purpose. A $6,476 surplus resulted from the $80,000 in grants for resource management activities provided in 2002-2003.

35 In 2003-2004, the KTFN requested $40,000 and received $10,000 from INAC to continue funding the Oil and Gas Coordinator. The same funding was obtained in 2004-2005 for this purpose. Also, in 2004-2005, INAC provided $10,000 for the completion of a community protocol for the Cameron Hills Oil and Gas Project.

36 In summary, from 2001 to 2005, INAC and the GNWT provided a total of $140,000 to the KTFN for their traditional knowledge project and for the services of the Oil and Gas Councillor. This represents $30,000 less than the amount the KTFN requested. Of the total amount received, the record indicates that the KTFN had a $15,642 surplus.

- *The First Two Phases of the Cameron Hills Development*

37 Since 1992, Paramount obtained 14 production licenses (two issued in 1992, four in 2002, two in 2003 and six in 2004), and it holds 7 land use permits (LUP), 4 water licenses and 22 federal surface leases, all in the Cameron Hills. As mentioned, development proceeded in three phases: the Drilling Project, the Gathering and Pipeline Project, and the Extension Project.

38 The Drilling Project involved 9 new wells and 7 existing wells in order to evaluate oil and gas reserves. The Gathering and Pipeline Project involved the construction of an extensive trans-boundary pipeline and gathering system to connect Paramount's wells in the Cameron Hills to Alberta's pipeline system. This also included more than 60 km of pipelines, well-site facilities for 11 existing and 9 new wells, temporary construction camps to house up to 200 workers, a permanent camp for 20 workers, an airstrip and vehicle access routes to well-sites.

39 Applications for land use permit and water licences for the Drilling Project were made to the Land and Water Board on August 29, 2000. The project was referred to the Review Board for an environmental assessment on November 20, 2000, and the Review Board issued its environmental assessment report on October 16, 2001. The Review Board recommended that land use permits and water licenses be issued on condition that the mitigating measures contained in Paramount's environmental report be respected. The Drilling Project was eventually allowed to proceed on this basis.

40 The Applicants state that they were surprised to learn in 2001, when the Drilling Project was first before the Review Board, the full magnitude of Paramount's plans for the Cameron Hills area. They claim that they were not aware that the Federal Crown had previously issued Paramount extensive licenses in the Cameron Hills. The Applicants argue that the KTFN were facing a major industrial development without any meaningful input into the issuance of the original discovery and exploration licenses granted to Paramount.

41 Paramount initiated the Gathering and Pipeline System Project in April 2001 by applying to the Land and Water Board for land use permits and water licenses. The KTFN were involved in the preliminary screening and environmental review processes for the Gathering and Pipeline Project. Between June 22, 2000, and November 19,

2001, more than a dozen meetings were held and numerous phone calls were made with Paramount, discussing traditional knowledge, benefits of the project for the Kakisa community, concerns in respect to other Bands claiming stewardship over the Cameron Hills area as traditional territory, and mitigating measures for the environment. The KTFN's participation included a helicopter flyover of the proposed project and a three day excursion to the territory around Tathlina Lake for the purpose of discussing traditional knowledge.

42 The project was referred to the Review Board for environmental assessment and on December 3, 2001, the Review Board issued its report on the Environment Assessment.

43 Paramount's DAR prepared for the Gathering and Pipeline System Environmental Assessment concluded that the project would have no significant cumulative environmental impacts and was not expected to have an adverse effect on the pursuit of traditional activities. Both the KTFN and the GNWT disagreed. The Applicants questioned Paramount's ability to draw conclusions regarding impacts of its project on the Applicants in the absence of a proper Traditional Land Use Study. In its submissions to the Review Board, the GNWT argued that Paramount had underestimated the impact of the project on the boreal caribou population. In its Environmental Assessment Report for the Gathering and Pipeline Project, the Review Board found that the Applicants were "very actively involved in traditional land use ... most if not all residents participate in traditional land use in one manner or another". The Review Board accepted the GNWT data that "...Kakisa families derive 50-60%, and possibly more, of their annual food basket requirements from the land." Ultimately, the Review Board recommended that with the implementation of 21 mitigating measures, the project "... is not likely in its opinion to have any significant adverse impact on the environment or to be a cause of significant public concern".

44 Paramount expressed serious concern in respect to measures 13, 15, 16 and 17. I reproduce these recommendations in Appendix B to these reasons. These recommendations essentially provided that the project not proceed until Paramount: (1) has revised its Heritage Resource Plan to incorporate First Nation concerns; (2) has developed a compensation plan co-operatively with affected First Nations which address the effects on land and resources used beyond trapping; and (3) has provided INAC with proof that affected First Nations have approved of the Traditional Use Study and incorporated any mitigating measures arising from the Study into their development plan.

45 The KTFN wrote to the Review Board and INAC urging support for the measures and asking that the necessary steps be taken to ensure that these conditions are fulfilled by Paramount before any construction begins on the ground. The KTFN noted that the report supported their position that Paramount's Traditional Use Study had not been completed and the Benefits Plan failed to meet some of its legislated requirements regarding compensation.

46 From the beginning of the Cameron Hills development, the Applicants have expressed concerns regarding the project's actual impact on land, water and wildlife in the Cameron Hills area, affecting their rights to hunt fish and trap. From the outset, the KTFN consistently expressed two concerns: first, that a Traditional Land Use Study was required to provide baseline data against which mitigating measures could be designed and damages caused by Paramount's development could be measured, and second, that an Impacts and Benefits Agreement which would include investments in the community and employment opportunities, be negotiated with the KTFN to address Paramount's infringement of their aboriginal title and treaty rights. In the Applicant's submission, neither of these objectives has been met.

47 With respect to the Traditional Land Use Study, Paramount prepared a statutory Benefits Plan pursuant to subsection 5(2) of the *Canada Oil and Gas Operations Act*. Paramount concedes that the Benefits Plan was never intended to address specific benefits or impact on a particular community, but was a plan to address benefits to Canadians in general and people in the north in particular.

48 The Applicants' contend that Paramount's Traditional Knowledge (TK) Study did not meet the requirements of a proper Traditional Land Use Study. They argue that the study was prepared without meaningful consultation and completed without their full or proper involvement or participation. They claim the study was deficient in that it did

not consider or address how the KTFN occupied their territory, how their laws protected the land, water and wildlife, or how Paramount's operations truly impact their economy, culture, traditional way of life and well-being.

49 Paramount argues that the availability of traditional knowledge of the KTFN to further assist in fashioning mitigating measures was limited by the KTFN itself. Paramount's TK study was prepared from information gathered from KTFN Elders and Chief Chicot himself, who participated in the process. Paramount contends that after it prepared the study it made several attempts to request further input from the Applicants. None was forthcoming. Paramount's study was therefore submitted to the Review Board without the Applicants' further input.

50 The Applicants agree that only a limited amount of traditional land use information was provided to Paramount and the Review Board. They explain that they did not want some of their sensitive traditional knowledge to become public, such as the location of trap lines. They further believed that Paramount "needs to recognize the aboriginal and treaty rights of the KTFN before the remaining information is shared as part of the ABA negotiations about infringing KTFN rights".

51 The Applicants also contend that they were not involved in the process that led to the preparation of the benefits agreement by Paramount and there was no meaningful consultation about accommodating matters of real concern to their community. The Plan provided for compensating trappers "who can conclusively establish that they have sustained lower harvests directly attributable to Paramount's operations in the area." In the Applicants' view, Paramount's plan was unworkable for a number of reasons. First, precise records of their harvesting were not kept. Second, direct loss of trapping income is not the only impact warranting compensation or benefits. Third, the plan does not consider the fact that the Applicants' treaty rights and asserted Aboriginal rights are at stake.

52 The consult to modify process was initiated by the Minister of INAC with respect to the Gathering and Pipeline Project Environmental Assessment Report on December 20, 2001. The Ministers expressed concern with recommendations 13, 15, 16 and 17 in the Review Board's Environmental Assessment Report and proposed certain modifications and a deletion. The Review Board felt that other participants to the environmental assessment process should have the opportunity to make their concerns known in respect of the impugned measures to be discussed at the upcoming meeting between INAC, the NEB and the Review Board. As a result, all participants, including the KTFN, were sent a copy of the Review Board's December 24, 2001 letter to INAC wherein it expressed the view it would not object to these participants making their views known in respect to the proposed changes sought by the Ministers.

53 In a letter to the Review Board dated January 3, 2002, INAC expressed the view that the provisions of the Act provide that only the federal Minister and the Responsible Ministers are to consult with the Review Board regarding its Report.

54 The Review Board and the Ministers met in a closed meeting on January 4, 2002, despite the Applicants' protestation. After considering the evidence presented in the consult to modify process, the Review Board approved modifications to all of the impugned measures, and also deleted measure 17. On January 11, 2002, the Ministers issued a final decision that substantially modified recommendations 13, 15, 16 and deleted recommendation 17. I reproduce these modified recommendations in Appendix C to these reasons. In his decision letter, the Minister of INAC, writing on behalf of the Responsible Ministers under the Act, indicated that certain letters expressing the views of the Applicants were considered. I note, however, that certain other letters on behalf of the Applicants were not identified by the Minister.

55 The Applicants perceived the Ministers' decision to be detrimental to their interests and, in particular, protested the deletion of recommendation 17 and modifications to the other recommended measures. The Applicants reiterated their position that they had not been consulted on this issue.

- *The Extension Project*

56 In April 2003, Paramount brought an application to the Land and Water Board to amend some of the land use permits and water licenses issued with respect to its initial project. This aspect of the development came to be known as the Extension Project. It signalled the beginning of Paramount's production work in the Cameron Hills. The project initially involved approval for 5 additional wells but would eventually also include the drilling, testing and tie-in of up to 50 additional wells over a period of 10 years; the production of oil and gas for over 15-20 years; the excavation of 733 km of seismic lines; the construction of temporary camps servicing up to 200 workers; the withdrawal of water from lakes; and the disposal of drill waste.

57 After receiving the application, the Land and Water Board conducted the requisite preliminary screening of the project. During this stage it consulted with 21 organizations, including the KTFN and the DCFN. The Land and Water Board found, as a result of its preliminary screening, that it was satisfied of the project's significant adverse impacts on the environment and that there was a clear indication of public concern. As a result the Land and Water Board referred Paramount's application to the Review Board for an environmental assessment pursuant to section 125 of the Act, and recommended that the Review Board consider joint public hearings with the Land and Water Board.

58 The environmental assessment followed the process outlined earlier in these reasons. In June 2003, the draft TOR and a draft work plan were sent to the interested parties, including the Applicants. On July 21, 2003, the Applicants responded to the draft TOR and as a result of comments made by the KTFN the work plan was adjusted.

59 On August 8, 2003, the Review Board issued the final TOR, setting out the scope of the environmental review. The Review Board determined the environmental assessment should be focused on the cumulative effects of drilling, testing and tie-in of up to 50 additional wells over the next 10 years indicated in Paramount's planned development and not just the 5 well sites actually applied for.

60 On September 17, 2003, Paramount prepared and submitted its DAR to the Review Board which included an assessment of the impact of the 5 well sites applied for, plus the additional 48 under the planned development. The DAR also included a detailed summary of the public consultation process and the results of various studies that were undertaken for the purposes of the environmental assessment. The DAR also set out in an appendix a summary of the consultation and communication which had occurred between Paramount and the KTFN since May of 2000. The summary indicates extensive correspondence and a great number of meetings and exchanges between the parties.

61 The second phase of the environmental assessment included two rounds of IRs. Many of these requests originated from the KTFN and were directed to both INAC and Paramount. Responses were provided, but not always to the satisfaction of the KTFN.

62 A pre-hearing conference was held to address the hearing process and to set a draft agenda for the public hearing. A community meeting was held at Kakisa on February 17, 2004, between members of the KTFN, the Land and Water Board, the Review Board and Paramount to discuss related issues.

63 A public hearing was held jointly by the Review Board and the Land and Water Board at Hay River on February 18 and 19, 2004. The Applicants participated in the hearing and had the opportunity to question Paramount and other parties involved in the environmental assessment.

64 Following the public hearing, the parties were invited to submit technical reports to the Review Board. The KTFN did so on March 2, 2004 and on March 10, 2004 Paramount responded to the concerns raised in the technical report submitted by the KTFN. INAC, in a letter dated March 11, 2004, to the Review Board, also responded to concerns raised by the KTFN in its technical report and answered questions asked by the KTFN at the public hearing.

65 During the Environmental Assessment Process the Applicants issued two Information Requests (IR 1.2.136 and

IR 1.2.137) asking INAC to clarify how it intended to discharge its duty to consult and accommodate. INAC responded that the Land and Water Board and the Review Board are the primary vehicles for environmental assessment consultations with Aboriginal groups and the general public, producing an opportunity for participation. INAC indicated that it would wait until the environmental assessment process was complete before making any decision regarding potential infringement and Aboriginal consultation regarding the project.

66 INAC's understanding of the Crown's duty to consult in respect to an asserted Aboriginal right is expressed in its response to KTFN Information Request 1.2.31, which I reproduce below:

> With respect to Aboriginal rights: the Crown may not unjustifiably infringe on rights protected by Section 35 of the *Constitution Act, 1982*, and **the onus is on the First National to prove that a right exists and that it would be unjustifiably infringed upon.** The Crown is unable to unilaterally determine what assertions a First Nation might make or what the ultimate outcome of that assertion may be. When responding to an assertion, and without limiting in any way the breadth or scope of the matters that Canada may consider, including the ethnographic, historical, traditional, and other evidence, Canada also takes into consideration expressions by the First Nations of consent or support for the proposed activity.
>
> [Emphasis in original.]

67 The Review Board issued its Report and its reasons on the environmental assessment on June 1, 2004. In its report the Review Board recognized the KTFN dependence on the Cameron Hills Area and made certain findings in respect to the projects potential impact on the Applicants' rights. I reproduce below certain applicable excerpts from the report.

> The Cameron Hills is an important traditional use area for local First Nations. (p. vi)
>
> There is no doubt, in the Review Board's opinion, that the evidence in this proceeding provides a firm foundation for the concerns expressed about this area, particularly in relation to the possible effects of the proposed development on the traditional activities important to the [Ka'a'Gee Tu and other aboriginal communities]. (p. 14)
>
> [The] Board concludes that the environmental consequence of the combined direct and indirect footprint of the Planned Development Case is *High* (potentially significant) for boreal caribou and marten. (p. 42)
>
> The Review Board supports the communities' requests for a socio-economic agreement with Paramount. The Review Board also concurs with the GNWT on the effectiveness of socio-economic agreements to aid in assessing the impact on the social and the cultural aspects of northern development. (p. 51)

68 Notwithstanding the above observations the Review Board concluded that "...with the implementation of the measures recommended in this Report of EA and the commitments made by Paramount Resources Ltd, ... the proposed development will not likely have a significant environmental impact or be cause for significant public concern and should proceed to the regulatory phase of approvals." The Review Board in its report issued 17 mitigating measures and suggestions. These measures and suggestions are attached as Appendix D to these reasons.

69 The Report considered impacts on both the "Biophysical Environment" and "Socio-Economic and cultural environment".

70 In respect to the Biophysical Environment, issues concerning air quality, water quality, wildlife and in particular the Boral Caribou and the cumulative impact of the project were considered.

71 The Applicants raised concerns about water quality and its impact on fishing. The Review Board found that there was potential for significant adverse environmental impacts to water due to potential spills and sedimentation of waterways from erosion as a result of Paramount's operations in the Cameron Hills. The Review Board found that application of measures R-8 to R-11 and suggestion S-1 would mitigate these potential impacts.

72 In relation to hunting and trapping, the Review Board concluded that the balance of the evidence did not suggest wildlife concerns, except in the case of the Boreal Caribou. It found that the measures concerning the Boreal Caribou proposed by the GNWT, supported by the Applicants, would mitigate the likelihood for significant adverse environmental impacts on the Boreal Caribou population. Additional concerns were raised regarding wolves and wolverines. The Review Board considered the evidence and concluded that the approach taken by Paramount was reasonable, and decided that wolves and wolverines should be explicitly considered in future environmental assessments in the area. Ultimately, the Review Board provided mitigation measures R-12 to R-14 and suggestions S-3 and S-4 in relation to wildlife.

73 In respect to impacts on the socio-economic and cultural environment, the Review Board considered the difficulties surrounding an agreement on the Wildlife and Resources Harvesting Compensation Plan. It noted that the Aboriginal communities emphasized that compensation plans must address economic as well as cultural components and not merely the lost revenue from harvesting. The Review Board found that to prevent significant potential adverse socio-economic impacts on the environment relating to the viability of the Cameron Hills as a source of harvesting and preserving harvesting opportunities over the long term, further mitigation was needed. It recommended measures R-15 and R-16 and suggestions S-5 and S-6.

74 In a letter dated June 24, 2004, addressed to the Responsible Ministers, the KTFN provided its response to the Review Board's environmental report. In a subsequent letter dated July 7, 2004 to the Responsible Ministers and the Review Board, the KTFN sought to be included in the post-Report process under sections 130 and 131 of the Act. In their July 29, 2004 letter to INAC, the KTFN firmly stated their position that the "...closed door, post-Report process that shuts them out" clearly violates the principles of natural justice and fairness and by engaging in such a process the Crown is failing to discharge its duty to consult.

75 In a letter to the KTFN dated August 26, 2004, the Minister of Fisheries and Oceans stated that he and the other Responsible Ministers would be making a decision pursuant to section 130 of the Act. This also represents the position adopted by INAC, which is repeatedly expressed in the record, namely that pursuant to the Act, only the Responsible Ministers and the Review Board may participate in the consult to modify process.

- Consult to Modify Process for the Extension Project

76 Both the NEB and the Responsible Ministers had concerns about some of the mitigation measures set out by the Review Board. By letter dated August 19, 2004, addressed to the Review Board, the Minister of INAC on behalf of the Responsible Ministers initiated consultation with the Review Board, pursuant to subparagraph 130 (1)(*b*)(ii) of the Act. INAC informed the Review Board on November 17, 2004, that the Responsible Ministers wanted to address recommended measures R7, R11, R12, R13, R15, and R16 in the Environmental Assessment Report. Proposed modifications with supporting rationale were submitted for the Review Board's consideration. In particular, the modifications proposed the deletion of recommendations R15 and R16.

77 The Review Board decided to seek comments and input related to the Responsible Ministers' proposed modifications, from parties to the Environmental Assessment process, which included the Applicants.

78 In response, the KTFN wrote to the Review Board on December 17, 2004, and provided comprehensive comments on the proposed modifications to the Review Board's recommended measures. In essence the KTFN reasserted views it had expressed in its June 14, 2004 letter to the Review Board. While the KTFN stated that certain proposed changes were generally acceptable, it strongly objected to the deletion of recommendations R15 and R16 and urged the Responsible Ministers to strengthen the recommended measures. Further, the KTFN submitted that the consult to modify process was not in keeping with the Crown's duty to consult as clarified by the Supreme Court of Canada in the recent decisions of *Haida Nation v. British Columbia (Minister of Forests)*, *2004 SCC 73*, *[2004] 3 S.C.R. 511* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, *2004 SCC 74*, *[2004] 3 S.C.R. 550*. The honour of the Crown was at stake in such matters and meaningful consultation must take place prior to the approval of projects that will infringe Aboriginal title and rights. In KTFN's

submission to the Review Board, the consult to modify process and the substance of the proposed modifications represents an "an impoverished vision of the honour of the Crown".

79 Following the release of the Supreme Court decisions in *Haida* and *Taku* and before the decision on the Extension Project was made, INAC conducted a "Crown Consultation Analysis" with the view of assessing whether consultation and accommodation performed to date had been adequate in addressing the potential infringements on an Aboriginal Treaty and/or upon asserted Aboriginal rights. The analysis concluded that adequate consultation had been conducted.

80 Thereafter, the Applicants were excluded from the consult to modify process which continued for three months until March 15, 2005, when the Review Board adopted the revised recommendations.

81 The Review Board, the Ministers and the NEB met on January 24, 2005, and decided that Canada would take the position that R-15 and R-16 would be substantially revised instead of deleted. On March 15, 2005, the Review Board forwarded final revised recommendations to the Ministers. The Applicants did not participate in this meeting and were not consulted in respect to the final recommendations.

82 The KTFN wrote directly to the Minister of INAC on six different occasions between July 20, 2004 and April 27, 2005, asking INAC to respect its legal duty to consult before rendering a final decision. These letters went unanswered until May 17, 2005, at which time the Minister of INAC wrote to Chief Chicot and assured him that he would be contacted before a final decision was made. However, this commitment was not kept. INAC never met with the KTFN to discuss the proposed modifications to the recommended measures or the final decision on the Extension Project.

83 In her March 24, 2005 letter to the Minister of INAC, counsel for the KTFN addressed the modified recommendations that had been submitted to the Responsible Ministers for decision. In her submissions on behalf of the KTFN, counsel argued that the process that led to the modified recommendations failed to solicit the input of the KTFN and as a result its concerns were not heard. The KTFN submitted that the recommendations were substantially rewritten in secret and, as a consequence, fairness and justice were lost and the honour of the Crown impugned. The KTFN further submitted that the proposed modifications are in effect tantamount to a rejection of the original recommendations and as a result trigger the statutory requirement that an environmental impact review be ordered. Finally, it is argued that, in the circumstances, the Crown has not discharged its duty to consult and accommodate.

84 The Minister of INAC, on behalf of the Responsible Ministers, by letter dated July 5, 2005, adopted the recommended mitigating measures of the Review Board with modifications. In the decision letter, the Minister stated that the decision was made after undertaking consultation with the Review Board and considering the Environmental Assessment Report and letters from various stakeholders, including the following letters; from the KTFN dated June 24 and August 10, 2004; and the letters from Counsel for the KTFN dated July 20, August 31, November 19, December 13, 2004, and March 24 and April 28, 2005.

85 By letter dated July 20 and July 28, 2005, the Applicants wrote to the Land and Water Board informing it that the Ministers' decision was made in breach of the Federal Crown's duty to consult and accommodate and that there had yet to be proper consultation with the Applicants.

86 Of the 17 recommended measures, 12 were modified during the consult to modify process. Six measures falling within the jurisdiction of the NEB were modified by the NEB. The NEB contends that these modifications were made after receipt of comments from Paramount, government departments and the Applicants.

87 Six other measures falling within the jurisdictions of the Responsible Ministers were modified by the Responsible Ministers. R-15 and R-16 were not deleted as originally proposed but instead were modified. The modifications to R-15 removed the requirement for a compensation plan and enforcement to be determined through binding arbitration, and modifications to R-16 removed the requirement for a socio-economic agreement to be

developed in consultation with affected communities. I reproduce below the two recommendations as modified:

> R-15 The Review Board recommends that Paramount commit, in a letter to the Parties to the Environmental Assessment, to compensate the Ka'a'Gee Tu First Nation and other affected Aboriginal groups for any direct wildlife harvesting and resource harvesting losses suffered as a result of project activities, and to consider indirect losses on a case-by-case basis.
>
> R-16 The Review Board recommends that Paramount report annually to the Government of the Northwest Territories and the other Parties to the Environmental Assessment documenting its performance in the provision of socio-economic benefits, such as employment and training opportunities for local residents, including a detailed ongoing community consultation plan describing the steps it has taken and will take to improve its performance in those areas. The Government of the Northwest Territories will review this report with Paramount in collaboration with the other Parties to the Environmental Assessment.

88 The Applicants challenge the Responsible Ministers' decision by filing the within application for judicial review on August 9, 2005, which was amended on February 23, 2006.

3. Issues

89 The central issue in this application is whether the Crown failed to discharge its duty to consult in making the decision. The issue involves answering the following questions:

(1) What is the content of the Crown's duty to consult and accommodate?

(2) Did the Crown fulfil its duty in the circumstances of this case?

(3) What is the appropriate remedy, in the event it is determined that the Crown failed to fulfill the duty to consult?

4. Standard of Review

90 The applicable standard of review of government decisions which are challenged on the basis of allegations that the government failed to discharge its duty to consult and accommodate pending claims resolution was canvassed by the Supreme Court in *Haida*. In that case, Chief Justice McLachlin suggested that, absent a statutory process for such a review, general principles of administrative law were to be considered. Here, as in *Haida*, no specific review process has been established. At paragraphs 61 to 63 of the Court's reasons for decision, the Chief Justice wrote:

> 61. On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (CanLII), [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, supra. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

62. The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": Gladstone, *[1996] 2 S.C.R. 723*, supra, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *[1996] 1 S.C.R. 1013*, supra, at para. 110, "in ... information and consultation the concept of reasonableness must come into play... . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

63. Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

91 The above general principles find application here. A question as to the existence and content of the duty to consult and accommodate is a question of law reviewable on the standard of correctness. A question as to whether the Crown failed to discharge its duty to consult in making the decision typically involves assessing the facts of the case against the content of the duty. On findings of fact, deference to the decision maker may be warranted. The degree of deference to be afforded by a reviewing court depends on the nature of the question and the relative expertise of the decision maker in respect to the facts. Here, it is difficult to isolate the pure questions of law from the issues of fact. In essence, the central question is whether, as implemented, the mandated environmental assessment and regulatory processes are sufficient to discharge the Crown's duty to consult and accommodate in the circumstances. This is a mixed question of fact and law. Applying the reasoning set out above in *Haida*, it would therefore follow that absent error on legal issues, because of the factual component of the decision, the Ministers may be in a better position to evaluate the issue than the reviewing court, and as a result some degree of deference may be required.

92 Further, Ministerial decisions in these circumstances are polycentric in nature, in the sense that they often involve the making of choices between competing interests. These factors militate towards a certain degree of deference in favour of the decision maker.

93 Based on the above principles articulated in *Haida*, I find that the question of whether the regulatory process at issue and its implementation discharge the Crown's duty to consult and accommodate in the circumstances is to be examined on the standard of reasonableness. Questions concerning the existence and content of the duty, to the extent such questions arise in this application, are to be reviewed on the standard of correctness.

5. The Law

94 The duty to consult was first held to arise from the fiduciary duty owed by the Crown toward Aboriginal peoples (see *Guerin v. Canada*, *[1984] 2 S.C.R. 335*, *13 D.L.R. (4th) 321* and *R. v. Sparrow*, *[1990] 1 S.C.R. 1075*). In more recent cases, the Supreme Court has held that the duty to consult and accommodate is founded upon the honour of the Crown, which requires that the Crown, acting honourably, participate in processes of negotiation with the view to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake (see *Haida, supra*; *Taku, supra*, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*), *2005 SCC 69*, *[2005] S.C.J. No. 71*).

95 In *Haida,* Chief Justice McLachlin sets out the circumstances which give rise to the duty to consult. At paragraph 35 of the reasons for decision, she wrote:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect

> it: see *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C), at p. 71, *per* Dorgan J.

96 For the duty to arise there must, first, be either an existing or potentially existing Aboriginal right or title that might be adversely affected by the Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and that the contemplated conduct might adversely affect those rights. While the facts in *Haida* did not concern treaties, there is nothing in that decision which would indicate that the same principles would not find application in Treaty cases. Indeed in *Mikisew*, the Supreme Court essentially decided that the *Haida* principles apply to Treaties.

97 While knowledge of a credible but unproven claim suffices to trigger a duty to consult and, if appropriate, accommodate, the content of the duty varies with the circumstances. Precisely what is required of the government may vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. However, at a minimum, it must be consistent with the honour of the Crown. At paragraph 37 of *Haida*, the Chief Justice wrote:

> ...Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. Hence, unlike the question of whether there is or is not a duty to consult, which attracts a yes or no answer, the question of what this duty consists, is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to consult.

98 At paragraphs 43 to 45, the Chief Justice invokes the concept of a spectrum to assist in determining the kind of duties that may arise in different situations.

> Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision- making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

99 The kind of duty and level of consultation will therefore vary in different circumstances.

6. Analysis

100 Here, the Respondent, the Attorney General of Canada does not dispute that the Crown had an obligation to consult with the Applicants in advance of making the impugned decision. It is the Attorney General of Canada's contention that the consultation process engaged in was sufficient to discharge the Crown's duty to consult and accommodate in the circumstances of this case. Since it is agreed that the duty is triggered I will now turn to consider the content and scope of the duty to consult owed by the Crown to the KTFN in the circumstances. As indicated in *Haida*, the scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title and to the seriousness of the potentially adverse effects upon the right or title claimed. I will now deal with each of the above factors in turn.

101 The existence of the Applicants' broad harvesting rights to hunt, trap and fish under Treaty 11 is not in dispute. Since these rights are not asserted rights but established rights, the analysis would usually now turn to consideration of the degree to which the conduct contemplated by the Crown would adversely affect the harvesting rights of the Applicants in order to determine the content of the Crown's duty to consult. Here, however, there is also an asserted claim to Aboriginal title which may have a bearing on the Crown's duty. It is therefore necessary before turning to consider the seriousness of the potential adverse effect upon the right or title claimed to consider the strength of the Applicants' asserted claim.

102 Here, the Applicants assert that their Aboriginal rights were never surrendered by Treaty 11. Contrary to INAC's expressed understanding of the Crown's duty to consult articulated in response to IR 1.2.31, which I reproduced at paragraph 66, above, *Haida* teaches that the Aboriginal group need not prove that an asserted right exists before the obligation is triggered. While there is no dispute as to the existence of the Applicants' harvesting rights, the parties disagree about whether Treaty 11 extinguished Aboriginal title. The Applicants understand Treaty 11 to be a peace and friendship treaty and contend that the Aboriginal signatories to the Treaty did not, thereby, intend to surrender Aboriginal title. The Crown construes Treaty 11 as an extinguishment agreement which essentially provides for the cession and surrender of the described lands subject to "the right to pursue their usual vocations of hunting, trapping and fishing." The Crown acknowledges that it did not fulfill the reserve creation obligation of that Treaty. The Applicants contend that the Deh Cho did not allow reserve lands to be set aside for them pursuant to the Treaty because they did not want to submit to the Crown's interpretation of the Treaty.

103 Since 1998, the issue of Aboriginal title, "the land question" has been subject to the "Deh Cho Process" whereby the Crown in right of Canada, the Deh Cho First Nations, and the Government of the NWT have agreed to seek a negotiated resolution to the land question. The Process has led to a negotiated Framework Agreement signed in 2001. Two subsequent agreements were negotiated: an Interim Resource Development Agreement and an Interim Measures Agreement. The latter agreement established the *Deh Cho Land Use Planning Committee*, which contemplates a collaborative approach in land use planning of the Deh Cho territory, which includes the Cameron Hills area.

104 The Respondent contends that the land claims process was entered into on a without prejudice basis and should therefore have no bearing on the determination of the strength of the Applicants' asserted claim. I disagree. While not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the Applicants' asserted claim.

105 The evidence establishes that a significant component of Treaty 11, the Crown's obligation to set aside reserve lands, was not fulfilled. This is not disputed by the parties to these proceedings. The eventual legal impact of the Crown's failure to fulfill its Treaty obligation on the Applicants' asserted Aboriginal title remains to be determined on a more fulsome record at trial. For the purposes of this application, I think it appropriate to consider

these underlying circumstances to the land title issues which flow from Treaty 11 as material factors in assessing the strength of the Applicants' asserted claim.

106 The Crown's obligation under Treaty 11, to set aside reserve lands, is arguably a fundamental aspect of the Treaty. Here, the Crown failed to set aside reserve lands for the exclusive use of the Aboriginal community as required under the terms of the Treaty. The question then is what effect, if any, does the Crown's breach of its Treaty obligation have on the Applicants' asserted claim of Aboriginal title? In my view, the question, at a minimum, raises a serious issue to be debated. Further, the Crown's acceptance of the comprehensive land claims process with the view of seeking a negotiated resolution to the land question, and resulting agreements, lend further support to the Applicants' argument that their asserted claim is meritorious. The above factors must be balanced against the language in the Treaty, which in the Respondent's submission clearly supports an agreement to relinquish Aboriginal title in the lands at issue.

107 It is not for the Court, in the conduct of a judicial review application, to decide the Applicants' asserted claim. Such questions are best left to be dealt with in the context of a trial where the ethnographic, historical, and traditional evidence is comprehensively reviewed and considered. In the circumstances of this case, while it is difficult to quantify the strength of the Applicants' asserted claim, I am nevertheless satisfied that the claim raises a reasonably arguable case. This determination is based on a review of the record before me, the nature of the asserted claim, the language of Treaty 11, the Crown's breach of its Treaty obligation and the Crown's commitment to the comprehensive land claims process. In the circumstances, these factors serve to elevate the content of the Crown's duty to consult from what would otherwise have been the case had the content of the duty been based exclusively on the interpretation of the Treaty rights in play.

108 I now turn to the seriousness of the potentially adverse effect of the intended Crown conduct upon the rights or title claimed.

109 The Extension Project involves, among other work that I addressed earlier in these reasons, the drilling and testing of up to 50 additional wells over a 10 year period, reclamation work, 733 km of seismic lines and temporary camps to be set up to service the needs of up to 200 workers. Even at the preliminary screening stage, the Review Board was satisfied of the project's significant adverse impacts on the environment and that there was a clear indication of public concern. To appreciate the significance of the potential impact the Extension Project would have on the lands at issue and on the harvesting rights of the Applicants, one need only consider the report which resulted from the Environmental Assessment Process under the Act. At page 14 of its report, the Review Board found that the evidence provided a "firm foundation for the concerns expressed about this area, particularly in relation to the possible effects of the proposed development on the traditional activities important to the Ka'a'Gee Tu and other aboriginal communities".

110 Paramount contends that there is little indication that any of the Applicants' traditional activities actually occur on the plateau of the Cameron Hills, the site of Paramount's activities in this Application. While this may be so, it remains that the Plateau is within the area over which the Applicants' claim Aboriginal title. Further, as stated earlier in these reasons, the Review Board was satisfied on the evidence, that the combined direct and indirect footprint of the Planned Development would have a significant impact on the environment. Also, the Review Board did not distinguish the Plateau from other areas in the Cameron Hills. Rather, the Review Board recognized the Cameron Hills as an important traditional use area for local First Nations.

111 The Review Board issued comprehensive Environmental Reports for both the Gathering and Pipeline Project and the Extension Project. These reports, which I have reviewed in some detail earlier in these reasons, discuss the potential impacts of oil and gas development on the lands, fish and wildlife in the affected territory and recommend numerous mitigating measures viewed by the Review Board as necessary to address and minimize the impact of the projects on the environment and therefore by extension on the Applicants' Treaty and asserted rights. A review of the evidence which led the Review Board to prepare its report on the Extension Project and recommend mitigating measures, leaves little doubt as to the significance of the potential impact on the Cameron Hills area and on the Applicants' Treaty and asserted rights.

112 I am therefore satisfied that the extension project will have a significant and lasting impact on the Cameron Hills area and, consequently, on the lands over which the Applicants assert Aboriginal title. I am also satisfied that the project has the potential of having a significant impact on the Applicants' "broad harvesting rights to hunt, trap and fish".

113 The Respondent, the Attorney General of Canada, cites *Mikisew* for the proposition that the Crown's duty, in the circumstances, lies at the lower end of the Spectrum. In *Mikise*, where established Treaty rights were also at issue, Mr. Justice Binnie on behalf of the Supreme Court wrote: "...given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the *Mikisew* hunting, fishing and trapping rights are expressly subject to the 'taking up' limitation, I believe the Crown's duty lies at the lower end of the spectrum." Mr. Justice Bennie went on to describe the content of the duty at the lower end of the spectrum.

114 Here, the Applicants also assert a claim of Aboriginal title, which was not the case in *Mikisew*. Further, oil and gas development in the Cameron Hills area, from its inception, and the Extension Project in particular, involve far more than the building of a minor road. In my view the project's physical scope and potential impact on the environment and the Applicants' established rights to hunt, fish and trap, and asserted aboriginal title, as discussed above, militate in favour of the content of the Crown's duty to consult being greater than that found to be the case in *Mikisew*.

115 Even in *Mikisew*, where Mr. Justice Binnie found the Crown's duty to consult to lie at the lower end of the spectrum, he nevertheless held that the Crown was required to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. At paragraph 64 of the Court's reasons, he described the content of the duty as follows:

> ...The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users. This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights).

116 Mr. Justice Binnie agreed with the following articulation of the duty to consult by Mr. Justice Finch, J.A., (now C.J.B.C.), in *Halfway River First Nation v. British Columbia (Ministry of Forests)* *(1999), 178 D.L.R. (4th) 666* at paras. 159-160:

> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
>
> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.
>
> [Emphasis added.]

117 In my view, the contextual factors in this case, particularly the seriousness of the impact on the Aboriginal people, by the Crown's proposed course of action and the strength of the Applicants' asserted aboriginal claim, militate in favour of a more important role of consultation. The duty must in these circumstances involve formal participation in the decision-making process.

118 The consultation process provided for under the Act is comprehensive and provides the opportunity for significant consultation between the developer and the affected Aboriginal groups. As noted above, the record indicates that the Applicants have had many opportunities to express their concerns in writing or at public meetings

through submissions made by counsel on their behalf or by the Applicants directly. The record also establishes the Applicants were heavily involved in the process and that their involvement influenced the work and recommendations of the Review Board. In essence, the product of the consultation process is reflected in the Review Board's Environmental Assessment Reports. These reports, while not necessarily producing the results sought by the Applicants, do reflect the collective input of all of the parties involved, including the Applicants. The Environmental Assessment Report concerning the Extension Project clearly shows that many of the concerns of the Applicants were taken into account. While the Review Board ultimately endorsed the project, it did so only with significant mitigating measures and suggestions which were supported by the Applicants and which went a long way in addressing their main concerns.

119 Up until this point, the process, in my view, provided an opportunity for the Applicants to express their interests and concerns, and ensured that these concerns were seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. Up until this point in the process, I am satisfied that the Applicants benefited from formal participation in the decision-making process.

120 The difficulty in this case arises when the Crown elected to avail itself of the "consult to modify process" provided for in the Act. Under the Act, where a recommendation approving a project is made by the Review Board and is subject to the imposition of measures considered necessary to prevent the significant adverse impact of the project, this process provides that the Responsible Ministers may agree to adopt the recommendation with modifications after consulting the Review Board. As a result of the consult to modify process, many of the Review Board's recommendations were modified. Recommendations R-15 and R-16 were of particular importance to the Applicants, affecting the wildlife compensation plan and the socio-economic agreement. This occurred notwithstanding the firmly expressed and long held position of the Applicants that these recommendations were critical to them. The Applicants, apart from objecting to any change or deletion of these recommendations, had no opportunity for any input in respect to proposed changes to these recommendations. There may well have been other options that could have gone a long way in satisfying the Applicants' objections. In the absence of consultations we will never know. The consult to modify process, in the circumstances of this case, essentially allowed the Crown to unilaterally change the outcome of what was arguably, until that point, a meaningful process of consultation. Implementation of the mitigating measures recommended by the Review Board may not have been sufficient to address all of the concerns of the Applicants, but may have been sufficient to discharge the Crown's duty to consult and accommodate in the circumstances. This is so because the recommendations were the product of a process that provided the Aboriginals an opportunity for meaningful input whereby the Crown, through the Review Board, demonstrated an intention of substantially addressing their concerns. Clearly, this cannot be said of the consult to modify process. The new proposals which resulted from the consult to modify process were never submitted to the Applicants for their input. There was simply no consultation, let alone any meaningful consultation at this stage.

121 It is not enough to rely on the process provided for in the Act. From the outset, representatives of the Crown defended the process under the Act as sufficient to discharge its duty to consult, essentially because it was provided for in the Act. I agree with the Applicants that the Crown's duty to consult cannot be boxed in by legislation. That is not to say that engaging in a statutory process may never discharge the duty to consult. In *Taku*, at paragraph 22, the Supreme Court found that the process engaged in by the Province of British Columbia under the *Environmental Protection Act* of that jurisdiction fulfilled the requirements of the Crown's duty to consult. The circumstances here are different. The powers granted to the Ministers under the Act must be exercised in a manner that fulfills the honour of the Crown. The manner in which the consult to modify process was implemented in this case, for reasons expressed herein, failed to fulfill the Crown's duty to consult and was inconsistent with the honour of the Crown.

122 The Respondent, the Attorney General of Canada, argues that the role of the tribunal at the consult to modify stage of the process is a polycentric one, made in the exercise of judgment that takes into account appropriate economic, social, political and other considerations and as a consequence a reviewing court should show deference to the tribunal's decision. Further, the Respondent, the Attorney General of Canada, argues that the

consult to modify process is but one small part of the overall process and that prior to making a decision under section 130 of the Act, a full exploration of the proposal and its actual and long-term effects had occurred.

123 It is true that the Review Board via a long hearing process which involved the KTFN undertook the task of investigating the Applicants' concerns and eventually made recommendations to address some of those concerns. However, by engaging the "consult to modify process" which resulted in a substantial revision of certain key recommendations of the Review Board, in particular Recommendations 15 and 16, without consulting the Applicants, the Ministers essentially decided not to rely on the investigative and fact finding role of the Review Board. It is not good enough for the Ministers, at this stage, to argue that as a consequence of prior consultation they were made aware of the concerns of the Applicants. The difficulty is that the Applicants were not made aware of subsequent proposals by the Ministers that changed the recommended mitigating measures of the Review Board. They could not provide their views or build on the proposed modifications because they were not part of the process. They were simply not consulted. The Ministers, in effect, commenced their own process of determining how to respond to the Applicants' concerns and that process made no provision for any input by the Applicants. The matter is further aggravated here by the significance of the changes made to recommendations of the Review Board, which the Ministers knew were important to the Applicants. In my view, the Crown's duty to consult in respect to the new proposals which resulted from the consult to modify process was not met in the circumstances.

124 I find the Crown failed to discharge its duty to consult in the circumstances of this case. In sum, the consult to modify process allowed for fundamental changes to be made to important recommendations which were the result of an earlier consultative process involving the Applicants and other stakeholders. These changes were made without input from the Applicants. It cannot be said, therefore, that the consult to modify process was conducted with the genuine intention of allowing the KTFN's concerns to be integrated into the final decision. At this stage the Applicants were essentially shut out of the process.

7. Other Issues

125 The Applicants contend that the Ministers' meeting with Paramount on May 17, 2005, breached the rules of procedural fairness and gives rise to a reasonable apprehension of bias. It is argued that the Ministers, at that time, were aware that the parties had taken adversarial positions on whether recommendations in the Environmental Assessment Report on the Extension Project should be modified. It was therefore incumbent on the Ministers to ensure procedural fairness was met and to provide equal access to the Applicants.

126 Paramount argues that the meetings in Ottawa were never about the consult to modify process, but were generally about Paramount's development and the delay in the regulatory process. Mr. Livingstone, on behalf of the Respondents, attests that while Paramount tabled a "generic presentation about its development to Mimi Fortier" the meeting had nothing to do with the consult to modify process and that it was open to the Applicants to request a similar meeting.

127 In my view, it is strongly advisable that representatives of Ministers should not hold meetings with any party to a proceeding, absent the adverse party or parties, in cases where a decision by the said Ministers is pending. I am nevertheless satisfied that the evidence here does not allow me to conclude that the impugned meeting resulted in a breach of procedural fairness or that the particular circumstances give rise to a reasonable apprehension of bias.

128 The Applicants also argue that their full and meaningful participation in the consultation process under the Act was compromised by a lack of resources. The evidence indicates that the Crown did provide funding to allow the KTFN to participate in the consultation process. The financial resources advanced over the five year period were not every thing the Applicants had requested, but they were not insignificant. While the Applicants allege that the lack of resources impaired their ability to fully participate in the process, they fail to identify what additional resources would have been required to adequately address their needs, or to what end such additional resources would be used. Further, as mentioned, the evidence established that a surplus remained from the funds that were provided. Based on the evidence on the record, I am unable to determine whether the resources provided were

sufficient to allow a meaningful participation in the process. In any event, given my above determination that the Crown in right of Canada has not discharged its duty to consult in the circumstances, resolution of the funding issue in not necessary in order to dispose of this application.

129 Finally, the Applicants argue that Paramount's Traditional Knowledge study was prepared by Paramount without meaningful consultation and consequently fails to meet the requirements of a proper Traditional Land Use Study. On the evidence, I find that the Applicants have not justified their failure to participate in the consultative process for the purpose of developing a TK study. I am not persuaded that the concerns or excuses offered by the Applicants for not sharing TK information with Paramount or the Review Board have merit.

130 I understand the main concern to be the protection of sensitive information concerning Traditional Knowledge of the Applicants becoming public. No evidence was adduced to suggest that other options were unavailable to protect against public dissemination of such sensitive information, while still participating in the process. In my view, since the Applicants have not justified their failure to participate, the Applicants cannot now complain that their concerns were not considered in the preparation of the TK study. While it may not be necessary to decide the issue, given my earlier determinative finding that the Crown breached its duty to consult, any future consultative process will require the Applicants' sharing their traditional knowledge and full meaningful participation in the consultation process.

8. Conclusion

131 The Crown in right of Canada has failed to discharge it duty to consult and, if necessary, accommodate before making a final decision on the approval of the Extension Project. The Crown in right of Canada has a duty to consult with the KTFN in respect to modifications it proposes to bring to the recommendations of the Review Board pursuant to the Environmental Assessment Process concerning the Extension Project. Good faith consultation in the consult to modify stage of the process is required and while there is no duty to reach an agreement, such consultation may well lead to an obligation to accommodate the concerns of the KTFN. The extent and nature of accommodation, if any, can only be ascertained after meaningful consultation at this final stage of the process.

9. Remedy

132 The Applicants seek a remedy which provides for the following relief:

(a) An order declaring that the decision is invalid and unlawful, quashing and setting aside the decision. Also a declaration that the Ministers breached their constitutional and legal duty to consult with and accommodate the Ka'a'Gee Tu before issuing the Ministers' decision.

(b) An order directing the Ministers to consult through good faith negotiations with the Ka'a'Gee Tu and accommodate the Ka'a'Gee Tu's Treaty with respect to their concerns before allowing the Extension Project to proceed, with a direction that Paramount participate in the negotiations. These negotiations would be conducted with Court oversight.

(c) An order restraining the Ministers and Paramount from taking any further steps in relation to the approval of the Extension Project, pending further order of the Court.

(d) An order that the parties are at liberty to re-apply to this Court for further relief.

(e) Costs.

133 I am satisfied that the proper relief in the circumstances consists in a declaration that the Crown in right of Canada has breached its duty to consult and accommodate. As a consequence, I will order that in accord with the above reasons, the parties are to engage in a process of meaningful consultation with the view of taking into account the concerns of the KTFN and if necessary accommodate those concerns. The process is to be conducted

with the aim of reconciling outstanding differences between the parties, in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida* and *Taku*.

134 The Applicants will have their costs on the application.

ORDER

THIS COURT DECLARES that:

The Crown in right of Canada has breached its duty to consult with the Ka'a'Gee Tu First Nation before deciding to approve the Extension Project.

THIS COURT ORDERS that:

1. In accordance with the above reasons, the parties are to engage in a process of meaningful consultation with the view of taking into account the concerns of the KTFN and if necessary accommodate those concerns. The process is to be conducted with the aim of reconciliation in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida* and *Taku*.
2. The Applicants will have their costs on the application, to be borne and shared by the Respondents in proportions to be agreed upon by them.

3. Failing such agreement, each Respondent may serve and file written submissions on the issue of the apportioning of the costs between Respondents, not to exceed 10 pages each no later than August 20, 2007, with replies not to exceed 5 pages each to be served and filed no later than August 31, 2007. The Court will then determine, after consideration of the written submissions, the proportion of the costs to be borne by each Respondent.

BLANCHARD J.

* * * * *

APPRENDIX A

Mackenzie Valley Resource Management Act, 1998 C-26

Loi sur la gestion des ressources de la vallée du Mackenzie 1998, ch. 26

3. Wherever in this Act reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised

(*a*) by providing, to the party to be consulted,

(i) notice of the matter in sufficient form and detail to allow the party to prepare its views on the matter,

(ii) a reasonable period for the party to prepare those views, and

(iii) an opportunity to present those views to the party having the power or duty to consult; and

(*b*) by considering, fully and impartially, any views so presented.

60.1 In exercising its powers, a board shall consider

(*a*) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley; and

(*b*) any traditional knowledge and scientific information that is made available to it.

63. (1) A board shall provide a copy of each application made to the board for a licence or permit to the owner of any land to which the application relates and to appropriate departments and agencies of the federal and territorial governments.

Notice of applications

(2) A board shall notify affected communities and first nations of an application made to the board for a licence, permit or authorization and allow a reasonable period of time for them to make representations to the board with respect to the application.

Notice to Tlicho Government

(3) The Wekeezhii Land and Water Board shall notify the Tlicho Government of an application made to the Board for a licence, permit or authorization and allow a reasonable period of time for it to make representations to the Board with respect to the application.

Consultation with Tlicho Government

(4) The Wekeezhii Land and Water Board shall consult the Tlicho Government before issuing, amending or renewing any licence, permit or authorization for a use of Tlicho lands or waters on those lands or a deposit of waste on those lands or in those waters.

111. (1) The following definitions apply in this Part.

"designated regulatory agency"

"*organisme administratif désigné*"

"designated regulatory agency" means an agency named in the schedule, referred to in a land claim agreement as an independent regulatory agency.

"development"

"*projet de développement*"

"development" means any undertaking, or any part or extension of an undertaking, that is carried out on land or water and includes an acquisition of lands pursuant to the *Historic Sites and Monuments Act* and measures carried out by a department or agency of government leading to the establishment of a park subject to the *Canada National Parks Act* or the establishment of a park under a territorial law.

"environmental assessment"

"*évaluation environnementale*"

"environmental assessment" means an examination of a proposal for a development undertaken by the Review Board pursuant to section 126.

"environmental impact review"

"*étude d'impact*"

"environmental impact review" means an examination of a proposal for a development undertaken by a review panel established under section 132.

"follow-up program"

"*programme de suivi*"

"follow-up program" means a program for evaluating

(*a*) the soundness of an environmental assessment or environmental impact review of a proposal for a development; and

(*b*) the effectiveness of the mitigative or remedial measures imposed as conditions of approval of the proposal.

"impact on the environment"

"*répercussions environnementales*" ou

"*répercussions sur l'environnement*"

"impact on the environment" means any effect on land, water, air or any other component of the environment, as well as on wildlife harvesting, and includes any effect on the social and cultural environment or on heritage resources.

"mitigative or remedial measure"

"*mesures correctives ou d'atténuation*"

"mitigative or remedial measure" means a measure for the control, reduction or elimination of an adverse impact of a development on the environment, including a restorative measure.

"preliminary screening"

"*examen préalable*"

"preliminary screening" means an examination of a proposal for a development undertaken pursuant to section 124.

"regulatory authority"

"*autorité administrative*"

"regulatory authority" , in relation to a development, means a body or person responsible for issuing a licence, permit or other authorization required for the development under any federal or territorial law, but does not include a designated regulatory agency or a local government.

"responsible minister"

"*ministre compétent*"

"responsible minister" , in relation to a proposal for a development, means any minister of the Crown in right of Canada or of the territorial government having jurisdiction in relation to the development under federal or territorial law.

"Review Board"

"*Office*"

"Review Board" means the Mackenzie Valley Environmental Impact Review Board established by subsection 112(1)

Application

(2) This Part applies in respect of developments to be carried out wholly or partly within the Mackenzie Valley and, except for section 142, does not apply in respect of developments wholly outside the Mackenzie Valley.

1998, c. 25, s. 111; 2000, c. 32, s. 55; 2005, c. 1, s. 65.

114. The purpose of this Part is to establish a process comprising a preliminary screening, an environmental assessment and an environmental impact review in relation to proposals for developments, and

(*a*) to establish the Review Board as the main instrument in the Mackenzie Valley for the environmental assessment and environmental impact review of developments;

(*b*) to ensure that the impact on the environment of proposed developments receives careful consideration before actions are taken in connection with them; and

(*c*) to ensure that the concerns of aboriginal people and the general public are taken into account in that process.

115. The process established by this Part shall be carried out in a timely and expeditious manner and shall have regard to

(*a*) the protection of the environment from the significant adverse impacts of proposed developments;

(*b*) the protection of the social, cultural and economic well-being of residents and communities in the Mackenzie Valley; and

(*c*) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley.

1998, c. 25, s. 115; 2005, c. 1, s. 67.

Considerations

115.1 In exercising its powers, the Review Board shall consider any traditional knowledge and scientific information that is made available to it.

2005, c. 1, s. 68.

125. (1) Except as provided by subsection (2), a body that conducts a preliminary screening of a proposal shall

(*a*) determine and report to the Review Board whether, in its opinion, the development might have a significant adverse impact on the environment or might be a cause of public concern; and

(*b*) where it so determines in the affirmative, refer the proposal to the Review Board for an environmental assessment.

Within local government territory

(2) Where a proposed development is wholly within the boundaries of a local government, a body that conducts a preliminary screening of the proposal shall

(*a*) determine and report to the Review Board whether, in its opinion, the development is likely to have a significant adverse impact on air, water or renewable resources or might be a cause of public concern; and

(*b*) where it so determines in the affirmative, refer the proposal to the Review Board for an environmental assessment.

Assessment by Review Board

128. (1) On completing an environmental assessment of a proposal for a development, the Review Board shall,

(*a*) where the development is not likely in its opinion to have any significant adverse impact on the environment or to be a cause of significant public concern, determine that an environmental impact review of the proposal need not be conducted;

(*b*) where the development is likely in its opinion to have a significant adverse impact on the environment,

(i) order that an environmental impact review of the proposal be conducted, subject to paragraph 130(1)(*c*), or

(ii) recommend that the approval of the proposal be made subject to the imposition of such measures as it considers necessary to prevent the significant adverse impact;

(*c*) where the development is likely in its opinion to be a cause of significant public concern, order that an environmental impact review of the proposal be conducted, subject to paragraph 130(1)(*c*); and

(*d*) where the development is likely in its opinion to cause an adverse impact on the environment so significant that it cannot be justified, recommend that the proposal be rejected without an environmental impact review.

Report to ministers, agencies and Tlicho Government

(2) The Review Board shall make a report of an environmental assessment to

(*a*) the federal Minister, who shall distribute it to every responsible minister;

(*b*) any designated regulatory agency from which a licence, permit or other authorization is required for the carrying out of the development; and

(*c*) if the development is to be carried out wholly or partly on Tlicho lands, the Tlicho Government.

Copies of report

(3) The Review Board shall provide a copy of its report to any body that conducted a preliminary screening of the proposal, to any body that referred the proposal to the Review Board under subsection 126(2) and to the person or body that proposes to carry out the development.

Areas identified

(4) The Review Board shall identify in its report any area within or outside the Mackenzie Valley in which the development is likely, in its opinion, to have a significant adverse impact or to be a cause of significant public concern and specify the extent to which that area is affected.

1998, c. 25, s. 128; 2005, c. 1, s. 78.

130. (1) After considering the report of an environmental assessment, the federal Minister and the responsible ministers to whom the report was distributed may agree

(*a*) to order an environmental impact review of a proposal, notwithstanding a determination under paragraph 128(1)(*a*);

(*b*) where a recommendation is made under subparagraph 128(1)(*b*)(ii) or paragraph 128(1)(*d*),

(i) to adopt the recommendation or refer it back to the Review Board for further consideration, or

(ii) after consulting the Review Board, to adopt the recommendation with modifications or reject it and order an environmental impact review of the proposal; or

(*c*) irrespective of the determination in the report, to refer the proposal to the Minister of the Environment, following consultation with that Minister, for the purpose of a joint review under the *Canadian Environmental Assessment Act*, where the federal Minister and the responsible ministers determine that it is in the national interest to do so.

Consultation

(1.1) Before making an order under paragraph (1)(*a*) or a referral under paragraph (1)(*c*), the federal Minister and the responsible ministers shall consult the Tlicho Government if the development is to be carried out wholly or partly on Tlicho lands.

Areas identified

(2) Where an environmental impact review of a proposal is ordered under subsection (1), the federal Minister and responsible ministers shall identify any area within or outside the Mackenzie Valley in which the development is likely, in their opinion, to have a significant adverse impact or to be a cause of significant public concern and specify the extent to which that area is affected.

Additional information

(3) If the federal Minister and responsible ministers consider any new information that was not before the Review Board, or any matter of public concern not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(*b*).

Distribution of decision

(4) The federal Minister shall distribute a decision made under this section to the Review Board and to every first nation, local government, regulatory authority and department and agency of the federal or territorial government affected by the decision.

Effect of decision

(5) The federal Minister and responsible ministers shall carry out a decision made under this section to the extent of their respective authorities. A first nation, local government, regulatory authority or department or agency of the federal or territorial government affected by a decision made under this section shall act in conformity with the decision to the extent of their respective authorities.

1998, c. 25, s. 130; 2005, c. 1, s. 80.

Decision by designated Agency

131. (1) A designated regulatory agency shall, after considering a report of the Review Board containing a recommendation made under subparagraph 128(1)(*b*)(ii) or paragraph 128(1)(*d*),

(*a*) adopt the recommendation or refer it back to the Review Board for further consideration; or

(*b*) after consulting the Review Board, adopt the recommendation with modifications or reject it and order an environmental impact review of the proposal.

Effect of decision

(2) A designated regulatory agency shall carry out, to the extent of its authority, any recommendation that it adopts.

Areas identified

(3) Where an environmental impact review of a proposal is ordered under subsection (1), the designated regulatory agency shall identify any area within or outside the Mackenzie Valley in which the development is likely, in its opinion, to have a significant adverse impact or to be a cause of significant public concern and specify the extent to which that area is affected.

Additional information

(4) If a designated regulatory agency considers any new information that was not before the Review Board, or any matter of public concern that was not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(*b*).

Decision by Tlicho Government

131.1 (1) If a development is to be carried out wholly or partly on Tlicho lands, the Tlicho Government shall, after considering a report of the Review Board containing a recommendation made under subparagraph 128(1)(*b*)(ii),

(*a*) adopt the recommendation or refer it back to the Review Board for further consideration; or

(*b*) after consulting the Review Board, adopt the recommendation with modifications or reject it.

Effect of decision

(2) The Tlicho Government shall carry out, to the extent of its authority, any recommendation that it adopts.

Additional information

(3) If the Tlicho Government considers any new information that was not before the Review Board, or any matter of public concern that was not referred to in the Review Board's reasons, the new information or matter shall be identified in the decision made under this section and in any consultation under paragraph (1)(*b*).

2005, c. 1, s. 81.

Conservation

131.2 In making a decision under paragraph 130(1)(*b*) or subsection 131(1) or 131.1(1), the federal Minister and the responsible ministers, a designated regulatory agency or the Tlicho Government, as the case may be, shall consider the importance of the conservation of the lands, waters and wildlife of the Mackenzie Valley on which the development might have an impact.

2005, c. 1, s. 81.

Consideration of report by ministers

135. (1) After considering the report of a review panel, the federal Minister and responsible ministers to whom the report was distributed may agree to

(*a*) adopt the recommendation of the review panel or refer it back to the panel for further consideration; or

(*b*) after consulting the review panel, adopt the recommendation with modifications or reject it.

Additional information

(2) If the federal Minister and responsible ministers consider any new information that was not before the review panel, or any matter of public concern not referred to in the panel's reasons, the new information or the matter shall be identified in the decision made under this section and in their consultations under paragraph (1)(*b*).

* * *

3. Toute consultation effectuée sous le régime de la présente loi comprend l'envoi, à la partie à consulter, d'un avis suffisamment détaillé pour lui permettre de préparer ses arguments, l'octroi d'un délai suffisant pour ce faire et la possibilité de présenter à qui de droit ses vues sur la question; elle comprend enfin une étude approfondie et impartiale de ces vues.

60.1 Dans l'exercice de ses pouvoirs, l'office tient compte, d'une part, de l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie et, d'autre part, des connaissances traditionnelles et des renseignements scientifiques mis à sa disposition.

63. (1) L'office adresse une copie de toute demande de permis dont il est saisi aux ministères et organismes compétents des gouvernements fédéral et territorial, ainsi qu'au propriétaire des terres visées.

Avis à la collectivité et à la première nation

(2) Il avise la collectivité et la première nation concernées de toute demande de permis ou d'autorisation dont il est saisi et leur accorde un délai suffisant pour lui présenter des observations à cet égard.

Avis au gouvernement tlicho

(3) L'Office des terres et des eaux du Wekeezhii avise de plus le gouvernement tlicho de toute demande de permis ou d'autorisation dont il est saisi et lui accorde un délai suffisant pour lui présenter des observations à cet égard.

Consultation du gouvernement tlicho

(4) L'Office des terres et des eaux du Wekeezhii consulte le gouvernement tlicho avant de délivrer, modifier ou renouveler un permis ou une autorisation relativement à l'utilisation des terres tlichos ou des eaux qui s'y trouvent ou au dépôt de déchets dans ces lieux.

111. (1) Les définitions qui suivent s'appliquent à la présente partie.

"autorité administrative"

"*regulatory authority*"

"autorité administrative" Personne ou organisme chargé, au titre de toute règle de droit fédérale ou territoriale, de délivrer les permis ou autres autorisations relativement à un projet de développement. Sont exclus les administrations locales et les organismes administratifs désignés.

"étude d'impact"

"*environmental impact review*"

"étude d'impact" Examen d'un projet de développement effectué par une formation de l'Office en vertu de l'article 132.

"évaluation environnementale"

"*environmental assessment*"

"évaluation environnementale" Examen d'un projet de développement effectué par l'Office en vertu de l'article 126.

"examen préalable"

"*preliminary screening*"

"examen préalable" Examen d'un projet de développement effectué en vertu de l'article 124.

"mesures correctives ou d'atténuation"

"*mitigative or remedial measure*"

"mesures correctives ou d'atténuation" Mesures visant la limitation, la réduction ou l'élimination des répercussions négatives sur l'environnement. Sont notamment visées les mesures de rétablissement.

"ministre compétent"

"*responsible minister*"

"ministre compétent" Le ministre du gouvernement fédéral ou du gouvernement territorial ayant compétence, sous le régime des règles de droit fédérales ou territoriales, selon le cas, en ce qui touche le projet de développement en cause.

"Office"

"*Review Board*"

"Office" L'Office d'examen des répercussions environnementales de la vallée du Mackenzie constitué en vertu du paragraphe 112(1).

"organisme administratif désigné"

"*designated regulatory agency*"

"organisme administratif désigné" Organisme mentionné à l'annexe. "Organisme administratif autonome" dans l'accord de revendication.

"programme de suivi"

"*follow-up program*"

"programme de suivi" Programme visant à vérifier, d'une part, de bien-fondé des conclusions de l'évaluation environnementale ou de l'étude d'impact, selon le cas, et, d'autre part, l'efficacité des mesures correctives ou d'atténuation auxquelles est assujetti le projet de développement.

"projet de développement"

"*development*"

"projet de développement" Ouvrage ou activité -- ou toute partie ou extension de ceux-ci -- devant être réalisé sur la terre ou sur l'eau. Y sont assimilées la prise de mesures, par un ministère ou un organisme gouvernemental, en vue de la constitution de parcs régis par la *Loi sur les parcs nationaux du Canada* ou de la constitution de parcs en vertu d'une règle de droit territoriale ainsi que l'acquisition de terres sous le régime de la *Loi sur les lieux et monuments historiques*.

"répercussions environnementales" ou

"répercussions sur l'environnement"

"*impact on the environment*"

"répercussions environnementales" ou "répercussions sur l'environnement" Les répercussions sur le sol, l'eau et l'air et toute autre composante de l'environnement, ainsi que sur l'exploitation des ressources fauniques. Y sont assimilées les répercussions sur l'environnement social et culturel et sur les ressources patrimoniales.

Champ d'application

(2) La présente partie s'applique aux projets de développement devant être réalisés en tout ou en partie dans la vallée du Mackenzie et ne s'applique pas, à l'exception de l'article 142, aux projets devant être réalisés entièrement à l'extérieur de celle-ci.

1998, ch. 25, art. 111; 2000, ch. 32, art. 55; 2005, ch. 1, art. 65.

114. La présente partie a pour objet d'instaurer un processus comprenant un examen préalable, une évaluation environnementale et une étude d'impact relativement aux projets de développement et, ce faisant :

a) de faire de l'Office l'outil primordial, dans la vallée du Mackenzie, en ce qui concerne l'évaluation environnementale et l'étude d'impact de ces projets;

b) de veiller à ce que la prise de mesures à l'égard de tout projet de développement découle d'un jugement éclairé quant à ses répercussions environnementales;

c) de veiller à ce qu'il soit tenu compte, dans le cadre du processus, des préoccupations des autochtones et du public en général.

115. Le processus mis en place par la présente partie est suivi avec célérité, compte tenu des points suivants :

a) la protection de l'environnement contre les répercussions négatives importantes du projet de développement;

b) le maintien du bien-être social, culturel et économique des habitants et des collectivités de la vallée du Mackenzie;

c) l'importance de préserver les ressources pour le bien-être et le mode de vie des peuples autochtones du Canada visés par l'article 35 de la *Loi constitutionnelle de 1982* et qui utilisent les ressources d'une région de la vallée du Mackenzie.

1998, ch. 25, art. 115; 2005, ch. 1, art. 67.

Éléments à considérer

115.1 Dans l'exercice de ses pouvoirs, l'Office tient compte des connaissances traditionnelles et des renseignements scietifiques mis à sa disposition.

2005, ch. 1, art. 68.

125. (1) Sauf dans les cas visés au paragraphe (2), l'organe chargé de l'examen préalable indique, dans un rapport d'examen adressé à l'Office, si, à son avis, le projet est susceptible soit d'avoir des répercussions négatives importantes sur l'environnement, soit d'être la cause de préoccupations pour le public. Dans l'affirmative, il renvoie l'affaire à l'Office pour qu'il procède à une évaluation environnementale.

Territoire d'une administration locale

(2) Dans le cas d'un projet devant être entièrement réalisé dans le territoire d'une administration locale, le rapport indique si, de l'avis de l'organe chargé de l'examen préalable, le projet soit aura vraisemblablement des répercussions négatives importantes sur l'air, l'eau ou les ressources renouvelables, soit est susceptible d'être la cause de préoccupations pour le public. Dans l'affirmative, l'affaire fait l'objet du même renvoi.

Résultat de l'évaluation environnementale

128. (1) Au terme de l'évaluation environnementale, l'Office :

a) s'il conclut que le projet n'aura vraisemblablement pas de répercussions négatives importantes sur l'environnement ou ne sera vraisemblablement pas la cause de préoccupations importantes pour le public, déclare que l'étude d'impact n'est pas nécessaire;

b) s'il conclut que le projet aura vraisemblablement des répercussions négatives importantes sur l'environnement :

(i) soit ordonne, sous réserve de la décision ministérielle prise au titre de l'alinéa 130(1)*c*), la réalisation d'une étude d'impact,

(ii) soit recommande que le projet ne soit approuvé que si la prise de mesures de nature, à son avis, à éviter ces répercussions est ordonnée;

c) s'il conclut que le projet sera vraisemblablement la cause de préoccupations importantes pour le public, ordonne, sous réserve de la décision ministérielle prise au titre de l'alinéa 130(1)*c*), la réalisation d'une étude d'impact;

d) s'il conclut que le projet aura vraisemblablement des répercussions négatives si importantes sur l'environnement qu'il est injustifiable, en recommande le rejet, sans étude d'impact.

Rapport de l'Office

(2) L'Office adresse son rapport d'évaluation, d'une part, au ministre fédéral, qui est tenu de le transmettre à tout ministre compétent, et, d'autre part, à l'organisme administratif désigné chargé de délivrer les permis ou autres autorisations nécessaires à la réalisation du projet. Il adresse également le rapport au gouvernement tlicho s'il s'agit d'un projet devant être réalisé -- même en partie -- sur les terres tlichos.

Copie

(3) L'Office adresse une copie du rapport au promoteur du projet de développement, à l'organe en ayant effectué l'examen préalable et, en cas de renvoi effectué en vertu du paragraphe 126(2), au ministère, à l'organisme, à la première nation, au gouvernement tlicho ou à l'administration locale concernée.

Régions touchées

(4) Dans son rapport, l'Office précise la région -- même située à l'extérieur de la vallée du Mackenzie -- dans laquelle, à son avis, le projet aura vraisemblablement les répercussions visées à l'alinéa (1)*b*) ou sera vraisemblablement la cause des préoccupations visées à l'alinéa (1)*c*), ainsi que la mesure dans laquelle la région sera ainsi touchée.

1998, ch. 25, art. 128; 2005, ch. 1, art. 78.

130. (1) Au terme de leur étude du rapport d'évaluation environnementale, le ministre fédéral et les ministres compétents auxquels le rapport a été transmis peuvent, d'un commun accord :

a) ordonner la réalisation d'une étude d'impact malgré la déclaration contraire faite en vertu de l'alinéa 128(1)*a*);

b) accepter la recommandation faite par l'Office en vertu du sous-alinéa 128(1)*b*)(ii) ou de l'alinéa 128(1)*d*), la lui renvoyer pour réexamen ou après avoir consulté ce dernier soit l'accepter avec certaines modifications, soit la rejeter et ordonner la réalisation d'une étude d'impact;

c) dans les cas où, à leur avis, l'intérêt national l'exige et après avoir consulté le ministre de l'Environnement, saisir celui-ci de l'affaire, quelles que soient les conclusions du rapport, pour qu'un examen conjoint soit effectué sous le régime de la *Loi canadienne sur l'évaluation environnementale*.

Consultation du gouvernement tlicho

(1.1)Avant de prendre la mesure visée aux alinéas (1)*a*) ou *c*), le ministre fédéral et les ministres compétents consultent le gouvernement tlicho si le projet de développement doit être réalisé -- même en partie -- sur les terres tlichos.

Régions touchées

(2) Dans les cas où ils ordonnent la réalisation d'une étude d'impact, le ministre fédéral et les ministres compétents précisent la région -- même située à l'extérieur de la vallée du Mackenzie -- dans laquelle, à leur avis, le projet aura vraisemblablement des répercussions négatives importantes ou sera vraisemblablement la cause de préoccupations importantes pour le public, ainsi que la mesure dans laquelle la région sera ainsi touchée.

Renseignements supplémentaires

(3) Le ministre fédéral et les ministres compétents sont tenus d'indiquer, au soutien de la décision ou dans le cadre des consultations visées à l'alinéa (1)*b*), les renseignements dont il a été tenu compte et qui étaient inconnus de l'Office, ainsi que les questions d'intérêt public qui ont été étudiées et qui n'ont pas été soulevées par ce dernier.

Communication de la décision

(4) Le ministre fédéral est chargé de communiquer la décision ainsi rendue à l'Office, aux premières nations, administrations locales et autorités administratives touchées par celle-ci et aux ministères et organismes des gouvernements fédéral et territorial concernés.

Mise en oeuvre

(5) Ces premières nations, administrations locales, autorités administratives, ministères et organismes sont tenus de se conformer à la décision ministérielle dans la mesure de leur compétence. La mise en oeuvre de celle-ci incombe au ministre fédéral et aux ministres compétents.

1998, ch. 25, art. 130; 2005, ch. 1, art. 80.

Organisme administrative désigné

131. (1) Au terme de son étude du rapport d'évaluation environnementale, l'organisme administratif désigné accepte la recommandation faite par l'Office en vertu du sous-alinéa 128(1)*b*)(ii) ou de l'alinéa 128(1)*d*), la lui renvoie pour réexamen ou après avoir consulté ce dernier soit l'accepte avec certaines modifications, soit la rejette et ordonne la réalisation d'une étude d'impact.

Mise en oeuvre

(2) L'organisme administratif désigné est tenu, dans la mesure de sa compétence, de mettre en oeuvre toute recommandation qu'il accepte.

Régions touchées

(3) Dans les cas où il ordonne la réalisation d'une étude d'impact, l'organisme administratif désigné précise la région -- même située à l'extérieur de la vallée du Mackenzie -- dans laquelle, à son avis, le projet aura vraisemblablement des répercussions négatives importantes ou sera vraisemblablement la cause de préoccupations importantes pour le public, ainsi que la mesure dans laquelle la région sera ainsi touchée.

Renseignements supplémentaires

(4) L'organisme administratif désigné est tenu d'indiquer, au soutien de sa décision ou dans le cadre des consultations visées au paragraphe (1), les renseignements dont il tient compte et qui étaient inconnus de l'Office, ainsi que les questions d'intérêt public qu'il a étudiées et qui n'ont pas été soulevées par ce dernier.

Décision du gouvernement tlicho

131.1 (1) Lorsque le projet de développement doit être réalisé -- même en partie -- sur les terres tlichos, le gouvernement tlicho, au terme de son étude du rapport d'évaluation environnementale, accepte la recommandation faite par l'Office en vertu du sous-alinéa 128(1)*b*)(ii), la lui renvoie pour réexamen ou, après l'avoir consulté, soit l'accepte avec modifications, soit la rejette.

Mise en oeuvre

(2) Le gouvernement tlicho est tenu, dans la mesure de sa compétence, de mettre en oeuvre toute recommandation qu'il accepte.

Renseignements supplémentaires

(3) Il est tenu d'indiquer, au soutien de sa décision ou dans le cadre des consultations visées au paragraphe (1), les renseignements dont il tient compte et qui étaient inconnus de l'Office, ainsi que les questions d'intérêt public qu'il a étudiées et qui n'ont pas été soulevées par ce dernier.

2005, ch. 1, art. 81.

Préservation des terres, des eaux et de la faune

131.2 Pour la prise de toute décision en vertu de l'alinéa 130(1)*b*) ou des paragraphes 131(1) ou 131.1(1), le ministre fédéral et les ministres compétents, l'organisme administratif désigné ou le gouvernement tlicho, selon le cas, tiennent compte de l'importance de préserver les terres, les eaux et la faune de la vallée du Mackenzie qui peuvent être touchées par le projet de développement.

2005, ch. 1, art. 81.

Décision ministérielle

135. (1) Au terme de son étude du rapport visé au paragraphe 134(2), le ministre fédéral et les ministres compétents auxquels ce document a été transmis peuvent, d'un commun accord, parvenir à l'une des décisions suivantes :

a) ils acceptent la recommandation de la formation de l'Office ou la lui renvoient pour réexamen;

b) après avoir consulté cette dernière, ils l'acceptent avec certaines modifications ou la rejettent.

Renseignements supplémentaires

(2) Le ministre fédéral et les ministres compétents sont tenus d'indiquer, au soutien de la décision ou dans le cadre des consultations visées à l'alinéa (1)*b*), les renseignements dont il a été tenu compte et qui étaient inconnus de la formation, ainsi que les questions d'intérêt public qui ont été étudiées et qui n'ont pas été soulevées par celle-ci.

Canada Oil and Gas Operations Act/

5(2) Before authorizing any work or activity under paragraph (1)(*b*), the National Energy Board shall require the submission of a plan satisfactory to the National Energy Board for the employment of Canadians and for providing Canadian manufacturers, consultants, contractors and service companies with a full and fair

opportunity to participate on a competitive basis in the supply of goods and services used in that work or activity.

* * *

Loi sur les opérations pétrolières au Canada

5(2) Avant d'autoriser les activités prévues à l'alinéa (1)*b*), l'Office national de l'énergie exige la soumission d'un programme qu'il juge acceptable, prévoyant dans l'exécution de celles-ci l'embauche de Canadiens et offrant aux fabricants, conseillers, entrepreneurs et compagnies de services canadiens la juste possibilité de participer, compte tenu de leur compétitivité, à la fourniture des biens et services utilisés lors de ces activités.

APPENDIX B

Recommended Mitigating Measures R-13, R-15, R-16 and R-17

From the Environmental Assessment Report concerning the Gathering and Pipeline Project

The MVEIRB produced the following Recommendations with respect to the Gathering and Pipeline Project in the original Environmental Assessment Report, dated October 16, 2001:

R-13 INAC ensures that Paramount discusses its proposed compensation plan with the affected communities and the GNWT. Paramount should widen the scope of the compensation plan as required to ensure that reasonable and credible land and resource use impacts caused by the development and identified by the communities are eligible for compensation.

R-14 The MVLWB and the NEB ensure that Paramount includes mitigative measures in the TK study to address impacts identified by the TK study. The MVLWB and the NEB should obtain copies of the completed TK study from Paramount along with evidence of community approval of the study. The MVLWB and the NEB should ensure that authorization terms and conditions are amended as appropriate to address any impacts identified by the study that have not already been addressed with existing terms and conditions.

R-15 INAC and Paramount amend the Benefits Plan approved by INAC on September 25, 2001 to include the revised compensation plan developed as a result of Review Board Measure no13 or that a separate compensation plan be developed to address these concerns. Should Paramount and the communities be unable to come to an agreement on the contents of the revised compensation plan, then INAC should make the final decision and proceed with its approval of the amended Benefits Plan.

R-16 INAC ensures that the amended Benefits Plan requires Paramount to provide copies of the Annual Reports required by the Benefits Plan to the GNWT, the Review Board, the MVLWB and the local communities in addition to INAC. The scope of the Annual Reports should be expanded beyond what is currently required. The Annual Reports should detail consultations undertaken with the local communities, discuss what concerns were raised by the communities, describe how Paramount has addressed or intends to address these concerns and discuss what actions Paramount will take to enhance positive socio-economic impacts and mitigate negative socio-economic impacts.

R-17 The MVLWB, the NEB and INAC do not take any irreversible steps in relation to this development until INAC has accepted this recommendation for an amended Benefits Plan. When complete, a copy of the amended Plan should be provided to each of the potentially impacted communities and to the Review Board, the MVLWB, the NEB, INAC and the GNWT.

APPENDIX C

Modified Recommendations R-13, R-15, R-16 and R-17

Following the Consult to Modify Process in respect

To the Gathering and Pipeline Project

INAC initiated a consult to modify process to change these recommendations. The final recommendations issued January 11, 2002, significantly modified recommendations R-13 to R-16 and deleted R-17. The modified recommendations follow:

R-13 (as modified) Paramount is to discuss, develop and implement a wildlife and resource harvesting compensation plan with potentially affected First Nation communities -- Deh Gah Go'tie First Nation, Fort Providence Métis, Ka'a'Gee Tu First Nation, K'atlodeeche First Nation and West Point First Nation. The scope of the plan is to include compensation for hunting, trapping, fishing and other resource harvesting activity losses resulting from the development as agreed to by Paramount and the communities. Paramount is to commence the consultations as soon as possible, with a draft plan submitted to the communities within 60 days of EA Report acceptance by the INAC Minister and a final plan submitted to the communities within 90 days of EA Report acceptance. The plan is to apply retroactively to impacts arising from the start of construction of the gathering facilities and pipeline. If requested by Paramount or any of the communities, the GNWT and INAC are to facilitate the discussions on the plan.

R-14 (as modified) The MVLWB and/or the NEB should ensure that the affected aboriginal communities have been provided a copy of the TK study and an opportunity to comment on the study and Paramount's proposed mitigative measures. The MVLWB and/or the NEB should ensure that Paramount implements appropriate mitigative measures to address impacts throughout the life span of the development.

R-15 (as modified) Paramount and the communities are to cooperate to the fullest extent possible in developing the wildlife and resource harvesting compensation plan. If the parties are unable to come to an agreement on the contents of the plan within the 90 day period, an independent arbitrator shall be jointly appointed within 30 days by the GNWT and INAC. The arbitration process shall conclude within 30 days of the appointment of the arbitrator.

R-16 (as modified) Following review and acceptance of Paramount's Cameron Hills Annual Report, INAC will provide copies of the Report to the GNWT, the Review Board, the MVLWB and the potentially affected First Nations communities. The scope of the Annual Report should detail consultations undertaken with the local communities, discuss concerns raised by the communities, describe how Paramount has addressed or intends to address these concerns and discuss what actions Paramount will take to enhance positive socio-economic impacts.

R-17 (as modified) This measure has been deleted.

APPENDIX D

SUMMARY OF RECOMMENDATIONS AND SUGGESTIONS

Report of Environmental Assessment and Reasons for Decision

EA03-005 Paramount Resources Limited Cameron Hills Extension

Recommendations

R-1 The Review Board recommends that regulatory authorities include in their authorizations those items set out in the Developer's commitments, outlined in Appendix A, that are within their jurisdiction.

R-2 The Review Board recommends that Paramount prepare a report within 12 months and thereafter, annually, until the developments on the SDL are abandoned and restored, for distribution in plain language to the parties in this EA. This report will outline the implementation status of each commitment made during the course of this EA, as set out in Appendix A.

R-3 The Review Board recommends that prior to the issuance of any further licenses or permits Paramount install a meteorological station (at minimum must monitor wind speed, wind direction and temperature) in the Cameron Hills SDL to gather baseline data related to its development. Meteorological data will be provided annually to air quality staff of GNWT-RWED and Environment Canada along with a detailed re-modeling of Paramount's various development scenarios to ensure onsite meteorological conditions are reflected in the modeled outputs.

R-4 The Review Board recommends that Paramount install a continuous gas analysis monitoring system to track ambient air quality (at minimum 1 hour SO2 and NO2) and provide the data to the general public via website, to be updated no less than monthly if a live connection is not available. Annual reports on the status of the air quality at Cameron Hills will be provided by Paramount to all potentially affected communities and government in a plain language document throughout the life of the Paramount operations at Cameron Hills.

R-5 The Review Board recommends that Paramount install an amine fuel sweetening unit at the Central Battery (H-03) location prior to bringing any further wells online or pipe in sweet fuel from outside Cameron Hills, as per Paramount's original development plan.

R-6 The Review Board recommends that any further combustion engines being installed for line heaters and pumpjacks at the Cameron Hills operation must use the sweetened fuel or an alternate source of no sulphur fuel.

R-7 The Review Board recommends that the Government of Canada (INAC and Environment Canada) and the Government of the Northwest Territories implement recommendation 7 from the Ranger-Chevron EA by June 2005.

R-8 The Review Board recommends that Paramount modify its spill reporting procedures for the Paramount Cameron Hills developments to include notice of spill occurrences to potentially affected communities. Spills must be reported according to the NWT Spill Reporting Procedures.

R-9 The Review Board recommends that Paramount continue to monitor all work sites for erosion, and take appropriate measures in advance to avoid such problems. The Review Board recommends appropriate erosion mitigation measures be identified in advance and authorized by the NEB and INAC inspectors, and that any remediation of sites be documented and reported to regulators and the Ka'a'Gee Tu First Nation on a quarterly basis.

R-10 The Review Board recommends that Paramount, in the case of an isolated water crossing, maintain downstream water flow at pre-in-stream work levels. All in-stream work must be completed as expediently as possible to mitigate disruption of fish movements.

R-11 The Review Board recommends that the Department of Fisheries and Oceans conduct regular site visits to the Cameron Hills to inspect for determine if any impacts to fish or fish habitat. Reports of these inspections must be made publicly available via DFO and also be sent directly to the Ka'a'Gee Tu First Nation, in a plain language version.

R-12 The Review Board recommends that RWED will, within the next six months, initiate the formation of a Deh Cho Boreal Caribou Working Group (DCBCWG). The Working Group will, among other things, consider: habitat identification, range plan development, thresholds, monitoring systems, adaptive mitigation, research programs and cumulative effects models. In addition, it will coordinate its activities with similar working groups in Alberta and British Columbia.

R-13 The Review Board recommends that the MVLWB adopt an average linear disturbance target of 1.8 km per km squared as a boreal caribou disturbance threshold for the entire Cameron Hills, NT area, in order to prevent significant adverse environmental impacts on boreal caribou populations whose range includes the Paramount SDL and surrounding area. This shall be considered in all future land use applications for the area.

R-14 The Review Board recommends that paramount locate at least 50% of all proposed and planned development In the Cameron Hills SDL, as described In Paramount's Developer's Assessment Report, on

areas that are currently disturbed (as of the date of Ministerial approval of this Report of Environmental Assessment). This requirement should be included as a condition in land use permit MV2002A0046.

R-15 The Review Board recommends that Paramount and the other parties to the unfinished Cameron Hills Wildlife and Resources Harvesting Compensation Plan developed in response to measures 13 and 15 of EA01-005 complete the compensation plan. If a compensation plan cannot be completed by these parties within 90 days of the federal Minister's acceptance of this report, this matter will proceed to binding arbitration, pursuant to the NWT Arbitration Act. A letter signed by the parties, indicating agreement to the compensation plan or in the case of arbitration, the arbitrator's decision must be filed with NEB and MVLWB prior to the commencement of Paramount's operations under land use permit MV2002A0046.

R-16 The Review Board recommends that the GNWT develop a socio-economic agreement with Paramount in consultation with affected communities before operations proceed under the land use permit MV2002A0046. The socio-economic agreement is to address issues such as employment targets, educational and training opportunities for local residents and a detailed ongoing community consultation plan.

R-17 The Review Board recommends the KTFN be notified directly if any heritage resources are suspected or encountered during Paramount's activities in the Cameron Hills.

Suggestions

S-1 The Review Board suggests that a member of the K'a'Gee Tu First Nation be invited by DFO to accompany its inspectors while conducting inspections in the Cameron Hills operations area.

S-2 The Review Board suggests the agencies responsible for water resource management and protection increase their monitoring and enforcement efforts commensurate with the increase in the scope of Paramount's development in the Cameron Hills area.

S-3 The Review Board suggests that the MVLWB and NEB specify low-impact seismic lines (currently =4.5 m wide average, maximum =5 m wide, maximum line of sight =200 m) as the current standard for geophysical programs in boreal caribou habitat, as outlined in the MVEIRB 2003 draft document: Reference Bulletin - Preliminary Screening of Seismic Operations in the Mackenzie Valley.

S-4 The Review Board suggests that RWED determine the need for cooperative research to document the impacts of the Cameron Hills development on marten, wolf, and wolverine populations.

S-5 The Review Board suggests that the discussion and drafting of the community investment plan be resumed between the KTFN and Paramount, with a target date of completion and implementation of November 30, 2004.

S-6 The Review Board suggests that Paramount continue discussions with the Hay River Health and Social Services with regards to services (emergency or other) that may be utilized by the company in certain instances.

End of Document

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

Heard: March 14, 2005;

Judgment: November 24, 2005.

File No.: 30246.

[2005] 3 S.C.R. 388 | [2005] 3 R.C.S. 388 | [2005] S.C.J. No. 71 | *[2005] A.C.S. no 71* | 2005 SCC 69

Mikisew Cree First Nation, appellant; v. Sheila Copps, Minister of Canadian Heritage, and Thebacha Road Society, respondents, and Attorney General for Saskatchewan, Attorney General of Alberta, Big Island Lake Cree Nation, Lesser Slave Lake Indian Regional Council, Treaty 8 First Nations of Alberta, Treaty 8 Tribal Association, Blueberry River First Nations and Assembly of First Nations, interveners.

(70 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Indians — Treaty rights — Crown's duty to consult — Crown exercising its treaty right and "taking up" surrendered lands to build winter road to meet regional transportation needs — Proposed road reducing territory over which Mikisew Cree First Nation would be entitled to exercise its treaty rights to hunt, fish and trap — Whether Crown had duty to consult Mikisew — If so, whether Crown discharged its duty — Treaty No. 8.

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples

Appeal — Role of intervener — New argument.

[page389]

Summary:

Under Treaty 8, made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories, an area whose size dwarfs France, exceeds Manitoba,

Saskatchewan and Alberta and approaches the size of British Columbia. In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the rights to hunt, trap and fish throughout the land surrendered to the Crown except "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to track around the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Federal Court, Trial Division set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult with the Mikisew adequately and granted an interlocutory injuction against constructing the winter road. The court held that the standard public notices and open houses which were given were not sufficient and that the Mikisew were entitled to a distinct consultation process. The Federal Court of Appeal set aside the decision and found, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the treaty rather than an infringement of it. This judgment was delivered before the release of this Court's decisions in *Haida Nation* and *Taku River Tlingit First Nation*.

Held: The appeal should be allowed. The duty of consultation, which flows from the honour of the Crown, was breached.

[page390]

The government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. [para. 4]

When the Crown exercises its Treaty 8 right to "take up" land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed "taking up", it is not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown. [paras. 33-34] [para. 59]

The Crown, while it has a treaty right to "take up" surrendered lands, is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the content of the Crown's duty. Under Treaty 8, the First Nation treaty rights to hunt, fish and trap are therefore limited not only by geographical limits and specific forms of government regulation, but also by the Crown's right to take up lands under the treaty, subject to its duty to consult and, if appropriate, to accommodate the concerns of the First Nation affected. [paras. 55-56]

Here, the duty to consult is triggered. The impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. Contrary to the Crown's argument, the duty to consult was not discharged in 1899 by the pre-treaty negotiations. [paras. 54-55]

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the [page391] "taking up" limitation, the content of the Crown's duty of consultation in this case lies at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information

about the project, addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew's concerns, and attempt to minimize adverse impacts on its treaty rights. [para. 64]

The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shifted from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation. [paras. 64-67]

The Attorney General of Alberta did not overstep the proper role of an intervener when he raised before the Federal Court of Appeal a fresh argument on the central issue of whether the Minister's approval of the winter road infringed Treaty 8. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the court provided that in doing so its legal argument does not require additional facts not proven in evidence at trial, or raise an argument that is otherwise unfair to one of the parties. [para. 40]

Cases Cited

Considered: *R. v. Badger*, [1996] 1 S.C.R. 771; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; **distinguished:***R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [2005] 2. S.C.R. 220, 2005 SCC 43; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. v. Morgentaler*, [1993] 1 S.C.R. 462; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19; *Province of Ontario v. Dominion of [page392] Canada* (1895), 25 S.C.R. 434; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *R. v. Smith*, [1935] 2 W.W.R. 433.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

Natural Resources Transfer Agreement, 1930 (Alberta) (Schedule of *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26), para. 10.

Wood Buffalo National Park Game Regulations, SOR/78-830, s. 36(5).

Treaties and Proclamations

Royal Proclamation (1763), R.S.C. 1985, App. II, No. 1.

Treaty No. 8 (1899).

Authors Cited

Mair, Charles. *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*. Toronto: William Briggs, 1908.

Report of Commissioners for Treaty No. 8, in *Treaty No. 8 made June 21, 1899 and Adhesions, Reports, etc.*, reprinted from 1899 edition. Ottawa: Queen's Printer, 1966.

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Rothstein, Sexton and Sharlow JJ.A.), *[2004] 3 F.C.R. 436*, *(2004), 236 D.L.R. (4th) 648*, *317 N.R. 258*, *[2004] 2 C.N.L.R. 74*, *[2004] F.C.J. No. 277* (QL), *2004 FCA 66*, reversing a judgment of Hansen J. *(2001), 214 F.T.R. 48*, *[2002] 1 C.N.L.R. 169*, *[2001] F.C.J. No. 1877* (QL), *2001 FCT 1426*. Appeal allowed.

Counsel

Jeffrey R. W. Rath and Allisun Taylor Rana, for the appellant.

Cheryl J. Tobias and Mark R. Kindrachuk, Q.C., for the respondent Sheila Copps, Minister of Canadian Heritage.

No one appeared for the respondent the Thebacha Road Society.

P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey and Angela J. Brown, for the intervener the Attorney General of Alberta.

[page393]

James D. Jodouin and Gary L. Bainbridge, for the intervener the Big Island Lake Cree Nation.

C. Allan Donovan and Bram Rogachevsky, for the intervener the Lesser Slave Lake Indian Regional Council.

Robert C. Freedman and Dominique Nouvet, for the intervener the Treaty 8 First Nations of Alberta.

E. Jack Woodward and Jay Nelson, for the intervener the Treaty 8 Tribal Association.

Thomas R. Berger, Q.C., and Gary A. Nelson, for the intervener the Blueberry River First Nations.

Jack R. London, Q.C., and Bryan P. Schwartz, for the intervener the Assembly of First Nations.

The judgment of the Court was delivered by

BINNIE J.

1 The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of

smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

2 Treaty 8 is one of the most important of the post-Confederation treaties. Made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. Some idea of the size of this surrender is given by the fact that it dwarfs France (543,998 square kilometres), [page394] exceeds the size of Manitoba (650,087 square kilometres), Saskatchewan (651,900 square kilometres) and Alberta (661,185 square kilometres) and approaches the size of British Columbia (948,596 square kilometres). In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the following rights of hunting, trapping, and fishing:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]
>
> (*Report of Commissioners for Treaty No. 8* (1899), at p. 12)

3 In fact, for various reasons (including lack of interest on the part of First Nations), sufficient land was not set aside for reserves for the Mikisew Cree First Nation (the "Mikisew") until the 1986 Treaty Land Entitlement Agreement, 87 years after Treaty 8 was made. Less than 15 years later, the federal government approved a 118-kilometre winter road that, as originally conceived, ran through the new Mikisew First Nation Reserve at Peace Point. The government did not think it necessary to engage in consultation directly with the Mikisew before making this decision. After the Mikisew protested, the winter road alignment was changed to track the boundary of the Peace Point reserve instead of running through it, again without consultation with the Mikisew. The modified road alignment traversed the traplines of approximately 14 Mikisew families who reside in the area near the proposed road, and others who may trap in that area although they do not live there, and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose), the Mikisew say, would be adversely affected. The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem [page395] very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.

4 In this case, the relationship was not properly managed. Adequate consultation in advance of the Minister's approval did not take place. The government's approach did not advance the process of reconciliation but undermined it. The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the *Constitution Act, 1982*), was breached. The Mikisew appeal should be allowed, the Minister's approval quashed, and the matter returned to the Minister for further consultation and consideration.

I. Facts

5 About 5 percent of the territory surrendered under Treaty 8 was set aside in 1922 as Wood Buffalo National Park. The Park was created principally to protect the last remaining herds of wood bison (or buffalo) in northern Canada and covers 44,807 square kilometres of land straddling the boundary between northern Alberta and southerly parts of the Northwest Territories. It is designated a UNESCO World Heritage Site. The Park itself is larger than Switzerland.

6 At present, it contains the largest free-roaming, self-regulating bison herd in the world, the last remaining natural nesting area for the endangered whooping crane, and vast undisturbed natural boreal forests. More to the point, it has been inhabited by First Nation peoples for more than over 8,000 years, some of whom still earn a subsistence living by hunting, fishing and commercial trapping within the Park boundaries. The Park includes the traditional lands of the Mikisew. As a result of the Treaty Land Entitlement Agreement, the Peace Point Reserve was formally excluded from the Park in 1988 but of course is surrounded by it.

7 The members of the Mikisew Cree First Nation are descendants of the Crees of Fort Chipewyan who signed Treaty 8 on June 21, 1899. It is common ground that its members are entitled to the benefits of Treaty 8.

A. *The Winter Road Project*

8 The proponent of the winter road is the respondent Thebacha Road Society, whose members include the Town of Fort Smith (located in the Northwest Territories on the northeastern boundary of Wood Buffalo National Park, where the Park headquarters is located), the Fort Smith Métis Council, the Salt River First Nation, and Little Red River Cree First Nation. The advantage of the winter road for these people is that it would provide direct winter access among a number of isolated northern communities and to the Alberta highway system to the south. The trial judge accepted that the government's objective was to meet "regional transportation needs": *(2001), 214 F.T.R. 48*, *2001 FCT 1426*, at para. 115.

B. *The Consultation Process*

9 According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested [page397] stakeholders. Thus Parks Canada acting for the Minister, provided the Mikisew with the Terms of Reference for the environmental assessment on January 19, 2000. The Mikisew were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the Mikisew did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the Mikisew did not formally participate in the open houses, because "... an open house is not a forum for us to be consulted adequately".

10 Apparently, Parks Canada left the proponent Thebacha Road Society out of the information loop as well. At the end of January 2001, it advised Chief Poitras that it had just been informed that the Mikisew did not support the road. Up to that point, Thebacha had been led to believe that the Mikisew had no objection to the road's going through the reserve. Chief Poitras wrote a further letter to the Minister on January 29, 2001 and received a standard-form response letter from the Minister's office stating that the correspondence "will be given every consideration".

11 Eventually, after several more miscommunications, Parks Canada wrote Chief Poitras on April 30, 2001, stating in part: "I apologize to you and your people for the way in which the consultation process unfolded concerning the proposed winter road and any resulting negative public perception of the [Mikisew Cree First Nation]". At that point, in fact, the decision to approve the road with a modified alignment had already been taken.

12 On May 25, 2001, the Minister announced on the Parks Canada website that the Thebacha Road Society was authorized to build a winter road 10 metres wide with posted speed limits ranging from 10 to 40 kilometres per hour. The approval was said to be in accordance with "Parks Canada plans and policy" and "other federal laws and regulations". [page398] No reference was made to any obligations to the Mikisew.

13 The Minister now says the Mikisew ought not to be heard to complain about the process of consultation

because they declined to participate in the public process that took place. Consultation is a two-way street, she says. It was up to the Mikisew to take advantage of what was on offer. They failed to do so. In the Minister's view, she did her duty.

14 The proposed winter road is wide enough to allow two vehicles to pass. Pursuant to s. 36(5) of the *Wood Buffalo National Park Game Regulations*, SOR/78-830, creation of the road would trigger a 200-metre wide corridor within which the use of firearms would be prohibited. The total area of this corridor would be approximately 23 square kilometres.

15 The Mikisew objection goes beyond the direct impact of closure of the area covered by the winter road to hunting and trapping. The surrounding area would be, the trial judge found, injuriously affected. Maintaining a traditional lifestyle, which the Mikisew say is central to their culture, depends on keeping the land around the Peace Point reserve in its natural condition and this, they contend, is essential to allow them to pass their culture and skills on to the next generation of Mikisew. The detrimental impact of the road on hunting and trapping, they argue, may simply prove to be one more incentive for their young people to abandon a traditional lifestyle and turn to other modes of living in the south.

16 The Mikisew applied to the Federal Court to set aside the Minister's approval based on their view of the Crown's fiduciary duty, claiming that the Minister owes "a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road" (trial judge, at para. 26).

[page399]

17 An interlocutory injunction against construction of the winter road was issued by the Federal Court, Trial Division on August 27, 2001.

II. Relevant Enactments

18 *Constitution Act, 1982*

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

III. Judicial History

A. *Federal Court, Trial Division* ((2001), 214 F.T.R. 48, 2001 FCT 1426)

19 Hansen J. held that the lands included in Wood Buffalo National Park were not "taken up" by the Crown within the meaning of Treaty 8 because the use of the lands as a national park did not constitute a "visible use" incompatible with the existing rights to hunt and trap (*R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Sioui*, [1990] 1 S.C.R. 1025). The proposed winter road and its 200-metre "[no] firearm" corridor would adversely impact the Mikisew's treaty rights. These rights received constitutional protection in 1982, and any infringements must be justified in accordance with the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In Hansen J.'s view, the Minister's decision to approve the road infringed the Mikisew's Treaty 8 rights and could not be justified under the *Sparrow* test.

20 In particular, the trial judge held that the standard public notices and open houses which were given were not sufficient. The Mikisew were entitled to a distinct consultation process. She stated at paras. 170-71:

> The applicant complains that the mitigation measures attached to the Minister's decision were not developed in consultation with Mikisew and were not designed to minimize impacts on Mikisew's rights. I [page400] agree. Even the realignment, apparently adopted in response to Mikisew's objections, was not developed in consultation with Mikisew. The evidence does not establish that any consideration was given to whether the new route would minimize impacts on Mikisew's treaty rights. The evidence of Chief George

> Poitras highlighted an air of secrecy surrounding the realignment, a process that should have included a transparent consideration of Mikisew's concerns.
>
> Parks Canada admitted it did not consult with Mikisew about the route for the realignment, nor did it consider the impacts of the realignment on Mikisew trappers' rights.

21 Accordingly, the trial judge allowed the application for judicial review and quashed the Minister's approval.

B. *Federal Court of Appeal* ([*[2004] 3 F.C.R. 436*](), [*2004 FCA 66*]())

22 Rothstein J.A., with whom Sexton J.A. agreed, allowed the appeal and restored the Minister's approval. He did so on the basis of an argument brought forward by the Attorney General of Alberta as an intervener on the appeal. The argument was that Treaty 8 expressly contemplated the "taking up" of surrendered lands for various purposes, including roads. The winter road was more properly seen as a "taking up" pursuant to the Treaty rather than an infringement of it. As Rothstein J.A. held:

> Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35. This is to be contrasted with the case where the limitations provided by the treaty do not apply but the government nevertheless seeks to limit the treaty right. In such a case, the *Sparrow* test must be satisfied in order for the infringement to be constitutionally permissible. [para. 21]

Rothstein J.A. also held that there was no obligation on the Minister to consult with the Mikisew about the road, although to do so would be "good practice" (para. 24). (This opinion was delivered before the release of this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [page401] [*[2004] 3 S.C.R. 511*](), [*2004 SCC 73*](), and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director*), [*[2004] 3 S.C.R. 550*](), [*2004 SCC 74*]().)

23 Sharlow J.A., in dissenting reasons, agreed with the trial judge that the winter road approval was itself a *prima facie* infringement of the Treaty 8 rights and that the infringement had not been justified under the *Sparrow* test. The Crown's obligation as a fiduciary must be considered. The failure of the Minister's staff at Parks Canada to engage in meaningful consultation was fatal to the Crown's attempt at justification. She wrote:

> In this case, there is no evidence of any good faith effort on the part of the Minister to understand or address the concerns of Mikisew Cree First Nation about the possible effect of the road on the exercise of their Treaty 8 hunting and trapping rights. It is significant, in my view, that Mikisew Cree First Nation was not even told about the realignment of the road corridor to avoid the Peace Point Reserve until after it had been determined that the realignment was possible and reasonable, in terms of environmental impact, and after the road was approved. That invites the inference that the responsible Crown officials believed that as long as the winter road did not cross the Peace Point Reserve, any further objections of the Mikisew Cree First Nation could be disregarded. Far from meaningful consultation, that indicates a complete disregard for the concerns of Mikisew Cree First Nation about the breach of their Treaty 8 rights. [para. 152]

Sharlow J.A. would have dismissed the appeal.

IV. Analysis

24 The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other [page402] purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The "other purposes" would be at least as broad as the purposes listed in the recital, mentioned above, including "travel".

25 There was thus from the outset an uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:

> The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.
>
> (C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61)

As Cory J. explained in *Badger*, at para. 57, "[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings".

26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown's interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:

[page403]

> We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [p. 5]

27 Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction "and thus prevent any trouble" (Mair, at p. 61).

A. *Interpretation of the Treaty*

28 The interpretation of the treaty "must be realistic and reflect the intention[s] of both parties, not just that of the [First Nation]" (*Sioui*, at p. 1069). As a majority of the Court stated in *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 14:

> The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty ... the completeness of any written record ... and the interpretation of treaty terms once found to exist. The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles" the [First Nation] interests and those of the Crown. [Emphasis in original; citations omitted.]

See also *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43, *per* McLachlin C.J. at paras. 22-24, and *per* LeBel J. at para. 115.

29 The Minister is therefore correct to insist that the clause governing hunting, fishing and trapping cannot be isolated from the treaty as a whole, but must be read in the context of its underlying purpose, as intended by both the Crown and the First [page404] Nations peoples. Within that framework, as Cory J. pointed out in *Badger*,

> the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [para. 52]

30 In the case of Treaty 8, it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, "the same means of earning a livelihood would continue after the treaty as existed before it" (p. 5).

31 I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

32 It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River [page405] First Nation v. British Columbia (Ministry of Forests)* *(1999), 178 D.L.R. (4th) 666*, *1999 BCCA 470*. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982*" (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.

B. *The Process of Treaty Implementation*

33 Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:

> The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp [page406] dealing" (*Badger*, at para. 41). Thus in *Marshall, supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship".
>
> ...
>
> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case

will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

C. *The Mikisew Legal Submission*

35 The appellant, the Mikisew, essentially reminded the Court of what was said in *Haida Nation* and *Taku River*. This case, the Mikisew say, is stronger. In those cases, unlike here, the aboriginal interest to the lands was asserted but not yet proven. In this case, the aboriginal interests are protected by Treaty 8. They are established legal facts. As [page407] in *Haida Nation*, the trial judge found the aboriginal interest was threatened by the proposed development. If a duty to consult was found to exist in *Haida Nation* and *Taku River*, then, *a fortiori*, the Mikisew argue, it must arise here and the majority judgment of the Federal Court of Appeal was quite wrong to characterise consultation between governments and aboriginal peoples as nothing more than a "good practice" (para. 24).

D. *The Minister's Response*

36 The respondent Minister seeks to distinguish *Haida Nation* and *Taku River*. Her counsel advances three broad propositions in support of the Minister's approval of the proposed winter road.

1. In "taking up" the 23 square kilometres for the winter road, the Crown was doing no more than Treaty 8 entitled it to do. The Crown as well as First Nations have rights under Treaty 8. The exercise by the Crown of *its* Treaty right to "take up" land is not an infringement of the Treaty but the performance of it.
2. The Crown went through extensive consultations with First Nations in 1899 at the time Treaty 8 was negotiated. Whatever duty of accommodation was owed to First Nations was discharged at that time. The terms of the Treaty do not contemplate further consultations whenever a "taking up" occurs.
3. In the event further consultation was required, the process followed by the Minister through Parks Canada in this case was sufficient.

37 For the reasons that follow, I believe that each of these propositions must be rejected.

[page408]

(1) <u>In "taking up" Land for the Winter Road the Crown Was Doing No More Than It Was Entitled To Do Under the Treaty</u>

38 The majority judgment in the Federal Court of Appeal held that "[w]ith the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt" (para. 19).

39 The "Crown rights" argument was initially put forward in the Federal Court of Appeal by the Attorney General of Alberta as an intervener. The respondent Minister advised the Federal Court of Appeal that, while she did not dispute the argument, "[she] was simply not relying on it" (para. 3). As a preliminary objection, the Mikisew say that an intervener is not permitted "to widen or add to the points in issue": *R. v. Morgentaler*, *[1993] 1 S.C.R. 462*, at p.

463. Therefore it was not open to the Federal Court of Appeal (or this Court) to decide the case on this basis.

(a) *Preliminary Objection: Did the Attorney General of Alberta Overstep the Proper Role of an Intervener?*

40 This branch of the Mikisew argument is, with respect, misconceived. In their application for judicial review, the Mikisew argued that the Minister's approval of the winter road infringed Treaty 8. The infringement issue has been central to the proceedings. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal [page409] argument that it ought to have raised earlier in the proceedings but did not, as in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, where Duff J. stated, at p. 539:

> A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 51-52.

41 Even granting that the Mikisew can fairly say the Attorney General of Alberta frames the non-infringement argument differently than was done by the federal Minister at trial, the Mikisew have still not identified any prejudice. Had the argument been similarly formulated at trial, how could "further light" have been thrown on it by additional evidence? The historical record was fully explored at trial. At this point the issue is one of the rules of treaty interpretation, not evidence. It thus comes within the rule stated in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19, that "[t]he Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice" (para. 33). Here the Attorney General of Alberta took the factual record as he found it. The issue of treaty infringement has always been central to the case. Alberta's legal argument is not one that should have taken the Mikisew by surprise. In these circumstances it would be intolerable if the courts were precluded from giving effect to a correct legal analysis just because it came later rather than sooner and from an intervener rather than a party. To close our eyes to the argument would be to "risk an injustice".

[page410]

(b) *The Content of Treaty 8*

42 The "hunting, trapping and fishing clause" of Treaty 8 was extensively reviewed by this Court in *Badger*. In that case Cory J. pointed out that "even by the terms of Treaty No. 8, the Indians' right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation" (para. 37). The members of the First Nations, he continued, "would have understood that land had been 'required or taken up' when it was being put to a [visible] use which was incompatible with the exercise of the right to hunt" (para. 53).

> [T]he oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis. [para. 58]

43 While *Badger* noted the "geographic limitation" to hunting, fishing and trapping rights, it did not (as it did not need to) discuss the process by which "from time to time" land would be "taken up" and thereby excluded from the exercise of those rights. The actual holding in *Badger* was that the Alberta licensing regime sought to be imposed

on all aboriginal hunters within the Alberta portion of Treaty 8 lands infringed Treaty 8, even though the treaty right was expressly made subject to "regulations as may from time to time be made by the government". The Alberta licensing scheme denied to "holders of treaty rights as modified by the [*Natural Resources Transfer Agreement, 1930*] the very means of exercising those rights" (para. 94). It was thus an attempted exercise of regulatory power that went beyond what was reasonably within the contemplation of the parties to the treaty in 1899. (I note parenthetically that the *Natural Resources Transfer Agreement*, 1930 is not at issue in this case as the Mikisew reserve is vested in Her [page411] Majesty in Right of Canada. Paragraph 10 of the Agreement provides that after-created reserves "shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof".)

44 The Federal Court of Appeal purported to follow *Badger* in holding that the hunting, fishing and trapping rights would be infringed only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains" (para. 18). With respect, I cannot agree with this implied rejection of the Mikisew procedural rights. At this stage the winter road is no more than a contemplated change of use. The proposed use would, if carried into execution, reduce the territory over which the Mikisew would be entitled to exercise their Treaty 8 rights. Apart from everything else, there would be no hunting at all within the 200-metre road corridor. More broadly, as found by the trial judge, the road would injuriously affect the exercise of these rights in the surrounding bush. As the Parks Canada witness, Josie Weninger, acknowledged in cross-examination:

> Q: But roads, in effect, change the pattern of moose and other wildlife within the Park and that's been what Parks Canada observed in the past with regards to other roads, correct?
>
> A: It is documented that roads do impact. I would be foolish if I said they didn't.

The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts [page412] include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the "trigger" to the duty to consult identified in *Haida Nation* is satisfied.

45 The Minister seeks to extend the *dictum* of Rothstein J.A. by asserting, at para. 96 of her factum, that the test ought to be "whether, after the taking up, it still remains reasonably practicable, within the Province as a whole, for the Indians to hunt, fish and trap for food [to] the extent that they choose to do so" (emphasis added). This cannot be correct. It suggests that a prohibition on hunting at Peace Point would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometres distant across the province, equivalent to a commute between Toronto and Quebec City (809 kilometres) or Edmonton and Regina (785 kilometres). One might as plausibly invite the truffle diggers of southern France to try their luck in the Austrian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfilment of the promises of Treaty 8.

46 The Attorney General of Alberta tries a slightly different argument, at para. 49 of his factum, adding a *de minimus* element to the treaty-wide approach:

> In this case the amount of land to be taken up to construct the winter road is 23 square kilometres out of 44,807 square kilometres of Wood Buffalo National [page413] Park and out of 840,000 square kilometres encompassed by Treaty No. 8. As Rothstein J.A. found, this is not a case where a meaningful right to hunt no longer remains.

47 The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trapline. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5):

> The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band.

Badger recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

[page414]

48 What Rothstein J.A. actually said at para. 18 is as follows:

> With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. [Emphasis added.]

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

(c) *Unilateral Crown Action*

49 There is in the Minister's argument a strong advocacy of unilateral Crown action (a sort of "this is surrendered land and we can do with it what we like" approach) which not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect. It is all the more extraordinary given the Minister's acknowledgment at para. 41 of her factum that "[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians' exercise of hunting, fishing and trapping rights without consultation".

50 The Attorney General of Alberta denies that a duty of consultation can be an implied term of Treaty 8. He argues:

[page415]

> Given that a consultation obligation would mean that the Crown would be required to engage in meaningful consultations with any and all affected Indians, being nomadic individuals scattered across a vast expanse of land, every time it wished to utilize an individual plot of land or change the use of the plot, such a requirement would not be within the range of possibilities of the common intention of the parties.

The parties *did* in fact contemplate a difficult period of transition and sought to soften its impact as much as possible, and any administrative inconvenience incidental to managing the process was rejected as a defence in *Haida Nation* and *Taku River*. There is no need to repeat here what was said in those cases about the overarching objective of reconciliation rather than confrontation.

(d) *Honour of the Crown*

51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada* *(1895), 25 S.C.R. 434*, at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow, Delgamuukw v. British Columbia* *[1997] 3 S.C.R. 1010*, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

[page416]

52 It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price.

(2) Did the Extensive Consultations with First Nations Undertaken in 1899 at the Time Treaty 8 Was Negotiated Discharge the Crown's Duty of Consultation and Accommodation?

53 The Crown's second broad answer to the Mikisew claim is that whatever had to be done was done in 1899. The Minister contends:

> While the government should consider the impact on the treaty right, there is no duty to accommodate in this context. The treaty itself constitutes the accommodation of the aboriginal interest; taking up lands, as defined above, leaves intact the essential ability of the Indians to continue to hunt, fish and trap. As long as that promise is honoured, the treaty is not breached and no separate duty to accommodate arises. [Emphasis added.]

54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

55 The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal [page417] with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns

(*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

56 In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. Viewed in light of the facts of this case, we should qualify *Badger*'s identification of two inherent limitations on Indian hunting, fishing and trapping rights under Treaty 8 (geographical limits and specific forms of government regulation) by a third, namely the Crown's right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. Such a third qualification (not at issue in *Badger*) is fully justified by the history of the negotiations leading to Treaty 8, as well as by the honour of the Crown as previously discussed.

57 As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in [page418] violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

58 *Sparrow* holds not only that rights protected by s. 35 of the *Constitution Act, 1982* are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances. The Mikisew rights under Treaty 8 are protected by s. 35. The Crown does not seek to justify in *Sparrow*-terms shortcomings in its consultation in this case. The question that remains, therefore, is whether what the Crown did here complied with its obligation to consult honourably with the Mikisew First Nation.

(3) Was the Process Followed by the Minister Through Parks Canada in this Case Sufficient?

59 Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.

60 I should state at the outset that the winter road proposed by the Minister was a permissible purpose for "taking up" lands under Treaty 8. It is obvious that the listed purposes of "settlement, mining, lumbering" and "trading" all require suitable transportation. The treaty does not spell out permissible "other purposes" but the term should not be read restrictively: *R. v. Smith*, *[1935] 2 W.W.R. 433*, [page419] (Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to "travel".

61 The question is whether the Minister and her staff pursued the permitted purpose of regional transportation needs in accordance with the Crown's duty to consult. The answer turns on the particulars of that duty shaped by the circumstances here. In *Delgamuukw*, the Court considered the duty to consult and accommodate in the context of an infringement of aboriginal title (at para. 168):

> In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal

> peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. [Emphasis added.]

62 In *Haida Nation*, the Court pursued the kinds of duties that may arise in pre-proof claim situations, and McLachlin C.J. used the concept of a spectrum to frame her analysis (at paras. 43-45):

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice... .
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high [page420] significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case... .
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. ... [Emphasis added.]

63 The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the [page421] overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

[page422]

65 It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.

66 Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections. We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

67 The trial judge's findings of fact make it clear that the Crown failed to demonstrate an "'intention of substantially addressing [Aboriginal] concerns' ... through a meaningful process of consultation" (*Haida Nation*, at para. 42). On the contrary, the trial judge held that

> [i]n the present case, at the very least, this [duty to consult] would have entailed a response to Mikisew's October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting could not have been conducted with the genuine intention of allowing Mikisew's concerns to be integrated with the proposal. [para. 154]

The trial judge also wrote:

> ... it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a [page423] First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

68 I agree, as did Sharlow J.A., dissenting in the Federal Court of Appeal. She declared that the mitigation measures were adopted through a process that was "fundamentally flawed" (para. 153).

69 In the result I would allow the appeal, quash the Minister's approval order, and remit the winter road project to the Minister to be dealt with in accordance with these reasons.

70 Costs are sought by the Mikisew on a solicitor and client basis but there are no exceptional circumstances to justify such an award. The appeal is therefore allowed and the decision of the Court of Appeal is set aside, all with costs against the respondent Minister in this Court and in the Federal Court of Appeal on a party and party basis. The costs in the Trial Division remain as ordered by the trial judge.

Solicitors:

Solicitors for the appellant: Rath & Co., Priddis, Alberta.

Solicitor for the respondent Sheila Copps, Minister of Canadian Heritage: Attorney General of Canada, Edmonton.

Solicitors for the respondent the Thebacha Road Society: Ackroyd Piasta Roth & Day, Edmonton.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Big Island Lake Cree Nation: Woloshyn & Co., Saskatoon.

[page424]

Solicitors for the intervener the Lesser Slave Lake Indian Regional Council: Donovan & Co., Vancouver.

Solicitors for the intervener the Treaty 8 First Nations of Alberta: Cook Roberts, Victoria.

Solicitors for the intervener the Treaty 8 Tribal Association: Woodward & Co., Victoria.

Solicitors for the intervener the Blueberry River First Nations: Thomas R. Berger, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

End of Document

Editor's Note: Erratum released on August 25, 2014. Original judgment has been corrected with text of erratum appended.

Date: 20140708
Docket: CI 11-01-70566
(Winnipeg Centre)
Indexed as: Pimicikamak et al v. Her Majesty The Queen in Right of Manitoba et al
Cited as: 2014 MBQB 143

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
PIMICIKAMAK AND THE CROSS LAKE BAND OF INDIANS, applicants, - and - HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA AND THE MANITOBA HYDRO-ELECTRIC BOARD, respondents.	N. Kate Kempton and Stephanie Kearns for the applicants Gordon E. Hannon and Sarah Bahir for Her Majesty The Queen in Right of Manitoba Robert J. Adkins and and Maria L. Grande for Manitoba Hydro-Electric Board Jacqueline G. Collins for Intervenor, Incorporated Community of Crosslake Judgment Delivered: July 8, 2014

JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] This preliminary motion - brought prior to a still to be scheduled judicial review - requires the court to address the following challenging but important question: to what extent, if any, should the "record" on this application for judicial review involving Crown-Aboriginal consultation, be supplemented (and changed) with additional or "extrinsic" evidence not otherwise before the original decision maker(s)?

[2] Insofar as this evidentiary motion is brought prior to and separately from the actual judicial review hearing on the merits (where in Manitoba, such evidentiary issues are normally determined), this motion and its preliminary determination represent a somewhat exceptional manner of proceeding. However, given the somewhat more complicated nature of the motion and the evidence in question and in order to facilitate greater clarity and focus for the purposes of the parties' preparation and eventual argument at the judicial review, the court in the present case (in the context of requested case management) has permitted the parties to bring this preliminary motion prior to the judicial review hearing. See ***Sowemimo v. College of Physicians and Surgeons of Manitoba***, 2013 MBQB 42, 287 Man.R. (2d) 270. In this case, an early clarification of the relevant and permissible record for the judicial review will also assist in avoiding the unjustified filing of extensive and responsive affidavits and complex and perhaps collateral cross-examinations which will give rise to prejudicial cost and delay for all parties.

[3] While it is acknowledged that preliminary motions such as this one in relation to applications for judicial review are generally discouraged, given that Pimicikamak and the Cross Lake Band of Indians (hereinafter "the applicants") challenge the adequacy of the efforts to satisfy the duty to consult (by attempting to file evidence in the form of 11 additional affidavits not initially before the decision maker(s)), it was my view that the fair and expeditious determination of the issues on the eventual judicial review, require an earlier clarification of what is the valid record on which the review is to be conducted.

[4] On this motion, the respondents, Her Majesty The Queen in Right of Manitoba (hereinafter "Manitoba") and Manitoba Hydro-Electric Board (hereinafter "Hydro"), seek an order striking out in their entirety, the affidavits of:

- Alan Paupanekis (sworn January 22, 2013);
- Chief Garrison Settee (sworn January 15, 2013);
- Daniel Ross (sworn January 15, 2013);
- David Witty (sworn November 21, 2012);
- James Thomas (sworn January 8, 2013);
- Mervin Spence Garrick (sworn January 15, 2013);
- Roland Robinson (sworn January 15, 2013);
- Thomas Monias (sworn September 17, 2012);
- Darrell Settee (sworn January 18, 2011);
- Gideon McKay (sworn July 18, 2011);

- Darwin Paupanakis sworn March 19, 2013.

[5] In the alternative to striking out the affidavits in their entirety, the respondents identify portions of them which need be struck as they are, according to the respondents, improper, objectionable and irrelevant.

[6] Amongst the other relief sought by the respondents on this motion, they also seek an order striking out certain portions of the re-amended notice of application. Specifically, the respondents seek to strike paras. 1, 2, 3, 4 and 5 under the heading "Overview", as they contain argument and fail to comply with the Court of Queen's Bench Rules. In addition, the respondents seek to strike paras. 20-25, 31, 41-44, 46(1) and the last sentence in para. 28 of that same document. The respondents submit that those paragraphs are improper, objectionable and irrelevant to the issue on the judicial review.

[7] The 11 impugned affidavits identified above in para. 4 are filed in the context of the judicial review of Manitoba's decision to enter into the Cross Lake Community Settlement Agreement (hereinafter "the Agreement") with the Incorporated Community of Cross Lake. Prior to entering into the Agreement, Manitoba contends that it consulted the applicants. The applicants take issue with the adequacy of that consultation. The main issue on the judicial review will be whether Manitoba fulfilled its duty of consultation. The applicants submit that Hydro also owed them in law, a duty of consultation – a duty which they say Hydro did not satisfy.

[8] Absent any formal delegation (not present in this case), Hydro is not in fact or in agency the government and it is not the Crown. The applicants' position to be argued on the eventual judicial review concerning the existence of Hydro's duty to consult, is essentially a legal one. In other words, it is a question of law. Accordingly, it would not seem to require evidence *per se*. The 11 specific affidavits identified above do not in any event provide factual support for the applicants' position respecting Hydro's duty to consult. So to the extent that extrinsic affidavits may be relevant to the issue of a duty to consult, the affidavits in question are not obviously of assistance in establishing a duty to consult that would attach to Hydro. While the nature, factual contents and focus of the impugned affidavits do not pre-empt the applicants from making the legal argument they wish to make (respecting Hydro's duty) at the eventual judicial review hearing, that argument in relation to Hydro (at this stage) does not provide the applicants (given the absence of support from the affidavits) an additional or persuasive justification for the admission of that extrinsic evidence on this motion. The applicants appear to concede this point at paras. 79 and 80 of their brief. Accordingly, as will be seen, I will <u>not</u> focus on the applicants' position respecting Hydro's alleged duty to consult as a potential justification for the admission of the 11 affidavits.

II. <u>ISSUE</u>

[9] Based upon the governing law and the respective positions of the parties, the principal issue on this motion reduces to the following question:

- Are the affidavits filed by the applicants relevant and otherwise admissible in a judicial review as to whether the respondent (Manitoba) fulfilled its duty to consult the applicants in relation to Manitoba's decision to enter into the Agreement with the Incorporated Community of Cross Lake?

III. THE EXISTING RECORD OF CONSULTATION

[10] In addition to the various affidavits filed, the evidentiary foundation on this motion includes what Manitoba has filed as a complete record of the consultation (hereinafter "the consultation record") as maintained by the Aboriginal Consultation Unit of Manitoba Aboriginal Northern Affairs.

[11] Also part of the evidentiary foundation on this motion (see the affidavit of Dave Hicks, Exhibits H and J) is the Agreement and the report on the consultation that Manitoba considered prior to entering into the Agreement.

[12] Finally, I note that the evidentiary foundation, amongst other materials, also consists of the Northern Flood Agreement attached as Exhibit A to the affidavit of Dave Hicks.

IV. BACKGROUND AND CONTEXT

[13] In 1977, Manitoba, Hydro, the Northern Flood Committee Inc. (representing five Indian Bands including the Cross Lake First Nation) and Her Majesty The Queen in Right of Canada entered into the Northern Flood Agreement (hereinafter the "NFA").

[14] The Northern Flood Committee Inc. is described in the NFA as having been incorporated by the Indian Bands of Nelson House, Norway House, Cross Lake, Split Lake, and York Factory (hereinafter "the First Nations"), being residents of Reserves which would be adversely affected by the Churchill River Diversion and Lake Winnipeg Regulation Project (hereinafter "the Project"). Hydro, in cooperation with both the Federal and Provincial Governments, developed the Project in order to facilitate the development of hydroelectric power in Manitoba. The Project was built during the mid-1970s and continues to be operated for the generation of hydroelectric power pursuant to the statutory responsibility of Hydro. The Project is defined by the NFA as:

> The Lake Winnipeg Regulation and Churchill River Diversion Projects as described in the Summary Report of the Lake Winnipeg, Churchill and Nelson Rivers Study Board (April 1975) (Nelson River Development) as more particularly shown on pages 18 and 19 of the Summary Report. A schematic map prepared by Hydro is attached hereto as Schedule 'A' showing the addition of Early Morning and Kepuche generating stations on the Burntwood River at static inundation levels of 810' and 710' A.S.L. respectively. The permitted static inundation levels are as determined by Article 3.9.
>
> [Affidavit of Hicks, Exhibit A – the NFA]

[15] In 1992, the Cross Lake Community Council and Norway House Community Council filed two statements of claim in the Court of Queen's Bench. Manitoba and Hydro were named defendants in both actions. The Attorney General of Canada was named a defendant in only one of the actions. In 1993, statements of defence were filed by all defendants.

[16] In or about March 1998, the Cross Lake Community Council, the Norway House Community Council, Manitoba and Hydro initiated discussions aimed at

resolution of the two actions. The parties signed a memorandum of understanding dated February 14, 2000. Subsequently, between 2000 and 2003, negotiations took place and resulted in an agreement in principle dated April 3, 2003 which set out the principles and understandings to guide and govern the negotiation of a final settlement agreement.

[17] On April 18, 2007, Manitoba, Hydro and Cross Lake Community Council signed a letter of understanding regarding the negotiated terms of settlement. Throughout the negotiations with Cross Lake Community Council, Manitoba expressed to Cross Lake Community Council that before the approval of the Agreement, Manitoba would consult with the First Nation community.

[18] Leaving aside the contentious issue of the adequacy of consultation, consultation with the Cross Lake First Nation was undertaken by Manitoba and was initiated by a letter from Manitoba dated August 20, 2007. The particulars of the consultation are set forth in the affidavits of Jason Fontaine (affirmed November 8, 2013) and Dave Hicks (affirmed November 21, 2013). I note that Hydro was not part of the Crown consultation.

[19] On June 14, 2010, the Lieutenant Governor in Council, by an order, authorized the Minister of Aboriginal Northern Affairs to enter into the proposed Agreement. On September 16, 2010, the Agreement was entered into, which settled the claims brought in 1992 by the Cross Lake Community Council against both Manitoba and Hydro. Pursuant to Articles 2 and 3 of the Agreement, Hydro has certain responsibilities with respect to the controlling benchmark, water level

data, records and related items, all as more specifically set out in the Agreement, and was to make certain payments to the Cross Lake Community Council. Hydro has no role with respect to conveyance of any land issues, or the Cross Lake Community boundaries or permits.

[20] On or about February 24, 2011, the applicants filed their application for judicial review. That application was then amended on August 23, 2011 and re-amended on April 12, 2013. It is the position of the applicants that the Agreement will privatize Crown land and make various parcels unavailable to the applicants for the exercise of their Treaty 5 rights and inherent Aboriginal rights. Further, the applicants submit that the Agreement will remove parcels of the Crown land from availability for selection by the applicants as Reserve land under Article 3 of the NFA.

[21] As part of their application for judicial review, the applicants have filed various affidavits that are now impugned by the respondents as inadmissible extrinsic evidence on the judicial review. The applicants contend, amongst other things, that the impugned affidavit evidence properly demonstrates that prior to the agreement being entered into, the applicants were not given an opportunity to share all of the relevant information with Manitoba before Manitoba "unilaterally cut off" consultations, over the applicants' protest that they still had more information to provide. Manitoba strongly opposes any characterization of the consultations as inadequate or as having been "unilaterally" terminated. A detailed account of the parties' positions is set out below.

V. POSITIONS OF THE PARTIES

Position of the Applicants

[22] The applicants contend that the honour of the Crown requires the Crown to consult with Aboriginal peoples and accommodate their rights as part of a process of fair dealing and reconciliation. The applicants point to the legal test set out in ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 34 and 39. ***Haida*** confirms the existence of the duty which arises when the Crown is aware of proven or asserted Aboriginal or treaty rights and contemplates action that might adversely affect those rights. ***Haida*** also addresses the scope and content of the duty to consult. Discerning the scope and content of that duty depends upon the nature and importance of the Aboriginal and treaty rights in question and the extent of the potential impact of the Crown action on those rights. ***Haida*** confirms that the determination as to whether the Crown has fulfilled its duty to consult need take into account the scope and content of the duty owed and indeed, all the circumstances that transpire, including the process of consultation and its result. In this instance, the applicants submit that as part of the judicial review, the issues of the scope and content of the duty, as well as whether the Crown fulfilled its duty, are all issues that will require the court's determination. Accordingly, the applicants submit that the affidavit evidence that it adduced is relevant to the determination of those issues.

[23] The applicants acknowledge that given the general rule that a judicial review is to be a review of the original decision and not a hearing *de novo*, evidence that was not before the original decision maker(s) is usually not admissible on a judicial review of the original decision. Notwithstanding that general rule, the applicants note the exceptions to that general rule and what they say is justifiable application of those exceptions to the facts of this particular case. Specifically, the applicants argue that the impugned evidence falls into the exceptions that permit extrinsic evidence in order to establish the duty, scope and content of the duty to consult. Further, the applicants justify the extrinsic evidence as necessary to fill in gaps in the consultation record, some of which they say compromises their ability to establish procedural unfairness.

[24] The applicants assert that the governing law supports the proposition that where the Aboriginal party was denied the opportunity to share its concerns during the consultation process, evidence is admissible in the judicial review to show what is, in the circumstance of a given case, the scope of the duty to consult and accommodate. The applicants submit that such evidence may be admissible insofar as it shows the nature and importance of the rights to be impacted, the nature and severity of the impact on those rights, and ultimately, to demonstrate whether the duty was satisfied. The applicants insist that such evidence is admissible on this judicial review because Manitoba did not provide the opportunity for it to be admitted into the consultation process. See ***Yellowknives Dene First Nation v. Canada (Attorney General)***, 2010 FC

1139, 377 F.T.R 267 at paras. 61-62; ***Liidlii Kue First Nation v. Canada (Attorney General)***, [2000] 4 C.N.L.R. 123 (F.C.) at para. 32; ***Cold Lake First Nation v. Alberta (Minister of Tourism, Parks and Recreation)***, 2012 ABQB 579, 543 A.R. 198 at para. 27; and ***Enge v. Northwest Territories (Department of Environment and Natural Resources, North Slave Region)***, 2013 NWTSC 33, [2013] W.W.R. 562 at para. 17.

[25] Put simply, the applicants maintain that all of their evidence filed is admissible, relevant and necessary in order for the court to determine the central issues in this case: the scope and content of the duty to consult and whether that duty was satisfied. The applicants maintain that all of their affidavit evidence is admissible to fill the gaps in the consultation record that was filed by Manitoba on this judicial review. The applicants submit that insofar as the impugned evidence would have been before Manitoba in the consultation process (and thus in the consultation record), had Manitoba not unilaterally and prematurely cut off consultation, that evidence ought now to be admitted for use on the judicial review.

Position of Manitoba

[26] Manitoba will take the position at the hearing of the judicial review that it fulfilled its duty to consult the applicants. On this preliminary motion, Manitoba maintains that the applicants' attempt to adduce evidence in addition to the consultation record (which record Manitoba says is transparently provided both on this motion and for the purposes of eventual judicial review) through the

impugned affidavits, is, in the circumstances of this case, not permissible in that the same evidentiary principle applicable in the context of other judicial reviews applies to the judicial review of the adequacy of Crown-Aboriginal consultation. In other words, absent the applicability of certain exceptional justifications, this court must review whether Manitoba fulfilled its duty to consult on the basis of the record that was before it during the process of consultation. Admission of the affidavits in this case, says Manitoba, would turn the judicial review process into a hearing *de novo*.

[27] Manitoba reminds the court that the applicants have the onus to establish that the affidavits fall within the narrow exceptions that would render them admissible at judicial review. In that connection, Manitoba submits that the affidavits do not fill any gaps in the consultation record. Indeed, Manitoba notes that the applicants did not initially allege that the consultation record is deficient or inaccurate. Manitoba further submits that the affidavits do not demonstrate or support a violation of procedural fairness - a violation that the applicants also did not initially allege as a ground of review in the re-amended notice of application. Even if a violation of procedural fairness had been originally alleged, Manitoba argues that the affidavits do not provide any information that is not already in the consultation record. In that regard, Manitoba notes that only three of the affidavits provide certain views and opinions on how those deponents perceive the consultation process to be inadequate. Even then,

Manitoba notes that the factual basis for those views (letters, meetings, comments or communications) is already in the consultation record.

[28] Manitoba has acknowledged in its brief and in its oral argument on this preliminary motion that it had a duty to consult the applicants on the medium to high end of the consultation spectrum. With that acknowledgement, Manitoba questions the relevance and probativeness of the affidavits or parts of the affidavits whose purpose is said to be connected to the need to establish the existence or the scope and content of Manitoba's duty. Manitoba submits that insofar as the affidavits or parts of the affidavits have been proffered by the applicants with that connected justification, those affidavits or parts of those affidavits should be struck as evidence which is not necessary.

[29] Manitoba underscores the fact that it provided a process of consultation that started in August 2007 and ended in August 2010. That process, says Manitoba, gave the applicants several opportunities to bring forth any concerns, issues or relevant information that they may have had. In other words, if the applicants had any evidence that would elevate the scope of consultation beyond that rather significant level (medium to high) which was already conceded by Manitoba on this motion, they had a chance to bring that evidence to Manitoba's attention during the relevant period. Had they done so, it is Manitoba's position that the consultation would have reflected such evidence. Manitoba now observes that to admit the impugned affidavits at the judicial review stage, in the particular circumstances of this case, would be inconsistent with what the

governing law has identified as the applicants' reciprocal duty to provide relevant information during the process of consultation.

[30] Finally, as part of Manitoba's position is its submission that the affidavits themselves do not comply with the relevant Queen's Bench rules relating to affidavits. Manitoba contends that the affidavits include statements that are not statements of fact. Further, the affidavits include hearsay evidence with respect to facts that are contentious in this application and further still, the affidavits contain material which is irrelevant to the issues subject to the judicial review.

Position of Hydro

[31] Hydro stipulates, for the purposes of this preliminary motion, that at the eventual hearing of the judicial review on its merits, its position will be that it was not part of the Crown consultation process. In other words, the duty to consult with respect to an Aboriginal right or title rests with the Province of Manitoba as government, unless there has been a delegation which in this case has not occurred. Insofar as Hydro is a party with interests in the outcome of the judicial review, it acknowledges the practical and legal proposition that on a judicial review, it is the just and proper process for the judge hearing the application to identify the real issues for adjudication between the parties and to control the evidence to be heard in the final adjudication. It is in that spirit that Hydro entered into case management with respect to this judicial review and it is in that spirit that Hydro made its submissions on this motion, which it agreed ought to be decided prior to the hearing of the judicial review on its merits.

[32] Hydro submits that the evidentiary record to be used at the ultimate hearing of this application concerning the consultation that took place between Manitoba and the First Nation community, requires clarification and direction. Hydro expressed its support for the relief sought by Manitoba in its notice of motion filed November 15, 2013. Indeed, Hydro has filed a similar motion.

[33] Hydro asserts that on the question of what is to constitute the record before this court on the judicial review, the court must first address the general relevance of the impugned affidavits. To address and discern the relevance of those affidavits, it is necessary to clearly understand what exactly is being sought by the applicants as against each respondent. In that connection, Hydro emphasizes the need to understand what the applicants identify as the errors requiring judicial review.

[34] Hydro notes that the applicants seek, amongst other things, judicial review of the decision of Manitoba and Hydro to enter into the Agreement. More specifically, the applicants seek an order quashing the Agreement, or in the alternative, an order quashing those provisions of the Agreement wherein Manitoba purports to convey interests and land to the Cross Lake Community Council and expand the boundary of the Cross Lake Community Council. The order is in addition to the declaration that the applicants seek respecting Manitoba's failure to comply with its legal and constitutional duties to consult with and accommodate the applicants with respect to the Agreement.

[35] Having accepted and acknowledged the principles set out in ***Haida***, Hydro nonetheless takes the position that in the present case, the relief sought by the applicants against Hydro does not fall within the principles of ***Haida***, nor does the relief sought depend on the interpretation of the Agreement. In this respect, Hydro reminds the court that it is not the government. Accordingly, Hydro says there was no legal obligation on the part of Hydro to have consulted with the applicants regarding the Agreement, wherein monetary payments are made by Hydro to the Cross Lake Community Council for resolution of the Court of Queen's Bench actions. As a consequence, Hydro submits it is not open to the applicants to seek judicial review of the settlement as between Hydro and the Cross Lake Community Council. Indeed, it is Hydro's position that much of the relief that the applicants seek in relation to Hydro is not available and should otherwise not constitute, for the purposes of this motion, a justification for the admission of the extrinsic evidence that the applicants seek to have admitted on the judicial review.

[36] Hydro points to the notice of application itself and the alleged grounds for judicial review (the errors) that are set out at paras. 16 to 50. In reviewing those grounds and the Crown consultation record (as filed as an attachment to the affidavit of Jason Fontaine on this motion), Hydro submits that it is clear that the present case is not dealing with the sort of "jurisdictional errors" identified as a justifiable exception to have admitted extrinsic evidence. Instead, Hydro suggests that the applicants' 11 affidavits seek to provide an historical overview

of their ancestry and claim to certain sites, purported issues with Article 3 of the land exchange under the NFA. Hydro submits that the affidavits repeat part of the Crown consultation record without explanation as to why such material is necessary and/or why such material was not available and provided during the Crown consultation process. Hydro also underscores the absence of any explanation from the applicants as to why recourse was not taken under the arbitration provision of the NFA (Article 24).

[37] It is the position of Hydro that the alleged grounds of judicial review are properly characterized as intra-jurisdictional errors, and thus the extrinsic evidence sought to be admitted is not permissible. Similar to the position of Manitoba, it is Hydro's contention that the request to have admitted the affidavits in question constitute evidence which will create a hearing *de novo* which is not a function of judicial review before this or any court.

[38] Insofar as para. 46(f) of the application asserts that Hydro acted in bad faith in not consulting or accommodating the applicants, Hydro argues that no extrinsic evidence is required for the determination of this point – a question of law that will have to await legal argument at the judicial review hearing. In that regard, Hydro submits that the record reveals that it did not partake in the consultation process and that such responsibility for consultation rested with Manitoba, which consultation was undertaken. Simply put, Hydro maintains that there is no duty for Hydro to have consulted with the applicants regarding a monetary payment to the Cross Lake Community Council and resolution of the

two actions and nothing in relation to the admissibility of the extrinsic evidence should be justified on the basis of such a purely legal argument.

[39] In addition to the above, Hydro also objects to the impugned affidavits on the basis of a failure to comply with the Queen's Bench Rules. Beyond the alleged non-compliance with the relevant rules, Hydro also points out that many of the specific facts asserted in the impugned affidavits are collateral to the specific issues on the judicial review and those so-called facts are highly contentious and are not accepted by Hydro. In this regard, Hydro draws to the court's attention its concerns that where such fundamentally contested facts find their way into affidavits of questionable relevance, not only is there a risk of a hearing *de novo*, but also, following the inevitable cross-examinations, an inefficient and somewhat unfocused adjudication on matters collateral to what should be the focus of the judicial review.

Position of the Incorporated Community of Cross Lake

[40] As intervenor, the Incorporated Community of Cross Lake supports the position and underlying arguments of Manitoba and Hydro in respect of the issue on this motion.

VI. LEGAL FRAMEWORK

[41] In light of the issue on this preliminary evidentiary motion and given the applicants' position that in the circumstances of this judicial review there exists the necessary justifications to admit the extrinsic evidence, it is well at this stage to briefly review the applicable legal framework. What follows is a brief review

of the relevant legal first principles that attach to Crown-Aboriginal consultations, judicial reviews generally, and the degree to which the evidentiary foundation and the record on a judicial review involving Crown-Aboriginal consultations can or should be supplemented.

The duty to consult

[42] The honour of the Crown requires the Crown to consult with Aboriginal peoples and accommodate their rights as part of the process of fair dealing and reconciliation. The legal test for the duty to consult and accommodate was set out by the Supreme Court of Canada in ***Haida***, *supra*. Both the duty to consult and the test enunciated in ***Haida*** by the Supreme Court were affirmed in ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, 2010 SCC 43, [2010] 2 S.C.R 650.

[43] In ***Haida***, the Supreme Court of Canada explained that governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. The Supreme Court stated at para. 35 that the duty to consult arises:

> … when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it ….

[44] Prior to the Crown engaging in a consultation process, it must conduct a preliminary or initial assessment to determine the existence and scope of its duty to consult. Towards that end, the Crown must consider the existence of an assertion of a treaty or Aboriginal right, and the potential and severity of the

impact of the Crown's proposed decision on those rights. See ***Haida***, *supra*, at paras. 37-39.

[45] Manitoba concedes that it had a duty to consult the applicants as its decision to enter into the Agreement did potentially affect the applicants' rights or interests under Treaty 2 or under the NFA.

[46] Identifying the scope and content of the Crown duty to consult in a particular case will depend upon:

(1) the nature and importance of the Aboriginal and treaty rights;

(2) the extent of the potential impact of the Crown action on those rights. See ***Haida*** at paras. 34 and 39.

[47] The purpose of s. 35 of the ***Constitution Act, 1982*** is to reconcile the historic and pre-existing sovereignty of Aboriginal peoples with the Crown's asserted sovereignty. The duty to consult and accommodate is an essential means by which reconciliation is to be effected. See ***Haida*** at para. 20; ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 1.

Standard of review in cases where the consultation process between the Crown and an Aboriginal community is in issue

[48] Administrative law remedies have been provided for by the Supreme Court of Canada in respect of alleged failures to comply with the duty of consultation. In other words, where a First Nation or Aboriginal community alleges a failure of the Crown to discharge its duty of consultation, the issue is normally determined pursuant to administrative law principles in the context of a judicial review.

[49] In ***Haida***, the Supreme Court of Canada has directed the courts to review the consultation process on a standard of reasonableness. As it relates to the government's initial assessment of the existence or extent of the duty, the Supreme Court in ***Haida*** has directed the courts to review that assessment on the correctness standard to the extent that "the issue is one of pure law and can be isolated from issues of fact". See ***Haida***, *supra*, at para. 61-63; ***Rio Tinto***, *supra*, at para. 64; ***Hupacasath First Nation v. British Columbia (Minister of Forests)***, 2008 BCSC 1505 at para. 187, 173 A.C.W.S. (3d) 330; ***Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)***, 2014 FC 197 at para. 34.

[50] To repeat an important point made earlier in this judgment, it was acknowledged by Manitoba in its submission that it (Manitoba) accepts the existence of a Crown duty in this case and further, it accepts that the scope and content of its duty to consult is at the medium to high level of the spectrum. I note that acknowledgement by Manitoba because of its potential effect on the necessity (or not) of advancing extrinsic evidence so as to address, for example, at the judicial review, the scope and content of the duty Manitoba owed to the applicants.

[51] There is no apparent need to formally apply the appropriate standard of review as discussed above, for the purposes of determining the discrete issue on this preliminary evidentiary motion. Nonetheless, the knowledge of the respective standards of review applicable to the consultation process, as well as

Manitoba's own assessment of the extent of its duty, may provide additional reference points for discerning and evaluating on this motion, some of the necessity and relevance of much of what the applicants say is the admissible extrinsic evidence.

General rule and exceptions governing the relevant evidentiary foundation and record on a judicial review of Crown-Aboriginal consultations

[52] It is well established that a judicial review is meant to be a review of a decision, not a *de novo* hearing to be undertaken by a court. On a judicial review, extrinsic affidavit evidence may be introduced only in very limited circumstances. When a court reviews the reasonableness or the correctness of the original decision by the decision maker(s), the court is usually required to undertake that review based upon the information made available to the original decision maker(s). As part of the general rule on judicial review, the court is required to conduct such a review on the basis of the record as it existed before the original decision maker(s). To do otherwise could and usually would result in a different case than the one that was evaluated by the original decision maker(s). See ***AOV Adults Only Video Ltd. v. Manitoba (Labour Board)***, 2003 MBCA 81, 177 Man.R. (2d) 56; ***Wilson v. United Steel Workers of America, Local 5442***, 2003 MBQB 224 at para. 24, 178 Man.R. (2d) 224; ***Zeliony v. Red River College***, 2007 MBQB 308 at para. 20, 222 Man.R. (2d) 156; ***Board of Education of Winnipeg School Division No. 1 v. Winnipeg***

Teachers' Assn. of The Manitoba Teachers' Society, 2007 MBQB 23 at paras. 27-34, 211 Man.R. (2d) 138.

[53] In ***Sowemimo***, *supra*, at para. 54, I reaffirmed the rationale for a court conducting a judicial review on the basis of the original record (such as it existed before the original decision maker(s)) and the need to take care to not casually transform the record (without clear justification for extrinsic evidence) upon which the review will be conducted:

> **54** It is well accepted that when a court conducts a judicial review, it must conduct such a review on the basis of the record alone such as it existed before the tribunal or board in question. In the present case, the starting position is that the court will conduct its eventual judicial review of the Executive Committee's decision only on the basis of the record that was before it. This is to ensure that the review is based on the same case that was before the Executive Committee when it made its decision. Evidence coming from outside or extrinsic to the record of the initial hearing is admissible on the judicial review only in unique and special circumstances where there is demonstrable justification for such evidence. Any such evidence will usually come in the form of an affidavit in which additional information is asserted for the purposes of filling in alleged gaps in the record to establish jurisdictional error, or in rare cases, problems relating to procedural fairness and the matter of conduct of the decisional process. In the context of any attempts to establish any of the errors or problems just mentioned with respect to a tribunal or board's decision, it is critical to remember that if the error or problem can be adequately assessed or established from the record, then the proposed extrinsic evidence is not required and thus not admissible.

[54] Given the general rule that a judicial review is to be a review of the original decision and not a *de novo* hearing, evidence that was not before the original decision maker(s) (extrinsic evidence) is usually not admissible on the judicial review of the original decision. There are, however, exceptions to this general rule.

[55] Extrinsic evidence is admissible for the purpose of showing that the record filed by the decision maker(s) is incomplete. Extrinsic evidence filed in this regard is admitted where it can be justified so as to ensure that the court has a complete and accurate picture of all of the evidence presented to the decision maker(s). In other words, the evidence in question is justified as being required to fill in gaps in the record. See ***AOV Adults Only Video***, *supra*, at para. 33.

[56] Extrinsic evidence may also be admissible in a judicial review for the purposes of establishing jurisdictional error or procedural unfairness in the conduct of the decision making process. See ***Sowemimo***, *supra*, at para. 54. Errors which may lead to a loss of jurisdiction include those situations where a decision maker(s) has made a decision in bad faith, made a decision which it has no power to make, or failed to comply with the requirements of natural justice or procedural fairness. See ***AOV Adults Only Video***, *supra*, at para. 29 quoting ***Anisminic Ltd. v. Foreign Compensation Commission and Another***, [1969] 2 A.C. 147 (H.L.) at 171. See also ***Zeliony***, *supra*, at paras. 20-31.

[57] In cases of judicial review in which a breach of the duty to consult and accommodate (as between the Crown and an Aboriginal community) is alleged, extrinsic evidence establishing the elements of the duty has also been determined to be a potential exception to the general rule that the review must take place on the basis of the record before the decision maker(s).

[58] In addition to establishing the existence of the duty, such evidence – not before the original decision maker(s) – has also been admitted in order to permit

the court to determine the scope, content and ultimately, the fulfillment (or not) of the duty to consult and accommodate. See ***Tsuu T'ina Nation v. Alberta (Environment)***, 2008 ABQB 547, 453 A.R. 114; ***Enge v. Northwest Territories (Department of Environment and Natural Resources, North Slave Region)***, 2013 NWTSC 33, [2013] 8 W.W.R. 562; ***Liidlii Kue First Nation***, *supra*; and ***Kwakiutl First Nation v. North Island Central Coast Forest District***, 2013 BCSC 1068, 52 B.C.L.R. (5th) 381.

[59] In the present case, as earlier stated, there will be no issue at the judicial review that there existed and Manitoba owed a duty to consult the applicants. The issue on the judicial review will be whether Manitoba fulfilled its duty, taking into consideration the scope and content of the duty owed and the circumstances of the consultation which would include the process of consultation. The issue on this particular preliminary evidentiary motion leading up to the judicial review, is whether the applicants can successfully invoke the exceptions and justifications that would require the issue on the judicial review to be determined based upon a record different from that which was before the original decision maker(s) prior to the Agreement.

[60] All of the respondents acknowledge that the Crown consultation process with First Nations or Aboriginal communities differs in some respects from the more typical decision making processes involving a statutory tribunal or decision maker(s) (where a record of proceedings is maintained by the decision maker(s)). Yet even with that recognized difference, courts have routinely

applied the general principles of judicial review in reviews of Crown-Aboriginal consultations. See ***Fort McKay First Nation v. Alberta (Minister of Environment and Sustainable Resource Development)***, 2014 ABQB 32 at paras. 6, 26, 28, 29 and 39, [2014] 2 C.N.L.R. 140; ***Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)***, 2013 ABCA 443 at paras. 35-58, 88 Alta. LR. (5th) 179; ***Enge v. Northwest Territories (Department of Environment and Natural Resources, North Slave Region)***, 2013 NWTSC 33 at para. 22, [2013] 8 W.W.R. 562.

[61] In ***Fort McKay First Nation***, *supra*, the Alberta Court of Queen's Bench stated clearly that even in the particular and unique context of judicial reviews respecting Crown-Aboriginal consultations, the basic principle of judicial review must not be casually set aside:

> **28** I do not read his decision, however, as establishing a fixed set of categories of evidence admissible on judicial review. Rather, his point was that one must not lose sight of the purpose of judicial review - to determine whether a decision meets the appropriate standard of review, not to usurp the decision maker's role and reconsider the decision made on its merits.
>
> **29** In ***Tsuu T'ina*** the Court did permit the admission of new evidence on the basis that, like here, one of the decisions to be reviewed was the adequacy of the consultation process, where the Crown must evaluate its own efforts to discharge its duty to consult. However, nothing in ***Tsuu T'ina*** (nor in ***Yellowknives Dene First Nation v. Canada (Attorney General)***, 2010 FC 1139) mandates or permits a party to adduce new evidence that is irrelevant or which is tendered in an effort to have the judicial review judge conduct a trial *de novo*, essentially usurping the jurisdiction of the initial decision maker.

VII. ANALYSIS

***Are the affidavits filed by the applicants relevant and otherwise admissible in a judicial review as to whether the respondent (Manitoba) fulfilled its duty to consult the applicants in relation to Manitoba's decision to enter into the Agreement with the Incorporated Community of Cross Lake*?**

[62] For the reasons that follow, I have determined that the impugned affidavits which the applicants seek to adduce into evidence on the judicial review, should be struck in their entirety.

[63] To summarize, I have determined on the evidence adduced on this motion (which includes the existing consultation record) that the impugned evidence cannot be justified and admitted in the particular circumstances of this case to fill in any supposed gaps in the consultation record. Neither are the affidavits admissible on the basis of a need to demonstrate procedural unfairness, the possible proof of which has not been established on this motion – even on a low threshold and even with reference to any of the additional affidavits. The affidavits can similarly not be justified and admitted in this case to establish the scope and conduct of the duty to consult and accommodate owed by Manitoba. With Manitoba having conceded that the scope and content of its duty is at least at the medium and potentially high level, Manitoba has willingly set itself up for an assessment on the existing record which will examine both the accuracy of that concession and whether Manitoba has satisfied that duty. With the scope and content of Manitoba's duty sitting perhaps at the high end of the spectrum (by Manitoba's own admission), the applicants cannot claim it is necessary to

consider extrinsic evidence for a purpose now rendered somewhat moot by Manitoba's concession. For reasons set out below, I have determined that the existing record is both fair and adequate for reviewing how Manitoba "scoped" and assessed the level of its duty, as well as for reviewing whether it satisfied that duty.

[64] Without being able to successfully invoke the above justifications, the 11 affidavits which were not before the decision maker(s), cannot now on this judicial review be justifiably admitted in order to establish that the duty to consult and accommodate was not met.

[65] While the question as to whether Manitoba fulfilled its duty to consult remains a main and live issue on the judicial review, the need to determine that question, absent the applicability of any of the other exceptions that might justify the admission of the 11 affidavits, is not such so as to require the court to allow what would otherwise be inadmissible extrinsic evidence. The review as to whether Manitoba has met its duty to consult will take place on the existing consultation record and that review will be conducted on a standard of reasonableness.

[66] The applicants' affidavits are "in addition to" the consultation record. Manitoba is correct in saying that some of the affidavits repeat what is already in the consultation record and some of the affidavits include information that the applicants failed to provide to Manitoba during the process of consultation where there existed a reciprocal duty on the part of the applicants to bring forth

relevant information. For example, some of the affidavits can be seen to address historical and traditional uses of specific land subject to the Agreement, which information, it would seem, if not already in the consultation record, is information the applicants could have provided (but did not) during the process of consultation. Moreover, there is still other information contained in the affidavits which, separate and apart from its extrinsic nature, is not clearly information relevant to the main question on the judicial review as to whether Manitoba fulfilled its duty of consultation.

[67] What follows is a more specific analysis of the questions that address what the applicants contended (and the court rejected) were justifications for the admissions of the impugned affidavits.

(a) Do the affidavits fill in gaps in the consultation record and/or are they required to establish procedural unfairness?

[68] The applicants had argued that the extrinsic evidence they sought to adduce is necessary and justified in that the consultation record filed by Manitoba is not a complete record of what happened during the consultation process.

[69] The applicants contended that their extrinsic evidence provides examples and references of Manitoba's failure to include in the consultation record all the information Manitoba had before it during the consultation process, or, information that the applicants had asked Manitoba to review.

[70] The extrinsic evidence which the applicants identify as necessary to fill in the alleged gaps in the consultation record included the following:

- affidavit of Thomas Monias at paras. 3-9, 11-12, 14-17 and 20;
- affidavit of Chief Garrison Settee at paras. 6-13, 15, 17, 20-22, 27-28, and 35;
- affidavit of Roland Robinson at paras. 3-4, 7, 9-15, 7-18, 22-25, 27 and 29;
- affidavit of Mervin Spence Garrick whose Exhibits A and B provide the history report and mapping that the applicants say is missing from the consultation record;
- affidavit of Darwin Paupanakis at paras. 3-12, 15-16, 35 and 59.

With the above affidavit evidence, the applicants argued that the court would have had all the information that ought to have been included in the consultation record and all the information necessary to assess the scope and content of the duty owed (and whether Manitoba met that duty).

[71] Having reviewed the evidence and the consultation record, I have concluded that Manitoba is accurate when it states that notwithstanding the applicants' ostensible justification, there are in fact only three of the impugned affidavits that relate to the consultation process. My review of the affidavits confirms that as it relates to the record of the consultation process (between August 2007 and August 2010), the potentially relevant affidavits on point are those of Darwin Paupanakis, Roland Robinson and Thomas Monias.

[72] As Manitoba has legitimately noted, even the affidavits of Messrs. Paupanekis, Paupanakis, Robinson and Monias do not identify or fill in gaps in

the consultation record. With the exception of para. 33 of the affidavit of Darwin Paupanakis, the three affidavits provide no further factual information (that has not already been provided in the consultation record) about what was discussed during the consultation process. In respect of those three affidavits, there are only two exhibits that are not otherwise in the consultation record. In that regard, I note Exhibit I of the affidavit of Darwin Paupanakis which is a ministerial statement from the year 2000. I am in agreement with Manitoba when it states that such a statement, made some seven years before the consultation process began, has questionable relevance to the issue of whether Manitoba satisfied its duty of consultation between 2007 and 2010. Respecting the second connected exhibit, I note Exhibit C of the affidavit of Thomas Monias which is a map in relation to land selection and disputes under the NFA. Again, I share Manitoba's concern and view that such evidence is of a nature that it raises questions of relevance and issues of contested fact. Such contested evidence, if admitted, can lead to consideration of matters about which facts are very much in dispute and seemingly collateral to the issue on the judicial review. This in turn could quickly distract the court and counsel from the required focus of the judicial review.

[73] As part of their argument justifying the admission of the impugned affidavit evidence, the applicants had also attempted to identify that which, if true, could be characterized as procedural unfairness in the context of what the

applicants allege was the "premature end" and unilateral and arbitrary "cut-off" of the consultation process.

[74] Having reviewed all of the evidence on this motion, including the 11 affidavits and the consultation record, in my view there is an absence of persuasive evidence to support the applicants' position. Separate from whether Manitoba's actual performance of its duty to consult was adequate (the question for the judicial review), I have determined that during the consultation process, the applicants had at least the opportunity to provide that which they now attempt to adduce and justify as necessary extrinsic evidence. In that regard, I note the affidavit evidence of Dave Hicks (paras. 11 and 12) and the affidavit of Jason Fontaine (Exhibit A, tabs 3, 8, 9, 11, 12, 14, 16, 17, 18, 20, 25, 27, 30, 32, 34, 37, 38, 46, 48, 49, 50, 53, 55, 63, 64, 66 and 70). Accordingly, the extrinsic evidence ought not now to be admitted on the basis of an inaccurate characterization of a "premature end" to the consultation.

[75] Insofar as there remains some dissatisfaction with the adequacy of the information that Manitoba received in the consultation process, fairness requires that there must be some examination of the degree of vigilance with which the applicants themselves attempted (during the consultation process) to furnish such information. In this connection, I would be remiss if I did not comment upon what is acknowledged to be a reciprocal duty that attaches to Aboriginal peoples during the process of consultation where, quite properly, the honour of the Crown gives rise to, on the part of government, a duty to consult. That

reciprocal duty "to bring forward" requires Aboriginal peoples and communities to constructively furnish relevant information and to do so in a clear and focused way during what must be, by definition, some sort of finite process. It is in this way that the government in question is assisted in being able to share information and in turn, respond to its duty to reconcile and accommodate the interests and concerns raised.

[76] In ***Halfway River First Nation v. British Columbia (Ministry of Forests)***, 1999 BCCA 470, 178 D.L.R. (4th) 666 at para. 161, the British Columbia Court of Appeal noted as follows:

> **161** There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan et al v. Fort St. James Forest District (District Manager)*, [1994] B.C.J. No. 2642, (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

[77] The reciprocal duty that attaches to a First Nation requiring it to help facilitate an assessment of the asserted rights by outlining its concerns with clarity, was the subject of comment in ***Cold Lake First Nations v. Alberta (Tourism, Parks and Recreation)***, 2013 ABCA 443 at para. 29, 566 A.R. 259:

> **29** The First Nations contend that the record is silent as to the location and frequency of the traditional activities and the extent to which traditional activities could potentially be adversely impacted by the proposed campground expansion. The First Nations submit that the Crown had a duty to acquire the information about Aboriginal practices and did not. This argument was raised for the first time on appeal. In our view this did not form part of the Crown's obligation. Both parties have reciprocal duties to facilitate an assessment of the asserted rights and to outline concerns with clarity: *Haida* at para 36. We do not view this as a gap in the record for which the Crown is responsible. The First Nations argue that the Crown had a duty to provide full information about historic

> Aboriginal uses of the land in question. They rely on a passage in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at paras 1293-94, available on line, which seems to suggest such a duty. However, the facts in that case are very different and the issue was not discussed on appeal: 2012 BCCA 285, 324 BCAC 214. There is no suggestion here that the Crown had or withheld such information. In our opinion, the Crown should not ordinarily be required to conduct such research in lieu of the First Nations, as the First Nations should be in a much better position to ascertain their own historical practices.
>
> [emphasis added]

[78] Care must be taken to ensure that in cases involving Crown-Aboriginal consultation, otherwise unjustified extrinsic evidence at the judicial review stage is not casually admitted in the name of filling in so-called incomplete gaps in the record or because of a supposed premature end to the consultations, where such potential justifications have no persuasive evidentiary basis. The erroneous admission of such evidence on the basis of an unsupported (in the evidence) justification where there was in fact an opportunity on the part of the First Nation community to share its concerns, would risk a de-emphasis or dilution in what is meant to be a meaningful and reciprocal duty to provide relevant information.

[79] I am in agreement with Manitoba that on the facts of this case, where there existed an earlier opportunity to provide relevant information, admitting now for the first time additional evidence relating to the applicants' interests or the impact on those interests, would be irreconcilable with the applicants' reciprocal duty to have earlier provided that information during the consultation process.

[80] In determining as I have on this motion that the applicants have not met their onus to justify the admission of the extrinsic evidence on the basis of filling in incomplete gaps in the record and/or for the purposes of establishing procedural unfairness, I am nonetheless not pre-determining or deciding in any way whether Manitoba has satisfied in the consultation process, its duty to consult. That distinct determination will take place on the actual judicial review.

(b) Are the affidavits justified in order to establish the scope and content of the duty to consult?

[81] To determine the scope and content of a government's duty to consult, reference can be made to the nature of the Aboriginal rights and the extent of the potential impact on those rights.

[82] In the present case, the applicants argued that certain of their affidavit evidence respecting the nature of the applicants' rights and the potential impact of the Agreement on those rights, is necessary and relevant on the upcoming judicial review in relation to establishing the scope and content of Manitoba's duty. In that regard, the applicants contended that the existing consultation record is insufficient for the court to be able to assess the nature of the applicants' rights and the impact of the Agreement on those rights.

[83] The applicants pointed to the following portions of the impugned evidence as establishing the nature and importance of the applicants' rights:

- affidavit of Daniel Ross at paras. 6-20 and 21-52 provides evidence about traditional uses;

- affidavit Alan Paupanekis at paras. 7-22, 25-26, 28-44 and 46, provides evidence about NFA rights and traditional uses;
- affidavit of Thomas Monias at paras. 21-27 and Exhibit C provides evidence about NFA rights and traditional uses;
- affidavit of Chief Garrison Settee at paras. 3, 5 and 14-36 along with Exhibit B provides evidence about Treaty 5 and NFA rights and traditional territory;
- affidavit of Roland Robinson at paras. 7-8 provides evidence about the nature of Pimicikamak's Treaty 5, Aboriginal NFA rights;
- affidavit of Mervin Spence Garrick at paras. 6-24, 26-33, 35-49, 51, Exhibits A and B provides evidence about traditional uses and traditional territory;
- affidavit of Darwin Paupanakis at paras. 26, 31-31, 75-76 and Exhibit I provides evidence about the nature and importance of Pimicikamak's Aboriginal Treaty 5 and NFA rights;
- affidavit of Gideon McKay at paras. 4-15, 17, 26 and 28-35 provides evidence about traditional uses and traditional lands;
- affidavit of David Witty at paras. 14-45, 49-50, 61, 65-66, 69-73, 75-80, Exhibits B to F provides evidence about the nature of the NFA rights;

- affidavit of James Thomas at paras. 8-21, 25-36, 75-80 and Exhibits B to E provides evidence about the nature of the NFA rights.

[84] In respect of the potential impact of the Agreement on the applicants' rights, they point to the following affidavits:

- affidavit of Daniel Ross at paras. 19-20;
- affidavit of Alan Paupanekis at paras. 14, 23-24, 29, 39 and 47;
- affidavit of Roland Robinson at paras. 7-8, 11, 17, 20, 25-26;
- affidavit of Mervin Spence Garrick at paras. 25, 49 and 51;
- affidavit of Darwin Paupanakis at paras. 26-34, 36-39, 75-76;
- affidavit of Gideon McKay at paras. 8-16, 18, 19-33 and 36;
- affidavit of John Thomas at paras. 22-24, 37-74, 81-82 and Exhibits F to N;
- affidavit of David Witty at paras. 46-48, 51-58, 59-60, 62-64, 67-68, 74, 81-87 and Exhibits G and H.

[85] As I earlier explained at paras. 73 to 79, *infra*, without in any way pre-empting the necessary finding on the ultimate issue to be adjudicated on the judicial review in relation to Manitoba's duty to consult, I am of the view that the consultation and its process in the present case, provided the applicants at least the opportunity to advise the Crown of all concerns about any adverse effects (on the exercise of Aboriginal or treaty rights) flowing as a consequence of the Agreement. As a result and given the absence of any other justification, I have

determined that there is no need to admit on the judicial review, the additional material or extrinsic evidence respecting any such adverse effects. In noting my earlier finding that the applicants had both an opportunity and a duty to bring forward the relevant information regarding their concerns about the adverse effects, I also note the relevant submission made by Manitoba at para. 50 of its brief. The paragraph highlights the efforts and invitations on the part of Manitoba for the purpose of discerning adverse effects and impact.

> 50. While there is no formal initial assessment document stating Manitoba's conclusions on the scope of consultation, Manitoba did the following, which shows that Manitoba assessed the scope to be medium to high before the consultation started:
>
> a. "Manitoba's approach in the negotiations with the Cross Lake Community Council was to negotiate an agreement that would mitigate or avoid any adverse effects on the exercise of treaty or aboriginal rights of Cross Lake First Nation/Pimicikamak (the 'First Nation community')." Affidavit of Dave Hicks, par 10)
>
> b. Manitoba also negotiated on the basis that "before the approval of the agreement, Manitoba would consult with the First Nation community, recognizing that Manitoba would remain open to adjustments in the agreement if the consultation raised legitimate issues." Affidavit of Dave Hicks, par 11).
>
> c. Manitoba informed the Incorporated Community of Cross lake that "the negotiated land and resource management components of the proposed settlement agreement may change depending on what Manitoba might learn from its consultation with the First Nation community." Affidavit of Dave Hicks, par 12)
>
> d. In its first letter to Cross Lake Nation, Manitoba offered "to arrange a meeting which would provide you with an opportunity to inform us about any issues or concerns that you may have about the effect of the land and land-related provisions of the proposed settlement agreement, so that we may consider those concerns and address or accommodate any reasonable concerns. We would be pleased to include representatives of the Cross Lake Community or Manitoba Hydro (or both) at the meeting if you wish" (Affidavit of Jason Fontaine, Exhibit A, tab 2). Similar invitations and requests for meetings were extended several times throughout the consultation

process (Affidavit of Jason Fontaine, Exhibit A, tabs 3, 8, 9, 11, 12, 14, 16, 18, 25, 27, 30, 32, 34, 37, 38, 46, 48, 49, 53, 63 and 64).

e. There were five meetings (out of the six scheduled) with the representatives of the Applicants during the consultation process (Affidavit of Jason Fontaine, tabs 17, 20, 50, 55, 66, 70).

[86] Although Manitoba acknowledges that the consultation record does not reflect the formal assessment to determine the scope of its duty to consult, Manitoba did clearly concede in its brief and in its oral submissions that its duty was at the medium to high end of the spectrum. In other words, Manitoba is acknowledging that its consultation process can and will be assessed (in relation to whether it correctly "scoped" its duty and whether it reasonably satisfied its duty) on the assumption that its obligation was at least at the medium level and potentially, at the highest level. With that reference point and possible range having been conceded, the necessary assessment of Manitoba's "scoping" and ultimate fulfillment of its duty (requiring potentially the highest level of consultation) can adequately take place by examining and reviewing the information received and the communications and actions taken by Manitoba in what it says was its attempt to engage the applicants. The information received and the communication and actions taken are found in the existing record.

[87] Notwithstanding Manitoba's acknowledgement about the scope and content of its duty, I recognize and accept that on the judicial review proper, part of my task will require me to specifically determine and articulate what I identify is the scope and content of Manitoba's duty to consult. In doing so, I will be evaluating how Manitoba's consultation process reconciles not only with

the extent of the duty as identified by Manitoba, but as importantly, the extent of that duty as identified by this court. As earlier explained, as it relates to Manitoba's initial assessment of the extent of its duty, that assessment is to be reviewed on a standard of correctness.

[88] In the end, I have concluded that the current consultation record provides an adequate and fair basis for determining whether Manitoba correctly assessed the extent of its duty to consult, whose scope and content required, by Manitoba's own admission, no lower than a medium and perhaps the highest sort of consultation on the analytical spectrum. The current consultation record also provides an adequate and fair basis for determining on the particulars facts of this case, whether Manitoba satisfied – on a standard of reasonableness – its particular duty to consult.

[89] Although I have determined in the particular circumstances of this motion that the extrinsic evidence cannot be justified on the basis of a need to establish the scope and content of Manitoba's duty to consult, that determination in no way pre-empts what will remain as the separate and main determination on the judicial review: did Manitoba fulfill the duty of consultation given what it concedes was the scope and content of that duty which was at least at a medium and potentially high level?

(c) The impugned affidavits and the alleged non-compliance with the Queen's Bench Rules

[90] Having determined for the foregoing reasons that the impugned affidavits are otherwise not admissible and should be struck in their entirety, it will now

not be necessary to address in detail the alleged deficiencies in the otherwise inadmissible affidavits which the respondents contended were also not in compliance with the Queen's Bench Rules.

[91] While not now necessary to fully address the respondents' arguments, I do note in passing that I am in agreement with the essence of Hydro's position as set out in paras. 46-65 of its brief. I similarly accept as accurate many of the specific allegations (in relation to the specific parts of the identified affidavit) as set out in Manitoba's grounds for objection as listed in Schedule B of Manitoba's notice of motion. Accordingly, had I not struck the affidavits in their entirety (for the reasons already provided) several of the identified portions of those affidavits would have nonetheless been struck. Such paragraphs alternately included statements that are not statements of fact; they included hearsay; interpretations and conclusions of law; assertions which amounted to unqualified expert opinion; and generally, statements that were highly contentious and likely collateral and irrelevant to the issues requiring focus on the judicial review.

[92] The Supreme Court of Canada in ***Tsilhqot'in Nation v. British Columbia***, 2014 SCC 44 at para. 23, has recently reminded lower courts that in cases such as the present, what is at stake is nothing less than justice for the Aboriginal group and its descendants and the reconciliation between that group and broader society. With those goals in mind, the Supreme Court cautioned lower courts to remember that what is required is not a technical, but rather a functional approach to pleadings, which approach will result in decisions based

on the best evidence that emerges. In accepting and applying the above proposition, it would seem that lower courts must nonetheless draw the necessary distinction between the pleadings and evidence. In other words, courts must still distinguish, in my view, between the technical approach impugned by the Supreme Court of Canada in ***Tsilhqot'in Nation***, *supra*, and the still time-honoured approach grounded in principle, that properly requires and ensures a more or less substantiated and reliable evidentiary foundation. The creation or admission of that substantiated and reliable evidentiary foundation is presumed to be subject to a rigorous process and set of reference points that are identifiable, predictable and based in legal principle.

(d) The impugned parts of the notice of application

[93] The respondents have moved to strike certain portions of the re-amended notice of application as identified by para. 6, *infra*.

[94] It was acknowledged by the respondents that this aspect of their submissions was a comparatively less significant and determinative part of their motion in relation to the other preliminary issues that required clarification and adjudication in preparation for the judicial review. Although little if any time was spent at the oral hearing on this aspect of the respondents' argument, insofar as the respondents have raised this as part of their motion, it requires from me, a determination. In that regard, I will simply note the obvious: the impugned paragraphs do contain argument and some do not comply with the form of a notice of application as required by the Queen's Bench Rules. As Hydro has

argued, if such statements are relevant, they ought to properly appear in a party's written submissions.

[95] The respondents' motion in relation to the impugned paragraphs of the notice of application will therefore be granted.

VIII. CONCLUSION

[96] Insofar as they fail to comply with the form of notice of application as required by the Queen's Bench Rules and insofar as they contain argument, this court orders that paras. 1, 2, 3, 4 and 5 of the amended notice of motion under the heading "Overview" be struck in their entirety. This court further orders that paras. 20-25, 31, 41-44, 46(1) and the final sentence of para. 38 also be struck in their entirety. Those paragraphs are properly challenged by the respondents as being improper, objectionable and irrelevant to the application for judicial review. The connected relief sought by the applicants falls within the exclusive jurisdiction of the arbiter under the NFA.

[97] This court further orders that the entirety of the 11 impugned affidavits (set out at para. 4, *infra*) be struck. That evidence was not initially part of the consultation record and is not now admissible pursuant to any of the otherwise exceptional justifications that would permit such extrinsic evidence on a judicial review.

[98] Based on the relief sought by the applicants and the relief available to them in law on this judicial review, the principal issues still to be determined on this judicial review are as follows:

(a) Did Manitoba satisfy its duty to consult the applicants?

(b) Did Hydro owe a duty in law to consult the applicants and if so, did they satisfy that legal duty?

[99] To the extent that the parties sought on this motion additional and more general direction that can be provided for this and perhaps other similar cases (respecting the appropriate process to be followed for clarifying the record on a judicial review), such direction will have to be gleaned from the governing jurisprudence and from the foregoing reasons which are based on the admittedly particular circumstances of this case. In the alternative, more definitive guidance and direction may come from the soon-to-be completed revision of the Manitoba Court of Queen's Bench Civil Rules which are anticipated to address, amongst other things, some of the fundamental procedural issues surrounding applications for judicial review and the general availability and use of case management in that context.

[100] If any further clarification or direction is required respecting anything that follows from the formal determinations made on this motion, those matters may be the subject of appropriate discussion at any future case management meeting or "on the record" appearances the parties may seek to schedule. Absent compelling reasons for any such meeting, all remaining matters that need be raised and which are relevant and properly justiciable in the context of the judicial review will be the subject of eventual argument and possible adjudication on this judicial review.

[101] A hearing date should now be set for the judicial review.

[102] In light of their success on this motion, the respondents will have their costs.

_____C.J.Q.B.

Date: 20140708
Docket: CI 11-01-70566
(Winnipeg Centre)
Indexed as: Pimicikamak et al v. Her Majesty The Queen in Right of Manitoba et al
Cited as: 2014 MBQB 143

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
PIMICIKAMAK AND THE CROSS LAKE BAND OF INDIANS, applicants, - and - HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA AND THE MANITOBA HYDRO-ELECTRIC BOARD, respondents.	N. Kate Kempton and Stephanie Kearns for the applicants Gordon E. Hannon and Sarah Bahir for Her Majesty The Queen in Right of Manitoba Robert J. Adkins and and Maria L. Grande for Manitoba Hydro-Electric Board Jacqueline G. Collins for Intervenor, Incorporated Community of Crosslake Judgment Delivered: July 8, 2014

JOYAL, C.J.Q.B.

E R R A T U M

Please note that there was a typographical error on page 1 of the judgment delivered by me in this matter on July 8, 2014. The court docket

number indicated in the top left hand corner was incorrect – it should have read CI 11-01-70566 (not CR 11-

01-70566). I would ask that you please replace page 1 in your copy of judgment with the attached page 1, as amended.

DATED this 25th day of August, 2014.

_____C.J.Q.B.

R. v. Blais, [2003] 2 S.C.R. 236

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: March 18, 2003;

Judgment: September 19, 2003.

File No.: 28645.

[2003] 2 S.C.R. 236 | *[2003] 2 R.C.S. 236* | *[2003] S.C.J. No. 44* | *[2003] A.C.S. no 44* | *2003 SCC 44*

Ernest Lionel Joseph Blais, appellant; v. Her Majesty The Queen, respondent, and Attorney General of Canada, Attorney General for Saskatchewan, Attorney General of Alberta, Métis National Council and Congress of Aboriginal Peoples, interveners.

(44 paras.)

Case Summary

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Catchwords:

Constitutional law — Manitoba Natural Resources Transfer Agreement — Hunting rights — Métis — Métis convicted of hunting contrary to provincial statute — Natural Resources Transfer Agreement providing that provincial laws respecting game apply to Indians subject to their continuing right to hunt, trap and fish for food on unoccupied Crown lands — Whether Métis are "Indians" under hunting rights provision of Natural Resources Transfer Agreement — Natural Resources Transfer Agreement (Manitoba), para. 13.

Summary:

The appellant, a Manitoba Métis, was convicted of hunting deer out of season. He had been hunting for food on unoccupied Crown land. His appeals to the Manitoba Court of Queen's Bench and the Manitoba Court of Appeal were based solely on the defence that, as a Métis, he was immune from conviction under the *Wildlife Act* regulations in so far as they infringed on his right to hunt for food under para. 13 of the Manitoba *Natural [page237] Resources Transfer Agreement* (*NRTA*). This provision stipulates that the provincial laws respecting game apply to the Indians subject to the continuing right of the Indians to hunt, trap and fish for food on unoccupied Crown lands. Both appeals were unsuccessful. The issue in this appeal was whether the Métis are "Indians" under the hunting rights provision of the *NRTA*.

Held: The appeal should be dismissed.

The *NRTA* is a constitutional document which must be read generously within its contextual and historical confines and yet in such a way that its purpose is not overshot. Here, the appellant is not entitled to benefit from the protection accorded to "Indians" in the *NRTA.* First, the *NRTA*'s historical context suggested that the term "Indians" did not include the Métis. The historical documentation indicated that, in Manitoba, the Métis had been treated as a different group from "Indians" for purposes of delineating rights and protections. Second, the

common usage of the term "Indian" in 1930 did not encompass the Métis. The terms "Indian" and "half-breed" had been used to refer to separate and distinguishable groups of people in Manitoba from the mid-19th century through the period in which the *NRTA* was negotiated and enacted. The location of para. 13 in the *NRTA* under the heading "Indian Reserves" further supports this interpretation. Third, the purpose of para. 13 of the *NRTA* was to ensure respect for the Crown's obligations to "Indians" with respect to hunting rights, who were viewed as requiring special protection and assistance. This view did not extend to the Métis, who were considered more independent and less in need of Crown protection.

A requirement for "continuity of language" should not be imposed on the Constitution as a whole and, in any event, such an interpretation would not support the contention that the term "Indians" should include the Métis. The principle that ambiguities should be resolved in favour of Aboriginal peoples is inapplicable as the historical documentation was sufficient to support the view that the term "Indians" in para. 13 of the *NRTA* was not meant to encompass the Métis. Nor does the "living tree" doctrine expand the historical purpose of para. 13; while constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of governmental power", the Court is not free to invent new [page238] obligations foreign to the original purpose of the provision at issue, but rather must anchor the analysis in the historical context of the provision.

Cases Cited

Applied: R. v. Powley, *[2003] 2 S.C.R. 207*, *2003 SCC 43*; referred to: Spooner Oils Ltd. v. Turner Valley Gas Conservation Board, *[1933] S.C.R. 629*; Frank v. The Queen, *[1978] 1 S.C.R. 95*; Moosehunter v. The Queen, *[1981] 1 S.C.R. 282*; R. v. Horseman, *[1990] 1 S.C.R. 901*; R. v. Badger, *[1996] 1 S.C.R. 771*; R. v. Big M Drug Mart Ltd., *[1985] 1 S.C.R. 295*; Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec, *[1939] S.C.R. 104*; Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*; R. v. Sutherland, *[1980] 2 S.C.R. 451*; Mitchell v. Peguis Indian Band, *[1990] 2 S.C.R. 85*; Edwards v. Attorney-General for Canada, *[1930] A.C. 124*; Hunter v. Southam Inc., *[1984] 2 S.C.R. 145*; R. v. Marshall, *[1999] 3 S.C.R. 456*.

Statutes and Regulations Cited

Constitution Act, 1867, s. 91(24).

Constitution Act, 1930 [reprinted in R.S.C. 1985, App. II, No. 26].

Constitution Act, 1982, s. 35.

Indian Act, R.S.C. 1985, c. I-5, s. 88.

Manitoba Act, 1870, S.C. 1870, c. 3 [reprinted in R.S.C. 1985, App. II, No. 8], s. 31.

Natural Resources Transfer Agreement (Manitoba), paras. 1, 10, 11, 12, 13.

Wildlife Act, R.S.M. 1987, c. W130, s. 26 [rep. & sub. 1989-90, c. 27, s. 13].

Authors Cited

Canada. House of Commons. House of Commons Debates, vol. XX, 3rd Sess., 5th Parl., July 6, 1885, p. 3113.

Canada. Royal Commission on Aboriginal Peoples. Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, vol. 4. Ottawa: The Commission, 1996.

Côté, Pierre-André. The Interpretation of Legislation in Canada, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.

Flanagan, Thomas E. "The History of Metis Aboriginal Rights: Politics, Principle, and Policy" (1990), 5 C.J.L.S. 71.

Morris, Alexander. The Treaties of Canada with the Indians of Manitoba and the North-West Territories, [page239] Including the Negotiations on Which they Were Based, and Other Information Relating Thereto. Toronto: Belfords, Clarke, 1880.

Morton, W. L. Manitoba: The Birth of a Province. Winnipeg: Manitoba Record Society Publications, 1984.

History and Disposition:

APPEAL from a judgment of the Manitoba Court of Appeal *(2001), 198 D.L.R. (4th) 220*, *[2001] 8 W.W.R. 231*, *156 Man. R. (2d) 53*, 246 W.A.C. 53, *[2001] 3 C.N.L.R. 187*, *[2001] M.J. No. 168* (QL), *2001 MBCA 55*, affirming a decision of the Court of Queen's Bench, *[1998] 10 W.W.R. 442*, *130 Man. R. (2d) 114*, *[1998] 4 C.N.L.R. 103*, *[1998] M.J. No. 395* (QL), upholding a judgment of the Provincial Court, *[1997] 3 C.N.L.R. 109*, *[1996] M.J. No. 391* (QL). Appeal dismissed.

Counsel

Lionel Chartrand, for the appellant.

Holly D. Penner and Deborah L. Carlson, for the respondent.

Ivan G. Whitehall, Q.C., Barbara Ritzen and Michael H. Morris, for the intervener the Attorney General of Canada.

Written submissions only by P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

Kurt J. W. Sandstrom and Margaret Unsworth, for the intervener the Attorney General of Alberta.

Jean Teillet, Clem Chartier, Arthur Pape and Jason Madden, for the intervener the Métis National Council.

Joseph Eliot Magnet, for the intervener the Congress of Aboriginal Peoples.

The following is the judgment delivered by

THE COURT

1 This case raises the issue of whether the Métis are "Indians" under the hunting rights provisions of the Manitoba *Natural Resources Transfer Agreement* [page240] ("*NRTA*"), incorporated as Schedule (1) to the *Constitution Act, 1930*. We conclude that they are not.

2 On February 10, 1994, Ernest Blais and two other men went hunting for deer in the District of Piney, in the Province of Manitoba. At that time, deer hunting was prohibited in that area by the terms of the wildlife regulations passed pursuant to *The Wildlife Act* of Manitoba, R.S.M. 1987, c. W130, s. 26, as amended by S.M. 1989-90, c. 27, s. 13. Mr. Blais was charged with unlawfully hunting deer out of season.

3 The requisite elements of the offence were conceded at trial. However, the appellant asserted two defences that would have entitled him to acquittal. Both defences were based on his identity as a Métis. First, the appellant argued that, as a Métis, he had an aboriginal right to hunt for food under s. 35 of the *Constitution Act, 1982*. Second, he claimed a constitutional right to hunt for food on unoccupied Crown lands by virtue of para. 13 of the *NRTA.*

4 The parties agreed at trial, and continue to agree, that the appellant was hunting for food for himself and for the members of his immediate family, and that he was hunting on unoccupied Crown land. They further agree that the appellant is Métis.

5 The trial judge rejected both of the appellant's defences and entered a conviction on August 22, 1996 (*[1997] 3 C.N.L.R. 109*). The appellant appealed the conviction to the Manitoba Court of Queen's Bench (*[1998] 4 C.N.L.R. 103*) and to the Manitoba Court of Appeal (*[2001] 3 C.N.L.R. 187*, *2001 MBCA 55*). His appeals were based solely on the defence that, as a Métis, he is immune from conviction under the *Wildlife Act* regulations in so far as they infringe on his right to hunt for food under para. 13 of the *NRTA*. Both courts rejected this defence and upheld the appellant's conviction.

[page241]

6 Because we agree that para. 13 of the *NRTA* cannot be read to include the Métis, we would dismiss this appeal . We make no findings with respect to the existence of a Métis right to hunt for food in Manitoba under s. 35 of the *Constitution Act, 1982*, since the appellant chose not to pursue this defence.

II. Analysis

7 Mr. Blais is a "Métis", a member of a distinctive community descended from unions between Europeans and Indians or Inuit. This is agreed by the parties and was confirmed by the trial judge. There is no basis for disturbing this finding, particularly as the appellant satisfies the criteria of self-identification, ancestral connection, and community acceptance set out in *R. v. Powley*, *[2003] 2 S.C.R. 207*, *2003 SCC 43*. The question is whether, as a Métis, he is entitled to benefit from this hunting provision for "Indians".

8 Paragraph 13 of the *NRTA* reads:

> In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

This provision consists of a stipulation and an exception. The stipulation is that "the laws respecting game in force in the Province from time to time shall apply to the Indians" (emphasis added). The exception is the continuing right

of the Indians to hunt, trap and fish for food on unoccupied Crown lands "provided, however, that the said Indians shall have the right, which the Province hereby assures to [page242] them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access" (emphasis added).

9 The issue, as stated, is whether the exception addressed to "Indians" applies to the Métis. As we explain in *Powley, supra*, at para. 10, the term "Métis" does not designate all individuals with mixed heritage; "rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears". Members of Métis communities in the prairie provinces collectively refer to themselves as the "Métis Nation", and trace their roots to the western fur trade: *Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities* (1996), vol. 4, at p. 203 ("*RCAP Report*"). Other Métis communities emerged in eastern Canada: *RCAP Report*; see *Powley*, at para. 10. The sole question before us is whether the appellant, being a Métis, is entitled to benefit from the protection accorded to "Indians" in the *NRTA*. He can claim this benefit only if the term "Indians" in para. 13 encompasses the Métis.

A. *An Overview of the NRTA*

10 Before embarking on our analysis of the meaning of "Indians" in para. 13, it may be useful to set out the history of the *NRTA* in general and para. 13 in particular. The three *NRTA*s arose as part of an effort to put the provinces of Alberta, Manitoba and Saskatchewan on an equal footing with the other Canadian provinces by giving them jurisdiction over and ownership of their natural resources. [page243] Paragraph 1 of each of these Agreements reads in part:

> In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the Constitution Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall ... belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof ...; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada ... it being the intention that ... Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter. [Emphasis added.]

In other words, the Agreements were largely concerned with the transfer of contractual and related liabilities from Canada to the provinces. Indeed, early litigation relating to the *NRTA*s involved precisely this: see, e.g., *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, *[1933] S.C.R. 629*.

11 In the midst of these transfer provisions, three out of 25 paragraphs in the Manitoba *NRTA* come under the separate heading "Indian Reserves". Paragraph 13 is one of them. These paragraphs are identical to paras. 10-12 of the Alberta and Saskatchewan *NRTA*s. The three provisions indicate that, notwithstanding the transfer of control over land to Manitoba, responsibility for administering Indian reserves will remain with the federal Crown (para. 11); that the rules set out in the March 24, 1924 agreement between Canada and Ontario will apply to these Indian reserves and to any others subsequently created in the Province [page244] (para. 12); and that provincial hunting and fishing laws will apply to Indians except that these laws shall not prevent Indians from hunting and fishing for food on unoccupied Crown lands (para. 13).

12 The broad purpose of the *NRTA* was to transfer control over land and natural resources to the three western provinces. The first two of the three provisions on "Indian Reserves" were included to specify that the administration of these reserves would remain with the federal government notwithstanding the general transfer. However, the

provincial government would have the right and the responsibility to legislate with respect to certain natural resource matters affecting Indians, including hunting. Section 88 of the *Indian Act*, R.S.C. 1985, c. I-5, introduced in 1951 (S.C. 1951, c. 29, s. 87), makes general provincial laws applicable to Indians in the absence of conflicting treaties or Acts of Parliament . By enacting para. 13, the federal government specified that hunting and fishing by Indians could be the subject of provincial regulation, while seeking to ensure that its pre-existing obligations towards the Indians with respect to hunting rights would be fulfilled.

13 Paragraph 13 both affirmed and limited the Province's regulatory power: *Frank v. The Queen*, [1978] 1 S.C.R. 95, at p. 100; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, at p. 285; *R. v. Horseman*, [1990] 1 S.C.R. 901, at pp. 931-32; *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 45. It affirmed the Province's power to regulate hunting for conservation purposes (see *Badger, supra*, at para. 71) but it carved out a protected space for hunting by Indians on unoccupied Crown lands and on lands to which the Indians have a right of access. Other potential sources of aboriginal hunting rights exist outside of the para. 13 framework, such as time-honoured practices recognized by the common law and protected by s. 35 of the *Constitution Act, 1982*. However, because [page245] Mr. Blais grounds his claim exclusively in para. 13 of the *NRTA*, we must confine our reasoning to this provision.

B. *The Regulatory Context*

14 The Province of Manitoba has used its regulatory power to enact laws designed to protect its wildlife population: *The Wildlife Act*. The regulations prescribe when, where, how and what species people can hunt. Where there is not an absolute prohibition on hunting a particular species, Manitoba has instituted seasonal restrictions and a system of licensing to keep track of the date, location, kind and number of animals killed.

15 Seasonal restrictions and licensing requirements for deer hunting under the Manitoba *Wildlife Act* currently do not apply to members of Indian bands. Mr. Blais was arrested and charged with unlawfully hunting deer out of season because he is not a member of an Indian band, but a member of the Manitoba Métis community. The position of the Manitoba government is that para. 13 of the *NRTA* does not exempt the Métis from the obligation to comply with the deer-hunting regulations. Mr. Blais says that it does.

C. *Guiding Principles and Application*

16 Against this background, we turn to the issue before us: whether "Indians" in para. 13 of the *NRTA* include the Métis. The starting point in this endeavour is that a statute -- and this includes statutes of constitutional force -- must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see [page246] E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As P.-A. Côté stated in the third edition of his treatise, "Any interpretation that divorces legal expression from the context of its enactment may produce absurd results" (*The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 290).

17 The *NRTA* is a constitutional document. It must therefore be read generously within these contextual and historical confines. A court interpreting a constitutionally guaranteed right must apply an interpretation that will fulfill the broad purpose of the guarantee and thus secure "for individuals the full benefit of the [constitutional] protection": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. "At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the [constitutional provision] was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart, supra*, at p. 344. This is essentially the approach the Court used in 1939 when the Court examined the historical record to determine whether the term "Indians" in s. 91(24) of the *British North America Act, 1867* includes the Inuit (*Reference as to whether "Indians" in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] S.C.R. 104).

18 Applied to this case, this means that we must fulfill -- but not "overshoot" -- the purpose of para. 13 of the *NRTA*. We must approach the task of determining whether Métis are included in "Indians" under para. 13 by looking at the historical context, the ordinary meaning of the language used, and the philosophy or objectives lying behind

it.

(1) Historical Context

19 The *NRTA* was not a grant of title, but an administrative transfer of the responsibilities that the Crown acknowledged at the time towards "the Indians [page247] within the boundaries" of the Province -- a transfer with constitutional force. In ascertaining which group or groups the parties to the *NRTA* intended to designate by the term "Indians", we must look at the prevailing understandings of Crown obligations and the administrative regimes that applied to the different Aboriginal groups in Manitoba. The record suggests that the Métis were treated as a different group from "Indians" for purposes of delineating rights and protections.

20 The courts below found, and the record confirms, that the Manitoba Métis were not considered wards of the Crown. This was true both from the perspective of the Crown, and from the perspective of the Métis. Wright J. summarized his findings on this point as follows, at paras. 18-19:

> The nature of the negotiations in the 1920's, as reflected in correspondence and other evidence introduced at the trial of the appellant, shows that protection was the fundamental concern of the federal authorities, being consistent with the Crown's obligations to those who automatically or voluntarily became subject to, or beneficiaries of, the *Indian Act*.
>
> Nowhere is there any suggestion [that] the Metis, as a people, sought or were regarded as being in need of this kind of protection. On the contrary, the evidence demonstrates the Metis to be independent and proud of their identity separate and apart from the Indians.

21 The difference between Indians and Métis appears to have been widely recognized and understood by the mid-19th century. In 1870, Manitoba had a settled population of 12,228 inhabitants, almost 10,000 of whom were either English Métis or French Métis. Government actors and the Métis themselves viewed the Indians as a separate group with different historical entitlements; in fact, many if not most of the members of the Manitoba government at the time of its entry into Confederation were themselves Métis.

22 The *Manitoba Act, 1870* used the term "half-breed" to refer to the Métis, and set aside land [page248] specifically for their use: *Manitoba Act, 1870*, S.C. 1870, c. 3, s. 31 (reprinted in R.S.C. 1985, App. II, No. 8). While s. 31 states that this land is being set aside "towards the extinguishment of the Indian Title to the lands in the Province", this was expressly recognized at the time as being an inaccurate description. Sir John A. Macdonald explained in 1885:

> Whether they [the Métis] had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of that Province ... 1,400,000 acres would be quite sufficient for the purpose of compensating these men for what was called the extinguishment of the Indian title. That phrase was an incorrect one, the half-breeds did not allow themselves to be Indians.
>
> (*House of Commons Debates*, July 6, 1885, at p. 3113, cited in T. E. Flanagan, "The History of Metis Aboriginal Rights: Politics, Principle, and Policy" (1990), 5 *C.J.L.S.* 71, at p. 74)

23 Other evidence in the record corroborates this view. For example, at trial, the expert witness Dr. G. Ens attached to his report a book written by Lieutenant-Governor A. Morris entitled *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, published in 1880. The book includes an account of negotiations between the Governor and an Indian Chief who expresses the concern that his mixed-blood offspring might not benefit from the proposed treaty. The Governor explains, at p. 69: "I am sent here to treat with the Indians. In Red River, where I came from, and where there is a great body of Half-breeds, they must be either white or Indian. If Indians, they get treaty money; if the Half-breeds call themselves white, they get land". This statement supports the view that Indians and Métis were widely understood as distinct groups for the purpose of determining their entitlements *vis-à-vis* the colonial administration .

[page249]

24 It could be argued that the ability of individual Métis to identify themselves with Indian bands and to claim treaty rights on this basis weighs against a view of the two groups as entirely distinct. However, the very fact that a Métis person could "choose" either an Indian or a white identity supports the view that a Métis person was not considered Indian in the absence of an individual act of voluntary association.

25 The Canadian government's response to an 1877 petition from a group of Métis further illustrates the perceived difference between the Indians and the Métis, and the exclusion of the Métis from the purview of Indian treaties. The Métis petitioners requested a grant of farming implements and seeds, and the relaxed enforcement of game laws to enable them to recover economically from the small-pox epidemic of 1870. David Laird, the Lieutenant-Governor of the North-West Territories, responded to the petition. He concluded by declaring:

> I can assure you that the Government feel[s] a kindly interest in your welfare, and it is because they desire to see you enjoying the full franchise and property rights of British subjects, and not laboring under the Indian state of pupilage, that they have deemed it for the advantage of half-breeds themselves that they should not be admitted to the Indian treaties.
>
> (W. L. Morton, ed., *Manitoba: The Birth of a Province* (1984), vol. I, at p. 23)

Without commenting on the motivations underlying the government's policy or on its ultimate wisdom, we take note of the clear distinction made between Indians and "half-breeds", and the fundamentally different perception of the government's relationship with and obligations towards these two groups. We also note that counsel for the intervener, the Métis National Council, told the Court of Appeal: "the Métis want to be 'Indian' under the *NRTA*, but for no other purpose" (para. 75).

[page250]

26 Placing para. 13 in its proper historical context does not involve negating the rights of the Métis. Paragraph 13 is not the only source of the Crown's or the Province's obligations towards Aboriginal peoples. Other constitutional and statutory provisions are better suited, and were actually intended, to fulfill this more wide-ranging purpose. The sole issue before us is whether the term "Indians" in the *NRTA* includes the Métis. The historical context of the *NRTA* suggests that it does not.

(2) Language

27 The common usage of the term "Indian" in 1930 also argues against a view of this term as encompassing the Métis. Both the terms "Indian" and "half-breed" were used in the mid-19th century. Swail Prov. Ct. J. cites a North American census prepared by the Hudson's Bay Company in 1856-57 (pp. 146-47). The census records 147,000 "Indians", and breaks this down into various groups, including "The Plain Tribes", "The Esquimaux", "Indians settled in Canada", and so forth. A separate line indicates the number of "Whites and half-breeds in Hudson's Bay Territory", which is estimated at 11,000, for a total of 158,000 "souls". This document illustrates that the "Whites and half-breeds" were viewed as an identifiable group, separate and distinct from the Indians.

28 The Red River Métis distinguished themselves from the Indians. For example, the successive Lists of Rights prepared by Métis leaders at the time of the creation of the Province of Manitoba excluded "the Indians" from voting. This provision could not plausibly have been intended to disenfranchise the Métis, who were the authors of the Lists and the majority of the population. The Third and Fourth Lists of Rights emphasized the importance of concluding treaties "between Canada and the different Indian tribes of the Province", with the "cooperation of the

Local Legislature" (Morton, *supra*, at pp. 246 and 249). The Local Legislature was, at that time, a [page251] Métis-dominated body, underscoring the Métis' own view of themselves and the Indians as fundamentally distinct.

29 There might not have been absolute consistency in the use of the terms "Indian" and "half-breed", and there appears to have been some mobility between the two groups. However, as evidenced by the historical documents statement cited above, the prevailing trend was to identify two distinct groups and to differentiate between their respective entitlements. Dr. Ens indicated in his report: "By 1850 'Half-Breed' was the most frequently used term among English-speaking residents of the North West to refer to all persons of mixed ancestry. It was a term that clearly differentiated between Indian and Metis populations" (respondent's record, at p. 176). At trial, the appellant's expert, Dr. Shore, could not cite any source in which the Canadian government used the term "Indian" to refer to all Aboriginal peoples, including the Métis.

30 This interpretation is supported by the location of para. 13 in the *NRTA* itself. Quite apart from formal rules of statutory construction, common sense dictates that the content of a provision will in some way be related to its heading. Paragraph 13 falls under the heading "Indian Reserves". Indian reserves were set aside for the use and benefit of Status Indians, not for the Métis. The placement of para. 13 in the part of the *NRTA* entitled "Indian Reserves", along with two other provisions that clearly do not apply to the Métis, supports the view that the term "Indian" as used throughout this part was not seen as including the Métis. This placement weighs against the argument that we should construe the term "Indians" more broadly than otherwise suggested by the historical context of the *NRTA* and the common usage of the term at the time of the *NRTA*'s enactment.

[page252]

31 We find no basis in the record for overturning the lower courts' findings that, as a general matter, the terms "Indian" and "half-breed" were used to refer to separate and distinguishable groups of people in Manitoba from the mid-19th century through the period in which the *NRTA* was negotiated and enacted.

(3) The *NRTA*'s Objectives

32 The purpose of para. 13 of the *NRTA* is to ensure respect for the Crown's obligations to "Indians" with respect to hunting rights. It was enacted to protect the hunting rights of the beneficiaries of Indian treaties and the *Indian Act* in the context of the transfer of Crown land to the provinces. It took away the right to hunt commercially while protecting the right to hunt for food and expanding the territory upon which this could take place: see *Frank, supra*, at p. 100; *Moosehunter, supra*, at p. 285; *Horseman, supra*, at pp. 931-32; and *Badger, supra*, at para. 45. Wright J. put it thus, at para. 8:

> The NRTA was entered into between the federal government and each of the Provinces of Manitoba, Saskatchewan and Alberta... . [Its] primary purpose was to transfer Crown lands, with the resources associated, from Canada to the Provinces concerned. Section 13 in the Manitoba agreement ... was included to enable Manitoba to pass laws respecting game and fish which would apply to Indians... . The exclusion in s. 13 was aimed to protect existing Indian rights to hunt, trap and fish on unoccupied Crown lands or any other lands to which the Indians had a right of access. Any such rights arose as a result of an Aboriginal historic base or because they were established or confirmed by treaty.

Manitoba would have the authority to pass laws respecting game and fish that would apply to all hunting and fishing activities in the province, including the activities of Indians. The exception was that Indians, a subset of the population with a particular historical relationship to the Crown, would not thereby be deprived of certain specified hunting and fishing rights.

[page253]

33 The protection accorded by para. 13 was based on the special relationship between Indians and the Crown. Underlying this was the view that Indians required special protection and assistance. Rightly or wrongly, this view did not extend to the Métis. The Métis were considered more independent and less in need of Crown protection than their Indian neighbours, as Wright J. confirmed. Shared ancestry between the Métis and the colonizing population, and the Métis' own claims to a different political status than the Indians in their Lists of Rights, contributed to this perception. The stark historic fact is that the Crown viewed its obligations to Indians, whom it considered its wards, as different from its obligations to the Métis, who were its negotiating partners in the entry of Manitoba into Confederation.

34 This perceived difference between the Crown's obligations to Indians and its relationship with the Métis was reflected in separate arrangements for the distribution of land. Different legal and political regimes governed the conclusion of Indian treaties and the allocation of Métis scrip. Indian treaties were concluded on a collective basis and entailed collective rights, whereas scrip entitled recipients to individual grants of land. While the history of scrip speculation and devaluation is a sorry chapter in our nation's history, this does not change the fact that scrip was based on fundamentally different assumptions about the nature and origins of the government's relationship with scrip recipients than the assumptions underlying treaties with Indians.

35 The historical context of the *NRTA*, the language of the section, and the purpose that led to its inclusion in the *Constitution Act, 1930* support the lower courts' conclusion that para. 13 does not encompass the Métis.

[page254]

D. *Appellant's Counter-Arguments*

(1) Continuity of Language

36 The appellant asks us to impose a "continuity of language" requirement on the Constitution as a whole in order to support his argument that the term "Indians" in the *NRTA* includes the Métis. We do not find this approach persuasive. To the contrary, imposing a continuity requirement would lead us to conclude that "Indians" and "Métis" are different, since they are separately enumerated in s. 35(2) of the *Constitution Act, 1982*. We emphasize that we leave open for another day the question of whether the term "Indians" in s. 91(24) of the *Constitution Act, 1867* includes the Métis -- an issue not before us in this appeal.

(2) The Ambiguity Principle

37 In the absence of compelling evidence that the term "Indians" in para. 13 includes the Métis, the appellant invokes the principle that ambiguities should be resolved in favour of Aboriginal peoples: see *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 464; see also *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, *per* La Forest J., at pp. 142-43 (suggesting refinements to this principle). This principle is triggered when there are doubts about the most fitting interpretation of the provision in question. In such cases, a generous and liberal interpretation is to be preferred over a narrow and technical one: *Nowegijick, supra*.

38 The ambiguity principle does not assist the appellant in this case. The historical documentation is sufficient to support the view that the term "Indians" in para. 13 of the *NRTA* was not meant to encompass the Métis. Nor do we find relevant the respondent's counter-argument that the ambiguity principle precludes extending the protection of para. 13 to the Métis because this would "dilute" the value of Indian hunting rights in Manitoba. If "Indians" in para. 13 includes the Métis, then such [page255] an interpretation will prevail whether or not "dilution" results.

(3) The "Living Tree" Principle

39 We decline the appellant's invitation to expand the historical purpose of para. 13 on the basis of the "living tree"

doctrine enunciated by Lord Sankey L.C. with reference to the 1867 *British North America Act*: *Edwards v. Attorney-General for Canada*, *[1930] A.C. 124* (P.C.), at p. 136. The appellant, emphasizing the constitutional nature of para. 13 , argues that this provision must be read broadly as providing solutions to future problems. He argues that, regardless of para. 13's original meaning, contemporary values, including the recognition of the Crown's fiduciary duty towards Aboriginal peoples and general principles of restitutive justice, require us to interpret the word "Indians" as including the Métis.

40 This Court has consistently endorsed the living tree principle as a fundamental tenet of constitutional interpretation. Constitutional provisions are intended to provide "a continuing framework for the legitimate exercise of governmental power": *Hunter v. Southam Inc.*, *[1984] 2 S.C.R. 145* , *per* Dickson J. (as he then was), at p. 155. But at the same time, this Court is not free to invent new obligations foreign to the original purpose of the provision at issue. The analysis must be anchored in the historical context of the provision. As emphasized above, we must heed Dickson J.'s admonition "not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore ... be placed in its proper linguistic, philosophic and historical contexts": *Big M Drug Mart, supra*, at p. 344; see Côté, *supra*, at p. 265. Dickson J. was speaking of the *Charter*, but his words apply equally to the task of interpreting the *NRTA*. Similarly, Binnie J. emphasized the need for attentiveness to context when he [page256] noted in *R. v. Marshall*, *[1999] 3 S.C.R. 456*, at para. 14, that "'[g]enerous' rules of interpretation should not be confused with a vague sense of after-the-fact largesse." Again the statement, made with respect to the interpretation of a treaty, applies here.

41 We conclude that the term "Indians" in para. 13 of the *NRTA* does not include the Métis, and we find no basis for modifying this intended meaning. This in no way precludes a more liberal interpretation of other constitutional provisions, depending on their particular linguistic, philosophical and historical contexts.

III. Conclusion

42 We find no reason to disturb the lower courts' findings that neither the Crown nor the Métis understood the term "Indians" to encompass the Métis in the decades leading up to and including the enactment of the *NRTA*. Paragraph 13 does not provide a defence to the charge against the appellant for unlawfully hunting deer out of season. We do not preclude the possibility that future Métis defendants could argue for site-specific hunting rights in various areas of Manitoba under s. 35 of the *Constitution Act, 1982*, subject to the evidentiary requirements set forth in *Powley, supra*. However, they cannot claim immunity from prosecution under the Manitoba wildlife regulations by virtue of para. 13 of the *NRTA*.

43 The appeal is dismissed. Each party shall bear its own costs.

44 The constitutional question is answered as follows:

> Is the appellant Ernest Lionel Joseph Blais, being a Métis, encompassed by the term "Indians" in para. 13 of the *Natural Resources Transfer Agreement, 1930*, as ratified [page257] by the *Manitoba Natural Resources Act*, (1930) 20-21 Geo. V, c. 29 (Can.), and confirmed by the *Constitution Act (1930)*, *20-21 Geo. V, c. 26 (U.K.)*, and therefore rendering s. 26 of *The Wildlife Act* of Manitoba unconstitutional to the extent that it infringes upon the appellant's right to hunt for food for himself and his family?

Answer: No.

APPENDIX

Relevant Constitutional and Statutory Provisions

Constitution Act, 1930

Manitoba -- Memorandum of Agreement

13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

The Wildlife Act, R.S.M. 1987, c. W130

26. No person shall hunt, trap, take or kill or attempt to trap, take or kill a wild animal during a period of the year when the hunting, trapping, taking or killing of that species or type of wild animal is either prohibited or not permitted by the regulations.

Solicitors:

Solicitor for the appellant: Aboriginal Centre Law Office, Winnipeg.

Solicitor for the respondent: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

[page258]

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitors for the intervener the Métis National Council: Pape & Salter, Vancouver.

Solicitor for the intervener the Congress of Aboriginal Peoples: Joseph Eliot Magnet, Ottawa.

End of Document

R. v. Horseman, [1990] 1 S.C.R. 901

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Lamer, Wilson, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.

1989: November 27 / 1990: May 3.

File No.: 20582.

[1990] 1 S.C.R. 901 | *[1990] 1 R.C.S. 901* | *[1990] S.C.J. No. 39* | *[1990] A.C.S. no 39*

Bert Horseman, appellant; v. Her Majesty The Queen, respondent; and The Attorney General of Manitoba and the Attorney General for Saskatchewan, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Case Summary

Indians — Hunting rights — Treaty Indian killing bear in self-defence and later selling hide — Alberta Wildlife Act prohibiting trafficking in wildlife without a licence — Whether prohibition applies to Treaty 8 Indians — Whether Treaty 8 hunting rights limited by 1930 Natural Resources Transfer Agreement — Wildlife Act, R.S.A. 1980, c. W-9, ss. 18, 42 — Treaty No. 8 — Natural Resources Transfer Agreement, 1930, para. 12.

Appellant, a Treaty 8 Indian, killed a grizzly bear in self-defence while hunting moose for food. He did not have at the time a licence under the Alberta Wildlife Act to hunt grizzly bears or sell their hides. A year later, in need of money to support his family, he purchased a grizzly bear hunting licence and sold the grizzly hide. This was an isolated act and not part of any planned commercial activity. Appellant was charged with unlawfully trafficking in wildlife, contrary to s. 42 of the Wildlife Act. At trial, he argued that the Act did not apply to him and that he was within his Treaty 8 rights when he sold the bear hide. This treaty secured the Indians' right "to pursue their usual vocations of hunting, trapping and fishing ... subject to such regulations as [might] from time to time be made by the Government of the country". The trial judge found that the appellant's Treaty 8 hunting rights included the right to barter and acquitted him. The summary conviction appeal court set aside the acquittal and convicted the appellant. The court held that the Alberta Natural Resources Transfer Agreement of 1930 had limited the [page902] Treaty 8 hunting rights to a right to hunt only for food. The Court of Appeal upheld the decision.

Held (Dickson C.J. and Wilson and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Lamer, La Forest, Gonthier and Cory JJ.: Section 42 of the Alberta Wildlife Act is a provincial law of general application which is applicable to Indians pursuant to s. 88 of the Indian Act so long as it does not conflict with a treaty right. The hunting rights reserved to the Indians in 1899 by Treaty No. 8 included hunting for commercial purposes, but these rights were subject to governmental regulation and have been limited to the right to hunt for food only -- that is to say, for sustenance for the individual Indian or the Indian's family -- by para. 12 of the Transfer Agreement. In exchange for the reduction in the right to hunt for purposes of commerce, the Crown widened the hunting territory and the means by which the Indians could hunt for food. The federal government's power to make such a modification unilaterally is unquestioned. Here, the appellant's sale of the bear hide was part of a "multi-stage process" which might include purchasing food for nourishment. The sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as

limited by the Transfer Agreement of 1930. The application of s. 42 of the Wildlife Act to the appellant was therefore not precluded by s. 88 of the Indian Act. The fact that a grizzly bear was killed by the appellant in self-defence or the fact that he obtained a grizzly bear hunting permit after he was in the possession of a bear hide is irrelevant to a consideration of whether there has been a breach of s. 42. The grizzly bear is in a precarious position, and trafficking in bear hides, other than pursuant to the provisions of the Wildlife Act, threatens its very existence. Section 42 is valid legislation enacted by the government with jurisdiction in the field. It reflects a bona fide concern for the preservation of a species.

Per Dickson C.J. and Wilson and L'Heureux-Dubé JJ. (dissenting): Indian treaties should be given a fair, large and liberal construction in favour of the Indians. [page903] They are sui generis, being the product of negotiation between very different cultures. Courts must therefore look at the broader historical context to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time. In 1899, the Indians were concerned that the most important aspect of their way of life, their ability to hunt and fish, not be interfered with. The language of Treaty No. 8 embodied a solemn engagement to Indians that their means of livelihood would be respected, and this promise was the sine qua non for obtaining their agreement to enter into the treaty. In guaranteeing the Indians the right to pursue their usual vocations of hunting, trapping and fishing "subject to such regulations as may from time to time be made by the Government of the country", the Canadian government committed itself to regulate hunting in a manner that would respect the Indians' lifestyle and the way in which they had traditionally pursued their livelihood.

Paragraph 12 of the Transfer Agreement was intended to respect the guarantees enshrined in Treaty No. 8, and the modifications to the areas within which Treaty 8 Indians would thereafter be able to engage in their traditional way of life should not be viewed as an attempt to abrogate or limit the Indians' rights to hunt and fish. Given the government's solemn commitment to Treaty 8 Indians, the term hunting "for food" in para. 12 should be construed as encompassing hunting for support and subsistence, which includes hunting in order to exchange the product of the hunt for other items, as opposed to purely commercial or sport hunting. Paragraph 12 must also be construed as conferring on the province of Alberta the power to regulate sport hunting and hunting for purely commercial purposes rather than as enabling it to place serious and invidious restrictions on traditional Indian hunting practices.

The killing of the bear in this case was not an act of "hunting"; it was an act of self-defence. Moreover, the sale of the hide was an isolated transaction for the purpose of support and subsistence. The appellant's conduct, therefore, is not caught by s. 42 of the Alberta Wildlife Act, which is applicable to Treaty 8 Indians only to the extent that they are engaged in commercial or sport hunting.

[page904]

Cases Cited

By Cory J.

Applied: Frank v. The Queen, *[1978] 1 S.C.R. 95*; R. v. Sutherland, *[1980] 2 S.C.R. 451*; Moosehunter v. The Queen, *[1981] 1 S.C.R. 282*; referred to: Simon v. The Queen, *[1985] 2 S.C.R. 387*; Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*; Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*; Cardinal v. Attorney General of Alberta, *[1974] S.C.R. 695*; R. v. Strongquill *(1953), 8 W.W.R. (N.S.) 247*; Myran v. The Queen, *[1976] 2 S.C.R. 137*.

By Wilson J. (dissenting)

Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*; Simon v. The Queen, *[1985] 2 S.C.R. 387*; R. v. White and Bob *(1964), 50 D.L.R. (2d) 613*, aff'd [1965] S.C.R. vi; R. v. Smith, *[1935] 3 D.L.R. 703*; R. v. Strongquill *(1953), 8*

W.W.R. (N.S.) 247; Frank v. The Queen, [1978] 1 S.C.R. 95; Prince and Myron v. The Queen, [1964] S.C.R. 81; R. v. Wesley, [1932] 2 W.W.R. 337; Sikyea v. The Queen, [1964] S.C.R. 642; R. v. George, [1966] S.C.R. 267; Moosehunter v. The Queen, [1981] 1 S.C.R. 282; R. v. Sutherland, [1980] 2 S.C.R. 451.

Statutes and Regulations Cited

An Act further to amend "The Indian Act" chapter forty-three of the Revised Statutes, S.C. 1890, c. 29, s. 10.
Constitution Act, 1867.
Constitution Act, 1930, 20 & 21 Geo. 5, c. 26 (U.K.) [reprinted in R.S.C. 1970, App. II, No. 25], s. 1.
Indian Act, R.S.C. 1927, c. 98, s. 69.
Indian Act, R.S.C. 1970, c. I-6, s. 88.
Natural Resources Transfer Agreement [confirmed by the Constitution Act, 1930], para. 12.
Treaty No. 8 (1899).
Unorganized Territories' Game Preservation Act, 1894, S.C. 1894, c. 31, ss. 2, 4 to 8, 26.
Wildlife Act, R.S.A. 1980, c. W-9, ss. 1(s), 18, 42.

Authors Cited

Daniel, Richard. "The Spirit and Terms of Treaty Eight." In The Spirit of the Alberta Indian Treaties. Edited by Richard Price. Montréal: Institute for Research on Public Policy, 1979.
Fumoleau, René. As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939. Toronto: McClelland and Stewart, 1973.
Hickey, Lynn, Richard L. Lightning and Gordon Lee, "T.A.R.R. Interview with Elders Program". In The Spirit of the Alberta Indian Treaties. Edited by Richard Price. Montréal: Institute for Research on Public Policy, 1979. [page905]
La Forest, G.V. Natural Resources and Public Property under the Canadian Constitution. Toronto: University of Toronto Press, 1969.
Laird, David, J. Ross and J. McKenna. "Report of Commissioners for Treaty No. 8." In Treaty No. 8 Made June 21, 1899 and Adhesions, Reports, etc. Ottawa: Reprinted by Queen's Printer, 1966.
O'Chiese, Peter, et al. "Interviews with Elders." In The Spirit of the Alberta Indian Treaties. Edited by Richard Price. Montréal: Institute for Research on Public Policy, 1979.
Ray, Arthur J. Commentary on Economic History of Treaty 8 Area (Department of History, University of British Columbia, 1985) [unpublished].

APPEAL from a judgment of the Alberta Court of Appeal (1987), 53 Alta. L.R. (2d) 146, 78 A.R. 351, [1987] 5 W.W.R. 454, [1987] 4 C.N.L.R. 99, dismissing the appellant's appeal from a judgment of Stratton J. (1986), 69 A.R. 13, [1986] 2 C.N.L.R. 94, allowing the Crown's appeal from the appellant's acquittal by Wong Prov. Ct. J., [1986] 1 C.N.L.R. 79, on a charge of trafficking in wildlife. Appeal dismissed, Dickson C.J. and Wilson and L'Heureux-Dubé JJ. dissenting.

Kenneth E. Staroszik, for the appellant. Richard F. Taylor and Margaret Unsworth, for the respondent. Donna J. Miller and Gordon E. Hannon, for the intervener the Attorney General of Manitoba. Graeme G. Mitchell, for the intervener the Attorney General for Saskatchewan.

Solicitors for the appellant: Rogers & Company, Calgary. Solicitor for the respondent: The Attorney General for Alberta, Edmonton. Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice,

Winnipeg. Solicitor for the intervener the Attorney General for Saskatchewan: The Department of Justice, Regina.

The reasons of Dickson C.J. and Wilson and L'Heureux-Dubé JJ. were delivered by

WILSON J. (dissenting)

1 I have had the advantage of reading the reasons of my colleague Justice Cory and must respectfully disagree with his conclusion that the appellant's conduct is caught by s. 42 of the Wildlife Act, R.S.A. 1980, c. W-9.

[page906]

2 While my colleague has reviewed the facts of this appeal and the decisions of the lower courts, I believe it is important to emphasize that all parties were agreed and the trial judge so found that Mr. Horseman was legitimately engaged in hunting moose for his own use in the Treaty 8 area when he killed the bear in self-defence. Mr. Horseman did not kill the bear with a view to selling its hide although he was eventually driven to do so a year later in order to feed himself and his family. The sale of the bear hide was an isolated act and not part of any planned commercial activity. None of this is in dispute.

3 The narrow question before us in this appeal then is whether the isolated sale for food of a bear hide obtained by the appellant fortuitously as the result of an act of self-defence is something that the government of Alberta is entitled to penalize under the Wildlife Act. In my view, the answer to this question requires a careful examination of the terms of Treaty No. 8 and the wording of para. 12 of the Natural Resources Transfer Agreement, 1930 (Alberta) (the "Transfer Agreement").

Interpreting Indian Treaties

4 This Court has already established a number of important guidelines for the interpretation of Indian treaties. In Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*, Dickson J. (as he then was) stated at p. 36:

> ... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians .... In Jones v. Meehan, 175 U.S. 1 (1899), it was held that Indian treaties "must ... be construed, not according to the technical meaning of [their] words ... but in the sense in which they would naturally be understood by the Indians". [Emphasis added.]

In Simon v. The Queen, *[1985] 2 S.C.R. 387*, at p. 402, Dickson C.J. pointed to his observation in Nowegijick and reiterated that "Indian treaties should be given a fair, large and liberal construction in favour of the Indians".

[page907]

5 The interpretive principles developed in Nowegijick and Simon recognize that Indian treaties are sui generis (per Dickson C.J. at p. 404 of Simon, supra). These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into. This is why the courts must be especially sensitive to the broader historical context in which such treaties were negotiated. They must be prepared to look at that historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time.

6 But the interpretive principles set out in Nowegijick and Simon were developed not only to deal with the unique nature of Indian treaties but also to address a problem identified by Norris J.A. in R. v. White and Bob *(1964), 50 D.L.R. (2d) 613* (B.C.C.A.), at p. 649 (aff'd [1965] S.C.R. vi):

> In view of the argument before us, it is necessary to point out that on numerous occasions in modern days, rights under what were entered into with Indians as solemn engagements, although completed with what would now be considered informality, have been whittled away on the excuse that they do not comply with present day formal requirements and with rules of interpretation applicable to transactions between people who must be taken in the light of advanced civilization to be of equal status.

In other words, to put it simply, Indian treaties must be given the effect the signatories obviously intended them to have at the time they were entered into even if they do not comply with to-day's formal requirements. Nor should they be undermined by the application of the interpretive rules we apply to-day to contracts entered into by parties of equal bargaining power.

7 In my view, the interpretive principles set out in Nowegijick and Simon are fundamentally sound and have considerable significance for this appeal. [page908] Any assessment of the impact of the Transfer Agreement on the rights that Treaty 8 Indians were assured in the treaty would continue to be protected cannot ignore the fact that Treaty No. 8 embodied a "solemn engagement". Accordingly, when interpreting the Transfer Agreement between the federal and provincial governments we must keep in mind the solemn commitment made to the Treaty 8 Indians by the federal government in 1899. We should not readily assume that the federal government intended to renege on the commitment it had made. Rather we should give it an interpretation, if this is possible on the language, which will implement and be fully consistent with that commitment. It is appropriate, therefore, to begin the analysis of the issues in this appeal with a review of the nature of the "solemn engagement" embodied in Treaty No. 8.

Treaty No. 8 and Indian Hunting Rights

8 In his Commentary on Economic History of Treaty 8 Area (unpublished; June 13, 1985, at p. 8), Professor Ray warns of the dangers involved in trying to understand the hunting practices of Indians in the Treaty 8 area by drawing neat distinctions between hunting for domestic use and hunting for commercial purposes. He notes that Indians in the Treaty 8 area had developed a way of life that centred on wildlife resources. They hunted beaver, moose, caribou and wood buffalo with a view to consuming some portions of their catch and exchanging other portions. "For these reasons, differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact" (p. 9).

9 Others have confirmed Professor Ray's understanding of the world in which Treaty 8 Indians lived prior to 1899: see, for example, Richard Daniel's observations in "The Spirit and Terms of Treaty Eight", in The Spirit of the Alberta Indian Treaties (Richard Price, ed., Institute for Research on Public Policy, 1979), at pp. 47 to 100. [page909] In my view, it is important to bear in mind this picture of the Treaty 8 Indians' way of life prior to 1899 when considering the context in which they consented to Treaty No. 8.

10 In one of the most detailed studies of the history of the negotiations leading up to Treaty No. 8, As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939 (1973), R. Fumoleau explains why the Canadian government sought an agreement with the Treaty 8 Indians. The Klondyke gold rush gave rise to serious problems throughout 1897 and 1898, with miners travelling through territory occupied by the Indians and paying little respect to their traditional way of life. Inevitably conflict broke out as the Indians retaliated. The government of Canada quickly realized that it was necessary to reach an understanding with the Indians about future relations. Commissioners Laird, Ross and McKenna were therefore sent out to negotiate a treaty with the Indians.

11 Mr. Daniel's study of these negotiations reveals that the Indians were especially concerned that the most important aspect of their way of life, their ability to hunt and fish, not be interfered with. He points out that the Commissioners repeatedly sought to assure the Indians that they would continue to be free to pursue these

activities as they always had. In the course of treaty negotiations at Lesser Slave Lake in June 1899 (negotiations that set the pattern for subsequent agreements with other Indian groups near Fort St. John, Fort Chipewyan, Fond du Lac, Fort Resolution and Wabasca), Commissioner Laird told the assembled Indians that "Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are." (See: Daniel, op. cit., at p. 76). Similarly, Mr. Fumoleau has observed that "[o]nly when the Treaty Commissioners promised them that they would be free to hunt and trap and fish for a living, and that their rights would be protected against the abuses of white hunters and trappers, did the Indians at each trading post of [page910] the Treaty 8 area consent to sign the treaty" (Fumoleau, op. cit., at p. 65).

12 The official report of the Commissioners who negotiated Treaty No. 8 (presented to the Minister of the Interior on September 22, 1899) confirms both that hunting and fishing rights were of particular concern to the Indians and that the Commissioners were at pains to make clear that the government of Canada did not wish to interfere with their traditional way of life. The Commissioners reported (at p. 6):

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be free to hunt and fish after the treaty as they would be if they never entered into it. [Emphasis added.]

13 Interviews with Indian elders of the Lesser Slave Lake area confirm the archival evidence with respect to the critical role played by the promise with respect to hunting and fishing rights. James Cornwall, who was present at the treaty negotiations at Lesser Slave Lake, signed an affidavit in 1937 (see Fumoleau, op. cit., at pp. 74-75) in which he stated:

> Much stress was laid on one point by the Indians, as follows: They would not sign under any circumstances, unless their right to hunt, trap and fish was guaranteed and it must be understood that these rights they would never surrender.

[page911]

More recent interviews with William Okeymaw of the Sucker Creek Reserve and Felix Gobot of Fort Chipewyan confirm that the treaty was to "be in effect as long as the sun shines and the rivers flow" (see: p. 151 of Peter O'Chiese et al., "Interviews with Elders", in The Spirit of the Alberta Indian Treaties, op. cit., at pp. 113-60). Lynn Hickey, Richard L. Lightning and Gordon Lee, who have conducted numerous interviews with elders in the Treaty 8 area, summarize the result of their findings as follows, in "T.A.R.R. Interview with Elders Program", in The Spirit of the Alberta Indian Treaties, pp. 103-12 (at p. 106):

> It is agreed that the treaty involved surrendering land, though a few people express this as an agreement to share land or surrender the surface only. Land is the only thing that was given up, however. The main discussion of the treaty by most elders concerns hunting, fishing, and trapping and how rights to pursue their traditional livelihood were not given up and were even strongly guaranteed in the treaty to last forever. Giving up the land would not interfere with the Indian's pursuit of his livelihood, and the Indians only signed the treaty on this condition. [Emphasis added.]

14 While one must obviously be sensitive to the fact that contemporary oral evidence of the meaning of provisions of Treaty No. 8 will not necessarily capture the understanding of the treaty that the Indians had in 1899, in my view such evidence is relevant where it confirms the archival evidence with respect to the meaning of the treaty. Indeed,

it seems to me to be of particular significance that the Treaty 8 Commissioners, historians who have studied Treaty No. 8, and Treaty 8 Indians of several different generations unanimously affirm that the government of Canada's promise that hunting, fishing and trapping rights would be protected forever was the sine qua non for obtaining the Indians' agreement to enter into Treaty No. 8. Hunting, fishing and trapping lay at the centre of their way of life. Provided that the source of their livelihood was protected, the Indians were prepared [page912] to allow the government of Canada to "have title" to the land in the Treaty 8 area.

15 In my view, it is in light of this historical context, one which did not, from the Indians' perspective, allow for simple distinctions between hunting for domestic use and hunting for commercial purposes and which involved a solemn engagement that Indians would continue to have unlimited access to wildlife, that one must understand the provision in Treaty No. 8 that reads:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [Emphasis added.]

16 If we are to remain faithful to the interpretive principles set out in Nowegijick and Simon, then we must not only be careful to understand that the language of Treaty No. 8 embodied a solemn engagement to Indians in the Treaty 8 area that their livelihood would be respected, but we must also recognize that in referring to potential "regulations" with respect to hunting, trapping and fishing the government of Canada was promising that such regulations would always be designed so as to ensure that the Indians' way of life would continue to be respected. To read Treaty No. 8 as an agreement that was to enable the government of Canada to regulate hunting, fishing and trapping in any manner that it saw fit, regardless of the impact of the regulations on the "usual vocations" of Treaty 8 Indians, is not credible in light of oral and archival evidence that includes a Commissioners' report stating that a solemn assurance was made that only such laws "as were in the interest of the Indians and were found necessary in [page913] order to protect the fish and fur-bearing animals would be made".

17 In other words, while the treaty was obviously intended to enable the government of Canada to pass regulations with respect to hunting, fishing and trapping, it becomes clear when one places the treaty in its historical context that the government of Canada committed itself to regulate hunting in a manner that would respect the lifestyle of the Indians and the way in which they had traditionally pursued their livelihood. Because any regulations concerning hunting and fishing were to be "in the interest" of the Indians, and because the Indians were promised that they would be as free to hunt, fish and trap "after the treaty as they would be if they never entered into it", such regulations had to be designed to preserve an environment in which the Indians could continue to hunt, fish and trap as they had always done.

Natural Resources Transfer Agreement

18 When the province of Alberta was created in 1905 its government did not receive the power to control natural resources in the province. Control over natural resources in Alberta remained in the hands of the federal government until 1930 when Canada and Alberta entered into the Transfer Agreement which placed Alberta on the same footing as the other provinces. Mindful of the government of Canada's responsibilities under a series of numbered treaties with Indians, the parties to the Transfer Agreement inserted a paragraph dealing with the Indians' treaty rights to hunt, fish and trap. Paragraph 12 of the Transfer Agreement stated:

> 12 In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any [page914] other lands to which the said Indians may have a right of access. [Emphasis added.]

19 In Natural Resources and Public Property under the Canadian Constitution (1969), at p. 180, G. V. La Forest (now a member of this Court) makes the following observation about para. 12 of the Transfer Agreement:

> The effect of the provision is to give the Indians a constitutional right as against the provinces to hunt and fish on unoccupied Crown lands; it cannot be unilaterally altered by the provinces. It appears to have been inserted to protect similar rights accorded by the various treaties under which the Indians surrendered the territory now comprising the Prairie provinces, and it has been held to be quite proper to look at these treaties for assistance in determining the meaning of the provision. [Emphasis added.]

The proposition that para. 12 of the Transfer Agreement was formulated with a view to protecting Treaty 8 rights and that it is therefore quite proper to look at Treaty No. 8 in order to understand the meaning of para. 12 of the Transfer Agreement has been emphasized on a number of occasions. For example, in R. v. Smith, *[1935] 3 D.L.R. 703*, at pp. 705-6, Turgeon J.A. (Mackenzie J.A. concurring) stated:

> As I have said, it is proper to consult this treaty in order to glean from it whatever may throw some light on the meaning to be given to the words in question. I would even say that we should endeavour, within the bounds of propriety, to give such meaning to these words as would establish the intention of the Crown and the Legislature to maintain the rights accorded to the Indians by the treaty. [Emphasis added.]

Similarly, in R. v. Strongquill *(1953), 8 W.W.R. (N.S.) 247* (Sask. C.A.) (a case relied upon by this Court in Frank v. The Queen, *[1978] 1 S.C.R. 95*, at p. 100) McNiven J.A. stated at p. 269:

> I have already said that whatever rights with respect to hunting were granted to the Indians by the said treaty were merged in par. 12 of the Natural Resources Agreement, supra. I have only referred to the treaty for such assistance as its terms may give in interpreting the language used in par. 12 for we must attribute to parliament an intention to fulfil its terms. It is also a [page915] cardinal rule of interpretation that words used in a statute are to be given their common ordinary and generally accepted meaning. Statutes are to be given a liberal construction so that effect may be given to each Act and every part thereof according to its spirit, true intent and meaning". [Emphasis added.]

20 The view expressed in Smith and in Strongquill to the effect that one should assume that Parliament intended to live up to its obligations under treaties with the Indians was subsequently approved by this Court in Prince and Myron v. The Queen, *[1964] S.C.R. 81*. Hall J. (for the Court) adopted the following passage from R. v. Wesley, *[1932] 2 W.W.R. 337*, in which McGillivray J.A. had commented at p. 344:

> I think the intention was that in hunting for sport or for commerce the Indian like the white man should be subject to laws which make for the preservation of game but, in hunting wild animals for the food necessary to his life, the Indian should be placed in a very different position from the white man who, generally speaking, does not hunt for food and was by the proviso to sec. 12 reassured of the continued enjoyment of a right which he has enjoyed from time immemorial. [Emphasis added.]

More recently, in Frank v. The Queen, supra, this Court reiterated that para. 12 was in part designed to ensure that the rights embodied in Treaty No. 8 were respected. Dickson J. stated at p. 100:

> It would appear that the overall purpose of para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food. See R. v. Wesley; R. v. Smith; R. v. Strongquill. [Emphasis added.]

21 In my view, the decisions in Smith and Wesley, cases that were decided shortly after the Transfer Agreement came into force, as well as later decisions in cases like Strongquill and Frank, make clear that, to the extent that it is

possible, one should view para. 12 of the Transfer Agreement as an attempt to [page916] respect the solemn engagement embodied in Treaty No. 8, not as an attempt to abrogate or derogate from that treaty. While it is clear that para. 12 of the Transfer Agreement adjusted the areas within which Treaty 8 Indians would thereafter be able to engage in their traditional way of life, given the oral and archival evidence with respect to the negotiation of Treaty No. 8 and the pivotal nature of the guarantee concerning hunting, fishing and trapping, one should be extremely hesitant about accepting the proposition that para. 12 of the Transfer Agreement was also designed to place serious and invidious restrictions on the range of hunting, fishing and trapping related activities that Treaty 8 Indians could continue to engage in. In so saying I am fully aware that this Court has stated on previous occasions that it is not in a position to question an unambiguous decision on the part of the federal government to modify its treaty obligations: Sikyea v. The Queen, *[1964] S.C.R. 642*, R. v. George, *[1966] S.C.R. 267*, and Moosehunter v. The Queen, *[1981] 1 S.C.R. 282*, at p. 293. We must, however, be satisfied that the federal government did make an "unambiguous decision" to renege on its Treaty 8 obligations when it signed the 1930 Transfer Agreement.

22 The respondent in this appeal has not pointed to any historical evidence in support of its claim that para. 12 of the Transfer Agreement was intended to limit the Indians' traditional right to hunt and fish (which included a right of exchange) to one confined to hunting and fishing for personal consumption only. Absent such evidence, and in view of the implications of bad faith on the part of the federal government which would arise from it, I am not prepared to accept that this was the legislature's intent. Indeed, it seems to me that in R. v. Sutherland, *[1980] 2 S.C.R. 451*, which dealt with an analogous provision in the Transfer Agreement with Manitoba, Dickson J. was concerned to make clear that the restrictive approach favoured by the respondent is entirely inappropriate. He stated at p. 461:

> Paragraph 13 of the Memorandum of Agreement, it is true, makes provincial game laws applicable to the Indians within the boundaries of the Province, but with the large and important proviso that assures them, inter [page917] alia, the "right" to hunt game at all seasons of the year for food on lands to which the Indians may have a right of access. This proviso should be given a broad and liberal construction. History supports such an interpretation as do the plain words of the proviso. The right assured is, in my view, the right to hunt game (any and all game), for food, at all seasons of the year (not just "open seasons") on lands to which they have a right of access (for hunting, trapping and fishing). [Emphasis added.]

23 Nevertheless, the respondent argues that the use of the words "for food" in para. 12 of the Transfer Agreement have this effect. They demonstrate, he submits, an intention on the part of the legislature to place substantial limits on the range of hunting related activities that Treaty 8 Indians can pursue free from provincial regulation. The respondent submits that Treaty 8 Indians can only derive protection from para. 12 if the purpose for which they are hunting is to feed themselves or their families and that because Mr. Horseman did not kill the bear with this purpose in mind his act falls outside the ambit of para. 12.

24 While the respondent suggests that this Court's jurisprudence on para. 12 and analogous provisions in other Transfer Agreements supports its restrictive reading of the proviso, I am of the view that this Court's previous decisions with respect to the language of para. 12 (and its equivalent in other Transfer Agreements) do not require the Court to construe the term "for food" in such a narrow and restricted manner. Given that Treaty No. 8 embodied a solemn engagement on the part of the government of Canada to respect a way of life that was built around hunting, fishing and trapping, given that our courts have on a number of occasions emphasized that we should seek to give meaning to the language used in para. 12 by looking to Treaty No. 8, and given that this Court's decision in Sutherland urged that para. 12 be given a "broad and liberal" construction, it seems to me that we should be very reluctant to accept any reading of the term "for food" that would constitute a profound inroad into the ability of Treaty 8 Indians to engage in the traditional [page918] way of life which they believed had been secured to them by the treaty.

25 I note that in Frank v. The Queen, supra, a case that involved a treaty Indian who had killed a moose, Dickson J. suggested (supra, at pp. 100-101) that, whereas under Treaty 6 hunting rights had been at large, under para. 12 they were now limited to hunting "for food" and that, as a result of para. 12, rights to hunt and fish otherwise than "for food" were subject to provincial game laws. But Dickson J. was quick to stress that in the case before him "these differences are unimportant because the appellant was hunting for food and upon land touched by both

Treaty and Agreement" (p. 100). In other words, while the presence of the term "for food" clearly meant that after 1930 the province of Alberta had the power to regulate hunting that was not "for food", Dickson J. saw no need in that case to explore in detail the nature of the distinction between hunting "for food" and hunting for other purposes.

26 In Moosehunter v. The Queen, supra, a case that involved a treaty Indian who had killed deer in Manitoba, Dickson J. did have occasion to consider the nature of the dividing line created by the term "for food" in somewhat more detail. He observed at p. 285:

> The reason or purpose underlying paragraph 12 was to secure to the Indians a supply of game and fish for their support and subsistence and clearly to permit hunting, trapping and fishing for food at all seasons of the year on all unoccupied Crown lands and lands to which the Indians had access. The Agreement had the effect of merging and consolidating the treaty rights of the Indians in the area and restricting the power of the provinces to regulate the Indians' right to hunt for food. The right of Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not. [Emphasis added.]

[page919]

27 In my view, the distinction that Dickson J. drew in Moosehunter between hunting for "support and subsistence", and hunting for "sport or commercially" is far more consistent with the spirit of Treaty No. 8 and with the proposition that one should not assume that the legislature intended to abrogate or derogate from Treaty 8 hunting rights than the respondent's submission that in using the term "for food" the legislature intended to restrict Treaty 8 hunting rights to hunting for direct consumption of the product of the hunt. And if we are to give para. 12 the "broad and liberal" construction called for in Sutherland, a construction that reflects the principle enunciated in Nowegijick and Simon that statutes relating to Indians must be given a "fair, large and liberal construction", then we should be prepared to accept that the range of activity encompassed by the term "for food" extends to hunting for "support and subsistence", i.e. hunting not only for direct consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport hunting.

28 And, indeed, when one thinks of it this makes excellent sense. The whole emphasis of Treaty No. 8 was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit.

[page920]

29 If we are to be sensitive to Professor Ray's observation that the distinction between hunting for commerce and domestic hunting is not one that can readily be imposed on the Indian hunting practices protected by Treaty No. 8, and if we are to approach para. 12 as a proviso that was intended to respect the guarantees enshrined in Treaty No. 8 (which I think we must do if at all possible), then para. 12 must be construed as a provision conferring on the province of Alberta the power to regulate sport hunting and hunting for purely commercial purposes rather than as a provision that was to enable the province to place serious and invidious restrictions on the Indians' right to hunt for "support and subsistence" in the broader sense.

30 When the phrase "for food" is read in this way para. 12 of the Transfer Agreement remains faithful to the Treaty

8 Commissioners' solemn engagement that the government of Canada would only enact "such laws as to hunting as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals" and that Treaty 8 Indians "would be free to hunt and fish after the treaty as they would be if they never entered into it". While Treaty 8 Indians and the government of Canada may not have foreseen in 1899 that limits would one day have to be placed on the extent to which people could engage in commercial and sport hunting, such restrictions are obviously necessary to-day in order to preserve particular species. Provided such restrictions on commercial and sport hunting are imposed in order to preserve species that might otherwise be endangered, the government would appear to be acting in the interests of the Indians in maintaining the well-being of the environment that is the pre-condition to their ability to pursue their traditional way of life. Such restrictions are entirely consistent with the spirit and language of Treaty No. 8. What is not consistent with the spirit and language of Treaty No. 8 is to restrict the ability of the Indians to hunt for "support and subsistence" [page921] unless this restriction also is required for the preservation of species threatened with extinction.

31 In summary, it seems to me that the term hunting "for food" was designed to draw a distinction between traditional hunting practices that the Indians were to be free to pursue and sport hunting or hunting for purely commercial purposes. And if we are to avoid paying mere lip-service to the interpretive principles set out in Nowegijick and Simon, principles that require us to resolve ambiguities with respect to the language of statutes like the Transfer Agreement in favour of the Indians, then any uncertainties regarding the nature of the boundary between purely commercial or sport hunting and the Indians' traditional hunting practices must be resolved by favouring an interpretation of para. 12 of the Transfer Agreement that gives the province of Alberta the power to regulate commercial and sport hunting but that leaves traditional Indian hunting practices untouched.

32 My colleague, Cory J., takes a different view. He concludes that para. 12 of the Transfer Agreement was designed to "cut down the scope of Indian hunting rights" and that there was a "quid pro quo" granted to the Indians by the Crown for the reduction in hunting rights. Describing this "quid pro quo", Cory J. suggests that the "area of hunting and the way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments". But in my view the historical evidence suggests both that the Indians had been guaranteed the right to hunt for their support and subsistence in the manner that they wished some four decades before the Transfer Agreement was ratified and that it is doubtful whether the provinces were ever in a legitimate constitutional position to regulate that form of hunting prior to the Transfer Agreement. As a result, I have difficulty in accepting my colleague's conclusion that the Transfer Agreement involved some sort of expansion of these hunting rights. Moreover, it seems to me somewhat disingenuous to attempt to justify any unilateral "cutting down of hunting rights" by the use of terminology connoting [page922] a reciprocal process in which contracting parties engage in a mutual exchange of promises. Be that as it may, I see no evidence at all that the federal government intended to renege in any way from the solemn engagement embodied in Treaty No. 8.

The Case at Bar

33 The learned trial judge found as a fact that the appellant killed the bear in self-defence and not with a view to selling, exchanging or bartering its hide. It is difficult therefore to describe Mr. Horseman's act as hunting for commerce or sport. Indeed, it is difficult to describe Mr. Horseman's act as "hunting" at all. It would be passing strange if the government of Canada in enacting the Transfer Agreement of 1930 intended to put Treaty 8 Indians in the absurd position of being penalized for defending themselves against attack by wild animals. Nor, with respect, can I accept my colleague's suggestion that Parliament believed that if Treaty 8 Indians were exempted from provincial regulations if they killed an animal in self-defence, they would try to circumvent such regulations by making duplicitous claims to this effect.

34 Section 42 of the Wildlife Act states that "no person shall traffic in any wildlife except as is expressly permitted by this Act or by the regulations". I have already suggested that while the federal government may have the power to regulate trafficking in wildlife provided that such regulation is in the interest of the Indians, the provincial government has no power to regulate Indian practices that fall within the Indians' traditional way of life and that are linked to their support and subsistence. In so far as Treaty 8 Indians are concerned, the government of Alberta is limited to regulation of purely commercial and sport hunting.

35 The trial judge stated:

> Keeping in mind the necessity of making factual findings in every case that comes before the court, I find [page923] that Mr. Horseman sold the grizzly bear hide in a manner, and for a purpose consistent with the tradition of his ancestors, that is "for the purposes of subsistence and exchange". I find that Mr. Horseman did not engage in a commercial transaction, that is one having profit as a primary aim.

She concluded therefore that Mr. Horseman's act fell outside the range of activities which the province of Alberta could regulate by means of the Wildlife Act. This result accords with common sense. While the province may be able to limit the Indians' right to traffic in hides where such trafficking forms part of a commercial venture or is the result of sport hunting, it does not, in my view, have the power to regulate an isolated sale that is the result of an act of self-defence. All the more so when the hide was sold by Mr. Horseman, as the trial judge found on the facts, not for commercial profit but to buy food for his family.

36 I would allow the appeal, set aside the order of the Court of Appeal, and restore the acquittal. I would answer the constitutional question as follows:

> Question:
>
> Between February 1, 1984 and May 30, 1984, was s. 42 of the Wildlife Act, R.S.A. 1980, c. W-9, constitutionally applicable to Treaty 8 Indians in virtue of the hunting rights granted to them under the said Treaty? In particular, were the hunting rights granted by Treaty No. 8 of 1899 extinguished, reduced or modified by para. 12 of the Alberta Natural Resources Transfer Agreement, as confirmed by the Constitution Act, 1930?
>
> Answer:
>
> Section 42 of the Wildlife Act was applicable to Treaty 8 Indians only to the extent that they were engaged in commercial or sport hunting. The Treaty 8 hunting rights were neither extinguished nor reduced by para. 12 of the Alberta Natural Resources Transfer Agreement. The territorial limits within which they could be exercised were, however, modified by para. 12.

[page924]

The judgment of Lamer, La Forest, Gonthier and Cory JJ. was delivered by

CORY J.

37 At issue on this appeal is whether the provisions of s. 42 and s. 1(s) of the Wildlife Act, R.S.A. 1980, c. W-9, apply to the appellant, whose forebears were members of one of the Indian Bands party to Treaty No. 8 signed in 1899 which guaranteed substantive hunting rights to certain Indian people.

Factual Background

38 The facts are not in dispute and were agreed upon at trial. Mr. Bert Horseman is an Indian within the meaning of the Indian Act, R.S.C. 1970, c. I-6. He is a descendant of the Indian people who were parties to Treaty No. 8. He is a member of the Horse Lakes Indian Band No. 196 and resides on that Reserve which is some 40 miles northwest of Grande Prairie, Alberta.

39 In the spring of 1983 the appellant went moose hunting in the territory north of his Reserve in order to feed

himself and his family. This he was entitled to do pursuant to the provisions of Treaty No. 8. He was successful in his hunt. He shot a moose, cut it and skinned it. The moose was too large for the appellant to bring back to the Reserve. He therefore hurried home to obtain the assistance of other Band members to haul it out of the bush. When they arrived at the carcass the appellant and his friends were unpleasantly surprised to find that a grizzly bear had appropriated the moose. The arrival of the appellant was even more unpleasant and upsetting for the bear, which by this time clearly believed it had acquired a valid possessory title to the moose. Faced with the conflicting claim, the bear charged the appellant. Bert Horseman displayed cool courage and skill under attack. He shot and killed the bear, skinned it and took the hide.

40 A scant few years ago the appellant no doubt would have been congratulated for his display of skill and courage and indeed his survival in dangerous and desperate circumstances. However, life in our time is not so simple and trouble of a different sort than charging grizzlies was looming [page925] on the horizon for the appellant. Horseman did not have a licence under the Wildlife Act to hunt grizzly bears or sell their hides. This omission ordinarily could be readily excused for neither the presence of the bear nor its attack could have been foreseen.

41 One year later, in the spring of 1984, the appellant found himself in the unfortunate position of being out of work and in need of money to support his family. In these straitened circumstances he decided to sell the grizzly hide. On or about April 19th he applied for and was issued a grizzly bear licence under s. 18 of the Wildlife Act. This licence entitled him to hunt and kill one bear and sell the hide to a licensed dealer as provided by the regulations passed pursuant to that Act. The appellant made use of this licence to sell the hide of his adversary of the year before to a licensed dealer for a price of $200. This isolated sale, which was clearly not part of any organized commercial transaction, took place between April 19th and May 22nd.

42 There can be no doubt of the financial needs of the appellant nor of his good faith. He certainly made efforts to stay within the spirit of the law. Nevertheless, an information was laid against him in July of 1984 charging him with trafficking in wildlife. The charge was set forth in these words:

> [The appellant] between the 1st day of February A.D. 1984 and the 30th day of May A.D. 1984 at or near Beaverlodge within the Province of Alberta did UNLAWFULLY traffic in wildlife, to wit a Grizzly Bear Hide except as is expressly permitted by the Wildlife Act or by the regulations.
>
> CONTRARY to the provisions of Section 42 of the Wildlife Act and amendments thereto.

The sole defence raised on behalf of Horseman was that the Wildlife Act did not apply to him and that he was within his Treaty 8 rights when he sold the bear hide. Nothing is to turn on the killing of the bear in self-defence. Nor is it argued that Horseman was induced into a mistake of the law by the words of an official of the Government. Rather, it is the appellant's position that he can, at any time, on Crown lands or on lands to which [page926] Indians have access, kill a grizzly bear for food. Further, it is said that he can sell the hide of any grizzly bear he kills in order to buy food.

The Courts Below

Provincial Court

43 The Provincial Court judge found that the hunting rights described in Treaty No. 8 were not limited to simply taking game for subsistence but included rights of trading and bartering in game: [1986] C.N.L.R. 79. She concluded that although s. 42 of the Wildlife Act of Alberta was a law of general application the Treaty 8 rights included the right to barter. Thus the appellant had not exceeded his Treaty rights when he sold the bear hide.

The Court of Queen's Bench

44 The judge of the Court of Queen's Bench set aside the acquittal and convicted the appellant and imposed the minimum fine provided by the Act of $100: *(1986), 69 A.R. 13*, *[1986] 2 C.N.L.R. 94*. The judge was of the view that

Treaty 8 rights had been specifically restricted as a result of the Natural Resources Transfer Agreement of 1930 which in his view limited the rights of the Indians to trapping, fishing and hunting only for food. In his opinion if the product of the hunt was involved in a multi-stage process whereby it was sold to obtain funds, even though those funds might be used for the purchase of food, then the activity had proceeded beyond hunting "for food" and had entered the domain of commerce. Further, he expressed the view that s. 42 of the Wildlife Act was of general application and that Horseman was bound by it.

The Court of Appeal

45 The Court of Appeal upheld the decision of the Court of Queen's Bench: (1987), *53 Alta. L.R. (2d) 146*, *78 A.R. 351*, *[1987] 5 W.W.R. 454*, *[1987] 4 C.N.L.R. 99*. It too was of the view that the effect of para. 12 of the Transfer Agreement was to restrict the Indian rights to hunting, trapping and fishing for food only. The Court of [page927] Appeal was also of the view that s. 42 of the Wildlife Act was of general application and that Horseman was bound by it.

Applicable Legislation

46

Treaty No. 8, 1899:

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Constitution Act, 1930:

> 1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the Constitution Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

Natural Resources Transfer Agreement, 1930 (Alberta):

> 12 In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

Wildlife Act, R.S.A. 1980, c. W-9:

> 42 No person shall traffic in any wildlife except as is expressly permitted by this Act or by the regulations.
>
> 1 ...

. . .

(s) "traffic" means any single act of selling, offering for sale, buying, bartering, soliciting or trading;

[page928]

Treaty and Hunting Rights

47 An examination of the historical background leading to the negotiations for Treaty No. 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the Treaty included hunting for commercial purposes. The Indians wished to protect the hunting rights which they possessed before the Treaty came into effect and the Federal Government wished to protect the native economy which was based upon those hunting rights. It can be seen that the Indians ceded title to the Treaty 8 lands on the condition that they could reserve exclusively to themselves "their usual vocations of hunting, trapping and fishing throughout the tracts surrendered".

48 The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life. In his Commentary on Economic History of Treaty 8 Area (unpublished; June 13, 1985), Professor Ray notes at p. 4:

> The Indians indicated to the Treaty 8 commissioners that they wanted assurances that the government would look after their needs in times of hardships before they would sign the treaty. The Commissioners responded by stressing that the government did not want Indians to abandon their traditional economic activities and become wards of the state. Indeed, one of the reasons that the Northwest Game Act of 1894 had been enacted was to preserve the resource base of the native economies outside of organized territories. The government feared that the collapse of these economies would throw a great burden onto the state such as had occurred when the bison economy of the prairies failed.

Professor Ray, in conclusion on this point, states at pp. 8-9:

> [C]ommercial provision hunting was an important aspect of the commercial hunting economy of the region from the onset of the fur trade in the late 18th century. However, no data exists that makes it possible to determine [page929] what proportion of the native hunt was intended to obtain provisions for domestic use as opposed to exchange.
>
> Furthermore, in terms of economic history, I am not sure any attempts to make such distinctions would be very meaningful in that Indians often killed animals, such as beaver, primarily to obtain pelts for trade. However, the Indians consumed beaver meat and in many areas it was an important component of the diet. Conversely, moose, caribou and wood buffalo were killed in order to obtain meat for consumption and for trade. Similarly, the hides of these animals were used by Indians and they were traded. For these reasons, differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact.

The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government of Canada lends further support to this conclusion where they wrote (at p. 6):

> Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it. [Emphasis added.]

49 I am in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for purposes of commerce. The next question that must be resolved is whether or not that right was in any way limited or affected by the Transfer Agreement of 1930.

[page930]

The Effect of the 1930 Transfer Agreement

50 At the outset two established principles must be borne in mind. First, the onus of proving either express or implicit extinguishment lies upon the Crown. See Simon v. The Queen, *[1985] 2 S.C.R. 387*; Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*. Secondly, any ambiguities in the wording of the Treaty or document must be resolved in favour of the Native people. This was expressed by Dickson J., as he then was, speaking for the Court in Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*, at p. 36, in these words:

> ... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

51 The appellant argues that the Transfer Agreement of 1930 was not signed by the Indians. Since they were not a party to it, they could not have agreed to any restriction of their hunting and fishing rights and that these rights could not have been lost as a result of the operation of what has been called the "merger and consolidation" theory.

52 The Crown on the other hand states that it is clear from the wording of para. 12 itself that the hunting rights were limited by the Agreement. The wording again is as follows:

> 12 In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping, and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access. [Emphasis added.]

53 The Crown argues that the rights granted to the Indians by the Treaty of 1899 were "merged and consolidated" in the 1930 Transfer Agreement. The Crown further submits that the limiting meaning of these words has been noted and upheld by this Court in Cardinal v. Attorney General of Alberta, *[1974] S.C.R. 695*; Frank v. The Queen, [page931] *[1978] 1 S.C.R. 95*; R. v. Sutherland, *[1980] 2 S.C.R. 451*, at p. 460, and Moosehunter v. The Queen, *[1981] 1 S.C.R. 282*.

54 The merger and consolidation theory was first put forward by McNiven J.A. in R. v. Strongquill *(1953), 8 W.W.R. (N.S.) 247* (Sask. C.A.). He stated at pp. 267-68:

> Pars. 10, 11 and 12 of the said agreement refer to Indians and with respect to the matters therein dealt with the rights heretofore enjoyed by the Indians whether by treaty or by statute were merged and consolidated. Vide Rex v. Smith, *[1935] 2 WWR 433*, *64 CCC 131*, where Turgeon, J.A. says at p. 436:
>
> > "It follows therefore that whatever the situation may have been in earlier years the extent to which Indians are now exempted from the operation of the game laws of Saskatchewan is to be determined by an interpretation of par. 12, given force of law by this Imperial statute."

In Cardinal v. Attorney General of Alberta, supra, Martland J., for the majority, expressed the opinion that the 1930 Transfer Agreement operated so as to extend provincial jurisdiction in the form of game laws to Indian Reserves. At

page 707 he wrote:

> The opening words of the section define its purpose. It is to secure to the Indians of the Province a continuing supply of game and fish for their support and subsistence. It is to achieve that purpose that Indians within the boundaries of the Province are to conform to Provincial game laws, subject, always, to their right to hunt and fish for food.

55 In later decisions Dickson J., as he then was, adopted this approach. It was his view that the Transfer Agreement operated so as to cut down the scope of Indian hunting rights. In Frank v. The Queen, supra, at p. 100, he commented:

> It would appear that the overall purpose of the para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to re-state and reassure to the [page932] treaty Indians the continued enjoyment of the right to hunt and fish for food.

56 Similarly in Moosehunter v. The Queen, supra, at p. 285, he wrote:

> The Agreement had the effect of merging and consolidating the treaty rights of the Indians in the area and restricting the power of the provinces to regulate the Indians' right to hunt for food. The right of Indians to hunt for sport or commercially could be regulated by provincial game laws but the right to hunt for food could not.

57 The appellant contends that these authorities should not be followed. The position is three-fold. Firstly, it is argued that when it is looked at in its historical context, the 1930 Transfer Agreement was meant to protect the rights of Indians and not to derogate from those rights. Secondly, and most importantly, it is contended that the traditional hunting rights granted to Indians by Treaty No. 8 could not be reduced or abridged in any way without some form of approval and consent given by the Indians, the parties most affected by the derogation, and without some form of compensation or quid pro quo for the reduction in the hunting rights. Thirdly, it is said that on policy grounds the Crown should not undertake to unilaterally change and derogate the Treaty rights granted earlier. To permit such a course of action could only lead to the dishonour of the Crown. It is argued that there rests upon the Crown an obligation to uphold the original Native interests protected by the Treaty. That is to say, the Crown should be looked upon as a trustee of the Native hunting rights.

58 These contentions cannot be accepted. The short answer to the appellant's position is that para. 12 of the 1930 Transfer Agreement was carefully considered and interpreted by Chief Justice Dickson in the three recent cases of Frank v. The Queen, supra; R. v. Sutherland, supra, and Moosehunter v. The Queen, supra. These cases dealt with the analogous problems arising from the Transfer Agreements with Manitoba and Saskatchewan which were worded in precisely the [page933] same way as the Transfer Agreement with Alberta under consideration in this case. These reasons constitute the carefully considered recent opinion of this Court. They are just as persuasive today as they were when they were released. Nothing in the appellant's submission would lead me to vary in any way the reasons so well and clearly expressed in those cases.

59 It is also clear that the Transfer Agreements were meant to modify the division of powers originally set out in the Constitution Act, 1867 (formerly the British North America Act, 1867). Section 1 of the Constitution Act, 1930 is unambiguous in this regard: "The agreements ... shall have the force of law notwithstanding anything in the Constitution Act, 1867 ...".

60 In addition, there was in fact a quid pro quo granted by the Crown for the reduction in the hunting right. Although the Agreement did take away the right to hunt commercially, the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments. For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited for others. Nor are the

Indians subject to seasonal limitations as are all other hunters. That is to say, they can hunt ducks and geese in the spring as well as the fall, just as they may hunt deer at any time of the year. Indians are not limited with regard to the type of game they may kill. That is to say, while others may be restricted as to the species or sex of the game they may kill, the Indians may kill for food both does and bucks; cock pheasants and hen pheasants; drakes and hen ducks. It can be seen that the quid pro quo was substantial. Both the area of hunting and the way in which the hunting could be conducted was extended and removed from the jurisdiction of provincial governments.

[page934]

61 The true effect of para. 12 of the Agreement was recognized by Laskin J., as he then was, in Cardinal, supra, at p. 722, where he wrote:

> [Section 12] is concerned rather with Indians as such, and with guaranteeing to them a continuing right to hunt, trap and fish for food regardless of provincial game laws which would otherwise confine Indians in parts of the Province that are under provincial administration. Although inelegantly expressed, s. 12 does not expand provincial legislative power but contracts it. Indians are to have the right to take game and fish for food from all unoccupied Crown lands (these would certainly not include Reserves) and from all other lands to which they may have a right of access. There is hence, by virtue of the sanction of the British North America Act, 1930, a limitation upon provincial authority regardless of whether or not Parliament legislates. [Emphasis added.]

This effect of para. 12 of the Agreement was also recognized by Dickson J., as he then was, in Myran v. The Queen, *[1976] 2 S.C.R. 137*, at p. 141:

> I think it is clear from Prince and Myron that an Indian of the Province is free to hunt or trap game in such numbers, at such times of the year, by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access.

62 It is thus apparent that although the Transfer Agreement modified the Treaty rights as to hunting, there was a very real quid pro quo which extended the Native rights to hunt for food. In addition, although it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case.

63 Further, it must be remembered that Treaty No. 8 itself did not grant an unfettered right to hunt. That right was to be exercised "subject to such [page935] regulations as may from time to time be made by the Government of the country". This provision is clearly in line with the original position of the Commissioners who were bargaining with the Indians. The Commissioners specifically observed that the right of the Indians to hunt, trap and fish as they always had done would continue with the proviso that these rights would have to be exercised subject to such laws as were necessary to protect the fish and fur bearing animals on which the Indians depended for their sustenance and livelihood.

64 Before the turn of the century the federal game laws of the Unorganized Territories provided for a total ban on hunting certain species (bison and musk oxen) in order to preserve both the species and the supply of game for Indians in the future. See The Unorganized Territories' Game Preservation Act, 1894, S.C. 1894, c. 31, ss. 2, 4 to 8 and 26. Even then the advances in firearms and the more efficient techniques of hunting and trapping, coupled with the habitat loss and the over-exploitation of game, (undoubtedly by Europeans more than by Indians), had made it essential to impose conservation measures to preserve species and to provide for hunting for future generations. Moreover, beginning in 1890, provision was made in the federal Indian Act for the Superintendent General to make the game laws of Manitoba and the Unorganized Territories applicable to Indians. See An Act further to amend

"The Indian Act" chapter forty-three of the Revised Statutes, S.C. 1890, c. 29, s. 10. A similar provision was in force in 1930. See Indian Act, R.S.C. 1927, c. 98, s. 69.

65 Obviously at the time the Treaty was made only the Federal Government had jurisdiction over the territory affected and it was the only contemplated "government of the country". The Transfer Agreement of 1930 changed the governmental authority which might regulate aspects of hunting in the interests of conservation. This change of governmental authority did not contradict the spirit of [page936] the original Agreement as evidenced by federal and provincial regulations in effect at the time. Even in 1899 conservation was a matter of concern for the governmental authority.

66 In summary, the hunting rights granted by the 1899 Treaty were not unlimited. Rather they were subject to governmental regulation. The 1930 Agreement widened the hunting territory and the means by which the Indians could hunt for food thus providing a real quid pro quo for the reduction in the right to hunt for purposes of commerce granted by the Treaty of 1899. The right of the Federal Government to act unilaterally in that manner is unquestioned. I therefore conclude that the 1930 Transfer Agreement did alter the nature of the hunting rights originally guaranteed by Treaty No. 8.

Section 42 of the Wildlife Act

67 At the outset it must be recognized that the Wildlife Act is a provincial law of general application affecting Indians not qua Indians but rather as inhabitants of the Province. It follows that the Act can be applicable to Indians pursuant to the provisions of s. 88 of the Indian Act so long as it does not conflict with a treaty right. It has been seen that the Treaty No. 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, that is to say, for sustenance for the individual Indian or the Indian's family. In the case at bar the sale of the bear hide was part of a "multi-stage process" whereby the product was sold to obtain funds for purposes which might include purchasing food for nourishment. The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement. Thus the application of s. 42 to Indians who are hunting for commercial purposes is not precluded by s. 88 of the Indian Act.

[page937]

68 The fact that a grizzly bear was killed by the appellant in self-defence must engender admiration and sympathy, but it is unfortunately not relevant to a consideration of whether there has been a breach of s. 42 of the Wildlife Act. Obviously if it were permissible to traffic in hides of grizzly bears that were killed in self-defence, then the numbers of bears slain in self-defence could be expected to increase dramatically. Unfortunate as it may be in this case, the prohibition against trafficking in bear hides without a licence cannot admit of any exceptions.

69 Neither, regrettably, can it be relevant to the breach of the s. 42 that the appellant in fact obtained a grizzly bear hunting permit after he was in the possession of a bear hide. The granting of a permit does not bring a hunter any guarantee of success but only an opportunity to legitimately slay a bear. The evidence presented at trial indicated that the limitations placed upon obtaining a licence and the limited chance of success in a bear hunt resulted in the success rate of between 2 and 4 per cent of the licence holder. This must be an important factor in the management of the bear population. Wildlife administrators must be able to rely on the success ratio and proceed on the assumption that those applying for a permit have not already shot a bear. The success ratio will determine the number of licenses issued in any year. The whole management scheme which is essential to the survival of the grizzly bear would be undermined if a licence were granted to an applicant who had already completed a successful hunt.

70 As well, s. 42 of the Wildlife Act is consistent with the very spirit of Treaty No. 8, which specified that the right to hunt would still be subject to government regulations. The evidence indicates that there remain only 575 grizzly

bears on provincial lands. This population cannot sustain a mortality rate higher than 11 per cent per annum if it is even to maintain its present numbers. The statistics indicate that the population will decline if death resulting from natural causes, legal hunting [page938] and poaching (and indications are that levels of poaching match legal takings) reached a total of more than 60 bears in a year. The grizzly bear requires a large range and is particularly sensitive to encroachment on its habitat. This magnificent animal is in a truly precarious position. All Canadians and particularly Indians who have a rich and admirable history and tradition of respect for and harmony with all forms of life, will applaud and support regulations which encourage the bears' survival. Trafficking in bear hides, other than pursuant to the provisions of the Wildlife Act, threatens the very existence of the grizzly bear. The bear may snarl defiance and even occasionally launch a desperate attack upon man, but until such time as it masters the operation of firearms, it cannot triumph and must rely on man for protection and indeed for survival. That protection is provided by the Wildlife Act, but if it is to succeed it must be strictly enforced.

71 Section 42 of the Wildlife Act is valid legislation enacted by the government with jurisdiction in the field. It reflects a bona fide concern for the preservation of a species. It is a law of general application which does not infringe upon the Treaty 8 hunting rights of Indians as limited by the 1930 Transfer Agreement.

Disposition

72 In the result, I would dismiss the appeal. The constitutional question posed should be answered as follows:

> Question:
>
> Between February 1, 1984 and May 30, 1984, was s. 42 of the Wildlife Act, R.S.A. 1980, c. W-9, constitutionally applicable to Treaty 8 Indians in virtue of the hunting rights granted to them under the said Treaty? In particular, were the hunting rights granted by Treaty No. 8 of 1899 extinguished, reduced or modified by para. 12 of the Alberta Natural Resources Transfer Agreement, as confirmed by the Constitution Act, 1930?
>
> Answer:
>
> [page939]
>
> The answer to both queries framed in the Question should be in the affirmative.

73 The Wildlife Act applied to the appellant and Horseman is guilty of violating s. 42 of the Act. Nonetheless he did not seek out the bear and shot it only in self-defence. The trial judge found that he acted in good faith when he obtained the license to hunt bear. He was in financial difficulties when he sold the bear hide in an isolated transaction. He has provided the means whereby the application of the Wildlife Act to Indians was explored. If it were not for statutory requirement of a minimum fine, in the unique circumstances of the case, I would vary the sentence by waiving the payment of the minimum fine. Nevertheless, in light of the circumstances of the case, and the time that has elapsed, I would order a stay of proceedings. There should be no order as to costs.

End of Document

R. v. Powley, [2003] 2 S.C.R. 207

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: March 17, 2003;

Judgment: September 19, 2003.

File No.: 28533.

[2003] 2 S.C.R. 207 | [2003] 2 R.C.S. 207 | [2003] S.C.J. No. 43 | [2003] A.C.S. no 43 | 2003 SCC 43

Her Majesty The Queen, appellant/respondent on cross-appeal; v. Steve Powley and Roddy Charles Powley, respondents/appellants on cross-appeal, and Attorney General of Canada, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of Alberta, Attorney General of Newfoundland and Labrador, Labrador Métis Nation, a body corporate, Congress of Aboriginal Peoples, Métis National Council ("MNC"), Métis Nation of Ontario ("MNO"), B.C. Fisheries Survival Coalition, Aboriginal Legal Services of Toronto Inc. ("ALST"), Ontario Métis and Aboriginal Association ("OMAA"), Ontario Federation of Anglers and Hunters ("OFAH"), Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation, and North Slave Métis Alliance, interveners.

(55 paras.)

Case Summary

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Constitutional law — Aboriginal rights — Métis — Two members of a Métis community near Sault Ste. [page208] Marie charged with hunting contrary to provincial statute — Whether members of this Métis community have constitutional aboriginal right to hunt for food in environs of Sault Ste. Marie — If so, whether infringement justifiable — Constitution Act, 1982, s. 35 — Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

Summary:

The respondents, who are members of a Métis community near Sault Ste. Marie, were acquitted of unlawfully hunting a moose without a hunting licence and with knowingly possessing game hunted in contravention of ss. 46 and 47(1) of Ontario's *Game and Fish Act.* The trial judge found that the members of the Métis community in and around Sault Ste. Marie have, under s. 35(1) of the *Constitution Act, 1982*, an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting legislation. The Superior Court of Justice and the Court of Appeal upheld the acquittals.

Held: The appeal and cross-appeal should be dismissed.

The term "Métis" in s. 35 of the *Constitution Act, 1982* does not encompass all individuals with mixed Indian

and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, and recognizable group identity separate from their Indian or Inuit and European forebears. A Métis community is a group of Métis with a distinctive collective identity, living together in the same geographical area and sharing a common way of life. The purpose of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture. In applying the *Van der Peet* test to determine the Métis' s. 35 entitlements, the pre-contact aspect of the test must be adjusted to take into account the post-contact ethnogenesis and evolution of the Métis. A pre-control test establishing when Europeans achieved political and legal control in an area and focusing on the period after a particular Métis community arose and before it came under the control of European laws and customs is necessary to accommodate this history.

[page209]

Aboriginal rights are communal, grounded in the existence of a historic and present community, and exercisable by virtue of an individual's ancestrally based membership in the present community. The aboriginal right claimed in this case is the right to hunt for food in the environs of Sault Ste. Marie. To support a site-specific aboriginal rights claim, an identifiable Métis community with some degree of continuity and stability must be established through evidence of shared customs, traditions, and collective identity, as well as demographic evidence. The trial judge's findings of a historic Métis community and of a contemporary Métis community in and around Sault Ste. Marie are supported by the record and must be upheld.

The verification of a claimant's membership in the relevant contemporary community is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community. Self-identification, ancestral connection, and community acceptance are factors which define Métis identity for the purpose of claiming Métis rights under s. 35. Absent formal identification, courts will have to ascertain Métis identity on a case-by-case basis taking into account the value of community self-definition, the need for the process of identification to be objectively verifiable and the purpose of the constitutional guarantee. Here, the trial judge correctly found that the respondents are members of the Métis community that arose and still exists in and around Sault Ste. Marie. Residency on a reserve for a period of time by the respondents' ancestors did not, in the circumstances of this case, negate their Métis identity. An individual decision by a Métis person's ancestors to take treaty benefits does not necessarily extinguish that person's claim to Métis rights, absent collective adhesion by the Métis community to the treaty.

The view that Métis rights must find their origin in the pre-contact practices of their aboriginal ancestors must be rejected. This view in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The historical record fully supports the trial judge's finding that the period just prior to 1850 is the appropriate date for finding effective European control in the Sault Ste. Marie area. The evidence also [page210] supports his finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850. This practice has been continuous to the present.

Ontario's lack of recognition of any Métis right to hunt for food and the application of the challenged provisions infringes the Métis aboriginal right and conservation concerns did not justify the infringement. Even if the moose population in that part of Ontario were under threat, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs. Further, the difficulty of identifying members of the Métis community should not be exaggerated so as to defeat constitutional rights. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt.

While the Court of Appeal had jurisdiction to issue a stay of its decision, which has now expired, no compelling reason existed for issuing an additional stay.

Cases Cited

Applied: R. v. Van der Peet, *[1996] 2 S.C.R. 507*; referred to: R. v. Sparrow, *[1990] 1 S.C.R. 1075*; Reference re Manitoba Language Rights, *[1985] 1 S.C.R. 721*.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35.

Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46, 47(1).

Authors Cited

Canada. Royal Commission on Aboriginal Peoples. Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities, vol. 4. Ottawa: The Commission, 1996.

Lytwyn, Victor P. "Historical Report on the Métis Community at Sault Ste. Marie", March 27, 1998.

Morrison, James. "The Robinson Treaties of 1850: A Case Study". Study prepared by the Royal Commission on Aboriginal Peoples.

[page211]

Ontario. Ministry of Natural Resources. Interim Enforcement Policy on Aboriginal Right to Hunt and Fish for Food. Toronto: The Ministry, 1991.

Peterson, Jacqueline. "Many roads to Red River: Métis genesis in the Great Lakes region, 1680-1815". In Jacqueline Peterson and Jennifer S. H. Brown, eds., The New Peoples: Being and Becoming Métis in North America. Winnipeg: University of Manitoba Press, 1985, 37.

Ray, Arthur J. "An Economic History of the Robinson Treaties Area Before 1860", March 17, 1998.

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal *(2001), 53 O.R. (3d) 35*, *196 D.L.R. (4th) 221*, *141 O.A.C. 121*, *152 C.C.C. (3d) 97*, *[2001] 2 C.N.L.R. 291*, *40 C.R. (5th) 221*, *80 C.R.R. (2d) 1*, *[2001] O.J. No. 607* (QL), affirming a decision of the Superior Court of Justice *(2000), 47 O.R. (3d) 30*, *[2000] 1 C.N.L.R. 233*, upholding a judgment of the Ontario Court (Provincial Division), *[1999] 1 C.N.L.R. 153*, *58 C.R.R. (2d) 149*, *[1998] O.J. No. 5310* (QL). Appeal and cross-appeal dismissed.

Counsel

Lori R. Sterling and Peter Lemmond, for the appellant/respondent on cross-appeal.

Jean Teillet and Arthur Pape, for the respondents/appellants on cross-appeal.

Ivan G. Whitehall, Q.C., Michael H. Morris and Barbara Ritzen, for the intervener the Attorney General of Canada.

René Morin, for the intervener the Attorney General of Quebec.

Gabriel Bourgeois, Q.C., and Pierre Castonguay, for the intervener the Attorney General of New Brunswick.

Deborah L. Carlson and Holly D. Penner, for the intervener the Attorney General of Manitoba.

Darlene A. Leavitt, for the intervener the Attorney General of British Columbia.

Written submissions only by P. Mitch McAdam, for the intervener the Attorney General for Saskatchewan.

[page212]

Margaret Unsworth and Kurt Sandstrom, for the intervener the Attorney General of Alberta.

Donald H. Burrage, Q.C., for the intervener the Attorney General of Newfoundland and Labrador.

D. Bruce Clarke, for the intervener the Labrador Métis Nation.

Joseph Eliot Magnet, for the intervener the Congress of Aboriginal Peoples.

Clem Chartier and Jason Madden, for the interveners the Métis National Council and the Métis Nation of Ontario.

Written submissions only by J. Keith Lowes, for the intervener the B.C. Fisheries Survival Coalition.

Written submissions only by Brian Eyolfson, for the intervener the Aboriginal Legal Services of Toronto Inc.

Robert MacRae, for the intervener the Ontario Métis and Aboriginal Association.

Written submissions only by Timothy S. B. Danson, for the intervener the Ontario Federation of Anglers and Hunters.

Alan Pratt and Carla M. McGrath, for the intervener the Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation.

Written submissions only by Janet L. Hutchison and Stuart C. B. Gilby, for the intervener the North Slave Métis Alliance.

The following is the judgment delivered by

THE COURT

I. Introduction

1 This case raises the issue of whether members of the Métis community in and around Sault Ste. Marie enjoy a constitutionally protected right to hunt for food under s. 35 of the *Constitution Act, 1982*. We conclude that they do.

[page213]

2 On the morning of October 22, 1993, Steve Powley and his son, Roddy, set out hunting. They headed north from their residence in Sault Ste. Marie, and at about 9 a.m., they shot and killed a bull moose near Old Goulais Bay Road.

3 Moose hunting in Ontario is subject to strict regulation. The Ministry of Natural Resources ("MNR") issues Outdoor Cards and validation stickers authorizing the bearer to harvest calf moose during open season. People wishing to harvest adult moose must enter a lottery to obtain a validation tag authorizing them to hunt either a bull or a cow in a particular area, as specified on the tag. The number of tags issued for a given season depends on the calculations of MNR biologists, who estimate the current adult moose population and the replacement rate for animals removed from the population. The validation tag requirement and seasonal restrictions are not enforced against Status Indians, and the MNR does not record Status Indians' annual harvest. (See *MNR Interim Enforcement Policy on Aboriginal Right to Hunt and Fish for Food* (1991).)

4 After shooting the bull moose near Old Goulais Bay Road, Steve and Roddy Powley transported it to their residence in Sault Ste. Marie. Neither of them had a valid Outdoor Card, a valid hunting licence to hunt moose, or a validation tag issued by the MNR. In lieu of these documents, Steve Powley affixed a handwritten tag to the ear of the moose. The tag indicated the date, time, and location of the kill, as required by the hunting regulations. It stated that the animal was to provide meat for the winter. Steve Powley signed the tag, and wrote his Ontario Métis and Aboriginal Association membership number on it.

5 Later that day, two conservation officers arrived at the Powleys' residence. The Powleys told the officers they had shot the moose. One week later, the Powleys were charged with unlawfully hunting moose and knowingly possessing game hunted [page214] in contravention of the *Game and Fish Act*, R.S.O. 1990, c. G-1. They both entered pleas of not guilty.

6 The facts are not in dispute. The Powleys freely admit that they shot, killed, and took possession of a bull moose without a hunting licence. However, they argue that, as Métis, they have an aboriginal right to hunt for food in the Sault Ste. Marie area that cannot be infringed by the Ontario government without proper justification. Because the Ontario government denies the existence of any special Métis right to hunt for food, the Powleys argue that subjecting them to the moose hunting provisions of the *Game and Fish Act* violates their rights under s. 35(1) of the *Constitution Act, 1982*, and cannot be justified.

7 The trial court, Superior Court, and Court of Appeal agreed with the Powleys. They found that the members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food that is infringed without justification by the Ontario hunting regulations. Steve and Roddy Powley were therefore acquitted of unlawfully hunting and possessing the bull moose. Ontario appeals from these acquittals.

8 The question before us is whether ss. 46 and 47(1) of the *Game and Fish Act*, which prohibit hunting moose without a licence, unconstitutionally infringe the respondents' aboriginal right to hunt for food, as recognized in s. 35(1) of the *Constitution Act, 1982*.

II. Analysis

9 Section 35 of the *Constitution Act, 1982* provides:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> [page215]
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

10 The term "Métis" in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European forebears. Métis communities evolved and flourished prior to the entrenchment of European control, when the influence of European settlers and political institutions became pre-eminent. The Royal Commission on Aboriginal Peoples describes this evolution as follows:

> Intermarriage between First Nations and Inuit women and European fur traders and fishermen produced children, but the birth of new Aboriginal cultures took longer. At first, the children of mixed unions were brought up in the traditions of their mothers or (less often) their fathers. Gradually, however, distinct Métis cultures emerged, combining European and First Nations or Inuit heritages in unique ways. Economics played a major role in this process. The special qualities and skills of the Métis population made them indispensable members of Aboriginal/non-Aboriginal economic partnerships, and that association contributed to the shaping of their cultures... . As interpreters, diplomats, guides, couriers, freighters, traders and suppliers, the early Métis people contributed massively to European penetration of North America.
>
> The French referred to the fur trade Métis as *coureurs de bois* (forest runners) and *bois brulés* (burnt-wood people) in recognition of their wilderness occupations and their dark complexions. The Labrador Métis (whose culture had early roots) were originally called "livyers" or "settlers", those who remained in the fishing settlements year-round rather than returning periodically to Europe or Newfoundland. The Cree people expressed the Métis character in the term *Otepayemsuak*, meaning the "independent ones".
>
> (*Report of the Royal Commission on Aboriginal Peoples: Perspectives and Realities*, vol. 4, at pp. 199-200 ("*RCAP Report*"))

[page216]

The Métis developed separate and distinct identities, not reducible to the mere fact of their mixed ancestry: "What distinguishes Métis people from everyone else is that they associate themselves with a culture that is distinctly Métis" (*RCAP Report*, vol. 4, at p. 202).

11 The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of "the Métis". However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis "peoples", a possibility left open by the language of s. 35(2), which speaks of the "Indian, Inuit and Métis peoples of Canada".

12 We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. It is not necessary for us to decide, and we did not receive

submissions on, whether this community is also a Métis "people", or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.

13 Our evaluation of the respondents' claim takes place against this historical and cultural backdrop. The overarching interpretive principle for our legal analysis is a purposive reading of s. 35. The inclusion of the Métis in s. 35 is based on a commitment [page217] to recognizing the Métis and enhancing their survival as distinctive communities. The purpose and the promise of s. 35 is to protect practices that were historically important features of these distinctive communities and that persist in the present day as integral elements of their Métis culture.

14 For the reasons elaborated below, we uphold the basic elements of the *Van der Peet* test (*R. v. Van der Peet*, *[1996] 2 S.C.R. 507*) and apply these to the respondents' claim. However, we modify certain elements of the pre-contact test to reflect the distinctive history and post-contact ethnogenesis of the Métis, and the resulting differences between Indian claims and Métis claims.

A. *The Van der Peet Test*

15 The core question in *Van der Peet* was: "How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?" (para. 15, *per* Lamer C.J.). Lamer C.J. wrote for the majority, at para. 31:

> [W]hat s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

16 The emphasis on prior occupation as the primary justification for the special protection accorded aboriginal rights led the majority in *Van der Peet* to endorse a pre-contact test for identifying which customs, practices or traditions were integral to a particular aboriginal culture, and therefore entitled to constitutional protection. However, the majority recognized that the pre-contact test might prove inadequate to capture the range of Métis customs, [page218] practices or traditions that are entitled to protection, since Métis cultures by definition post-date European contact. For this reason, Lamer C.J. explicitly reserved the question of how to define Métis aboriginal rights for another day. He wrote at para. 67:

> [T]he history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.

17 As indicated above, the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.

[page219]

18 With this in mind, we proceed to the issue of the correct test to determine the entitlements of the Métis under s. 35 of the *Constitution Act, 1982*. The appropriate test must then be applied to the findings of fact of the trial judge. We accept *Van der Peet* as the template for this discussion. However, we modify the pre-contact focus of the *Van der Peet* test when the claimants are Métis to account for the important differences between Indian and Métis claims. Section 35 requires that we recognize and protect those customs and traditions that were historically important features of Métis communities prior to the time of effective European control, and that persist in the present day. This modification is required to account for the unique post-contact emergence of Métis communities, and the post-contact foundation of their aboriginal rights.

(1) Characterization of the Right

19 The first step is to characterize the right being claimed: *Van der Peet, supra*, at para. 76. Aboriginal hunting rights, including Métis rights, are contextual and site-specific. The respondents shot a bull moose near Old Goulais Bay Road, in the environs of Sault Ste. Marie, within the traditional hunting grounds of that Métis community. They made a point of documenting that the moose was intended to provide meat for the winter. The trial judge determined that they were hunting for food, and there is no reason to overturn this finding. The right being claimed can therefore be characterized as the right to hunt for food in the environs of Sault Ste. Marie.

20 We agree with the trial judge that the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.

[page220]

(2) Identification of the Historic Rights-Bearing Community

21 The trial judge found that a distinctive Métis community emerged in the Upper Great Lakes region in the mid-17th century, and peaked around 1850. We find no reviewable error in the trial judge's findings on this matter, which were confirmed by the Court of Appeal. The record indicates the following: In the mid-17th century, the Jesuits established a mission at Sainte-Marie-du-Sault, in an area characterized by heavy competition among fur traders. In 1750, the French established a fixed trading post on the south bank of the Saint Mary's River. The Sault Ste. Marie post attracted settlement by Métis -- the children of unions between European traders and Indian women, and their descendants (A. J. Ray, "An Economic History of the Robinson Treaties Area Before 1860" (1998) ("Ray Report"), at p. 17). According to Dr. Ray, by the early 19th century, "[t]he settlement at Sault Ste. Marie was one of the oldest and most important [Métis settlements] in the upper lakes area" (Ray Report, at p. 47). The Hudson Bay Company operated the Sault Ste. Marie's post primarily as a depot from 1821 onwards (Ray Report, at p. 51). Although Dr. Ray characterized the Company's records for this post as "scanty" (Ray Report, at p. 51), he was able to piece together a portrait of the community from existing records, including the 1824-25 and 1827-28 post journals of HBC Chief Factor Bethune, and the 1846 report of a government surveyor, Alexander Vidal (Ray Report, at pp. 52-53).

22 Dr. Ray's report indicates that the individuals named in the post journals "were overwhelmingly Métis", and that Vidal's report "provide[s] a crude indication of the rate of growth of the community and highlights the continuing dominance of Métis in it" (Ray Report, at p. 53). Dr. Victor P. Lytwyn characterized the Vidal report and accompanying map as "clear evidence of a distinct and cohesive Métis community at Sault Ste. Marie" (V. P. Lytwyn, [page221] "Historical Report on the Métis Community at Sault Ste. Marie" (1998) ("Lytwyn Report"), at p. 2) while Dr. Ray elaborated: "By the time of Vidal's visit to the Sault Ste. Marie area, the people of mixed ancestry living there had developed a distinctive sense of identity and Indians and Whites recognized them as being a separate people" (Ray Report, at p. 56).

23 In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim. Here, we find no basis for overturning the trial judge's finding of a historic Métis community at Sault Ste. Marie. This finding is supported by the record and must be upheld.

(3) Identification of the Contemporary Rights-Bearing Community

24 Aboriginal rights are communal rights: They must be grounded in the existence of a historic and present community, and they may only be exercised by virtue of an individual's ancestrally based membership in the present community. The trial judge found that a Métis community has persisted in and around Sault Ste. Marie despite its decrease in visibility after the signing of the Robinson-Huron Treaty in 1850. While we take note of the trial judge's determination that the Sault Ste. Marie Métis community was to a large extent an "invisible entity" (*[1999] 1 C.N.L.R. 153*, at para. 80) from the [page222] mid-19th century to the 1970s, we do not take this to mean that the community ceased to exist or disappeared entirely.

25 Dr. Lytwyn describes the continued existence of a Métis community in and around Sault Ste. Marie despite the displacement of many of the community's members in the aftermath of the 1850 treaties:

> [T]he Métis continued to live in the Sault Ste. Marie region. Some drifted into the Indian Reserves which had been set apart by the 1850 Treaty. Others lived in areas outside of the town, or in back concessions. The Métis continued to live in much the same manner as they had in the past -- fishing, hunting, trapping and harvesting other resources for their livelihood.
>
> (Lytwyn Report, at p. 31 (emphasis added); see also J. Morrison, "The Robinson Treaties of 1850: A Case Study", at p. 201.)

26 The advent of European control over this area thus interfered with, but did not eliminate, the Sault Ste. Marie Métis community and its traditional practices, as evidenced by census data from the 1860s through the 1890s. Dr. Lytwyn concluded from this census data that "[a]lthough the Métis lost much of their traditional land base at Sault Ste. Marie, they continued to live in the region and gain their livelihood from the resources of the land and waters" (Lytwyn Report, at p. 32). He also noted a tendency for underreporting and lack of information about the Métis during this period because of their "removal to the peripheries of the town", and "their own disinclination to be identified as Métis" in the wake of the Riel rebellions and the turning of Ontario public opinion against Métis rights through government actions and the media (Lytwyn Report, at p. 33).

27 We conclude that the evidence supports the trial judge's finding that the community's lack of visibility [page223] was explained and does not negate the existence of the contemporary community. There was never a lapse; the Métis community went underground, so to speak, but it continued. Moreover, as indicated below, the "continuity" requirement puts the focus on the continuing practices of members of the community, rather than more generally on the community itself, as indicated below.

28 The trial judge's finding of a contemporary Métis community in and around Sault Ste. Marie is supported by the evidence and must be upheld.

(4) Verification of the Claimant's Membership in the Relevant Contemporary Community

29 While determining membership in the Métis community might not be as simple as verifying membership in, for example, an Indian band, this does not detract from the status of Métis people as full-fledged rights-bearers. As Métis communities continue to organize themselves more formally and to assert their constitutional rights, it is

imperative that membership requirements become more standardized so that legitimate rights-holders can be identified. In the meantime, courts faced with Métis claims will have to ascertain Métis identity on a case-by-case basis. The inquiry must take into account both the value of community self-definition, and the need for the process of identification to be objectively verifiable. In addition, the criteria for Métis identity under s. 35 must reflect the purpose of this constitutional guarantee: to recognize and affirm the rights of the Métis held by virtue of their direct relationship to this country's original inhabitants and by virtue of the continuity between their customs and traditions and those of their Métis predecessors. This is not an insurmountable task.

30 We emphasize that we have not been asked, and we do not purport, to set down a comprehensive definition of who is Métis for the purpose of asserting a claim under s. 35. We therefore limit [page224] ourselves to indicating the important components of a future definition, while affirming that the creation of appropriate membership tests before disputes arise is an urgent priority. As a general matter, we would endorse the guidelines proposed by Vaillancourt Prov. J. and O'Neill J. in the courts below. In particular, we would look to three broad factors as indicia of Métis identity for the purpose of claiming Métis rights under s. 35: self-identification, ancestral connection, and community acceptance.

31 First, the claimant must self-identify as a member of a Métis community. This self-identification should not be of recent vintage: While an individual's self-identification need not be static or monolithic, claims that are made belatedly in order to benefit from a s. 35 right will not satisfy the self-identification requirement.

32 Second, the claimant must present evidence of an ancestral connection to a historic Métis community. This objective requirement ensures that beneficiaries of s. 35 rights have a real link to the historic community whose practices ground the right being claimed. We would not require a minimum "blood quantum", but we would require some proof that the claimant's ancestors belonged to the historic Métis community by birth, adoption, or other means. Like the trial judge, we would abstain from further defining this requirement in the absence of more extensive argument by the parties in a case where this issue is determinative. In this case, the Powleys' Métis ancestry is not disputed.

33 Third, the claimant must demonstrate that he or she is accepted by the modern community whose continuity with the historic community provides the legal foundation for the right being claimed. Membership in a Métis political organization may be relevant to the question of community acceptance, but it is not sufficient in the absence of a [page225] contextual understanding of the membership requirements of the organization and its role in the Métis community. The core of community acceptance is past and ongoing participation in a shared culture, in the customs and traditions that constitute a Métis community's identity and distinguish it from other groups. This is what the community membership criterion is all about. Other indicia of community acceptance might include evidence of participation in community activities and testimony from other members about the claimant's connection to the community and its culture. The range of acceptable forms of evidence does not attenuate the need for an objective demonstration of a solid bond of past and present mutual identification and recognition of common belonging between the claimant and other members of the rights-bearing community.

34 It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.

35 In this case, there is no reason to overturn the trial judge's finding that the Powleys are members of the Métis community that arose and still exists in and around Sault Ste. Marie. We agree with the Court of Appeal that, in the circumstances of this case, the fact that the Powleys' ancestors lived on an Indian reserve for a period of time does not negate the Powleys' Métis identity. As the Court of Appeal indicated, "E.B. Borron, commissioned in 1891 by the province to report on annuity payments to the Métis, was of the view that Métis who had taken treaty benefits remained Métis and he recommended that they be removed from the treaty annuity lists" (*(2001), 53 O.R. (3d) 35*, at para. 139, *per* Sharpe J.A.). We emphasize that the individual decision by a Métis person's ancestors to take treaty [page226] benefits does not necessarily extinguish that person's claim to Métis rights. It will depend, in part,

on whether there was a collective adhesion by the Métis community to the treaty. Based on the record, it was open to the trial judge to conclude that the rights of the Powleys' ancestors did not merge into those of the Indian band.

(5) Identification of the Relevant Time Frame

36 As indicated above, the pre-contact aspect of the *Van der Peet* test requires adjustment in order to take account of the post-contact ethnogenesis of the Métis and the purpose of s. 35 in protecting the historically important customs and traditions of these distinctive peoples. While the fact of prior occupation grounds aboriginal rights claims for the Inuit and the Indians, the recognition of Métis rights in s. 35 is not reducible to the Métis' Indian ancestry. The unique status of the Métis as an Aboriginal people with post-contact origins requires an adaptation of the pre-contact approach to meet the distinctive historical circumstances surrounding the evolution of Métis communities.

37 The pre-contact test in *Van der Peet* is based on the constitutional affirmation that aboriginal communities are entitled to continue those practices, customs and traditions that are integral to their distinctive existence or relationship to the land. By analogy, the test for Métis practices should focus on identifying those practices, customs and traditions that are integral to the Métis community's distinctive existence and relationship to the land. This unique history can most appropriately be accommodated by a post-contact but pre-control test that identifies the time when Europeans effectively established political and [page227] legal control in a particular area. The focus should be on the period after a particular Métis community arose and before it came under the effective control of European laws and customs. This pre-control test enables us to identify those practices, customs and traditions that predate the imposition of European laws and customs on the Métis.

38 We reject the appellant's argument that Métis rights must find their origin in the pre-contact practices of the Métis' aboriginal ancestors. This theory in effect would deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1). The right claimed here was a practice of both the Ojibway and the Métis. However, as long as the practice grounding the right is distinctive and integral to the pre-control Métis community, it will satisfy this prong of the test. This result flows from the constitutional imperative that we recognize and affirm the aboriginal rights of the Métis, who appeared after the time of first contact.

39 The pre-control test requires us to review the trial judge's findings on the imposition of European control in the Sault Ste. Marie area. Although Europeans were clearly present in the Upper Great Lakes area from the early days of exploration, they actually discouraged settlement of this region. J. Peterson explains:

> With the exception of Detroit, Kaskaskia and Cahokia, the French colonial administration established no farming communities in the Great Lakes region. After 1763, only partly in response to the regionwide resistance [page228] movement known as Pontiac's Rebellion, the British likewise discouraged settlement west of Lake Ontario. Desire to keep the peace and to monopolize the profits of the Great Lakes Indian trade were the overriding considerations favouring this policy. To have simultaneously encouraged an influx of white farmers would have upset both the diplomatic alliance with the native inhabitants inherited from the French and the ratio between humans and animals on the ground, straining the fur-bearing capacities of the region.
>
> (J. Peterson, "Many roads to Red River: Métis genesis in the Great Lakes region, 1680-1815", in *The New Peoples: Being and Becoming Métis in North America* (1985), 37, at p. 40)

This policy changed in the mid-19th century, as British economic needs and plans evolved. The British sent William B. Robinson to negotiate treaties with the Indian tribes in the regions of Lake Huron and Lake Superior. One of his objectives as Treaty Commissioner was to obtain land in order to allow mining, timber and other development, including the development of a town at Sault Ste. Marie (Lytwyn Report, *supra*, at p. 29).

40 The historical record indicates that the Sault Ste. Marie Métis community thrived largely unaffected by European

laws and customs until colonial policy shifted from one of discouraging settlement to one of negotiating treaties and encouraging settlement in the mid-19th century. The trial judge found, and the parties agreed in their pleadings before the lower courts, that "effective control [of the Upper Great Lakes area] passed from the Aboriginal peoples of the area (Ojibway and Metis) to European control" in the period between 1815 and 1850 (para. 90). The record fully supports the finding that the period just prior to 1850 is the appropriate date for finding effective control in this geographic area, which the Crown agreed was the critical date in its pleadings below.

[page229]

(6) Determination of Whether the Practice is Integral to the Claimants' Distinctive Culture

41 The practice of subsistence hunting and fishing was a constant in the Métis community, even though the availability of particular species might have waxed and waned. The evidence indicates that subsistence hunting was an important aspect of Métis life and a defining feature of their special relationship to the land (Peterson, *supra*, at p. 41; Lytwyn Report, *supra*, at p. 6). A major part of subsistence was the practice at issue here, hunting for food.

42 Peterson describes the Great Lakes Métis communities as follows at p. 41:

> These people were neither adjunct relative-members of tribal villages nor the standard bearers of European civilization in the wilderness. Increasingly, they stood apart or, more precisely, in between. By the end of the last struggle for empire in 1815, their towns, which were visually, ethnically and culturally distinct from neighbouring Indian villages and "white towns" along the eastern seaboard, stretched from Detroit and Michilimackinac at the east to the Red River at the northwest.
>
> ...
>
> ... [R]esidents [of these trading communities] ... drew upon a local subsistence base rather than on European imports ... . [S]uch towns grew as a result of and were increasingly dominated by the offspring of Canadian trade employees and Indian women who, having reached their majority, were intermarrying among themselves and rearing successive generations of métis. In both instances, these communities did not represent an extension of French, and later British colonial culture, but were rather "adaptation[s] to the Upper Great Lakes environment." [Emphasis added.]

43 Dr. Ray emphasized in his report that a key feature of Métis communities was that "their members earned a substantial part of their livelihood off of [page230] the land" (Ray Report, *supra*, at p. 56 (emphasis deleted)). Dr. Lytwyn concurred: "The Métis of Sault Ste. Marie lived off the resources of the land. They obtained their livelihood from hunting, fishing, gathering and cultivating" (Lytwyn Report, at p. 2). He reported that "[w]hile Métis fishing was prominent in the written accounts, hunting was also an important part of their livelihood", and that "[a] traditional winter hunting area for the Sault Métis was the Goulais Bay area" (Lytwyn Report, at pp. 4-5). He elaborated at p. 6:

> In the mid-19th century, the Métis way of life incorporated many resource harvesting activities. These activities, especially hunting and trapping, were done within traditional territories located within the hinterland of Sault Ste. Marie. The Métis engaged in these activities for generations and, on the eve of the 1850 treaties, hunting, fishing, trapping and gathering were integral activities to the Métis community at Sault Ste. Marie.

44 This evidence supports the trial judge's finding that hunting for food was integral to the Métis way of life at Sault Ste. Marie in the period just prior to 1850.

(7) Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted

45 Although s. 35 protects "existing" rights, it is more than a mere codification of the common law. Section 35 reflects a new promise: a constitutional commitment to protecting practices that were historically important features of particular aboriginal communities. A certain margin of flexibility might be required to ensure that aboriginal practices can evolve and develop over time, but it is not necessary to define or to rely on that margin in this case. Hunting for food was an important feature of the Sault Ste. Marie Métis community, and the practice has been continuous to the present. Steve and Roddy Powley claim a Métis aboriginal right to hunt for food. The right claimed by the Powleys [page231] falls squarely within the bounds of the historical practice grounding the right.

(8) Determination of Whether or Not the Right Was Extinguished

46 The doctrine of extinguishment applies equally to Métis and to First Nations claims. There is no evidence of extinguishment here, as determined by the trial judge. The Crown's argument for extinguishment is based largely on the Robinson-Huron Treaty of 1850, from which the Métis as a group were explicitly excluded.

(9) If There Is a Right, Determination of Whether There Is an Infringement

47 Ontario currently does not recognize any Métis right to hunt for food, or any "special access rights to natural resources" for the Métis whatsoever (appellant's record, at p. 1029). This lack of recognition, and the consequent application of the challenged provisions to the Powleys, infringe their aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community.

(10) Determination of Whether the Infringement Is Justified

48 The main justification advanced by the appellant is that of conservation. Although conservation is clearly a very important concern, we agree with the trial judge that the record here does not support this justification. If the moose population in this part of Ontario were under threat, and there was no evidence that it is, the Métis would still be entitled to a priority allocation to satisfy their subsistence needs in accordance with the criteria set out in *R. v. Sparrow*, *[1990] 1 S.C.R. 1075*. While preventative measures might be required for conservation purposes in the future, we have not been presented with evidence to support such measures here. The Ontario authorities can make out a case for [page232] regulation of the aboriginal right to hunt moose for food if and when the need arises. On the available evidence and given the current licensing system, Ontario's blanket denial of any Métis right to hunt for food cannot be justified.

49 The appellant advances a subsidiary argument for justification based on the alleged difficulty of identifying who is Métis. As discussed, the Métis identity of a particular claimant should be determined on proof of self-identification, ancestral connection, and community acceptance. The development of a more systematic method of identifying Métis rights-holders for the purpose of enforcing hunting regulations is an urgent priority. That said, the difficulty of identifying members of the Métis community must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.

50 While our finding of a Métis right to hunt for food is not species-specific, the evidence on justification related primarily to the Ontario moose population. The justification of other hunting regulations will require adducing evidence relating to the particular species affected. In the immediate future, the hunting rights of the Métis should track those of the Ojibway in terms of restrictions for conservation purposes and priority allocations where threatened species may be involved. In the longer term, a combination of negotiation and judicial settlement will more clearly define the contours of the Métis right to hunt, a right that we recognize as part of the special aboriginal relationship to the land.

B. *The Request for a Stay*

51 With respect to the cross-appeal, we affirm that the Court of Appeal had jurisdiction to issue a stay of its decision in these circumstances. This power should continue to be used only in exceptional [page233] situations in which a court of general jurisdiction deems that giving immediate effect to an order will undermine the very purpose of that order or otherwise threaten the rule of law: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. We note that the Powleys' acquittal would have remained valid notwithstanding the stay. It was, however, within the Court of Appeal's discretion to suspend the application of its ruling to other members of the Métis community in order to foster cooperative solutions and ensure that the resource in question was not depleted in the interim, thereby negating the value of the right.

52 The initial stay expired on February 23, 2002, and more than a year has passed since that time. The Court of Appeal's decision has been the law of Ontario in the interim, and chaos does not appear to have ensued. We see no compelling reason to issue an additional stay. We also note that it is particularly important to have a clear justification for a stay where the effect of that stay would be to suspend the recognition of a right that provides a defence to a criminal charge, as it would here.

III. Conclusion

53 Members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food under s. 35(1). This is determined by their fulfillment of the requirements set out in *Van der Peet*, modified to fit the distinctive purpose of s. 35 in protecting the Métis.

54 The appeal is dismissed with costs to the respondents. The cross-appeal is dismissed.

55 The constitutional question is answered as follows:

> Are ss. 46 and 47(1) of the *Game and Fish Act*, R.S.O. 1990, c. G.1, as they read on October 22, 1993, of no force or effect with respect to the respondents, being [page234] Métis, in the circumstances of this case, by reason of their aboriginal rights under s. 35 of the *Constitution Act, 1982*?
>
> Answer: Yes.

APPENDIX

Relevant Constitutional and Statutory Provisions

Game and Fish Act, R.S.O. 1990, c. G.1, ss. 46 and 47(1)

46. No person shall knowingly possess any game hunted in contravention of this Act or the regulations.

47. (1) Except under the authority of a licence and during such times and on such terms and conditions and in such parts of Ontario as are prescribed in the regulations, no person shall hunt black bear, polar bear, caribou, deer, elk or moose.

Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Solicitors:

Solicitor for the appellant/respondent on cross-appeal: Ministry of the Attorney General of Ontario, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Pape & Salter, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

[page235]

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Solicitors for the intervener the Labrador Métis Nation: Burchell Green Hayman Parish, Halifax.

Solicitor for the intervener the Congress of Aboriginal Peoples: Joseph Eliot Magnet, Ottawa.

Solicitor for the interveners the Métis National Council and Métis Nation of Ontario: Métis National Council, Ottawa.

Solicitor for the intervener the B.C. Fisheries Survival Coalition: J. Keith Lowes, Vancouver.

Solicitor for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

Solicitor for the intervener the Ontario Métis and Aboriginal Association: Robert MacRae, Sault Ste. Marie.

Solicitors for the intervener the Ontario Federation of Anglers and Hunters: Danson, Recht & Voudouris, Toronto.

Solicitor for the intervener the Métis Chief Roy E. J. DeLaRonde, on behalf of the Red Sky Métis Independent Nation: Alan Pratt, Dunrobin, Ontario.

Solicitors for the intervener the North Slave Métis Alliance: Chamberlain Hutchison, Edmonton; Burchell Green Hayman Parish, Halifax.

End of Document

R. v. Sparrow, [1990] 1 S.C.R. 1075

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and McIntyre *, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

1988: November 3/1990: May 31.

File No.: 20311.

[1990] 1 S.C.R. 1075 | *[1990] 1 R.C.S. 1075* | *[1990] S.C.J. No. 49* | *[1990] A.C.S. no 49*

Ronald Edward Sparrow, appellant; v. Her Majesty The Queen, respondent; and The National Indian Brotherhood/Assembly of First Nations, the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Pacific Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., the Fisheries Council of British Columbia, the United Fishermen and Allied Workers' Union, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta and the Attorney General of Newfoundland, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

* McIntyre J. took no part in the judgment.

Case Summary

Constitutional law — Aboriginal rights — Fishing rights — Indian convicted of fishing with net larger than permitted by Band's licence — Whether or not net length restriction inconsistent with s. 35(1) of the Constitution Act, 1982 — Constitution Act, 1982, ss. 35(1), 52(1) — Fisheries Act, R.S.C. 1970, c. F-14, s. 34 — British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12, 27(1), (4).

[page1076]

Indians — Aboriginal rights — Fishing rights — Interpretation — Indian convicted of fishing with net larger than permitted by Band's licence — Whether or not net length restriction inconsistent with s. 35(1) of Constitution Act, 1982.

Appellant was charged in 1984 under the Fisheries Act with fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts alleged constitute the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s. 35(1) of the Constitution Act, 1982.

Appellant was convicted. The trial judge found that an aboriginal right could not be claimed unless it was supported by a special treaty and that s. 35(1) of the Constitution Act, 1982 accordingly had no application. An appeal to County Court was dismissed for similar reasons. The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Its decision was appealed and cross-appealed. The constitutional question before this Court queried whether the net length restriction contained in the Band's fishing licence was inconsistent with s. 35(1) of the Constitution Act, 1982.

Held: The appeal and cross-appeal should be dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Section 35(1) applies to rights in existence when the Constitution Act, 1982 came into effect; it does not revive extinguished rights. An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.

The Crown failed to discharge its burden of proving extinguishment. An aboriginal right is not extinguished merely by its being controlled in great detail by the regulations under the Fisheries Act. Nothing in the Fisheries Act or its detailed regulations demonstrated a clear and plain intention to extinguish the Indian [page1077] aboriginal right to fish. These fishing permits were simply a manner of controlling the fisheries, not of defining underlying rights. Historical policy on the part of the Crown can neither extinguish the existing aboriginal right without clear intention nor, in itself, delineate that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can, however, regulate the exercise of that right but such regulation must be in keeping with s. 35(1).

Section 35(1) of the Constitution Act, 1982, at the least, provides a solid constitutional base upon which subsequent negotiations can take place and affords aboriginal peoples constitutional protection against provincial legislative power. Its significance, however, extends beyond these fundamental effects. The approach to its interpretation is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself.

Section 35(1) is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights. The provision is not subject to s. 1 of the Canadian Charter of Rights and Freedoms. Any law or regulation affecting aboriginal rights, however, will not automatically be of no force or effect by the operation of s. 52 of the Constitution Act, 1982. Legislation that affects the exercise of aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

Section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts aboriginal rights. The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867, but must be read together with s. 35(1). Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

[page1078]

The test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. The inquiry begins with a reference to the characteristics or incidents of the right at stake. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful to avoid the application of traditional common law concepts of property as they develop their understanding of the "sui generis" nature of aboriginal rights. While it is impossible to give an easy definition of fishing rights, it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.

To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. Is the limitation unreasonable? Does the regulation impose undue hardship? Does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation.

Here, the regulation would be found to be a prima facie interference if it were found to be an adverse restriction on the exercise of the natives' right to fish for food. The issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

[page1079]

If a prima facie interference is found, the analysis moves to the issue of justification. This test involves two steps. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. The "public interest" justification is so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights. The justification of conservation and resource management, however, is uncontroversial.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified. There must be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource.

Guidelines are necessary to resolve the allocational problems that arise regarding the fisheries. Any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.

The justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. Section 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority and guarantees that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include: whether there has [pagee1080] been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. This list is not exhaustive.

Cases Cited

Applied: Jack v. The Queen, *[1980] 1 S.C.R. 294*; Attorney-General for Canada v. Attorney-General for Ontario, *[1898] A.C. 700*; Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*; Guerin v. The Queen, *[1984] 2 S.C.R. 335*; R. v. Taylor and Williams *(1981), 34 O.R. (2d) 360*; considered: R. v. Denny *(1990), 9 W.C.B. (2d) 438*, Nova Scotia Court of Appeal, March 5, 1990; R. v. Hare and Debassige *(1985), 20 C.C.C. (3d) 1* (Ont. C.A.); R. v. Eninew, R. v. Bear *(1984), 12 C.C.C. (3d) 365* (Sask. C.A.), aff'g *(1983), 7 C.C.C. (3d) 443* (Sask. Q.B.); distinguished: R. v. Derriksan *(1976), 71 D.L.R. (3d) 159* (S.C.C.); referred to: Calder v. Attorney General of British Columbia (1970), 74 W.W.R. 481 (B.C.C.A.), aff'd *[1973] S.C.R. 313*; Attorney-General for Ontario v. Bear Island Foundation *(1984), 49 O.R. (2d) 353* (H.C.); Re Steinhauer and The Queen *(1985), 15 C.R.R. 175* (Alta. Q.B.); Martin v. The Queen *(1985), 17 C.R.R. 375* (N.B.Q.B.); R. v. Agawa *(1988), 28 O.A.C. 201*; St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.); Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development, *[1980] 1 F.C. 518* (T.D.); R. v. Wesley, *[1932] 2 W.W.R. 337*; Prince and Myron v. The Queen, *[1964] S.C.R. 81*; R. v. Sutherland, *[1980] 2 S.C.R. 451*; Simon v. The Queen, *[1985] 2 S.C.R. 387*; Johnson v. M'Intosh (1823), 8 Wheaton 543 (U.S.S.C.); Canadian Pacific Ltd. v. Paul, *[1988] 2 S.C.R. 654*; Pasco v. Canadian National Railway Co., *[1986] 1 C.N.L.R. 35* (B.C.S.C.); Reference re Manitoba Language Rights, *[1985] 1 S.C.R. 721*; Kruger v. The Queen, *[1978] 1 S.C.R. 104*.

Statutes and Regulations Cited

British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12(1), (2), 27(1), (4).
British Columbia Terms of Union, R.S.C., 1985, App. II, No. 10, art. 13.
Canadian Charter of Rights and Freedoms, ss. 1, 33.
Constitution Act, 1867, ss. 91(12), (24), 109.
Constitution Act, 1930.
Constitution Act, 1982, ss. 35(1), 52(1).
Fisheries Act, R.S.C. 1970, c. F-14, ss. 34, 61(1).
Quebec Boundaries Extension Act, 1912, S.C. 1912, c. 45. [page1081]
Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.
Wildlife Act, S.B.C. 1966, c. 55.

Authors Cited

Canada. Department of Indian Affairs and Northern Development. In All Fairness: A Native Claims Policy -- Comprehensive Claims. Ottawa: 1981.
Canada. Department of Indian Affairs and Northern Development. Statement of the Government of Canada on Indian Policy. Ottawa: 1969.
Clement, W.H.P. The Law of the Canadian Constitution, 3rd ed. Toronto: Carswells, 1916.
Little Bear, Leroy. "A Concept of Native Title," [1982] 5 Can. Legal Aid Bul. 99.
Lyon, Noel. "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95.
McNeil, Kent. "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 Supreme Court L.R. 255.
Pentney, William. "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1987), 22 U.B.C. L. Rev. 207.
Sanders, Douglas. "Pre-existing Rights: The Aboriginal Peoples of Canada," in Gérald A. Beaudoin and Ed Ratushny, eds., The Canadian Charter of Rights and Freedoms, 2nd ed. Toronto: Carswells, 1989.
Schwartz, Bryan. First Principles, Second Thoughts: Aboriginal People, Constitutional Reform and Canadian Statecraft. Montreal: Institute for Research on Public Policy, 1986.

Slattery, Brian. "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. of Comp. Law 361.
Slattery, Brian. "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal *(1986), 9 B.C.L.R. (2d) 300*, *36 D.L.R. (4th) 246*, *[1987] 2 W.W.R. 577*, allowing an appeal from a judgment of Lamperson Co. Ct. J., [1986] B.C.W.L.D. 599, dismissing an appeal from conviction by Goulet Prov. Ct. J. Appeal and cross-appeal dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

[page1082]

Marvin R.V. Storrow, Q.C., Lewis F. Harvey and Joanne Lysyk, for the appellant. Thomas R. Braidwood, Q.C., and James E. Dorsey, for the respondent. Harry A. Slade, Arthur Pape and Louise Mandell, for the intervener the National Indian Brotherhood/Assembly of First Nations. Christopher Harvey, for the interveners the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild and the Deep Sea Trawlers' Association of B.C. J. Keith Lowes, for the intervener the Fisheries Council of British Columbia. Ian Donald, Q.C., for the intervener the United Fishermen and Allied Workers' Union. J.T.S. McCabe, Q.C., and Michel Hélie, for the intervener the Attorney General for Ontario. René Morin and Robert Décary, Q.C., for the intervener the Attorney General of Quebec. E. Robert A. Edwards, Q.C., and Howard R. Eddy, for the intervener the Attorney General of British Columbia. Kenneth J. Tyler and Robert G. Richards, for the intervener the Attorney General for Saskatchewan. Robert J. Normey, for the intervener the Attorney General for Alberta. S. Ronald Stevenson, for the intervener the Attorney General of Newfoundland.

Solicitors for the appellant: Blake, Cassels & Graydon, Toronto. Solicitors for the respondent: Braidwood, MacKenzie, Brewer & Greyell, Vancouver. Solicitors for the intervener the National Indian Brotherhood/the Assembly of First Nations: Pape & Salter, Vancouver. Solicitors for the interveners the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Pacific Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C.: Russell & DuMoulin, Vancouver. Solicitors for the intervener the Fisheries Council of British Columbia: Mawhinney & Kellough, Vancouver. Solicitors for the intervener the United Fishermen and Allied Workers' Union: Rankin & Company, Vancouver. Solicitor for the intervener the Attorney General for Ontario: The Deputy Attorney General, Toronto. Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy. Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria. Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina. Solicitor for the intervener the Attorney General for Alberta: The Department of the Attorney General for Alberta, Edmonton. Solicitor for the intervener the Attorney General of Newfoundland: The Attorney General of Newfoundland, St. John's.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND LA FOREST J.

1 This appeal requires this Court to explore for the first time the scope of s. 35(1) of the Constitution Act, [page1083] 1982, and to indicate its strength as a promise to the aboriginal peoples of Canada. Section 35(1) is found in Part II of that Act, entitled "Rights of the Aboriginal Peoples of Canada", and provides as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

2 The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the Fisheries Act, R.S.C. 1970, c. F-14, and the regulations under that Act. The issue is whether Parliament's power to regulate fishing is now limited by s. 35(1) of the Constitution Act, 1982, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.

Facts

3 The appellant, a member of the Musqueam Indian Band, was charged under s. 61(1) of the Fisheries Act of the offence of fishing with a drift net longer than that permitted by the terms of the Band's Indian food fishing licence. The fishing which gave rise to the charge took place on May 25, 1984 in Canoe Passage which is part of the area subject to the Band's licence. The licence, which had been issued for a one-year period beginning March 31, 1984, set out a number of restrictions including one that drift nets were to be limited to 25 fathoms in length. The appellant was caught with a net which was 45 fathoms in length. He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence is inconsistent with s. 35(1) of the Constitution Act, 1982 and therefore invalid.

The Courts Below

4 Goulet Prov. Ct. J., who heard the case, first referred to the very similar pre-Charter case of R. v. Derriksan *(1976), 71 D.L.R. (3d) 159* (S.C.C.), [page1084] where this Court held that the aboriginal right to fish was governed by the Fisheries Act and regulations. He then expressed the opinion that he was bound by Calder v. Attorney-General of British Columbia (1970), 74 W.W.R. 481 (B.C.C.A.), which held that a person could not claim an aboriginal right unless it was supported by a special treaty, proclamation, contract or other document, a position that was not disturbed because of the divided opinions of the members of this Court on the appeal which affirmed that decision (*[1973] S.C.R. 313*). Section 35(1) of the Constitution Act, 1982 thus had no application. The alleged right here was not based on any treaty or other document but was said to have been one exercised by the Musqueam from time immemorial before European settlers came to this continent. He, therefore, convicted the appellant, finding it unnecessary to consider the evidence in support of an aboriginal right.

5 An appeal to Lamperson J. of the County Court of Vancouver, [1986] B.C.W.L.D. 599, was dismissed for similar reasons.

6 The British Columbia Court of Appeal *(1986), 9 B.C.L.R. (2d) 300*, found that the courts below had erred in deciding that they were bound by the Court of Appeal decision in Calder, supra, to hold that the appellant could not rely on an aboriginal right to fish. Since the pronouncement of the Supreme Court of Canada judgment, the Court of Appeal's decision has been binding on no one. The court also distinguished Calder on its facts.

7 The court then dealt with the other issues raised by the parties. On the basis of the trial judge's conclusion that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished "from time immemorial", it stated that, with the other circumstances, this should have led to the conclusion that Mr. Sparrow was exercising an existing aboriginal right. It rejected the Crown's contention that the right was no longer existing by reason of its "extinguishment by regulation". An aboriginal right could continue, though regulated. [page1085] The court also

rejected textual arguments made to the effect that s. 35 was merely of a preambular character, and concluded that the right to fish asserted by the appellant was one entitled to constitutional protection.

8 The issue then became whether that protection extended so far as to preclude regulation (as contrasted with extinguishment which did not arise in this case) of the exercise of that right. In its view, the general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. Parliament retained the power to regulate fisheries and to control Indian lands under ss. 91(12) and (24) of the Constitution Act, 1867 respectively. Reasonable regulations were necessary to ensure the [page1086] proper management and conservation of the resource, and the regulations under the Fisheries Act restrict the right of all persons including Indians. The court observed, at p. 330:

> Section 35(1) of the Constitution Act, 1982 does not purport to revoke the power of Parliament to act under Head 12 or 24. The power to regulate fisheries, including Indian access to the fisheries, continues, subject only to the new constitutional guarantee that the aboriginal rights existing on 17th April 1982 may not be taken away.

9 The court rejected arguments that the regulation of fishing was an inherent aspect of the aboriginal right to fish and that such regulation must be confined to necessary conservation measures. The right had always been and continued to be a regulated right. The court put it this way, at p. 331:

> The aboriginal right which the Musqueam had was, subject to conservation measures, the right to take fish for food and for the ceremonial purposes of the band. It was in the beginning a regulated, albeit self-regulated, right. It continued to be a regulated right, and on 17th April 1982, it was a regulated right. It has never been a fixed right, and it has always taken its form from the circumstances in which it has existed. If the interests of the Indians and other Canadians in the fishery are to be protected, then reasonable regulations to ensure the proper management and conservation of the resource must be continued.

10 The court then went on to particularize the right still further. It was a right for a purpose, not one related to a particular method. Essentially, it was a right to fish for food and associated traditional band activities:

> The aboriginal right is not to take fish by any particular method or by a net of any particular length. It is to take fish for food purposes. The breadth of the right should be interpreted liberally in favour of the Indians. So "food purposes" should not be confined to subsistence. In particular, this is so because the Musqueam tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere day-to-day domestic consumption.

That right, the court added, has not changed its nature since the enactment of the Constitution Act, 1982. What has changed is that the Indian food fishery right is now entitled to priority over the interests of other user groups and that that right, by reason of s. 35(1), cannot be extinguished.

11 The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Observing that the conviction was based on an erroneous view of the law and could not stand, the court further remarked upon the existence of unresolved conflicts in the evidence, including the question whether a change in the fishing conditions was necessary to reduce the catch to a level sufficient to satisfy reasonable food requirements, as well as for conservation purposes.

The Appeal

12 Leave to appeal to this Court was then sought and granted. On November 24, 1987, the following constitutional question was stated:

> Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the British Columbia Fishery (General) Regulations and the Fisheries Act, R.S.C. [page1087] 1970, c. F-14, inconsistent with s. 35(1) of the Constitution Act, 1982?

13 The appellant appealed on the ground that the Court of Appeal erred (1) in holding that s. 35(1) of the Constitution Act, 1982 protects the aboriginal right only when exercised for food purposes and permits restrictive regulation of such rights whenever "reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest", and (2) in failing to find the net length restriction in the Band's food fish licence was inconsistent with s. 35(1) of the Constitution Act, 1982.

14 The respondent Crown cross-appealed on the ground that the Court of Appeal erred in holding that the aboriginal right had not been extinguished before April 17, 1982, the date of commencement of the Constitution Act, 1982, and in particular in holding that, as a matter of fact and law, the appellant possessed the aboriginal right to fish for food. In the alternative, the respondent alleged, the Court of Appeal erred in its conclusions respecting the scope of the aboriginal right to fish for food and the extent to which it may be regulated, more particularly in holding that the aboriginal right included the right to take fish for the ceremonial purposes and societal needs of the Band and that the Band enjoyed a constitutionally protected priority over the rights of other people engaged in fishing. Section 35(1), the respondent maintained, did not invalidate legislation passed for the purpose of conservation and resource management, public health and safety and other overriding public interests such as the reasonable needs of other user groups. Finally, it maintained that the conviction ought not to have been set aside or a new trial directed because the appellant failed to establish a prima facie case that the reduction in the length of the net had unreasonably interfered with his right by preventing him from meeting his food fish requirements. According to the respondent, the Court of Appeal had erred in shifting the [page1088] burden of proof to the Crown on the issue before the appellant had established a prima facie case.

15 The National Indian Brotherhood/Assembly of First Nations intervened in support of the appellant. The Attorneys General of British Columbia, Ontario, Quebec, Saskatchewan, Alberta and Newfoundland supported the respondent, as did the B. C. Wildlife Federation and others, the Fisheries Council of British Columbia and the United Fishermen and Allied Workers' Union.

The Regulatory Scheme

16 The Fisheries Act, s. 34, confers on the Governor in Council broad powers to make regulations respecting the fisheries, the most relevant for our purposes being those set forth in the following paragraphs of that section:

> 34. ...
>
> (a) for the proper management and control of the seacoast and inland fisheries;
>
> (b) respecting the conservation and protection of fish;
>
> (c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;
>
> . . .
>
> (e) respecting the use of fishing gear and equipment;
>
> (f) respecting the issue, suspension and cancellation of licences and leases;
>
> (g) respecting the terms and conditions under which a lease or licence may be issued;

Contravention of the Act and the regulations is made an offence under s. 61(1) under which the appellant was charged.

17 Acting under its regulation-making powers, the Governor in Council enacted the British Columbia Fishery

(General) Regulations, SOR/84-248. Under these Regulations (s. 4), everyone is, inter alia, prohibited from fishing without a licence, and [page1089] then only in areas and at the times and in the manner authorized by the Act or regulations. That provision also prohibits buying, selling, trading or bartering fish other than those lawfully caught under the authority of a commercial fishing licence. Section 4 reads:

> 4. (1) Unless otherwise provided in the Act or in any Regulations made thereunder in respect of the fisheries to which these Regulations apply or in the Wildlife Act (British Columbia), no person shall fish except under the authority of a licence or permit issued thereunder.
>
> (2) No person shall fish for any species of fish in the Province or in Canadian fisheries waters of the Pacific Ocean except in areas and at times authorized by the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.
>
> (3) No person who is the owner of a vessel shall operate that vessel or permit it to be operated in contravention of these Regulations.
>
> (4) No person shall, without lawful excuse, have in his possession any fish caught or obtained contrary to the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.
>
> (5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.

18 The Regulations make provision for issuing licences to Indians or a band "for the sole purpose of obtaining food for that Indian and his family and for the band", and no one other than an Indian is permitted to be in possession of fish caught pursuant to such a licence. Subsections 27(1) and (4) of the Regulations read:

> 27. (1) In this section "Indian food fish licence" means a licence issued by the Minister to an Indian or a band for the sole purpose of obtaining food for that Indian and his family or for the band.
>
> . . .
>
> (4) No person other than an Indian shall have in his possession fish caught under the authority of an Indian food fish licence.

[page1090]

19 As in the case of other licences issued under the Act, such licences may, by s. 12 of the Regulations, be subjected to restrictions regarding the species and quantity of fish that may be taken, the places and times when they may be taken, the manner in which they are to be marked and, most important here, the type of gear and equipment that may be used. Section 12 reads as follows:

> 12. (1) Subject to these Regulations and any regulations made under the Act in respect of the fisheries to which these Regulations apply and for the proper management and control of such fisheries, there may be specified in a licence issued under these Regulations
>
> (a) the species of fish and quantity thereof that is permitted to be taken;
>
> (b) the period during which and the waters in which fishing is permitted to be carried out;
>
> (c) the type and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is to be used;
>
> (d) the manner in which fish caught and retained for educational or scientific purposes is to be held or displayed;
>
> (e) the manner in which fish caught and retained is to be marked and transported; and

(f) the manner in which scientific or catch data is to be reported.

(2) No person fishing under the authority of a licence referred to in subsection (1) shall contravene or fail to comply with the terms of the licence.

20 Pursuant to these powers, the Musqueam Indian Band, on March 31, 1984, was issued an Indian food fishing licence as it had since 1978 "to fish for salmon for food for themselves and their family" in areas which included the place where the offence charged occurred, the waters of Ladner Reach and Canoe Passage therein described. The licence contained time restrictions as well as the type of gear to be used, notably "One Drift net twenty-five (25) fathoms in length".

21 The appellant was found fishing in the waters described using a drift net in excess of 25 fathoms. [page1091] He did not contest this, arguing instead that he had committed no offence because he was acting in the exercise of an existing aboriginal right which was recognized and affirmed by s. 35(1) of the Constitution Act, 1982.

Analysis

22 We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed", and the impact of s. 35(1) on the regulatory power of Parliament.

"Existing"

23 The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982. A number of courts have taken the position that "existing"' means being in actuality in 1982: R. v. Eninew *(1983), 7 C.C.C. (3d) 443* (Sask. Q.B.), at p. 446, aff'd *(1984), 12 C.C.C. (3d) 365* (Sask. C.A.). See also Attorney-General for Ontario v. Bear Island Foundation *(1984), 49 O.R. (2d) 353* (H.C.); R. v. Hare and Debassige *(1985), 20 C.C.C. (3d) 1* (Ont. C.A.); Re Steinhauer and The Queen *(1985), 15 C.R.R. 175* (Alta. Q.B.); Martin v. The Queen *(1985), 17 C.R.R. 375* (N.B.Q.B.); R. v. Agawa *(1988), 28 O.A.C. 201*.

24 Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. Blair J.A. in Agawa, supra, had this to say about the matter, at p. 214:

> Some academic commentators have raised a further problem which cannot be ignored. The Ontario Fishery Regulations contained detailed rules which vary for different regions in the province. Among other things, the Regulations specify seasons and methods of fishing, species of fish which can be caught and catch limits. Similar detailed provisions apply under the comparable [page1092] fisheries Regulations in force in other provinces. These detailed provisions might be constitutionalized if it were decided that the existing treaty rights referred to in s. 35(1) were those remaining after regulation at the time of the proclamation of the Constitution Act, 1982.

As noted by Blair J.A., academic commentary lends support to the conclusion that "existing" means "unextinguished" rather than exercisable at a certain time in history. Professor Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at pp. 781-82, has observed the following about reading regulations into the rights:

> This approach reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a

> constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.

See also Professor McNeil, "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 Supreme Court L.R. 255, at p. 258 (q.v.); Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1988), 22 U.B.C. L. Rev. 207.

25 The arbitrariness of such an approach can be seen if one considers the recent history of the federal regulation in the context of the present case and the fishing industry. If the Constitution Act, 1982 had been enacted a few years earlier, any right held by the Musqueam Band, on this approach, would have been constitutionally subjected to the restrictive regime of personal licences that had existed since 1917. Under that regime, the Musqueam catch had by 1969 become minor or non-existent. In 1978 a system of band licences was introduced on an experimental basis which permitted the Musqueam to fish with a 75 fathom [page1093] net for a greater number of days than other people. Under this regime, from 1977 to 1984, the number of Band members who fished for food increased from 19 persons using 15 boats, to 64 persons using 38 boats, while 10 other members of the Band fished under commercial licences. Before this regime, the Band's food fish requirement had basically been provided by Band members who were licensed for commercial fishing. Since the regime introduced in 1978 was in force in 1982, then, under this approach, the scope and content of an aboriginal right to fish would be determined by the details of the Band's 1978 licence.

26 The unsuitability of the approach can also be seen from another perspective. Ninety-one other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve) obtain their food fish from the Fraser River. Some or all of these bands may have an aboriginal right to fish there. A constitutional patchwork quilt would be created if the constitutional right of these bands were to be determined by the specific regime available to each of those bands in 1982.

27 Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," supra, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

[page1094]

The Aboriginal Right

28 We turn now to the aboriginal right at stake in this appeal. The Musqueam Indian Reserve is located on the north shore of the Fraser River close to the mouth of that river and within the limits of the City of Vancouver. There has been a Musqueam village there for hundreds of years. This appeal does not directly concern the reserve or the adjacent waters, but arises out of the Band's right to fish in another area of the Fraser River estuary known as Canoe Passage in the South Arm of the river, some 16 kilometres (about 10 miles) from the reserve. The reserve and those waters are separated by the Vancouver International Airport and the Municipality of Richmond.

29 The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. Much of the evidence of an aboriginal right to fish was given by Dr. Suttles, an anthropologist, supported by that of Mr. Grant, the Band administrator. The Court of Appeal thus summarized Dr. Suttles' evidence, at pp. 307-308:

> Dr. Suttles was qualified as having particular qualifications in respect of the ethnography of the Coast Salish Indian people of which the Musqueams were one of several tribes. He thought that the Musqueam had lived in their historic territory, which includes the Fraser River estuary, for at least 1,500 years. That historic territory extended from the north shore of Burrard Inlet to the south shore of the main channel of the

> Fraser River, including the waters of the three channels by which that river reaches the ocean. As part of the Salish people, the Musqueam were part of a regional social network covering a much larger area but, as a tribe, were themselves an organized social group with their own name, territory and resources. Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others.
>
> Dr. Suttles described the special position occupied by the salmon fishery in that society. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, [page1095] and in their ceremonies. The salmon were held to be a race of beings that had, in "myth times", established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual. Toward the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species.

30 While the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right, and the evidence was not extensive, the correctness of the finding of fact of the trial judge "that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River for salmon" is supported by the evidence and was not contested. The existence of the right, the Court of Appeal tells us, was "not the subject of serious dispute". It is not surprising, then, that, taken with other circumstances, that court should find, at p. 320, that "the judgment appealed from was wrong in ... failing to hold that Sparrow at the relevant time was exercising an existing aboriginal right".

31 In this Court, however, the respondent contested the Court of Appeal's finding, contending that the evidence was insufficient to discharge the appellant's burden of proof upon the issue. It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it.

32 What the Crown really insisted on, both in this Court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the Fisheries Act.

33 The history of the regulation of fisheries in British Columbia is set out in Jack v. The Queen, *[1980] 1 S.C.R. 294*, especially at pp. 308 et seq., and we need only summarize it here. Before the [page1096] province's entry into Confederation in 1871, the fisheries were not regulated in any significant way, whether in respect of Indians or other people. The Indians were not only permitted but encouraged to continue fishing for their own food requirements. Commercial and sport fishing were not then of any great importance. The federal Fisheries Act was only proclaimed in force in the province in 1876 and the first Salmon Fishery Regulations for British Columbia were adopted in 1878 and were minimal.

34 The 1878 regulations were the first to mention Indians. They simply provided that the Indians were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale or barter. The Indian right or liberty to fish was thereby restricted, and more stringent restrictions were added over the years. As noted in Jack v. The Queen, supra, at p. 310:

> The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit.

The 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food; see P.C. 2539 of Sept. 11, 1917. The Indian food fishing provisions remained essentially the same from 1917 to 1977. The regulations of 1977 retained the general principles of the previous sixty years. An Indian could fish for food under a "special licence" specifying method, locale and times of fishing.

Following an experimental program to be discussed later, the 1981 regulations provided for the entirely new concept of a Band food fishing licence, while retaining comprehensive [page1097] specification of conditions for the exercise of licences.

35 It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish. The extinguishment need not be express, he argued, but may take place where the sovereign authority is exercised in a manner "necessarily inconsistent" with the continued enjoyment of aboriginal rights. For this proposition, he particularly relied on St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (P.C.); Calder v. Attorney-General of British Columbia, supra; Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development, *[1980] 1 F.C. 518* (T.D.); and Attorney-General for Ontario v. Bear Island Foundation, supra. The consent to its extinguishment before the Constitution Act, 1982 was not required; the intent of the Sovereign could be effected not only by statute but by valid regulations. Here, in his view, the regulations had entirely displaced any aboriginal right. There is, he submitted, a fundamental inconsistency between the communal right to fish embodied in the aboriginal right, and fishing under a special licence or permit issued to individual Indians (as was the case until 1977) in the discretion of the Minister and subject to terms and conditions which, if breached, may result in cancellation of the licence. The Fisheries Act and its regulations were, he argued, intended to constitute a complete code inconsistent with the continued existence of an aboriginal right.

36 At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. The distinction to be drawn was carefully explained, in the context of federalism, in the first [page1098] fisheries case, Attorney-General for Canada v. Attorney-General for Ontario, *[1898] A.C. 700*. There, the Privy Council had to deal with the interrelationship between, on the one hand, provincial property, which by s. 109 of the Constitution Act, 1867 is vested in the provinces (and so falls to be regulated qua property exclusively by the provinces) and, on the other hand, the federal power to legislate respecting the fisheries thereon under s. 91(12) of that Act. The Privy Council said the following in relation to the federal regulation (at pp. 712-13):

> ... the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

37 In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in Baker Lake, supra, at p. 568:

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

See also Attorney-General for Ontario v. Bear Island Foundation, supra, at pp. 439-40. That in Judson J.'s view was what had occurred in Calder, supra, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, [page1099] including aboriginal title. But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be 'clear and plain'". (Emphasis added.) The test of extinguishment to be

adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

38 There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

39 We would conclude then that the Crown has failed to discharge its burden of proving extinguishment. In our opinion, the Court of Appeal made no mistake in holding that the Indians have an existing aboriginal right to fish in the area where Mr. Sparrow was fishing at the time of the charge. This approach is consistent with ensuring that an aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.

40 The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.

[page1100]

41 The British Columbia Court of Appeal in this case held that the aboriginal right was to fish for food purposes, but that purpose was not to be confined to mere subsistence. Rather, the right was found to extend to fish consumed for social and ceremonial activities. The Court of Appeal thereby defined the right as protecting the same interest as is reflected in the government's food fish policy. In limiting the right to food purposes, the Court of Appeal referred to the line of cases involving the interpretation of the Natural Resources Agreements and the food purpose limitation placed on the protection of fishing and hunting rights by the Constitution Act, 1930 (see R. v. Wesley, *[1932] 2 W.W.R. 337*, Prince and Myron v. The Queen, *[1964] S.C.R. 81*; R. v. Sutherland, *[1980] 2 S.C.R. 451*).

42 The Court of Appeal's position was attacked from both sides. The respondent for its part, argued that, if an aboriginal right to fish does exist, it does not include the right to take fish for the ceremonial and social activities of the Band. The appellant, on the other hand, attacked the Court of Appeal's restriction of the right to a right to fish for food. He argued that the principle that the holders of aboriginal rights may exercise those rights according to their own discretion has been recognized by this Court in the context of the protection of treaty hunting rights (Simon v. The Queen, *[1985] 2 S.C.R. 387*) and that it should be applied in this case such that the right is defined as a right to fish for any purpose and by any non-dangerous method.

43 In relation to this submission, it was contended before this Court that the aboriginal right extends to commercial fishing. While no commercial fishery existed prior to the arrival of European settlers, it is contended that the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes. The presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least [page1101] in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.

44 Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish for food for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right

without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).

45 In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's food fishing licence. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.

"Recognized and Affirmed"

46 We now turn to the impact of s. 35(1) of the Constitution Act, 1982 on the regulatory power of Parliament and on the outcome of this appeal specifically.

[page1102]

47 Counsel for the appellant argued that the effect of s. 35(1) is to deny Parliament's power to restrictively regulate aboriginal fishing rights under s. 91(24) ("Indians and Lands Reserved for the Indians"), and s. 91(12) ("Sea Coast and Inland Fisheries"). The essence of this submission, supported by the intervener, the National Indian Brotherhood/Assembly of First Nations, is that the right to regulate is part of the right to use the resource in the Band's discretion. Section 35(1) is not subject to s. 1 of the Canadian Charter of Rights and Freedoms nor to legislative override under s. 33. The appellant submitted that, if the regulatory power continued, the limits on its extent are set by the word "inconsistent" in s. 52(1) of the Constitution Act, 1982 and the protective and remedial purposes of s. 35(1). This means that aboriginal title entails a right to fish by any non-dangerous method chosen by the aboriginals engaged in fishing. Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s. 35(1). Thus, counsel for the appellant speculated, "in certain circumstances, necessary and reasonable conservation measures might qualify" (emphasis added) -- where for example such measures were necessary to prevent serious impairment of the aboriginal rights of present and future generations, where conservation could only be achieved by restricting the right and not by restricting fishing by other users, and where the aboriginal group concerned was unwilling to implement necessary conservation measures. The onus of proving a justification for restrictive regulations would lie with the government by analogy with s. 1 of the Charter.

48 In response to these submissions and in finding the appropriate interpretive framework for s. 35(1), we start by looking at the background of s. 35(1).

[page1103]

49 It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; see Johnson v. M'Intosh (1823), 8 Wheaton 543 (U.S.S.C.); see also the Royal Proclamation itself (R.S.C., 1985, App. II, No. 1, pp. 4-6); Calder, supra, per Judson J., at p. 328, Hall J., at pp. 383 and 402. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this Court, see Canadian Pacific Ltd. v. Paul, *[1988] 2 S.C.R. 654*. As MacDonald J. stated in Pasco v. Canadian National Railway Co., *[1986] 1 C.N.L.R. 35* (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."

50 For many years, the rights of the Indians to their aboriginal lands -- certainly as legal rights -- were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported

by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's The Law of the Canadian Constitution (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the Statement of the Government of Canada on Indian Policy (1969), although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to [page1104] the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see The Quebec Boundaries Extension Act, 1912, S.C. 1912, c. 45. It took a number of judicial decisions and notably the Calder case in this Court (1973) to prompt a reassessment of the position being taken by government.

51 In the light of its reassessment of Indian claims following Calder, the federal Government on August 8, 1973 issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country". (Emphasis added.) See Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People, August 8, 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility". But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. "The Government", it stated, "is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

[page1105]

52 It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position; see also In All Fairness: A Native Claims Policy -- Comprehensive Claims (1981), pp. 11-12; Slattery, "Understanding Aboriginal Rights" op. cit., at p. 730. As recently as Guerin v. The Queen, *[1984] 2 S.C.R. 335*, the federal government argued in this Court that any federal obligation was of a political character.

53 It is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Métis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the Guerin case, supra, but for a proper understanding of the situation, it is essential to remember that the Guerin case was decided after the commencement of the Constitution Act, 1982. In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights (see Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada," in Beaudoin and Ratushny, eds., The Canadian Charter of Rights and Freedoms, 2nd ed., especially at p. 730).

54 In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95, says the following about s. 35(1), at p. 100:

[page1106]

> ... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

55 The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.

56 In Reference re Manitoba Language Rights, *[1985] 1 S.C.R. 721*, this Court said the following about the perspective to be adopted when interpreting a constitution, at p. 745:

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the Constitution Act, 1982 declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the Constitution Act, 1982, which deal with aboriginal rights, it said the following, at p. 322:

[page1107]

> This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime in the future .... To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as Nowegijick v. R., *[1983] 1 S.C.R. 29* ....

57 In Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*, at p. 36, the following principle that should govern the interpretation of Indian treaties and statutes was set out:

> ... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

58 In R. v. Agawa, supra, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:

> The second principle was enunciated by the late Associate Chief Justice MacKinnon in R. v. Taylor and Williams *(1981), 34 O.R. (2d) 360*. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian rights "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:

> "The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned."
>
> This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: [page1108] see Guerin v. The Queen, *[1984] 2 S.C.R. 335*; *55 N.R. 161*; *13 D.L.R. (4th) 321*.

59 In Guerin, supra, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our [page1109] opinion, Guerin, together with R. v. Taylor and Williams *(1981), 34 O.R. (2d) 360*, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

60 We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from Nowegijick, Taylor and Williams and Guerin, should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content (Lyon, op. cit.; Pentney, op. cit.; Schwartz, "Unstarted Business: Two Approaches to Defining s. 35 -- 'What's in the Box?' and 'What Kind of Box?'", Chapter XXIV, in First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft; Slattery, op. cit.; and Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. of Comp. Law 361).

61 In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the Constitution Act, 1982. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

62 There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in Nowegijick, supra, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by Guerin v. The Queen, supra.

63 We refer to Professor Slattery's "Understanding Aboriginal Rights", supra, with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these [page1110] two extreme positions must be rejected in favour of a justificatory scheme.

64 Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute

de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

65 The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

66 In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation [page1111] made pursuant to the Fisheries Act. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the Regulation of the Fisheries

67 Taking the above framework as guidance, we propose to set out the test for prima facie interference with an existing aboriginal right and for the justification of such an interference. With respect to the question of the regulation of the fisheries, the existence of s. 35(1) of the Constitution Act, 1982, renders the authority of R. v. Derriksan, supra, inapplicable. In that case, Laskin C.J., for this Court, found that there was nothing to prevent the Fisheries Act and the Regulations from subjecting the alleged aboriginal right to fish in a particular area to the controls thereby imposed. As the Court of Appeal in the case at bar noted, the Derriksan line of cases established that, before April 17, 1982, the aboriginal right to fish was subject to regulation by legislation and subject to extinguishment. The new constitutional status of that right enshrined in s. 35(1) suggests that a different approach must be taken in deciding whether regulation of the fisheries might be out of keeping with constitutional protection.

68 The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations [page1112] regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in Guerin, supra, at p. 382, referred to as the "sui generis" nature of aboriginal rights. (See also Little Bear, "A Concept of Native Title," [1982] 5 Can. Legal Aid Bul. 99.)

69 While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

70 To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a prima facie interference if

it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to [page1113] the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

71 If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

72 The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource or in the public interest". (Emphasis added.) We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

73 The justification of conservation and resource management, on the other hand, is surely uncontroversial. In Kruger v. The Queen, *[1978] 1 S.C.R. 104*, the applicability of the B.C. Wildlife Act, S.B.C. 1966, c. 55, to the appellant members [page1114] of the Penticton Indian Band was considered by this Court. In discussing that Act, the following was said about the objective of conservation (at p. 112):

> Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former.

74 While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

75 If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from Taylor and Williams and Guerin, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

76 The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between [page1115] the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource. There is a clear need for guidelines that will

resolve the allocational problems that arise regarding the fisheries. We refer to the reasons of Dickson J., as he then was, in Jack v. The Queen, supra, for such guidelines.

77 In Jack, the appellants' defence to a charge of fishing for salmon in certain rivers during a prohibited period was based on the alleged constitutional incapacity of Parliament to legislate such as to deny the Indians their right to fish for food. They argued that art. 13 of the British Columbia Terms of Union imposed a constitutional limitation on the federal power to regulate. While we recognize that the finding that such a limitation had been imposed was not adopted by the majority of this Court, we point out that this case concerns a different constitutional promise that asks this Court to give a meaningful interpretation to recognition and affirmation. That task requires equally meaningful guidelines responsive to the constitutional priority accorded aboriginal rights. We therefore repeat the following passage from Jack, at p. 313:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
>
> [page1116]
>
> I agree with the general tenor of this argument .... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.

78 The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

79 The decision of the Nova Scotia Court of Appeal in R. v. Denny *(1990), 9 W.C.B. (2d) 438*, unreported, judgment rendered March 5, 1990, addresses the constitutionality of the Nova Scotia Micmac Indians' right to fish in the waters of Indian Brook and the Afton River, and does so in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of the [page1117] rights. Clarke C.J.N.S., for a unanimous court, found that the Nova Scotia Fishery Regulations enacted pursuant to the federal Fisheries Act were in part inconsistent with the constitutional rights of the appellant Micmac Indians. Section 35(1) of the Constitution Act, 1982, provided the appellants with the right to a top priority allocation of any surplus of the fisheries resource which might exist after the needs of conservation had been taken into account. With respect to the issue of the Indians' priority to a food fishery, Clarke C.J.N.S. noted that the official policy of the federal government recognizes that priority. He added the following, at pp. 22-23:

> I have no hesitation in concluding that factual as well as legislative and policy recognition must be given to the existence of an Indian food fishery in the waters of Indian Brook, adjacent to the Eskasoni Reserve, and the waters of the Afton River after the needs of conservation have been taken into account ...
>
> To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the Federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

Further, Clarke C.J.N.S. found that s. 35(1) provided the constitutional recognition of the aboriginal priority with respect to the fishery, and that the regulations, in failing to guarantee that priority, were in violation of the constitutional provision. He said the following, at p. 25:

> Though it is crucial to appreciate that the rights afforded to the appellants by s. 35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their food needs, where a [page1118] surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

80 In light of this approach, the argument that the cases of R. v. Hare and Debassige, supra, and R. v. Eninew, R. v. Bear *(1984), 12 C.C.C. (3d) 365* (Sask. C.A.), stand for the proposition that s. 35(1) provides no basis for restricting the power to regulate must be rejected, as was done by the Court of Appeal below. In Hare and Debassige, which addressed the issue of whether the Ontario Fishery Regulations, C.R.C. 1978, c. 849, applied to members of an Indian Band entitled to the benefit of the Manitoulin Island Treaty which granted certain rights with respect to taking fish, Thorson J.A. emphasized the need for priority to be given to measures directed to the management and conservation of fish stocks with the following observation (at p. 17):

> Since 1867 and subject to the limitations thereon imposed by the Constitution, which of course now includes s. 35 of the Constitution Act, 1982, the constitutional authority and responsibility to make laws in relation to the fisheries has rested with Parliament. Central to Parliament's responsibility has been, and continues to be, the need to provide for the proper management and conservation of our fish stocks, and the need to ensure that they are not depleted or imperilled by deleterious practices or methods of fishing.
>
> The prohibitions found in ss. 12 and 20 of the Ontario regulations clearly serve this purpose. Accordingly, it need not be ignored by our courts that while these prohibitions place limits on the rights of all persons, they are there to serve the larger interest which all persons share in the proper management and conservation of these important resources.

In Eninew, Hall J.A. found, at p. 368, that "the treaty rights can be limited by such regulations as are reasonable". As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. Rather, the regulations [page1119] enforced pursuant to a conservation or management objective may be scrutinized according to the justificatory standard outlined above.

81 We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the

salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

82 Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

83 We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

[page1120]

Application to this Case -- Is the Net Length Restriction Valid?

84 The Court of Appeal below found that there was not sufficient evidence in this case to proceed with an analysis of s. 35(1) with respect to the right to fish for food. In reviewing the competing expert evidence, and recognizing that fish stock management is an uncertain science, it decided that the issues at stake in this appeal were not well adapted to being resolved at the appellate court level.

85 Before the trial, defence counsel advised the Crown of the intended aboriginal rights defence and that the defence would take the position that the Crown was required to prove, as part of its case, that the net length restriction was justifiable as a necessary and reasonable conservation measure. The trial judge found s. 35(1) to be inapplicable to the appellant's defence, based on his finding that no aboriginal right had been established. He therefore found it inappropriate to make findings of fact with respect to either an infringement of the aboriginal right to fish or the justification of such an infringement. He did, however, find that the evidence called by the appellant "[c]asts some doubt as to whether the restriction was necessary as a conservation measure. More particularly, it suggests that there were more appropriate measures that could have been taken if necessary; measures that would not impose such a hardship on the Indians fishing for food. That case was not fully met by the Crown."

86 According to the Court of Appeal, the findings of fact were insufficient to lead to an acquittal. There was no more evidence before this Court. We also would order a re-trial which would allow findings of fact according to the tests set out in these reasons.

87 The appellant would bear the burden of showing that the net length restriction constituted a prima facie infringement of the collective aboriginal right [page1121] to fish for food. If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation. In trying to show that the restriction is necessary in the circumstances of the Fraser River fishery, the Crown could use facts pertaining to fishing by other Fraser River Indians.

88 In conclusion, we would dismiss the appeal and the cross-appeal and affirm the Court of Appeal's setting aside of the conviction. We would accordingly affirm the order for a new trial on the questions of infringement and whether any infringement is nonetheless consistent with s. 35(1), in accordance with the interpretation set out here.

89 For the reasons given above, the constitutional question must be answered as follows:

Question	Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated March 30, 1984, issued pursuant to the British Columbia Fishery (General) Regulations and the Fisheries Act, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the Constitution Act, 1982?
Answer	This question will have to be sent back to trial to be answered according to the analysis set out in these reasons.

End of Document

R. v. Van der Peet, [1996] 2 S.C.R. 507

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

1995: November 27, 28, 29 / 1996: August 21.

File No.: 23803.

[1996] 2 S.C.R. 507 | *[1996] 2 R.C.S. 507* | *[1996] S.C.J. No. 77* | *[1996] A.C.S. no 77*

Dorothy Marie Van der Peet, appellant; v. Her Majesty The Queen, respondent, and The Attorney General of Quebec, the Fisheries Council of British Columbia, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation, the First Nations Summit, Delgamuukw et al., Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Constitutional law — Aboriginal rights — Right to sell fish on non-commercial basis — Fish caught under native food fish licence — Regulations prohibiting sale or barter of fish caught under that licence — Fish sold to non-aboriginal and charges laid — Definition of "existing aboriginal rights" as used in s. 35 of Constitution Act, 1982 — Whether an aboriginal right being exercised in the circumstances — Constitution Act, 1982, s. 35(1) — Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) — British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5).

The appellant, a native, was charged with selling 10 salmon caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the British Columbia Fishery (General) Regulations, which prohibited the sale or barter of fish caught under such a licence. The restrictions imposed by s. 27(5) were alleged to infringe the appellant's aboriginal right to sell fish and accordingly were invalid because they violated s. 35(1) of the Constitution Act, 1982. The trial judge held that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell such fish and found the appellant guilty. The summary appeal judge found an aboriginal right to sell fish and remanded for a new trial. The Court of Appeal allowed the Crown's appeal and restored the guilty verdict. The constitutional question before this Court queried whether s. 27(5) of the Regulations was of no force or effect in the circumstances by reason of the aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982.

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

The Aboriginal Right

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: A purposive analysis of s. 35(1) must take place in light of the general principles applicable to the legal relationship between the Crown and aboriginal peoples. This relationship is a fiduciary one and a generous and liberal interpretation should accordingly be given in favour of aboriginal peoples. Any ambiguity as to the scope and definition of s. 35(1) must be resolved in favour of aboriginal peoples. This purposive analysis is not to be limited to an analysis of why a pre-existing doctrine was elevated to constitutional status.

Aboriginal rights existed and were recognized under the common law. They were not created by s. 35(1) but subsequent to s. 35(1) they cannot be extinguished. They can, however, be regulated or infringed consistent with the justificatory test laid out in R. v. Sparrow.

Section 35(1) provides the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose. The French version of the text, prior jurisprudence of this Court and the courts of Australia and the United States, academic commentators and legal literature support this approach.

To be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. A number of factors must be considered in applying the "integral to a distinctive culture" test. The court must take into account the perspective of the aboriginal peoples, but that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.

In assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right. To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. The activities must be considered at a general rather than specific level. They may be an exercise in modern form of a pre-contact practice, custom or tradition and the claim should be characterized accordingly.

To be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question -- one of the things which made the culture of the society distinctive. A court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society. It is those distinctive features that need to be acknowledged and reconciled with the sovereignty of the Crown.

The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society. Conclusive evidence from pre-contact times about the practices, customs and traditions of the community in question need not be produced. The evidence simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. The concept of continuity is the means by which a "frozen rights" approach to s. 35(1) will be avoided. It does not require an unbroken chain between current practices, customs and traditions and those existing prior to contact. A practice existing prior to contact can be resumed after an interruption.

Basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the inclusion of the Métis in the definition of "aboriginal peoples of Canada" in s. 35(2) of the Constitution Act, 1982. The history of the Métis and the reasons underlying their inclusion in the protection given by s. 35 are quite distinct from those relating to other aboriginal peoples in Canada. The manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined.

A court should approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions and customs engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards applied in other contexts.

Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. Claims to aboriginal rights are not to be determined on a general basis.

In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition. Incidental practices, customs and traditions

cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

A practice, custom or tradition, to be recognized as an aboriginal right need not be distinct, meaning "unique", to the aboriginal culture in question. The aboriginal claimants must simply demonstrate that the custom or tradition is a defining characteristic of their culture.

The fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. A practice, custom or tradition will not meet the standard for recognition of an aboriginal right, however, where it arose solely as a response to European influences.

The relationship between aboriginal rights and aboriginal title (a sub-category of aboriginal rights dealing solely with land claims) must not confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look both at the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

The first step in the application of the integral to a distinctive culture test requires the Court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. Here, the appellant claimed that the practices, customs and traditions of the Sto:lo include as an integral element the exchange of fish for money or other goods. The significance of the practice, tradition or custom is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. The claim must be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

The trial judge made no clear and palpable error which would justify an appellate court's substituting its findings of fact. These findings included: (1) prior to contact exchanges of fish were only "incidental" to fishing for food purposes; (2) there was no regularized trading system amongst the appellant's people prior to contact; (3) the trade that developed with the Hudson's Bay Company, while of significance to the Sto:lo of the time, was qualitatively different from what was typical of Sto:lo culture prior to contact; and, (4) the Sto:lo's exploitation of the fishery was not specialized and that suggested that the exchange of fish was not a central part of Sto:lo culture. The appellant failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo culture which existed prior to contact and was therefore protected by s. 35(1) of the Constitution Act, 1982.

Per L'Heureux-Dubé J. (dissenting): Aboriginal rights find their origin in the historic occupation and use of native ancestral lands. These rights relate not only to aboriginal title but also to the component elements of this larger right, such as aboriginal rights to hunt, fish or trap, and their accompanying practices, customs and traditions. They also include other matters, not related to land, that form part of a distinctive aboriginal culture.

Aboriginal rights can exist on reserve lands, aboriginal title lands, and aboriginal right lands. Reserve lands are reserved by the federal government for the exclusive use of Indian people. Title to aboriginal title lands -- lands which the natives possess for occupation and use at their own discretion -- is founded on common law and is subject to the Crown's ultimate title. It exists when the bundle of aboriginal rights is large enough to command the recognition of a sui generis proprietary interest to occupy and use the land. Aboriginal title can also be founded on treaties. Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. These types of lands are not static or mutually exclusive.

Prior to 1982, aboriginal rights were founded only on the common law and they could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign". Now, s. 35(1) of the

Constitution Act, 1982 protects aboriginal interests arising out of the native historic occupation and use of ancestral lands through the recognition and affirmation of "existing aboriginal and treaty rights of the aboriginal peoples of Canada".

The Sparrow test deals with constitutional claims of infringement of aboriginal rights. This test involves three steps: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a prima facie infringement of such right; and, (3) the justification of the infringement.

Section 35(1) must be given a generous, large and liberal interpretation and ambiguities or doubts should be resolved in favour of the natives. Aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown vis-à-vis aboriginal people. Most importantly, aboriginal rights protected under s. 35(1) must be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. It is not appropriate that the perspective of the common law be given an equal weight with the perspective of the natives.

The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Two approaches have emerged.

The first approach focuses on the particular aboriginal practice, custom or tradition. It considers that what is common to both aboriginal and non-aboriginal cultures is non-aboriginal and hence not protected by s. 35(1). This approach should not be adopted. This approach misconstrues the words "distinctive culture", used in Sparrow, by interpreting it as if it meant "distinct culture". It is also overly majoritarian. Finally, this approach is unduly restrictive as it defines aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away.

The second approach describes aboriginal rights in a fairly high level of abstraction and is more generic. Its underlying premise is that the notion of "integral part of [aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Section 35(1) should be viewed as protecting, not a catalogue of individualized practices, customs or traditions but the "distinctive culture" of which aboriginal activities are manifestations. The emphasis is on the significance of these activities to natives rather than on the activities themselves. These aboriginal activities should be distinguished from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1).

The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, customs and traditions which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). A generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. What constitutes a practice, custom or tradition distinctive to native culture and society must be examined through the eyes of aboriginal people.

The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, custom or tradition has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized as a right under s. 35(1). Two basic approaches exist: the "frozen right" approach and the "dynamic right" approach. The latter should be preferred.

The "frozen right" approach would recognize practices, customs and traditions that existed from time immemorial and that continued to exist at the time of British sovereignty. This approach overstates the impact of European influence on aboriginal communities, crystallizes aboriginal practice as of an arbitrary date, and imposes a heavy burden on the persons claiming an aboriginal right even if evidentiary standards are relaxed. In addition, it embodies inappropriate and unprovable assumptions about aboriginal culture and society and is inconsistent with Sparrow which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982.

Underlying the "dynamic right" approach is the premise that "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. Aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, customs and traditions change and evolve

with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality. Practices, customs and traditions need not have existed prior to British sovereignty or European contact. British sovereignty, instead of being considered the turning point in aboriginal culture, would be regarded as having recognized and affirmed practices, customs and traditions which are sufficiently significant and fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity".

The aboriginal activity must have formed an integral part of a distinctive aboriginal culture for a substantial continuous period of time. This period should be assessed based on: (1) the type of aboriginal practices, customs and traditions; (2) the particular aboriginal culture and society; and, (3) the reference period of 20 to 50 years. This approach gives proper consideration to the perspective of aboriginal people on the meaning of their existing rights.

As regards the delineation of the aboriginal right claimed, the purposes of aboriginal practices, customs and traditions are highly relevant in assessing if they are sufficiently significant to the culture for a substantial continuing period of time. The purposes should not be strictly compartmentalized but rather should be viewed on a spectrum, with aboriginal activities undertaken solely for food at one extreme, those directed to obtaining purely commercial profit at the other extreme, and activities relating to livelihood, support and sustenance at the centre.

An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. Whether an activity is sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time will have to be determined on the specific facts giving rise to each case, as proven by the Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right.

Nevertheless, the facts did not support framing the issue in this case in terms of commercial fishing. Appellant did not argue that her people possessed an aboriginal right to fish for commercial purposes but only the right to sell, trade and barter fish for their livelihood, support and sustenance. Finally, the legislative provision under constitutional challenge was not only aimed at commercial fishing but also at the non-commercial sale, trade and barter of fish.

The trial judge and the Court of Appeal erred in framing the issue and in using a "frozen right" approach. The trial judge, since he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1), made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. An appellate court, given these palpable and overriding errors affecting the trial judge's assessment of the facts, is accordingly justified in intervening in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial.

The fishery always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. These activities formed part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time -- for centuries before the arrival of Europeans -- and continued in modernized forms until the present day. The criteria regarding the characterization and the time requirement of aboriginal rights protected under s. 35(1) of the Constitution Act, 1982 were met.

Per McLachlin J. (dissenting): A court considering the question of whether a particular practice is the exercise of a s. 35(1) constitutional aboriginal right must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is true to the Crown's position as fiduciary for the first peoples. The legal perspectives of both the European and the aboriginal societies must be incorporated and the common law being applied must give full recognition to the pre-existing aboriginal tradition.

The sale at issue should not be labelled as something other than commerce. One person selling something to another is commerce. The critical question is not whether the sale of the fish is commerce or non-commerce, but

whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

An aboriginal right must be distinguished from the exercise of an aboriginal right. Rights are generally cast in broad, general terms and remain constant over the centuries. The exercise of rights may take many forms and vary from place to place and from time to time. The principle that aboriginal rights must be ancestral rights is reconciled with this Court's insistence that aboriginal rights not be frozen by the determination of whether the modern practice at issue may be characterized as an exercise of the right. The rights are ancestral: their exercise takes modern forms.

History is important. A recently adopted practice would generally not qualify as being aboriginal. A practice, however, need not be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights do not find their source in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question, which existed prior to the imposition of European law and which often dated from time immemorial.

Continuity -- a link -- must be established between the historic practice and the right asserted. The exercise of a right can lapse, however, for a period of time. Aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982.

Neither the "integral part" nor the "dynamic rights" approach provides a satisfactory test for determining whether an aboriginal right exists, even though each captures important facets of aboriginal rights. The "integral-incidental" test is too broad, too indeterminative and too categorical.

Aboriginal rights should be defined through an empirical approach. Inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1) should be drawn from history rather than attempting to describe a priori what an aboriginal right is.

The common law predicated dealings with aboriginals on two fundamental principles: (1) that the Crown asserted title subject to existing aboriginal interests in their traditional lands and adjacent waters, and (2) that those interests were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for their sustenance is a fundamental aboriginal right which is supported by the common law and by the history of this country and which is enshrined in s. 35(1) of the Constitution Act, 1982.

The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained therefrom. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a prima facie right to continue to do so, absent a treaty exchanging that right for other consideration. The right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for traditional needs, albeit in their modern form. If the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what they traditionally obtained from the resource -- basic housing, transportation, clothing and amenities -- over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers.

All aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. Any right, aboriginal or other, also carries with it the obligation to use it responsibly. The Crown must establish a regulatory regime which respects these objectives.

The evidence conclusively established that over many centuries the fishery was used not only for food and ceremonial purposes but also for a variety of other needs. The scale of fishing here fell well within the limit of the

traditional fishery.

Extinguishment

Per L'Heureux-Dubé J. (dissenting): The question of the extinguishment of the right found to exist must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain." No government of the day considered either the aboriginal right or the effect of its proposed action on that right, as required by the "clear and plain" test, in effecting any regulations which allegedly had the effect of extinguishing the aboriginal right to fish commercially.

Prima Facie Infringement

Per L'Heureux-Dubé J. (dissenting): The question of prima facie infringement must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): The inquiry into infringement involves two stages: (1) the person charged must show that he or she had a prima facie right to his or her actions, and (2) the Crown must then show that the regulatory scheme satisfied the particular aboriginal entitlement to fish for sustenance. The second requirement was not met.

Justification

Per L'Heureux-Dubé J. (dissenting): The question of justification must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): A large view of justification which cuts back the aboriginal right on the ground that this is required for reconciliation and social harmony should not be adopted. It runs counter to the authorities, is indeterminate and ultimately more political than legal. A more limited view of justification, that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use, should be adopted.

A government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Limits that have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified.

Subject to the limitations relating to conservation and prevention of harm to others, the aboriginal people have a priority to fish for food, ceremony and supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times. Non-aboriginal peoples may use the resource subject to these conditions.

The regulation at issue was not justified.

Cases Cited

By Lamer C.J.

Applied: R. v. Sparrow, *[1990] 1 S.C.R. 1075*; considered: Guerin v. The Queen, *[1984] 2 S.C.R. 335*; Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Mabo v. Queensland [No. 2] (1992), 175 C.L.R. 1; referred to: R. v. N.T.C. Smokehouse Ltd., *[1996] 2 S.C.R. 672*; R. v. Gladstone, *[1996] 2 S.C.R. 723*; R. v. Big M Drug Mart Ltd., *[1985] 1 S.C.R. 295*; Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979); R. v. Oakes, *[1986] 1 S.C.R. 103*; Hunter v. Southam Inc., *[1984] 2 S.C.R. 145*; Simon v. The Queen, *[1985] 2 S.C.R. 387*; Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*;

R. v. Horseman, *[1990] 1 S.C.R. 901*; R. v. Sioui, *[1990] 1 S.C.R. 1025*; R. v. George, *[1966] S.C.R. 267*; R. v. Sutherland, *[1980] 2 S.C.R. 451*; Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*; Kruger v. The Queen, *[1978] 1 S.C.R. 104*; R. v. Derriksan *(1976), 71 D.L.R. (3d) 159* (S.C.C.), [1976] 2 S.C.R. v; Stein v. The Ship "Kathy K", *[1976] 2 S.C.R. 802*; Beaudoin-Daigneault v. Richard, *[1984] 1 S.C.R. 2*; Laurentide Motels Ltd. v. Beauport (City), *[1989] 1 S.C.R. 705*; Hodgkinson v. Simms, *[1994] 3 S.C.R. 377*; Schwartz v. Canada, *[1996] 1 S.C.R. 254*; N.V. Bocimar S.A. v. Century Insurance Co. of Canada, *[1987] 1 S.C.R. 1247*.

By L'Heureux-Dubé J. (dissenting)

R. v. N.T.C. Smokehouse Ltd., *[1996] 2 S.C.R. 672*; R. v. Gladstone, *[1996] 2 S.C.R. 723*; Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*; R. v. Sioui, *[1990] 1 S.C.R. 1025*; R. v. Sparrow, *[1990] 1 S.C.R. 1075*; Guerin v. The Queen, *[1984] 2 S.C.R. 335*; Mabo v. Queensland [No. 2] (1992), 175 C.L.R. 1; St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 A.C. 46; R. v. Lewis, *[1996] 1 S.C.R. 921*; R. v. Nikal, *[1996] 1 S.C.R. 1013*; Baker Lake v. Minister of Indian Affairs and Northern Development, *[1980] 1 F.C. 518*; Simon v. The Queen, *[1985] 2 S.C.R. 387*; R. v. Horseman, *[1990] 1 S.C.R. 901*; R. v. Badger, *[1996] 1 S.C.R. 771*; Mitchell v. Peguis Indian Band, *[1990] 2 S.C.R. 85*; R. v. George, *[1966] S.C.R. 267*; Sikyea v. The Queen, *[1964] S.C.R. 642*; Kruger v. The Queen, *[1978] 1 S.C.R. 104*; R. v. Taylor *(1981), 62 C.C.C. (2d) 227*; Jack v. The Queen, *[1980] 1 S.C.R. 294*; R. v. Denny *(1990), 55 C.C.C. (3d) 322*; Edwards v. Attorney-General for Canada, *[1930] A.C. 124*; Attorney General of Quebec v. Blaikie (No. 1), *[1979] 2 S.C.R. 1016*; Re Residential Tenancies Act, 1979, *[1981] 1 S.C.R. 714*; Hunter v. Southam Inc., *[1984] 2 S.C.R. 145*; R. v. Big M Drug Mart Ltd., *[1985] 1 S.C.R. 295*; R. v. Keegstra, *[1990] 3 S.C.R. 697*; R. v. Sutherland, *[1980] 2 S.C.R. 451*; Moosehunter v. The Queen, *[1981] 1 S.C.R. 282*; Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*; Delgamuukw v. British Columbia *(1993), 104 D.L.R. (4th) 470*; Ford v. Quebec (Attorney General), *[1988] 2 S.C.R. 712*; Irwin Toy Ltd. v. Quebec (Attorney General), *[1989] 1 S.C.R. 927*; Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326*; Committee for the Commonwealth of Canada v. Canada, *[1991] 1 S.C.R. 139*; RJR-MacDonald Inc. v. Canada (Attorney General), *[1995] 3 S.C.R. 199*; R. v. Nova Scotia Pharmaceutical Society, *[1992] 2 S.C.R. 606*; Ontario v. Canadian Pacific Ltd., *[1995] 2 S.C.R. 1031*; Frank v. The Queen, *[1978] 1 S.C.R. 95*; R. v. Jones *(1993), 14 O.R. (3d) 421*; R. v. King, *[1993] O.J. No. 1794*; R. v. Fraser, *[1994] 3 C.N.L.R. 139*; Stein v. The Ship "Kathy K", *[1976] 2 S.C.R. 802*; Beaudoin-Daigneault v. Richard, *[1984] 1 S.C.R. 2*; Lensen v. Lensen, *[1987] 2 S.C.R. 672*; Laurentide Motels Ltd. v. Beauport (City), *[1989] 1 S.C.R. 705*; Ontario (Attorney General) v. Bear Island Foundation, *[1991] 2 S.C.R. 570*; Lapointe v. Hôpital Le Gardeur, *[1992] 1 S.C.R. 351*; R. v. Burns, *[1994] 1 S.C.R. 656*; Hodgkinson v. Simms, *[1994] 3 S.C.R. 377*; Schwartz v. Canada, *[1996] 1 S.C.R. 254*.

By McLachlin J. (dissenting)

R. v. Sparrow, *[1990] 1 S.C.R. 1075*; R. v. N.T.C. Smokehouse Ltd., *[1996] 2 S.C.R. 672*; R. v. Gladstone, *[1996] 2 S.C.R. 723*; Mabo v. Queensland [No. 2] (1992), 175 C.L.R. 1; Guerin v. The Queen, *[1984] 2 S.C.R. 335*; The Case of Tanistry (1608), Davis 28, 80 E.R. 516; In re Southern Rhodesia, [1919] A.C. 211; Tijani v. Secretary, Southern Nigeria, [1921] 2 A.C. 399; Oyekan v. Adele, [1957] 2 All E.R. 785; Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*; United States v. Dion, 476 U.S. 734 (1986); Jack v. The Queen, *[1980] 1 S.C.R. 294*.

Statutes and Regulations Cited

British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5) [ad. SOR/85-290, s. 5].
British Columbia Terms of Union, R.S.C., 1985, App. II, No. 10.
Constitution Act, 1867, s. 91(24).
Constitution Act, 1982, ss. 35(1), (2), 52.
Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1).
Indian Act, R.S.C., 1985, c. I-5, ss. 81, 82, 88.
Loi sur la protection du consommateur, L.R.Q. 1977, c. P-40.1.
Order in Council, P.C. 2539 (September 11, 1917).

Oregon Boundary Treaty, 1846, 34 B.S.P. 14.
Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.

Authors Cited

Asch, Michael. Home and Native Land: Aboriginal Rights and the Canadian Constitution. Toronto: Methuen, 1984.
Asch, Michael and Patrick Macklem. "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" *(1991), 29 Alta. L. Rev. 498*.
Binnie, W. I. C. "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990), 15 Queen's L.J. 217.
Blackstone, Sir William. Commentaries on the Laws of England, vol. 2. Oxford: Clarendon Press, 1769.
Bowker, Andrea. "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 Toronto Fac. L. Rev. 1.
Chitty, Joseph. A Treatise on the Law of the Prerogatives of the Crown. London: Butterworths, 1820.
Concise Oxford Dictionary of Current English, 9th ed. Edited by Della Thompson. Oxford: Clarendon Press, 1995, "distinct", "distinctive", "tradition".
Driedger on the Construction of Statutes, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.
Duff, Wilson. The Upper Stalo Indians of the Fraser Valley, British Columbia (Anthropology in British Columbia -- Memoir No. 1). Victoria: British Columbia Provincial Museum, 1952.
Elliott, David. Law and Aboriginal Peoples of Canada, 2nd ed. Canadian Legal Studies Series. North York, Ont.: Captus Press, 1994.
Émond, André. "Existe-t-il un titre indien originaire dans les territoires cédés par la France en 1763?" *(1995), 41 McGill L.J. 59*.
Émond, André. "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale" (1996), 30 R.J.T. 1.
Grammond, Sébastien. "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt Sparrow" (1991), 36 McGill L.J. 1382.
Halsbury's Laws of Australia, vol. 1 ["Hunting, Gathering and Fishing Rights", paras. 5-2250, 5-2255, 5-2260, 5-2265]. North Ryde: Butterworths Pty Limited, 1991 (loose-leaf).
Hogg, Peter W. Constitutional Law of Canada, 3rd ed. Toronto: Carswell, 1992.
Holdsworth, Sir William Searle. A History of English Law, vol. 11. London: Methuen, 1938.
Lafontaine, Alain. "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones" (1995), 36 C. de D. 669.
Lyon, Noel. "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95.
Lysyk, Kenneth. "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 Can. Bar Rev. 450.
Macklem, Patrick. "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 McGill L.J. 382.
Macklem, Patrick. "Normative Dimensions of an Aboriginal Right of Self-Government" *(1995), 21 Queen's L.J. 173*.
McNeil, Kent. "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255.
McNeil, Kent. Common Law Aboriginal Title. Oxford: Clarendon Press, 1989.
Pentney, William. "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II--Section 35: The Substantive Guarantee" (1988), 22 U.B.C. L. Rev. 207.
Petit Robert I. Paris: Le Robert, 1990, "ancestral".
Sanders, Douglas. "The Rights of the Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 314.
Shorter Oxford English Dictionary, 3rd ed., vol. 1. Oxford: Clarendon Press, 1973, "integral".
Slattery, Brian. "Aboriginal Sovereignty and Imperial Claims" (1991), 29 Osgoode Hall L.J. 681.
Slattery, Brian. Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title. Saskatoon: University of Saskatchewan Native Law Centre, 1983.
Slattery, Brian. "First Nations and the Constitution: A Question of Trust" (1992), 71 Can. Bar Rev. 261.
Slattery, Brian. "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232.

Slattery, Brian. The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories. Saskatoon: University of Saskatchewan Native Law Centre, 1979.
Slattery, Brian. "The Legal Basis of Aboriginal Title". In Aboriginal Title in British Columbia: Delgamuukw v. The Queen. Edited by Frank Cassidy. Lantzville, B.C.: Oolichan Books, 1992.
Slattery, Brian. "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727.
Walters, Mark. "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992), 17 Queen's L.J. 350.

APPEAL from a judgment of the British Columbia Court of Appeal *(1993), 80 B.C.L.R. (2d) 75*, *29 B.C.A.C. 209*, 48 W.A.C. 209, *83 C.C.C. (3d) 289*, *[1993] 5 W.W.R. 459*, *[1993] 4 C.N.L.R. 221*, allowing an appeal from a judgment of Selbie J. *(1991), 58 B.C.L.R. (2d) 392*, *[1991] 3 C.N.L.R. 161*, allowing an appeal from conviction by Scarlett Prov. Ct. J., *[1991] 3 C.N.L.R. 155*. Appeal dismissed, L'Heureux-Dubé and McLachlin JJ. dissenting.

Louise Mandell and Leslie J. Pinder, for the appellant. S. David Frankel, Q.C., and Cheryl J. Tobias, for the respondent. René Morin, for the intervener the Attorney General of Quebec. J. Keith Lowes, for the intervener the Fisheries Council of British Columbia. Christopher Harvey, Q.C., and Robert Lonergan, for the interveners the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation. Harry A. Slade, Arthur C. Pape and Robert C. Freedman, for the intervener the First Nations Summit. Stuart Rush, Q.C., and Michael Jackson, for the interveners Delgamuukw et al. Arthur C. Pape and Clayton C. Ruby, for the interveners Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner.

Solicitors for the appellant: Mandell, Pinder, Vancouver. Solicitor for the respondent: The Attorney General of Canada, Ottawa. Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy. Solicitor for the intervener the Fisheries Council of British Columbia: J. Keith Lowes, Vancouver. Solicitors for the interveners the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation: Russell & DuMoulin, Vancouver. Solicitors for the intervener the First Nations Summit: Ratcliff & Company, North Vancouver. Solicitors for the interveners Delgamuukw et al.: Rush Crane, Guenther & Adams, Vancouver. Solicitors for the interveners Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner: Pape & Salter, Vancouver.

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. was delivered by

LAMER C.J.

I. Introduction

1 This appeal, along with the companion appeals in R. v. N.T.C. Smokehouse Ltd., *[1996] 2 S.C.R. 672*, and R. v. Gladstone, *[1996] 2 S.C.R. 723*, raises the issue left unresolved by this Court in its judgment in R. v. Sparrow, *[1990] 1 S.C.R. 1075*: How are the aboriginal rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982 to be defined?

2 In Sparrow, Dickson C.J. and La Forest J., writing for a unanimous Court, outlined the framework for analyzing s. 35(1) claims. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the

infringement is justified. In Sparrow, however, it was not seriously disputed that the Musqueam had an aboriginal right to fish for food, with the result that it was unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) are to be defined. It is this question and, in particular, the question of whether s. 35(1) recognizes and affirms the right of the Sto:lo to sell fish, which must now be answered by this Court.

3 In order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible. As Dickson J. (as he then was) said in R. v. Big M Drug Mart Ltd., *[1985] 1 S.C.R. 295*, at p. 344, a constitutional provision must be understood "in the light of the interests it was meant to protect". This principle, articulated in relation to the rights protected by the Canadian Charter of Rights and Freedoms, applies equally to the interpretation of s. 35(1).

4 This judgment will thus, after outlining the context and background of the appeal, articulate a test for identifying aboriginal rights which reflects the purposes underlying s. 35(1), and the interests which that constitutional provision is intended to protect.

II. Statement of Facts

5 The appellant Dorothy Van der Peet was charged under s. 61(1) of the Fisheries Act, R.S.C. 1970, c. F-14, with the offence of selling fish caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the British Columbia Fishery (General) Regulations, SOR/84-248. At the time at which the appellant was charged s. 27(5) read:

> 7. . . . (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

6 The charges arose out of the sale by the appellant of 10 salmon on September 11, 1987. The salmon had been caught by Steven and Charles Jimmy under the authority of an Indian food fish licence. Charles Jimmy is the common law spouse of the appellant. The appellant, a member of the Sto:lo, has not contested these facts at any time, instead defending the charges against her on the basis that in selling the fish she was exercising an existing aboriginal right to sell fish. The appellant has based her defence on the position that the restrictions imposed by s. 27(5) of the Regulations infringe her existing aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the Constitution Act, 1982.

III. Judgments Below

Provincial Court, *[1991] 3 C.N.L.R. 155*

7 Scarlett Prov. Ct. J. rejected the appellant's argument that she sold fish pursuant to an aboriginal right. On the basis of the evidence from members of the appellant's band, and anthropological experts, he found that, historically, the Sto:lo people clearly fished for food and ceremonial purposes, but that any trade in salmon that occurred was incidental and occasional only. He found, at p. 160, that there was no trade of salmon "in any regularized or market sense" but only "opportunistic exchanges taking place on a casual basis". He found that the Sto:lo could not preserve or store fish for extended periods of time and that the Sto:lo were a band rather than a tribal culture; he held both of these facts to be significant in suggesting that the Sto:lo did not engage in a market system of exchange. On the basis of these findings regarding the nature of the Sto:lo trade in salmon, Scarlett Prov. Ct. J. held that the Sto:lo's aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. He therefore found the accused guilty of violating s. 61(1) of the Fisheries Act.

Supreme Court of British Columbia *(1991), 58 B.C.L.R. (2d) 392*

8 Selbie J. of the Supreme Court of British Columbia held that Scarlett Prov. Ct. J. erred when he looked at the

evidence in terms of whether or not it demonstrated that the Sto:lo participated in a market system of exchange. The evidence should not have been considered in light of "contemporary tests for 'marketing'" (at para. 15) but should rather have been viewed so as to determine whether it "is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise" (at para. 16). He held, at para. 16, that the evidence in this case was consistent with an aboriginal right to sell fish because it suggested that aboriginal societies had no stricture or prohibition against the sale of fish, with the result that "when the first Indian caught the first salmon he had the 'right' to do anything he wanted with it -- eat it, trade it for deer meat, throw it back or keep it against a hungrier time". Selbie J. therefore held that the Sto:lo had an aboriginal right to sell fish and that the trial judge's verdict against the appellant was inconsistent with the evidence. He remanded for a new trial on the questions of whether this right had been extinguished, whether the regulations infringed the right and whether any infringement of the right had been justified.

The Court of Appeal *(1993), 80 B.C.L.R. (2d) 75*

9 The British Columbia Court of Appeal allowed the Crown's appeal and restored the guilty verdict of Scarlett Prov. Ct. J. Macfarlane J.A. (Taggart J.A. concurring) held, at para. 20, that a practice will be protected as an aboriginal right under s. 35(1) of the Constitution Act, 1982 where the evidence establishes that it had "been exercised, at the time sovereignty was asserted, for a sufficient length of time to become integral to the aboriginal society". To be protected as an aboriginal right, however, the practice cannot have become "prevalent merely as a result of European influences" (para. 21) but must rather arise from the aboriginal society itself. On the basis of this test Macfarlane J.A. held that the Sto:lo did not have an aboriginal right to sell fish. The question was not, he held at para. 30, whether the Sto:lo could support a right to dispose of surplus food fish on a casual basis but was rather whether they had a right to "sell fish allocated for food purposes on a commercial basis" which should be given constitutional priority in the allocation of the fishery resource. Given that this was the question, Macfarlane J.A. held that the assessment of the evidence by the trial judge was correct. The evidence, while indicating that surplus fish would have been disposed of or traded, did not establish that the "purpose of fishing was to engage in commerce" (para. 41). While the Sto:lo did trade salmon with the Hudson's Bay Company prior to the British assertion of sovereignty in a manner that could be characterized as commercial, this trade was "not of the same nature and quality as the aboriginal traditions disclosed by the evidence" (para. 41) and did not, therefore, qualify for protection as an aboriginal right under s. 35(1).

10 In his concurring judgment Wallace J.A. articulated a test for aboriginal rights similar to that of Macfarlane J.A. in so far as he too held, at para. 78, that the practices protected as aboriginal rights by s. 35(1) are those "traditional and integral to the native society pre-sovereignty". Wallace J.A. emphasized that s. 35(1) should not be interpreted as having the purpose of enlarging the pre-1982 concept of aboriginal rights; instead it should be seen as having the purpose of protecting from legislative encroachment those aboriginal rights that existed in 1982. Section 35(1) was not enacted so as to facilitate the current objectives of the aboriginal community but was rather enacted so as to protect "traditional aboriginal practices integral to the culture and traditional way of life of the native community" (para. 78). Wallace J.A. held, at para. 104, that rights should not be "determined by reference to the economic objectives of the rights-holders". He concluded from this analytical framework that the trial judge was correct in determining that the commercial sale of fish is different in nature and kind from the aboriginal right of the Sto:lo to fish for sustenance and ceremonial purposes, with the result that the appellant could not be said to have been exercising an aboriginal right when she sold the fish.

11 Lambert J.A. dissented. While he agreed that aboriginal rights are those aboriginal customs, traditions and practices which are an integral part of a distinctive aboriginal culture, he added to that proposition the proviso that to determine whether a practice is in fact integral it is necessary first to describe it correctly. In his view, the appropriate description of a right or practice is one based on the significance of the practice to the particular aboriginal culture. As such, in determining the extent to which aboriginal fishing is a protected right under s. 35(1) a court should look not to the purpose for which aboriginal people fished, but should rather look at the significance of fishing to the aboriginal society; it is the social significance of fishing which is integral to the distinctive aboriginal society and which is, therefore, protected by s. 35(1) of the Constitution Act, 1982. Lambert J.A. found support for this proposition in this Court's judgment in Sparrow, supra, in the American case law arising out of disputes over the

terms of treaties signed with aboriginal people in the Pacific northwest (see, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979)), and in the general principle that the definition of aboriginal rights must take into account the perspective of aboriginal people. Lambert J.A. held that the social significance of fishing for the Sto:lo was that fishing was the means by which they provided themselves with a moderate livelihood; he therefore held at para. 150 that the Sto:lo had an aboriginal right protected by s. 35(1)

> to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood. . . . [Emphasis in original.]

Lambert J.A. rejected the position of the majority that the commercial dimension of the fishery was introduced by Europeans and therefore outside of the protection of s. 35(1). The key point, he suggested, is not that the Europeans introduced commerce, but is rather that as soon as the Europeans arrived the Sto:lo began trading with them. In doing so the Sto:lo were not breaking with their past; the trade with the Hudson's Bay Company "represented only a response to a new circumstance in the carrying out of the existing practice" (para. 180). Lambert J.A. went on to hold that the Sto:lo right to fish for a moderate livelihood had not been extinguished and that it had been infringed by s. 27(5) of the Regulations in a manner not justified by the Crown. He would thus have dismissed the appeal of the Crown and entered a verdict of acquittal.

12 Hutcheon J.A. also dissented. He did so on the basis that there is no authority for the proposition that the relevant point for identifying aboriginal rights is prior to contact with Europeans and European culture. Hutcheon J.A. held that the relevant historical time is instead 1846, the time of the assertion of British sovereignty in British Columbia. Since it is undisputed that by 1846 the Sto:lo were trading commercially in salmon, the Sto:lo can claim an aboriginal right to sell fish protected by s. 35(1) of the Constitution Act, 1982. Hutcheon J.A. held further that this right had not been extinguished prior to 1982. In the result, he would have remanded for a new trial on the issues of infringement and justification.

IV. Grounds of Appeal

13 Leave to appeal to this Court was granted on March 10, 1994. The following constitutional question was stated:

> Is s. 27(5) of the British Columbia Fishery (General) Regulations, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the Constitution Act, 1982, by reason of the aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982, invoked by the appellant?

The appellant appealed on the basis that the Court of Appeal erred in defining the aboriginal rights protected by s. 35(1) as those practices integral to the distinctive cultures of aboriginal peoples. The appellant argued that the Court of Appeal erred in holding that aboriginal rights are recognized for the purpose of protecting the traditional way of life of aboriginal people. The appellant also argued that the Court of Appeal erred in requiring that the Sto:lo satisfy a long-time use test, in requiring that they demonstrate an absence of European influence and in failing to adopt the perspective of aboriginal peoples themselves.

14 The First Nations Summit intervened in support of the appellant as did Delgamuukw et al. and Pamajewon et al. The Fisheries Council of British Columbia, the Attorney General of Quebec, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation intervened in support of the respondent Crown.

V. Analysis

Introduction

15 I now turn to the question which, as I have already suggested, lies at the heart of this appeal: How should the aboriginal rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982 be defined?

16 In her factum the appellant argued that the majority of the Court of Appeal erred because it defined the rights in s. 35(1) in a fashion which "converted a Right into a Relic"; such an approach, the appellant argued, is inconsistent with the fact that the aboriginal rights recognized and affirmed by s. 35(1) are rights and not simply aboriginal practices. The appellant acknowledged that aboriginal rights are based in aboriginal societies and cultures, but argued that the majority of the Court of Appeal erred because it defined aboriginal rights through the identification of pre-contact activities instead of as pre-existing legal rights.

17 While the appellant is correct to suggest that the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights, the position she would have this Court adopt takes s. 35(1) too far from that which the provision is intended to protect. Section 35(1), it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal.

18 In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the Charter, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected: R. v. Oakes, *[1986] 1 S.C.R. 103*, at p. 136; R. v. Big M Drug Mart Ltd., supra, at p. 336.

19 Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. As academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality", Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" *(1991), 29 Alta. L. Rev. 498*, at p. 502; they are the rights held by "Indians qua Indians", Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 776.

20 The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.

21 The way to accomplish this task is, as was noted at the outset, through a purposive approach to s. 35(1). It is through identifying the interests that s. 35(1) was intended to protect that the dual nature of aboriginal rights will be comprehended. In Hunter v. Southam Inc., *[1984] 2 S.C.R. 145*, Dickson J. explained the rationale for a purposive approach to constitutional documents. Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the Constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers": Hunter, supra, at p. 155. A purposive approach to s. 35(1), because ensuring that the provision is not viewed as static and only relevant to current circumstances, will ensure that the recognition and affirmation it offers are consistent with the fact that what it is recognizing and affirming are "rights". Further, because it requires the court to analyze a given constitutional provision "in the light of the interests it was meant to protect"(Big M Drug Mart Ltd., supra, at p. 344), a purposive approach to s. 35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: aboriginal people and their rights in relation to Canadian society as a whole.

22 In Sparrow, supra, Dickson C.J. and La Forest J. held at p. 1106 that it was through a purposive analysis that s.

35(1) must be understood:

> The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. [Emphasis added.]

In that case, however, the Court did not have the opportunity to articulate the purposes behind s. 35(1) as they relate to the scope of the rights the provision is intended to protect. Such analysis is now required to be undertaken.

General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown

23 Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In Sparrow, supra, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples:

> When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. [Emphasis added].

24 This interpretive principle, articulated first in the context of treaty rights -- Simon v. The Queen, *[1985] 2 S.C.R. 387*, at p. 402; Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*, at p. 36; R. v. Horseman, *[1990] 1 S.C.R. 901*, at p. 907; R. v. Sioui, *[1990] 1 S.C.R. 1025*, at p. 1066 -- arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: R. v. George, *[1966] S.C.R. 267*, at p. 279. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

25 The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples. In R. v. Sutherland, *[1980] 2 S.C.R. 451*, at p. 464, Dickson J. held that paragraph 13 of the Memorandum of Agreement between Manitoba and Canada, a constitutional document, "should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph". This interpretive principle applies equally to s. 35(1) of the Constitution Act, 1982 and should, again, inform the Court's purposive analysis of that provision.

Purposive Analysis of Section 35(1)

26 I now turn to a purposive analysis of s. 35(1).

27 When the court identifies a constitutional provision's purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision; it is articulating the reasons underlying the protection that the provision gives. With regards to s. 35(1), then, what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of aboriginal peoples; it must identify the basis for the special status that aboriginal peoples have within Canadian society as a whole.

28 In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*. At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights: Kruger v. The Queen, *[1978] 1 S.C.R. 104*, at p. 112; R. v. Derriksan *(1976), 71 D.L.R. (3d) 159* (S.C.C.), [1976] 2 S.C.R. v; it is this which distinguishes the aboriginal rights recognized and affirmed in s.

35(1) from the aboriginal rights protected by the common law. Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in Sparrow, supra.

29 The fact that aboriginal rights pre-date the enactment of s. 35(1) could lead to the suggestion that the purposive analysis of s. 35(1) should be limited to an analysis of why a pre-existing legal doctrine was elevated to constitutional status. This suggestion must be resisted. The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights; however, the interests protected by s. 35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that legal doctrine now has constitutional status.

30 In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

31 More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

32 That the purpose of s. 35(1) lies in its recognition of the prior occupation of North America by aboriginal peoples is suggested by the French version of the text. For the English "existing aboriginal and treaty rights" the French text reads "[l]es droits existants -- ancestraux ou issus de traités". The term "ancestral", which Le Petit Robert 1 (1990) dictionary defines as "[q]ui a appartenu aux ancêtres, qu'on tient des ancêtres", suggests that the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence -- the ancestry -- of aboriginal peoples in North America.

33 This approach to s. 35(1) is also supported by the prior jurisprudence of this Court. In Calder, supra, the Court refused an application by the Nishga for a declaration that their aboriginal title had not been extinguished. There was no majority in the Court as to the basis for this decision; however, in the judgments of both Judson J. and Hall J. (each speaking for himself and two others) the existence of aboriginal title was recognized. Hall J. based the Nishga's aboriginal title in the fact that the land to which they were claiming title had "been in their possession from time immemorial" (Calder, supra, at p. 375). Judson J. explained the origins of the Nishga's aboriginal title as follows, at p. 328:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. [Emphasis added.]

The position of Judson and Hall JJ. on the basis for aboriginal title is applicable to the aboriginal rights recognized and affirmed by s. 35(1). Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in Calder, supra, can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries" (p. 328).

34 The basis of aboriginal title articulated in Calder, supra, was affirmed in Guerin v. The Queen, *[1984] 2 S.C.R. 335*. The decision in Guerin turned on the question of the nature and extent of the Crown's fiduciary obligation to aboriginal peoples; because, however, Dickson J. based that fiduciary relationship, at p. 376, in the "concept of aboriginal, native or Indian title", he had occasion to consider the question of the existence of aboriginal title. In holding that such title existed, he relied, at p. 376, on Calder, supra, for the proposition that "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". [Emphasis added.]

35 The view of aboriginal rights as based in the prior occupation of North America by distinctive aboriginal societies, finds support in the early American decisions of Marshall C.J. Although the constitutional structure of the United States is different from that of Canada, and its aboriginal law has developed in unique directions, I agree with Professor Slattery both when he describes the Marshall decisions as providing "structure and coherence to an untidy and diffuse body of customary law based on official practice" and when he asserts that these decisions are "as relevant to Canada as they are to the United States" -- "Understanding Aboriginal Rights", supra, at p. 739. I would add to Professor Slattery's comments only the observation that the fact that aboriginal law in the United States is significantly different from Canadian aboriginal law means that the relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings.

36 In Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), the first of the Marshall decisions on aboriginal title, the Supreme Court held that Indian land could only be alienated by the U.S. government, not by the Indians themselves. In the course of his decision (written for the court), Marshall C.J. outlined the history of the exploration of North America by the countries of Europe and the relationship between this exploration and aboriginal title. In his view, aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations. The substance and nature of aboriginal rights to land are determined by this intersection (at pp 572-74):

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy. [Emphasis added.]

It is, similarly, the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation of aboriginal rights in s. 35(1) is directed.

37 In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) the U.S. Supreme Court invalidated the conviction under a Georgia statute of a non-Cherokee man for the offence of living on the territory of the Cherokee Nation. The court held that the law under which he was convicted was ultra vires the State of Georgia. In so doing the court considered the nature and basis of the Cherokee claims to the land and to governance over that land. Again, it based its judgment on its analysis of the origins of those claims which, it held, lay in the relationship between the pre-existing rights of the "ancient possessors" of North America and the assertion of sovereignty by European nations (at pp. 542-43 and 559):

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.
>
> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.
>
> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?
>
> But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

. . .

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. [Emphasis added.]

Marshall C.J.'s essential insight that the claims of the Cherokee must be analyzed in light of their pre-existing occupation and use of the land -- their "undisputed" possession of the soil "from time immemorial" -- is as relevant for the identification of the interests s. 35(1) was intended to protect as it was for the adjudication of Worcester's claim.

38 The High Court of Australia has also considered the question of the basis and nature of aboriginal rights. Like

that of the United States, Australia's aboriginal law differs in significant respects from that of Canada. In particular, in Australia the courts have not as yet determined whether aboriginal fishing rights exist, although such rights are recognized by statute: Halsbury's Laws of Australia (1991), vol. 1, paras. 5-2250, 5-2255, 5-2260 and 5-2265. Despite these relevant differences, the analysis of the basis of aboriginal title in the landmark decision of the High Court in Mabo v. Queensland [No. 2] (1992), 175 C.L.R. 1, is persuasive in the Canadian context.

39 The Mabo judgment resolved the dispute between the Meriam people and the Crown regarding who had title to the Murray Islands. The islands had been annexed to Queensland in 1879 but were reserved for the native inhabitants (the Meriam) in 1882. The Crown argued that this annexation was sufficient to vest absolute ownership of the lands in the Crown. The High Court disagreed, holding that while the annexation did vest radical title in the Crown, it was insufficient to eliminate a claim for native title; the court held at pp. 50-51 that native title can exist as a burden on the radical title of the Crown: "there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty".

40 From this premise, Brennan J., writing for a majority of the Court, went on at p. 58 to consider the nature and basis of aboriginal title:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty, as Moynihan J. perceived in the present case. It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled "with the institutions or the legal ideas of civilized society", In re Southern Rhodesia, [1919] A.C., at p. 233, that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown. These fictions denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidents of native title. [Emphasis added.]

This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" -- that which is "handed down [from ancestors] to posterity", The Concise Oxford Dictionary (9th ed. 1995), -- implies these origins for the customs and laws that the Australian High Court in Mabo is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in Mabo, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.

41 Academic commentators have also been consistent in identifying the basis and foundation of the s. 35(1) claims of aboriginal peoples in aboriginal occupation of North America prior to the arrival of Europeans. As Professor David Elliott, at p. 25, puts it in his compilation Law and Aboriginal Peoples of Canada (2nd ed. 1994), the "prior aboriginal presence is at the heart of the concept of aboriginal rights". Professor Macklem has, while also considering other possible justifications for the recognition of aboriginal rights, described prior occupancy as the "familiar" justification for aboriginal rights, arising from the "straightforward conception of fairness which suggests that, all other things being equal, a prior occupant of land possesses a stronger claim to that land than subsequent arrivals": Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" *(1995), 21 Queen's L.J. 173*, at p. 180. Finally, I would note the position of Professor Pentney who has described aboriginal rights as collective rights deriving "their existence from the common law's recognition of [the] prior social organization" of aboriginal peoples: William Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II -- Section 35: The Substantive Guarantee" (1988), 22 U.B.C. L. Rev. 207, at p. 258.

42 I would note that the legal literature also supports the position that s. 35(1) provides the constitutional

framework for reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty. In his comment on Delgamuukw v. British Columbia ("British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992), 17 Queen's L.J. 350), Mark Walters suggests at pp. 412-13 that the essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures:

> The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. . . . a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives. [Emphasis added.]

Similarly, Professor Slattery has suggested that the law of aboriginal rights is "neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities" (Brian Slattery, "The Legal Basis of Aboriginal Title", in Frank Cassidy, ed., Aboriginal Title in British Columbia: Delgamuukw v. The Queen (1992), at pp. 120-21) and that such rights concern "the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions" ("Understanding Aboriginal Rights", supra, at p. 737).

43 The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes; the next section of the judgment, as well as that which follows it, will attempt to accomplish this task.

The Test for Identifying Aboriginal Rights in Section 35(1)

44 In order to fulfil the purpose underlying s. 35(1) -- i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions -- the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

45 In Sparrow, supra, this Court did not have to address the scope of the aboriginal rights protected by s. 35(1); however, in their judgment at p. 1099 Dickson C.J. and La Forest J. identified the Musqueam right to fish for food in the fact that:

> The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. [Emphasis added.]

The suggestion of this passage is that participation in the salmon fishery is an aboriginal right because it is an "integral part" of the "distinctive culture" of the Musqueam. This suggestion is consistent with the position just adopted; identifying those practices, customs and traditions that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans.

46 In light of the suggestion of Sparrow, supra, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an

aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

47 I would note that this test is, in large part, consistent with that adopted by the judges of the British Columbia Court of Appeal. Although the various judges disagreed on such crucial questions as how the right should be framed, the relevant time at which the aboriginal culture should be examined and the role of European influences in limiting the scope of the right, all of the judges agreed that aboriginal rights must be identified through the practices, customs and traditions of aboriginal cultures. Macfarlane J.A. held at para. 20 that aboriginal rights exist where "the right had been exercised . . . for a sufficient length of time to become integral to the aboriginal society" (emphasis added); Wallace J.A. held at para. 78 that aboriginal rights are those practices "traditional and integral to the native society" (emphasis added); Lambert J.A. held at para. 131 that aboriginal rights are those "custom[s], tradition[s], or practice[s] . . . which formed an integral part of the distinctive culture of the aboriginal people in question" (emphasis added). While, as will become apparent, I do not adopt entirely the position of any of the judges at the Court of Appeal, their shared position that aboriginal rights lie in those practices, customs and traditions that are integral is consistent with the test I have articulated here.

Factors to be Considered in Application of the Integral to a Distinctive Culture Test

48 The test just laid out -- that aboriginal rights lie in the practices, customs and traditions integral to the distinctive cultures of aboriginal peoples -- requires further elaboration with regards to the nature of the inquiry a court faced with an aboriginal rights claim must undertake. I will now undertake such an elaboration, concentrating on such questions as the time period relevant to the court's inquiry, the correct approach to the evidence presented, the specificity necessary to the court's inquiry, the relationship between aboriginal rights and the rights of aboriginal people as Canadian citizens, and the standard that must be met in order for a practice, custom or tradition to be said to be "integral".

Courts must take into account the perspective of aboriginal peoples themselves

49 In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In Sparrow, supra, Dickson C.J. and La Forest J. held, at p. 1112, that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake". It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

50 It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.

Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right

51 Related to this is the fact that in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive

culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.

52 I would note here by way of illustration that, in my view, both the majority and the dissenting judges in the Court of Appeal erred with respect to this aspect of the inquiry. The majority held that the appellant's claim was that the practice of selling fish "on a commercial basis" constituted an aboriginal right and, in part, rejected her claim on the basis that the evidence did not support the existence of such a right. With respect, this characterization of the appellant's claim is in error; the appellant's claim was that the practice of selling fish was an aboriginal right, not that selling fish "on a commercial basis" was. It was however, equally incorrect to adopt, as Lambert J.A. did, a "social" test for the identification of the practice, tradition or custom constituting the aboriginal right. The social test casts the aboriginal right in terms that are too broad and in a manner which distracts the court from what should be its main focus -- the nature of the aboriginal community's practices, customs or traditions themselves. The nature of an applicant's claim must be delineated in terms of the particular practice, custom or tradition under which it is claimed; the significance of the practice, custom or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom or tradition is integral to the distinctive culture, but the significance of a practice, custom or tradition cannot, itself, constitute an aboriginal right.

53 To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.

54 It should be acknowledged that a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.

> In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question

55 To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.

56 This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).

57 Moreover, the aboriginal rights protected by s. 35(1) have been said to have the purpose of reconciling pre-existing aboriginal societies with the assertion of Crown sovereignty over Canada. To reconcile aboriginal societies

with Crown sovereignty it is necessary to identify the distinctive features of those societies; it is precisely those distinctive features which need to be acknowledged and reconciled with the sovereignty of the Crown.

58 As was noted earlier, Lambert J.A. erred when he used the significance of a practice, custom or tradition as a means of identifying what the practice, custom or tradition is; however, he was correct to recognize that the significance of the practice, custom or tradition is important. The significance of the practice, custom or tradition does not serve to identify the nature of a claim of acting pursuant to an aboriginal right; however, it is a key aspect of the court's inquiry into whether a practice, custom or tradition has been shown to be an integral part of the distinctive culture of an aboriginal community. The significance of the practice, custom or tradition will inform a court as to whether or not that practice, custom or tradition can be said to be truly integral to the distinctive culture in question.

59 A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question.

> The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact

60 The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

61 The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown.

62 That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

63 I would note in relation to this point the position adopted by Brennan J. in Mabo, supra, where he holds, at p. 60, that in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to the present day:

> . . . when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim (I take no position on that matter), but rather

in its suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

64 The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in Sparrow, supra, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

65 I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, infra, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.

66 Further, I would note that basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the fact that s. 35(2) of the Constitution Act, 1982 includes within the definition of "aboriginal peoples of Canada" the Métis people of Canada.

67 Although s. 35 includes the Métis within its definition of "aboriginal peoples of Canada", and thus seems to link their claims to those of other aboriginal peoples under the general heading of "aboriginal rights", the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.

> Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims

68 In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written

records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

Claims to aboriginal rights must be adjudicated on a specific rather than general basis

69 Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. In the case of Kruger, supra, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists

70 In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct

71 The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is not that it be distinct to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is distinctive. A tradition or custom that is distinct is one that is unique -- "different in kind or quality; unlike" (Concise Oxford Dictionary, supra). A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is distinctive -- "distinguishing, characteristic" -- makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture what it is, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture. The person or community claiming the existence of an aboriginal right protected by s. 35(1) need only show that the particular practice, custom or tradition which it is claiming to be an aboriginal right is distinctive, not that it is distinct.

72 That the standard an aboriginal community must meet is distinctiveness, not distinctness, arises from the recognition in Sparrow, supra, of an aboriginal right to fish for food. Certainly no aboriginal group in Canada could claim that its culture is "distinct" or unique in fishing for food; fishing for food is something done by many different cultures and societies around the world. What the Musqueam claimed in Sparrow, supra, was rather that it was fishing for food which, in part, made Musqueam culture what it is; fishing for food was characteristic of Musqueam culture and, therefore, a distinctive part of that culture. Since it was so it constituted an aboriginal right under s.

35(1).

> The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.

73 The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.

> Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples

74 As was noted in the discussion of the purposes of s. 35(1), aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

75 With these factors in mind I will now turn to the particular claim made by the appellant in this case to have been acting pursuant to an aboriginal right.

Application of the Integral to a Distinctive Culture Test to the Appellant's Claim

76 The first step in the application of the integral to a distinctive culture test requires the court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. In this case the most accurate characterization of the appellant's position is that she is claiming an aboriginal right to exchange fish for money or for other goods. She is claiming, in other words, that the practices, customs and traditions of the Sto:lo include as an integral part the exchange of fish for money or other goods.

77 That this is the nature of the appellant's claim can be seen through both the specific acts which led to her being charged and through the regulation under which she was charged. Mrs. Van der Peet sold 10 salmon for $50. Such a sale, especially given the absence of evidence that the appellant had sold salmon on other occasions or on a regular basis, cannot be said to constitute a sale on a "commercial" or market basis. These actions are instead best characterized in the simple terms of an exchange of fish for money. It follows from this that the aboriginal right pursuant to which the appellant is arguing that her actions were taken is, like the actions themselves, best characterized as an aboriginal right to exchange fish for money or other goods.

78 Moreover, the regulations under which the appellant was charged prohibit all sale or trade of fish caught pursuant to an Indian food fish licence. As such, to argue that those regulations implicate the appellant's aboriginal right requires no more of her than that she demonstrate an aboriginal right to the exchange of fish for money (sale) or other goods (trade). She does not need to demonstrate an aboriginal right to sell fish commercially.

79 The appellant herself characterizes her claim as based on a right "to sufficient fish to provide for a moderate

livelihood". In so doing the appellant relies on the "social" test adopted by Lambert J.A. at the British Columbia Court of Appeal. As has already been noted, however, a claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question. The definition of aboriginal rights is determined through the process of determining whether a particular practice, custom or tradition is integral to the distinctive culture of the aboriginal group. The significance of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. As such, the appellant's claim cannot be characterized as based on an assertion that the Sto:lo's use of the fishery, and the practices, customs and traditions surrounding that use, had the significance of providing the Sto:lo with a moderate livelihood. It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

80 Having thus identified the nature of the appellant's claim, I turn to the fundamental question of the integral to a distinctive culture test: Was the practice of exchanging fish for money or other goods an integral part of the specific distinctive culture of the Sto:lo prior to contact with Europeans? In answering this question it is necessary to consider the evidence presented at trial, and the findings of fact made by the trial judge, to determine whether the evidence and findings support the appellant's claim that the sale or trade of fish is an integral part of the distinctive culture of the Sto:lo.

81 It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses. In Stein v. The Ship "Kathy K", *[1976] 2 S.C.R. 802*, Ritchie J., speaking for the Court, held at p. 808 that absent a "palpable and overriding error" affecting the trial judge's assessment of the facts, an appellate court should not substitute its own findings of fact for those of the trial judge:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

This principle has also been followed in more recent decisions of this Court: Beaudoin-Daigneault v. Richard, *[1984] 1 S.C.R. 2*, at pp. 8-9; Laurentide Motels Ltd. v. Beauport (City), *[1989] 1 S.C.R. 705*, at p. 794; Hodgkinson v. Simms, *[1994] 3 S.C.R. 377*, at p. 426. In the recently released decision of Schwartz v. Canada, *[1996] 1 S.C.R. 254*, La Forest J. made the following observation at para. 32, with which I agree, regarding appellate court deference to findings of fact:

> Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact . . . This explains why the rule applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. . . .

I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial judge's assessment of the credibility of the testimony of expert witnesses, N.V. Bocimar S.A. v. Century Insurance Co. of Canada, *[1987] 1 S.C.R. 1247*, at pp. 1249-50.

82 In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis -- his determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them -- is a

determination of a question of law which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J.'s analysis, however -- the findings of fact from which that legal inference was drawn -- do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error". This is particularly the case given that those findings of fact were made on the basis of Scarlett Prov. Ct. J.'s assessment of the credibility and testimony of the various witnesses appearing before him.

83 In adjudicating this case Scarlett Prov. Ct. J. obviously did not have the benefit of direction from this Court as to how the rights recognized and affirmed by s. 35(1) are to be defined, with the result that his legal analysis of the evidence was not entirely correct; however, that Scarlett Prov. Ct. J. was not entirely correct in his legal analysis of the facts as he found them does not mean that he made a clear and palpable error in reviewing the evidence and making those findings of fact. Indeed, a review of the transcript and exhibits submitted to this Court demonstrate that Scarlett Prov. Ct. J. conducted a thorough and compelling review of the evidence before him and committed no clear and palpable error which would justify this Court, or any other appellate court, in substituting its findings of fact for his. Moreover, I would note that the appellant, while disagreeing with Scarlett Prov. Ct. J.'s legal analysis of the facts, made no arguments suggesting that in making findings of fact from the evidence before him Scarlett Prov. Ct. J. committed a palpable and overriding error.

84 Scarlett Prov. Ct. J. carefully considered all of the testimony presented by the various witnesses with regards to the nature of Sto:lo society and came to the following conclusions at p. 160:

> Clearly, the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularized market system in the exchange of fish. Such fish as were exchanged through individual trade, gift, or barter were fish surplus from time to time. Natives did not fish to supply a market, there being no regularized trading system, nor were they able to preserve and store fish for extended periods of time. A market as such for salmon was not present but created by European traders, primarily the Hudson's Bay Company. At Fort Langley the Sto:lo were able to catch and deliver fresh salmon to the traders where it was salted and exported. This use was clearly different in nature and quantity from aboriginal activity. Trade in dried salmon with the fort was clearly dependent upon Sto:lo first satisfying their own requirements for food and ceremony.
>
> This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This Court accepts the evidence of Dr. Stryd and John Dewhurst [sic] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.
>
> Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic.

I would add to Scarlett Prov. Ct. J.'s summation of his findings only the observation, which does not contradict any of his specific findings, that the testimony of the experts appearing before him indicated that such limited exchanges of salmon as took place in Sto:lo society were primarily linked to the kinship and family relationships on which Sto:lo society was based. For example, under cross-examination Dr. Daly described trade as occurring through the "idiom" of maintaining family relationships:

> The medium or the idiom of much trade was the idiom of kinship, of providing hospitality, giving gifts, reciprocating in gifts. . . .

Similarly, Mr. Dewhirst testified that the exchange of goods was related to the maintenance of family and kinship relations.

85 The facts as found by Scarlett Prov. Ct. J. do not support the appellant's claim that the exchange of salmon for money or other goods was an integral part of the distinctive culture of the Sto:lo. As has already been noted, in order to be recognized as an aboriginal right, an activity must be of central significance to the culture in question -- it must be something which makes that culture what it is. The findings of fact made by Scarlett Prov. Ct. J. suggest that the exchange of salmon for money or other goods, while certainly taking place in Sto:lo society prior to contact, was not a significant, integral or defining feature of that society.

86 First, Scarlett Prov. Ct. J. found that, prior to contact, exchanges of fish were only "incidental" to fishing for food purposes. As was noted above, to constitute an aboriginal right, a custom must itself be integral to the distinctive culture of the aboriginal community in question; it cannot be simply incidental to an integral custom. Thus, while the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture, this is not sufficient, absent a demonstration that the exchange of salmon was itself a significant and defining feature of Sto:lo society, to demonstrate that the exchange of salmon is an integral part of Sto:lo culture.

87 For similar reasons, the evidence linking the exchange of salmon to the maintenance of kinship and family relations does not support the appellant's claim to the existence of an aboriginal right. Exchange of salmon as part of the interaction of kin and family is not of an independent significance sufficient to ground a claim for an aboriginal right to the exchange of fish for money or other goods.

88 Second, Scarlett Prov. Ct. J. found that there was no "regularized trading system" amongst the Sto:lo prior to contact. The inference drawn from this fact by Scarlett Prov. Ct. J., and by Macfarlane J.A. at the British Columbia Court of Appeal, was that the absence of a market means that the appellant could not be said to have been acting pursuant to an aboriginal right because it suggests that there is no aboriginal right to fish commercially. This inference is incorrect because, as has already been suggested, the appellant in this case has only claimed a right to exchange fish for money or other goods, not a right to sell fish in the commercial marketplace; the significance of the absence of regularized trading systems amongst the Sto:lo arises instead from the fact that it indicates that the exchange of salmon was not widespread in Sto:lo society. Given that the exchange of salmon was not widespread it cannot be said that, prior to contact, Sto:lo culture was defined by trade in salmon; trade or exchange of salmon took place, but the absence of a market demonstrates that this exchange did not take place on a basis widespread enough to suggest that the exchange was a defining feature of Sto:lo society.

89 Third, the trade engaged in between the Sto:lo and the Hudson's Bay Company, while certainly of significance to the Sto:lo society of the time, was found by the trial judge to be qualitatively different from that which was typical of the Sto:lo culture prior to contact. As such, it does not provide an evidentiary basis for holding that the exchange of salmon was an integral part of Sto:lo culture. As was emphasized in listing the criteria to be considered in applying the "integral to" test, the time relevant for the identification of aboriginal rights is prior to contact with European societies. Unless a post-contact practice, custom or tradition can be shown to have continuity with pre-contact practices, customs or traditions, it will not be held to be an aboriginal right. The trade of salmon between the Sto:lo and the Hudson's Bay Company does not have the necessary continuity with Sto:lo culture pre-contact to support a claim to an aboriginal right to trade salmon. Further, the exchange of salmon between the Sto:lo and the Hudson's Bay Company can be seen as central or significant to the Sto:lo primarily as a result of European influences; activities which become central or significant because of the influence of European culture cannot be said to be aboriginal rights.

90 Finally, Scarlett Prov. Ct. J. found that the Sto:lo were at a band level of social organization rather than at a tribal level. As noted by the various experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour -- for example, specialization in the gathering and trade of fish -- whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive, in the same way that the absence of regularized trade or a market is suggestive, that the exchange of fish was not a central part of Sto:lo culture. I would note here as well Scarlett Prov. Ct. J.'s finding that the Sto:lo did

not have the means for preserving fish for extended periods of time, something which is also suggestive that the exchange or trade of fish was not central to the Sto:lo way of life.

91 For these reasons, then, I would conclude that the appellant has failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society which existed prior to contact. The exchange of fish took place, but was not a central, significant or defining feature of Sto:lo society. The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of the Constitution Act, 1982.

The Sparrow Test

92 Since the appellant has failed to demonstrate that the exchange of fish was an aboriginal right of the Sto:lo, it is unnecessary to consider the tests for extinguishment, infringement and justification laid out by this Court in Sparrow, supra.

VI. Disposition

93 Having concluded that the aboriginal rights of the Sto:lo do not include the right to exchange fish for money or other goods, I would dismiss the appeal and affirm the decision of the Court of Appeal restoring the trial judge's conviction of the appellant for violating s. 61(1) of the Fisheries Act. There will be no order as to costs.

94 For the reasons given above, the constitutional question must be answered as follows:

Question	Is s. 27(5) of the British Columbia Fishery (General) Regulations, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the Constitution Act, 1982, by reason of the aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982, invoked by the appellant?

Answer No.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting)

95 This appeal, as well as the appeals in R. v. N.T.C. Smokehouse Ltd., *[1996] 2 S.C.R. 672*, and R. v. Gladstone, *[1996] 2 S.C.R. 723*, in which judgment is handed down concurrently, and the appeal in R. v. Nikal, *[1996] 1 S.C.R. 1013*, concern the definition of aboriginal rights as constitutionally protected under s. 35(1) of the Constitution Act, 1982.

96 While the narrow issue in this particular case deals with whether the Sto:lo, of which the appellant is a member, possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, the broader issue is the interpretation of the nature and extent of constitutionally protected aboriginal rights.

97 The Chief Justice concludes that the Sto:lo do not possess an aboriginal right to exchange fish for money or other goods and that, as a result, the appellant's conviction under the Fisheries Act, R.S.C. 1970, c. F-14, should be upheld. Not only do I disagree with the result he reaches, but I also diverge from his analysis of the issue at bar, specifically as to his approach to defining aboriginal rights and as to his delineation of the aboriginal right claimed by the appellant.

98 The Chief Justice has set out the facts and judgments and I will only briefly refer to them for a better understanding of what follows.

99 Dorothy Van der Peet, the appellant, was charged with violating s. 27(5) of the British Columbia Fishery (General) Regulations, SOR/84-248, and, thereby, committing an offence contrary to s. 61(1) of the Fisheries Act. These charges arose out of the appellant's sale of 10 salmon caught by her common law spouse and his brother under the authority of an Indian food fish licence, issued pursuant to s. 27(1) of the Regulations. Section 27(5) of the British Columbia Fishery (General) Regulations, is the provision here under constitutional challenge; it provides:

> 7. . . . (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

100 The appellant, her common law husband and his brother are all members of the Sto:lo Band, part of the Coast Salish Nation. Both parties to this dispute accept that the appellant sold the fish, that the sale of the fish was contrary to the Regulations and that the fish were caught pursuant to a recognized aboriginal right to fish. The parties disagree, however, as to the nature of the Sto:lo's relationship with the fishery, particularly whether their right to fish encompasses the right to sell, trade and barter fish.

101 Scarlett Prov. Ct. J., the trial judge found on the evidence, *[1991] 3 C.N.L.R. 155*, that trade by the Sto:lo was incidental to fishing for food and was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. He held, therefore, that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell and found the appellant guilty as charged.

102 On appeal to the British Columbia Supreme Court, *(1991), 58 B.C.L.R. (2d) 392*, Selbie J., the summary appeal judge, gave a different interpretation to the oral testimony, expert evidence and archaeological records. In his view, the evidence demonstrated that the Sto:lo's relationship with the fishery was broad enough to include the trade of fish since the Sto:lo who caught fish in their original aboriginal society could do whatever they wanted with that fish. He overturned the appellant's conviction and entered an acquittal.

103 At the British Columbia Court of Appeal *(1993), 80 B.C.L.R. (2d) 75*, the findings and verdict of the trial judge were restored. The majority of the Court of Appeal, per Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., found that the Sto:lo engaged only in casual exchanges of fish and that this was entirely different from fishing for commercial and market purposes. Lambert J.A., dissenting, held that the best description of the aboriginal practices, traditions and customs of the Sto:lo was one which included the sale, trade and barter of fish. Also dissenting, Hutcheon J.A. focused on the evidence demonstrating that by 1846, the date of British sovereignty, trade in salmon was taking place in the Sto:lo community.

104 Leave to appeal was granted by this Court and the Chief Justice stated the following constitutional question:

> Is s. 27(5) of the British Columbia Fishery (General) Regulations, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the Constitution Act, 1982, by reason of the aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982, invoked by the appellant?

105 In my view, the definition of aboriginal rights as to their nature and extent must be addressed in the broader context of the historical aboriginal reality in Canada. Therefore, before going into the specific analysis of aboriginal rights protected under s. 35(1), a review of the legal evolution of aboriginal history is in order.

I. Historical and General Background

106 It is commonly accepted that the first aboriginal people of North America came from Siberia, over the Bering

terrestrial bridge, some 12,000 years ago. They found a terra nullius and gradually began to explore and populate the territory. These people have always enjoyed, whether as nomadic or sedentary communities, some kind of social and political structure. Accordingly, it is fair to say that prior to the first contact with the Europeans, the native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs.

107 In that regard, it is useful to acknowledge the findings of Marshall C.J. of the United States Supreme Court in the so-called trilogy, comprised of Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Particularly in Worcester, Marshall C.J.'s general description of aboriginal societies in North America is apropos (at pp. 542-43):

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.

This passage was quoted, with approval, by Hall J. in Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*, at p. 383. Also in Calder, Judson J., for the majority in the result, made the following observations at p. 328:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. [Emphasis added.]

See also, regarding the independent character of aboriginal nations, the remarks of Lamer J. (as he then was) in R. v. Sioui, *[1990] 1 S.C.R. 1025*, at p. 1053.

108 At the time of the first formal arrival of the Europeans, in the sixteenth century, most of the territory of what is now Canada was occupied and used by aboriginal people. From the earliest point, however, the settlers claimed sovereignty in the name of their home country. Traditionally, there are four principles upon which states have relied to justify the assertion of sovereignty over new territories: see Brian Slattery, The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories (1979). These are: (1) conquest, (2) cession, (3) annexation, and (4) settlement, i.e., acquisition of territory that was previously unoccupied or is not recognized as belonging to another political entity.

109 In the eyes of international law, the settlement thesis is the one rationale which can most plausibly justify European sovereignty over Canadian territory and the native people living on it (see Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" *(1995), 21 Queen's L.J. 173*) although there is still debate as to whether the land was indeed free for occupation. See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991), 29 Osgoode Hall L.J. 681, and Michael Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution (1984).

110 In spite of the sovereignty proclamation, however, the early practices of the British recognized aboriginal title or rights and required their extinguishment by cession, conquest or legislation: see André Émond, "Existe-t-il un titre indien originaire dans les territoires cédés par la France en 1763?" *(1995), 41 McGill L.J. 59*, at p. 62. This tradition of the British imperial power (either applied directly or after French capitulation) was crystallized in the Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1.

111 In R. v. Sparrow, *[1990] 1 S.C.R. 1075*, Dickson C.J. and La Forest J. wrote the following regarding Crown sovereignty and British practices vis-à-vis aboriginal people at p. 1103:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. . . .

See also André Émond, "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale" (1996), 30 R.J.T. 1, at p. 1.

112 As a result, it has become accepted in Canadian law that aboriginal title, and aboriginal rights in general, derive from historic occupation and use of ancestral lands by the natives and do not depend on any treaty, executive order or legislative enactment: see Calder v. Attorney-General of British Columbia, supra, at p. 390, per Hall J., confirmed in Guerin v. The Queen, *[1984] 2 S.C.R. 335*, at p. 379, per Dickson J. (as he then was), and Sparrow, supra; see also the decision of the High Court of Australia in Mabo v. Queensland [No. 2] (1992), 175 C.L.R. 1. See also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 Queen's L.J. 232, at p. 242, and Peter W. Hogg, Constitutional Law of Canada (3rd ed. 1992) at p. 679. This position is known as the "inherent theory" of aboriginal rights, as contrasted with the "contingent theory" of aboriginal rights: see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" *(1991), 29 Alta. L. Rev. 498*, Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 McGill L.J. 382, and Kent McNeil, Common Law Aboriginal Title (1989).

113 Aboriginal people's occupation and use of North American territory was not static, nor, as a general principle, should be the aboriginal rights flowing from it. Natives migrated in response to events such as war, epidemic, famine, dwindling game reserves, etc. Aboriginal practices, traditions and customs also changed and evolved, including the utilisation of the land, methods of hunting and fishing, trade of goods between tribes, and so on. The coming of Europeans increased this fluidity and development, bringing novel opportunities, technologies and means to exploit natural resources: see Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at pp. 741-42. Accordingly, the notion of aboriginal rights must be open to fluctuation, change and evolution, not only from one native group to another, but also over time.

114 Aboriginal interests arising out of natives' original occupation and use of ancestral lands have been recognized in a body of common law rules referred to as the doctrine of aboriginal rights: see Brian Slattery, "Understanding Aboriginal Rights", supra, at p. 732. These principles define the terms upon which the Crown acquired sovereignty over native people and their territories.

115 The traditional and main component of the doctrine of aboriginal rights relates to aboriginal title, i.e., the sui generis proprietary interest which gives native people the right to occupy and use the land at their own discretion, subject to the Crown's ultimate title and exclusive right to purchase the land: see St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 A.C. 46 (P.C.), at p. 54, Calder v. Attorney-General of British Columbia, supra, at p. 328, per Judson J., and at p. 383, per Hall J., and Guerin, supra, at pp. 378 and 382, per Dickson J. (as he then was).

116 The concept of aboriginal title, however, does not capture the entirety of the doctrine of aboriginal rights. Rather, as its name indicates, the doctrine refers to a broader notion of aboriginal rights arising out of the historic occupation and use of native ancestral lands, which relate not only to aboriginal title, but also to the component elements of this larger right - such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs - as well as to other matters, not related to land, that form part of a distinctive aboriginal culture: see W. I. C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990), 15 Queen's L.J. 217, and Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 Can. Bar Rev. 314.

117 This brings me to the different type of lands on which aboriginal rights can exist, namely reserve lands, aboriginal title lands, and aboriginal right lands: see Brian Slattery, "Understanding Aboriginal Rights", supra, at pp. 743-44. The common feature of these lands is that the Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, which is the result of the British assertion of sovereignty over Canadian territory. There are, however, important distinctions to draw between these types of lands with regard to the legislation applicable and claims of aboriginal rights.

118 Reserve lands are those lands reserved by the Federal Government for the exclusive use of Indian people; such lands are regulated under the Indian Act, R.S.C., 1985, c. I-5. On reserve lands, federal legislation, pursuant to s. 91(24) of the Constitution Act, 1867, as well as provincial laws of general application, pursuant to s. 88 of the Indian Act, are applicable. However, under s. 81 of the Indian Act, band councils can enact by-laws, for particular purposes specified therein, which supplant incompatible provincial legislation - even that enacted under s. 88 of the Act - as well as incompatible federal legislation - in so far as the Minister of Indian Affairs has not disallowed the by-laws pursuant to s. 82 of the Act. The latter scenario was the foundation of the claims in R. v. Lewis, *[1996] 1 S.C.R. 921*, and partly in R. v. Nikal, supra.

119 Aboriginal title lands are lands which the natives possess for occupation and use at their own discretion, subject to the Crown's ultimate title (see Guerin v. The Queen, supra, at p. 382); federal and provincial legislation applies to aboriginal title lands, pursuant to the governments' respective general legislative authority. Aboriginal title of this kind is founded on the common law and strict conditions must be fulfilled for such title to be recognized: see Calder v. Attorney-General of British Columbia, supra, and Baker Lake v. Minister of Indian Affairs and Northern Development, *[1980] 1 F.C. 518*. In fact, aboriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a sui generis proprietary interest to occupy and use the land. It follows that aboriginal rights can be incidental to aboriginal title but need not be; these rights are severable from and can exist independently of aboriginal title. As I have already noted elsewhere, the source of these rights is the historic occupation and use of ancestral lands by the natives.

120 Aboriginal title can also be founded on treaties concluded between the natives and the competent government: see Simon v. The Queen, *[1985] 2 S.C.R. 387*, and R. v. Horseman, *[1990] 1 S.C.R. 901*. Where this occurs, the aboriginal rights crystallized in the treaty become treaty rights and their scope must be delineated by the terms of the agreement. The rights arising out of a treaty are immune from provincial legislation - even that enacted under s. 88 of the Indian Act - unless the treaty incorporates such legislation, as in R. v. Badger, *[1996] 1 S.C.R. 771*. A treaty, however, does not exhaust aboriginal rights; such rights continue to exist apart from the treaty, provided that they are not substantially connected to the rights crystallized in the treaty or extinguished by its terms.

121 Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. In these cases, the aboriginal rights on the land are restricted to residual portions of the aboriginal title - such as the rights to hunt, fish or trap - or to other matters not connected to land; they do not, therefore, entail the full sui generis proprietary right to occupy and use the land.

122 Both the Canadian Parliament and provincial legislatures can enact legislation, pursuant to their respective general legislative competence, that affect native activities on aboriginal right lands. As Cory J. puts it in Nikal, supra (at para. 92): "[t]he government must ultimately be able to determine and direct the way in which these rights [of the natives and of the rest of Canadian society] should interact". See also, Calder v. Attorney-General of British Columbia, supra, at pp. 328-29, per Judson J., and at p. 401, per Hall J; Guerin, supra, at pp. 377-78, Sparrow, supra, at p. 1103, and Mitchell v. Peguis Indian Band, *[1990] 2 S.C.R. 85*, at p. 109.

123 These types of lands are not static or mutually exclusive. A piece of land can be conceived of as aboriginal title land and later become reserve land for the exclusive use of Indians; such land is then, reserve land on aboriginal title land. Further, aboriginal title land can become aboriginal right land because the occupation and use by the particular group of aboriginal people has narrowed to specific activities. The bottom line is this: on every type of land described above, to a larger or smaller degree, aboriginal rights can arise and be recognized.

124 This being said, the instant case is confined to the recognition of an aboriginal right and does not involve by-laws on a reserve or claims of aboriginal title, nor does it relate to any treaty rights. The contention of the appellant is simply that the Sto:lo, of which she is one, possess an aboriginal right to fish - arising out of the historic

occupation and use of their lands - which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.

125 Prior to 1982, the doctrine of aboriginal rights was founded only on the common law and aboriginal rights could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign": see St. Catherine's Milling and Lumber Co. v. The Queen, supra, at p. 54, also R. v. George, *[1966] S.C.R. 267*, Sikyea v. The Queen, *[1964] S.C.R. 642*, and Calder v. Attorney-General of British Columbia, supra; see also, regarding the mode of extinguishing aboriginal rights, Kenneth Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 Can. Bar Rev. 450.

126 Since then, however, s. 35(1) of the Constitution Act, 1982 provides constitutional protection to aboriginal interests arising out of the native historic occupation and use of ancestral lands through the recognition and affirmation of "existing aboriginal and treaty rights of the aboriginal peoples of Canada": see Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992), 71 Can. Bar Rev. 261, at p. 263. Consequently, as I shall examine in some detail, the general legislative authority over native activities is now limited and legislation which infringes upon existing aboriginal or treaty rights must be justified.

127 The general analytical framework developed under s. 35(1) will now be outlined before proceeding with the interpretation of the nature and extent of constitutionally protected aboriginal rights.

II. Section 35(1) of the Constitution Act, 1982 and the Sparrow Test

128 The analysis of the issue before us must start with s. 35(1) of the Constitution Act, 1982, found in Part II of that Act entitled "Rights of the Aboriginal Peoples of Canada", which provides:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

129 The scope of s. 35(1) was discussed in Sparrow, supra. In that case, a member of the Musqueam Band, Ronald Edward Sparrow, was charged under s. 61(1) of the Fisheries Act with the offence of fishing with a drift-net in excess of the 25-fathom depth permitted by the terms of the band's Indian food fishing licence. The fishing occurred in a narrow channel of the Fraser River, a few miles upstream from Vancouver International Airport. Sparrow readily admitted having fished as alleged, but he contended that, because the Musqueam had an aboriginal right to fish, the attempt to regulate net length was inconsistent with s. 35(1) and was thus rendered of no force or effect by s. 52 of the Constitution Act, 1982.

130 I pause here to note that in Sparrow, Dickson C.J. and La Forest J. stressed the importance of taking a case-by-case approach to the interpretation of the rights involved in s. 35(1). They stated at p. 1111:

> We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

See also Kruger v. The Queen, *[1978] 1 S.C.R. 104*, and R. v. Taylor *(1981), 62 C.C.C. (2d) 227* (Ont. C.A.).

131 The Court, nevertheless, developed a basic analytical framework for constitutional claims of aboriginal right protection under s. 35(1). The test set out in Sparrow includes three steps, namely: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a prima facie infringement of such right; and (3) the justification of the infringement. I shall briefly discuss each of them in turn.

132 The rights of aboriginal people constitutionally protected in s. 35(1) are those in existence at the time of the

enactment of the Constitution Act, 1982. However, the manner in which they were regulated in 1982 is irrelevant to the definition of aboriginal rights because they must be assessed in their contemporary form; aboriginal rights are not frozen in time: see Sparrow, at p. 1093; see also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", supra, Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 Sup. Ct. L. Rev. 255, and William Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II - Section 35: The Substantive Guarantee" (1988), 22 U.B.C. L. Rev. 207. The onus is on the claimant to prove that he or she benefits from an existing aboriginal right. I will return later to this first step to elaborate on the interpretation of the nature and extent of aboriginal rights.

133 Also, the Crown could extinguish aboriginal rights by legislation prior to 1982, but its intention to do so had to be clear and plain. Therefore, the regulation of an aboriginal activity does not amount to its extinguishment (Sparrow, at p. 1097) and legislation necessarily inconsistent with the continued enjoyment of aboriginal rights is not sufficient to meet the test. The "clear and plain" hurdle for extinguishment is, as a result, quite high: see Simon, supra. The onus of proving extinguishment is on the party alleging it, that is, the Crown.

134 As regards the second step of the Sparrow test, when an existing aboriginal right has been established, the claimant must demonstrate that the impugned legislation constitutes a prima facie infringement of the right. Put another way, the question becomes whether the legislative provision under scrutiny is in conflict with the recognized aboriginal right, either because of its object or its effects. In Sparrow, Dickson C.J. and La Forest J. provided the following guidelines, at p. 1112, regarding infringement:

> To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a prima facie interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

135 Thirdly, after the claimant has demonstrated that the legislation in question constitutes a prima facie infringement of his or her aboriginal right, the onus then shifts again to the Crown to prove that the infringement is justified. Courts will be asked, at this stage, to balance and reconcile the conflicting interests of native people, on the one hand, and of the rest of Canadian society, on the other. Specifically, this last step of the Sparrow test requires the assessment of both the validity of the objective of the legislation and the reasonableness of the limitation.

136 As to the objective, there is no doubt that a legislative scheme aimed at conservation and management of natural resources will suffice (Sparrow, at p. 1113). Other legislative objectives found to be substantial and compelling, such as the security of the public, can also be valid, depending on the circumstances of each case. The notion of public interest, however, is too vague and broad to constitute a valid objective to justify the infringement of an aboriginal right (Sparrow, at p. 1113).

137 With respect to the reasonableness of the limits upon the existing aboriginal right, the special trust relationship and the responsibility of the Crown vis-à-vis aboriginal people have to be contemplated. At a minimum, this fiduciary duty commands that some priority be afforded to the natives in the regulatory scheme governing the activity recognized as aboriginal right: see Sparrow, at pp. 1115-17, also Jack v. The Queen, *[1980] 1 S.C.R. 294*, and R. v. Denny *(1990), 55 C.C.C. (3d) 322* (N.S.C.A.).

138 A number of other elements may have to be weighed in the assessment of justification. In Sparrow, Dickson

C.J. and La Forest J. drew up the following non-exhaustive list of factors relating to justification at p. 1119:

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

139 In the case at bar, the issue relates only to the interpretation of the nature and extent of the Sto:lo's aboriginal right to fish and whether it includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes; i.e., the very first step of the Sparrow test, dealing with the assessment and definition of aboriginal rights. If it becomes necessary to proceed to extinguishment or to the questions of prima facie infringement and justification, the parties agreed that the case should be remitted to trial, as the summary appeal judge did, given that there is insufficient evidence to enable this Court to decide those issues.

140 In order to determine whether the Sto:lo benefit from an existing aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, it is necessary to elaborate on the appropriate approach to interpreting the nature and extent of aboriginal rights in general. That I now propose to do.

III. Interpretation of Aboriginal Rights

141 While I am in general agreement with the Chief Justice on the fundamental interpretative canons relating to aboriginal law which he discussed, the application of those rules to his definition of aboriginal rights under s. 35(1) of the Constitution Act, 1982 does not, in my view, sufficiently reflect them. For the sake of convenience, I will summarize them here.

142 First, as with all constitutional provisions, s. 35(1) must be given a generous, large and liberal interpretation in order to give full effect to its purposes: see, regarding the Constitution Act, 1867, Edwards v. Attorney-General for Canada, *[1930] A.C. 124* (P.C.), Attorney General of Quebec v. Blaikie (No. 1), *[1979] 2 S.C.R. 1016*, Re Residential Tenancies Act, 1979, *[1981] 1 S.C.R. 714*; in the context of the Charter, Hunter v. Southam Inc., *[1984] 2 S.C.R. 145*, R. v. Big M Drug Mart Ltd., *[1985] 1 S.C.R. 295*, R. v. Keegstra, *[1990] 3 S.C.R. 697*; and, particular to aboriginal rights in s. 35(1), Sparrow, supra, at p. 1108, where Dickson C.J. and La Forest J. wrote that "s. 35(1) is a solemn commitment that must be given meaningful content".

143 Further, the very nature of ancient aboriginal records, such as treaties, agreements with the Crown and other documentary evidence, commands a generous interpretation, and uncertainties, ambiguities or doubts should be resolved in favour of the natives: see R. v. Sutherland, *[1980] 2 S.C.R. 451*, Moosehunter v. The Queen, *[1981] 1 S.C.R. 282*, Nowegijick v. The Queen, *[1983] 1 S.C.R. 29*, Simon, supra, Horseman, supra, Sioui, supra, Sparrow, supra, and Mitchell, supra; see also William Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II -- Section 35: The Substantive Guarantee", supra, at p. 255.

144 Second, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown vis-à-vis aboriginal people: see Taylor, supra, and Guerin, supra. This fiduciary obligation attaches because of the historic power and responsibility assumed by the Crown over aboriginal people. In Sparrow, supra, the Court succinctly captured this obligation at p. 1108:

> That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Emphasis added.]

See also Alain Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones" (1995), 36 C. de D. 669.

145 Finally, but most importantly, aboriginal rights protected under s. 35(1) have to be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. In that respect, the following remarks of Dickson C.J. and La Forest J. in Sparrow, at p. 1112, are particularly apposite:

> While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. [Emphasis added.]

Unlike the Chief Justice, I do not think it appropriate to qualify this proposition by saying that the perspective of the common law matters as much as the perspective of the natives when defining aboriginal rights.

146 These principles of interpretation are important to keep in mind when determining the proper approach to the question of the nature and extent of aboriginal rights protected in s. 35(1) of the Constitution Act, 1982, to which I now turn.

147 The starting point in contemplating whether an aboriginal practice, tradition or custom warrants constitutional protection under s. 35(1) was hinted at by this Court in Sparrow, supra. Dickson C.J. and La Forest J. made this observation, at p. 1099, regarding the role of the fishery in Musqueam life:

> The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. [Emphasis added.]

148 The crux of the debate at the British Columbia Court of Appeal in the present appeal, and in most of the appeals heard contemporaneously, lies in the application of this standard of "integral part of their distinctive culture" to defining the nature and extent of the particular aboriginal right claimed to be protected in s. 35(1) of the Constitution Act, 1982. This broad statement of what characterizes aboriginal rights must be elaborated and made more specific so that it becomes a defining criterion. In particular, two aspects must be examined in detail, namely (1) what are the necessary characteristics of aboriginal rights, and (2) what is the period of time relevant to the assessment of such characteristics.

> Characteristics of aboriginal rights

149 The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Which aboriginal practices, traditions and customs warrant constitutional protection? It appears from the jurisprudence developed in the courts below (see the reasons of the British Columbia Court of Appeal and the decision in Delgamuukw v. British Columbia *(1993), 104 D.L.R. (4th) 470*) that two approaches to this difficult question have emerged. The first one, which the Chief Justice endorses, focuses on the particular aboriginal practice, tradition or custom. The second approach, more generic, describes aboriginal rights in a fairly high level of abstraction. For the reasons that follow, I favour the latter approach.

150 The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted. The analysis turns on the manifestations of the "integral part of [aboriginals'] distinctive culture" introduced in Sparrow, supra, at p. 1099. Further, on this view, what makes aboriginal culture distinctive is that which differentiates it from non-aboriginal culture. The majority of the Court of Appeal adopted this position, as the following passage from Macfarlane J.A.'s reasons reveals (at para. 37):

> What was happening in the aboriginal society before contact with the Europeans is relevant in identifying the unique traditions of the aborigines which deserved protection by the common law. It is also necessary to separate those traditions from practices which are not a unique part of Indian culture, but which are common to Indian and non-Indian alike. [Emphasis added.]

Accordingly, if an activity is integral to a culture other than that of aboriginal people, it cannot be part of aboriginal people's distinctive culture. This approach should not be adopted for the following reasons.

151 First, on the pure terminology angle of the question, this position misconstrues the words "distinctive culture", used in the above excerpt of Sparrow, by interpreting it as if it meant "distinct culture". These two expressions connote quite different meanings and must not be confused. The word "distinctive" is defined in The Concise Oxford Dictionary (9th ed. 1995) as "distinguishing, characteristic" where the word "distinct" is described as "1 (often foll. by from) a not identical; separate; individual. b different in kind or quality; unlike". While "distinct" mandates comparison and evaluation from a separate vantage point, "distinctive" requires the object to be observed on its own. While describing an object's "distinctive" qualities may entail describing how the object is different from others (i.e., "distinguishing"), there is nothing in the term that requires it to be plainly different. In fact, all that "distinctive culture" requires is the characterization of aboriginal culture, not its differentiation from non-aboriginal cultures.

152 While the Chief Justice recognizes the difference between "distinctive" and "distinct", he applies it only as regards the manifestations of the distinctive aboriginal culture, i.e., the individualized practices, traditions and customs of a particular group of aboriginal people. As I will examine in more detail in a moment, the "distinctive" aboriginal culture has, in my view, a generic and much broader application.

153 Second, holding that what is common to both aboriginal and non-aboriginal cultures must necessarily be non-aboriginal and thus not aboriginal for the purpose of s. 35(1) is, to say the least, an overly majoritarian approach. This is diametrically opposed to the view propounded in Sparrow, supra, that the interpretation of aboriginal rights be informed by the fiduciary responsibility of the Crown vis-à-vis aboriginal people as well as by the aboriginal perspective on the meaning of the rights. Such considerations command that practices, traditions and customs which characterize aboriginal societies as the original occupiers and users of Canadian lands be protected, despite their common features with non-aboriginal societies.

154 Finally, an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away. Such a strict construction of constitutionally protected aboriginal rights flies in the face of the generous, large and liberal interpretation of s. 35(1) of the Constitution Act, 1982 advocated in Sparrow.

155 A better approach, in my view, is to examine the question of the nature and extent of aboriginal rights from a certain level of abstraction and generality.

156 A generic approach to defining the nature and extent of aboriginal rights starts from the proposition that the notion of "integral part of [aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Instead of focusing on a particular practice, tradition or custom, this conception refers to a more abstract and profound concept. In fact, similar to the values enshrined in the Canadian Charter of Rights and Freedoms, aboriginal rights protected under s. 35(1) should be contemplated on a multi-layered or multi-faceted basis: see Andrea Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 Toronto Fac. L. Rev. 1, at pp. 28-29.

157 Accordingly, s. 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the "distinctive culture" of which aboriginal activities are manifestations. Simply put, the emphasis would be on the significance of these activities to natives rather than on the activities themselves.

158 Although I do not claim to examine the question in terms of liberal enlightenment, an analogy with freedom of expression guaranteed in s. 2(b) of the Charter will illustrate this position. Section 2(b) of the Charter does not refer to an explicit catalogue of protected expressive activities, such as political speech, commercial expression or picketing, but involves rather the protection of the ability to express: see Ford v. Quebec (Attorney General), *[1988] 2 S.C.R. 712*, Irwin Toy Ltd. v. Quebec (Attorney General), *[1989] 1 S.C.R. 927*, Edmonton Journal v. Alberta (Attorney General), *[1989] 2 S.C.R. 1326*, Keegstra, supra; Committee for the Commonwealth of Canada v. Canada, *[1991] 1 S.C.R. 139*, and RJR-MacDonald Inc. v. Canada (Attorney General), *[1995] 3 S.C.R. 199*. In other words, the constitutional guarantee of freedom of expression is conceptualized, not as protecting the possible manifestations of expression, but as preserving the fundamental purposes for which one may express oneself, i.e., the rationales supporting freedom of expression.

159 Similarly, aboriginal practices, traditions and customs protected under s. 35(1) should be characterized by referring to the fundamental purposes for which aboriginal rights were entrenched in the Constitution Act, 1982. As I have already noted elsewhere, s. 35(1) constitutionalizes the common law doctrine of aboriginal rights which recognizes aboriginal interests arising out of the historic occupation and use of ancestral lands by natives. This, in my view, is how the notion of "integral part of a distinctive aboriginal culture" should be contemplated. The "distinctive aboriginal culture" must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands: Calder v. Attorney-General of British Columbia, supra, at p. 328, per Judson J., and Guerin, supra, at p. 379, per Dickson J. (as he then was).

160 This rationale should inform the characterization of aboriginal activities which warrant constitutional protection as aboriginal rights. The practices, traditions and customs protected under s. 35(1) should be those that are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. See Delgamuukw v. British Columbia, supra, at pp. 646-47, per Lambert J.A., dissenting; see also Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow", supra, at p. 505, and Pentney, "The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II -- Section 35: The Substantive Guarantee", supra, at pp. 258-59.

161 Put another way, the aboriginal practices, traditions and customs which form the core of the lives of native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s. 35(1). This was described by Lambert J.A., dissenting at the Court of Appeal, as the "social" form of description of aboriginal rights (see para. 140), a formulation the Chief Justice rejects. Lambert J.A. distinguished these aboriginal activities from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1) of the Constitution Act, 1982. I agree with this description which, although flexible, provides a defining criterion for the interpretation of the nature and extent of aboriginal rights and, contrary to what my colleague McLachlin J. suggests, does not suffer from vagueness or overbreadth, as defined by this Court (see R. v. Nova Scotia Pharmaceutical Society, *[1992] 2 S.C.R. 606*, and Ontario v. Canadian Pacific Ltd., *[1995] 2 S.C.R. 1031*).

162 Further comments regarding this approach are in order. The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). Further, a generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. Finally, it is almost trite to say that what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations.

163 It is necessary to discuss at this point the period of time relevant to the assessment of the practices, traditions and customs which form part of the distinctive culture of a particular group of aboriginal people.

Period of time relevant to aboriginal rights

164 The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, tradition or custom has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized as a right under s. 35(1). Here, again, two basic approaches have been advocated in the courts below (see the decisions of the British Columbia Court of Appeal in this case, and in Delgamuukw v. British Columbia, supra), namely the "frozen right" approach and the "dynamic right" approach. An examination of each will show that the latter view is to be preferred.

165 The "frozen right" approach would recognize practices, traditions and customs - forming an integral part of a distinctive aboriginal culture - which have long been in existence at the time of British sovereignty: see Slattery, "Understanding Aboriginal Rights", supra, at pp. 758-59. This requires the aboriginal right claimant to prove two elements: (1) that the aboriginal activity has continuously existed for "time immemorial", and (2) that it predated the assertion of sovereignty. Defining existing aboriginal rights by referring to pre-contact or pre-sovereignty practices, traditions and customs implies that aboriginal culture was crystallized in some sort of "aboriginal time" prior to the arrival of Europeans. Contrary to the Chief Justice, I do not believe that this approach should be adopted, for the following reasons.

166 First, relying on the proclamation of sovereignty by the British imperial power as the "cut-off" for the development of aboriginal practices, traditions and customs overstates the impact of European influence on aboriginal communities: see Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal", supra, at p. 22. From the native people's perspective, the coming of the settlers constitutes one of many factors, though a very significant one, involved in their continuing societal change and evolution. Taking British sovereignty as the turning point in aboriginal culture assumes that everything that the natives did after that date was not sufficiently significant and fundamental to their culture and social organization. This is no doubt contrary to the perspective of aboriginal people as to the significance of European arrival on their rights.

167 Second, crystallizing aboriginal practices, traditions and customs at the time of British sovereignty creates an arbitrary date for assessing existing aboriginal rights: see Sébastien Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt Sparrow" (1991), 36 McGill L.J. 1382, at pp. 1403-4. In effect, how would one determine the crucial date of sovereignty for the purpose of s. 35(1)? Is it the very first European contacts with native societies, at the time of the Cabot, Verrazzano and Cartier voyages? Is it at a later date, when permanent European settlements were founded in the early seventeenth century? In British Columbia, did sovereignty occur in 1846 - the year in which the Oregon Boundary Treaty, 1846 was concluded - as held by the Court of Appeal for the purposes of this litigation? No matter how the deciding date is agreed upon, it will not be consistent with the aboriginal view regarding the effect of the coming of Europeans.

168 As a third point, in terms of proof, the "frozen right" approach imposes a heavy and unfair burden on the natives: the claimant of an aboriginal right must prove that the aboriginal practice, tradition or custom is not only sufficiently significant and fundamental to the culture and social organization of the aboriginal group, but has also been continuously in existence, but as the Chief Justice stresses, even if interrupted for a certain length of time, for an indeterminate long period of time prior to British sovereignty. This test embodies inappropriate and unprovable assumptions about aboriginal culture and society. It forces the claimant to embark upon a search for a pristine aboriginal society and to prove the continuous existence of the activity for "time immemorial" before the arrival of Europeans. This, to say the least, constitutes a harsh burden of proof, which the relaxation of evidentiary standards suggested by the Chief Justice is insufficient to attenuate. In fact, it is contrary to the interpretative approach propounded by this Court in Sparrow, supra, which commands a purposive, liberal and favourable construction of aboriginal rights.

169 Moreover, when examining the wording of the constitutional provisions regarding aboriginal rights, it appears that the protection should not be limited to pre-contact or pre-sovereignty practices, traditions and customs. Section 35(2) of the Constitution Act, 1982 provides that the "'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada" (emphasis added). Obviously, there were no Métis people prior to contact with Europeans as the Métis are the result of intermarriage between natives and Europeans: see Pentney, "The Rights

of the Aboriginal Peoples of Canada in the Constitution Act, 1982, Part II -- Section 35: The Substantive Guarantee", supra, at pp. 272-74. Section 35(2) makes it clear that aboriginal rights are indeed guaranteed to Métis people. As a result, according to the text of the Constitution of Canada, it must be possible for aboriginal rights to arise after British sovereignty, so that Métis people can benefit from the constitutional protection of s. 35(1). The case-by-case application of s. 35(2) of the Constitution Act, 1982 proposed by the Chief Justice does not address the issue of the interpretation of s. 35(2).

170 Finally, the "frozen right" approach is inconsistent with the position taken by this Court in Sparrow, supra, which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982. The following passage from Dickson C.J. and La Forest J.'s reasons makes this point (at p. 1093):

> Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," supra, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected. [Emphasis added.]

This broad proposition should be taken to relate, not only to the meaning of the word "existing" found in s. 35(1), but also to the more fundamental question of the time at which the content of the rights themselves is determined. Accordingly, the interpretation of the nature and extent of aboriginal rights must "permit their evolution over time".

171 The foregoing discussion shows that the "frozen right" approach to defining aboriginal rights as to their nature and extent involves several important restrictions and disadvantages. A better position, in my view, would be evolutive in character and give weight to the perspective of aboriginal people. As the following analysis will demonstrate, a "dynamic right" approach to the question will achieve these objectives.

172 The "dynamic right" approach to interpreting the nature and extent of aboriginal rights starts from the proposition that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" (Sparrow, at p. 1093). According to this view, aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality.

173 Distinctive aboriginal culture would not be frozen as of any particular time but would evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world. Instead of considering it as the turning point in aboriginal culture, British sovereignty would be regarded as having recognized and affirmed practices, traditions and customs which are sufficiently significant and fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity", founded in British imperial constitutional law, to the effect that when new territory is acquired the lex loci of organized societies, here the aboriginal societies, continues at common law.

174 See, on the doctrine of continuity in general, Sir William Blackstone, Commentaries on the Laws of England (1769), vol. 2, at p. 51, Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown (1820), at p. 119, and Sir William Searle Holdsworth, A History of English Law (1938), vol. 11, at pp. 3-274. See also, in the context of Canadian aboriginal law, Brian Slattery, Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title (1983), Kent McNeil, Common Law Aboriginal Title (1989), Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992), 17 Queen's L.J. 350, Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones", supra, at p. 719; and Émond, "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale", supra, at p. 96.

175 Consequently, in order for an aboriginal right to be recognized and affirmed under s. 35(1), it is not imperative

for the practices, traditions and customs to have existed prior to British sovereignty and, a fortiori, prior to European contact, which is the cut-off date favoured by the Chief Justice. Rather, the determining factor should only be that the aboriginal activity has formed an integral part of a distinctive aboriginal culture - i.e., to have been sufficiently significant and fundamental to the culture and social organization of the aboriginal group - for a substantial continuous period of time as defined above.

176 Such a temporal requirement is less stringent than the "time immemorial" criterion developed in the context of aboriginal title: see Calder v. Attorney-General of British Columbia, supra; and, Baker Lake v. Minister of Indian Affairs and Northern Development, supra; see also Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt Sparrow", supra, at p. 1394. This qualification of the time immemorial test finds support in the obiter dicta of this Court in Sparrow, supra, at p. 1095, regarding the Musqueam Band's aboriginal right to fish:

> It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it. [Emphasis added.]

177 The substantial continuous period of time for which the aboriginal practice, tradition or custom must have been engaged in will depend on the circumstances and on the nature of the aboriginal right claimed. However, as proposed by Professor Slattery, in "Understanding Aboriginal Rights", supra, at p. 758, in the context of aboriginal title, "in most cases a period of some twenty to fifty years would seem adequate". This, in my view, should constitute a reference period to determine whether an aboriginal activity has been in existence for long enough to warrant constitutional protection under s. 35(1).

178 In short, the substantial continuous period of time necessary to the recognition of aboriginal rights should be assessed based on (1) the type of aboriginal practices, traditions and customs, (2) the particular aboriginal culture and society, and (3) the reference period of 20 to 50 years. Such a time frame does not minimize the fact that in order to benefit from s. 35(1) protection, aboriginal activities must still form the core of the lives of native people; this surely cannot be characterized as an extreme position, as my colleague Justice McLachlin affirms.

179 The most appreciable advantage of the "dynamic right" approach to defining the nature and extent of aboriginal rights is the proper consideration given to the perspective of aboriginal people on the meaning of their existing rights. It recognizes that distinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society. This, in the aboriginal people's perspective, is no doubt the true sense of the constitutional protection provided to aboriginal rights through s. 35(1) of the Constitution Act, 1982.

Summary

180 In the end, the proposed general guidelines for the interpretation of the nature and extent of aboriginal rights constitutionally protected under s. 35(1) can be summarized as follows. The characterization of aboriginal rights should refer to the rationale of the doctrine of aboriginal rights, i.e., the historic occupation and use of ancestral lands by the natives. Accordingly, aboriginal practices, traditions and customs would be recognized and affirmed under s. 35(1) of the Constitution Act, 1982 if they are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. Furthermore, the period of time relevant to the assessment of aboriginal activities should not involve a specific date, such as British sovereignty, which would crystallize aboriginal's distinctive culture in time. Rather, as aboriginal practices, traditions and customs change and evolve, they will be protected in s. 35(1) provided that they have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time.

181 This approach being set out, I will turn to the specific issue raised by this case, namely whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Before examining the distinctive aboriginal culture of the Sto:lo people in that respect, a brief review of

the case law on aboriginal trade activities, which shows that aboriginal practices, traditions and customs can have different purposes, will be helpful to delineate the issue at bar.

IV. Case Law on Aboriginal Trade Activities

182 At the British Columbia Court of Appeal, the majority framed the issue as being whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the fish. Macfarlane J.A. put the question that way because "[i]n essence, [this case] is about an asserted Indian right to sell fish allocated for food purposes on a commercial basis" (see para. 30). I leave aside for the moment the delineation of the aboriginal right claimed in this case in order, first, to examine the case law on treaty and aboriginal rights regarding trade to demonstrate that there is an important distinction to be drawn between, on the one hand, the sale, trade and barter of fish for livelihood, support and sustenance purposes and, on the other, the sale, trade and barter of fish for purely commercial purposes.

183 This Court, in Sparrow, supra, proposed to leave to another day the discussion of commercial aspects of the right to fish, since (at p. 1101) "the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes" (emphasis added). Accordingly, Dickson C.J. and La Forest J. confined their reasons to the aboriginal right to fish for food, social and ceremonial purposes. In so doing, however, it appears that they implicitly distinguished between (1) the right to fish for food, social and ceremonial purposes (which was recognized for the Musqueam Band), (2) the right to fish for livelihood, support and sustenance purposes, and (3) the right to fish for purely commercial purposes (see Sparrow, at pp. 1100-1101). The differentiation between the last two classes of purposes, which is of key interest here, was discussed and elaborated upon by Wilson J. in Horseman, supra.

184 In Horseman, this Court examined the scope of the Horse Lakes Indian Band's right to hunt under Treaty No. 8, 1899, as amended by the Natural Resources Transfer Agreement, 1930 (Alberta) ("NRTA"). In that case, the appellant, Bert Horseman, was charged with the offence of unlawfully "trafficking" in wildlife, contrary to s. 42 of the Wildlife Act, R.S.A. 1980, c. W-9, which was defined as "any single act of selling, offering for sale, buying, bartering, soliciting or trading". The appellant had killed a grizzly bear in self-defence, while legally hunting moose for food, and he sold the bear hide because he was in need of money to support his family. Horseman argued that the Wildlife Act did not apply to him because he was within his Treaty No. 8 rights when he sold the grizzly hide.

185 Cory J. (Lamer, La Forest and Gonthier JJ. concurring), for the majority, held that the Treaty No. 8 right to hunt generally has been circumscribed by the NRTA to the right to hunt for "food" only. He made it clear, however, that before the NRTA (1930), the Horse Lakes people had the right to hunt for commercial purposes under Treaty No. 8 (at pp. 928-29):

> The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life.
>
> . . .
>
> I am in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for purposes of commerce. The next question that must be resolved is whether or not that right was in any way limited or affected by the Transfer Agreement of 1930. [Emphasis added.]

This passage recognizes that the practices, traditions and customs of the Horse Lakes people were not frozen at the time of British sovereignty and that when Treaty No. 8 was concluded in 1899, their activities had evolved so that commercial hunting and fishing formed an "integral part" of their culture and society.

186 Furthermore, Cory J. upheld the findings of the courts below that the sale of the grizzly hide constituted a commercial hunting activity which, as a consequence, fell outside the ambit of the treaty rights to hunt. He wrote at

p. 936:

> It has been seen that the Treaty No. 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, that is to say, for sustenance for the individual Indian or the Indian's family. In the case at bar the sale of the bear hide was part of a "multi-stage process" whereby the product was sold to obtain funds for purposes which might include purchasing food for nourishment. The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement. [Emphasis added.]

Cory J. concluded that the Wildlife Act applied and found the appellant guilty of unlawfully trafficking in wildlife.

187 Wilson J. (Dickson C.J. and L'Heureux-Dubé J. concurring), dissenting, was of the view that, from an aboriginal perspective, a simple dichotomy between hunting for domestic use and hunting for commercial purposes should not be determinative of the treaty rights. Rather, Treaty No. 8 and the NRTA should be interpreted so as to preserve the Crown's commitment to respecting the lifestyle of the Horse Lakes people and the way in which they had traditionally pursued their livelihood.

188 Contrary to Cory J., Wilson J. held that the words "for food" in the NRTA did not have the effect of placing substantial limits on the range of hunting activities permitted under Treaty No. 8. After reviewing the decisions of this Court in Frank v. The Queen, *[1978] 1 S.C.R. 95*, and Moosehunter, supra, Wilson J. found that the treaty right to hunt "for food" amounted to a right to hunt for support and sustenance. She explained her view as follows, at p. 919:

> And if we are to give para. 12 [of the NRTA] the "broad and liberal" construction called for in Sutherland, a construction that reflects the principle enunciated in Nowegijick and Simon that statutes relating to Indians must be given a "fair, large and liberal construction", then we should be prepared to accept that the range of activity encompassed by the term "for food" extends to hunting for "support and subsistence", i.e. hunting not only for direct consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport hunting.
>
> And, indeed, when one thinks of it this makes excellent sense. The whole emphasis of Treaty No. 8 was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit. [Emphasis added.]

Wilson J. concluded that the Wildlife Act could not forbid the activities which fall within the aboriginal traditional way of life and that are linked to the Horse Lakes people's support and sustenance. Consequently, she would have acquitted the appellant because he sold the grizzly hide to buy food for his family, not for commercial profit.

189 As far as this case is concerned, there are two points which stand out from the foregoing review of the reasons in Horseman, supra. First, the Horse Lakes people's original practices, traditions and customs regarding hunting were held to have evolved to include, at the time Treaty No. 8 was concluded, the right to make some commercial use of the game. Second, and more importantly, when determining whether a treaty right exists (which no doubt extends to aboriginal rights), there should be a distinction drawn between, on the one side, activities relating to the support and sustenance of the natives and, on the other, ventures undertaken purely for commercial profit. Such a

differentiation is far from being artificial, as McLachlin J. seems to suggest, and, in fact, this distinction ought to be used in the context of s. 35(1) of the Constitution Act, 1982 as in other contexts; in short, there are sales which do not qualify as commercial sales (see, for example, Loi sur la protection du consommateur, L.R.Q. 1977, c. P-40.1).

190 This differentiation was adopted by the Ontario Court (Prov. Div.) in R. v. Jones *(1993), 14 O.R. (3d) 421*. In that case, the defendants, members of the Chippewas of Nawash, were charged with the offence of taking more lake trout than permitted by the band's commercial fishing licence, contrary to the Ontario Fishery Regulations, 1989, authorized by the Fisheries Act. The defendants argued that the quota imposed by the Band's licence interfered with their protected aboriginal right or treaty right to engage in commercial fishing. After referring to both the reasons of Cory J. and of Wilson J. in Horseman, supra, Fairgrieve Prov. Ct. J. reached the following conclusions at pp. 440-41:

> Consideration of the historical, anthropological and archival evidence leaves an existing aboriginal right to fish for commercial purposes that essentially coincides with the treaty right already stated: the Saugeen have a collective ancestral right to fish for sustenance purposes in their traditional fishing grounds. Apart from the waters adjacent to the two reserves and their unsurrendered islands, the aboriginal commercial fishing right is not exclusive, but does allow them to fish throughout their traditional fishing grounds on both sides of the peninsula. To use Ms. Blair's language [for the Defendants], the nature of the aboriginal right exercised is one directed "to a subsistence use of the resource as opposed to a commercially profitable enterprise". It is the band's continuing communal right to continue deriving "sustenance" from the fishery resource which has always been an essential part of the community's economic base. [Emphasis added.]

See also, R. v. King, *[1993] O.J. No. 1794* (Ont. Ct. Prov. Div.), at para. 51, and R. v. Fraser, *[1994] 3 C.N.L.R. 139* (B.C. Prov. Ct.), at p. 145, as well as the commentators Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?", supra, at pp. 234-35, and Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal", supra, at p. 8.

191 In sum, as Sparrow, supra, suggests, when assessing whether aboriginal practices, traditions and customs have been sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people for a substantial continuing period of time, the purposes for which such activities are undertaken should be considered highly relevant. An aboriginal activity can form an integral part of the distinctive culture of a group of aboriginal people if it is done for certain purposes - e.g., for livelihood, support and sustenance purposes. However, the same activity could be considered not to be part of their distinctive aboriginal culture if it is done for other purposes - e.g., for purely commercial purposes. The Chief Justice fails to draw this distinction, which I believe to be highly relevant, although he agrees that the Court of Appeal mischaracterized the aboriginal right here claimed.

192 This contemplation of aboriginal or treaty rights based on the purpose of the activity is aimed at facilitating the delineation of the rights claimed as well as the identification and evaluation of the evidence presented in their support. However, as in Horseman, supra, to respect aboriginal perspective on the matter, the purposes for which aboriginal activities are undertaken cannot and should not be strictly compartmentalized. Rather, in my view, such purposes should be viewed on a spectrum, with aboriginal activities undertaken solely for food, at one extreme, those directed to obtaining purely commercial profit, at the other extreme, and activities relating to livelihood, support and sustenance, at the centre.

193 This being said, in this case, as I have already noted elsewhere, the British Columbia Court of Appeal framed the issue as being one of whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the fish. To state the question in that fashion not only disregards the above distinction between the purposes for which fish can be sold, traded and bartered but also mischaracterizes the facts of this case, misconceives the contentions of the appellant and overlooks the legislative provision here under constitutional challenge.

194 First, the facts giving rise to this case do not support the Court of Appeal's framing of the issue in terms of

commercial fishing. The appellant, Dorothy Van der Peet, was charged with the offence of selling salmon which were legally caught by her common law spouse and his brother. The appellant sold 10 salmon. There is no evidence as to the purposes of the sale or as to what the money was going to be used for. It is clear, however, that the offending transaction proven by the Crown is not part of a commercial venture, nor does it constitute an act directed at profit. It would be different if the Crown had shown, for instance, that the appellant sold 10 salmon every day for a year or that she was selling fish to provide for commercial profit. This is not, however, the scenario presented to us and, as the facts stand on the record, it is reasonable to infer from them that the appellant sold the 10 salmon, not for profit, but for the support and sustenance of herself and her family.

195 Furthermore, the appellant did not argue in the courts below or before this Court that the Sto:lo possess an aboriginal right to fish for commercial purposes. The submissions were only to the effect that the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for their livelihood, support and sustenance. In fact, before this Court, the appellant relied on the dissenting opinion of Lambert J.A., at the Court of Appeal, who stated (at para. 150) that the Sto:lo had the right to "catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood" (italics omitted, underlining added). It is well settled that in framing the issue in a case courts cannot overlook the contentions of the parties; in the case at bar, the appellant did not seek the recognition and affirmation of an aboriginal right to fish for commercial purposes.

196 Finally, the legislative provision under constitutional challenge is not only aimed at commercial fishing, but also forbids both commercial and non-commercial sale, trade and barter of fish. For convenience, here is again s. 27(5) of the British Columbia Fishery (General) Regulations:

> 27. . . .
>
> (5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence. [Emphasis added.]

The scope of s. 27(5) encompasses any sale, trade or barter of fish caught under an Indian food fish licence. If the prohibition were directed at the sale, trade and barter of fish for commercial purposes, the question of the validity of the Regulations would raise a different issue, one which does not arise on the facts of this case since an aboriginal right to fish commercially is not claimed here. Section 27(5) prohibits the sale, trade and barter of fish for livelihood, support and sustenance, and we must determine whether, as it stands, this provision complies with the constitutional protection afforded to aboriginal rights under s. 35(1) of the Constitution Act, 1982.

197 An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. In other words, the above distinction based on the purposes of aboriginal activities does not impose an additional burden on the claimant of an aboriginal right. It may be that, for a particular group of aboriginal people, the practices, traditions and customs relating to some commercial activities meet the test for the recognition of an aboriginal right, i.e., to be sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time. This will have to be determined on the specific facts giving rise to each case, as proven by the Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right. In fact, the consideration of aboriginal activities based on their purposes is simply aimed at facilitating the delineation of the aboriginal rights claimed as well as the identification and evaluation of the evidence presented in support of the rights.

198 In the instant case, this Court is only required to decide whether the Sto:lo's right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, and not whether it includes the right to make commercial use of the fish. In that respect, it is necessary to review the evidence to determine whether such activities have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time so as to give rise to an aboriginal right. That is what I now propose to do.

V. The Case

199 The question here is whether the particular group of aboriginal people, the Sto:lo Band, of which the appellant is a member, has engaged in the sale, trade and barter of fish for livelihood, support and sustenance purposes, in a manner sufficiently significant and fundamental to their culture and social organization, for a substantial continuous period of time, entitling them to benefit from a constitutionally protected aboriginal right to that extent.

200 At trial, after having examined the historical evidence presented by the parties, Scarlett Prov. Ct. J. arrived at the following conclusions (at p. 160):

> This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This court accepts the evidence of Dr. Stryd and John Dewhurst [sic] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.
>
> Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic. This court concludes on the evidence, therefore, that the Sto:lo aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. [Emphasis added.]

201 I agree with the Chief Justice that it is well established, both in criminal and civil contexts, that an appellate court will not disturb the findings of fact made by a trial judge in the absence of "some palpable and overriding error which affected his [or her] assessment of the facts" (emphasis added): see Stein v. The Ship "Kathy K", *[1976] 2 S.C.R. 802*, at p. 808; see also Beaudoin-Daigneault v. Richard, *[1984] 1 S.C.R. 2*, Lensen v. Lensen, *[1987] 2 S.C.R. 672*, Laurentide Motels Ltd. v. Beauport (City), *[1989] 1 S.C.R. 705*, Ontario (Attorney General) v. Bear Island Foundation, *[1991] 2 S.C.R. 570*, Lapointe v. Hôpital Le Gardeur, *[1992] 1 S.C.R. 351*, R. v. Burns, *[1994] 1 S.C.R. 656*, Hodgkinson v. Simms, *[1994] 3 S.C.R. 377*, and Schwartz v. Canada, *[1996] 1 S.C.R. 254*.

202 At the British Columbia Supreme Court, Selbie J. was of the view that the trial judge committed such an error and, as a consequence, substituted his own findings of fact (at paras. 15 and 16):

> With respect, in my view the learned judge erred in using contemporary tests for "marketing" to determine whether the aboriginal acted in ways which were consistent with trade albeit in a rudimentary way as dictated by the times.
>
> In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. We are, after all, basically considering the existence in antiquity of an aboriginal's right to dispose of his fish other than by eating it himself or using it for ceremonial purposes - the words "sell", "barter", "exchange", "share", are but variations on the theme of "disposing". It defies common sense to think that if the aboriginal did not want the fish for himself, there would be some stricture against him disposing of it by some other means to his advantage. We are speaking of an aboriginal "right" existing in antiquity which should not be restrictively interpreted by today's standards. I am satisfied that when the first Indian caught the first salmon he had the "right" to do anything he wanted with it - eat it, trade it for deer meat, throw it back or keep it against a hungrier time. As time went on and for an infinite variety of reasons, that "right" to catch the fish and do anything he wanted with it became hedged in by rules arising from religion, custom, necessity and social change. One such restriction requiring an adjustment to his rights was the need dictated by custom or religion to share the first catch - to do otherwise would court punishment by his god and by the people. One

> of the social changes that occurred was the coming of the white man, a circumstance, as any other, to which he must adjust. With the white man came new customs, new ways and new incentives to colour and change his old life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or for bad, changed and he must needs change with them - and he did. A money economy eventually developed and he adjusted to that also - he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the logical progression of such. It has been held that the aboriginal right to hunt is not frozen in time so that only the bow and arrow can be used in exercising it - the right evolves with the times: see Simon v. R., *[1985] 2 S.C.R. 387* . . . . So, in my view, with the right to fish and dispose of them, which I find on the evidence includes the right to trade and barter them. The Indian right to trade his fish is not frozen in time to doing so only by the medium of the potlatch and the like; he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money. It is thus my view that the aboriginal right of the Sto:lo peoples to fish includes the right to sell, trade or barter them after they have been caught. It is my view that the learned judge imposed a verdict inconsistent with the evidence and the weight to be given it. [Emphasis added.]

203 At the British Columbia Court of Appeal, Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., for the majority, took the position that an aboriginal right would be recognized only if the manifestations of the distinctive aboriginal culture - i.e., the particular aboriginal practices, traditions or customs - were particular to native culture and not common to non-aboriginal societies. Further, the evidence would need to show that the activities in question have been engaged in for time immemorial at the time sovereignty was asserted by Britain. Macfarlane J.A. wrote (at para. 21):

> To be so regarded those practices must have been integral to the distinctive culture of the aboriginal society from which they were said to have arisen. A modernized form of such a practice would be no less an aboriginal right. A practice which had not been integral to the organized society and its distinctive culture, but which became prevalent merely as a result of European influences, would not qualify for protection as an aboriginal right. [Emphasis added.]

The majority of the Court of Appeal agreed with the trial judge's findings and held that the Sto:lo's practices, traditions and customs did not justify the recognition of an aboriginal right to fish for commercial purposes.

204 Lambert J.A., in dissent, applied what he called a "social" form of description of aboriginal rights, one which does not "freeze" native practices, traditions and customs in time. In light of the evidence, he concluded that the distinctive aboriginal culture of the Sto:lo warranted the recognition of an aboriginal right to sell, trade and barter fish in order to provide them with a "moderate livelihood". He stated (at para. 150):

> For those reasons I conclude that the best description of the aboriginal customs, traditions and practices of the Sto:lo people in relation to the sockeye salmon run on the Fraser River is that their aboriginal customs, traditions and practices have given rise to an aboriginal right, to be exercised in accordance with their rights of self-regulation including recognition of the need for conservation to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood, and, in any event, not less than the quantity of salmon needed to provide every one of the collective holders of the aboriginal right with the same amount of salmon per person per year as would have been consumed or otherwise utilized by each of the collective holders of the right, on average, from a comparable year's salmon run, in, say, 1800. [Italics in original; emphasis added.]

205 It appears from the foregoing review of the judgments that the conclusions on the findings of fact relating to whether the Sto:lo possess an aboriginal right to sell, trade and barter fish varied depending on the delineation of the aboriginal right claimed and on the approach used to interpreting such right. The trial judge, as well as the majority of the Court of Appeal, framed the issue as being whether the Sto:lo possess an aboriginal right to fish for

commercial purposes and used an approach based on the manifestations of distinctive aboriginal culture which differentiates between aboriginal and non-aboriginal practices and which "freezes" aboriginal rights in a pre-contact or pre-sovereignty aboriginal time. The summary appeal judge, as well as Lambert J.A. at the Court of Appeal, described the issue in terms of whether the Sto:lo possess an aboriginal right to sell, trade and barter fish for livelihood. Further, they examined the aboriginal right claimed at a certain level of abstraction, which focused on the distinctive aboriginal culture of the Sto:lo and which was evolutive in nature.

206 As I have already noted elsewhere, the issue in the present appeal is whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Accordingly, the trial judge and the majority of the Court of Appeal erred in framing the issue. Furthermore, it is my view that the nature and extent of aboriginal rights protected under s. 35(1) of the Constitution Act, 1982 must be defined by referring to the notion of "integral part of a distinctive aboriginal culture", i.e., whether an aboriginal practice, tradition or custom has been sufficiently significant and fundamental to the culture and social organization of the particular group of aboriginal people for a substantial continuous period of time. Therefore, by using a "frozen right" approach focusing on aboriginal practice to defining the nature and extent of the aboriginal right, Scarlett Prov. Ct. J. and the majority of the Court of Appeal were also in error.

207 Consequently, when the trial judge assessed the historical evidence presented at trial, he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1) of the Constitution Act, 1982. He thus made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. It is also noteworthy that the first appellate judge, who asked himself the right questions, made diametrically opposed findings of fact on the evidence presented at trial.

208 The result of these palpable and overriding errors, which affected the trial judge's assessment of the facts, is that an appellate court is justified in intervening - as did the summary appeal judge - in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial: see Stein v. The Ship "Kathy K", supra. I note also that this Court, as a subsequent appellate court in such circumstances, does not have to show any deference to the assessment of the evidence made by lower appellate courts. Since this Court is in no less advantageous or privileged position than the lower appellate courts in assessing the evidence on the record, we are free to reconsider the evidence and substitute our own findings of fact (see Schwartz v. Canada, supra, at paras. 36-37). I find myself, however, in general agreement with the findings of fact of Selbie J., the summary appeal judge, and of Lambert J.A. Nonetheless, I will revisit the evidence to determine whether it reveals that the sale, trade and barter of fish for livelihood, support and sustenance purposes have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time.

209 The Sto:lo, who are part of the Coast Salish Nation, have lived in their villages along the Fraser River from Langley to above Yale. They were an organized society, whose main socio-political unit was the extended family. The Fraser River was their main source of food the year around and, as such, the Sto:lo considered it to be sacred. It is interesting to note that their name, the "Sto:lo", means "people of the river": see Wilson Duff, The Upper Stalo Indians of the Fraser Valley, British Columbia (Anthropology in British Columbia - Memoir No. 1), 1952, at p. 11.

210 Archaeological evidence demonstrates that the Sto:lo have relied on the fishery for centuries. Located near the mouth of the Fraser River, the Sto:lo fishery consists of five species of salmon - sockeye, chinook, coho, chum and pink - as well as sturgeon, eulachons and trout. The Sto:lo used many methods and devices to fish salmon, such as dip-nets, harpoons, weirs, traps and hooks. Both the wind and the heat retention capacity of the geography of the Fraser Canyon result in an excellent area for wind drying fish. Therefore, although fresh fish were procurable year around, they dried or smoked large amounts at the end of the summer to use for the hard times of winter.

211 The Sto:lo community is geographically located between two biogeoclimatic zones: the interior plateau region and the coastal maritime area. As such, they have long enjoyed the exchange of regional goods with the people living in these zones. See, in that respect, the report of Dr. Richard Daly, an expert in social and cultural

anthropology called by the appellant and who gave expert opinion evidence on the social structure and culture of the Sto:lo, and also Duff, The Upper Stalo Indians of the Fraser Valley, British Columbia, supra, at p. 95.

212 The oral histories, corroborated by expert evidence, show a long tradition of trading relationships among the Sto:lo and with their neighbours, both before the arrival of Europeans and to the present day. Dr. Arnoud Henry Stryd, an expert in archaeology with a strong background in anthropology called by the respondent to give expert opinion evidence and to speak to the archaeological record, testified that exchanging goods has been a feature of the human condition from the earliest times:

> Q. Yes. You say there's evidence for trade in non-perishable items throughout much of the archaeological record for British Columbia.
>
> A. Well, that's right. In my point of view, the tendency to trade is one that's very human and if you have things that you have that you don't need and your neighbours have something that you would like that they are willing to, that they don't need, that it seems very obvious that some kind of exchange of goods would take place and the earliest part of the human condition to exchange items. [Emphasis added.]

213 Likewise, John Trevor Dewhirst, an anthropologist and ethno-historian called by the respondent, gave expert opinion evidence on the aboriginal trade of salmon of the Sto:lo. Although he insisted that there was no "organized regularized large scale exchange of salmon" in pre-contact or pre-sovereignty aboriginal time, he testified to the effect that the Sto:lo did exchange, trade and barter salmon among themselves and with other native people, and that such activities were rooted in their culture:

> Q. We had reached the stage, sir, as I understand it where - we're now at the point with your evidence, sir, that the exchange of salmon amongst the Indians - you've mentioned that, sir, there was some exchange of salmon amongst the Indians?
>
> A. Oh, yes, very definitely.
>
> Q. Yes. Could you expand on that, please?
>
> A. Yes. I think it's very clear from the - both from the historical record and - and from the anthropological evidence, the ethnographic evidence collected by various workers, Wilson Duff, Marion Smith, Dr. Daly and others whom we've mentioned - and Suttles - exchange of salmon for other foodstuffs and perhaps non-food items definitely took place amongst the Sto:Lo and was a definite feature of their society and culture.
>
> What I'd like to do is go over some of that material evidence regarding the exchange of salmon and examine that in terms of - of trade and the - try - try to determine - try to develop a context for in fact what was happening at least in some of these instances.
>
> . . .
>
> A. That - I believe that the record does not indicate the presence of an organized regularized large scale exchange of salmon amongst the Sto:Lo or between the Sto:Lo and other Native peoples and by this large scale exchange I - I think - rather, by the exchange of salmon I think it's important to look at this context and see if in fact there is a kind of a market situation. I mean, most cultures, most societies do exchange items between relatives and friends and so on. I think that this is debatable whether you can call this trade in - in the sense of a - of a kind of a marketplace and I'd like to turn now to some of the - some of the evidence that's been presented. [Emphasis added.]

214 It seems well founded to conclude, as the expert witnesses for the respondent did, that no formalized market system of trade of salmon existed in the original Sto:lo society because, as a matter of fact, organized large scale

trade in salmon appears to run contrary to the Sto:lo's aboriginal culture. They viewed salmon as more than just food; they treated salmon with a degree of respect since the Sto:lo community was highly reliant and dependant on the fish resources. On the one hand, the Sto:lo pursued salmon very aggressively in order to get them for livelihood, support and sustenance purposes. On the other, however, they were sufficiently mindful not to exploit the abundance of the river and they taught their children a thoughtful attitude towards salmon and also how to conserve them.

215 As the social and cultural anthropologist Dr. Richard Daly explained at trial, the exchange of salmon among the Sto:lo and with their neighbours was informed by the ethic of feeding people, catching and trading only what was necessary for their needs and the needs of face-to-face relationships:

> Q. Is the sale of fish or other foodstuff, in you opinion, also part of the Sto:lo culture?
>
> A. The way it is explained to me by people in the Sto:lo community, that it's all part of feeding yourself and feeding others. You're looking after your basic necessities. And today it's all done through the medium of cash. And you may not have anything to reciprocate when - when other native people from a different area come to you with say tanned hides from the Interior for making - for handicraft work. You may not have anything to give them in return at that time and you pay for it, like anyone else would. But then when you - you've put up your salmon or you're able to take them a load of fresh salmon you reciprocate and they pay you. But it's - it's considered to be a similar procedure as the bartering because it's satisfying the basic needs.
>
> And also people tell me that they go fishing in order to get the money for the gas to drive to the fishing sites, to look after the repair of their nets and to - to make some of the necessary amounts of cash needed for their day-to-day existence. And I have observed people going out to fish with an intention of selling. They don't go to get a maximum number of fish and sell them on the market for the - the going price. They sell it at the going price but they - they won't take any more fish than they have orders for because that's - that's the wrong attitude towards the fish and fishing. So I think in a sense it - it's very consistent with the type of bartering that has preceded it and it's sort of still couched in that same idiom, as well. [Emphasis added.]

216 The foregoing review of the historical evidence on the record reveals that there was trade of salmon for livelihood, support and sustenance purposes among the Sto:lo and with other native people and, more importantly, that such activities formed part of, and were undoubtedly rooted in, the distinctive aboriginal culture of the Sto:lo. In short, the fishery has always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. Accordingly, to use the terminology of the test propounded above, the sale, trade and barter of fish for livelihood, support and sustenance purposes was sufficiently significant and fundamental to the culture and social organization of the Sto:lo.

217 The period of intensive trade of fish in a market-type economy involving the Sto:lo began after the coming of the Europeans, in approximately 1820, when the Hudson's Bay Company established a post at Fort Langley on the Fraser River. Following that, the Sto:lo participated in a thriving commercial fishery centred around the trade of salmon. According to Jamie Morton, an historian called by the appellant to give expert opinion evidence on the history of the European trade with native people, approximately 1,500 to 3,000 barrels of salmon (with 60-90 fish per barrel) were cured per year, which the Hudson's Bay Company bought and shipped to Hawaii and other international ports. (See also Lambert J.A., at para. 121.)

218 This trade of salmon in a market economy, however, is not relevant to determine whether the Sto:lo possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes. I note, in passing, that such commercial use of the fish would seem to be intrinsically incompatible with the pre-contact or pre-sovereignty culture of the Sto:lo which commanded that the utilization of the salmon, including its sale, trade and barter, be restricted to providing livelihood, support and sustenance, and did not entail obtaining purely commercial profit.

219 As far as the issue here is concerned, the sale, trade and barter of fish for livelihood, support and sustenance

purposes have always been sufficiently significant and fundamental to the culture and social organization of the Sto:lo. This conclusion is no doubt in line with the perspective of the Sto:lo regarding the importance of the trade of salmon in their society. Consequently, the criterion regarding the characterization of aboriginal rights protected under s. 35(1) of the Constitution Act, 1982 is met.

220 Furthermore, there is no doubt that these activities did form part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time. In that respect, we must consider the type of aboriginal practices, traditions and customs, the particular aboriginal culture and society, and the reference period of 20 to 50 years. Here, the historical evidence shows that the Sto:lo's practices, traditions and customs relating to the trade of salmon for livelihood, support and sustenance purposes have existed for centuries before the arrival of Europeans. As well, it appears that such activities have continued, though in modernized forms, until the present day. Accordingly, the time requirement for the recognition of an aboriginal right is also met in this case.

221 As a consequence, I conclude that the Sto:lo Band, of which the appellant is a member, possess an aboriginal right to sell, trade and barter fish for livelihood, support and sustenance purposes. Under s. 35(1) of the Constitution Act, 1982 this right is protected.

VI. Disposition

222 In the result, I would allow the appeal on the question of whether the Sto:lo possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. The question of the extinguishment of such right, as well as the issues of prima facie infringement and justification, must be remitted to trial since there is insufficient evidence to enable this Court to decide upon them. Consequently, the constitutional question can only be answered partially:

Question: Is s. 27(5) of the British Columbia Fishery (General) Regulations, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the Constitution Act, 1982, by reason of the aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982 invoked by the appellant?

Answer: The aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982 invoked by the appellant, are recognized and the question of whether s. 27(5) of the British Columbia Fishery (General) Regulations is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the Constitution Act, 1982, will depend on the issues of extinguishment, prima facie infringement and justification as determined in a new trial.

223 There will be no costs to either party.

The following are the reasons delivered by

McLACHLIN J. (dissenting)

224 This appeal concerns the right of the Sto:lo of British Columbia to sell fish caught in the Fraser River. The appellant, Mrs. Van der Peet, sold salmon caught under an Indian food fishing licence by her common law husband and his brother. The sale of salmon caught under an Indian food licence was prohibited. Mrs. Van der Peet was charged with selling fish contrary to the Regulations of the Fisheries Act, R.S.C. 1970, c. F-14. At trial, she raised the defence that the regulations under which she was charged was invalid because it infringed her aboriginal right, confirmed by s. 35 of the Constitution Act, 1982 to catch and sell fish. If so, s. 52 of the Constitution Act, 1982 acts to invalidate the regulation to the extent of the conflict.

225 The inquiry thus focuses on s. 35(1) of the Constitution Act, 1982, which provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Section 35(1) gives constitutional protection not only to aboriginal rights codified through treaties at the time of its adoption in 1982, but also to aboriginal rights which had not been formally recognized at that date: R. v. Sparrow, *[1990] 1 S.C.R. 1075*, per Dickson C.J. and La Forest J., at pp. 1105-6. The Crown has never entered into a treaty with the Sto:lo. They rely not on a codified aboriginal right, but on one which they ask the courts to recognize under s. 35(1).

226 Against this background, I turn to the questions posed in this appeal:

1. Do the Sto:lo possess an aboriginal right under s. 35(1) of the Constitution Act, 1982 which entitles them to sell fish?
   (a) Has a prima facie right been established?
   (b) If so, has it been extinguished?
2. If a right is established, do the government regulations prohibiting sale infringe the right?
3. If the regulations infringe the right, are they justified?

227 My conclusions on this appeal may be summarized as follows. The issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental aboriginal rights. These encompass the right to be sustained from the land or waters upon which an aboriginal people have traditionally relied for sustenance. Trade in the resource to the extent necessary to maintain traditional levels of sustenance is a permitted exercise of this right. The right endures until extinguished by treaty or otherwise. The right is limited to the extent of the aboriginal people's historic reliance on the resource, as well as the power of the Crown to limit or prohibit exploitation of the resource incompatible with its responsible use. Applying these principles, I conclude that the Sto:lo possess an aboriginal right to fish commercially for purposes of basic sustenance, that this right has not been extinguished, that the regulation prohibiting the sale of any fish constitutes a prima facie infringement of it, and that this infringement is not justified. Accordingly, I conclude that the appellant's conviction must be set aside.

1. Do the Sto:lo Possess an Aboriginal Right to Sell Fish Protected under Section 35(1) of the Constitution Act, 1982?

A. Is a Prima Facie Right Established?

228 I turn first to the principles which govern the inquiry into the existence of an aboriginal right.

(i) General Principles of Interpretation

229 This Court in Sparrow, supra, discussed the dual significance of s. 35(1) of the Constitution Act, 1982 in the context of fishing. Section 35(1) is significant, first, because it entrenches aboriginal rights as of the date of its adoption in 1982. Prior to that date, aboriginal rights to fish were subject to regulation and extinguishment by unilateral government act. After the adoption of s. 35, these rights can be limited only by treaty. But s. 35(1) is significant in a second, broader sense. It may be seen as recognition of the right of aboriginal peoples to fair recognition of aboriginal rights and settlement of aboriginal claims. Thus Dickson C.J. and La Forest J. wrote in Sparrow, at p. 1105:

> . . . s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible. . . . Section 35(1), at the least, provides a solid

> constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

Quoting from Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95, at p. 100, Dickson C.J. and La Forest J. continued at p. 1106:

> . . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

230 It may not be wrong to assert, as the Chief Justice does, that the dual purposes of s. 35(1) are first to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior occupation. But it is, with respect, incomplete. As the foregoing passages from Sparrow attest, s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.

231 Following these precepts, this Court in Sparrow decreed, at pp. 1106-7, that s. 35(1) be construed in a generous, purposive and liberal way. It represents "a solemn commitment that must be given meaningful content" (p. 1108). It embraces and confirms the fiduciary obligation owed by the government to aboriginal peoples (p. 1109). It does not oust the federal power to legislate with respect to aboriginals, nor does it confer absolute rights. Federal power is to be reconciled with aboriginal rights by means of the doctrine of justification. The federal government can legislate to limit the exercise of aboriginal rights, but only to the extent that the limitation is justified and only in accordance with the high standard of honourable dealing which the Constitution and the law imposed on the government in its relations with aboriginals (p. 1109).

232 To summarize, a court approaching the question of whether a particular practice is the exercise of a constitutional aboriginal right under s. 35(1) must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is true to the position of the Crown throughout Canadian history as trustee or fiduciary for the first peoples of this country. Finally, I would join with the Chief Justice in asserting, as Mark Walters counsels in "British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia" (1992), 17 Queen's L.J. 350, at pp. 413 and 412, respectively, that "a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives" of the "two vastly dissimilar legal cultures" of European and aboriginal societies. We apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal tradition.

(ii) The Right Asserted -- the Right to Fish for Commercial Purposes

233 The first step is to ascertain the aboriginal right which is asserted by Mrs. Van der Peet. Are we concerned with the right to fish, the right to sell fish on a small sustenance-related level, or commercial fishing?

234 The Chief Justice and Justice L'Heureux-Dubé state that this appeal does not raise the issue of the right of the Sto:lo to engage in commercial fishery. They argue that the sale of one or two fish to a neighbour cannot be considered commerce, and that the British Columbia courts erred in treating it as such.

235 I agree that this case was defended on the ground that the fish sold by Mrs. Van der Peet were sold for purposes of sustenance. This was not a large corporate money-making activity. In the end, as will be seen, I agree

with Justice L'Heureux-Dubé that a large operation geared to producing profits in excess of what the people have historically taken from the river might not be constitutionally protected.

236 This said, I see little point in labelling Mrs. Van der Peet's sale of fish something other than commerce. When one person sells something to another, that is commerce. Commerce may be large or small, but commerce it remains. On the view I take of the case, the critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

237 Making an artificial distinction between the exchange of fish for money or other goods on the one hand and for commercial purposes on the other, may have serious consequences, if not in this case, in others. If the aboriginal right at issue is defined as the right to trade on a massive, modern scale, few peoples may be expected to establish a commercial right to fish. As the Chief Justice observes in R. v. N.T.C. Smokehouse Ltd., *[1996] 2 S.C.R. 672*, "[t]he claim to an aboriginal right to exchange fish commercially places a more onerous burden" on the aboriginal claimant "than a claim to an aboriginal right to exchange fish for money or other goods" (para. 20). In the former case, the trade must be shown to have existed pre-contact "on a scale best characterized as commercial" (para. 20). With rare exceptions (see the evidence in R. v. Gladstone, *[1996] 2 S.C.R. 723*, released concurrently) aboriginal societies historically were not interested in massive sales. Even if they had been, their societies did not afford them mass markets.

(iii) Aboriginal Rights versus the Exercise of Aboriginal Rights

238 It is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.

239 If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago. So if we ask whether there is an aboriginal right to a particular kind of trade in fish, i.e., large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer may be quite different. Having defined the basic underlying right in general terms, the question then becomes whether the modern practice at issue may be characterized as an exercise of the right.

240 This is how we reconcile the principle that aboriginal rights must be ancestral rights with the uncompromising insistence of this Court that aboriginal rights not be frozen. The rights are ancestral; they are the old rights that have been passed down from previous generations. The exercise of those rights, however, takes modern forms. To fail to recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live.

241 I share the concern of L'Heureux-Dubé J. that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no aboriginal right where a different analysis might find one. By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.

242 To constitute a right under s. 35(1) of the Constitution Act, 1982, the right must be of constitutional significance. A right of constitutional significance may loosely be defined as a right which has priority over ordinary legal principles. It is a maxim which sets the boundaries within which the law must operate. While there were no formal constitutional guarantees of aboriginal rights prior to 1982, we may nevertheless discern certain principles

relating to aboriginal peoples which were so fundamental as to have been generally observed by those charged with dealing with aboriginal peoples and with making and executing the laws that affected them.

243 The activity for which constitutional protection is asserted in this case is selling fish caught in the area of the Fraser River where the Sto:lo traditionally fished for the purpose of sustaining the people. The question is whether this activity may be seen as the exercise of a right which has either been recognized or which so resembles a recognized right that it should, by extension of the law, be so recognized.

(iv) The Time Frame

244 The Chief Justice and L'Heureux-Dubé J. differ on the time periods one looks to in identifying aboriginal rights. The Chief Justice stipulates that for a practice to qualify as an aboriginal right it must be traceable to pre-contact times and be identifiable as an "integral" aspect of the group's culture at that early date. Since the barter of fish was not shown to be more than an incidental aspect of Sto:lo society prior to the arrival of the Europeans, the Chief Justice concludes that it does not qualify as an aboriginal right.

245 L'Heureux-Dubé J., by contrast, minimizes the historic origin of the alleged right. For her, all that is required is that the practice asserted as a right have constituted an integral part of the group's culture and social organization for a period of at least 20 to 50 years, and that it continue to be an integral part of the culture at the time of the assertion of the right.

246 My own view falls between these extremes. I agree with the Chief Justice that history is important. A recently adopted practice would generally not qualify as being aboriginal. Those things which have in the past been recognized as aboriginal rights have been related to the traditional practices of aboriginal peoples. For this reason, this Court has always been at pains to explore the historical origins of alleged aboriginal rights. For example, in Sparrow, this Court began its inquiry into the aboriginal right to fish for food with a review of the fishing practices of the Musqueam Band prior to European contact.

247 I cannot agree with the Chief Justice, however, that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question. As Brennan J. (as he then was) put it in Mabo v. Queensland [No. 2] (1992), 175 C.L.R. 1, at p. 58, "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory." The French version of s. 35(1) aptly captures the governing concept. "Les droits existants -- ancestraux ou issus de traités --" tells us that the rights recognized and affirmed by s. 35(1) must be rooted in the historical or ancestral practices of the aboriginal people in question. This Court in Guerin v. The Queen, *[1984] 2 S.C.R. 335*, adopted a similar approach: Dickson J. (as he then was) refers at p. 376 to "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right. The governing concept is simply the traditional customs and laws of people prior to imposition of European law and customs. What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people. Most often, that law or tradition will be traceable to time immemorial; otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only moment to consider. What went before and after can be relevant too.

248 My concern is that we not substitute an inquiry into the precise moment of first European contact -- an inquiry which may prove difficult -- for what is really at issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory. For example, there are those who assert that Europeans settled the eastern maritime regions of Canada in the 7th and 8th centuries A.D. To argue that aboriginal rights crystallized then would make little sense; the better question is what laws and customs held sway before superimposition of European laws and customs. To take another example, in parts of the west of Canada, over a century elapsed between the first contact with Europeans and imposition of "Canadian" or "European" law. During this period, many tribes lived

largely unaffected by European laws and customs. I see no reason why evidence as to the laws and customs and territories of the aboriginals in this interval should not be considered in determining the nature and scope of their aboriginal rights. This approach accommodates the specific inclusion in s. 35(1) of the Constitution Act, 1982 of the aboriginal rights of the Métis people, the descendants of European explorers and traders and aboriginal women.

249 Not only must the proposed aboriginal right be rooted in the historical laws or customs of the people, there must also be continuity between the historic practice and the right asserted. As Brennan J. put it in Mabo, at p. 60:

> The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.

The continuity requirement does not require the aboriginal people to provide a year-by-year chronicle of how the event has been exercised since time immemorial. Indeed, it is not unusual for the exercise of a right to lapse for a period of time. Failure to exercise it does not demonstrate abandonment of the underlying right. All that is required is that the people establish a link between the modern practice and the historic aboriginal right.

250 While aboriginal rights will generally be grounded in the history of the people asserting them, courts must, as I have already said, take cognizance of the fact that the way those rights are practised will evolve and change with time. The modern exercise of a right may be quite different from its traditional exercise. To deny it the status of a right because of such differences would be to deny the reality that aboriginal cultures, like all cultures, change and adapt with time. As Dickson C.J. and La Forest J. put it in Sparrow, at p. 1093 "[t]he phrase 'existing aboriginal rights' [in s. 35(1) of the Constitution Act, 1982] must be interpreted flexibly so as to permit their evolution over time".

(v) The Procedure for Determining the Existence of an Aboriginal Right

251 Aboriginal peoples, like other peoples, define themselves through a myriad of activities, practices and claims. A few of these, the Canadian Charter of Rights and Freedoms tells us, are so fundamental that they constitute constitutional "rights" of such importance that governments cannot trench on them without justification. The problem before this Court is how to determine what activities, practices and claims fall within this class of constitutionally protected rights.

252 The first and obvious category of constitutionally protected aboriginal rights and practices are those which had obtained legal recognition prior to the adoption of s. 35(1) of the Constitution Act, 1982. Section 35(1) confirms "existing" aboriginal rights. Rights granted by treaties or recognized by the courts prior to 1982 must, it follows, remain rights under s. 35(1).

253 But aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982. As noted above, this Court has held that s. 35(1) "is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples": Sparrow, at p. 1106, quoting Noel Lyon, "An Essay on Constitutional Interpretation", supra, at p. 100. This poses the question of what new, previously unrecognized aboriginal rights may be asserted under s. 35(1).

254 The Chief Justice defines aboriginal rights as specific pre-contact practices which formed an "integral part" of the aboriginal group's "specific distinct culture". L'Heureux-Dubé J., adopting a "dynamic" rights approach, extends aboriginal rights to any activity, broadly defined, which forms an integral part of a distinctive aboriginal group's culture and social organization, regardless of whether the activity pre-dates colonial contact or not. In my respectful view, while both these approaches capture important facets of aboriginal rights, neither provides a satisfactory test for determining whether an aboriginal right exists.

(vi) The "Integral-Incidental" Test

255 I agree with the Chief Justice, at para. 46, that to qualify as an aboriginal right "an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right". I also agree with L'Heureux-Dubé J. that an aboriginal right must be "integral" to a "distinctive aboriginal group's culture and social organization". To say this is simply to affirm the foundation of aboriginal rights in the laws and customs of the people. It describes an essential quality of an aboriginal right. But, with respect, a workable legal test for determining the extent to which, if any, commercial fishing may constitute an aboriginal right, requires more. The governing concept of integrality comes from a description in the Sparrow case where the extent of the aboriginal right (to fish for food) was not seriously in issue. It was never intended to serve as a test for determining the extent of disputed exercises of aboriginal rights.

256 My first concern is that the proposed test is too broad to serve as a legal distinguisher between constitutional and non-constitutional rights. While the Chief Justice in the latter part of his reasons seems to equate "integral" with "not incidental", the fact remains that "integral" is a wide concept, capable of embracing virtually everything that an aboriginal people customarily did. The Shorter Oxford English Dictionary, vol. 1 (3rd ed.1973), offers two definitions of "integral": 1. "Of or pertaining to a whole . . . constituent, component"; and 2. "Made up of component parts which together constitute a unity". To establish a practice as "integral" to a group's culture, it follows, one must show that the practice is part of the unity of practices which together make up that culture. This suggests a very broad definition: anything which can be said to be part of the aboriginal culture would qualify as an aboriginal right protected by the Constitution Act, 1982. This would confer constitutional protection on a multitude of activities, ranging from the trivial to the vital. The Chief Justice attempts to narrow the concept of "integral" by emphasizing that the proposed right must be part of what makes the group "distinctive", the "specific" people which they are, stopping short, however, of asserting that the practice must be unique to the group and adhere to none other. But the addition of concepts of distinctness and specificity do not, with respect, remedy the overbreadth of the test. Minor practices, falling far short of the importance which we normally attach to constitutional rights, may qualify as distinct or specific to a group. Even the addition of the notion that the characteristic must be central or important rather than merely "incidental", fails to remedy the problem; it merely poses another problem, that of determining what is central and what is incidental to a people's culture and social organization.

257 The problem of overbreadth thus brings me to my second concern, the problem of indeterminacy. To the extent that one attempts to narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right.

258 Finally, the proposed test is, in my respectful opinion, too categorical. Whether something is integral or not is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the ground of justification. In this appeal, the Chief Justice's exclusion of "commercial fishing" from the right asserted masks the lack of internal limits in the integral test. But the logic of the test remains ineluctable, for all that: assuming that another people in another case establishes that commercial fishing was integral to its ancestral culture, that people will, on the integral test, logically have an absolute priority over non-aboriginal and other less fortunate aboriginal fishers, subject only to justification. All others, including other native fishers unable to establish commercial fishing as integral to their particular cultures, may have no right to fish at all.

259 The Chief Justice recognizes the all or nothing logic of the "integral" test in relation to commercial fishing rights in his reasons in Gladstone, supra. Having determined in that case that an aboriginal right to commercial fishing is established, he notes at para. 61 that unlike the Indian food fishery, which is defined in terms of the peoples' need for food, the right to fish commercially "has no internal limitations". Reasoning that where the test for the right imposes no internal limit on the right, the court may do so, he adopts a broad justification test which would go beyond limiting the use of the right in ways essential to its exercise as envisioned in Sparrow, to permit partial

reallocation of the aboriginal right to non-natives. The historically based test for aboriginal rights which I propose, by contrast, possesses its own internal limits and adheres more closely to the principles that animated Sparrow, as I perceive them.

(vii) The Empirical Historic Approach

260 The tests proposed by my colleagues describe qualities which one would expect to find in aboriginal rights. To this extent they may be informative and helpful. But because they are overinclusive, indeterminate, and ultimately categorical, they fall short, in my respectful opinion, of providing a practically workable principle for identifying what is embraced in the term "existing aboriginal rights" in s. 35(1) of the Constitution Act, 1982.

261 In my view, the better approach to defining aboriginal rights is an empirical approach. Rather than attempting to describe a priori what an aboriginal right is, we should look to history to see what sort of practices have been identified as aboriginal rights in the past. From this we may draw inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1). Confronted by a particular claim, we should ask, "Is this like the sort of thing which the law has recognized in the past?". This is the time-honoured methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis.

262 Just as there are two fundamental types of scientific reasoning -- reasoning from first principles and empirical reasoning from experience -- so there are two types of legal reasoning. The approach adopted by the Chief Justice and L'Heureux-Dubé J. in this appeal may be seen as an example of reasoning from first principles. The search is for a governing principle which will control all future cases. Given the complexity and sensitivity of the issue of defining hitherto undefined aboriginal rights, the pragmatic approach typically adopted by the common law -- reasoning from the experience of decided cases and recognized rights -- has much to recommend it. In this spirit, and bearing in mind the important truths captured by the "integral" test proposed by the Chief Justice and L'Heureux-Dubé J., I turn to the question of what the common law and Canadian history tell us about aboriginal rights.

(viii) The Common Law Principle: Recognition of Pre-Existing Rights and Customs

263 The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread -- the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement.

264 For centuries, it has been established that upon asserting sovereignty the British Crown accepted the existing property and customary rights of the territory's inhabitants. Illustrations abound. For example, after the conquest of Ireland, it was held in The Case of Tanistry (1608), Davis 28, 80 E.R. 516, that the Crown did not take actual possession of the land by reason of conquest and that pre-existing property rights continued. Similarly, Lord Sumner wrote in In re Southern Rhodesia, [1919] A.C. 211, at p. 233 that "it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected [pre-existing aboriginal rights] and forborne to diminish or modify them". Again, Lord Denning affirmed the same rule in Oyekan v. Adele, [1957] 2 All E.R. 785, at p. 788:

> In inquiring . . . what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native

> law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law. . . . [Emphasis added.]

265 Most recently in Mabo, the Australian High Court, after a masterful review of Commonwealth and American jurisprudence on the subject, concluded that the Crown must be deemed to have taken the territories of Australia subject to existing aboriginal rights in the land, even in the absence of acknowledgment of those rights. As Brennan J. put it at p. 58: "an inhabited territory which became a settled colony was no more a legal desert than it was 'desert uninhabited'. . . ." Once the "fictions" of terra nullius are stripped away, "[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs" of the indigenous people.

266 In Canada, the Courts have recognized the same principle. Thus in Calder v. Attorney-General of British Columbia, *[1973] S.C.R. 313*, at p. 328, Judson J. referred to the asserted right "to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished". In the same case, Hall J. (dissenting on another point) rejected at p. 416 as "wholly wrong" "the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer". Subsequent decisions in this Court are consistent with the view that the Crown took the land subject to pre-existing aboriginal rights and that such rights remain in the aboriginal people, absent extinguishment or surrender by treaty.

267 In Guerin, supra, this Court re-affirmed this principle, stating at pp. 377-78:

> In recognizing that the Proclamation is not the sole source of Indian title the Calder decision went beyond the judgment of the Privy Council in St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect Calder is consistent with the position of Chief Justice Marshall in the leading American cases of Johnson v. M'Intosh, 8 Wheaton 543 (1823), and Worcester v. State of Georgia, 6 Peters 515 (1832), cited by Judson and Hall JJ. in their respective judgments.
>
> In Johnson v. M'Intosh Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. [Emphasis added.]

This Court's judgment in Sparrow, supra, re-affirmed that approach.

(ix) The Nature of the Interests and Customs Recognized by the Common Law

268 This much is clear: the Crown, upon discovering and occupying a "new" territory, recognized the law and custom of the aboriginal societies it found and the rights in the lands they traditionally occupied that these supported. At one time it was suggested that only legal interests consistent with those recognized at common law would be recognized. However, as Brennan J. points out in Mabo, at p. 59, that rigidity has been relaxed since the decision of the Privy Council in Tijani v. Secretary, Southern Nigeria, [1921] 2 A.C. 399, "[t]he general principle that the common law will recognize a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title".

269 It may now be affirmed with confidence that the common law accepts all types of aboriginal interests, "even though those interests are of a kind unknown to English law": per Lord Denning in Oyekan, supra, at p. 788. What the laws, customs and resultant rights are "must be ascertained as a matter of fact" in each case, per Brennan J. in Mabo, at p. 58. It follows that the Crown in Canada must be taken as having accepted existing native laws and customs and the interests in the land and waters they gave rise to, even though they found no counterpart in the

law of England. In so far as an aboriginal people under internal law or custom had used the land and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty.

270 This much appears from the Royal Proclamation of 1763, R.S.C., 1985, App. II, No. 1, which set out the rules by which the British proposed to govern the territories of much of what is now Canada. The Proclamation, while not the sole source of aboriginal rights, recognized the presence of aboriginals as existing occupying peoples. It further recognized that they had the right to use and alienate the rights they enjoyed the use of those territories. The assertion of British sovereignty was thus expressly recognized as not depriving the aboriginal people of Canada of their pre-existing rights; the maxim of terra nullius was not to govern here. Moreover, the Proclamation evidences an underlying concern for the continued sustenance of aboriginal peoples and their descendants. It stipulated that aboriginal people not be permitted to sell their land directly but only through the intermediary of the Crown. The purpose of this stipulation was to ensure that the aboriginal peoples obtained a fair exchange for the rights they enjoyed in the territories on which they had traditionally lived -- an exchange which would ensure the sustenance not only of the current generation but also of generations to come. (See Guerin, supra, at p. 376; see also Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727.)

271 The stipulation against direct sale to Europeans was coupled with a policy of entering into treaties with various aboriginal peoples. The treaties typically sought to provide the people in question with a land base, termed a reserve, as well as other benefits enuring to the signatories and generations to come -- cash payments, blankets, foodstuffs and so on. Usually the treaties conferred a continuing right to hunt and fish on Crown lands. Thus the treaties recognized that by their own laws and customs, the aboriginal people had lived off the land and its waters. They sought to preserve this right in so far as possible as well as to supplement it to make up for the territories ceded to settlement.

272 These arrangements bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding -- the Grundnorm of settlement in Canada -- was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them. (In making this comment, I do not foreclose the possibility that other arguments might be made with respect to areas in Canada settled by France.)

273 The same notions held sway in the colony of British Columbia prior to union with Canada in 1871. An early governor, Governor Douglas, pronounced a policy of negotiating solemn treaties with the aboriginal peoples similar to that pursued elsewhere in Canada. Tragically, that policy was overtaken by the less generous views that accompanied the rapid settlement of British Columbia. The policy of negotiating treaties with the aboriginals was never formally abandoned. It was simply overridden, as the settlers, aided by administrations more concerned for short-term solutions than the duty of the Crown toward the first peoples of the colony settled where they wished and allocated to the aboriginals what they deemed appropriate. This did not prevent the aboriginal peoples of British Columbia from persistently asserting their right to an honourable settlement of their ancestral rights -- a settlement which most of them still await. Nor does it negate the fundamental proposition acknowledged generally throughout Canada's history of settlement that the aboriginal occupants of particular territories have the right to use and be sustained by those territories.

274 Generally speaking, aboriginal rights in Canada were group rights. A particular aboriginal group lived on or controlled a particular territory for the benefit of the group as a whole. The aboriginal rights of such a group inure to the descendants of the group, so long as they maintain their connection with the territory or resource in question. In Canada, as in Australia, "many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connextion with it" (p. 59). But "[w]here a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connextion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence" (Mabo, at pp. 59-60).

275 It thus emerges that the common law and those who regulated the British settlement of this country predicated dealings with aboriginals on two fundamental principles. The first was the general principle that the Crown took subject to existing aboriginal interests in the lands they traditionally occupied and their adjacent waters, even though those interests might not be of a type recognized by British law. The second, which may be viewed as an application of the first, is that the interests which aboriginal peoples had in using the land and adjacent waters for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the Constitution Act, 1982.

(x) The Right to Fish for Sale

276 Against this background, I come to the issue at the heart of this case. Do aboriginal people enjoy a constitutional right to fish for commercial purposes under s. 35(1) of the Constitution Act, 1982? The answer is yes, to the extent that the people in question can show that it traditionally used the fishery to provide needs which are being met through the trade.

277 If an aboriginal people can establish that it traditionally fished in a certain area, it continues to have a similar right to do so, barring extinguishment or treaty. The same justice that compelled those who drafted treaties with the aboriginals in the nineteenth century to make provision for the continuing sustenance of the people from the land, compels those dealing with aboriginals with whom treaties were never made, like the Sto:lo, to make similar provision.

278 The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained from the portion of the river or sea. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a prima facie right to continue to do so, absent a treaty exchanging that right for other consideration. At its base, the right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in their modern form. However, if the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

279 The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource. In most cases, one would expect the aboriginal right to trade to be confined to what is necessary to provide basic housing, transportation, clothing and amenities -- the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery, over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers. On this principle, where the aboriginal people can demonstrate that they historically have drawn a moderate livelihood from the fishery, the aboriginal right to a "moderate livelihood" from the fishery may be established (as Lambert J.A. concluded in the British Columbia Court of Appeal). However, there is no automatic entitlement to a moderate or any other livelihood from a particular resource. The inquiry into what aboriginal rights a particular people possess is an inquiry of fact, as we have seen. The right is established only to the extent that the aboriginal group in question can establish historical reliance on the resource. For example, evidence that a people used a water resource only for occasional food and sport fishing would not support a right to fish for purposes of sale, much less to fish to the extent needed to provide a moderate livelihood. There is, on this view, no generic right of commercial fishing, large-scale or small. There is only the right of a particular aboriginal people to take from the resource the modern equivalent of what by aboriginal law and custom it historically took. This conclusion echos the

suggestion in Jack v. The Queen, *[1980] 1 S.C.R. 294*, approved by Dickson C.J. and La Forest J. in Sparrow, of a "limited" aboriginal priority to commercial fishing.

280 A further limitation is that all aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. These aboriginal rights are founded on the right of the people to use the land and adjacent waters. There can be no use, on the long term, unless the product of the lands and adjacent waters is maintained. So maintenance of the land and the waters comes first. To this may be added a related limitation. Any right, aboriginal or other, by its very nature carries with it the obligation to use it responsibly. It cannot be used, for example, in a way which harms people, aboriginal or non-aboriginal. It is up to the Crown to establish a regulatory regime which respects these objectives. In the analytic framework usually used in cases such as this, the right of the government to limit the aboriginal fishery on grounds such as these is treated as a matter of justifying a limit on a "prima facie" aboriginal right. Following this framework, I will deal with it in greater detail under the heading of justification.

(xi) Is an Aboriginal Right to Sell Fish for Commerce Established in this Case?

281 I have concluded that subject to conservation needs, aboriginal peoples may possess a constitutional right under s. 35(1) of the Constitution Act, 1982, to use a resource such as a river site beside which they have traditionally lived to provide the modern equivalent of the amenities which they traditionally have obtained from the resource, whether directly or indirectly, through trade. The question is whether, on the evidence, Mrs. Van der Peet has established that the Sto:lo possessed such a right.

282 The evidence establishes that by custom of the aboriginal people of British Columbia, the Sto:lo have lived since time immemorial at the place of their present settlement on the banks of the Fraser River. It also establishes that as a fishing people, they have for centuries used the fish from that river to sustain themselves. One may assume that the forest and vegetation on the land provided some of their shelter and clothing. However, their history indicates that even in days prior to European contact, the Sto:lo relied on fish, not only for food and ceremonial purposes, but also for the purposes of obtaining other goods through trade. Prior to contact with Europeans, this trade took place with other tribes; after contact, sales on a larger scale were made to the Hudson's Bay Company, a practice which continued for almost a century. In summary, the evidence conclusively establishes that over many centuries, the Sto:lo have used the fishery not only for food and ceremonial purposes, but also to satisfy a variety of other needs. Unless that right has been extinguished, and subject always to conservation requirements, they are entitled to continue to use the river for these purposes. To the extent that trade is required to achieve this end, it falls within that right.

283 I agree with L'Heureux-Dubé J. that the scale of fishing evidenced by the case at bar falls well within the limit of the traditional fishery and the moderate livelihood it provided to the Sto:lo.

284 For these reasons I conclude that Mrs. Van der Peet's sale of the fish can be defended as an exercise of her aboriginal right, unless that right has been extinguished.

B. Is the Aboriginal Right Extinguished?

285 The Crown has never concluded a treaty with the Sto:lo extinguishing its aboriginal right to fish. However, it argues that any right the Sto:lo people possess to fish commercially was extinguished prior to 1982 through regulations limiting commercial fishing by licence. The appellant, for her part, argues that general regulations controlling the fishery do not evidence the intent necessary to establish extinguishment of an aboriginal right.

286 For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": Sparrow, supra, at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in United States v. Dion, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the "clear and plain" test] is clear evidence that [the government] actually considered the conflict between its

intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

287 Following this approach, this Court in Sparrow rejected the Crown's argument that pre-1982 regulations imposing conditions on the exercise of an aboriginal right extinguished it to the extent of the regulation. To accept that argument, it reasoned at p. 1091, would be to elevate such regulations as applied in 1982 to constitutional status and to "incorporate into the Constitution a crazy patchwork of regulations". Rejecting this "snapshot" approach to constitutional rights, the Court distinguished between regulation of the exercise of a right, and extinguishment of the right itself.

288 In this case, the Crown argues that while the regulatory scheme may not have extinguished the aboriginal right to fish for food (Sparrow) it nevertheless extinguished any aboriginal right to fish for sale. It relies in particular on Order in Council, P.C. 2539, of September 11, 1917, which provided:

> Whereas it is represented that since time immemorial, it has been the practice of the Indians of British Columbia to catch salmon by means of spears and otherwise after they have reached the upper non-tidal portions of the rivers;
>
> And whereas while after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested, in view of the great importance the Indians attached to their practice of catching salmon they have been permitted to do so for their own food purposes only . . . .
>
> And whereas the Department of the Naval Service is informed that the Indians have concluded that this regulation is ineffective, and this season arrangements are being made by them to carry on fishing for commercial purposes in an extensive way;
>
> And whereas it is considered to be in the public interest that this should be prevented and the Minister of the Naval Service, after consultation with the Department of Justice on the subject, recommends that action as follows be taken;
>
> Therefore His Excellency the Governor General in Council, under the authority of section 45 of the Fisheries Act, 4-5 George V, Chapter 8, is pleased to order and it is hereby ordered as follows: --
>
> > 2. An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose . . . .

289 The argument that Regulation 2539 extinguished any aboriginal right to fish commercial faces two difficulties. The first is the absence of any indication that the government of the day considered the aboriginal right on the one hand, and the effect of its proposed action on that right on the other, as required by the "clear and plain" test. There is no recognition in the words of the regulation of any aboriginal right to fish. They acknowledge no more than an aboriginal "practice" of fishing for food. The regulation takes note of the aboriginal position that the regulations confining them to food fishing are "ineffective". However, it does not accept that position. It rather rejects it and affirms that free fishing by natives for sale will not be permitted. This does not meet the test for regulatory extinction of aboriginal rights which requires: acknowledgment of right, conflict of the right proposed with policy, and resolution of the two.

290 The second difficulty the Crown's argument encounters is that the passage quoted does not present a full picture of the regulatory scheme imposed. To determine the intent of Parliament, one must consider the statute as a whole: Driedger on the Construction of Statutes (3rd ed. 1994). Similarly, to determine the intent of the Governor in Council making a regulation, one must look to the effect of a regulatory scheme as a whole.

291 The effect of Regulation 2539 was that Indians were no longer permitted to sell fish caught pursuant to their right to fish for food. However, Regulation 2539 was only a small part of a much larger regulatory scheme, dating back to 1908, in which aboriginal peoples played a significant part. While the 1917 regulation prohibits aboriginal peoples from selling fish obtained under their food rights, it did not prevent them from obtaining licences to fish

commercially under the general regulatory scheme laid down in 1908 and modified through the years. In this way, the regulations recognized the aboriginal right to participate in the commercial fishery. Instead of barring aboriginal fishers from the commercial fishery, government regulations and policy before and after 1917 have consistently given them preferences in obtaining the necessary commercial licences. Far from extinguishing the aboriginal right to fish, this policy may be seen as tacit acceptance of a "limited priority" in aboriginal fishers to the commercial fishery of which Dickson J. spoke in Jack and which was approved in Sparrow.

292 Evidence of the participation in commercial fishing by aboriginal people prior to the regulations in 1917 in commercial fishing was discussed by Dickson J. in Jack, supra. That case was concerned with the policy of the Colonialists prior to Confederation. Without repeating the entirety of that discussion here, it is sufficient to note the conclusion reached at p. 311:

> . . . the Colony gave priority to the Indian fishery as an appropriate pursuit for the coastal Indians, primarily for food purposes and, to a lesser extent, for barter purposes with the white residents.

293 This limited priority for aboriginal commercial fishing is reflected in the government policy of extending preferences to aboriginals engaged in the fishery. The 1954 Regulations, as amended in 1974, provided for reduced licensing fees for aboriginal fishers. For example, either a gill-net fishing licence that would cost a non-aboriginal fisher $2,000, or a seine fishing licence that would cost a non-native fisher $200, would cost a native fisher $10. Moreover, the evidence available indicates that there has been significant aboriginal participation in the commercial fishery. Specifically, a review of aboriginal participation in the commercial fishery for 1985 found that 20.5 per cent of the commercial fleet was Indian-owned or Indian-operated and that that segment of the commercial fleet catches 27.7 per cent of the commercial catch. Since the regulatory scheme is cast in terms of individual rights, it has never expressly recognized the right of a particular aboriginal group to a specific portion of the fishery. However, it has done so implicitly by granting aboriginal fishers preferences based on their membership in an aboriginal group.

294 It thus emerges that the regulatory scheme in place since 1908, far from extinguishing the aboriginal right to fish for sale, confirms that right and even suggests recognition of a limited priority in its exercise. I conclude that the aboriginal right of the Sto:lo to fish for sustenance has not been extinguished.

295 The remaining questions are whether the regulation infringes the Sto:lo's aboriginal right to fish for trade to supplement the fish they took for food and ceremonial purposes and, if so, whether that infringement constitutes a justifiable limitation on the right.

2. Is the Aboriginal Right Infringed?

296 The right established, the next inquiry, following Sparrow, is whether the regulation constitutes a prima facie infringement of the aboriginal right. If it does, the inquiry moves on to the question of whether the prima facie infringement is justified.

297 The test for prima facie infringement prescribed by Sparrow is "whether the legislation in question has the effect of interfering with an existing aboriginal right" (p. 1111). If it has this effect, the prima facie infringement is made out. Having set out this test, Dickson C.J. and La Forest J. supplement it by stating that the court should consider whether the limit is unreasonable, whether it imposes undue hardship, and whether it denies to the holders of the right their "preferred means of exercising that right" (p. 1112). These questions appear more relevant to the stage two justification analysis than to determining the prima facie right; as the Chief Justice notes in Gladstone (at para. 43), they seem to contradict the primary assertion that a measure which has the effect of interfering with the aboriginal right constitutes a prima facie violation. In any event, I agree with the Chief Justice that a negative answer to the supplementary questions does not negate a prima facie infringement.

298 The question is whether the regulatory scheme under which Mrs. Van der Peet stands charged has the "effect"

of "interfering with an existing aboriginal right", in this case the right of the Sto:lo to sell fish to the extent required to provide for needs they traditionally by native law and custom took from the section of the river whose banks they occupied. The inquiry into infringement in a case like this may be viewed in two stages. At the first stage, the person charged must show that he or she had a prima facie right to do what he or she did. That established, it falls to the Crown to show that the regulatory scheme meets the particular entitlement of the Sto:lo to fish for sustenance.

299 The first requirement is satisfied in this case by demonstration of the aboriginal right to sell fish prohibited by regulation. The second requirement, however, has not been satisfied. Notwithstanding the evidence that aboriginal fishers as a class enjoy a significant portion of the legal commercial market and that considerable fish caught as "food fish" is illegally sold, the Crown has not established that the existing regulations satisfy the particular right of the Sto:lo to fish commercially for sustenance. The issue is not the quantity of fish currently caught, which may or may not satisfy the band's sustenance requirements. The point is rather that the Crown, by denying the Sto:lo the right to sell any quantity of fish, denies their limited aboriginal right to sell fish for sustenance. The conclusion of prima facie infringement of the collective aboriginal right necessarily follows.

300 The Crown argued that regulation of a fishery to meet the sustenance needs of a particular aboriginal people is administratively unworkable. The appellant responded with evidence of effective regulation in the State of Washington of aboriginal treaty rights to sustenance fishing. I conclude that the sustenance standard is not so inherently indeterminate that it cannot be regulated. It is for the Crown, charged with administering the resource, to determine effective means to regulate its lawful use. The fact that current regulations fail to do so confirms the infringement, rather than providing a defence to it.

3. Is the Government's Limitation of Mrs. Van der Peet's Right to Fish for Sustenance Justified?

301 Having concluded that the Sto:lo possess a limited right to engage in fishing for commerce and that the regulation constitutes a prima facie infringement of this right, it remains to consider whether the infringement is justified. The inquiry into justification is in effect an inquiry into the extent the state can limit the exercise of the right on the ground of policy.

302 Just as I parted company with the Chief Justice on the issue of what constitutes an aboriginal right, so I must respectfully dissent from his view of what constitutes justification. Having defined the right at issue in such a way that it possesses no internal limits, the Chief Justice compensates by adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony: Gladstone, at paras. 73 to 75. I would respectfully decline to adopt this concept of justification for three reasons. First, it runs counter to the authorities, as I understand them. Second, it is indeterminate and ultimately more political than legal. Finally, if the right is more circumspectly defined, as I propose, this expansive definition of justification is not required. I will elaborate on each of these difficulties in turn, arguing that they suggest a more limited view of justification: that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use.

303 I turn first to the authorities. The doctrine of justification was elaborated in Sparrow. Dickson C.J. and La Forest J. endorsed a two-part test. First, the Crown must establish that the law or regulation at issue was enacted for a "compelling and substantial" (p. 1113) purpose. Conserving the resource was cited as such a purpose. Also valid, "would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves" (p. 1113). Second, the government must show that the law or regulation is consistent with the fiduciary duty of the Crown toward aboriginal peoples. This means, Dickson C.J. and La Forest J. held, that the Crown must demonstrate that it has given the aboriginal fishery priority in a manner consistent with the views of Dickson J. (as he then was) in Jack: absolute priority to the Crown to act in accordance with conservation; clear priority to Indian food fishing; and "limited priority" for aboriginal commercial fishing "over the competing demands of commercial and sport fishing" (p. 311).

304 The Chief Justice interprets the first requirement of the Sparrow test for justification, a compelling and substantial purpose, as extending to any goal which can be justified for the good of the community as a whole,

aboriginal and non-aboriginal. This suggests that once conservation needs are met, the inquiry is whether the government objective is justifiable, having regard to regional interests and the interests of non-aboriginal fishers. The Chief Justice writes in Gladstone (at para. 75):

> . . . I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. [Emphasis added.]

305 Leaving aside the undefined limit of "proper circumstances", the historical reliance of the participation of non-aboriginal fishers in the fishery seems quite different from the compelling and substantial objectives this Court described in Sparrow -- conservation of the resource, prevention of harm to the population, or prevention of harm to the aboriginal people themselves. These are indeed compelling objectives, relating to the fundamental conditions of the responsible exercise of the right. As such, it may safely be said that right-thinking persons would agree that these limits may properly be applied to the exercise of even constitutionally entrenched rights. Conservation, for example, is the condition upon which the right to use the resource is itself based; without conservation, there can be no right. The prevention of harm to others is equally compelling. No one can be permitted to exercise rights in a way that will harm others. For example, in the domain of property, the common law has long provided remedies against those who pollute streams or use their land in ways that detrimentally affect others.

306 Viewed thus, the compelling objectives foreseen in Sparrow may be seen as united by a common characteristic; they constitute the essential pre-conditions of any civilized exercise of the right. It may be that future cases may endorse limitation of aboriginal rights on other bases. For the purposes of this case, however, it may be ventured that the range of permitted limitation of an established aboriginal right is confined to the exercise of the right rather than the diminution, extinguishment or transfer of the right to others. What are permitted are limitations of the sort that any property owner or right holder would reasonably expect -- the sort of limitations which must be imposed in a civilized society if the resource is to be used now and in the future. They do not negate the right, but rather limit its exercise. The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in Sparrow.

307 The Chief Justice, while purporting to apply the Sparrow test for justification, deviates from its second requirement as well as the first, in my respectful view. Here the stipulations are that the limitation be consistent with the Crown's fiduciary duty to the aboriginal people and that it reflect the priority set out by Dickson J. in Jack. The duty of a fiduciary, or trustee, is to protect and conserve the interest of the person whose property is entrusted to him. In the context of aboriginal rights, this requires that the Crown not only preserve the aboriginal people's interest, but also manage it well: Guerin. The Chief Justice's test, however, would appear to permit the constitutional aboriginal fishing right to be conveyed by regulation, law or executive act to non-native fishers who have historically fished in the area in the interests of community harmony and reconciliation of aboriginal and non-aboriginal interests. Moreover, the Chief Justice's scheme has the potential to violate the priority scheme for fishing set out in Jack. On his test, once conservation is satisfied, a variety of other interests, including the historical participation of non-native fishers, may justify a variety of regulations governing distribution of the resource. The only requirement is that the distribution scheme "take into account" the aboriginal right. Such an approach, I fear, has the potential to violate not only the Crown's fiduciary duty toward native peoples, but also to render meaningless the "limited priority" to the non-commercial fishery endorsed in Jack and Sparrow.

308 Put another way, the Chief Justice's approach might be seen as treating the guarantee of aboriginal rights under s. 35(1) as if it were a guarantee of individual rights under the Charter. The right and its infringement are acknowledged. However, the infringement may be justified if this is in the interest of Canadian society as a whole. In the case of individual rights under the Charter, this is appropriate because s. 1 of the Charter expressly states

that these rights are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, in the case of aboriginal rights guaranteed by s. 35(1) of the Constitutional Act, 1982, the framers of s. 35(1) deliberately chose not to subordinate the exercise of aboriginal rights to the good of society as a whole. In the absence of an express limitation on the rights guaranteed by s. 35(1), limitations on them under the doctrine of justification must logically and as a matter of constitutional construction be confined, as Sparrow suggests, to truly compelling circumstances, like conservation, which is the sine qua non of the right, and restrictions like preventing the abuse of the right to the detriment of the native community or the harm of others -- in short, to limitations which are essential to its continued use and exploitation. To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the Constitution.

309 A second objection to the approach suggested by the Chief Justice is that it is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement. The imprecision of the proposed test is apparent. "In the right circumstances", themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed. Courts may properly be expected, the Chief Justice suggests, not to be overly strict in their review; as under s. 1 of the Charter, the courts should not negate the government decision, so long as it represents a "reasonable" resolution of conflicting interests. This, with respect, falls short of the "solid constitutional base upon which subsequent negotiations can take place" of which Dickson C.J. and La Forest J. wrote in Sparrow, at p. 1105.

310 My third observation is that the proposed departure from the principle of justification elaborated in Sparrow is unnecessary to provide the "reconciliation" of aboriginal and non-aboriginal interests which is said to require it. The Chief Justice correctly identifies reconciliation between aboriginal and non-aboriginal communities as a goal of fundamental importance. This desire for reconciliation, in many cases long overdue, lay behind the adoption of s. 35(1) of the Constitution Act, 1982. As Sparrow recognized, one of the two fundamental purposes of s. 35(1) was the achievement of a just and lasting settlement of aboriginal claims. The Chief Justice also correctly notes that such a settlement must be founded on reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must, of necessity, find their exercise. It is common ground that ". . . a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives" of the "two vastly dissimilar legal cultures" of European and aboriginal cultures": Walters, supra, at pp. 413 and 412, respectively. The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.

311 My reasons are twofold. First, as suggested earlier, if we adopt a conception of aboriginal rights founded in history and the common law rather than what is "integral" to the aboriginal culture, the need to adopt an expansive concept of justification diminishes. As the Chief Justice observes, the need to expand the Sparrow test stems from the lack of inherent limits on the aboriginal right to commercial fishing he finds to be established in Gladstone. On the historical view I take, the aboriginal right to fish for commerce is limited to supplying what the aboriginal people traditionally took from the fishery. Since these were not generally societies which valued excess or accumulated wealth, the measure will seldom, on the facts, be found to exceed the basics of food, clothing and housing, supplemented by a few amenities. This accords with the "limited priority" for aboriginal commercial fishing that this Court endorsed in Sparrow. Beyond this, commercial and sports fishermen may enjoy the resource as they always have, subject to conservation. As suggested in Sparrow, the government should establish what is required to meet what the aboriginal people traditionally by law and custom took from the river or sea, through consultation and negotiation with the aboriginal people. In normal years, one would expect this to translate to a relatively small percentage of the total commercial fishing allotment. In the event that conservation concerns virtually eliminated commercial fishing, aboriginal commercial fishing, limited as it is, could itself be further reduced or even eliminated.

312 On this view, the right imposes its own internal limit -- equivalence with what by ancestral law and custom the aboriginal people in question took from the resource. The government may impose additional limits under the rubric of justification to ensure that the right is exercised responsibly and in a way that preserves it for future generations. There is no need to impose further limits on it to affect reconciliation between aboriginal and non-aboriginal peoples.

313 The second reason why it is unnecessary to adopt the broad doctrine of justification proposed by the Chief Justice is that other means, yet unexploited, exist for resolving the different legal perspectives of aboriginal and non-aboriginal people. In my view, a just calibration of the two perspectives starts from the premise that full value must be accorded to such aboriginal rights as may be established on the facts of the particular case. Only by fully recognizing the aboriginal legal entitlement can the aboriginal legal perspective be satisfied. At this stage of the process -- the stage of defining aboriginal rights -- the courts have an important role to play. But that is not the end of the matter. The process must go on to consider the non-aboriginal perspective -- how the aboriginal right can be legally accommodated within the framework of non-aboriginal law. Traditionally, this has been done through the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. At this stage, the stage of reconciliation, the courts play a less important role. It is for the aboriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized aboriginal rights. This process -- definition of the rights guaranteed by s. 35(1) followed by negotiated settlements -- is the means envisioned in Sparrow, as I perceive it, for reconciling the aboriginal and non-aboriginal legal perspectives. It has not as yet been tried in the case of the Sto:lo. A century and one-half after European settlement, the Crown has yet to conclude a treaty with them. Until we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.

314 I have argued that the broad approach to justification proposed by the Chief Justice does not conform to the authorities, is indeterminate, and is, in the final analysis unnecessary. Instead, I have proposed that justifiable limitation of aboriginal rights should be confined to regulation to ensure their exercise conserves the resource and ensures responsible use. There remains a final reason why the broader view of justification should not be accepted. It is, in my respectful opinion, unconstitutional.

315 The Chief Justice's proposal comes down to this. In certain circumstances, aboriginals may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests. In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard aboriginal rights and property. But my concern is more fundamental. How, without amending the Constitution, can the Crown cut down the aboriginal right? The exercise of the rights guaranteed by s. 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aboriginals to non-aboriginals, would be to diminish the substance of the right that s. 35(1) of the Constitution Act, 1982 guarantees to the aboriginal people. This no court can do.

316 I therefore conclude that a government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Specifically, limits that have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified. Short of repeal of s. 35(1), such transfers can be made only with the consent of the aboriginal people. It is for the governments of this country and the aboriginal people to determine if this should be done, not the courts. In the meantime, it is the responsibility of the Crown to devise a regulatory scheme which ensures the responsible use of the resource and provides for the division of what remains after conservation needs have been met between aboriginal and non-aboriginal peoples.

317 The picture of aboriginal rights that emerges resembles that put forward by Dickson J. (as he then was) in Jack and endorsed in Sparrow. Reasoning from the premise that the British Columbia Terms of Union, R.S.C., 1985, App. II, No. 10, required the federal government to adopt an aboriginal "policy as liberal" as that of the colonial government of British Columbia, Dickson J. opined at p. 311:

> . . . one could suggest that "a policy as liberal" would require clear priority to Indian food fishing and some priority to limited commercial fishing over the competing demands of commercial and sport fishing. Finally, there can be no serious question that conservation measures for the preservation of the resource -- effectively unknown to the regulatory authorities prior to 1871 -- should take precedence over any fishing, whether by Indians, sportsmen, or commercial fishermen.

318 The relationship between the relative interests in a fishery with respect to which an aboriginal right has been established in the full sense, that is of food, ceremony and articles to meet other needs obtained directly from the fishery or through trade and barter of fish products, may be summarized as follows:

1. The state may limit the exercise of the right of the aboriginal people, for purposes associated with the responsible use of the right, including conservation and prevention of harm to others;
2. Subject to these limitations, the aboriginal people have a priority to fish for food, ceremony, as well as supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times;
3. Subject to (1) and (2) non-aboriginal peoples may use the resource.

319 In times of plentitude, all interests may be satisfied. In times of limited stocks, aboriginal food fishing will have priority, followed by additional aboriginal commercial fishing to satisfy the sustenance the fishery afforded the particular people in ancestral times. The aboriginal priority to commercial fishing is limited to satisfaction of these needs, which typically will be confined to basic amenities. In this sense, the right to fish for commerce is a "limited" priority. If there is insufficient stock to satisfy the entitlement of all aboriginal peoples after required conservation measures, allocations must be made between them. Allocations between aboriginal peoples may also be required to ensure that upstream bands are allowed their fair share of the fishery, whether for food or supplementary sustenance. All this is subject to the overriding power of the state to limit or indeed, prohibit fishing in the interests of conservation.

320 The consequence of this system of priorities is that the Crown may limit aboriginal fishing by aboriginal people found to possess a right to fish for sustenance on two grounds: (1) on the ground that a limited amount of fish is required to satisfy the basic sustenance requirement of the band, and (2) on the ground of conservation and other limits required to ensure the responsible use of the resource (justification).

321 Against this background, I return to the question of whether the regulation preventing the Sto:lo from selling any fish is justified. In my view it is not. No compelling purpose such as that proposed in Sparrow has been demonstrated. The denial to the Sto:lo of their right to sell fish for basic sustenance has not been shown to be required for conservation or for other purposes related to the continued and responsible exploitation of the resource. The regulation, moreover, violates the priorities set out in Jack and Sparrow and breaches the fiduciary duty of the Crown to preserve the rights of the aboriginal people to fish in accordance with their ancestral customs and laws by summarily denying an important aspect of the exercise of the right.

4. Conclusion

322 I would allow the appeal to the extent of confirming the existence in principle of an aboriginal right to sell fish for sustenance purposes, and set aside the appellant's conviction. I would answer the constitutional question as follows:

Question: Is s. 27(5) of the British Columbia Fishery (General) Regulations, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the Constitution Act, 1982, by reason of the aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982, invoked by the appellant?

Answer: Section 27(5) of the British Columbia Fishery (General) Regulations, SOR/84-248, as it read on September 11, 1987, is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the Constitution Act, 1982, by reason of the aboriginal rights within the meaning of s. 35 of the Constitution Act, 1982, as invoked by the appellant.

End of Document

R. v. Young, [2003] 2 C.N.L.R. 317

Canadian Native Law Reporter

Quebec Court of Appeal

Rousseau-Houle, Pelletier and Morin JJ.A.

January 22, 2003

[2003] 2 C.N.L.R. 317

Attorney General of Québec (appellant (complainant)) v. Edward Young (Respondent (accused)) Quebec Registry 200-10-000906-995 (610-36-000025-973) (610-27-000448-927) Edward Young (appellant (accused)) v. Attorney General of Québec (respondent (complainant)) Quebec Registry 200-10-000912-993 (610-36-000025-973) (610-27-000448-927)

Case Summary

The Crown appealed from the judgment of the Superior Court (*[2000] 3 C.N.L.R. 286*) which dismissed the Crown's appeal from the judgment of the Court of Quebec (*[1998] 4 C.N.L.R. 272*), which acquitted the accused, an Algonquin Indian, on the charge of fishing in the territory of an outfitting operation that had exclusive rights without the lessee's consent, contrary to s. 96 of the Act respecting the conservation and development of wildlife, R.S.Q., c. C-61.1.

The accused acknowledged having fished on the lake in question but submitted that the laws pertaining to the outfitting operation leased with exclusive rights conflicted with his Aboriginal right to fish for subsistence purposes pursuant to s. 35 of the Constitution Act, 1982.

The accused also appealed from the judgment of the Superior Court which upheld the appellant's acquittal but included two conditions in the judgment: " ... the respondents may have access to lakes for which exclusive rights have been granted, provided the following two conditions are met: (1) They fish for subsistence purposes; (2) The other lakes that are as readily accessible as those on the territory of the outfitting operation with exclusive rights must not be sufficient to meet that need." The accused sought to have these conditions removed.

Held: Crown's appeal dismissed; accused's appeal allowed.

per Rousseau-Houle J.A. (Pelletier J.A. concurring)

1. The Algonquins' Aboriginal right to fish for food is not a right to the territory itself, but is a right linked to the activity exercised on the territory concerned. The object of the right is to grant priority to the allocation of the resource to the Aboriginal peoples.
2. In the circumstances of this case a prima facie infringement of the Aboriginal right to fish for food has been proven. The water areas contiguous to the reserve are managed by outfitting operations and as a result the Algonquin people sometimes have to travel great distances to reach geographically accessible lakes suited to the exercise of their Aboriginal rights. Accordingly, they have been deprived of both a right of priority access to the resource and a right of ready and privileged access.
2. The Appeal Court was reticent to modify the finding by the Superior Court that the outfitting operations served an important economic objective and could justify the infringement of Aboriginal

rights when the evidence showed that the outfitting operations with exclusive rights enables Aboriginal people, to a certain extent, to be participants in the economic development of the region.

3. However, the economic objectives via the development of resource use and promotion of recreational activities is allied with the paramount objective of resource conservation. Reasonable catch limits that provide Algonquin families with a moderate livelihood at present-day standards, the necessity and suitability of resource conservation measures, and respect for the priority of the Aboriginal right to hunt and fish for subsistence purposes are all elements that must be taken into account when wildlife conservation and development measures are adopted.

4. The Crown did not fulfill its fiduciary obligation on the basis of priority in the allocation of the resource. The legislation does not include exceptional measures designed to promote reasonable access for Aboriginal people to territories of outfitting operations with exclusive rights nor a means of sharing the resource among the various users and Aboriginal people. Accordingly, the rights at stake have not been infringed as little as possible.

5. Consultation of, and participation by, Algonquins was necessary in this case because measures causing a lesser infringement of the Algonquins' rights could have been proposed and implemented.

6. The two conditions imposed by the Superior Court should be struck. The first condition is pointless because the issue is recognition of the Aboriginal right to fish for food. With respect to the second condition, in addition to imposing on the members of the Aboriginal community the burden of proving that the infringement of their right of priority access to the resource is justified, it renders ineffective the finding that section 96 of the Act cannot be invoked against the accused.

per Morin J.A. (dissenting in the disposition of the accused's appeal)

1. Both the trial court and the Superior Court concluded that s. 96 of the Act infringed the Aboriginal right to fish for subsistence purposes. Their conclusions are supported both by the evidence adduced and by the declarations of the Crown. The only question requiring a decision is that of the justification for the infringement.

2. The Superior Court was right in deciding that a reason other than wildlife conservation, namely, socioeconomic development, in this case, could justify the infringement of Aboriginal rights. There was no reason for the Court to intervene on this aspect.

3. The Superior Court was correct in determining that the Crown did not demonstrate that s. 96 was compatible with the government's fiduciary obligations in its relations with the Aboriginal peoples. The evidence showed that the government did not take the existence of Aboriginal right to fish for subsistence purposes into account when setting up the system of outfitting operations. It did not consult with the Aboriginal peoples on the subject and the principle that top priority must be given to Indian food fishing was not followed in setting up and running the outfitting operations. Accordingly, the appeal by the Crown should be dismissed.

4. With respect to the appeal by the accused to have the two conditions imposed by the Superior Court cancelled, the appeal should be dismissed.

5. Through the appeal the accused was seeking to give the Court's ruling a general scope, whereas this was an individual case and must be treated as such. The first condition was appropriate as the accused himself invoked his right to fish for subsistence purposes in order to contest the charge against him. The second condition was in line with the idea that the restriction of an Aboriginal right must needlessly infringe the interests protected by such a right in order to be regarded as a prima facie infringement.

* * * * * *

D. Soroka, for Edward Young. P. Peltier-Rivest and B. Bussières, for the Attorney General of Quebec.

Judgment [R. v. Young]

(1) The Court, ruling on the appellant's appeal from a judgment rendered on August 12, 1999 [see *[2000] 3 C.N.L.R. 286*] by the Honourable André Trotier, Justice of the Superior Court, District of Témiscamingue, who dismissed the appeal from the judgment rendered on December 2, 1997 [see *[1998] 4 C.N.L.R. 272*] by the Honourable Jean-Charles Coutu, Judge of the Court of Québec, District of Temiscamingue, who acquitted the respondent of the charge of fishing on the territory of an outfitting operation with exclusive rights contrary to section 96 of the Act respecting the conservation and development of wildlife (R.S.Q., c. C-61.1);

(2) Having examined the record, heard the evidence and taken the case under advisement;

(3) For the reasons given by Rousseau-Houle J.A., to which Pelletier J.A. subscribes, and for the reasons given by Morin J.A.;

(4) Dismisses the appeal, with costs.
Judgment [Young v. R.]

1 The Court, ruling on the appellant's appeal from a judgment rendered on August 12, 1999 by the Honourable André Trotier, Justice of the Superior Court, District of Témiscamingue, who upheld the appellant's acquittal of the charge of fishing on the territory of an outfitting operation with exclusive rights contrary to section 96 of the Act respecting the conservation and development of wildlife (R.S.Q., c. C-61.1), but included two conditions in his judgment, as follows:

> [TRANSLATION]
>
> Under the circumstances, the Court finds that the respondents may have access to lakes for which exclusive rights have been granted, provided the following two conditions are met:
>
> (1) They fish for subsistence purposes;
>
> (2) The other lakes that are as readily accessible as those on the territory of the outfitting operation with exclusive rights must not be sufficient to meet that need.

2 Having examined the record, heard the evidence and taken the case under advisement;

3 For the reasons given by Rousseau-Houle J.A., to which Pelletier J.A. subscribes;

4 Allows the appeal, with costs;

5 Strikes the two conditions mentioned by Trotier J.;

6 For the reasons he expressed, Morin J.A. would have dismissed the appeal, with costs.

PELLETIER J.A. concurs with ROUSSEAU-HOULE J.A.

ROUSSEAU-HOULE J.A.

7 I will rely on the facts stated by my colleague Morin J.A. Even if I admitted, as he proposes, that the Attorney General recognized, not only the existence of Aboriginal fishing rights for food purposes, but also the infringement of those rights, I would still analyse the infringement. For it is at the infringement stage that one must examine the restrictions on Aboriginal rights, which subsequently must be justified by the Attorney General (Mitchell v. M.R.N., *[2001] 1 S.C.R. 911* [*199 D.L.R. (4th) 385*, *[2001] 3 C.N.L.R. 122*, *269 N.R. 207*], at para. 23). The burden of proving justification may vary depending on the nature and scope of the infringement.

8 My analysis of the infringement will be limited to the observations of fact and of law stemming from R. v. Adams, *[1996] 3 S.C.R. 101* [*138 D.L.R. (4th) 657*, *[1996] 4 C.N.L.R. 1*, *110 C.C.C. (3d) 97*, *202 N.R. 89*] and R. v. Côté, *[1996] 3 S.C.R. 139* [*138 D.L.R. (4th) 385*, *[1996] 4 C.N.L.R. 26*, *110 C.C.C. (3d) 122*], and to the historical, anthropological and archeological evidence already brought forth when those decisions were rendered in all of the cases of prosecution of Algonquins belonging to the Kipawa, Timiscaming, Winneway and Wolf Lake bands for various violations of the Act respecting the conservation and development of wildlife, R.S.Q., c. C-61.1, and of the Fisheries Act, R.S.C. (1985), c. F-14.

9 The analysis will lead me to find, as Coutu and Trotier JJ. recognized, that section 96 of the Act respecting the conservation and development of wildlife infringed the rights of the Algonquin band members to fish for subsistence purposes on the territory of the Beauchesne outfitting operation and in the traditional Algonquin hunting and fishing territories in the Ottawa River watershed.

10 In addition to section 96, sections 85 and 86 of the Act are relevant to this dispute:

> 85. The Minister may, after consultation with the Minister of Natural Resources, delimit areas on land in the public domain with a view to increased utilization of wildlife resources.
>
> 86. The Minister may lease exclusive hunting, fishing or trapping rights on all or part of the lands in the public domain contemplated in section 85.
>
> 96. No person may, except with the lessee's authorization, carry on an activity for which exclusive rights have been granted on any land on which exclusive hunting, fishing or trapping rights have been granted.

1. Evidence of Infringement of the Aboriginal Right to Fish for Subsistence Purposes

11 As to the law, Adams and Côté held that the existence of an Aboriginal right to hunt or fish was not necessarily based on proof of Aboriginal title, because such rights could exist in the absence of evidence establishing a claim to Aboriginal title.

12 An Aboriginal right can be a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right. It can also be an activity exercised on a territory traditionally occupied by the group concerned. It is not necessary for an Aboriginal group to establish that its occupation and use of the land was sufficient to support a claim of title to the land (Adams, at para. 26) in order for the activity to be protected by the Constitution. In Côté, Lamer C.J. stressed that "[a]n Aboriginal practice, custom or tradition entitled to protection as an Aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity prior to contact. As such, an Aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land" (at para. 39). He pointed out, in Adams, that "[a] site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question" (at para. 30).

13 The Algonquins' Aboriginal right to fish for food is not a right to the territory itself. It is a right linked to the activity exercised on the territory concerned. The object of the right is to grant priority to the allocation of the resource to

Aboriginal peoples. Consequently, limiting access to the territory where the resource is found could be an infringement of that right (Côté, at para. 57).

14 Adams and Côté reaffirmed that the guidelines of R. v. Sparrow, *[1990] 1 S.C.R. 1075* [*70 D.L.R. (4th) 385*, *[1990] 4 W.W.R. 410*, *46 B.C.L.R. (2d) 1*, *[1990] 3 C.N.L.R. 160*, *56 C.C.C. (3d) 263*, *111 N.R. 241*], must be followed in determining whether the purpose or the effect of a legal or regulatory provision is incompatible with the Aboriginal right. This will be the case if the provision restricting the Aboriginal right is unreasonable, imposes undue hardship or denies to the holders of the right their preferred means of exercising the right.

15 In Adams and Côté, it was a question of deciding whether the regulatory scheme for fishing infringed Aboriginal rights and, in the affirmative, whether the infringement was justified. Côté was particularly to the point. It had been decided that para. 4(1) of the Quebec Fishery Regulations, which provided that a person who seeks to fish within a designated territory (ZEC) must hold a valid licence, infringed the right of Mr. Côté, an Algonquin of the Maniwaki reserve. The regulations authorized the Minister, at his discretion, to issue a special licence to an Aboriginal person authorizing that person to fish for food, but they did not prescribe any criteria to guide or structure the exercise of the discretion in order to ensure that the power was exercised in a manner consistent with the Crown's special fiduciary obligation.

16 On the other hand, the Regulation respecting controlled zones had been deemed compatible with the fiduciary obligation. Under the Regulation, an Algonquin could enter a ZEC by a variety of means of transport other than motor vehicle without paying a fee. If he entered by motor vehicle, he had to pay an access fee, which was used for the upkeep of the facilities and roads of the ZEC. The Supreme Court found that the resulting financial burden did not restrict the constitutional rights of the Aboriginal persons concerned, but actually facilitated the exercise of those rights.

17 As to the facts, Côté recognized that, at the time of contact with Europeans, the Algonquins' ancestral lands lay at the heart of the Ottawa River basin. The Algonquins were a socially organized but nomadic people and moved frequently within those lands (at para. 67).

18 The historical, anthropological and archeological evidence for the existence of Aboriginal rights on the territory claimed by the Algonquins in the current cases was compatible with the testimony of expert Parent that the Supreme Court accepted in Côté. From the testimony of anthropologist Frenette, archeologist Côté and historians Morrison and Ratelle, it could be gathered as an observation of fact that the region of rivière Kipawa and lac Kipawa, and the largest watershed of the Ottawa River had been frequented from pre-contact times by Indian bands including those from whom the Algonquins derive their ancestry.

19 No evidence allowed for limiting the Aboriginal right to fish for subsistence purposes to the precise site of the Beauchesne outfitting operation. It was inaccurate to say, as Trotier J. did, that there was a "site specific right"[1] on the territory of the Beauchesne outfitting operation. Aboriginal rights lie along a spectrum depending on their connection with the territory concerned (Delgamuukw v. British Columbia, *[1997] 3 S.C.R. 1010* [*153 D.L.R. (4th) 193*, *66 B.C.L.R. (3d) 285*, *[1998] 1 C.N.L.R. 14*, *220 N.R. 161*], at para. 138). At one end of the spectrum, there are Aboriginal rights that are practices, customs and traditions integral to the distinctive Aboriginal culture of the group claiming the right. In the middle of the spectrum, there are activities which, out of necessity, take place on land and, indeed, may even be tied to a particular piece of land (site-specific right). At the other end of the spectrum, there is Aboriginal title itself. The Aboriginal rights which the Supreme Court placed at the first end and in the middle of the spectrum are rights of the same type. In both cases, they are fundamental elements of the distinct culture of an Aboriginal group. Only the extent of the land base varies, being larger in the first case and extending down to very limited areas in the second case.[2]

20 It was not shown that the site of the Beauchesne outfitting operation was especially important to the Algonquin community in terms of religion, tradition or culture. The site was part of the traditional Algonquin fishing and hunting territory and was widely used by the Aboriginal people living in the region because of its great accessibility. It follows that, in evaluating the infringement, it must be taken into account that the pieces of land granted to outfitting

operations occupy a very small part of the vast territory of the Témiscamingue region where the Algonquins can exercise their Aboriginal rights.

21 There are, in fact, three pieces of land on which exclusive rights have been leased for outfitting operations in the Témiscamingue region: that of the Reserve Beauchesne, created in 1987, but formerly part of the wildlife sanctuary; that of Lac a la Truite, also created in 1987, but already subject to an outfitter's permit under the former law for 25 to 30 years; and that of Kipawa or Lac Dumoine, first granted to an Aboriginal person and then resold by that person.

22 The lands concerned by these outfitting operations represent 5% of the territory in the Témiscamingue region. Of a total of 7554 lakes, 344 cannot be freely used by the Aboriginal people. The Beauchesne outfitting operation itself covers 206 km2 and counts 94 lakes. It is located just a few kilometres from the place where the Kipawa Algonquin community of 150 to 200 families lives. Members of that community argued that they were being denied ready access to a large, geographically accessible part of their traditional fishing territory because, in order to have access to the territory of the Beauchesne outfitting operation, they had to pay fees of $2000 a week for a group of four persons and obtain the authorization of the outfitter, at its pure discretion.

23 The community members also alleged that, while a substantial number of lakes and reserves do exist in the Kipawa region, many of them are in the territories of the two other outfitting operations. They added, as the chief of the Eagle Village reserve, Jimmy Constant, pointed out in his testimony, that other accessible lakes have been overfished and that, in the Témiscamingue region, it is necessary to travel about 100 kilometres to obtain enough fish for subsistence purposes.

24 The Attorney General did not adduce any evidence at all regarding the accessibility of the various lakes in the Témiscamingue region by road or by water, or by water and portage. Trotier J. gathered that the Algonquins might have to travel more than 80 kilometres to reach geographically accessible lakes suited to the exercise of their Aboriginal rights. They were deprived of both a right of priority access to a resource and a right of ready and privileged access.

25 Under the circumstances, the prima fade infringement of the Aboriginal right to fish for food was proven.

2. Justification of the Infringement

26 Coutu J. of the Court of Québec [see *[1998] 4 C.N.L.R. 272*] had held that outfitting operations with exclusive rights are strictly commercial enterprises set up, not to conserve species, but to promote sport fishing, as set forth in section 85 of the Act.

27 In this regard, he mentioned the testimony of Alain Fort, a biologist with the ministère de l'Environnement et de la Faune, who characterized the outfitting operations in that way and admitted that the primary objective of outfitting operations with exclusive rights was the development of wildlife territories. Coutu J. found that that objective, while valid, could not defeat the Aboriginal rights of the Aboriginal people on the territories concerned.

28 Trotier J. [see *[2000] 3 C.N.L.R. 286*] affirmed that he would have made the same finding as Coutu J. if the issue had been limited to management and conservation of the territory. Indeed, the development of sport fishing is not in itself a compelling and substantial objective justifying the infringement of an Aboriginal right protected by section 35(1) of the Constitution Act (Adams, at para. 58). However, according to Trotier J., where it is proven that sport fishing activities have a significant economic dimension, it can be inferred from R. v. Gladstone, *[1996] 2 S.C.R. 723* [*137 D.L.R. (4th) 648*, *[1996] 9 W.W.R. 149*, *23 B.C.L.R. (3d) 155*, *[1996] 4 C.N.L.R. 65*, *109 C.C.C. (3d) 193*, *50 C.R. (4th) 111*, *200 N.R. 189*], at para. 75, and Delgamuukw v. British Columbia, at para. 161, that measures ensuring "the pursuit of economic and regional fairness" and "the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups" satisfy the justification test.

29 Noting simply that the system of outfitting operations makes it possible to exploit the socioeconomic potential

that is available because of the wealth of wildlife in western Québec, as the evidence of economic spin-offs for the region shows, Trotier J. concluded that the Attorney General had discharged his burden with regard to the first part of the justification test.

30 Trotier J. not having supported his conclusion with any evidence underlying the observation of significant economic spin-offs, the parties included in their appeal files the studies and statistics relating to the economic activity generated by sport fishing in the Abitibi-Témiscamingue region submitted to Trotier J. as well as the testimony pertaining to the question of the role played by outfitting operations in conserving fishing resources.

31 Outfitting operations can be licensed with or without exclusive rights. Operations without exclusive rights are located on free territory and provide lodging and services related to hunting, fishing and trapping. The people who frequent the free territory can choose to use the outfitting services or not. Outfitters without exclusive rights do not control the use of the resource on the territory neighbouring on their facilities.

32 Outfitters with exclusive rights control resource use on the territories leased to them. Leases are granted through calls for tenders.[3] Proposals are assessed on a number of criteria: Aboriginal participation in ownership of the enterprise (20 points); promoter's experience (20 points); wildlife conservation (30 points); wildlife harvesting (40 points); investment in buildings and infrastructures (30 points); hiring and training of personnel, including Aboriginal people (20 points); marketing (20 points); promoter's solvency (20 points); project financing (20 points); project profitability (20 points); methods of harmonization with holders of occupation rights (10 points).

33 In the case of the Beauchesne outfitting operation, the outfitters were required to provide the department with a management plan in which they described the means they intended to employ to reach the objectives set for wildlife conservation and harvesting, and hiring and training of personnel.[4]

34 When the Minister grants leases with exclusive rights, he wants to be sure that the resource on the territory concerned is harvested in a profitable and rational manner. An outfitter must adhere to its management plan on pain of cancellation of his permit. In exchange for his commitments, he has the right to charge fishers and hunters fees for access and lodging, and thereby run its business profitably.

35 Outfitters are not the only ones who benefit from the profits their operations generate. The Attorney General proved that, in 1996, sport fishing in the Témiscamingue region generated an estimated $20 million in economic activity.[5]

36 Outfitting operations with exclusive rights established in the region accounted for $1 million of the total amount.

37 Trotier J. found that the operations served an important economic objective. I would be extremely reticent to modify that finding, especially since the evidence shows that the system of outfitting operations with exclusive rights enables Aboriginal people, to a certain extent, to be privileged participants in the economic development of their region.

38 But there is more. The pursuit of economic objectives via the development of resource use and the promotion of recreational activities is allied with the paramount objective of resource conservation. The tendering documents and management plans show this. Alain Fort and Daniel Nadeau, both biologists with the ministère de l'Environnement et de la Faune, affirmed that, together with ZECs and wildlife sanctuaries, outfitting operations with exclusive rights form a network whose goal is to inform the government about the pressure fishing exerts on each lake and about the status of the various fish species in each lake. With this information, the government can establish fishing resource trends on the territories concerned and take appropriate action if problems arise.

39 Jimmy Constant's testimony is revealing about the will of the members of his community to see resource protection and control measures implemented:

> I guess the only way to answer that is ZEC or exclusive rights, I think I had discussions on the side with different people and I gave them my thoughts and my feelings, but I guess with ZEC and exclusive rights, I have no problem with that as long as they don't interfere with our aboriginal rights to hunt and fish because I think what the impact on a territory that we depend on for other ... for food and whatever, it's sort of like (inaudible) control, you know it's poor hunting in our area. To me, that's one of the biggest problems. There's not really any control.
>
> There's no quotas on big game and there's not ... the problem right now that I see to is the ZEC, when they form ZEC, they should have expanded the whole territory and put it under ZEC or exclusive rights because what's happening now is you're getting pressure on lakes that are not considered ZEC, because nobody wants to pay the fees to go into ZEC. So, the impact is all focused on certain lakes and to me, that's been the biggest problem since the formation of ZEC. [at p. 3513.]

40 The Algonquins are contesting the constitutional validity of section 96 of the Act not so much because the objectives pursued therein are not real and important, but because the objectives were determined without truly consulting Aboriginal groups. If those groups had been consulted, they would have seen to greater protection of their priority right of access to the resource.

41 Reconciling Aboriginal society and the rest of society is essential to the pursuit of the objectives of conservation and fairness both economically and regionally.

42 Reasonable catch limits that provide Algonquin families with a moderate livelihood at present-day standards (R. v. Marshall, *[1999] 3 S.C.R. 456* [*177 D.L.R. (4th) 513*, *178 N.S.R. (2d) 201*, *[1999] 4 C.N.L.R. 161*, *138 C.C.C. (3d) 97*, *246 N.R. 83*], at para. 61), the necessity and suitability of resource conservation measures, and respect for the priority of the Aboriginal right to hunt and fish for subsistence purposes are all elements that must be taken into account when wildlife conservation and development measures are adopted.

43 In the case at bar, the Attorney General did not fulfil his fiduciary obligation as applied in Sparrow and Gladstone, supra, on the basis of priority in the allocation of the resource. The law includes neither exceptional measures designed to promote reasonable access for Aboriginal people to territories of outfitting operations with exclusive rights, nor means of sharing the resource among the various users and Aboriginal people.

44 In Sparrow, Dickson and LaForest JJ. explained as follows the importance of granting absolute priority to fishing for food purposes:

> If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing. (at p. 1116 [S.C.R.; p. 185 C.N.L.R.]).

45 One cannot reasonably conclude that the rights at stake have been infringed as little as possible because there are a multitude of lakes in the Abitibi-Témiscamingue region. The evidence showed that the lakes in question are not as readily accessible and that they cannot fully satisfy the community's needs for food.

46 No solution was sought that involved a lesser infringement of the access rights of the Algonquins of the region to the Beauchesne outfitting operation. At the time, the Supreme Court had not yet ruled that information and consultation are important enough to constitute one of the criteria for assessing the reasonableness of a law or regulation. In addition, the letters in the record and the testimony of Jimmy Constant and Alain Fort indicate that some information was available and that the Algonquins were not very interested in the question of outfitting operations with exclusive rights.

47 Contrary to what I decided in the appeals of Thérèse Goulet and Jimmy Constant, consultation of, and

participation by, Algonquins was necessary in this case, because measures causing a lesser infringement of the Algonquins' rights could have been proposed and implemented.

48 In my view, Trotier J., having determined that the Attorney General had not fulfilled his fiduciary obligation, was justified in finding that section 96 of the Act infringed the accused's rights protected by section 35 of the Constitution Act and that, as a result, the accused had to be acquitted of the charge of fishing on the territory of the Beauchesne outfitting operation.

49 Having made that finding, Trotier J. could not add that [TRANSLATION] "the respondents may have access to lakes for which exclusive rights have been granted, provided the following two conditions are met":

(1) They fish for subsistence purposes;

(2) The other lakes that are as readily accessible as those on the territory of the outfitting operation with exclusive rights must not be sufficient to meet that need.

50 The first condition is needless, because the issue is recognition of the Aboriginal right to fish for food. As for the second condition, not only does it impose on the members of the Aboriginal community the burden of proving that the infringement of their right of priority access to the resource is justified, but it renders ineffective the finding that section 96 of the Act cannot be invoked against the respondents.

51 For these reasons, I propose that the Attorney General's appeal be dismissed with costs, that Edward Young's appeal be allowed with costs, and that the two conditions in the judgment be struck therefrom.

MORIN J.A.

52 In the beginning, the dispute which gave rise to this appeal raised the following questions:

1. Did Edward Young, a member of the Kipawa Algonquin band, have the right to fish on the territory of the Beauchesne outfitting operation on January 4, 1992?
2. In the affirmative, does section 96 of the Act respecting the conservation and development of wildlife (R.S.Q., c. C-61.1), which prohibits fishing on the territory of an outfitting operation without the lessee's authorization, constitute an infringement of Edward Young's right?
3. In the affirmative, did the Attorney General of Québec show that the infringement was justified?

53 For the reasons I will mention later, only the third question is actually the subject of this appeal, in the sense that it is the only one that presents a true issue. In my view, the first two questions have already been given a positive answer as a result of the attitude adopted at the trial level by the Attorney General of Québec, even if he argues the contrary.

The facts

54 Edward Young is accused of violating section 96 of the Act respecting the conservation and development of wildlife by fishing on the territory of the Beauchesne outfitting operation without having been authorized to do so by the lessee of that territory. Section 96 reads as follows:

96. No person may, except with the lessee's authorization, carry on an activity for which exclusive rights have been granted on any land on which exclusive hunting, fishing or trapping rights have been granted.

55 The accused does not deny the facts that gave rise to the accusation against him. In defence, he simply invokes his Aboriginal rights to fish for subsistence purposes pursuant to section 35 of the Constitution Act, 1982, subsection 1 of which states the following rule:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Judgment of the Court of Québec

56 On December 2, 1997, Jean-Charles Coutu, Judge of the Court of Québec, acquitted Edward Young of the charge brought against him, in a short six-page judgment [see *[1998] 4 C.N.L.R. 272*].

57 We should not be fooled by the fact that the judgment was brief. At the time, Coutu J. was faced with several cases resulting from 56 prosecutions of various members of the Algonquin bands of Kipawa, Wolf Lake, Timiscaming and Winneway, in the Témiscamingue region. The band members were accused of various violations of the Act respecting the conservation and development of wildlife and of the Fisheries Act (*R.S.C. 1985, c. F-14*), allegedly committed at several locations in Abitibi-Témiscamingue. So, in order to understand the judgment I have mentioned, we must consider the context and take into account several other judgments that Coutu J. referred to.

58 The first of those judgments was rendered by Coutu J. on June 5, 1996 in R. v. Roger Duguay (files 610-27-904-895, 610-27-905-892 and 610-27-906-890).

59 Duguay, who was accused of several violations of the Fisheries Act, contested the charges by arguing that he was an Aboriginal person with Aboriginal rights to hunt and fish in the territories neighbouring on Lac Kipawa. Based on the absence of evidence that Duguay and his ancestors had exercised exclusive occupation of the territory where the violations were committed, Coutu J. ruled that Duguay could not claim to exercise Aboriginal rights in the territory occupied by the Kipawa band.

60 Shortly after the Duguay ruling, i.e. on October 3, 1996, the Supreme Court of Canada rendered two judgments - R. v. Adams, *[1996] 3 S.C.R. 101* [*138 D.L.R. (4th) 657*, *[1996] 4 C.N.L.R. 1*, *110 C.C.C. (3d) 97*, *202 N.R. 89*] and R. v. Côté, *[1996] 3 S.C.R. 139* [*138 D.L.R. (4th) 385*, *[1996] 4 C.N.L.R. 26*, *110 C.C.C. (3d) 122*] - in which it distinguished between "aboriginal right' and "aboriginal title", specifying that an Aboriginal right can exist independently of Aboriginal title to a given territory.

61 About a year later, on December 2, 1997, Coutu J. rendered a judgment in another of the 56 prosecutions of Algonquins, namely, R. v. Carl Mongrain Sr. (file No. 610-27000728-906) [*[1998] 4 C.N.L.R. 218*]. I feel it is appropriate to quote large excerpts from this judgment, because it contains the general principles that guided Coutu J. in the various cases he had to rule on, notably the case that led to this appeal.

62 Coutu J. set the stage as follows, at pages 3 to 6 of Carl Mongrain Sr.:

> [TRANSLATION]
>
> In several cases involving a man named Roger Duguay, I declared that Mr. Duguay could not claim to have aboriginal rights to hunt and fish in the territory currently occupied by the Kipawa band, because I linked those rights, as the jurisprudence in general had up to that point, to the claim to aboriginal title of the territory in question.
>
> However, in five consecutive rulings in 1996, the Supreme Court was somewhat more specific about what constitutes an aboriginal right, more particularly with regard to hunting and fishing (R. v. Côté, *[1996] 3 S.C.R. 139*; R. v. Adams, *[1996] 3 S.C.R. 101*; R. v. Van der Peet, *[1996] 2 S.C.R. 507*; R. v. Gladstone, *[1996] 2 S.C.R. 723*; R. v. N.T.C. Smokehouse Ltd, *[1996] 2 S.C.R. 672*).

In sum, the Supreme Court dissociated the aboriginal right to hunt and fish from the obligation to establish beforehand aboriginal title to lands or territories.

In light of the Supreme Court rulings, the Attorney General of Québec purely and simply withdrew several of the complaints that had been submitted to me, and, on March 24, 1997, filed, in the cases of Roger Duguay and Rudolph Duguay, a consent to judgment which reads as follows:

> [TRANSLATION]
>
> "Considering that, since the decision rendered in this case by the Honourable Jean-Charles Coutu, the Supreme Court of Canada has ruled on the parameters of aboriginal hunting and fishing rights in R. v. Adams, *[1996] 3 S.C.R. 101* and R. v. Côté, *[1996] 3 S.C.R. 139*;
>
> Considering that the Superior Court, given the evidence now at its disposal, would likely, in light of those cases, declare that the accused have aboriginal fishing rights;
>
> Considering that, since Corporation des médecins professionnels du Québec v. Thibault, *[1988] 1 S.C.R. 1033*, the Crown can no longer adduce additional evidence in a de novo appeal;
>
> The Attorney General of Québec, on the prosecution's behalf, consents to the appeals' being allowed and the files' being returned to The Honourable Judge Jean-Charles Coutu of the Court of Québec so that he can hear any evidence justifying the regulations at issue according to the test established by the Supreme Court of Canada." (See Superior Court, District of Témiscamingue, files 610-36-000009-96 to 15-96).

Subsequent to this consent, Jacques J. Levesque J.S.C. rendered the following judgment, on October 27, 1997:

> [TRANSLATION]
>
> For these reasons, the Court:
>
> Allows the appellant's appeal;
>
> Declares that the appellant is [TRANSLATION] "an Indian who is a member of the 'Eagle Village' Kipawa band and that he has the same rights as all the members of the band";
>
> Returns the file for trial before the honourable judge who heard the case, so that he can hear any evidence justifying the regulations at issue;
>
> ...

In the meantime, on April 8, 1997, Mtre. Jocelyne Provost, representing the Attorney General, made the following declaration before me:

> [TRANSLATION]
>
> ...
>
> MTRE. PROVOST:
>
> Marcel Paré. Because they each have their specialty, your Honour. So Mr. Pare specializes in hunting and large game. Mr. Fort, who is here this morning and is a biologist, specializes in fish, and he's the one who will testify today regarding outfitting operations, management plans of outfitting operations and the offence regarding bait fish.
>
> This will be part of our justificatory evidence, your Honour, because we are indeed going to withdraw certain complaints. I will make a mini-declaration for the purposes of the minutes, because we have in fact not finished leading evidence on aboriginal rights per se, but the Attorney General deems appropriate at this stage to decide not to lead evidence.
>
> So, we go to the step ... so, obviously, under the circumstances in which we are not leading evidence, it's a safe bet that the Court would declare that aboriginal people have aboriginal hunting and fishing rights and the matter can't go any further than that for the moment and we are nevertheless going to

justify, according to the Sparrow test (supra), certain regulations in relation to which we are maintaining our complaints.

THE COURT:

All right! So, go ahead with your first declaration in that case.

MTRE. PROVOST:

Yes, yes.

THE COURT:

With regard to aboriginal rights.

MTRE. PROVOST:

That's right. So, I want it to be written in the minutes that the Attorney General has decided, at this stage, not to lead any evidence on the aboriginal rights of the accused.

Consequently, given the Supreme Court's decisions in the Adams and Côté-Descontie cases, the Court, in the opinion of the Attorney General, is likely to declare, given the evidence filed in those matters, at this time, that the accused have aboriginal hunting and fishing rights.

THE COURT:

If I understand you correctly, the Attorney General is not declaring that there are aboriginal rights, but is asking me to rule on the subject given that he is not making a defence.

MTRE. PROVOST:

There is no admission, your Honour. All we're saying, in fact, we don't admit, it's very important, that there are, except that, given the Supreme Court decisions and taking into account that the Attorney General is deciding not to lead evidence in those matters. It's because we're deciding not to lead any. That means that we would not have any to lead.

THE COURT:

Against that already led.

MTRE. PROVOST:

That's it, exactly. Yes, indeed. Quite right.

THE COURT:

Yes.

MTRE. PROVOST:

OK. Having said that, given that we are not leading any evidence in those matters and given, precisely, the Supreme Court decisions I mentioned, the Attorney General has made a certain number of withdrawals and I will continue by taking the roll as it stands and indicating to the Court which evidence we are maintaining .. not evidence, which offences we are maintaining and which we are withdrawing.

(stenographic notes of August 8, 1997, at pp. 4ff.)

Given that the Attorney General has not officially made any admission regarding aboriginal rights, I am obliged to rule on their existence in order to be able, to make a finding regarding the facts submitted to me in each of the cases. Apart from that, I feel that I am bound only by the exact subjects dealt with by the Supreme Court in Adams and Côté and by the Superior Court in the previously cited judgment by Levesque J.S.C.[6]

63 This long introduction providing an idea of the general context of the case before him, Coutu J. ruled succinctly

on the issue of Aboriginal hunting and fishing rights as follows:

> [TRANSLATION]
>
> In light of these declarations, the Supreme Court judgments, the previously cited Superior Court judgment and the evidence submitted to me, I can affirm that all the accused Aboriginal persons whose cases are pending before me have, upon proof of their Indian status and their frequentation of the territory concerned, a recognized aboriginal right to fish and hunt for food.
>
> In any case, the discussion about aboriginal fishing and hunting rights for food purposes is over with, for all practical purposes, and it is now time to move on to the second stage, which concerns the justification of the laws and regulations that infringe those rights.[7]

64 Coutu J. then took up the issue of the infringement of Aboriginal rights, pointing out that the parties were not in agreement about the need to deal with the issue.

> [TRANSLATION]
>
> In the notes and authorities submitted around July 17, 1997, the prosecution discusses each of the seven subjects mentioned above in connection with the infringement of aboriginal rights (see pages 7, 51, 89, 124 and 140 of the notes and authorities).
>
> In its notes and authorities submitted around October 23, 1997, the defence contests the prosecution's approach, alleging that the only issue now submitted to the Court is that of justification, not that of deciding whether or not there has been an infringement of aboriginal rights.[8]

65 It is important to note what Coutu J. said next, when he set forth his own assessment of the attitude adopted by the Attorney General of Québec:

> [TRANSLATION]
>
> The whole of the representations made by the prosecution when it decided not to pursue the contestation of aboriginal rights gives the impression that it took for granted that the law and the regulations relating to hunting and fishing pursuant to which the accused had been prosecuted infringed the accused's aboriginal rights in any case and that the only issue that remained to be decided was the justification of the laws and regulations in the face of aboriginal rights as required by the Supreme Court in R. v. Sparrow, *[1990] 1 S.C.R. 1075*.[9]

66 Oddly enough, Coutu J. then referred to the issue of the existence of the Aboriginal people's right to fish for subsistence purposes. He declared the following, in particular, on this subject:

> [TRANSLATION]
>
> In any case, I am of the opinion that the courts do not need lengthy evidence to establish this fact. It has always been recognized and taught to all schoolchildren in Québec that the way of life of the aboriginal peoples of Québec was based principally on hunting and fishing, and that they lived in a subsistence economy off the resources of the water and land surrounding them. On this point, I think we can say that the courts automatically have knowledge of this ancient and current reality, so that the burden of proof would lie on anyone wishing to contest its existence.[10]

67 After this digression, Coutu J. concluded as follows regarding the infringement of Aboriginal fishing rights:

> [TRANSLATION]
>
> That said, I feel that any law or regulation that limits the rights of aboriginal people to hunt or fish for food in the places they have frequented since time immemorial infringes their aboriginal rights and that that goes for the aboriginal rights of the accused in this case, unless, of course, it is successfully established that the

> laws or regulations concerned are justified according to the criteria established by the Supreme Court, or unless their justification is set forth in a treaty or agreement between a government and an aboriginal people or community.[11]

68 Finally, Coutu J. dealt with the issue of the justification of infringements of Aboriginal rights, recalling, first, that in R. v. Sparrow, the Supreme Court of Canada decided that one "must give top priority to Indian food fishing".

69 Coutu J. declared that the fishing management plan concerned by section 63 of the Act respecting the conservation and development of wildlife coincided with the order of priorities established by the Supreme Court of Canada:

> 63. A plan must determine the apportionment of halieutic resources according to the following order of priorities:
>
> (1) the reproductive stock;
>
> (2) fishing for food purposes;
>
> (3) sport fishing;
>
> (4) commercial fishing.[12]

70 He stressed, however, that section 63 does not cover the specific rights of Aboriginal people, the legislator limiting himself to mentioning "fishing for food purposes".

71 Coutu J. then added the following clarifications, still relying on Sparrow:

> [TRANSLATION]
>
> Also, it would be inaccurate to claim that the conservation of the species is the only reason that would justify a law or regulation that infringed aboriginal rights.[13]
>
> ...
>
> Finally, in evaluating the valid objective of the law and of the regulation in question, I will have to take into account, where applicable, other factors which must be assessed even though they are not as constraining, namely, minimum infringement, fair compensation, and consultation of the aboriginal peoples or communities concerned.[14]

72 In closing, Coutu J. recalled the Crown's fiduciary obligation, stressing the heavy burden of proof that lies on the Crown in justifying the infringement of Aboriginal rights.

73 Returning now to the judgment by Coutu J. in the Edward Young case, we have the following regarding the existence of Aboriginal rights and infringement of them:

> [TRANSLATION]
>
> There is no doubt that sections 96 and 171 of the Act respecting the conservation and development of wildlife (R.S.Q. c. 61.1), which prohibit fishing on land on which exclusive hunting, fishing and trapping rights have been leased, infringe the aboriginal rights of the aboriginal people who can claim to have aboriginal rights on the land in question.
>
> In this case and for the reasons set forth in the Carl Mongrain Sr. (file No. 610-27-000728-906), I conclude that Edward Young has aboriginal rights to hunt and fish for food in this territory and that sections 96 and 171 supra infringe his rights.[15]

74 Immediately afterward, Coutu J. dealt with the justification of the infringement, as follows:

> [TRANSLATION]
>
> The prosecution alleges that the setting up of what are commonly referred to as "outfitting operations with exclusive rights" is necessary for the purposes of species management and conservation.
>
> In my view, "outfitting operations with exclusive rights" are solely commercial enterprises set up, not for the conservation of species, but for the promotion of sport fishing, and, as section 85 of the Act respecting the conservation and development of wildlife says, "with a view to increased utilization of wildlife resources". So, we are not dealing solely with a goal of conservation, but chiefly with a goal of controlled harvesting.
>
> Naturally, the holders of such leases are subject to strict rules and must establish a management plan for the territory concerned in order to avoid overharvesting.
>
> Alain Fort, the biologist with the ministère de l'Environnement et de la Faune who testified for the prosecution, clearly established that we are dealing with commercial enterprises and that the chief goal behind the concept of "outfitting operations with exclusive rights" is the development of wildlife territories.
>
> It cannot be denied that the objective pursued by the department is valid, but it does not constitute, in my view, a "valid" objective that can override the aboriginal rights of the aboriginal people in the territories concerned.
>
> I conclude from this that sections 96 and 171 of the Act respecting the conservation and development of wildlife (R.S.Q. c. 61.1) do not take priority over the accused's aboriginal rights and that the accused was entitled to fish at the location mentioned in the charge.[16]

75 All these considerations led Coutu J. to acquit Edward Young.

Judgment of the Superior Court

76 The Court of Québec judgment was appealed to the Superior Court. On August 12, 1999, André Trotier J. dismissed the appeal [*[2000] 3 C.N.L.R. 286*].

77 It is noteworthy that Trotier J. ruled first on the problem of the evidence concerning the infringement of Aboriginal rights, expressing himself as follows:

> [TRANSLATION]
>
> At the outset, I would like to dispose of the procedural controversy. The Court must settle a disagreement between the parties regarding the scope of the Attorney General's notices of appeal.
>
> The respondents submit that the grounds invoked in the notice of appeal are strictly limited to the justification of the infringements of the said aboriginal rights, which the appellant firmly denies.
>
> Ruling on this point, the Court must agree with the appellant. The notices of appeal as drafted are very broad. Further, both parties argued these issues, so the respondents were not taken by surprise. Finally, the real ambiguity of the admissions made in first instance cannot dispense us from examining the whole of the matter.[17]

78 Trotier J. then dealt with the existence of the Aboriginal rights and made the following finding:

> [TRANSLATION]
>
> Under the circumstances, the trial judge was right to link the respondents' right to a specific territory. In any case, his finding was one of fact, which, apart from the error of law wrongly invoked by the appellant, is not directly called into question by the parties. Consequently, in examining the existence of an infringement, the

> Court will consider that the respondents are entitled to fish in the territory subject to the lease granted by the province.[18]

79 Trotier J. next turned to the issue of the infringement of Aboriginal rights, and ruled as follows:

> [TRANSLATION]
>
> It goes without saying that the Attorney General's argument that there is no infringement as long as fishing remains possible on a satisfactory portion of the territory loses much of its worth once the finding has been made that the respondents' right does not cover all of the Témiscamingue region, but rather certain specific places near the Kipawa reserve. From this perspective, the fact that any portion of the site subject to an aboriginal hunting right is no longer available (which is obviously true in this case) is a sufficient condition to conclude that there has been an appreciable restriction of an aboriginal right.
>
> In any case, even without linking the respondents' right to a given site, the Court could conclude that an infringement exists, because, as things stand, access to the available resources in the territory as a whole is unduly difficult for aboriginal people. As the Attorney General himself admitted, they are sometimes obliged to travel as much as 80 kilometres to a lake: the watercourses contiguous with the reserve are operated by outfitters. Such a situation manifestly infringes the respondents' fishing rights, to the extent that the onus is on the government to justify the effects of its law.[19]

80 Finally, Trotier J. examined the issue of the justification of the infringement, beginning with an explanation of the examination process:

> [TRANSLATION]
>
> As mentioned earlier, there are two aspects to this stage; one concerns the importance of the objective, the other the appropriateness of the methods used to attain it (or, more specifically, "whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples": Delgamuukw v. British Columbia, supra, (at para. 162).[20]

81 Regarding the first aspect, Trotier J. concluded that the system of outfitting operations was aimed only secondarily at wildlife conservation and that its main objective was socioeconomic development. Contrary to Coutu J., Trotier J. concluded, however, that the latter objective could serve to justify an infringement of Aboriginal rights:

> [TRANSLATION]
>
> In the opinion of the Court and with respect for the opposite opinion, the trial judge was therefore wrong to conclude that a socioeconomic development objective could never justify an infringement of aboriginal rights. In the case at bar, I am convinced, rather, that the development of the wildlife in the Témiscamingue region is an overriding objective and that, consequently, the government has discharged its burden of proof with regard to the first part of the test for justification.
>
> However, the trial judge's erroneous conclusion does not automatically overturn the verdicts of acquittal. The Attorney General still has to show that his law is compatible with the provincial government's fiduciary relationship when it affects aboriginal rights.[21]

82 Moving on to the second aspect of justification, Trotier J. pointed out that the government's fiduciary obligation raised, above all, the issue of the order of priority of Aboriginal rights:

> [TRANSLATION]
>
> ... the choice of the number, the area and the location of outfitting operations with exclusive rights must be made bearing in mind the priority right of aboriginal people to resources in territories subject to aboriginal rights (the specific site of the exercise of the right within the meaning of Adams, supra).[22]

83 The examination of the record led Trotier J. to reach the following conclusions:

> [TRANSLATION]
>
> In the case at bar, the legislative framework for the transfer of exclusive fishing rights provides two mechanisms for taking aboriginal fishing rights into account: either they can be considered incidental to trapping in beaver reserves or, more importantly, they can be authorized by a lessee. A third mechanism, namely, public hearings on the question, to which aboriginal people are invited, seems ineffective given low participation by aboriginal people.
>
> Be that as it may, according to the evidence adduced before the trial judge, the first two mechanisms are insufficient to ensure that the respondents can fully exercise their aboriginal fishing rights without disadvantage. According to certain witnesses and exhibits, the respondents and their fellow band members must sometimes travel a considerable number of kilometres before they are able to fish, whereas lakes geographically more accessible are subject to exclusive rights. This observation is sufficient to conclude that the government did not pursue its socioeconomic objective in a way that was compatible with its fiduciary obligation. More specifically, the economic development of the region could have been achieved as effectively by locating the outfitting operations with exclusive rights in a way that ensured that the aboriginal people would have access to a fishing territory large enough to satisfy their needs. The infringement was therefore not reduced to an acceptable level in the circumstances.[23]

84 Trotier J. nevertheless added the following clarifications to the above statements:

> [TRANSLATION]
>
> This conclusion does not mean, however, that the aboriginal people can abuse with impunity the right to fish in the lakes of outfitting operations with exclusive rights. The aboriginal right to fish for subsistence purposes has an intrinsic limit such that an aboriginal person who fished for other purposes, such as resale, would not be protected by it.
>
> Furthermore, fishing in lakes subject to exclusive rights must only occur as a last resort. If it is possible to harvest enough resources in lakes with readier geographic access or, at the very least, equivalent access, then aboriginal persons who fished on the territory of an outfitting operation would be exercising their aboriginal right needlessly, contrary to the general interests of the region as a whole, which is incompatible with the noble purpose of section 35, which is to reconcile the pre-existing presence of aboriginal peoples with the sovereignty of Her Majesty.[24]

85 This led Trotier J. to draw the following general conclusions:

> Under the circumstances, the Court finds that the respondents may have access to lakes for which exclusive rights have been granted, provided the following two conditions are met:
>
> (1) They fish for subsistence purposes;
>
> (2) The other lakes that are as readily accessible as those on the territory of the outfitting operation with exclusive rights must not be sufficient to meet that need.[25]

86 Applying the principles he had just stated to the case before him, Trotier J. ultimately concluded as follows:

> [TRANSLATION]
>
> In first instance, the Attorney General did not demonstrate that one of the two conditions had not been complied with. Accordingly, I must conclude that the exercise of the aboriginal fishing right was not abusive in the case at bar. For this reason, reversal is not warranted and the verdicts of acquittal must be upheld.[26]

Analysis

87 Neither Coutu J. nor Trotier J. dwelt on the first two questions I mentioned at the beginning of these reasons.

88 Both of them quickly gave a positive reply to both questions and concluded that Edward Young had the right to fish for subsistence purposes on the territory of the Beauchesne outfitting operation and that section 96 of the Act respecting the conservation and development of wildlife constituted an infringement of that right.

89 I do not think it is worthwhile to study the reasoning followed by the two judges to arrive at their conclusions on the subject. In my view, the decision by the Attorney General of Québec to move directly to the stage of the justification for the legislative or regulatory provisions in dispute, after the Supreme Court of Canada judgments in Côté and Adams, was equivalent in practice to recognition of the existence of Edward Young's right to fish for subsistence purposes and of the fact that section 96 caused an infringement of that right.

90 It is true that, when questioned by Coutu J., counsel for the Attorney General of Québec declared that no admission was being made on the subject. I feel, however, that a party cannot say one thing and its opposite at the same time, thereby confusing the issue, and then try to take advantage of the confusion. But that is exactly what counsel accomplished by acting as she did.

91 Under the circumstances, I am of the opinion that the Attorney General of Québec renounced the arguments he could have made regarding both the existence of Aboriginal rights and the infringement of those rights. Even if I do not agree with all of the reasons expressed by Coutu and Trotier JJ. on this subject, I do not think there is reason to go back over their conclusions on the two questions, since their conclusions are supported both by the evidence adduced and by the declarations of the Attorney General of Québec. Accordingly, I feel that the only question requiring a decision in this appeal is the question of the justification for the infringement.

92 Here I would like to point out that this particularity of this appeal sets it apart from other cases. Because of the problem I have just mentioned, the stage of evidence relating to the existence of Aboriginal rights and to the infringement of those rights was largely skipped over. In another case, in which complete evidence was adduced on the subject, the conclusions on the two questions could be different.

93 I think I should add that this problem of evidence was raised in a special way in this case, in which the territorial aspect of the exercise of the fishing right was at the heart of the dispute. This problem was avoided, or at least greatly mitigated in other cases that were heard at the same time by our Court, cases in which argument dealt mainly with the fishing or hunting methods used by the Algonquins.[27]

94 That said, I will immediately move on to the analysis of the third question raised at the beginning of these reasons: Did the Attorney General of Québec show that the infringement of Edward Young's right to fish for subsistence purposes caused by section 96 of the Act respecting the conservation and development of wildlife was justified?

95 I am of the opinion that Trotier J. gave a good description of the process required to rule on this question. As the Supreme Court declared in Sparrow and several subsequent cases, the first thing we must do is ask ourselves whether a valid legislative objective exists. Then, if the question receives a positive answer, it will be appropriate to determine whether the government took into account the fiduciary relationship between the Crown and the Aboriginal peoples when it passed the legislation concerned.

96 Contrary to Coutu J., Trotier J. felt that the Attorney General of Québec had successfully passed the first leg of this test by demonstrating that the objective sought in section 96 of the Act respecting the conservation and development of wildlife was valid.

97 In my view, Trotier J. was right to decide that a reason other than wildlife conservation, namely, socioeconomic development, in this case, could justify the infringement of Aboriginal rights. In Côté, Lamer C.J. raised such a

possibility, as follows:

> In considering the identical regulatory scheme in Adams, I found that the Crown had failed to meet both legs of the test of justification. Since the scheme appeared to be driven by the desire to facilitate sport fishing, without any evidence of a meaningful economic dimension to that sport fishing it could not be said to have been based on a compelling and substantial objective.[28] [Emphasis added.]

98 Trotier J. concluded from the evidence adduced before Coutu J. that the development of the wildlife in the Témiscamingue region constituted a compelling objective. Here, more specifically, is how he expressed himself on the subject:

> [TRANSLATION]
>
> In this case, the trial judge recognized the economic importance of outfitting operations with exclusive rights for the Témiscamingue region. He affirmed on this subject that "[it cannot be denied that the objective pursued by the department is valid" (Paul judgment, at p. 6). Moreover, the proof of the economic spin-offs of the system for the region speaks for itself: the creation of a number of direct jobs, some filled by aboriginal persons, significant revenues for the transportation, construction, hotel and restaurant industries in the region around the outfitting operation's territory.

99 Need we remind ourselves that, according to the oft-repeated teachings of the Supreme Court of Canada, particularly in Housen v. Nikolaisen,[29] it is not for an appeal court to substitute its assessment of the evidence for that of the courts whose judgments are being appealed from, absent a palpable and overriding error on the subject.

100 Trotier J. did not substitute his assessment of the evidence for that of Coutu J. (see paragraph 74 of these reasons); he made a different conclusion of law on the basis of the evidence, which he was justified in doing, as I have just explained.

101 Under the circumstances, I do not feel there is reason for our Court to intervene on this question.

102 On the other hand, Trotier J. decided that the Attorney General of Québec had failed in his attempt to pass the second leg of the test for justification of his legislation. According to Trotier J., the appellant had not successfully demonstrated that section 96 was compatible with the government's fiduciary obligations in its relations with the Aboriginal peoples.

103 I agree with this conclusion, even though I do not concur with all of the reasons that led Trotier J. to draw it. The evidence shows that the Québec government did not take the existence of Aboriginal peoples' rights to fish for subsistence purposes into account when it set up the system of outfitting operations. It did not consult the Aboriginal peoples on this subject, and the system of outfitting operations makes no mention at all of Aboriginal rights.

104 I think it is appropriate to recall here, like Coutu J., that in Sparrow, the Chief Justice of the Supreme Court of Canada declared that one "... must give top priority to Indian food fishing".[30]

105 This principle does not appear to have been followed in setting up and running the system of outfitting operations.

106 All things considered, Trotier J. was therefore justified in dismissing the appeal brought before him, and, under the circumstances, I am of the opinion that there is reason to dismiss the appeal brought before our Court by the Attorney General of Québec, with costs.

107 The Attorney General of Québec's appeal against Edward Young having been disposed of, it remains to deal with the latter's appeal against the former.

108 The appeal is a rather unusual one. Edward Young is not appealing from the acquittal of the charge against him. Rather, he is asking our Court to cancel the two conditions mentioned by Trotier J. in the excerpt of his judgment quoted at paragraph 85 of these reasons.

109 I am of the opinion that there is reason to dismiss the appeal, for the reasons given below.

110 At paragraph 92 of these reasons, I pointed out that a significant part of the evidence concerning the existence of Aboriginal rights and the infringement of those rights was skipped over as a result of the Attorney General of Québec's decision to move on to the stage of the justification for the legislation, without dwelling on the first two questions.

111 The first of the two conditions contested in Edward Young's appeal is clearly related to the very existence of his fishing right and the second is related to the notion of infringement of that right.

112 Through his appeal, Edward Young is seeking to give our Court's ruling a general scope, whereas, in my view, for the reasons mentioned at paragraph 92, we are dealing with an individual case that must be treated as such.

113 I think I should add that it would be surprising to imply that Trotier J. was wrong to mention the first condition when Edward Young himself invoked his right to fish for subsistence purposes in order to contest the charge against him.

114 The second condition is in line with the idea that the restriction of an Aboriginal right must needlessly infringe the interests protected by such a right in order to be regarded as a prima facie infringement of subsection 1 of section 35 of the Constitution Act, 1982. This idea was clearly stated in R. v. Sparrow, and Trotier J. simply applied it to the case at bar, concluding that Edward Young's right to fish for subsistence purposes had indeed been infringed. It was no doubt unnecessary to point out that he could have concluded differently if the evidence had so warranted, but I do not see that as a reason for our Court to intervene on the subject.

115 Finally, contrary to what the appellant implies, it is inaccurate to affirm that Trotier J. rendered a conditional judgment. He, in fact, decided the two matters he himself had raised, as can be seen in paragraph 86 of these reasons. As a result, the appeal is purely hypothetical, and I would even say moot.

116 Under the circumstances, I am of the opinion that Edward Young's appeal should be dismissed, with costs.

Crown's appeal dismissed;
accused's appeal allowed.

---

1 D. Lambert, "Van der Peet and Delgamuukw: Ten Unresolved Issues", (1998) 32 U.B.C. L. Rev. 249 at 256.

2 See R. Dupuis, Le statut juridique des peuples autochtones en droit québécois (Toronto: Carswell, 1999) at 191.

3 Exhibit P.J.-15, Pondération et description des critères d'évaluation des propositions.

4 Exhibit P.J.-11, Plan de gestion de la pourvoirie "La réserve Beauchesne" 1991-1994; Exhibit P.J.-12, Plan de gestion de la pourvoirie "La réserve Beauchesne" 1994-1997; Exhibit P.J.-13, Plan de gestion de la pourvoirie "Lac a la truite" 1994-1995; Exhibit P.J.-14, Plan de gestion de la pourvoirie "Kipawa" 1994-1996.

5 Exhibit P.J.-34, Méthode d'évaluation de l'activité économique générée par la pêche sportive en Abitibi-Témiscamingue.

6 Appellant's factum, vol. 1, at 151.3-151.6.

7 Appellant's factum, vol. 1, at 151.6, 151.7.

8 Appellant's factum, vol. 1, at 151.7.

9 Appellant's factum, vol. 1, at 151.8.

10 Appellant's factum, vol. 1, at 151.9.

11 Appellant's factum, vol. 1, at 151.11.

12 Paragraphs 3 and 4 should appear in the opposite order according to Supreme Court Reports.

13 Appellant's factum, vol. 1, at 151.12.

14 Appellant's factum, vol. 1, at 151.13.

15 Appellant's factum, vol. 1, at 143.

16 Appellant's factum, vol. 1, at 143-145.

17 Appellant's factum, vol. 1, at 86, 87.

18 Appellant's factum, vol. 1, at 92.

19 Appellant's factum, vol. 1, at 94.

20 Appellant's factum, vol. 1, at 94.

21 Appellant's factum, vol. 1, at 97, 98.

22 Appellant's factum, vol. 1, at 98.

23 Appellant's factum, vol. 1, at 99.

24 Appellant's factum, vol. 1, at 99, 100.

25 Appellant's factum, vol. 1, at 100.

26 Appellant's factum, vol. 1, at 100.

27 Files 200-10-000911-995, 200-10-000915-996, 200-10-000909-999, 200-10-000910-997, 200-10-000913-991, 200-10-000914-999 and 200-10-000916-994.

28 *[1996] 3 S.C.R. 139* at 189-190.

29 [2002] S.C.C. No. 33.

30 *[1990] 1 S.C.R. 1075* at 1116.

End of Document

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, [2010] 2 S.C.R. 650

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: May 21, 2010;

Judgment: October 28, 2010.

File No.: 33132.

[2010] 2 S.C.R. 650 | *[2010] 2 R.C.S. 650* | *[2010] S.C.J. No. 43* | *[2010] A.C.S. no 43* | *2010 SCC 43*

Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority, Appellants; v. Carrier Sekani Tribal Council, Respondent, and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, British Columbia Utilities Commission, Mikisew Cree First Nation, Moosomin First Nation, Nunavut Tunngavik Inc., Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, Upper Nicola Indian Band, Lakes Division of the Secwepemc Nation, Assembly of First Nations, Standing Buffalo Dakota First Nation, First Nations Summit, Duncan's First Nation, Horse Lake First Nation, Independent Power Producers Association of British Columbia, Enbridge Pipelines Inc. and TransCanada Keystone Pipeline GP Ltd., Interveners.

(95 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Constitutional law — Honour of the Crown — Aboriginal peoples — Aboriginal rights — Right to consultation — British Columbia authorized project altering timing and flow of water in area claimed by First Nations [page651] without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Duty to consult arises when Crown knows of potential Aboriginal claim or right and contemplates conduct that may adversely affect it — Whether Commission reasonably declined to consider adequacy of consultation in context of assessing whether agreement is in public interest — Whether duty to consult arose — What constitutes "adverse effect" — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

Administrative law — Boards and tribunals — Jurisdiction — British Columbia authorized project altering timing and flow of water in area claimed by First Nations without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Commission empowered to decide questions of law and to determine whether agreement is in public interest — Whether Commission had jurisdiction to discharge Crown's constitutional obligation to consult — Whether Commission had jurisdiction to consider adequacy of consultation — If so, whether it was required to consider adequacy of consultation in determining whether agreement is in public interest — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

Summary:

In the 1950s, the government of British Columbia authorized the building of a dam and reservoir which altered the amount and timing of water flows in the Nechako River. The First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River, but, pursuant to the practice at the time, they were not consulted about the dam project.

Since 1961, excess power generated by the dam has been sold by Alcan to BC Hydro under Energy Purchase Agreements ("EPAs") which commit Alcan to supplying and BC Hydro to purchasing excess electricity. The government of British Columbia sought the [page652] Commission's approval of the 2007 EPA. The First Nations asserted that the 2007 EPA should be subject to consultation under s. 35 of the *Constitution Act, 1982*.

The Commission accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, but found that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. The British Columbia Court of Appeal reversed the Commission's orders and remitted the case to the Commission for evidence and argument on whether a duty to consult the First Nations exists and, if so, whether it had been met. Alcan and BC Hydro appealed.

Held: The appeal should be allowed and the decision of the British Columbia Utilities Commission approving the 2007 EPA should be confirmed.

The Commission did not act unreasonably in approving the 2007 EPA. Governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. The duty to consult is grounded in the honour of the Crown and is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation. The duty has both a legal and a constitutional character, and is prospective, fastening on rights yet to be proven. The nature of the duty and the remedy for its breach vary with the situation.

The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This test can be broken down into three elements. First, the Crown must have real or constructive knowledge of a potential Aboriginal claim or right. While the existence of a potential claim is essential, proof that the claim will succeed is not. Second, there must be Crown conduct or a Crown decision. In accordance with the generous, purposive approach that must be brought to the duty to consult, the required decision or conduct is not confined to government exercise of statutory powers or to decisions or conduct which have an immediate impact [page653] on lands and resources. The duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights. Third, there must be a possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, speculative impacts, and adverse effects on a First Nation's future negotiating position will not suffice. Moreover, the duty to consult is confined to the adverse impacts flowing from the current government conduct or decision, not to larger adverse impacts of the project of which it is a part. Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation.

Tribunals are confined to the powers conferred on them by their constituent legislation, and the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on them. The legislature may choose to delegate the duty to consult to a tribunal, and it may empower the tribunal to determine whether adequate consultation has taken place.

The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a

question of law; it is a distinct, often complex, constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation must be expressly or impliedly empowered to do so and its enabling statute must give it the necessary remedial powers.

The duty to consult is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts. These remedies have proven time-consuming and expensive, are often ineffective, and serve the interest of no one.

[page654]

In this case, the Commission had the power to consider whether adequate consultation had taken place. The *Utilities Commission Act* empowered it to decide questions of law in the course of determining whether an EPA is in the public interest, which implied a power to decide constitutional issues properly before it. At the time, it also required the Commission to consider "any other factor that the commission considers relevant to the public interest", including the adequacy of consultation. This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over any "constitutional question", since the application for reconsideration does not fall within the narrow statutory definition of that term.

The Legislature did not delegate the Crown's duty to consult to the Commission. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to engage in consultation because consultation is a distinct constitutional process, not a question of law.

The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, and reasonably concluded that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. In this case, the Crown had knowledge of a potential Aboriginal claim or right and BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. However, the 2007 EPA would have neither physical impacts on the Nechako River or the fishery nor organizational, policy or managerial impacts that might adversely affect the claims or rights of the First Nations. The failure to consult on the initial project was an underlying infringement, and was not sufficient to trigger a duty to consult. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives will nevertheless be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them.

Cases Cited

Followed: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **referred to:** *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [page655] [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315; *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110; *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1; *An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637; *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4) 203; *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4) 653; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Dunsmuir v. New*

Brunswick, *2008 SCC 9*, *[2008] 1 S.C.R. 190*.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 1, 44(1), 58.

Constitution Act, 1867, s. 91(12).

Constitution Act, 1982, ss. 24, 35, 52.

Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 8.

Utilities Commission Act, R.S.B.C. 1996, c. 473, ss. 2(4), 71, 79, 101(1), 105.

Authors Cited

Newman, Dwight G. *The Duty to Consult: New Relationships with Aboriginal Peoples*. Saskatoon: Purich Publishing, 2009.

Slattery, Brian. "Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433.

Woodward, Jack. *Native Law*, vol. 1. Toronto: Carswell, 1994 (loose-leaf updated 2010, release 4).

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Huddart and Bauman JJ.A.), *2009 BCCA 67*, 89 B.C.L.R. (4) 298, *266 B.C.A.C. 228*, 449 W.A.C. 228, *[2009] 2 C.N.L.R. 58*, *[2009] 4 W.W.R. 381*, 76 R.P.R. (4) 159, *[2009] B.C.J. No. 259* (QL), *2009 CarswellBC 340*, allowing an appeal from a decision of the British Columbia Utilities Commission, 2008 CarswellBC 1232, and remitting the consultation issue to the Commission. Appeal allowed; decision [page656] of the British Columbia Utilities Commission approving 2007 EPA confirmed.

Counsel

Daniel A. Webster, *Q.C.*, *David W. Bursey* and *Ryan D. W. Dalziel*, for the appellant Rio Tinto Alcan Inc.

Chris W. Sanderson, *Q.C.*, *Keith B. Bergner* and *Laura Bevan*, for the appellant the British Columbia Hydro and Power Authority.

Gregory J. McDade, *Q.C.*, and *Maegen M. Giltrow*, for the respondent.

Mitchell R. Taylor, *Q.C.*, for the intervener the Attorney General of Canada.

Malliha Wilson and *Tamara D. Barclay*, for the intervener the Attorney General of Ontario.

Paul E. Yearwood, for the intervener the Attorney General of British Columbia.

Stephanie C. Latimer, for the intervener the Attorney General of Alberta.

Written submissions only by *Gordon A. Fulton*, *Q.C.*, for the intervener the British Columbia Utilities Commission.

Written submissions only by *Robert C. Freedman* and *Rosanne M. Kyle*, for the intervener the Mikisew Cree First Nation.

Written submissions only by *Jeffrey R. W. Rath* and *Nathalie Whyte*, for the intervener the Moosomin First Nation.

Richard Spaulding, for the intervener Nunavut Tunngavik Inc.

Written submissions only by *Timothy Howard* and *Bruce Stadfeld*, for the interveners the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band.

Robert J. M. Janes, for the intervener the Lakes Division of the Secwepemc Nation.

[page657]

Peter W. Hutchins and *David Kalmakoff*, for the intervener the Assembly of First Nations.

Written submissions only by *Mervin C. Phillips*, for the intervener the Standing Buffalo Dakota First Nation.

Arthur C. Pape and *Richard B. Salter*, for the intervener the First Nations Summit.

Jay Nelson, for the interveners the Duncan's First Nation and the Horse Lake First Nation.

Roy W. Millen, for the intervener the Independent Power Producers Association of British Columbia.

Written submissions only by *Harry C. G. Underwood*, for the intervener Enbridge Pipelines Inc.

Written submissions only by *C. Kemm Yates*, *Q.C.*, for the intervener the TransCanada Keystone Pipeline GP Ltd.

The judgment of the Court was delivered by

McLACHLIN C.J.

1 In the 1950s, the government of British Columbia authorized the building of the Kenney Dam in Northwest British Columbia for the production of hydro power for the smelting of aluminum. The dam and reservoir altered the water flows to the Nechako River, which the Carrier Sekani Tribal Council ("CSTC") First Nations have since time immemorial used for fishing and sustenance. This was done without consulting with the CSTC First Nations. Now, the government of British Columbia seeks approval of a contract for the sale of excess power from the dam to British Columbia Hydro and Power Authority ("BC Hydro"), a Crown corporation. The question is whether the British Columbia Utilities Commission (the "Commission") is required to consider the issue of consultation with the CSTC First Nations in determining whether the sale is in the public interest.

[page658]

2 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, this Court affirmed that governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. In the intervening years, government-Aboriginal consultation has become an important part of the resource development process in British Columbia especially; much of the land and resources there are subject to land claims negotiations. This case raises the issues of what triggers a duty to consult, and the place of government tribunals in consultation and the review of consultation. I would allow the appeal, while affirming the duty of BC Hydro to consult the CSTC First Nations on future developments that may adversely affect their claims and rights.

I. Background

A. *The Facts*

3 In the 1950s, Alcan (now Rio Tinto Alcan) dammed the Nechako River in northwestern British Columbia for the purposes of power development in connection with aluminum production. The project was one of huge magnitude. It diverted water from the Nechako River into the Nechako Reservoir, where a powerhouse was installed for the production of electricity. After passing through the turbines of the powerhouse, the water flowed to the Kemano River and on to the Pacific Ocean to the west. The dam affected the amount and timing of water flows into the Nechako River to the east, impacting fisheries on lands now claimed by the CSTC First Nations. Alcan effected these water diversions under Final Water Licence No. 102324 which gives Alcan use of the water on a permanent basis.

4 Alcan, the Province of British Columbia, and Canada entered into a Settlement Agreement in [page659] 1987 on the release of waters in order to protect fish stocks. Canada was involved because fisheries, whether seacoast-based or inland, fall within federal jurisdiction under s. 91(12) of the *Constitution Act, 1867*. The 1987 agreement directs the release of additional flows in July and August to protect migrating salmon. In addition, a protocol has been entered into between the Haisla Nation and Alcan which regulates water flows to protect eulachon spawning grounds.

5 The electricity generated by the project has been used over the years primarily for aluminum smelting. Since 1961, however, Alcan has sold its excess power to BC Hydro, a Crown Corporation, for use in the local area and later for transmission to neighbouring communities. The Energy Purchase Agreement ("EPA") entered into in 2007, which is the subject of this appeal is the latest in a series of power sales from Alcan to BC Hydro. It commits Alcan to supplying and BC Hydro to purchasing excess electricity from the Kemano site until 2034. The 2007 EPA establishes a Joint Operating Committee to advise the parties on the administration of the EPA and the operation of the reservoir.

6 The CSTC First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River. As was the practice at the time, they were not consulted about the diversion of the river effected by the 1950s dam project. They assert, however, that the 2007 EPA for the power generated by the project should be subject to consultation. This, they say, is their constitutional right under s. 35 of the *Constitution Act, 1982*, as defined in *Haida Nation*.

B. *The Commission Proceedings*

7 The 2007 EPA was subject to review before the Commission. It was charged with determining whether the sale of electricity was in the public interest under s. 71 of the *Utilities Commission Act*, [page660] R.S.B.C. 1996, c. 473. The Commission had the power to declare a contract for the sale of electricity unenforceable if it found that it was not in the public interest having regard to the quantity of energy to be supplied, the availability of supplies, the price

and availability of any other form of energy, the price of the energy supplied to a public utility company, and "any other factor that the commission considers relevant to the public interest".

8 The Commission began its work by holding two procedural conferences to determine, among other things, the "scope" of its hearing. "Scoping" is the process by which the Commission determines what "information it considers necessary to determine whether the contract is in the public interest" pursuant to s. 71(1)(b) of the *Utilities Commission Act*. The question of the role of First Nations in the proceedings arose at this stage. The CSTC was not party to the proceedings but the Haisla Nation was. The Haisla people submitted that the Province and BC Hydro "ha[d] failed to act on their legal obligation" to them, but refrained from asking the Commission "to assess the adequacy [of consultation] and accommodation afforded ... on the 2007 EPA": *Re: British Columbia Hydro & Power Authority Filing of Electricity Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71*, British Columbia Utilities Commission, October 10, 2007 (the "Scoping Order"), unreported. The Commission's Scoping Order therefore addressed the consultation issue as follows:

> Evidence relevant to First Nations consultation may be relevant for the same purpose that the Commission often considers evidence of consultation with other stakeholders. Generally, insufficient evidence of consultation, including with First Nations is not determinative of matters before the Commission.

9 On October 29, 2007, the CSTC requested late intervener status on the issue of consultation on the basis that the Commission's decision [page661] might negatively impact Aboriginal rights and title which were the subject of its ongoing land claims. At the opening of the oral hearing on November 19, 2007, the CSTC applied for reconsideration of the Scoping Order and, in written submissions of November 20, 2007, it asked the Commission to include in the hearing's scope the issues of whether the duty to consult had been met, whether the proposed power sale under the 2007 EPA could constitute an infringement of Aboriginal rights and title in and of itself, and the related issue of the environmental impact of the 2007 EPA on the rights of the CSTC First Nations.

10 The Commission established a two-stage process to consider the CSTC's application for reconsideration of the Scoping Order: an initial screening phase to determine whether there was a reasonable evidentiary basis for reconsideration, and a second phase to receive arguments on whether the rescoping application should be granted. At the first stage, the CSTC filed evidence, called witnesses and cross-examined the witnesses of BC Hydro and Alcan. The Commission confined the proceedings to the question of whether the 2007 EPA would adversely affect potential CSTC First Nations' interests by causing changes in water flows into the Nechako River or changes in water levels of the Nechako Reservoir.

11 On November 29, 2007, the Commission issued a preliminary decision on the Phase I process called "Impacts on Water Flows". It concluded that the "responsibility for operation of the Nechako Reservoir remains with Alcan under the 2007 EPA", and that the EPA would not affect water levels in the Nechako River stating, "the 2007 EPA sets the priority of generation produced but does not set the priority for water". With or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation".

12 As to fisheries, the Commission stated that "the priority of releases from the Nechako Reservoir [under the 1987 Settlement Agreement] [page662] is first to fish flows and second to power service". While the timing of water releases from the Nechako Reservoir for power generation purposes may change as a result of the 2007 EPA, that change "will have no impact on the releases into the Nechako river system". This is because water releases for power generation flow not into the Nechako River system to the east, with which the CSTC First Nations are concerned, but into the Kemano River to the west. Nor, the Commission found, would the 2007 EPA bring about a change in control over water flows and water levels, or alter the management structure of the reservoir.

13 The Commission then embarked on Phase II of the rescoping hearing and invited the parties to make written submissions on the reconsideration application - specifically, on whether it would be a jurisdictional error not to revise the Scoping Order to encompass consultation issues on these facts. The parties did so.

14 On December 17, 2007, the Commission dismissed the CSTC's application for reconsideration of the scoping

order on grounds that the 2007 EPA would not introduce new adverse effects to the interests of the First Nations: *Re British Columbia Hydro & Power Authority*, 2008 CarswellBC 1232 (B.C.U.C.) (the "Reconsideration Decision"). For the purposes of the motion, the Commission assumed the historic infringement of Aboriginal rights, Aboriginal title, and a failure by the government to consult. Referring to *Haida Nation*, it concluded that "more than just an underlying infringement" was required. The CSTC had to demonstrate that the 2007 EPA would "adversely affect" the Aboriginal interests of its member First Nations. Applying this test to its findings of fact, it stated that "a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing [without consultation] would not be a jurisdictional error". The Commission therefore concluded that its decision on the 2007 EPA would have no adverse effects on the CSTC First Nations' interests. The duty to consult was therefore not triggered, and no jurisdictional [page663] error was committed in failing to include consultation with the First Nations in the Scoping Order beyond the general consultation extended to all stakeholders.

15 The Commission went on to conclude that the 2007 EPA was in the public interest and should be accepted. It stated:

> In the circumstances of this review, evidence regarding consultation with respect to the historical, continuing infringement can reasonably be expected to be of no assistance for the same reasons there is no jurisdictional error, that is, the limited scope of the section 71 review, and there are no new physical impacts.

16 In essence, the Commission took the view that the 2007 EPA would have no physical impact on the existing water levels in the Nechako River and hence it would not change the current management of its fishery. The Commission further found that its decision would not involve any transfer or change in the project's licences or operations. Consequently, the Commission concluded that its decision would have no adverse impact on the pending claims or rights of the CSTC First Nations such that there was no need to rescope the hearing to permit further argument on the duty to consult.

C. *The Judgment of the Court of Appeal, 2009 BCCA 67, 89 B.C.L.R. (4th) 298 (Donald, Huddart and Bauman JJ.A.)*

17 The CSTC appealed the Reconsideration Decision and the approval of the 2007 EPA to the British Columbia Court of Appeal. The Court, *per* Donald J.A., reversed the Commission's orders and remitted the case back to the Commission for "evidence and argument on whether a duty to consult and, if necessary, accommodate the [CSTC First Nations] exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA" (para. 69).

[page664]

18 The Court of Appeal found that the Commission had jurisdiction to consider the issue of consultation. The Commission had the power to decide questions of law, and hence constitutional issues relating to the duty to consult.

19 The Court of Appeal went on to hold that the Commission acted prematurely by rejecting the application for reconsideration. Donald J.A., writing for the Court, stated:

> ... the Commission wrongly decided something as a preliminary matter which properly belonged in a hearing of the merits. The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the [CSTC] would win the point as a precondition for a hearing into the very same point.

> I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. [paras. 61-62]

20 The Court of Appeal held that the honour of the Crown obliged the Commission to decide the consultation issue, and that "the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation" (para. 53). Unlike the Commission, the Court of Appeal did not consider whether the 2007 EPA was capable of having an adverse impact on a pending claim or right of the CSTC First Nations. The Court of Appeal did not criticize the Commission's adverse impacts finding. Rather, it appears to have concluded that despite these findings, the Commission was obliged to consider whether consultation could be "useful". In finding that the Commission should have considered the consultation issue, the Court of Appeal appears to have taken a broader view than did the Commission as to when a duty to consult may arise.

21 The Court of Appeal suggested that a failure to consider consultation risked the approval of a contract in breach of the Crown's constitutional [page665] duty. Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry" (para. 42).

22 Alcan and BC Hydro appeal to this Court. They argue that the Court of Appeal took too wide a view of the Crown's duty to consult and of the role of tribunals in deciding consultation issues. In view of the Commission's task under its constituent statute and the evidence before it, Alcan and BC Hydro submit that the Commission correctly concluded that it had no duty to consider the consultation issue raised by the CSTC, since, however much participation was accorded, there was no possibility of finding a duty to consult with respect to the 2007 EPA.

23 The CSTC argues that the Court of Appeal correctly held that the Commission erred in refusing to rescope its proceeding to allow submissions on the consultation issue. It does not pursue earlier procedural arguments in this Court.

II. The Legislative Framework

A. *Legislation Regarding the Public Interest Determination*

24 The 2007 EPA was subject to review before the Commission under the authority of s. 71 of the *Utilities Commission Act* to determine whether it was in the public interest. Prior to May 2008, this determination was to be based on the quantity of energy to be supplied; the availability of supplies; the price and availability of any other form of energy; the price of the energy supplied to a public utility company; and "any other factor that the commission considers relevant to the public interest": [page666] *Utilities Commission Act*, s. 71(2)(a) to (e). Effective May 2008, these considerations were expanded to include "the government's energy objectives" and its long-term resource plans: s. 71(2.1)(a) and (b). The public interest clause, however, was narrowed to considerations of the interests of potential British Columbia public utility customers: s. 71(2.1)(d).

B. *Legislation on the Commission's Remedial Powers*

25 Based on the above considerations, the Commission may issue an order approving the proposed contract under s. 71(2.4) of the *Utilities Commission Act* if it is found to be in the public interest. If it is not found to be in the public interest, the Commission can issue an order declaring the contract unenforceable, either wholly or in part, or "make any other order it considers advisable in the circumstances": s. 71(2) and (3).

C. *Legislation on the Commission's Jurisdiction and Appeals*

26 Section 79 of the *Utilities Commission Act* states that all findings of fact made by the Commission within its jurisdiction are "binding and conclusive". This is supplemented by s. 105 which grants the Commission "exclusive

jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act". An appeal, however, lies from a decision or order of the Commission to the Court of Appeal with leave: s. 101(1).

27 Together, ss. 79 and 105 of the *Utilities Commission Act* constitute a "privative clause" as defined in s. 1 of the British Columbia *Administrative Tribunals Act*, *S.B.C. 2004, c. 45*. Under s. 58 of the *Administrative Tribunals Act*, this privative clause attracts a "patently unreasonable" standard of judicial review to "a finding of fact or law or [page667] an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause"; a standard of correctness is to be applied in the review of "all [other] matters".

28 The jurisdiction of the commission is also arguably affected by s. 44(1) of the *Administrative Tribunals Act* which applies to the Commission by virtue of s. 2(4) of the *Utilities Commission Act*. Section 44(1) of the *Administrative Tribunals Act* states that "[t]he tribunal does not have jurisdiction over constitutional questions". A "constitutional question" is defined in s. 1 of the *Administrative Tribunals Act* by s. 8 of the *Constitutional Question Act*, *R.S.B.C. 1996, c. 68*. Section 8(2) says:

> **8...** .
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

A "constitutional remedy" is defined as "a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion": *Constitutional Question Act*, s. 8(1).

D. *Section 35 of the Constitution Act, 1982*

29 Section 35 of the *Constitution Act, 1982* reads:

[page668]

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

III. The Issues

30 The main issues that must be resolved are: (1) whether the Commission had jurisdiction to consider consultation; and (2) if so, whether the Commission's refusal to rescope the inquiry to consider consultation should be set aside. In order to resolve these issues, it is necessary to consider when a duty to consult arises and the role of tribunals in relation to the duty to consult. These reasons will therefore consider:

1. When a duty to consult arises;

2. The role of tribunals in consultation;
3. The Commission's jurisdiction to consider consultation;
4. The Commission's Reconsideration Decision;
5. The Commission's conclusion that approval of the 2007 EPA was in the public interest.

IV. Analysis

A. *When Does the Duty to Consult Arise?*

31 The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when [page669] the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.

32 The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation: *Haida Nation*, at para. 20. As stated in *Haida Nation*, at para. 25:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

33 The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a [page670] final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective. Moreover, with a few exceptions, many Aboriginal groups have limited success in obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.

34 Grounded in the honour of the Crown, the duty has both a legal and a constitutional character: *R. v. Kapp*, *2008 SCC 41*, *[2008] 2 S.C.R. 483*, at para. 6. The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.

35 *Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-35. The duty is *prospective*, fastening on rights yet to be proven.

36 The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment [page671] Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 32.

37 The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

38 The duty to consult embodies what Brian Slattery has described as a "generative" constitutional order which sees "section 35 as serving a dynamic and not simply static function" ("Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433, at p. 440). This dynamicism was articulated in *Haida Nation* as follows, at para. 32:

> ... the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.

As the post-*Haida Nation* case law confirms, consultation is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations": D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21.

39 Against this background, I now turn to the three elements that give rise to a duty to consult.

(1) Knowledge by the Crown of a Potential Claim or Right

40 To trigger the duty to consult, the Crown must have real or constructive knowledge of a [page672] claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, para. 34. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice. As stated in *Haida Nation*, at para. 37:

> Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.

41 The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27 and 33.

(2) Crown Conduct or Decision

42 Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that [page673] engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

43 This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

44 Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

[page674]

(3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right

45 The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

46 Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

47 Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, [page675] a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

48 An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

49 The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation - the matter which is here at issue - a contemplated [page676] Crown action must put current claims and rights in jeopardy.

50 Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.

(4) An Alternative Theory of Consultation

51 As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

52 The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries [page677] or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.

53 I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue - not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

54 The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree - an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the resource and its

management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

[page678]

B. *The Role of Tribunals in Consultation*

55 The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, *2010 SCC 22*, *[2010] 1 S.C.R. 765*. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.

56 The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.

57 Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.

58 Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

59 The decisions below and the arguments before us at times appear to merge the different [page679] duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation.

60 This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

61 A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by [page680] statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

62 The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

63 As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

64 Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:

> The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate... . Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of [page681] deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness ....

65 It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Canada (Citizenship and Immigration) v. Khosa*, *2009 SCC 12*, *[2009] 1 S.C.R. 339*. It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

C. *The Commission's Jurisdiction to Consider Consultation*

66 Having considered the law governing when a duty to consult arises and the role of tribunals in relation to the duty to consult, I return to the questions at issue on appeal.

67 The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.

68 As discussed above, issues of consultation between the Crown and Aboriginal groups arise from s. 35 of the *Constitution Act, 1982*. They therefore have a constitutional dimension. The question is whether the Commission possessed the power to [page682] consider such an issue. As discussed, above, tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the Constitution.

69 It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the

legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.

70 Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?" (para. 42).

71 This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over [page683] constitutional matters. Section 2(4) of the *Utilities Commission Act* makes certain sections of the *Administrative Tribunals Act* applicable to the Commission. This includes s. 44(1) which provides that "[t]he tribunal does not have jurisdiction over constitutional questions." However, "constitutional question" is defined narrowly in s. 1 of the *Administrative Tribunals Act* as "any question that requires notice to be given under section 8 of the *Constitutional Question Act*". Notice is required only for challenges to the constitutional validity or constitutional applicability of any law, or are application for a constitutional remedy.

72 The application to the Commission by the CSTC for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982*. In broad terms, consultation under s. 35 of the *Constitution Act, 1982* is a constitutional question: *Paul*, para. 38. However, the provisions of the *Administrative Tribunals Act* and the *Constitutional Question Act* do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, in applying the test articulated in *Paul* and *Conway*, the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.

73 For these reasons, I conclude that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place.

74 While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place, [page684] its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

75 As the Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the Legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

D. *The Commission's Reconsideration Decision*

76 The Commission correctly accepted that it had the power to consider the adequacy of consultation with

Aboriginal groups. The reason it decided it would not consider this issue was not for want of power, but because it concluded that the consultation issue could not arise, given its finding that the 2007 EPA would not adversely affect any Aboriginal interest.

77 As reviewed earlier in these reasons, the Commission held a hearing into the issue of whether the main hearing should be rescoped to permit exploration of the consultation issue. The evidence at this hearing was directed to the issue [page685] of whether approval of the 2007 EPA would have any adverse impact on the interests of the CSTC First Nations. The Commission considered both the impact of the 2007 EPA on river levels (physical impact) and on the management and control of the resource. The Commission concluded that the 2007 EPA would not have any adverse physical impact on the Nechako River and its fishery. It also concluded that the 2007 EPA did not "transfer or change control of licenses or authorization", negating adverse impacts from management or control changes. The Commission held that an underlying infringement (i.e. failure to consult on the initial project) was not sufficient to trigger a duty to consult. It therefore dismissed the application for reconsideration and declined to rescope the hearing to include consultation issues.

78 The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statutes, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative Tribunals Act.* Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness" as set out in *Haida Nation* and *Dunsmuir v. New Brunswick*, *2008 SCC 9*, *[2008] 1 S.C.R. 190*.

79 A duty to consult arises, as set out above, when there is: (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right, (b) contemplated Crown conduct, and (c) the potential that the contemplated conduct may [page686] adversely affect the Aboriginal claim or right. If, in applying the test set out in *Haida Nation*, it is arguable that a duty to consult could arise, the Commission would have been wrong to dismiss the rescoping order.

80 The first element of the duty to consult - Crown knowledge of a potential Aboriginal claim or right - need not detain us. The CSTC First Nations' claims were well-known to the Crown; indeed, it was lodged in the Province's formal claims resolution process.

81 Nor need the second element - proposed Crown conduct or decision - detain us. BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia.

82 The third element - adverse impact on an Aboriginal claim or right caused by the Crown conduct - presents greater difficulty. The Commission, referring to *Haida Nation*, took the view that to meet the adverse impact requirement, "more than just an underlying infringement" was required. In other words, it must be shown that the 2007 EPA could "adversely affect" a current Aboriginal interest. The Court of Appeal rejected, or must be taken to have rejected, the Commission's view of the matter.

83 In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized [page687] developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the

present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past. The Commission applied the correct legal test.

84 It was argued that the Crown breached the rights of the CSTC when it allowed the Kenney Dam and electricity production powerhouse with their attendant impacts on the Nechako River to be built in the 1950s and that this breach is ongoing and shows no sign of ceasing in the foreseeable future. But the issue before the Commission was whether a fresh duty to consult could arise *with respect to the Crown decision before the Commission*. The question was whether the *2007 EPA* could *adversely* impact the claim or rights advanced by the CSTC First Nations in the ongoing claims process. The issue of ongoing and continuing breach was not before the Commission, given its limited mandate, and is therefore not before this Court.

85 What then is the potential impact of the 2007 EPA on the claims of the CSTC First Nations? The Commission held there could be none. The question is whether this conclusion was reasonable based on the evidence before the Commission on the rescoping inquiry.

86 The Commission considered two types of potential impacts. The first type of impact was the [page688] physical impact of the 2007 EPA on the Nechako River and thus on the fishery. The Commission conducted a detailed review of the evidence on the impact the 2007 EPA could have on the river's water levels and concluded it would have none. This was because the levels of water on the river were entirely governed by the water licence and the 1987 agreement between the Province, Canada, and Alcan. The Commission rejected the argument that not approving the 2007 EPA could potentially raise water levels in the Nechako River, to the benefit of the fishery, on the basis of uncontradicted evidence that if Alcan could not sell its excess electricity to BC Hydro it would sell it elsewhere. The Commission concluded that with or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation". Finally, the Commission concluded that changes in the timing of water releases for power generation have no effect on water levels in the Nechako River because water releases for power generation flow into the Kemano River to the west, rather than the Nechako River to the east.

87 The Commission also considered whether the 2007 EPA might bring about organizational, policy, or managerial changes that might adversely affect the claims or rights of the CSTC First Nations. As discussed above, a duty to consult may arise not only with respect to specific physical impacts, but with respect to high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants. It noted that a "section 71 review does not approve, transfer or change control of licenses or authorization". Approval of the 2007 EPA would not effect management changes, ruling out any attendant adverse impact. This, plus the absence of physical impact, led the Commission to conclude that the 2007 EPA had no potential to adversely impact on Aboriginal interests.

[page689]

88 It is necessary, however, to delve further. The 2007 EPA calls for the creation of a Joint Operating Committee, with representatives of Alcan and BC Hydro (s. 4.13). The duties of the committee are to provide advice to the parties regarding the administration of the 2007 EPA and to perform other functions that may be specified or that the parties may direct (s. 4.14). The 2007 EPA also provides that the parties will jointly develop, maintain, and update a reservoir operating model based on Alcan's existing operating model and "using input data acceptable to both Parties, acting reasonably" (s. 4.17).

89 The question is whether these clauses amount to an authorization of organizational changes that have the potential to adversely impact on Aboriginal interests. Clearly the Commission did not think so. But our task is to examine that conclusion and ask whether this view of the Commission was reasonable, bearing in mind the generous approach that should be taken to the duty to consult, grounded in the honour of the Crown.

90 Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be

viewed as organizational changes effected by the 2007 EPA, the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their [page690] constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive.

91 By contrast, in this case, the Crown remains present on the Joint Operating Committee and as a participant in the reservoir operating model. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The CSTC First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require BC Hydro to give the CSTC First Nations notice of any decisions under the 2007 EPA that have the potential to adversely affect their claims or rights.

92 This ongoing right to consultation on future changes capable of adversely impacting Aboriginal rights does not undermine the validity of the Commission's decision on the narrow issue before it: whether approval of the 2007 EPA could have an adverse impact on claims or rights of the CSTC First Nations. The Commission correctly answered that question in the negative. The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA is approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it, as is their entitlement under Final Water Licence No. 102324 and the 1987 Agreement on waterflows. Moreover, although the Commission did not advert to it, BC Hydro, as a participant on the Joint Operating Committee and the resevoir management team, must in the future consult with the CSTC First Nations on any decisions that may adversely impact their claims or rights. On this evidence, it was not unreasonable for the Commission to conclude that the 2007 EPA will not adversely affect the claims and rights [page691] currently under negotiation of the CSTC First Nations.

93 I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

E. *The Commission's Decision That Approval of the 2007 EPA Was in the Public Interest*

94 The attack on the Commission's decision to approve the 2007 EPA was confined to the Commission's failure to consider the issue of adequate consultation over the affected interests of the CSTC First Nations. The conclusion that the Commission did not err in rejecting the application to consider this matter removes this objection. It follows that the argument that the Commission acted unreasonably in approving the 2007 EPA fails.

V. Disposition

95 I would allow the appeal and confirm the decision of the British Columbia Utilities Commission approving the 2007 EPA. Each party will bear their costs.

Appeal allowed; British Columbia Utilities Commission's approval of 2007 Energy Purchase Agreement confirmed.

[page692]

Solicitors:

Solicitors for the appellant Rio Tinto Alcan Inc.: Bull, Housser & Tupper, Vancouver.

Solicitors for the appellant the British Columbia Hydro and Power Authority: Lawson Lundell, Vancouver.

Solicitors for the respondent: Ratcliff & Company, North Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the British Columbia Utilities Commission: Boughton Law Corporation, Vancouver.

Solicitors for the interveners the Mikisew Cree First Nation and the Lakes Division of the Secwepemc Nation: Janes Freedman Kyle Law Corporation, Victoria.

Solicitors for the intervener the Moosomin First Nation: Rath & Company, Priddis, Alberta.

Solicitor for the intervener Nunavut Tunngavik Inc.: Richard Spaulding, Ottawa.

Solicitors for the interveners the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band: Mandell Pinder, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Hutchins Légal inc., Montréal.

[page693]

Solicitors for the intervener the Standing Buffalo Dakota First Nation: Phillips & Co., Regina.

Solicitors for the intervener the First Nations Summit: Pape Salter Teillet, Vancouver.

Solicitors for the interveners the Duncan's First Nation and the Horse Lake First Nation: Woodward & Company, Victoria.

Solicitors for the intervener the Independent Power Producers Association of British Columbia: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener Enbridge Pipelines Inc.: McCarthy Tétrault, Toronto.

Solicitors for the intervener the TransCanada Keystone Pipeline GP Ltd.: Blake, Cassels & Graydon, Calgary.

Ross River Dena Council v. Yukon, [2011] Y.J. No. 130

British Columbia and Yukon Judgments

Yukon Territory Supreme Court

R.S. Veale J.

November 15, 2011.

S.C. No. 10-A0148

Registry: Whitehorse

[2011] Y.J. No. 130 | *2011 YKSC 84* | *343 D.L.R. (4th) 545* | *210 A.C.W.S. (3d) 287* | *[2012] 2 C.N.L.R. 341*

Between Ross River Dena Council, Plaintiff, and Government of Yukon, Defendant, and Yukon Chamber of Mines, Intervenor

(82 paras.)

Case Summary

Aboriginal law — Treaties and agreements — Agreements — Land claim agreements — Application by First Nation for declaration respondent government had duty to consult prior to recording mineral claims within Ross River area allowed in part — Applicant credibly asserted claims to land but had not yet established title — Quartz mining claims operated under free entry system — Recorder was required to record claims that conformed with Quartz Mining Act — Recording claim perfected claimant's exploration rights, so was Crown conduct/decision — Recording allowed exploration that could adversely impact land — Declaration made that duty to consult was engaged when claim recorded and required notifying applicant — Declaration suspended one year.

Aboriginal law — Aboriginal lands — Duties of Crown — Fair dealing and reconciliation — Consultation and accommodation — Application by First Nation for declaration respondent government had duty to consult prior to recording mineral claims within Ross River area allowed in part — Applicant credibly asserted claims to land but had not yet established title — Quartz mining claims operated under free entry system — Recorder was required to record claims that conformed with Quartz Mining Act — Recording claim perfected claimant's exploration rights, so was Crown conduct/decision — Recording allowed exploration that could adversely impact land — Declaration made that duty to consult was engaged when claim recorded and required notifying applicant — Declaration suspended one year.

Natural resources law — Mines and minerals — Exploration — Phases — Early exploration — Claim staking — Rights — Exclusive right to explore and right to lease the claim — Constitutional powers and ownership — Dispositions from Crown — Free entry — Title — Registration of title — Recorder's office — Application by First Nation for declaration respondent government had duty to consult prior to recording mineral claims within Ross River area allowed in part — Applicant credibly asserted claims to land but had not yet established title — Quartz mining claims operated under free entry system — Recorder was required to record claims that conformed with Quartz Mining Act — Recording claim perfected claimant's exploration rights, so was Crown conduct/decision — Recording allowed exploration that could adversely impact land — Declaration made that duty to consult was engaged when claim recorded and required notifying applicant — Declaration suspended one year.

Application by First Nation for a declaration that the respondent government had a duty to consult prior to recording a grant of quartz mineral claims within the Red River Area. There were several agreements in place between the parties concerning the land area in question, but no final agreement had been reached. Quartz claim staking had exploded in the Yukon and there were 8,633 active mineral claims within the area in question. After the Canadian government transferred management of land and waters to the respondent in 2003, the respondent began recording the location of quartz mineral claims. Quartz mineral claim staking operated under a free entry system so that anyone could prospect for claims on territorial lands. The Quartz Mining Act set out the requirements for recording a mineral claim. Claims could be indefinitely renewed, though only a small portion ever proceeded to development. Once a claim was recorded, claimants could engage in Class 1 exploration programs without notifying the respondent, so the applicant would also not be notified. Claimants were required to obtain permits for Class 2, 3 and 4 exploration programs, prior to which an assessment would be held for which the applicant was notified. The respondent maintained its duty to consult arose prior to issuing a Class 2 or higher permit. The applicant argued the duty arose prior to recording a claim.

HELD: Application allowed in part.

The agreements between the parties did not amount to an acknowledgement that the applicant had established Aboriginal title over the land in question, but the applicant had credibly asserted a claim. Under the Act, the Mining Recorder did not have the discretion to refuse to record a claim if the requirements were met. However, the mere lack of discretion did not eliminate the respondent's duty to consult. While recording a claim was non-discretionary, it perfected the claimant's right to carry out exploration. Thus, recording a claim was Crown conduct, or a decision, and triggered the duty to consult. Class 1 exploration programs permitted some construction, clearing and trenching, so the applicant's hunting, trapping and fishing rights could clearly be adversely affected. The effects of Class 1 exploration programs could not be fully mitigated by remediation regulations. The duty to consult could be achieved in the non-onerous manner of sending the applicant monthly reports. As the issue was ongoing, a declaration was made that the respondent's duty to consult was triggered after the claim was recorded and required it to notify the applicant by providing monthly reports. The declaration was suspended for one year to allow the respondent time to change its procedures.

Statutes, Regulations and Rules Cited

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Forestry Revitalization Act, SBC 2003, CHAPTER 17,

Quartz Mining Act, S.Y. 2003, c. 14, s. 2, s. 12, s. 18, s. 41, s. 49, s. 70, s. 78(1)(a), s. 80(1), s. 130

Quartz Mining Land Use Regulation, OIC 2003/64,

Rules of Court, Rule 5(21), Rule 19

Yukon Act, S.C. 2002, c. 7,

Yukon Environmental and Socio-economic Assessment Act, S.C. 2003, c. 7, s. 74(2)

Yukon Quartz Mining Act, R.S.C. 1985, c. Y-4, s. 130

Counsel

Stephen Walsh: Counsel for Ross River Dena Council.

Penelope Gawn and Laurie Henderson: Counsel for Government of Yukon.

Richard Buchan and Kevin O'Callaghan: Counsel for Yukon Chamber of Mines.

REASONS FOR JUDGMENT

R.S. VEALE J.

INTRODUCTION

1 Ross River Dena Council applies for a declaration that the Government of Yukon has a duty to consult prior to recording the grant of quartz mineral claims within the lands comprising the Ross River Area. Ross River Dena Council is a First Nation for which no Final Agreement is in effect. A duty to consult could arise if the three part test in *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 ("Haida Nation") is met.

2 This is the first time that this Court has been asked to find a duty to consult prior to the recording of quartz mineral claims. It is also somewhat unique as the recording of a quartz mineral claim by the Mining Recorder is not a discretionary act under the "free entry" system established by the *Quartz Mining Act*, S.Y. 2003, c. 14. Section 74(2) of the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*") imposes a duty to consult on the Government of Yukon in Class 2, 3 and 4 mining exploration programs. However, this duty to consult is not engaged at the stages of recording a quartz mineral claim or conducting a Class 1 exploration program.

3 This application is based upon Admissions of Fact and documents pursuant to Rule 19, which is the Summary Trial procedure in the Rules of Court. It is also based upon four affidavits from the Government of Yukon and three affidavits from the Yukon Chamber of Mines, which provide important and extensive background and context. The parties consented to the intervention of the Yukon Chamber of Mines. The Chamber's intervention has been helpful in providing the history and justification of the free entry system. Counsel should be commended for working together in Case Management to bring this matter on in seven months without unnecessary cross-examination or examination for discovery.

4 With respect to the remedy sought, Rule 5(21) grants the Court the discretion to make binding declarations of right whether or not consequential relief is claimed.

BACKGROUND

5 Ross River Dena Council is a Kaska First Nation for which no Final Agreement is in effect. There are 14 Yukon First Nations, 11 of which have signed Final Land Claim Agreements and Self-Government Agreements based upon the Umbrella Final Agreement dated May 29, 1993.

6 The Governments of Yukon and Canada began negotiating a Final Agreement with Ross River Dena Council in 1996. Negotiations with Liard First Nation, also a Kaska First Nation, were conducted separately at that time.

7 In 1999, the Kaska wished to negotiate at the same table with the goal of reaching a single Kaska Final

Agreement and Self-Government Agreement or, alternatively, separate but similar agreements for Ross River Dena Council and Liard First Nation.

8 Negotiations continued up until June 21, 2002, when the mandate of the Government of Canada to negotiate land claims expired. A formal comprehensive offer to settle the land claims of Ross River Dena Council and Liard First Nation was made and not accepted. There have been no Yukon land claim negotiations since that date.

The Ross River Area

9 There is no dispute about the Ross River Area. It is the northwestern part of the Kaska Traditional Territory which Ross River Dena Council, Liard First Nation, and Kaska Dena Council identified in the Umbrella Final Agreement. The Kaska Traditional Territory, which represents 23% of Yukon land, covers the southeastern part of Yukon.

10 There are three maps prepared by the Government of Yukon that have been filed in this case. All show a similar Kaska Traditional Territory. However, the map entitled 'Ross River Dena Council/Liard First Nation Traditional Territory / Crown Land Withdrawal from Disposal and Mineral Staking to Facilitate the Settlement of First Nation Claims' (hereafter the "Withdrawal Map"), dated August 2, 2011 actually delineates the Ross River Area. This map indicates that the Ross River Area encompasses 63,110 square kilometres (roughly equivalent to an area the size of Latvia or Lithuania). The Ross River Area is approximately 13% of Yukon land.

11 The Withdrawal Map shows Crown lands withdrawn from disposal and mineral staking in the Ross River Area. The purpose of the withdrawals is to give "interim protection" to lands selected by the First Nation during land claim negotiations as potential Settlement Land that would ultimately be protected by Final Agreements. Most withdrawals in the Ross River Area are to protect lands identified by Ross River Dena Council, but several parcels were identified by Liard First Nation. These withdrawals comprise 8% of the Ross River Area, and are in effect to March 31, 2013. The 8,633 active mineral claims also designated on the map comprise 14% of the Ross River Area.

Yukon Mining

12 The Yukon has experienced such an explosion of quartz claim staking in recent years that it is often referred to as the second gold rush. In 2010, the Director of Mineral Resources reported that 79,993 quartz claims were staked, increasing the total number of quartz claims in good standing to 158,419 at the end of 2010. Exploration costs for 2010 were estimated at $160 million, with gold projects capturing 58% of expenditures, zinc-lead 15%, copper and copper-molybdenum 12%, silver 10% and other minerals 5%. In 2010, there were over 130 active hard-rock exploration programs, with 83 recording expenditures greater than $100,000 and 36 spending more than $1 million.

13 The current year has seen even more activity. Mineral exploration expenditures for 2011 are estimated to be more than $250 million. By the end of June 2011, there were 226,961 quartz claims in good standing. There are currently three operating mines and one is in Kaska Territory.

The Kaska Agreements

14 There are three agreements between the Government of Yukon and Ross River Dena Council that are relevant to this application, as they represent either an acknowledgement of an asserted Ross River Dena Council claim to aboriginal rights and title (the Government of Yukon position) or that Ross River Dena Council has aboriginal rights and title, rights and interests in and to the Ross River Area (the Ross River Dena Council position).

15 In January 1997, the Kaska Tribal Council (of which Ross River Dena Council is a member) and the Government of Yukon signed 'An Accord on the Devolution of Federal Programs, Responsibilities and Powers' ("the Accord"). The purpose of the Accord was to reach an agreement on the devolution of federal resource programs to the Government of Yukon no later than April 1999. Neither the Kaska Tribal Council nor the Ross River Dena

Council reached an agreement. The third recital in the Accord states:

> Whereas the member governments of the KTC [Kaska Tribal Council] have continuing aboriginal rights, title and interests within the Yukon, ...

16 The second agreement, dated January 1997 between the Government of Yukon, the Council of Yukon First Nations, Yukon First Nations (including Ross River Dena Council), the Kaska Dena Council and the Kaska Tribal Council dealt with the transfer of control of Yukon oil and gas lands to the Government of Yukon from Canada. It contains the following recital:

> Yukon Indian People, subject to Settlement Agreements, have aboriginal rights, titles and interests in and to the Yukon which are recognized and affirmed by section 35 of the *Constitution Act, 1982*.

It also included a specific recital in similar wording for the Kaska, which includes Ross River Dena Council.

17 The second agreement also contains paragraph 2.1:

> 2.1 Nothing in this Agreement shall be construed so as to abrogate or derogate from, nor identify or define, any aboriginal rights, titles, interests or treaty rights of Yukon Indian People or any other aboriginal people of Canada.

18 The third agreement signed by the Government of Yukon and the Kaska (which includes Ross River Dena Council), entitled "Bi-lateral Agreement" and dated March 8, 2003, had a term of 24 months. The Bi-lateral Agreement recognized that the land claims negotiations between the Kaska, Yukon and Canada had ended with Canada's formal withdrawal based on the expiry of its mandate on June 21, 2002. The Bi-lateral Agreement expressed the interest of Yukon and the Kaska in establishing a partnership on a government-to-government basis. Specifically, the opening recital stated:

> Whereas Yukon acknowledges, in agreements entered into with the Kaska in January, 1997, that the Kaska have aboriginal rights, titles and interest in and to the Kaska Traditional Territory in the Yukon;

19 Under the heading "Objectives", the Bi-lateral Agreement stated, among other things:

> 2.1 The following objectives shall govern the relationship, on a government to government basis, between Yukon and the Kaska in respect of the management, development and beneficial enjoyment of the lands and resources within the Kaska Traditional Territory in the Yukon:
>
> (a) the conclusion of just and equitable Kaska Agreements shall continue to be of the highest priority to the parties and Yukon and Kaska shall jointly make best efforts to re-engage Canada in negotiations towards Kaska agreements;
>
> (b) dispositions of interests in and authorizations for exploration work and resource development on lands and resources within the Kaska Traditional Territory shall be granted only in accordance with the process set out in 3.3, 3.4 and 3.5. ...

20 Under the heading "Kaska Consent", the Bi-lateral Agreement states, in part:

> 3.3 Yukon shall not agree to any significant or major dispositions of interests in lands or resources or significant or major authorizations for exploration work and resource development in the Kaska Traditional Territory without consulting and obtaining the consent of the Kaska. ...

21 The Bi-lateral Agreement expired according to its terms on May 9, 2005, but the Government of Yukon extended the term to August 8, 2005. The forms in the *Quartz Mining Act* were changed to ensure that any person

wishing to record a claim in Kaska Traditional Territory was given a notice that the lands where the claims were located "are subject to unsettled aboriginal land claims".

The Devolution Transfer Agreement

22 On October 29, 2001, the Government of Canada and the Government of Yukon entered into the Devolution Transfer Agreement. In the Devolution Transfer Agreement, Canada agreed to transfer the management of land and waters in Yukon to the Government of Yukon, effective April 1, 2003. The objective of the Devolution Transfer Agreement was comprehensive:

> Objective
>
> 1.1 The objective of the Parties in entering into this Agreement is to provide for the transfer from Canada to the YTG of the resources and responsibilities associated with NAP [Northern Affairs Program] and to do so in a manner that respects the protection provided by the Constitution of Canada for any existing aboriginal, treaty and other rights of the aboriginal peoples of Canada and that is consistent with Self-Government Agreements and any existing fiduciary duties or obligations of the Crown to aboriginal peoples of Canada.

23 To achieve the transfer of management and control of resources to Yukon, Canada had to change the *Yukon Act* to ensure that the Yukon had the power to make laws to manage public lands and waters as well as to dispose of rights or interests to those lands. Specifically relevant to this case was the agreement of Canada to repeal the *Yukon Quartz Mining Act* and Yukon to legislate a mirroring *Quartz Mining Act*.

24 The Devolution Transfer Agreement also contains the following section:

> 2.7 Following the Effective Date, the YTG shall Consult with Yukon First Nations with respect to any proposed amendment or repeal of the *Yukon Act* (Canada) provided that Canada consults with the YTG prior to the introduction of any such proposed amendment or repeal in the House of Commons.

25 To all intents and purposes these legislative objectives were achieved and, effective April 1, 2003, the Government of Yukon began to record the location of quartz mineral claims within the boundaries of the Ross River Area without prior consultation with Ross River Dena Council.

Quartz Mining Act

26 Pursuant to the Devolution Transfer Agreement, Canada repealed the *Yukon Quartz Mining Act*, and Yukon enacted the *Quartz Mining Act*, which came into effect April 1, 2003. As noted, the Yukon *Quartz Mining Act* mirrored the federal *Act*, with the exception of adding Part 2, Land Use and Reclamation, consisting of sections 129 through 153. Part 2 also contains s. 130, which states:

> 130. The purpose of this Part is to ensure the development and viability of a sustainable, competitive and healthy quartz mining industry that operates in a manner that upholds the essential socio-economic and environmental values of the Yukon.

27 Section 12 of the *Quartz Mining Act* provides that "[a]ny individual 18 years of age or older may enter, locate, prospect, and mine for minerals on ... any vacant territorial lands". While the parties to this litigation have a vigorous disagreement about whether the duty to consult arises prior to recording the grant of a quartz mineral claim for a number of reasons to be discussed below, there is no disagreement that sections 18 to 49 of the *Quartz Mining Act* set out the requirements to locate a mineral claim.

28 To record a mineral claim, the locator must provide the mining recorder with three things:

> (1) a plan showing the location of the mineral claim;

(2) the payment of a fee; and

(3) the prescribed application with an affidavit or solemn declaration as to the contents of the application.

29 The Mining Recorder follows a checklist for recording claims, and considers, among other things, whether the claim is located in Kaska Traditional Territory. If yes, the locator is given a notice that "[t]he land in which this mineral claim is located is subject to unsettled aboriginal land claims". The Mining Recorder then issues a Record of Mineral Claim, assigning a Grant Number and setting out the Mining District, the area where the claim is situated, as well as a Claim Sheet Number. The Record of Mineral Claim indicates the date the claim was located and recorded and the date the claim is effective to, being one year from the date of recording. At this point, the locator is referred to as the 'holder of a mineral claim' which does not exceed 1500 feet by 1500 feet. To keep the quartz claim in good standing, the claimholder must perform assessment work to a value of $100 per year or pay $100 in lieu of the work. On the performance of assessment work or payment in lieu, the claim is automatically renewed. A claim may be held indefinitely by the claimholder. A claimholder may also group a number of claims together, not exceeding 750 in number. The claimholder may then carry out assessment work on one or more claims, and that work will apply to the group of claims.

30 The *Quartz Mining Act* is based upon the "free entry system", which consists of

(a) the right of entry onto lands owned by the Crown or Commissioner (s. 12);

(b) the right of the miner to stake a claim in order to receive the mineral rights (s. 41); and

(c) the right to lease and enter into production (s. 70).

31 As per s. 2 of the *Quartz Mining Act*:

> "entry" means not only the record of a mineral claim in the books of a mining recorder, but also the grant that may be issued for that claim;

32 The act of staking and locating a quartz mineral claim causes minimal environmental disturbance. I accept the fact that the Yukon mining industry has been built on the foundation that there is a right of free entry, subject to the exceptions set out in the *Quartz Mining Act* and *YESAA*, to enter, locate and prospect for minerals. Specifically, s. 78(1)(a) of the *Quartz Mining Act* states that the holder of a mineral claim is entitled to all the minerals found in or under the lands "together with the right to enter on and use and occupy the surface of the claim."

33 From the perspective of the Yukon Chamber of Mines, deciding to stake a mineral claim is a strategic and highly confidential activity. The Chamber points out that there is considerable expense and financial risk in prospecting and staking a quartz mineral claim under the free entry system. The advantage of the free entry system is that a prospector can locate a mineral showing, after considerable research and on-the-ground activity, and maintain its confidentiality until the mineral claim is recorded. It is common knowledge in the mining industry that only a small portion of the claims staked will ever proceed to the development or mining stage.

Mining activity and the *YESAA*

34 The *Quartz Mining Act* identifies four classes of exploration programs that reflect an increasing intensity of land use.

35 This court action focuses on Class 1 exploration programs, which have the least significant environmental impact. In a Class 1 exploration program, the holder of a claim is neither required to notify government nor obtain any permits prior to undertaking Class 1 activities, which are regulated by the *Quartz Mining Land Use Regulation* (OIC 2003/64). Thus, the Government of Yukon, and presumably Ross River Dena Council, may have no knowledge of a Class 1 exploration program activity, either in location or extent.

36 Class 2, 3 and 4 exploration programs and development and production activities are recognized to have significant potential environmental impacts. A mining land use permit must be obtained prior to undertaking a Class 2, 3 or 4 exploration program and a licence must be obtained prior to engaging in development and production. Prior to the issuance of authorizations an assessment must be made pursuant to *YESAA*. Any citizen can participate in the process, and First Nations, in whose traditional territories the activities are proposed, are notified and consulted. In particular, s. 74(2) of *YESAA* requires a decision body (Government of Yukon in this case) considering a recommendation in respect of a Class 2, 3 or 4 project to consult a First Nation for which no final agreement is in effect, if the project is located in the First Nation's traditional territory. In my view, in the context of Class 2, 3 and 4 activities, the duty to consult begins as soon as the applicant submits a proposal under *YESAA* and continues on behalf of government long after the decision body issues a decision document: see *Liard First Nation v. Yukon Government and Selwyn Chihong Mining Ltd.*, *2011 YKSC 55* at para. 119.

37 The Yukon Chamber of Mines points out that the current mining regime was recommended to the Minister of Indian Affairs and Northern Development by the Yukon Mining Advisory Committee in a report dated April 1992. The Committee was made up of representatives from the Government of Canada, Government of Yukon, Council for Yukon Indians, Klondike Placer Miners' Association, Yukon Conservation Society and Yukon Chamber of Mines. The Yukon Mining Advisory Committee recommended that mineral development activities at the lower end of the spectrum be allowed to proceed with minimal regulatory constraints and delays, while those activities with more significant impacts upon the environment or aboriginal interests would require assessment and consultation with Yukon First Nations and affected parties.

38 As stated above, this application is for a declaration that the duty to consult arises prior to the recording of a grant of quartz mineral claims. However, if the duty to consult arises, it could affect a claimholder's commencement of Class 1 exploration programs, which currently do not require notification, assessment or permitting.

Class 1 exploration programs

39 The attached Schedule A is a table entitled "Exploration Program Class Criteria" ("the Table") that is included in the *Quartz Mining Land Use Regulation*. It sets out 22 activities that might occur in an exploration program. The Table indicates the least intensive activity in Class 1 with the more intensive in Classes 2 and 3. A Class 4 exploration program is one that includes an activity that exceeds any of the criteria in a Class 3 exploration program. For example, the Regulations do not authorize new access roads, upgrading of access roads or trails for a Class 1 exploration program. However, 19 other activities, including construction of camps, storage of fuel, construction of lines and corridors, clearing and trenching are all permitted in Class 1 exploration programs, subject to specific limitations. To give examples, clearings are permitted not exceeding eight per claim, including helicopter pads and camps. Trenching is limited to 400 m3 per claim. Limited off-road use of vehicles with low ground pressure is permitted, as is the use of 1000 kilograms of explosives in any 30-day period. Class 1 exploration programs also permit the construction of underground structures that do not require the removal of more than 500 tonnes of rock to the surface.

40 Schedule 1 of the *Regulation* also contains specific operating considerations, which are very comprehensive and, if followed, are designed to rehabilitate or reclaim the land to its pre-activity state. While rehabilitation is a laudable statutory objective, it is hard to imagine quickly rehabilitating land after the harvesting of trees permitted in s. 80(1) of the *Quartz Mining Act* or the removal of 500 tonnes of rock. In other words, while Class 1 exploration programs may be less intensive than Class 2, 3 or 4, they may have significant impact depending on which activity is proceeding.

ISSUES

41 The are a number of issues that must be addressed:

1. Does the issuance of a Record of Mineral Claim meet the three-part test to establish a duty to consult? That is:
    (i) Does the Crown have knowledge, actual or constructive, of a potential aboriginal claim or right;
    (ii) Is there contemplated Crown conduct; and
    (iii) Is there a potential that the contemplated conduct may adversely affect an aboriginal claim or right?
2. If the three-part test is met, should declaratory relief be granted?
3. If declaratory relief is granted, does the duty to consult arise before or after the mineral claim is issued?

ANALYSIS

The Duty to Consult

42 There is a significant amount of precedent from the Supreme Court of Canada on the duty to consult and, where appropriate, to accommodate a First Nation with no final agreement in settlement of aboriginal claims: See *Haida Nation,* above, *Taku River Tlingit v. British Columbia (Project Assessment Director),* *2004 SCC 74* and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, *2010 SCC 43*. The duty to consult may also arise after a final agreement: See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *2005 SCC 69*, *Beckman v. Little Salmon/Carmacks First Nation*, *2010 SCC 53*.

43 The most up-to-date and comprehensive discussion of when the duty to consult arises is found in *Rio Tinto* at paras. 39-50. Reading all these paragraphs is recommended; however, it is a tedious practice to quote decisions at great length, so I will be as selective as possible. The first part of the test requires Crown knowledge of a potential claim or right. *Rio Tinto* says the following:

> (1) Knowledge by the Crown of a Potential Claim or Right
>
> [40] To trigger the duty to consult, the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *2005 SCC 69*, *[2005] 3 S.C.R. 388*, para. 34. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice. As stated in *Haida Nation*, at para. 37:
>
> > Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.

44 The Government of Yukon agrees that it has knowledge of the assertion of an aboriginal right or claim by Ross River Dena Council in the Ross River Area. However, the Government of Yukon denies that any of the agreements it has made should be interpreted as an express acknowledgment that Ross River Dena Council has established aboriginal rights, title and interests in and to the Ross River Area. The Government of Yukon considers such claims to be assertions rather than actual recognition of aboriginal rights or title.

45 In contrast, counsel for Ross River Dena Council submits that the Kaska agreements explicitly acknowledge title, and, per *Delgamuukw v. British Columbia,* *[1997] 3 S.C.R. 1010*, this title "encompasses the right to exclusive

use and occupation of the land." Ross River Dena Council submits that any mineral claim will impact its exclusive use and occupation.

46 In my view, the agreements do not amount to an acknowledgement that Ross River Dena Council has established aboriginal title to the full Ross River Area in the sense of exclusive use and occupation, although clearly the Government of Yukon has recognized that claims to aboriginal rights and title are extant and not yet defined. The fact that negotiations have been taking place for many years supports the view that the claims to aboriginal rights and title are credibly asserted but not established. It does not make sense to conflate the words in the agreements so that an acknowledgement of rights and title within the Ross River Area is an acknowledgement of aboriginal title to the whole area. I have no doubt that Ross River Dena Council asserts such a claim and as counsel indicates, the Kaska Tribal Council (representing Ross River Dena Council among others) has an outstanding court action in the Federal Court of Canada in this regard. But the nature, extent and scope of the asserted aboriginal rights have not been established. I conclude that the acknowledgements by the Government of Yukon in the three agreements are in the context of an assertion rather than an acceptance of an established aboriginal title to the Ross River Area. However, the Ross River Dena Council claim is not tenuous but in the category of a strong case sufficiently credible to meet the threshold required by the first element of the test for the duty to consult.

47 I should add at this point that the claim of Ross River Dena Council for special costs based on the alleged resiling of the Government of Yukon from its acknowledgement of aboriginal rights and title is denied. The Government of Yukon acknowledges the asserted claim of Ross River Dena Council to the Ross River area and indeed acknowledges that the first part of the test for the duty to consult has been established.

48 *Rio Tinto* discusses the second part of the duty to consult test starting at para. 42:

> (2) Crown Conduct or Decision
>
> [42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.
>
> [43] This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, *2005 BCSC 697*, *[2005] 3 C.N.L.R. 74*, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, *2008 BCSC 1139*, *[2008] 4 C.N.L.R. 315*, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.
>
> [44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices ... We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, *2007 ABCA 206*, *77 Alta. L.R. (4th) 203*, at paras. 37-40.

49 The Government of Yukon and the Chamber of Mines submit that the *Quartz Mining Act* does not give rise to Crown conduct or a decision based upon the exercise of discretion and that registration is a mandatory act required by statute. Counsel submits that there is therefore no government action or decision to which the duty to consult attaches. If I accept this submission, there can be no duty to consult despite Ross River Dena Council having satisfied the first element of the test.

50 The submission is best expressed by the Chamber of Mines in its brief, which I summarize as follows:

1. the existence and ownership of a quartz mineral claim comes into being when a person locates the mineral claim by staking it in accordance with the *Quartz Mining Act*;

2. since the mineral claim comes into existence upon being located, no Crown grant or action is required;
3. the Mining Recorder has no discretion to refuse to record a claim that conforms with the *Quartz Mining Act*;
4. the role of the Mining Recorder is solely to record a claim without the exercise of any discretion or decision making authority.

51 In this submission, the executive branch of government is merely carrying out a statutory requirement (i.e. recording the staking and location of quartz claims) imposed by the legislative branch with no ability to exercise discretion. The government is not actually making a decision or taking an action, since the staking and location of a quartz claim by a third party triggers a statutory duty to automatically record the claim if it meets the statutory requirements. As the statute itself precludes the exercise of discretion, Ross River Dena Council's challenge, according to the Chamber's submissions, should properly be made against the legislation and not the administrative actor.

52 The issue of whether the duty to consult only arises in the context of a discretionary decision was argued in *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, *2005 BCSC 697*. In that case, the First Nation applied for declaratory relief alleging that its aboriginal title and rights were infringed by logging pursuant to a tree farm licence issued by the province. The First Nation had been consulted by the provincial government before the licence issued. The province had recently introduced a policy initiative called the "Forest and Range Agreement Program" pursuant to the *Forestry Revitalization Act.* The provincial government submitted that the duty to consult was not triggered by the Crown's general management of forestry permits and approvals but rather by specific decisions that infringe on s. 35 Constitutional rights. Dillon J. stated the following about the Crown's duty to consult, at para. 94:

> [94] ... The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution (*Haida* at para. 60). In its review, the court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process (*Taku* at para. 24). It is not a question, therefore, of review of a decision but whether a constitutional duty has been fulfilled ... (my emphasis)

53 Similarly, in *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, *2008 BCSC 1642*, the First Nation successfully judicially reviewed a decision approving a Forest Stewardship Plan. Grauer J. stated at para. 131:

> [131] Finally, it is consistent with the observations of the Court of Appeal for British Columbia that the constitutional duty to consult and accommodate is "upstream" of the statutes under which the ministerial power has been exercised, so that the district manager is not able to follow a statute, regulation or policy in such a way as to offend the Constitution: ... (my emphasis)

54 It is true that the duty to consult often arises in judicial review cases where the court is examining a decision involving discretionary action by government or a board or tribunal. In my view, that does not mean that only discretionary decisions can attract the duty to consult. The duty to consult is a constitutional principle that applies "upstream" of a statute like the *Quartz Mining Act*. It would be surprising if a statute could be sheltered from a constitutional principle merely by eliminating discretion in government action or conduct. *Haida Nation* and *Rio Tinto* are not limited to discretionary decisions but are expressly meant to apply to Crown conduct overall. The question of whether government conduct includes legislative action was left unanswered by the Supreme Court of Canada at para. 44 of *Rio Tinto*. While I can appreciate the position of the Government of Yukon and the Chamber of Mines that legislative conduct is at issue here, it does not negate the constitutional duty to consult and accommodate pending claims resolution. The Government of Yukon does take action through the issuance of a Record of Mineral Claim, albeit without the exercise of discretion. As stated in the *Klahoose First Nation* case, the government cannot follow a legislative mandate in a manner that offends the Constitution.

55 In my view, a conclusion that the duty to consult only arises in a government decision with discretion is too narrow. The test is not simply a determination of whether there is a decision as opposed to administrative action, or a decision with discretion, but rather whether there is any conduct or action of the Crown that attracts the consideration of whether a constitutional principle is engaged to ensure the honour of the Crown.

56 In a further submission, the Government of Yukon submits that if its conduct overall with the Ross River Dena Council has complied with the honour of the Crown, the duty to consult is not engaged. In other words, the duty to consult only arises in circumstances where the honour of the Crown has not otherwise been fulfilled. This submission derives from a statement made by Binnie J. in *Beckman, supra*, at para. 44:

> The concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.

57 There is no doubt that the governments of Canada, Yukon and First Nations, as well as mining and conservation interests, have had input into the legislation now in place. But that does not mean that the duty to consult will not arise because the honour of the Crown has already been discharged. This would suggest that the honour of the Crown can be upheld in a general way which would permit the Crown to allow exploitation of a claimed resource without any consultation. In *Haida Nation*, McLachlin C.J. stated that the honour of the Crown "infuses" the process of treaty-making and treaty interpretation. But at para. 27 she stated:

> The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. (my emphasis)

58 The argument that the honour of the Crown in Yukon may have been satisfied with the First Nations that have Final Agreements did not succeed in the *Beckman* case where Binnie J. concluded at para. 57 that:

> The decision maker was required to take into account the impact of allowing the Paulsen application on the concerns and interests of members of the First Nation. He could not take these into account unless the First Nation was consulted as to the nature and extent of its concerns. Added to the ordinary administrative law duties, of course, was the added legal burden on the territorial government to uphold the honour of the Crown in its dealings with the First Nation. Nevertheless, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more general consultation process in the LSCFN Treaty itself, the content of the duty of consultation (as found by the Court of Appeal) was at the lower end of the spectrum. It was not burdensome. But nor was it a mere courtesy.

59 That is not to say that the past and current efforts of the Government of Yukon to maintain the honour of the Crown are irrelevant. On the contrary, they are of considerable importance in determining whether the honour of the Crown has been discharged when the duty to consult applies to government conduct. This is reflected in the statement of Binnie J. in the Little Salmon Carmacks judgment at para. 54:

> ... Where adequately resourced and professionally represented parties have sought to order their own affairs, and have given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the

> Crown, the Court should strive to respect their handiwork: *Quebec (Attorney General) v. Moses*, 2010 SCC 17 (CanLII), 2010 SCC 17, [2010] 1 S.C.R. 557.

60 The Government of Yukon makes a further submission that we are not dealing with a case like *Haida Nation*, where the Haida Nation had a cultural and aboriginal claim to the timber that was being harvested. In this case, we are addressing mineral rights to which no specific aboriginal claim is made. It strikes me that this argument is belied by the fact that many of the settled Yukon claims have granted mineral rights as part of the settlement. However, in my view, all that is required is an asserted claim to title, and the Government of Yukon has acknowledged this in its various agreements with Ross River Dena Council and its negotiations. This is not to mention the claims for other obvious aboriginal rights such as hunting, fishing, and trapping, which may be adversely impacted by resource extraction activities.

61 The Government of Yukon and the Chamber of Mines make an additional submission that this is not a duty to consult case at all. Rather, they submit that Ross River Dena Council must make a constitutional challenge to the *Quartz Mining Act* as an infringement on its aboriginal title. I have already found that Ross River Dena Council has an asserted claim rather than actual established aboriginal title and rights, despite the wording of the agreements. Had I found that Ross River Dena Council had established aboriginal rights, this constitutional challenge submission might have some merit. Interestingly, this was the way that *Mikisew Cree* proceeded before reaching the Supreme Court of Canada. Binnie J. dealt with this approach at para. 59:

> Where, as here, the Court is dealing with a proposed "taking up" it is not correct (even if it is concluded that the proposed measure if implemented would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the process by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.

62 I conclude that, despite the non-discretionary nature of the government conduct and the legislative scheme that governs it, the duty to consult is engaged when the Mining Recorder records a mineral claim. The second element to attract the duty to consult, that is Crown conduct or a decision, has been met.

63 *Rio Tinto* considers the third part of the *Haida* test starting at para. 45:

> (3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right
>
> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.
>
> [46] Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.
>
> [47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41 ...

64 The Government of Yukon and the Chamber of Mines submit that the impact here is speculative because there

is no evidentiary basis on which to assess the proposed conduct. If Ross River Dena Council's claim is put forward solely on the basis that its aboriginal title is adversely impacted in that it will not have exclusive use and occupation of the land, I have already found that the wording of their agreements does not amount to an established aboriginal title.

65 On the other hand, it is not difficult to see the potential for adverse impact on hunting and trapping and fishing rights, for example, if all of the activities permitted in a Class 1 exploration program took place on a staked and registered claim. The Supreme Court of Canada is explicit that "a potential for adverse impact suffices". That potential exists whenever the Mining Recorder issues a Record of Mineral Claim.

66 The Government of Yukon also submits that there is no adverse impact because the operating conditions in Schedule 1 of the *Quartz Mining Land Use Regulation* provide for land reclamation. These operating conditions, to the extent they can reduce impact, are certainly laudable, but there are clear limitations to the reclamation possible after trees are cut, trenching done and up to 500 tonnes of rock removed. The operating conditions do not eliminate the potential for adverse impact. I also query how the government can monitor Class 1 exploration programs, when they do not require any notice or permit.

67 The Government of Yukon submits that it is speculative to suggest that the recording of a quartz mineral claim will adversely affect the asserted aboriginal rights of Ross River Dena Council. It says that there is no causal connection between the recording of a mineral claim and potential adverse impacts. The government submits that locating a mineral claim involves the planting of two posts in the ground and blazing a line between them, followed by the recording of the mineral claim in the record book. It further states that the location and recording of the quartz claim does not reduce or remove the Yukon's legal authority to regulate the development of mineral resources.

68 I have found that the recording of a mineral claim is Crown conduct. It is the perfection of the right to carry out exploration programs which can have an obvious impact on land and resources. The duty to consult does not require an immediate physical impact on lands and resources to be triggered, but rather the potential for adverse impacts on aboriginal claims or title. Exploration programs which are not subject to any notice, permission or assessment certainly carry the potential for adverse impacts on the aboriginal rights asserted here. In my view, they cannot be treated as speculative in the sense of being theoretical, hypothetical or academic.

69 To a certain extent, the recording of a quartz mineral claim is similar to the transfer of a Tree Farm Licence ("T.F.L.") in the *Haida* case, although the size of a single mineral claim is very small compared to the size of a T.F.L. As McLachlin C.J. stated in *Haida*:

> [75] The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).
>
> [76] I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

70 I accept that there is a significant distinction between the tree cutting policy in British Columbia and the policy in the Yukon for Class 1 exploration programs. In the mining context, there is historically no requirement to give notice of plans or receive a permit before exploration begins. The identification of trees as worthy of cutting is quite different from the prospecting and exploration required to determine whether a mineral showing has any potential. However, in my view, at this stage of considering the triggering of the duty to consult, the government conduct is very similar whether it is tree licences or mineral claims. There is clearly a causal connection between the recording of a mineral claim and the potential for adverse impacts through a Class 1 exploration program.

71 The Government of Yukon submits that there is no way to have a meaningful consultation prior to the recording of a mineral claim. This highlights a major difference between a Tree Farm Licence and a mineral claim. In the case of a Tree Farm Licence, the trees exist for all to see and assess. There are no secrecy or confidentiality concerns as there are in the mining business where the claim holder does not want to disclose knowledge of the proposed area to be explored at a stage where the claim holder has no rights to the mineral and may be disclosing valuable commercial information. To some extent, the same argument may apply to a Tree Farm Licence but this commercial sensitivity really goes to the heart of the mining business.

72 A second aspect in the government's submission is the administrative nightmare that would occur if hundreds or thousands of individual duties to consult arise before the issuance of a mineral claim. This would impose an onerous obligation on both the Government of Yukon and First Nations without a final settlement. However, the impact of such an obligation could be substantially mitigated by applying the grouping concept already in place in the *Quartz Mining Act*.

73 I conclude, in the context of the *Quartz Mining Act* and *YESAA*, that the appropriate time for consultation is after the grant of the mineral claim, when the holder of the claim has some security of tenure and the First Nation is able to determine its potential adverse impact. I recognize that this timing of the duty to consult places the right to occupy and mine a mineral claim before the establishment or agreement on the nature and extent of the Ross River Dena Council aboriginal title. However, it also recognizes the right of the Crown to manage the resource in consultation with the First Nation.

74 For the purposes of this court action, a duty to consult after the recording of the claim could only extend to notice, because in the absence of proposed exploration there is no context that would expand the duty beyond this. In other words, the Government of Yukon would be required to notify the Ross River Dena Council when mineral claims are recorded in the Ross River Area. This is not particularly onerous as, in satisfaction of this duty, the Government could simply provide the First Nation with the monthly report it now receives from the Mining Recorder under s. 6 of the *Quartz Mining Act*. I note that the Chamber of Mines, while not conceding that there should be a duty to consult, acknowledges that the earliest point that the Crown could undertake a consultation would be after the mineral claim is recorded.

Declaratory Relief

75 The question remains whether the declaratory relief sought should be granted. Declaratory orders are discretionary orders. The scope of the discretion was described in *Canada v. Solosky*, *[1980] 1 S.C.R. 821* at p. 832 as follows:

> As Hudson suggests in his article, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706:
>
> > The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.
>
> As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately

> available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights. (p. 710)

76 There are two Yukon cases that have denied declaratory orders. In *Tr'ondëk Hwëch'in v. Canada*, 2004 YKCA 2, the Tr'ondëk Hwëch'in applied for a declaration that certain pre-existing mining claims in Tombstone Territorial Park were to be managed according to the objectives of the Tr'ondëk Hwëch'in Final Agreement. There was no actual dispute about the facts regarding the management of the mining claims before the court. The trial judge, observing that section 130 of the *Yukon Quartz Mining Act* required the operation of the mining claims to uphold the essential socio-economic and environmental values of the Yukon, declared that the claims could be managed according to the *Quartz Mining Act*, provided that the exercise of discretion by the government was in accordance with the objectives in s. 1 of Schedule "A" to Chapter 10 of the Tr'ondëk Hwëch'in Final Agreement. The Yukon Court of Appeal set aside the declarations for the following reasons at para. 11:

> I appreciate the point, made by counsel for the appellant, that this was an application for the construction or interpretation of a document, namely the THFA [Tr'ondëk Hwëch'in Final Agreement]. However, when one considers the scope of the declarations sought by CUMI [Canadian United Minerals Inc.] and Tr'ondëk herein, it appears to me that what was really being sought from the Supreme Court was something in the nature of an advisory opinion. I believe that the courts ought to be cautious in acceding to requests of this sort. A court may of course grant declaratory relief where no other relief is sought. But a court may properly exercise its discretion to refuse a declaration where the relief sought is not related to an existing and defined *lis*.

77 In *Tr'ondëk Hwëch'in v. Yukon*, 2007 YKCA 1, in an application for summary judgment, the Court of Appeal agreed with the trial judge, [2005] Y.J. No. 76, that certain declarations were hypothetical and would serve no useful purpose. The Court of Appeal also wrote at para. 28 as follows:

> In any event, whether a defence has been shown or not, the judge retains discretion under Rule 18(2) to grant or withhold summary judgment. In this case, that discretion is supplemented by the discretion described in *Canada v. Solosky, supra*, to grant or withhold declaratory relief. In my view, the primary basis for the dismissal of the application for summary judgment was the judge's exercise of this discretion.

78 Here, Ross River Dena Council seeks a declaration that the Government of Yukon has a duty to consult prior to recording the grant of quartz mineral claims in the Ross River Area. I have concluded that the three element test in *Haida Nation* and *Rio Tinto* has been met. It is not a hypothetical case, in the sense that there is ongoing quartz mining activity in the Ross River Area and there are currently 8,633 active quartz claims. In my view, it is appropriate to grant a declaration that the Government of Yukon has a duty to consult after the issuance of a mineral claim. The duty to consult that arises at this stage is simply to give notice to the First Nation that a mineral claim has been issued. This can be satisfied through providing the report prepared by the Mining Recorder under s. 6 of the *Quartz Mining Act*. This declaration does not require any further duty upon the Government of Yukon than notice.

79 There is some utility in this declaration. It provides a remedy to the dispute between the First Nation and the Government of Yukon. It would not be useful in the interest of judicial economy or costs to the parties to suggest that another court action be commenced on a specific mineral claim to resolve this issue. At the same time, it is not an onerous duty for the government, but its performance will provide the First Nation with valuable information about potential impacts on its traditional territory.

80 It would be naïve to suggest that this decision will resolve all future issues between the First Nation and the Government of Yukon respecting the grants of mineral claims. But this declaration avoids the necessity of further litigation on the issue of when the duty to consult commences. It is not necessary or fruitful to have further litigation on this issue involving a mining company filing a claim.

81 It is not uncommon, in cases where a declaration is made based on a constitutional principle to suspend the

effect of the declaration for a period of time to allow dialogue and consultation to take place: See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, *[1999] 2 S.C.R. 203*, at para. 116 - 124. The Government of Yukon has specifically requested time to review its quartz mining regime, and counsel for Ross River Dena Council has also suggested the appropriateness of dialogue. I am also cognizant that this ruling involves a change in procedure that may have other ramifications. Accordingly, the declaration that the Government of Yukon has a duty to consult arising after the grant of a quartz mineral claim requiring notice to the First Nation is suspended for a period of one year.

82 Costs may be spoken to at Case Management if necessary.

R.S. VEALE J.

* * * * *

Schedule "A"

EXPLORATION PROGRAM CLASS CRITERIA

Column 1 Activity	Column 2 Class 1 Criteria	Column 3 Class 2 Criteria	Column 4 Class 3 Criteria
Construction of structures other than underground structures	Structures without foundations intended for use for a period of not more than 12 consecutive months	Structures without foundations	Structures with foundations
Number of person-days per camp	Not exceeding 250	Not exceeding 250	More than 250
Number of persons in a camp at any one time	Not exceeding 10	More than 10	More than 10
Storage of fuel, total amount stored	Not exceeding 5000L	Not exceeding 40,000L	More than 40,000L
Storage of fuel, per container	Not exceeding 2000L	Not exceeding 10,000L	More than 10,000L
Construction of lines	Not exceeding 1.5m in width and cut by hand or with hand held tools	More than 1.5m in width or cut with tools that are not hand held	More than 1.5m in width or cut with tools that are not hand held
Construction of corridors – width	Not exceeding 5m in width	Not exceeding 5m in width	Not exceeding 10m in width
Construction of corridors – length	Total length not exceeding 0.5km	Total length not exceeding 0.5km	Total length or more than 0.5km
Trenching	Not exceeding (a) 1200m³ on a group of three adjoining claims in the program, provided that no claim in the program forms part of more than one group; or (b) 400m³ per claim that is not part of a group of three adjoining claims referred to in paragraph (a)	Total volume not exceeding 1200m³ per claim per year	Total volume not exceeding 5,000m³ per claim per year to a maximum of 10,000m³ over the life of the exploration program
Number of clearings per claim, including existing clearings	Not exceeding 8	Not exceeding 8	More than 8
Number of clearings, helicopter pads and camps	No more than 2 of the 8 clearings referred to in item 10	No more than 2 of the 8 clearings referred to in item 10	More than 8
Clearings – removal of vegetative mat	No removal of vegetative mat within 30m of a water body	Removal of vegetative mat	Removal of vegetative mat
Surface areas of clearings	Not exceeding 200m³, except for clearings for helicopter pads and camps which cannot exceed 500m³	(a) Not exceeding 400m³ per clearing, if only trees and brush are removed; (b) Not exceeding 500m³ per clearing, for helicopter pads and camps; or (c) Not exceeding 1,000m³, if vegetative mat is removed	(a) More than 400m³ per clearing, if only trees and brush are removed; (b) More than 500m³ per clearing, for helicopter pads and camps; or (c) More than 1,000m³, if vegetative mat is removed
Establishing new access roads, per exploration program	Not authorized	Not exceeding 5 km	Not exceeding 15 km
Upgrading of access roads, per exploration program	Not authorized	Not exceeding 10 km	Not exceeding 30 km
Establishment of trails, other than temporary trails, per exploration program	Not authorized	Not exceeding 10 M in width and 15 km in total length	Not exceeding 15 m in width and 40 km in total length
Establishing or using temporary trails, per exploration program	Not authorized on Category A Settlement Land or on Category B Settlement Land	Not exceeding 10 m in width and 15 km in total length	Not exceeding 15 m in width and 40 km in total length

	On land other than Category A Settlement Land or Category B Settlement Land, establishing a temporary trail or using a temporary trail that was established for another program if (a) the temporary trail width does not exceed 7m or 1m more than the width of the equipment to be moved along the temporary trail, whichever is less; (b) the total temporary trail length does not exceed 3km; and (c) the temporary trail is only used for the purpose of moving sampling equipment between test sites.		
Use of vehicles on existing roads or trails	Within the design limits or tolerances of the road or, if design limits or tolerances of roads or trails are not known, vehicles with a gross vehicle weight of less than 40t for roads, and less than 20t for trails	Within the design limits or tolerances of the road or, if design limits or tolerances of roads or trails are not known, vehicles with a gross vehicle weight or less than 40t for roads, and less than 20t for trails	Within the design limits or tolerances of the road or, if design limits or tolerances of roads or trails are not known, vehicles with a gross vehicle weight of more than 40t for roads, and less than 20t for trails
Off-road use of vehicles in summer	Low ground pressure vehicles only	Vehicles with a gross vehicle weight not	Vehicles with a gross vehicle weight of more
Off-road use of vehicle in winter	Low ground vehicles or vehicles with a gross vehicle weight not exceeding 40t used over a distance of not more than 15 km	Vehicles over than low ground pressure vehicles, used over a distance of not more than 25 km	Vehicles other than low ground pressure vehicles, used over an unlimited distance
Use of explosive	Not exceeding 1,000kg in any 30 day period	More than 1,000 kg in any 30 day period	More than 1,000 kg in any 30 day period
Construction of underground structures	Construction in which not more than 500t of rock is moved to the surface	Not more than 40,000t of rock is moved to the surface per year and not more than a total of 200,000t is moved to the surface for the exploration program	Not more than 100,000t of rock is moved to the surface per year and not more than a total of 200,000t is moved to the surface for the exploration program

End of Document

Sambaa K'e Dene Band v. Duncan, [2012] F.C.J. No. 216

Federal Court Judgments

Federal Court

Calgary, Alberta

Mactavish J.

Heard: November 22, 2011.

Judgment: February 10, 2012.

Docket T-1946-10

[2012] F.C.J. No. 216 | *[2012] A.C.F. no 216* | *2012 FC 204* | *405 F.T.R. 182* | *[2012] 2 C.N.L.R. 369*

Between Sambaa K'e Dene Band and Nahanni Butte Dene Band, Applicants, and John Duncan, Minister of Indian Affairs and Northern Development, Government of the Northwest Territories, and Acho Dene Koe First Nation, Respondents

(213 paras.)

Counsel

John R. Lojek, for the Applicants.

Andrew Fox, Donna Keats, for the Respondent (the Minister of Indian Affairs and Northern Development).

Karen Lajoie, for the Respondent (the Government of the Northwest Territories).

REASONS FOR JUDGMENT AND JUDGMENT

MACTAVISH J.

1 The Sambaa K'e Dene Band ["SKDB"], the Nahanni Butte Dene Band ["NBDB"] and the Acho Dene Koe First Nation ["ADKFN"] have overlapping claims to land in the south-western corner of the Northwest Territories ["NWT"].

2 The SKDB and NBDB seek judicial review of a decision of the Minister of Indian Affairs and Northern Development ["Canada" or "the Minister"] postponing consultations with them until such time as an agreement in principle is reached with the ADKFN in relation to the ongoing comprehensive land claims negotiations between Canada and the ADKFN. The SKDB and the NBDB have also named the Government of the Northwest Territories ["GNWT"] and the ADKFN as respondents in this application.

3 The SKDB and NBDB say that by delaying consultation with them until after an agreement in principle is entered into between Canada and the ADKFN, Canada has failed to comply with its legal and constitutional duty to consult with and properly accommodate the SKDB and the NBDB

4 For the reasons that follow, I have concluded that Canada had a duty to consult with the SKDB and the NBDB in

a timely and meaningful fashion, and that it has breached that duty. As a consequence, the application for judicial review will be granted.

The Relationship between the SKDB, NBDB and ADKFN

5 The members of the SKDB, NBDB and ADKFN are Aboriginal peoples within the meaning of section 35(1) of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, and all are parties to Treaty 11, which was signed on June 27, 1921.

6 Treaty 11 purported to surrender vast tracts of Aboriginal lands to the Crown. These lands are described generally in the Report of the Commissioner accompanying the Treaty as being "north of the 60th parallel, along the Mackenzie river and the Arctic ocean".

7 In exchange for this surrender, the Crown made a number of commitments to the Aboriginal peoples. In particular, the Crown undertook to set aside a specific quantum of reserve lands. According to the Report of the Commissioner, when the Aboriginal peoples expressed the concern that they would be confined to the reserves, they were assured that the reserve lands were to be "of their own choosing, for their own use", and that they would be free to come and go at will. However, the promised reserves were never established.

8 Treaty 11 further provided for the preservation of the right of the Aboriginal peoples to trap, hunt and fish within the Treaty boundaries. The parties agree that the SKDB and NBDB continue to enjoy these Treaty rights. There is, however, a disagreement between the First Nations and Canada as to whether Treaty 11 extinguished Aboriginal title to the lands in question, and as to the effect of the Treaty on other Aboriginal rights such as governance.

9 The SKDB, NBDB and ADKFN all continue to assert Aboriginal title over their respective traditional lands, whereas Canada's position is that Treaty 11 extinguished the First Nations' Aboriginal title.

10 The SKDB, NBDB and ADKFN each have traditional lands in the south-western corner of the NWT, a region known as "the Dehcho" (previously known as the "Deh Cho"). However, two-thirds of the lands claimed by the ADKFN as their traditional lands are located in the Yukon and British Columbia, whereas the majority of the lands claimed by the SKDB and the NBDB are located in the NWT.

11 There is also a dispute between the ADKFN on the one hand, and the SKDB and the NBDB on the other, as to the boundaries of each of their traditional lands, and whether each First Nation enjoyed exclusive use of these lands.

The Comprehensive Land Claims Process

12 Once Canada agrees to negotiate a comprehensive land claim asserted by an Aboriginal people, the process begins with the parties signing a "framework agreement" which delineates the process to be followed in the negotiations.

13 Assuming that the initial negotiations reveal sufficient common ground, the parties will then sign an "agreement in principle" outlining the essential points of agreement. An agreement in principle is not legally binding, and terms in an agreement in principle can be the subject of further negotiation.

14 Once agreement is reached on all of the outstanding issues, a final agreement is prepared, which may include agreements with respect to matters such as land ownership, financial benefits, governance issues and land overlaps. Should the final agreement be ratified by all of the parties, it becomes constitutionally protected, and is recognized as a Treaty under section 35 of the *Constitution Act, 1982*.

The Dehcho Process

15 The Dehcho First Nations filed a comprehensive land claim which was accepted for negotiation by Canada in 1998. The SKDB, NBDB and ADKFN were all part of this process.

16 In or about 1999, Canada entered into comprehensive land claims settlement negotiations with the Dehcho Tribal Council, in accordance with the provisions of the "Deh Cho Framework Agreement". These negotiations are ongoing, and are known as the "Dehcho Process". The Dehcho Process relates only to lands in the NWT.

17 Because the ADKFN claimed that two-thirds of its traditional territory was outside of the NWT, it had originally requested that Canada establish a separate comprehensive land claims process to cover lands claimed by it in the NWT, Yukon and British Columbia. In a March, 1999, response, Canada advised the ADKFN that it was not willing to undertake community-by-community negotiations. Consequently, while the ADKFN initially participated in the Dehcho Process, it did, however, reiterate its concerns from time to time with respect to the inability of the Dehcho Process to resolve all of its outstanding issues.

18 Amongst other things, the Deh Cho Framework Agreement provided that the Dehcho Process negotiations would not be confidential. It also identified the reaching of an agreement with respect to the use, management and conservation of land, water and other resources as one of its objectives.

19 The Deh Cho Framework Agreement further committed the parties to "explore options and identify processes for addressing transboundary issues in respect of the Dehcho territory located outside the Northwest Territories".

20 The Dehcho Process is coordinated by the Dehcho First Nations ["DFN"], through the Dehcho Tribal Council. The SKDB, NBDB and ADKFN are all part of the Dehcho Tribal Council, along with other First Nations in the Dehcho region. However, each retained its status as an independent First Nation, with its own Aboriginal and Treaty rights within its respective traditional use area.

21 The Dehcho Process negotiations are ongoing, and no agreement in principle has as yet been reached.

22 In addition to the longstanding boundary disputes between the SKDB and the ADKFN, and between the ADKFN and the NBDB, there have also been disagreements between the three First Nations with respect to oil and gas development in the region. The ADKFN has been more interested in pursuing the development of oil and gas resources than have the SKDB and the NBDB. Indeed, the SKDB is on record as having stated that it would prefer to wait until the outstanding land claims have been resolved before pursuing the development of oil and gas reserves.

23 While the SKDB and the NBDB have sought to have portions of the lands subject to overlapping claims designated as Protected Areas within the Dehcho process, ADKFN has sought to open up this land for oil and gas exploration.

24 A proposal by Canada in 1999 to mediate the boundary disputes between the First Nations did not proceed. Two years later, as part of the Dehcho Process, the Dehcho First Nations passed a motion requiring that there be boundary agreements between the SKDB, the NBDB and the ADKFN.

25 While the land claims themselves remain outstanding, a number of agreements have been reached through the Dehcho Process. These include an "Interim Measures Agreement" entered into in 2001 between the Dehcho First Nations, Canada and the GNWT. Amongst other things, this Agreement clarified the role of the Dehcho First Nations in resource management decisions while negotiations are in progress. The Agreement also provides guidance to stakeholders until a final agreement is in place.

26 The Dehcho Land Use Planning Committee ["DCLUPC"] was also established in 2001. Canada is a member of this Committee, which regulates conservation, development and utilization of the land, waters and other resources in the region.

27 The DCLUPC developed maps for land use planning purposes, which attempted to show the boundaries between the traditional lands of the SKDB, the NBDB and the ADKFN. Correspondence was exchanged during this process, in which the SKDB and the NBDB identified each of their respective primary and traditional land use areas.

28 An Interim Resource Development Agreement was entered into in October of 2003, which was designed to encourage oil and gas development in the Dehcho region in a way that allowed the Dehcho First Nations to benefit directly from resource development in advance of a final agreement.

29 In 2005 and 2006, the SKDB, NBDB and ADKFN were in correspondence with the DCLUPC with respect to the boundaries between the lands of the SKDB, the ADKFN and the NBDB, for land use zoning purposes. In addition to recording the areas of disagreement between the First Nations, the correspondence from the SKDB and the NBDB also identified primary land use areas which fell squarely within the Settlement Area now being asserted by the ADKFN.

30 In 2006, some of the primary land use areas claimed by the SKDB and the NBDB were accepted by the DCLUPC. This was reflected in the final draft Dehcho Land Use Planning zoning map, which was subsequently approved by the Dehcho First Nations.

The ADKFN Land Claims Process

31 While Canada was initially unwilling to undertake community-by-community negotiations in relation to the land claims of individual First Nations within the Northwest Territories, this position appears to have changed sometime in 2007 or 2008, when Canada and the GNWT agreed to enter into community-based land claims discussions directly with the ADKFN. As was noted earlier, the ADKFN had felt for some time that its interests were not being adequately represented through the Dehcho Process, in part because of its extensive claims to lands outside the NWT.

32 On July 14, 2008, the ADKFN signed its own framework agreement with Canada and the GNWT ["the ADKFN Framework Agreement"] in an effort to achieve its own comprehensive land claims agreement. The recitals to the ADKFN Framework Agreement provide that the parties to the Agreement intend to negotiate a comprehensive land claim to define and provide clarity to certain asserted lands, resources and governance rights of the ADKFN *within the NWT*.

33 The ADKFN Framework Agreement outlines the objectives and timetables for the parties' negotiations, the subject matters of those negotiations, and the approvals process for an eventual agreement in principle and final agreement.

34 One of the issues identified in the ADKFN Framework Agreement as a "matter for negotiation" is the issue of "settlement area, land selection and tenure of Settlement Lands". Section 12 of the ADKFN Framework Agreement provides that "[p]rior to concluding the Phase I Final Agreement, the Parties will finalize the Settlement Area taking into account any agreement concluded to resolve any overlap issues [in the NWT] between the Acho Dene Koe First Nation and any Aboriginal group".

35 Section 4.3 of the ADKFN Framework Agreement further provides that "Canada and the GNWT will offer and the Acho Dene Koe First Nation will accept a settlement offer based on their proportionate share of the offer made to the Dehcho First Nations through the Dehcho Process".

36 The ADKFN Framework Agreement relates to lands described as "the ADKFN Asserted Territory" which are identified on a map appended to the Agreement. Although lands in the Yukon and British Columbia are identified as ADKFN traditional territory on this map, the ADKFN Framework Agreement makes it clear that it is only the lands claimed by the ADKFN in the NWT that are the subject of the negotiations under the Agreement. These lands

include areas claimed as primary use areas by the SKDB and the NBDB - lands which had been accepted as their primary use areas by the DCLUPC (of which Canada was a member) in 2006.

37 Section 8 of the ADKFN Framework Agreement stipulates that negotiations under the Agreement are to be confidential. The ADKFN has, however, released the contents of the agreement to the public.

38 Canada did not notify or consult with the SKDB and the NBDB prior to entering into the ADKFN Framework Agreement.

The Overlap Negotiations

39 Canada has long been aware of the overlapping claims to land in the Dehcho region of the NWT. Canada's policy has been that overlap issues should be resolved internally between the affected First Nations, wherever possible.

40 To this end, Canada has encouraged the Dehcho First Nations, including the SKDB, NBDB and ADKFN, to resolve their boundary and overlap issues between themselves. The SKDB and the NBDB agree that this would be the most desirable way of resolving overlap issues.

41 In an effort to assist the First Nations in resolving their overlap issues, Canada provided funding for negotiations between the three First Nations. Between 2008 and 2011, the SKDB and the NBDB were provided with $435,000 by Canada to support them in resolving the boundary issues. This money was used by the SKDB and NBDB to conduct research, to compile relevant documents, to hold community meetings, and to prepare for and attend meetings with the ADKFN.

42 In July of 2008, Canada appointed Mr. Bob Overvold to act as the Minister's Special Representative, to explore options for resolving overlapping interests in the Dehcho region generally. Although part of Mr. Overvold's mandate required him to engage in discussions with Aboriginal groups regarding their interests in overlap areas, he had no mandate to engage in consultation on issues arising from the land claims negotiations processes.

43 An information sheet provided to the SKDB and NBDB by Mr. Overvold outlines Canada's approach to First Nation overlap issues, stating that overlap issues "should be dealt with early and throughout the negotiation process".

44 Mr. Overvold was invited to one meeting by the SKDB and NBDB. He also assembled information regarding the overlap concerns of the various First Nations and prepared a report and recommendations for the Minister. Amongst other things, his report questioned Canada's current policy regarding consultation in relation to overlap issues, suggesting that Canada may want to "look for opportunities to begin overlap discussions, if not necessarily consultation, earlier".

45 A number of meetings were held between the three First Nations, but by June of 2010, the negotiations had broken down. Particular points of contention arose from the groups' divergent views as to the issues and different visions for the process to follow in resolving them.

46 By way of example, the ADKFN wanted a peace treaty, whereas the SKDB and the NBDB wanted an overlap and boundary agreement. The SKDB and the NBDB insisted on a meeting with elders and harvesters in order to establish historical and contemporary land use, while the ADKFN objected to such an approach. The ADKFN wanted to negotiate a comprehensive land claims treaty jointly with the SKDB and NBDB, whereas the SKDB and NBDB preferred to remain part of the Dehcho process.

47 After the breakdown of the overlap negotiations, the SKDB and NBDB then contacted Mr. Overvold, explaining the situation to him, and advising that the SKDB and NBDB expected direct consultations with Canada to commence.

Notice Provided to Canada of the SKDB and NBDB's Concerns

48 In July of 2008, the SKDB notified Canada that a portion of the land identified as the ADKFN's asserted territory in the ADKFN Framework Agreement was the SKDB's "primary land use area". The SKDB advised Canada that "any proposed development or assignment of lands within this area requires consultation with and approval of the [SKDB]".

49 The NBDB also wrote to Canada that same month, advising that the map appended to the ADKFN Framework Agreement indicating the ADKFN's asserted territory included a portion of the NBDB's traditional territory. The NBDB also advised Canada that any proposed development or assignment of this area required consultation with and approval of the NBDB.

50 The SKDB and the NBDB also provided Canada with substantial documentation supporting their claims to the lands in question, including a map showing the extent of the overlapping claims, land use data, archaeological reports, traditional place names maps, and traditional use studies.

51 Peter Redvers was the Negotiation Facilitator for the joint SKDB/NBDB negotiation team. In November of 2009, Mr. Redvers came into possession of a brochure prepared by Canada entitled "Acho Dene Koe First Nation and Fort Liard Métis Community-based Land, Resource and Governance Negotiations, Agreement-in-Principle Negotiations and the Land Selection Process".

52 Under the heading "Federal Offer", the document stated that the ADKFN "would be able to select a total of 6,474 square kilometres of land within the NWT, for which it would own both the surface and sub-surface rights" [the "ADKFN Land Quantum"].

53 According to Mr. Redvers' affidavit, the SKDB and the NBDB have calculated that there are only 6,064 square kilometres of land in the south-west corner of the NWT that are outside of the SKDB and NBDB primary land use areas. Moreover, the surface and sub-surface rights to some of this land is currently in the hands of third parties. As a result, there is not enough land available to satisfy the ADKFN Land Quantum without infringing on the SKDB and NBDB's primary land use areas, thus infringing their Aboriginal and Treaty rights.

54 In November of 2009, counsel to the SKDB and the NBDB wrote to the Honourable Chuck Strahl, the then-Minister of Indian and Northern Affairs, formally advising him that the SKDB and the NBDB were of the view that the ADKFN Framework Agreement contemplated an "inevitable infringement" of their Treaty 11 and Aboriginal rights. As a consequence, the SKDB and NBDB were seeking immediate formal, direct and deep consultations with Canada.

55 Canada responded to the SKDB and NBDB by way of letter dated December 21, 2009 from Pamela McCurry, the Senior Assistant Deputy Minister for Policy and Strategic Direction. The letter stated that the settlement area for the ADKFN would not be finalized until the final agreement phase. Ms. McCurry further stated that "the Government of Canada feels that it would be premature to enter into consultation *until the outcome of these overlap discussions* [with the ADKFN] *is known*" [my emphasis].

56 In March of 2010, the SKDB and NBDB obtained a copy of a map that had been prepared by Canada which indicated the ADKFN's asserted territory, which territory was now being called the "ADK Settlement Area". The SKDB and the NBDB immediately contacted Canada, advising that the description in the map was "inaccurate and misleading and also prejudices current [boundary] negotiations".

57 According to the SKDB and NBDB, the ADKFN effectively terminated the overlap negotiations in a letter dated June 24, 2010, wherein ADKFN Chief Kotchea asserted that, based on the ADKFN's Traditional Use Study, the "ADK [is] the sole owner and user of lands that you [SKDB and NBDB] assert you have interests in".

58 On May 21, 2011, the SKDB and NBDB wrote to the Minister himself, affirming their longstanding concern that negotiations carried out under the ADKFN Framework Agreement would inevitably lead to an infringement of their rights. They observed that Canada's response to date had been to refer them to direct negotiations with the ADKFN in order to resolve the overlap and boundary issues. The SKDB and NBDB advised the Minister of the difficulties that they had encountered in these discussions, noting that the overlap negotiations did not relieve Canada of its duty to consult with them.

59 The SKDB and the NBDB advised the Minister that they had been told that the ADKFN and Canada were close to reaching an agreement in principle which was to include a draft settlement map encompassing primary traditional lands of the SKDB and NBDB. Given their belief that this agreement would have a direct impact on their Aboriginal and Treaty rights, the SKDB and the NBDB renewed their request for the establishment of "a direct and formal consultation process between Canada and the SKDB-NBDB in the immediate future".

60 Receiving no response to their request for consultation, apart from a verbal confirmation of the receipt of their letter, the SKDB and NBDB renewed their efforts to be consulted. Counsel for the SKDB and NBDB wrote to Minister Duncan personally on August 30, 2011, stating that his letter "serve[d] as a final request of the SKDB and NBDB for Canada to fulfill its duty to consult and engage in immediate, meaningful and substantive consultations with the SKDB and the NBDB as to the potential infringements of the Treaty rights and the Aboriginal rights of the SKDB and NBDB concerning the ADKFN overlap".

61 Counsel further asked Canada to commit that it would not enter into any further agreements with the ADKFN until such time as consultations with the SKDB and NBDB were concluded, as any future agreement between Canada and the ADKFN "may eliminate consultation options and thereby prejudice the SKDB and the NBDB".

The Decision under Review

62 In a letter dated October 25, 2010, Minister Duncan responded to the SKDB and NBDB's May 21, 2010 correspondence. The Minister stated:

> I can assure you that the [SKDB] and the [NBDB] will be consulted. In order for such consultations to be meaningful and productive, however, they usually occur after the signing of an agreement-in-principle and no agreement-in-principle with the [ADKFN] has yet been signed.

63 The Minister went on to explain that:

> This is done for a number of reasons. First, the parameters of the draft agreement-in-principle are still under negotiations and are undefined. Second, defining the geographic scope of the settlement areas or of settlement lands is not required at the agreement-in-principle stage. This process will be done during final agreement negotiations. Third, the confidentiality of our negotiation processes prevents the sharing of draft agreements-in-principle. They become public documents upon signature by the parties.

64 The Minister observed that agreements in principle are not legally binding, and that Canada would therefore be able to consider and address, "where warranted", the claims and interests of other Aboriginal groups expressed through consultations occurring at that time. The Minister also noted that provisions are included in agreements in principle and final agreements that are intended to ensure that the Aboriginal and Treaty rights of other Aboriginal peoples are not affected by the agreements.

65 The Minister concluded his letter by encouraging the SKDB and NBDB to continue to try to resolve the overlap issues through negotiations with the ADKFN, characterizing this as "the best way forward".

66 It is this decision that underlies this application for judicial review.

The SKDB and NBDB's Application for Judicial Review

67 The SKDB and the NBDB say that by delaying consultation with them until after an agreement in principle is entered into by Canada and the ADKFN, Canada has failed to comply with its legal and constitutional duty to consult with and properly accommodate the SKDB and NBDB.

68 The applicants seek the following remedies:

1. A declaration that Canada owes the SKDB and NBDB a legal and constitutional duty to adequately consult with them in a timely manner as to the subjects of the land claim with ADKFN that would affect or potentially affect the Aboriginal and Treaty rights of the SKDB and NBDB, including the determination of lands and resources forming the settlement area or settlement lands of the ADKFN's land claim, the use of such lands and resources, and the regulation or management of such lands and resources;
2. A declaration that the Minister's decision to postpone consultation until after an AIP is signed with the ADKFN does not meet, fulfill or discharge the legal and constitutional duty of Canada as described above;
3. An order setting aside the Minister's decision postponing the initiation and engagement in substantive consultations with the SKDB and NBDB;
4. An order directing the Minister to promptly initiate and engage in deep, meaningful and adequate consultation with the SKDB and NBDB with the intention of developing workable accommodation measures to address their concerns about the determination of lands and resources forming the settlement area or settlement lands of the ADKFN's land claim, and the regulation or management of such lands and resources, in such a manner consistent with the reasons for judgment of this Court and subject to the following terms:
    a. The terms of consultation are as determined by agreement between the Minister and the SKDB and NBDB, and in the event of failure to agree to such terms of consultation, either party can apply to this Court to establish them; and
    b. Any of the parties is at liberty to reapply to this Court for such further additional relief as is required to advance and conclude the consultations;
5. An order prohibiting the Minister from negotiating further any term or condition under the ADKFN Framework Agreement that would reasonably affect the SKDB or the NBDB and from engaging in interim land withdrawals pursuant to such negotiations, pending conclusion of adequate consultation with the SKDB and NBDB; and
6. Its costs of this application on a solicitor-client basis.

The Issues

69 Certain matters are not in dispute in this case. In particular, Canada concedes that:

1. The SKDB and NBDB enjoy the right to hunt, trap and fish throughout much of the area covered by Treaty 11;
2. The SKDB and NBDB have Treaty rights in relation to lands within the ADKFN Asserted Territory;
3. Canada is considering changes to the Treaty regime;
4. The SKDB and NBDB also claim to have Aboriginal rights to title to the land itself that are independent of their Treaty rights;

5. Canada has a duty to consult with, and if necessary, accommodate the SKDB and NBDB; and
6. Canada's duty to consult with the SKDB and NBDB has been triggered by the negotiation of the ADKFN Framework Agreement.

70 While there is no issue with respect to the existence of the duty to consult, what is in dispute in this case is the timing, scope and content of that duty.

71 The first question to be addressed is the standard of review to be applied to the Minister's decision with respect to the timing, scope and content of its consultations with the SKDB and NBDB.

Standard of Review

72 In *Haida Nation v. British Columbia (Minister of Forests)*, *2004 SCC 73*, *[2004] 3 S.C.R. 511* at paras. 61-63 [*Haida Nation*], the Supreme Court of Canada established the standard of review to be applied to Crown decisions relating to the duty to consult.

73 *Haida Nation* teaches that on questions of law, the decision-maker must generally be correct, whereas a reviewing Court may owe a degree of deference to the decision-maker on questions of fact or mixed fact and law: above at para. 61.

74 As noted in the preceding section of these reasons, the Crown concedes that it has a duty to consult with the SKDB and NBDB in this case. Insofar as the Minister's determination of the extent of that duty is concerned, the Supreme Court stated in *Haida Nation* that the "extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate": above at para. 61.

75 The Court further noted that "[t]he need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal". The Court recognized that "[a]bsent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required". In such cases, "the standard of review is likely to be reasonableness": all quotes from *Haida Nation,* above at para. 61.

76 Where "the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness". However, where the factual and legal issues are inextricably entwined, the standard will likely be reasonableness: *Haida Nation,* above at para. 61.

77 Insofar as the consultation *process* is concerned, the Supreme Court held in *Haida Nation* that "the process itself would likely fall to be examined on a standard of reasonableness". Moreover, "[p]erfect satisfaction" is not required. According to the Supreme Court, "[t]he government is required to make reasonable efforts to inform and consult". As long as "every reasonable effort is made to inform and to consult, such efforts would suffice": all quotes from *Haida Nation* above at para. 62.

78 Finally, the Supreme Court stated in *Haida Nation* that "[s]hould the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness". However, if the government is correct on these matters and acts on the appropriate standard "the decision will be set aside only if the government's process is unreasonable". The focus should not be on the outcome, but rather on the process of consultation and accommodation: both quotes from *Haida Nation,* above at para. 63.

79 It should be noted that *Haida Nation* was decided before the Supreme Court's decision in *Dunsmuir v. New Brunswick*, *2008 SCC 9*, *[2008] 1 S.C.R. 190*. However, in *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, *2008 FCA 212*, *297 D.L.R. (4th) 722* at para. 34, the Federal Court of Appeal confirmed that

Dunsmuir did not change the applicable standard of review in relation to decisions regarding the duty to consult. See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 74.

The Source and Function of the Duty to Consult and Accommodate

80 In order to put the issues raised by this application into context, it is helpful to start by considering the law relating to the source and function of the duty to consult and accommodate.

81 As the Supreme Court of Canada observed in Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 1, the management of the relationships between Canada's Aboriginal and non-Aboriginal peoples "takes place in the shadow of a long history of grievances and misunderstanding". The Court noted that the "multitude of smaller grievances created by the indifference of some government officials to Aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies": at para. 1.

82 It was in this context that the Supreme Court stated that "the fundamental objective of the modern law of Aboriginal and Treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions": Mikisew, above at para. 1.

83 The duty to consult and, if indicated, to accommodate, is grounded in the honour of the Crown. In order to act honourably, the Crown cannot "cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof": Haida Nation, above at para. 27. Instead, the Crown must respect these potential, but as yet unproven, interests.

84 While *Haida* Nation involved Aboriginal rights rather than Treaty rights, subsequent jurisprudence has confirmed that the same principles apply in treaty cases: see, for example, *Mikisew*, above at para. 34, and *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, 315 F.T.R. 178 at para. 96.

85 The duty to consult has both a legal and a constitutional character: *Rio Tinto*, above at para. 34, and *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 6. It is, moreover, "a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process": Rio Tinto, above at para. 32, citing Haida Nation at para. 20.

86 As the Supreme Court observed in Rio Tinto, "[w]hile the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their Treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation": Rio Tinto, above at para. 32, citing *Haida Nation* at para. 20. The duty to consult requires that the Crown take contested or established Aboriginal rights into account before making a decision that may have an adverse impact on them: *Rio Tinto*, above at para. 35.

87 The Supreme Court explained that the duty to consult "derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right": Rio Tinto, above at para. 33. In the absence of such a duty, Aboriginal groups would have to commence litigation and seek injunctive relief in order to stop the threatening activity, a process that has often met with obstacles.

88 The duty to consult is primarily a procedural right: *Mikisew*, above at para. 33. It is not based on the common law duty of fairness, however. Rather, it is a duty based on "a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution": Haida Nation, above at para. 32.

89 While primarily procedural in nature, the duty to consult also has a substantive dimension. The duty "is not fulfilled simply by providing a process within which to exchange and discuss information": *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315 at para. 178. Rather, consultation must be meaningful and conducted in good faith "with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue": *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, [1997] S.C.J. No. 108

at para. 168; see also Arthur Pape, "The Duty to Consult and Accommodate: A Judicial Innovation Intended to Promote Reconciliation" in *Aboriginal Law since Delgamuukw*, ed. Maria Morellato (Aurora, ON: Cartwright Group Ltd., 2009) at 317.

90 As long as the consultation is meaningful, there is no obligation on the Crown to reach an agreement. Rather, accommodation requires that "Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process": *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, *2004 SCC 74*, *[2004] 3 S.C.R. 550* at para. 2.

91 However, "where there is a strong Aboriginal claim that may be significantly and adversely affected by the proposed Crown action, meaningful consultation may require the Crown to modify its proposed course to avoid or minimize infringement of Aboriginal interests pending their final resolution": *Wii'litswx*, above at para. 178. See also *Haida Nation*, above at paras. 41-42, 45-50; *Taku River*, above at para. 29; *Mikisew*, above at para. 54.

92 With this understanding of the source and function of the duty to consult and accommodate, I turn next to consider when it is that the duty to consult will arise.

When Does the Duty to Consult and Accommodate Arise?

93 Canada is required to consult with its Aboriginal peoples where it "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it": see Haida Nation, above at para. 35.

94 The knowledge threshold that must be met to trigger the duty to consult and accommodate is not high: see *Mikisew*, above at para. 55. Indeed, knowledge of a credible but unproven claim is sufficient to trigger the duty: Haida Nation, above at para. 37. The Crown will always have knowledge of Treaty rights, as a Treaty party: *Mikisew*, above at para. 34.

95 Although it is essential that the Aboriginal people establish the existence of a potential claim, proof that the claim will succeed is not required: see *Rio Tinto*, above at para. 40.

96 While the threshold for triggering a duty to consult is relatively low, the content of the duty to consult will vary with the circumstances. One relevant consideration is the strength of the claim. A weak claim may only require the giving of notice whereas a stronger claim may attract more onerous obligations on the part of the Crown: see Haida Nation, above at para. 37. The content of the duty to consult in the circumstances of this case will be discussed in greater detail later in these reasons.

a) ***The Nature of the Claims in Question and the Crown's Knowledge of the Claims***

97 The SKDB and NBDB claim to have both Aboriginal and Treaty rights in relation to the lands claimed by them. As the Supreme Court of Canada noted in *R. v. Badger*, *[1996] 1 S.C.R. 771*, *[1996] S.C.J. No. 39*, Aboriginal and Treaty rights "differ in both origin and structure". Aboriginal rights "flow from the customs and traditions of the native peoples" and "embody the right of native people to continue living as their forefathers lived". In contrast, Treaty rights "are those contained in official agreements between the Crown and the native peoples": all quotes from para. 76.

98 There is no issue in this case as to the existence of the SKDB and NBDB's Treaty rights. As was noted earlier, the Crown accepts that the SKDB and NBDB have ongoing rights under Treaty 11 to hunt, fish and trap within the lands claimed by the ADKFN as its exclusive territory.

99 Canada also does not dispute that it has knowledge sufficient to trigger a duty to consult with the SKDB and

NBDB in relation to these Treaty rights. Canada maintains, however, that this consultation should not occur until *after* Canada has reached an agreement in principle with the ADKFN.

100 Canada does not concede that the SKDB and NBDB have Aboriginal rights to the land itself. While Canada disputes the well-foundedness of these claims, it clearly has knowledge of them by virtue of its participation in land claims negotiations with SKDB and NBDB in Dehcho Process.

101 I am therefore satisfied that the Crown has sufficient knowledge to trigger a duty of consult in relation to both the Treaty rights and the Aboriginal claims (including rights to the land) asserted by the SKDB and NBDB.

b) *The Government Action that may Affect the Asserted Rights*

102 In order for the duty to consult to be triggered, there must also be a Crown decision or proposed government action that may affect the rights in question: *Rio Tinto*, above at paras. 41 and 45. It is not necessary that this decision or proposed action have an *immediate* impact on the lands or resources in question. A potential adverse impact will suffice. As a consequence, the duty to consult extends to "'strategic, higher-level decisions' that may have an impact on Aboriginal claims and rights": *Rio Tinto*, above at para. 44.

103 Canada concedes that the conclusion of the ADKFN Framework Agreement and the commencement of negotiations with the ADKFN with respect to its comprehensive land claim may ultimately affect the SKDB and NBDB's Treaty rights. However, it says that any agreement in principle it may enter into with the ADKFN will have no impact on any potential or existing Aboriginal or Treaty rights of either the SKDB or the NBDB. As a consequence, the "seriousness of the impact" part of the *Haida Nation* test points to the low end of the consultation spectrum at this stage in the process.

104 Given Canada's concession that its actions may affect the asserted rights of the SKDB and NBDB, I am satisfied that this part of the *Haida Nation* test has been satisfied. I will address Canada's arguments as to the content of the duty it owes to the SKDB and NBDB and when consultation should take place further on in these reasons.

c) *The Adverse Effect of the Proposed Crown Conduct on the Aboriginal Claim or Right*

105 The third element that is required to give rise to the duty to consult is the potential effect of the proposed Crown conduct on the Aboriginal claim or Treaty right.

106 As the Supreme Court of Canada observed at paragraph 45 of *Rio Tinto*, above, what must be established this stage of the analysis is "the *possibility* that the Crown conduct may affect the Aboriginal claim or right" [my emphasis]. A claimant must show "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights".

107 The Court went on in *Rio Tinto* to observe that "a generous, purposive approach to this element is in order, given that the doctrine's purpose ... is 'to recognize that actions affecting unproven Aboriginal title or rights or Treaty rights can have irreversible effects that are not in keeping with the honour of the Crown'...": above at para. 46, citing Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) at 30.

108 Mere speculative impact is not enough. There must an "appreciable adverse effect on the First Nations' ability to exercise their Aboriginal right" and the adverse effect "must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice": *Rio Tinto*, above at para. 46.

109 Adverse impacts can extend to any effect that may prejudice a pending Aboriginal claim or right. Moreover, "high-level management decisions or structural changes to the resource's management may also adversely affect

Aboriginal claims or rights even if these decisions have no 'immediate impact on the lands and resources'". The reason for this is that "such structural changes may set the stage for further decisions that will have a direct adverse impact on land and resources": all quotes from *Rio Tinto*, above at para. 47 [emphasis in the original].

110 Canada accepts that the conclusion of the ADKFN Framework Agreement and the commencement of comprehensive land claim negotiations with the ADKFN may ultimately affect the SKDB and NBDB's Treaty rights, although it submits that the seriousness of that impact is speculative at this stage.

111 As will be explained below, I am not persuaded that the seriousness of that impact is speculative in light of decisions that have already been made by Canada in the context of its negotiations with the ADKFN - decisions that were made without any consultation with the SKDB and NBDB.

112 The seriousness of the potential impact on the rights of the SKDB and NBDB is a matter that may be addressed in determining the content of the consultation required at this stage of the process. However, Canada's concession regarding the potential impact that the ADKFN Framework Agreement and the negotiations with the ADKFN may ultimately have on the SKDB and NBDB's Treaty rights is sufficient to satisfy the third element of the *Haida Nation* test and to give rise to the duty to consult on the Crown.

What is the Scope of the Duty to Consult at this Stage in the Process?

113 The Supreme Court held in *Haida Nation*, above at para. 39, that the scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

114 That is, the degree of impact on the rights asserted will dictate the degree of consultation that is required in a specific case: *Mikisew*, above at paras. 34, 55 and 62-3. The more serious the potential impact on asserted Aboriginal or Treaty rights, the deeper the level of consultation that will be required.

115 The level of consultation required will vary from case to case, depending upon what is required by the honour of the Crown in a given set of circumstances: *Haida Nation*, above at para. 43. See also *Rio Tinto*, above at para. 36; Taku River, above at para. 32; *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, *[2010] 2 C.N.L.R. 316*, *[2010] A.J. No. 479* (Q.L.) (Alta. C.A.) at para. 71, and *Ahousaht,* above at para. 39.

116 Where, for example, the claims are weak, the Aboriginal right is limited, or the potential for infringement is minor, the only duty on the Crown may be to give notice, to disclose information, and to discuss any issues raised in response to the notice: *Haida Nation*, above at para. 43.

117 In contrast, where a strong *prima facie* case for the claim has been established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high, "deep consultation" aimed at finding a satisfactory interim solution, may be required: *Haida Nation*, above at para. 44.

118 While the precise requirements of the consultative process will vary with the circumstances, the consultation required in relation to claims lying at the stronger end of the spectrum may demand the opportunity for the claimants to make submissions, to participate in the decision-making process, and to receive written reasons which demonstrate that their concerns were considered and which reveal the impact those concerns had on the decision: *Haida Nation*, above at para. 44.

119 Other cases may fall between these two ends of the spectrum. Each case has to be examined individually in order to ascertain the content of the duty to consult in a particular set of circumstances. Moreover, the situation may have to be re-evaluated from time to time, as the level of consultation required may change as the process goes on and new information comes to light: *Haida Nation*, above at para. 45.

120 I will first examine the strength of the Aboriginal and Treaty claims asserted by the SKDB and NBDB, and will then consider the seriousness of the potential infringement of those claims, in order to assess the scope and content of the duty to consult owed by Canada to the SKDB and NBDB at the pre-agreement in principle stage.

a) The Prima Facie Strength of the Asserted Claims or Rights

121 There is no issue in this case as to the strength of the SKDB and NBDB's claim to Treaty rights. The Crown accepts that the SKDB and NBDB have ongoing rights under Treaty 11 to hunt, fish and trap within the lands claimed by the ADKFN as its exclusive territory.

122 Insofar as the SKDB and NBDB's claims to Aboriginal title are concerned, Canada does not concede that they have Aboriginal rights in relation to the land itself. However, it does not appear from the record before me that Canada has as yet carried out any meaningful evaluation of the strength of the SKDB and NBDB's claims to Aboriginal rights with respect to the lands in issue. Consequently, there is no factual assessment of the strength of the applicants' Aboriginal rights to which the Court owes deference.

123 Relying on the decision of the British Columbia Supreme Court in *Cook v. Canada (Minister of Aboriginal Relations and Reconciliation)*, *2007 BCSC 1722*, *80 B.C.L.R. (4th) 138*, Canada submits instead that the record before the Court is insufficient to allow for an assessment of the strength of the SKDB and NBDB's asserted Aboriginal rights or title at this stage of the process.

124 Canada also contends that because the SKDB and NBDB's Treaty rights have been established, it is not necessary for the Court to assess the strength of the SKDB and NBDB's asserted Aboriginal rights. Rather, Canada submits that in order to determine the content of the Crown's duty to consult, the Court's focus should be on the degree to which the conduct contemplated by the Crown would adversely affect the rights of the SKDB and NBDB to hunt, fish and trap over the disputed lands.

125 However, the nature and extent of the duty to consult is proportional to the nature and extent of the interest potentially affected. The duty is greater "where a foundational right is being extinguished than where regulations touch on rights that are admittedly subject to regulation": see *R. v. Lefthand*, *2007 ABCA 206*, *77 Alta. L.R. (4th) 203* at para. 35.

126 An Aboriginal claim to land is clearly a "foundational right". Indeed, the "most central interest" of Canada's Aboriginal peoples is their interest in their lands: see *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, *[1999] 1 F.C. 38*, *[1998] F.C.J. No. 1114* (QL) at para. 103, citing *Delgamuukw v. British Columbia*, *[1997] 3 S.C.R. 1010*, *[1997] S.C.J. No. 108* (QL).

127 As a consequence, the SKDB and NBDB's claims to Aboriginal rights in the land may have a bearing on the scope and content of the Crown's duty to consult in this case. It is therefore necessary to consider the evidence regarding the strength of the SKDB and NBDB's claims to Aboriginal rights before turning to consider the seriousness of the potential adverse effect upon the rights claimed.

128 A court's assessment of the duty to consult and accommodate prior to proof of an Aboriginal right does not amount to a prior determination of the Aboriginal claim on its merits; rather, courts are able to "differentiat[e] between tenuous claims, claims possessing a strong *prima facie* case, and established claims", even in the absence of a complete ethno-historical evidentiary record: *Haida Nation*, above at paras. 37 and 66.

129 Indeed, in *Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53*, *[2010] 3 S.C.R. 103* at para. 47, Justice Binnie confirmed that an application for judicial review was an appropriate procedure through which to assess the scope and adequacy of consultation. In both *Haida Nation* and *Little Salmon*, lower courts assessed the *prima facie* strength of Aboriginal claims based upon affidavit evidence.

130 In the *Cook* case relied upon by the Crown, the Court was faced with conflicting affidavits, and the applicants were unable to articulate a precise infringement of their interests. Contrary to what the Minister suggests, the Court in *Cook* did not decline to assess the strength of the claims, concluding instead that on the basis of the evidentiary record before it, the applicants had established only a "credible claim": see para. 151.

131 The SKDB and the NBDB assert that in entering into Treaty 11, they did not surrender their Aboriginal rights with respect to the disputed lands, whereas I understand the Crown to argue that these Aboriginal rights were extinguished by the Treaty. The Crown acknowledges, however, that it never fulfilled a significant component of Treaty 11, namely its obligation to set aside reserve lands for the benefit of the First Nations.

132 The legal consequences of the Crown's failure to fulfill a fundamental commitment in the Treaty in relation to the SKDB and NBDB's asserted Aboriginal title remain to be determined on a more complete record through the land claims process. However, it is appropriate for the purposes of this application to consider these underlying circumstances as material factors in assessing the strength of the applicants' asserted Aboriginal claims: see *Ka'a'Gee Tu First Nation*, above at para. 105.

133 Moreover, Canada has, since 1998, been involved in negotiations with the SKDB and NBDB regarding their claims to Aboriginal title through the Dehcho process. While not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the SKDB and NBDB's asserted claims: see *Ka'a'Gee Tu First Nation*, above at para. 104.

134 Through the Dehcho process, the SKDB and NBDB have provided Canada with considerable evidence in support of their historical claims to the lands in the overlap area, including, amongst other things, traditional use studies, traditional place name maps, and reports of archaeological studies. I do not understand the ADKFN to have provided Canada with similar evidence as of yet. We do know that as of March 15, 2010, the ADKFN had not yet completed their traditional land use study. In any event, there is little evidence regarding the strength of the ADKFN's competing claims in the record before me.

135 The SKDB and NBDB also rely on a statement made during the cross-examination of Janet Pound, a Chief Land Negotiator at the Department of Indian Affairs and Northern Development, as an admission regarding the strength of their Aboriginal claims. Counsel to the SKDB and NBDB asked Ms. Pound: "Now, is it agreed that Canada accepts the claims of Sambaa K'E and Nahanni Butte regarding overlap, that they are substantial claims and they are with merit?" to which Ms. Pound responded "I think so".

136 In fairness, regard must be had to the entirety of Ms. Pound's answer. She went on to state: "I think any time the Aboriginal groups are asserting something, they are their assertions, right? We have got to respect their assertions. We don't always - everything you do in agreements doesn't necessarily always match with that they are asserting, but obviously we're respecting the assertions that are made." I agree with Canada that when Ms. Pound's answer is read in its entirety, it is not an admission that the SKDB and NBDB's Aboriginal claims are meritorious.

137 While it is not easy to quantify the strength of the SKDB and NBDB's claims to Aboriginal title at this stage of the process, I am nevertheless satisfied that the claims raise a reasonably strong *prima facie* case. This finding is based upon a review of the record, the nature of the asserted claims, the language of Treaty 11, the Crown's breach of one of its fundamental obligations under Treaty 11, the paucity of evidence with respect to the strength of the ADKFN's claims to the disputed territory, and the Crown's commitment to the comprehensive land claims process.

138 I note that my conclusion in this regard with respect to the potential significance of the Crown's breach of its obligations under Treaty 11 is consistent with the finding of this Court in relation to the Aboriginal rights asserted in another Treaty 11 case: see *Ka'a'Gee Tu First Nation*, above at para. 107.

139 The fact that the SKDB and NBDB have established a reasonably strong *prima facie* case based upon their

asserted Aboriginal rights to the land in question serves to elevate the content of the Crown's duty to consult from what would otherwise have been the case had the duty been based exclusively on the SKDB and NBDB's claims to Treaty rights to hunt, fish and trap.

140 With this understanding of the strength of the SKDB and NBDB's Aboriginal and Treaty claims, I will next consider the seriousness of the potential infringement that the ADKFN negotiations and an eventual agreement in principle may have for these claims.

b) The Seriousness of the Potential Infringement of the Asserted Aboriginal and Treaty Rights

141 There is no dispute that the negotiation of the ADKFN Framework Agreement has triggered a duty on the part of Canada to consult with the SKDB and NBDB. The issue is the extent and depth of the consultations that are required at this stage of the process.

142 Canada submits that we cannot know at this stage of the process what impact its negotiations with the ADKFN will have for the SKDB and NBDB, with the result that it is impossible to assess the seriousness of the potential infringement of the SKDB and NBDB's asserted Aboriginal and Treaty rights. The result of this is that Canada's duty to consult with the SKDB and NBDB at this point is at the lower end of the consultation spectrum and is limited to notice, disclosure or discussion.

143 Canada points out that an agreement in principle is not a binding "decision". It does not grant any rights to the signatories, nor does it take away rights from other non-signatory First Nations. According to Canada, an agreement in principle is "merely an interim negotiating position subject to change".

144 Consequently, Canada says that it would be premature for it to engage in deep consultation with the SKDB and NBDB at this stage of the process. Because it will not be possible to know the particulars of the contemplated Crown conduct and the seriousness of any impact on the rights of the SKDB and NBDB until such time as Canada has entered into an agreement in principle with the ADKFN, consultation with the SKDB and NBDB should not take place until then.

145 I note, however, that Canada's position as to when consultation with the SKDB and NBDB should occur has not been consistent, and that previous representations made by Canada in this regard do not appear to have been respected.

146 It will be recalled that in her December 21, 2009 letter to counsel for the SKDB and NBDB, the Senior Assistant Deputy Minister for Policy and Strategic Direction advised the SKDB and NBDB it would be premature for Canada to enter into consultations with them *until the outcome of the overlap discussions between the ADKFN and the SKDB and NBDB was known*. It would have been entirely reasonable for the SKDB and NBDB to understand this statement to mean that Canada would consult with them once the outcome of the overlap negotiations was known.

147 By June of 2010, Canada was aware that the overlap discussions had failed. It did not, however, initiate any form of consultation with the SKDB and NBDB at that time. Instead, Canada's position as to when consultation with the SKDB and NBDB should take place seemed to change after the overlap negotiations broke down. This change in position is reflected in the Minister's October 25, 2010 letter, which advised the SKDB and NBDB that consultation would now not occur until *after* Canada reached an agreement in principle with the ADKFN.

148 Canada's position at the hearing of this application was generally consistent with the position taken by the Minister in his October 25, 2010 letter: that is, that consultation should take place after the signing of an agreement in principle with the ADKFN. However, counsel for Canada also stated that "the decision to send [the Final Agreement] to Parliament is where the duty to consult arises".

149 Given that the decision under review commits to consultations taking place after the signing of an agreement

in principle between Canada and the ADKFN, and that most of Canada's submissions focused on the conclusion of an agreement in principle with the ADKFN as being the point at which it was required to consult with the SKDB and NBDB, I will take that to be its real position.

150 As an agreement in principle merely represents an interim negotiating position which is subject to change, Canada says that the SKDB and NBDB's argument that positions will become entrenched once an agreement in principle is concluded is without merit. In support of this contention, Canada relies on several pre-*Haida Nation* decisions, including *Paul v. Canada*, *2002 FCT 615*, *219 F.T.R. 275* at para. 108, and *Pacific Fishermen's Defence Alliance v. Canada*, *[1988] 1 F.C. 498*, *[1987] F.C.J. No. 1146* at paras. 8 and 13.

151 Canada further submits that to consult in this context would be meaningless: citing *Cook*, above at paras. 175-77. According to Canada, it would be unproductive and premature for it to engage in further consultation with the SKDB and NBDB prior to an agreement in principle having been reached with the ADKFN because the extent of any impact on the SKDB and NBDB's rights would be speculative: *Tsuu T'ina*, above at para. 85.

152 By way of example, Canada says that the process for negotiating land selection will not begin until *after* an agreement in principle is concluded. It is thus impossible to know the particulars of contemplated Crown conduct, or to assess its impact on third party rights prior to concluding the agreement in principle with the ADKFN: *Kruger Inc. c. Premiere Nation des Betsiamites, 2006 QCCA 569*, *149 A.C.W.S. (3d) 864* at paras. 12-13.

153 Canada also points out that land claims treaties typically contain non-derogation clauses that protect the rights of other Aboriginal groups in a settlement area, and that any final agreement entered into with the ADKFN will contain such a provision. As a consequence, even a final agreement between the ADKFN and Canada would have no immediate impact on the Aboriginal and Treaty rights of either the SKDB or the NBDB.

154 In support of this contention, Canada relies on the decision of the British Columbia Supreme Court in *Cook*, above, which, like this case, involved overlapping land claims by several First Nations. The Court concluded that deep consultation and accommodation with the petitioners in that case was not required by Canada until after a final agreement was signed between it and the third-party First Nation.

155 In coming to this conclusion, the Court in *Cook* relied heavily on the presence of the non-derogation clause in the final agreement, stating that:

> 186 ... I do not find there is persuasive evidence that the [Final Agreement] causes irreparable harm to the petitioners, and, more importantly, I am satisfied that there is time for the petitioners, British Columbia and Canada to engage in consultation before the [Final Agreement] is implemented [...] In that consultation process, the petitioners will be able identify, with the clarity that they have so far been unable to articulate, any infringement on their title and rights claims. It is not for this Court, on the type of conflicting evidence tendered here, to draw those conclusions for them. The other factor of importance is that the non-derogation clause confirms that [Final Agreement] does not affect the Aboriginal rights or title of any other Aboriginal group.

156 Canada also relies on *Benoanie v. Canada (Minister of Indian and Northern Affairs)*, *[1993] 2 C.N.L.R. 97* (T.D.); *Tsehaht First Nation v. Huu-ay-aht First Nation*, *2007 BCSC 1141*, *160 A.C.W.S. (3d) 341* at para. 25; *Paul*, above; and *Tremblay v. Pessamit First Nation*, *2008 QCCS 1536*, *[2008] 4 C.N.L.R. 240*), to the same effect.

157 Moreover, Canada points out that Aboriginal rights either exist or they do not exist. They are not created by agreements, treaties or the law, and have constitutional protection under section 35 of the *Constitution Act, 1982*. As a consequence, Aboriginal rights cannot be extinguished by government action: *Tremblay*, above at paras. 59-60.

158 As a result, Canada submits that the duty to consult owed by it to the SKDB and NBDB during the pre-

agreement in principle phase is at the low end of the spectrum, and should be limited to notice, disclosure or discussion: *Haida Nation*, above at para. 43; *Mikisew*, above at para. 64.

159 I would start my analysis by observing that what *Haida Nation* actually says is required at the lower end of the consultation spectrum "may be to give notice, disclose information, *and discuss any issues raised in response to the notice*": at para. 43 [my emphasis].

160 Citing T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" *(2003), 41 Alta. L. Rev. 49* at 61, the Court goes on in *Haida Nation* to observe that "'consultation' in its least technical definition *is talking together for mutual understanding*"': at para. 43 [my emphasis].

161 Similarly, in Mikisew, where the Crown's duty to consult was found to lie at the lower end of the spectrum, it was nevertheless required to "engage directly" with the Mikisew. This "engagement" required the Crown to "solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights": above at para. 64.

162 Canada concedes that it has not, as yet, had *any* direct discussions with the SKDB and NBDB with respect to their concerns, notwithstanding the two First Nations' repeated requests for consultation. As will be explained later in these reasons, I am satisfied that Canada has not satisfied the duty on it to consult with the SKDB and NBDB, even if that duty were only at the lower end of the spectrum.

163 Moreover, and in any event, I am satisfied that the particular facts of this case are such that Canada has a present obligation to consult somewhat more deeply with the SKDB and NBDB.

164 I would start by noting that the duty to consult extends to strategic, higher level decisions that may have an impact on Aboriginal claims and rights, even if that impact on the disputed lands or resources may not be immediate: *Rio Tinto*, above at para. 44.

165 If it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions. Once important preliminary decisions have been made there may well be "a clear momentum" to move forward with a particular course of action: see *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management),* *2004 BCSC 1320*, *34 B.C.L.R. (4th) 280* at para. 75. Such a momentum may develop even if the preliminary decisions are not legally binding on the parties.

166 Indeed, the case law shows that the non-binding nature of preliminary decisions does not necessarily mean that there can be no duty to consult. For example, in *Dene Tha' First Nation v. Canada (Minister of Environment)*, *2006 FC 1354*, *303 F.T.R. 106*, negotiations leading to a non-binding Cooperation Plan nonetheless triggered a duty to consult that fell at the high end of the consultation spectrum.

167 Justice Phelan described the Cooperation Plan as "a complex agreement for a specified course of action, a road map, which intended to *do* something. It intended to set up the blue print from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the construction of [the project in issue]": *Dene Tha' First Nation*, above at para. 100. Justice Phelan further noted that "the Cooperation Plan, although not written in mandatory language, functioned as a blueprint for the entire project": above at para. 107.

168 Justice Phelan concluded that the Cooperation Plan was "a form of 'strategic planning'": at para. 108. By itself it conferred no rights, but it set up the means by which a whole process would be managed and was a process through which the rights of the Aboriginal peoples would be affected. As a consequence, Justice Phelan was satisfied that the Cooperation Plan established a process by which the rights of the Dene Tha' would be affected: above at para. 108.

169 I recognize that for the duty to consult to be engaged, there must be an appreciable adverse effect on the First Nations' ability to exercise their Aboriginal or Treaty rights, and that merely speculative impacts will not suffice. I

further recognize that the adverse effect must be on the future exercise of the rights themselves, and that an adverse effect on a First Nation's future negotiating position will not suffice: *Rio Tinto*, above at para. 46.

170 In this case, however, decisions have already been made by Canada, without consultation with either the SKDB or the NBDB, which will likely have a significant impact on each of their Treaty rights and Aboriginal claims.

171 One of these is the decision to limit the ADKFN's land claim to territory within the NWT. This decision is highly significant, considering that two-thirds of the ADKFN's asserted traditional territory lies outside of the NWT.

172 Similarly, the March, 2009, offer made by Canada to the ADKFN, will, in all likelihood, have a negative effect on the SKDB and NBDB's own land claims. This offer would allow the ADKFN to select a total of 6,474 square kilometres of land within the NWT in satisfaction of its land claim.

173 Canada's offer has been accepted by the ADKFN as a basis for the negotiation of an agreement in principle, which agreement will address the issue of land quantum. Given the dynamics of the negotiating process, it is hard to imagine that the agreement in principle will be less generous to the ADKFN than Canada's initial offer.

174 There are, however, only 6,064 square kilometres of land in the south-west corner of the NWT that are outside of the SKDB and NBDB primary land use areas and are available to satisfy the ADKFN's claims. As a result, the acceptance by the ADKFN of Canada's offer will inevitably result in an encroachment on the SKDB and NBDB's claimed territory.

175 This problem is compounded by the fact that the surface and sub-surface rights to some of the available land is currently in the hands of third parties. As a result, there is simply not enough land available in the NWT to satisfy the ADKFN's claims and Canada's offer without encroaching on the primary land use areas claimed by the SKDB and NBDB, and thus infringing their Aboriginal and Treaty rights. This impact is not speculative.

176 Moreover, Canada and the ADKFN have also already agreed, as part of the ADKFN Framework Agreement, not to create a new regulatory and land management regime for the lands in issue, but rather to adopt the regime currently operating under the *Mackenzie Valley Resource Management Act*. The SKDB and NBDB assert that the *MVRMA* resource management regime is inconsistent with the land management process advanced through the Dehcho process, namely collective co-management through a single management authority.

177 While the adverse impact of the adoption by the ADKFN of the *MVRMA* resource management regime in relation to lands potentially falling within the SKDB and NBDB's primary land use areas may not be immediately felt by the SKDB and NBDB, courts have held that the potential for infringement need not be immediate: *Rio Tinto*, above at paras. 44, 47 and 54. The potential infringement of asserted Aboriginal governance rights resulting from the application of the *MVRMA* to the disputed lands is prospective, but nevertheless serious.

178 Finally, the March, 2009, offer made by Canada to the ADKFN has also had immediate consequences for the SKDB and NBDB as it resulted in Canada proportionately reducing the offer that it made to the Dehcho First Nations, including the SKDB and NBDB.

179 This clear potential for infringement distinguishes this case from the *Cook* case relied upon by the Crown. In that case, there was an absence of any obvious infringement: see *Cook*, above at para. 179.

180 Moreover, *Cook* did not involve a situation in which overlap negotiations had broken down; none had yet been attempted: see paras. 115-18. The Court thus found that even if the applicant First Nations were later able to identify an infringement of their claims, several possibilities for accommodation remained available: at paras. 190-91.

181 Even in these circumstances, the Court nonetheless acknowledged that the Crown had a duty to consult with

the Aboriginal applicants at the agreement in principle stage, although it found that, in light of the absence of any infringement, the duty at that stage lay at the low end of the spectrum: *Cook*, above at paras. 179, 192.

182 In contrast, the contemplated Crown action here potentially puts current claims by and the rights of the SKDB and NBDB in jeopardy: *Rio Tinto*, above at para. 49. Moreover, the threat to the rights of the SKDB and NBDB is real, and not merely hypothetical, surmised or imagined: see *Pacific Fishermen's Defence Alliance*, above at para. 8.

183 I acknowledge that a non-derogation clause in a final agreement between Canada and the ADKFN will offer the SKDB and NBDB some measure of protection. Nevertheless, the prospect of reconciliation between the Crown and the SKDB and NBDB will inevitably be undermined if meaningful discussions with Canada only start after it has reached an agreement in principle with the ADKFN. Indeed, counsel for the Crown himself acknowledged this reality at the hearing.

184 Relying on the decision in *Cook*, Canada also argues that if it were required to enter into consultation with the SKDB and NBDB at this point in the process, it would then have to "ping-pong" back and forth between the SKDB and NBDB on the one hand, and the ADKFN on the other. When I suggested to counsel that this would have to occur in any negotiations taking place *after* the conclusion of an agreement in principle with the ADKFN, counsel agreed that this was indeed that case. He noted, however, that Canada would be able to enter into negotiations with the SKDB and NBDB "armed with an agreement in principle". This is, of course, precisely what the SKDB and NBDB are concerned about.

185 While it is clear from *Rio Tinto* that an adverse effect on a First Nation's future negotiating position will not be sufficient, by itself, to affect the duty to consult, the inevitable impact that the conclusion of an agreement in principle between Canada and the ADKFN will have on ongoing negotiations within the Dehcho Process is just one of many circumstances at play in this case.

186 Moreover, the law is clear that "[t]he Crown cannot run roughshod over one group's potential and claimed Aboriginal rights in favour of reaching a treaty with another": see *Cook*, above at para 162; *Haida Nation*, above at para. 27.

187 Canada insists that "there is nothing lost by waiting until after the AIP to engage in further consultation with the applicants": see Canada's memorandum of fact and law at para 89. I do not agree. Proceeding with negotiations with the ADKFN and excluding the applicants from any direct discussions despite their repeated entreaties to be consulted does little to promote reconciliation between Canada and the SKDB and NBDB, and may very well have the opposite effect.

188 The undermining of the reconciliation process is further compounded in this case by Canada having "moved the goalposts" in relation to the consultation process. While initially representing to the SKDB and NBDB that consultation would take place after the outcome of the overlap discussions was known, no such consultation in fact took place. When the SKDB and NBDB quite reasonably pushed for consultation after the breakdown of the overlap negotiations, they were once again put off, with the Minister now informing them that consultation would only occur after the conclusion of an agreement in principle between Canada and the ADKFN. With respect, this shifting position does nothing to promote the process of reconciliation and could only serve to further alienate the SKDB and NBDB.

189 Canada also argues that it cannot engage directly with the SKDB and NBDB until such time as it has an agreement in principle with the ADKFN as it cannot know what to discuss with the SKDB and NBDB. This of course begs the question of how it is that Canada can engage directly with the ADKFN, if it has not entered into an agreement in principle with the SKDB and NBDB?

190 It was argued in *Haida Nation* that the Crown could not know that rights exist before Aboriginal claims are resolved, and thus it could have no duty to consult with or accommodate First Nations. While recognizing that this

difficulty should not be minimized, the Supreme Court nevertheless held that "it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement": above at para. 36.

191 In order to facilitate this determination, the Supreme Court held that claimants should clearly outline their claims, "focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements": *Haida Nation*, above at para. 36.

192 While these comments were made in a slightly different context, the same point may be made here.

193 The SKDB and NBDB have provided Canada with a great deal of historical and other material supporting their respective claims and have clearly articulated these claims. Indeed, Canada has not suggested that it does not understand the nature or scope of the claims being asserted by the SKDB and NBDB. This further distinguishes this case from the *Cook* case relied upon by the Crown, where one of the reasons cited by the Court for finding that consultation could be deferred in that case until after the signing of an agreement in principle with another First Nation was the inability of the petitioner First Nations to clearly articulate any infringement on their title and rights claims: *Cook*, above at para. 186.

194 Perhaps because of the fact that the negotiations between the ADKFN and the Crown are confidential, little information has been provided to the Court as to the strength of the ADKFN's claims. However, it appears from the material filed in relation to this application that the SKDB and NBDB have provided Canada with substantial information regarding their own claims. There is thus ample basis for discussion.

195 Canada has also argued that because the ADKFN process is confidential, it cannot consult with the SKDB and NBDB at this stage in the process. I do not accept this argument.

196 While the ADKFN Framework Agreement contemplates that the agreement in principle will be made public, Canada has clearly stated that the process for negotiating land selection will not begin until *after* an agreement in principle is concluded. Those negotiations between the ADKFN and Canada will themselves be confidential.

197 To the extent that Canada's concern is the confidentiality of its negotiations with the ADKFN, I asked Crown counsel how Canada would be in any better position to consult with the SKDB and NBDB with respect to land selection issues *after* the conclusion of an agreement in principle with the ADKFN, given that the post-agreement in principle negotiations with the ADKFN would still be confidential. Counsel was unable to provide a satisfactory answer, other than to say "that's a bit of a difficult one".

Canada has not Discharged its Duty to Consult

198 Perfect satisfaction of the duty to consult is not required. As long as the Crown "makes reasonable efforts to inform and consult the First Nations which might be affected by the Minister's intended course of action, this will normally suffice to discharge the duty": *Ahousaht*, above at para. 38.

199 In all cases, the fundamental question is what is necessary to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake: *Haida Nation*, above at para. 45.

200 The honour of the Crown also mandates that it balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims: *Haida Nation*, above at para. 45.

201 Canada says that it has provided the SKDB and NBDB with notice of the ADKFN land claims process and subjects for negotiation. It has appointed a Ministerial Special Representative and supported negotiations between the First Nations with respect to overlap issues in an attempt to minimize the impact on the SKDB and NBDB's rights. It has also received information from the SKDB and NBDB in support of their claims, and has promised to

engage in deeper consultation prior to land selection by the ADKFN in the post-agreement in principle phase of its negotiations with the ADKFN, and to include a non-derogation clause in an ADKFN Final Agreement.

202 However, Ms. Pound acknowledged in her cross-examination that Canada has not, as yet, "formally engaged with [the SKDB and NBDB] on consultation". Indeed, Canada concedes that it has not, to this point, engaged in *any* direct discussions with the SKDB and NBDB with respect to their concerns. This lack of consultation is also reflected in the Ministerial letter that underlies this application for judicial review, which assures the SKDB and NBDB that consultation will occur in the future, but not until an agreement in principle is signed with the ADKFN.

203 At the same time, Canada asserts that it has demonstrated an ongoing intention to address the SKDB and NBDB's concerns through meaningful consultation after signing an agreement in principle with the ADKFN, thereby discharging its pre-agreement in principle duty to consult.

204 I agree with Canada that it was both reasonable and appropriate for it to encourage the ADKFN, the SKDB and the NBDB to endeavour to resolve their competing claims between themselves, and to facilitate those discussions. Indeed, encouraging overlapping claims to be worked out on a consensual basis is respectful of the First Nations involved. However, the fostering of overlap negotiations cannot, in my view, serve as a substitute for direct consultations by Canada with the affected First Nations.

205 Different levels of consultation may be required at different stages of the process: see *Cook* above at para. 197. The particular circumstances of this case, including the strength of the applicants' Aboriginal claims and their acknowledged Treaty rights, the actions proposed by Canada and the potential impact of those actions on the claims and rights of the SKDB and NBDB, the decisions already made in relation to the ADKFN's claims, and the representation made by Canada as to when consultation with the SKDB and NBDB would take place, are such that the honour of the Crown requires that it engage directly with the SKDB and NBDB prior to concluding an agreement in principle with the ADKFN.

Conclusion

206 For the reasons given, I am satisfied that the Minister's decision to delay consultation with the SKDB and NBDB until after the conclusion of an agreement in principle with the ADKFN was not reasonable, and the process followed was incompatible with the honour of the Crown: see *Mikisew*, above at para. 59.

207 While deeper consultation will be required after the conclusion of an agreement in principle with the ADKFN, Canada has a duty to consult with the SKDB and NBDB at this stage of the process by engaging in immediate and substantive discussions directly with them with respect to the potential infringements of their Aboriginal and Treaty rights in relation to lands subject to overlapping claims by the ADKFN.

Remedy

208 Although the Government of the NWT and the ADKFN have been named as respondents in this application, the decision under review in this case is an October 25, 2010 decision by the Minister of Indian Affairs and Northern Development postponing consultation with the SKDB and NBDB until after the conclusion of an agreement in principle between Canada and the ADKFN. Consequently, the remedy provided by the Court should be addressed solely to Canada. This is consistent with the relief requested in the SKDB and NBDB's Notice of Application.

209 For the reasons given, this Court declares that Canada has breached its duty to consult with the SKDB and NBDB, with the result that the Minister's October 25, 2010 decision to postpone consultation with the SKDB and NBDB is set aside.

210 Canada has a legal and constitutional duty to engage in immediate and substantive discussions directly with the SKDB and NBDB with respect to the subjects of the land claim with ADKFN that would affect or potentially affect the asserted Aboriginal and Treaty rights of the SKDB and NBDB, including the determination of lands and

resources forming the settlement area or settlement lands of ADKFN's land claim, the use of such lands and resources, and the regulation or management of such lands and resources.

211 Canada shall not enter into an agreement in principle with the ADKFN in relation to its pending land claim until such time as the consultations with the SKDB and NBDB referred to in the previous paragraph have been carried out.

212 This Court further declares that upon the conclusion of an agreement in principle with the ADKFN, Canada will have a duty to engage in deep, meaningful and adequate consultation with the SKDB and NBDB in order to develop workable accommodation measures to address their concerns with respect to the determination of lands and resources forming the settlement area or settlement lands of ADKFN's land claim, and the regulation or management of such lands and resources. This process is to be conducted with the aim of reconciling outstanding differences between the parties, in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida Nation* and *Taku River*.

213 The SKDB and NBDB are entitled to their costs of this matter. I am not persuaded that the circumstances of this case justify an award of solicitor and client costs. As agreed by the parties, the SKDB and NBDB's costs are fixed in the amount of $15,000.

JUDGMENT

THIS COURT DECLARES, ORDERS AND ADJUDGES that:

1. Canada has breached its duty to consult with the SKDB and NBDB;
2. This application for judicial review is allowed and the October 25, 2010 decision by the Minister of Indian Affairs and Northern Development postponing consultation with the SKDB and NBDB until after the conclusion of an agreement in principle between Canada and the ADKFN is set aside;
3. Canada shall engage in immediate and substantive discussions directly with the SKDB and NBDB with respect to the subjects of the land claim with ADKFN that would affect or potentially affect the asserted Aboriginal and Treaty rights of the SKDB and NBDB, including the determination of lands and resources forming the settlement area or settlement lands of ADKFN's land claim, the use of such lands and resources, and the regulation or management of such lands and resources;
4. Canada is prohibited from entering into an agreement in principle with the ADKFN in relation to its pending land claim until such time as the consultations with the SKDB and NBDB referred to in the paragraph 3 of this Order have been carried out;
5. Upon the conclusion of an agreement in principle with the ADKFN, Canada shall engage in deep, meaningful and adequate consultation with the SKDB and NBDB in order to develop workable accommodation measures to address their concerns about the determination of lands and resources forming the settlement area or settlement lands of ADKFN's land claim, and the regulation or management of such lands and resources. This process is to be conducted with the aim of reconciling outstanding differences between the parties, in a manner that is consistent with the honour of the Crown and the principles articulated by the Supreme Court of Canada in *Haida Nation* and *Taku River*; and
6. The SKDB and NBDB shall have their costs of this matter, fixed in the amount of $15,000.

MACTAVISH J.

End of Document

Sapotaweyak Cree Nation v. Manitoba, [2015] M.J. No. 67

Manitoba Judgments

Manitoba Court of Queen's Bench

Winnipeg Centre

D.P. Bryk J.

Heard: January 14, 2015.

Judgment: January 14, 2015.

Reasons: March 2, 2015.

Docket: CI 14-01-92744

[2015] M.J. No. 67 | 2015 MBQB 35 | 2015 CarswellMan 107 | 251 A.C.W.S. (3d) 362 | 316 Man. R. (2d) 79

Between Sapotaweyak Cree Nation and Chief Nelson Genaille, on behalf of Sapotaweyak Cree Nation, Plaintiffs, and The Government of Manitoba and Manitoba Hydro, Respondent

(264 paras.)

Counsel

Harley I. Schachter and Kaitlyn E. Lewis, for the plaintiff.

Gordon E. Hannon and Jim R. Koch, for the Government of Manitoba.

Douglas A. Bedford and Helga D. Van Iderstine, for Manitoba Hydro.

D.P. BRYK J.

I. INTRODUCTION

1 On December 4, 2014, the plaintiffs, Sapotaweyak Cree Nation ("SCN") and Chief Nelson Genaille ("Genaille"), on behalf of SCN (hereinafter referred to collectively as SCN), instituted legal proceedings by way of Statement of Claim naming the Government of Manitoba ("Manitoba") and Manitoba Hydro ("Hydro") as defendants. The relief sought is as follows:

(a) a Declaration that Manitoba and Hydro each have a duty to consult, grounded in the Honour of the Crown, in respect of contemplated conduct by each, that might affect the claimed Aboriginal or treaty rights of SCN;

(b) a Declaration that neither Manitoba nor Hydro have adequately consulted with SCN in respect of the Bipole III Transmission Line Project ("Bipole III");

(c) an Order requiring Manitoba to consult with SCN on the development of a Crown consultation policy and on the development of funding guidelines to be used for consultations, so as to enable meaningful participation by SCN in any future or ongoing consultation process;

(d) an Order that Manitoba must fulfill its consultative obligations (including any accommodation) with SCN, prior to permitting or otherwise allowing Hydro or any person to proceed to cut or clear any, or any further portion of the N4 corridor ("N4") of the proposed Bipole III hydro line;

(e) an Order that Hydro must fulfill its consultative obligations (including any accommodation) with SCN, prior to proceeding to cut or clear any, or any further portion of the N4 corridor of the proposed Bipole III hydro line;

(f) a Declaration that Manitoba and Hydro are required to expend such funds as are reasonably necessary in order to ensure that they can be properly informed of the likely negative effects that the Bipole III project will have on the claims, interests, and ambitions of the SCN, so that all relevant information is available to Manitoba and Hydro before making any further decisions, or taking further actions in cutting or clearing the N4 corridor;

(g) a Declaration that each of Manitoba and Hydro are required to provide such funding to SCN as is reasonably necessary in order for SCN to meaningfully participate in the consultation process;

(h) an Order determining the amounts, or alternatively, an Order fixing a process to ascertain what those funding amounts should be (whether to be incurred on Manitoba or Hydro's own behalf, or whether to be paid to SCN) so as to ensure that the consultation process is adequate, and to ensure that SCN is allowed to participate meaningfully in those consultations;

(i) a Declaration that Hydro has breached its obligations under the August 14, 2013 licence granted to it under ***The Environment Act***, *C.C.S.M., c. E125* ("Licence");

(j) an Order requiring the Minister to invoke s. 66 of the Licence and to revoke the Licence, or alternatively, an Order requiring the Minister to suspend the Licence, until Hydro fulfills its obligations of consultation and accommodation, and its obligations under the Licence, or alternatively, an Order requiring the Minister to advert as to whether or not the Licence should be revoked or suspended;

(k) an Order requiring Hydro to file a new proposal pursuant to s. 12 of ***The Environment Act***, to incorporate the results of the information that will be learned and the consultation process ordered to take place;

(l) an Order that the Crown Land Permit No. GP67109 ("Permit"), issued subsequent to the Licence, must be terminated and not extended (in accordance with s. 7 of the Permit), because Hydro has misrepresented material facts relating to the extent of their engagements with SCN, and they have failed to comply with the Licence;

(m) damages against each of Manitoba and Hydro for past failures to adequately consult and accommodate in respect of the proposed Bipole III project;

(n) general and special damages for all losses experienced by SCN arising out of or were connected to the proposed Bipole III project for which Manitoba and Hydro are liable, in amounts to be determined and proven;

(o) an interlocutory (and, if necessary, an interim injunction prior to that) and final injunction preventing any cutting or clearing within the geographic area noted as "N4" until adequate consultation and accommodation with SCN has taken place;

(p) an Order requiring Manitoba and Hydro to adequately consult with SCN in respect of the construction and operation of the Bipole III project as it may affect SCN's claims, interests, and ambitions, and to accommodate those claims, interests, and ambitions prior to making decisions or otherwise engaging in Crown conduct that has the potential to affect those claims, interests, and ambitions;

(q) pre- and post-judgment interest;

(r) costs on a solicitor and client basis; and

(s) such further and other relief as may be just.

2 By Notice of Motion filed December 4, 2014, SCN asked the court for the following relief:

a. an Order for an interlocutory injunction requiring Manitoba and Hydro to stop or not commence clearing and cutting areas within the geographic area known as N4 until the court is satisfied that adequate consultation with, and accommodation of SCN has taken place and until the court is satisfied that Hydro complies with the specifications, limits, terms, or conditions set out in the Licence;

b. in the alternative, and if Manitoba and/or Hydro are not ready to proceed to argue the case for an interlocutory injunction, an Order for an interim shorter term injunction to remain in effect until the motion for an interlocutory injunction can be heard or to such other time as may be just and convenient, requiring Manitoba and Hydro to stop or not commence clearing and cutting areas within the geographic area known as N4 until the court is satisfied that adequate consultation with, and accommodation of SCN has taken place and until the court is satisfied that Hydro complies with the specifications, limits, terms, or conditions set out in the Licence;

c. an interlocutory, or alternatively an Interim Order requiring that Manitoba and Hydro consult with SCN, and to seek to accommodate SCN's claims, interests, and ambitions in respect of the land comprising the Bipole III corridor and lands in the vicinity thereof prior to any cutting or clearing within the N4 geographic area commencing or continuing, and requiring Manitoba and Hydro to fund those consultations in an amount to be agreed, but failing agreement, in an amount to be determined by this court.

3 The motion for interim or interlocutory injunction was heard on January 13, 2015. On January 14, 2015, this court dismissed the motion against both Manitoba and Hydro and undertook to provide written reasons at a later date. The following are the written reasons for that decision.

4 SCN alleges that the Crown's duty to consult, grounded in the Honour of the Crown, attaches to both Manitoba and Hydro. With respect to the latter, they say that in these circumstances, Hydro is "the Crown."

5 In addition to the duty to consult, grounded in the Honour of the Crown, SCN contends that both Manitoba and Hydro made promises of consultations and accommodations to SCN and that meaningful consultations and accommodations aimed at addressing SCN's concerns and achieving reconciliation have not taken place.

6 According to SCN, they were reassured by Manitoba that the granting of the Licence to Hydro in August 2013 would not prevent both Manitoba and Hydro from properly consulting with SCN concerning its claims, interests, and ambitions. Manitoba explained to SCN that the very terms of the Licence required ongoing consultative efforts. SCN says that neither Manitoba nor Hydro were open to ongoing consultation after the issuance of the Licence. Manitoba declared its obligation for consultation to be terminated. Hydro simply proceeded with the cutting and clearing in N4 in December 2014.

7 Manitoba says that Bipole III is being constructed on Crown land and privately held land and not on reserve land or any land that has been selected by SCN pursuant to the Treaty Land Entitlement Framework Agreement ("TLE Framework Agreement"). Manitoba acknowledges that both Bipole III and the process under the TLE Framework Agreement require it to engage in separate and distinct consultative processes with SCN. However, Manitoba says that any concerns arising from the TLE Selection or Acquisition Process are separate and apart from the regulatory framework that authorized the construction of Bipole III, which includes the Licence and the associated work permits issued under ***The Crown Lands Act***, *C.C.S.M., c. C340*. Manitoba says that it has conducted its consultations with SCN in accordance with its legal obligations and the Honour of the Crown.

8 Hydro argues that it had no duty to consult by virtue of the fact that there was no specific delegation to it by the Crown of the Crown's duty to consult. Hydro denies being "the Crown" as alleged by SCN and states that its powers flow from the statute that created it.

9 Hydro accepts that it is an agent of the Crown. However, Hydro says there is nothing in statute or in case law suggesting it, as an agent of the Crown, has a duty to consult grounded in the Honour of the Crown as a separate or distinct obligation from that of the Crown.

10 Notwithstanding the absence of any duty to consult, Hydro admits that it embarked on a process of engagement with all of the First Nations who were potentially impacted by Bipole III, including SCN.

II. BACKGROUND

11 SCN is a band as defined in the ***Indian Act***, R.S.C., 1985, c. I-5. Its main Reserve is located near Pelican Rapids, in the Province of Manitoba.

12 Manitoba represents Her Majesty the Queen in Right of the Province of Manitoba, as well as the officers and servants of the Provincial Crown, in accordance with the provisions of ***The Proceedings Against the Crown Act***, *C.C.S.M., c. P140*.

13 Hydro is a Manitoba Crown corporation established pursuant to ***The Manitoba Hydro Act***, *C.C.S.M., c. H190* ("***Hydro Act***"), and pursuant to s. 4(2) of that Act is an agent of Her Majesty.

14 The purposes and objects of the ***Hydro Act*** are set out in s. 2 as follows:

> **Purposes and objects of Act**
>
> 2 The purposes and objects of this Act are to provide for the continuance of a supply of power adequate for the needs of the province, and to engage in and to promote economy and efficiency in the development, generation, transmission, distribution, supply and end-use of power and, in addition, are
>
> (a) to provide and market products, services and expertise related to the development, generation, transmission, distribution, supply and end-use of power, within and outside the province; and
>
> (b) to market and supply power to persons outside the province on terms and conditions acceptable to the board.

15 Manitoba, through its Department of Conservation and Water Stewardship ("CWS"), is charged with the management and control of Crown land for the benefit of public interest pursuant to a variety of statutes, including ***The Environment Act*** and ***The Crown Lands Act***.

16 Bipole III is a new high voltage direct current ("HVDC") transmission project intended to improve overall system reliability and dependability and includes construction of the following:

(a) a 500-kilovolt HVDC transmission line, approximately 1,385 kilometres at length, that links the northern power generating complex of Hydro located on the Lower Nelson River with its conversion and delivery system in southern Manitoba;

(b) two new converter stations, one northeast of Gillam, Manitoba, and one east of Winnipeg;

(c) two ground electrodes; and

(d) additional 230-kilovolt transmission line interconnections in the North.

17 The transmission line extends from the generating station at Keewatinohk in northeastern Manitoba, in a

southerly direction along the west side of Lakes Winnipegosis and Manitoba, terminating at the proposed converter station in Riel, just east of the City of Winnipeg. The route is divided into four northern sections: N1, N2, N3, N4; two central sections: C1 and C2; and two southern sections: S1 and S2. The portion of the transmission line at issue is N4 which extends from just south of The Pas, Manitoba, to just northeast of Swan River, Manitoba.

18 N4 consists of 11.2 square kilometres of Crown land and approximately two square kilometres of privately owned land. None of the land in question is SCN Reserve land, nor is it land they have selected pursuant to the TLE Framework Agreement. The N4 corridor of Bipole III will pass through lands that are part of SCN's "traditional" lands.

19 In 2008, Hydro began to study the potential environmental impacts of Bipole III. It initially sought input into this work from the public through a four-round Environmental Assessment and Consultation Program ("EACP") and through discussions with First Nations and the Manitoba Métis Federation ("MMF").

20 Hydro conducted the study and research and also engaged with First Nations, including funding workshops, open houses, meetings, and Aboriginal Traditional Knowledge ("ATK") Reports, all of which were filed and presented to the Clean Environment Commission ("CEC"). The CEC held a 35 day hearing, which was open to the public including First Nations, following which the CEC issued a report to the Minister of CWS recommending that Bipole III proceed.

21 Manitoba began its consultations with First Nations that would potentially be affected by Bipole III in August 2010. Meetings with SCN commenced in August 2011. Processes with work plans and budgets were developed to address the concerns and interests of First Nations which would be affected by Bipole III, including SCN. The consultations were concluded in July 2013.

22 The Licence includes more than 600 conditions and requirements to address concerns about the potential effects of Bipole III on affected First Nations. Those concerns are also directly addressed through the Environmental Protection Plan ("EPP"), the Cultural Heritage and Resources Protection Plan ("CHRPP") and the Construction Environmental Protection Plans ("CevPP").

23 Cutting and clearing for the N4 corridor of Bipole III commenced in December 2014. The cutting and clearing, plus the geotechnical work required in preparation for the erection of transmission towers, is expected to be completed by April 30, 2015.

III. ISSUES

24 SCN seeks an interlocutory injunction against Hydro and Manitoba. All parties agree that the test which SCN is required to meet in order to obtain an interim injunction is set out in ***RJR -- MacDonald Inc. v. Canada (Attorney General)***, *[1994] 1 S.C.R. 311*. The issues to be met by SCN are:

1. Is there a serious question to be tried?
2. Will SCN be irreparably harmed if no interlocutory injunction is ordered? and
3. Does the balance of convenience favour granting an interlocutory injunction?

25 While SCN is required to meet that test with respect to both Manitoba and Hydro, it has raised certain collateral issues specifically against either Manitoba or Hydro. For ease of reference in addressing those collateral issues, the claims against Manitoba and Hydro will be dealt with separately.

HYDRO

1. Is There a Serious Question to be Tried?

(i) Duty to Consult
Position of SCN

26 SCN argues that Hydro is a Crown corporation pursuant to s. 4(2) of the ***Hydro Act***. By virtue of the fact that its board, which administers the affairs of Hydro, are appointed by Order of the Lieutenant Governor in Council (see s. 5 of the ***Hydro Act***), Manitoba controls the appointments and is therefore Hydro's directing mind.

27 SCN relies on the Supreme Court of Canada decision in ***Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council***, *2010 SCC 43*, *[2010] 2 S.C.R. 650* ("***Rio Tinto Alcan***"), in support of its argument that Hydro entities controlled by the Crown are emanations of the Crown and they therefore share the constitutional duty to consult.

28 Because Hydro admits that it did not engage in the consultation process, the breach of that alleged duty raises a serious issue to be tried.

29 A second serious issue to be tried relates to the terms of the Licence. Section 4 under the headings "Specifications, Limits, Terms and Conditions" and under the sub-heading "Respecting Pre-Construction" provides:

> 4. The Licencee shall submit a complete Environmental Protection Plan (EPP) for approval of the Director prior to construction of the Development [Bipole III]. The EPP shall describe the approach to be used by the Licencee to ensure that mitigative measures are applied systematically, and in a manner consistent with the commitments made in the EIS [Environmental Impact Statement], including commitments for mitigation measures to address concerns raised by First Nations, Metis communities and local Aboriginal communities about potential adverse effects on the exercise of Aboriginal treaty rights as summarized in the EIS commitment table. If prior approval is given by the Director, separate EPPs may be submitted for the construction and operation phases, as well as for different reaches or components of the Development. Specifically, the EPP shall:
>
> (a) describe the environmental management system and protocol for internal reporting on monitoring and compliance for the construction of the project;
>
> (b) provide field construction personnel with clear instructions on the mitigation measures to be implemented and on the appropriate lines of communication and means of reporting to be followed throughout the full-life cycle of the project;
>
> (c) summarize environmental sensitivities and mitigation actions and emergency response plans and reporting protocols;
>
> (d) provide specific information on waste management practices to be used during the construction phase of the project, including consideration of all liquid and solid wastes generated;
>
> (e) identify how Aboriginal Traditional Knowledge will be enhanced and used in activities addressed in the EPP; and
>
> (f) address issues and concerns identified by representatives of First Nations, Metis, and local Aboriginal communities relating to the environmental effects of the project as described above.

30 According to SCN, Hydro did not consult with or engage SCN in the development of the EPP, nor did SCN receive any letter inviting them to participate in the process. Hydro's failure to do so constitutes a serious issue to be tried.

31 A third serious issue to be tried relates to the failure of Hydro to keep its promises and representations made to SCN as to how the consultative process was to unfold. SCN says it relied on those promises and representations to its detriment.

32 SCN argues that the breach of such promises or representations are not only in breach of procedural

requirements that negate the assertion that procedural fairness within the administrative law context has been afforded, but that such conduct is a breach of a substantive obligation and may amount to public law estoppel.

Position of Hydro

33 Hydro asserts that it is not "of the Crown" and it has not held itself out as such. It is a Crown corporation and its powers flow from the ***Hydro Act***. As such, Hydro has no "duty to consult, grounded in the Honour of the Crown."

34 The law of agency does not provide that agents automatically have all of the obligations of the principals from whom they derive their authority. One must look at what was delegated to the agent by the principal or what authority the agent had by implication. Manitoba acknowledges having a duty to consult with SCN and says that it did so. Manitoba further says that it did not delegate that duty to Hydro.

35 Hydro says that it nonetheless engaged with the First Nations who were potentially impacted by Bipole III. However, those efforts were separate and distinct from Manitoba's duty to consult. Hydro continues to offer to engage with SCN so that Bipole III minimizes the effects on them and on their lands. Hydro has offered to pay the salary of a member of SCN to act as a community liaison officer for a period of two years in order to identify any ongoing concerns. Thus far, SCN has chosen not to accept that offer.

36 As to SCN's allegation that Hydro has breached the provisions of the Licence and as such, it should be revoked, Hydro argues that is not a cause of action available to third parties such as SCN. The enforcement of licences lies with the Crown and it is not open to third parties to seek declarations that licences are in default.

37 Finally, in addition to the offer to pay the salary of a community liaison for a period of two years at a salary of $37,000 per year, Hydro had previously provided funding to SCN for the ATK Report. It has also offered SCN funding through the Bipole III Community Development Initiative in the amount of $161,000 per year for ten years to undertake initiatives that would provide benefit to the entire community.

Analysis

38 I am not persuaded by the argument advanced by SCN that Hydro had a "duty to consult, grounded in the Honour of the Crown as a separate and distinct obligation from that of the Crown."

39 A determination was made by Hydro that an alternate transmission line was required to supplement the existing Bipole I and Bipole II transmission lines. The validity of that decision is not in issue.

40 A route for the Bipole III transmission line was determined. However, before Hydro could commence construction of Bipole III, it required a licence pursuant to the provisions of ***The Environment Act***. Both Manitoba and Hydro acknowledged that the decision to issue the Licence triggered a duty to consult on the part of Manitoba. SCN argues that a concurrent duty to consult arose with respect to Hydro citing the Supreme Court of Canada decision in ***Rio Tinto Alcan*** as authority for that proposal (at para. 81).

41 I disagree with SCN's interpretation of the ***Rio Tinto Alcan*** decision. The facts in that case are clearly distinguishable. There, the Supreme Court of Canada held that the duty on Crown corporations to consult only arises when that Crown corporation is specifically charged with a duty to act in accordance with the Honour of the Crown. They did not say that all Crown corporations under any circumstances are charged with the responsibility to consult.

42 In ***Rio Tinto Alcan***, the trial court decided that B.C. Hydro had been specifically charged with the responsibility and duty to consult and that under those circumstances, its proposal to enter into an agreement to purchase electricity from Alcan amounted to Crown conduct. It was because of those unique circumstances that the trial court concluded that B.C. Hydro acted in place of the Crown.

43 There was no similar delegation of authority between Manitoba and Hydro. Moreover, in these circumstances, the law of agency does not establish that the obligations of the principal Manitoba automatically apply to its agent Hydro.

44 I have not been directed to any jurisprudence which would indicate the requirement for two separate simultaneous consultations by two separate entities.

45 I therefore conclude that Hydro did not have a duty to consult in the Honour of the Crown separate and distinct from that of Manitoba. Accordingly, I find there to be no serious issue to be tried relative to the question of Hydro's duty to consult.

(ii) Breach of Section 4 of the Licence

Position of SCN

46 SCN argues that it is entitled to maintain a cause of action against Hydro by virtue of its alleged breached of s. 4 of the Licence. SCN interprets s. 4 as requiring Hydro to consult regarding the development of the EPP. SCN says that no such consultation ever occurred.

Position of Hydro

47 On August 14, 2013, the Licence was granted to Hydro by Manitoba and was posted on the Public Registry. The public was notified that the parties could file appeals and six entities did (including Manitoba Wildlife, which was also represented by Whelan Enns Associates Inc. ("Whelan Enns")). However, SCN chose to not avail itself of this opportunity to challenge the issuance of the Licence or any of the conditions attached to it.

48 Following the issuance of the Licence, Hydro, where required, was to file documentation with Manitoba to demonstrate compliance with certain Licence conditions. Manitoba then confirmed when a Licence condition had been met.

49 Licence Condition No. 4 requires Hydro to "submit a complete Environmental Protection Plan (EPP) for approval of the Director prior to construction."

50 When Manitoba filed its EIS in 2011, it described Hydro's intentions with respect to the preparation and implementation of EPPs. Hydro also filed a 163 page draft EPP along with the EIS entitled "Environmental Protection, Follow-Up and Monitoring." It was dealt with at the CEC hearing through testimony and cross-examination of Hydro employees and experts in the field of environmental protection and management.

51 The EPP was refined between 2011 and 2014 and broken down into various construction sections. Pursuant to Licence Condition No. 4, the refined EPPs were submitted to Manitoba for approval prior to construction commencing.

52 On April 15, 2014, Hydro submitted a revised EPP relating to N4. On April 22, 2014, that document was sent to SCN.

53 According to Hydro, the EPP is a "living document" in that revisions occur as new information becomes available. Had SCN completed and submitted an ATK Report even after the Licence was issued, its concerns would have been taken into account.

54 On September 18, 2014, Hydro received approval from Manitoba in relation to the construction in N4.

55 Many of SCN's concerns identified in paragraphs 13, 14, and 17 of Genaille's first affidavit have been

addressed by Hydro in both the EIS and the Technical Reports. Further, during the CEC hearings, Hydro filed a Commitment Table setting out 600 commitments relating to mitigative and monitoring measures.

56 Hydro filed a supplemental report in January 2013 concerning the moose population near the SCN Reserve. Updated lists of mitigative measures have been filed since that date.

57 SCN, to date, has failed to accept Hydro's offer to find a member from within its community to act as liaison during construction in N4. As recently as December 9, 2014, Hydro has offered to continue to work with SCN on environmental protection issues. To date, all such approaches have been met with silence from SCN.

58 Hydro disagrees with SCN's interpretation of s. 4 of the Licence. According to s. 4, Hydro was required to "submit a complete Environmental Protection Plan (EPP) for approval of the Director prior to construction" of Bipole III. The EPP was to "describe the approach to be used" by Hydro to "ensure that mitigative measures are applied systematically, and in a manner consistent with the commitments made in the EIS, including commitments for mitigation measures to address concerns raised by First Nations, Metis communities, and local Aboriginal communities about potential adverse effects on the exercise of Aboriginal treaty rights as summarized in the EIS commitment table."

59 Hydro says that the "commitment" in s. 4 of the Licence refers to the commitment made to the EIS in the CEC. Hydro points to more than 600 such commitments being made.

60 Hydro further argues that it is not open to SCN to enforce conditions in the Licence as a third party even if Hydro was in breach of those conditions. See ***Haida Nation v. British Columbia (Minister of Forests)***, *2004 SCC 73*, *[2004] 3 S.C.R. 511*.

Analysis

61 On the evidence before me, I am not prepared to find Hydro in breach of s. 4 of the Licence. My reading of that section aligns with the interpretation offered by Hydro. Further, had I found Hydro is in breach of s. 4 of the Licence, I agree with Hydro's contention that SCN is not entitled to enforce that condition as a third party.

(iii) Adequacy of Funding by Hydro in the Consultative Process

Funding for ATK Report

62 As SCN also raised the issue of adequacy of funding by Hydro in the consultative process, notwithstanding the fact that I have found that Hydro had no duty to consult, I will make the following observations and offer these comments.

63 On February 8, 2012, SCN and Hydro entered into a written Contribution Agreement for Sapotaweyak Cree Nation Traditional Knowledge Project ("Contribution Agreement"). It was signed by the Chief and five councillors of SCN as well as the appropriate Hydro officials.

64 Prior to the Contribution Agreement being signed, Hydro invited SCN to participate in ATK workshops. However SCN chose to conduct a self-directed ATK Study and on November 9, 2011, asked Hydro for $106,478 to fund that study. On January 13, 2012, SCN submitted a revised request for $88,978 accompanied by a detailed budget as well as a detailed description of the work to be undertaken and report provided. The Contribution Agreement and the agreed funding of $89,000 related to SCN's request for that amount.

65 The Contribution Agreement provides *inter alia* as follows:

. . . . .

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the premises and the terms, provisions and mutual covenants contained in this Agreement, the parties hereto hereby agree as follows:

ARTICLE 1 -- DESCRIPTION OF THE WORK

1.1 Forthwith upon the execution of this Agreement, SCN will take steps to perform the work described more particularly in the statement and budget attached hereto as Schedule 1 (hereinafter referred to as "the Work");

1.2 SCN will, on or before April 30, 2012, provide to Hydro an interim project report and an interim expenditure report;

1.3 SCN will complete the work on or before June 30, 2012 and provide to Hydro a final project report which shall include land use and occupancy maps based upon memory mapping interviews and a summary of a community meeting held to discuss project results; and a final expenditure report;

1.4 SCN's Chief and Council will be fully responsible to see that the Work is carried out in accordance with the applicable laws and standards in force in the Province of Manitoba.

. . . . .

ARTICLE 2 -- FUNDING

2.1 Hydro will reimburse SCN's costs and expenditures of performing the Work in accordance with the following stipulations:

(a) The total amount to be paid to perform the Work shall not exceed eight nine thousand ($89,000.00) dollars;

(b) An initial advance of thirty thousand ($30,000.00) dollars shall be paid upon the execution of this Agreement;

(c) A further amount, not to exceed thirty thousand ($30,000.00) dollars shall be paid upon receipt and review of the interim expenditure report described in the Work, provided that report is in compliance with the other stipulations in this Agreement;

(d) A further amount not to exceed twenty thousand ($20,000.00) dollars shall be paid upon receipt of a second interim expenditure report, provided that the report is in compliance with other stipulations in this Agreement;

(e) A final reimbursement of up to nine thousand ($9,000.00) dollars shall be paid upon receipt and review of the final project report and final expenditure report;

(f) All expenses must be reasonable;

(g) All expenses must be identified in receipts and must be identifiable as having been incurred in performing the tasks specified in the Work;

(h) All accountings provided to Hydro by SCN shall include a letter from an authorized representative of SCN which letter shall include a statement certifying that all of the services and goods identified in the accompanying receipts were provided for the Work, what part of the Work required them and that they were not funded by any other process or entity; the expenditure report accompanying the financial documentation must be satisfactory to Manitoba Hydro and in accordance with the terms of this Agreement.

. . . .

[emphasis added]

66 According to the evidence provided by Genaille in his first affidavit, the said $89,000 represented payment only for a study relating to the northern half of N4 and that a further $89,000 was promised by Hydro for a study relating to the southern half of N4. The Contribution Agreement makes no reference to separate funding for studies relating to the northern half and the southern half of N4. Further, the Contribution Agreement does not provide for a second contract in relation to more work.

67 Ultimately, SCN did not submit their ATK Report in time for it to be incorporated into Hydro's EIS. However, it was expected to be used during the CEC hearing.

68 On February 9, 2012, Hydro advanced SCN the sum of $30,000 and made a similar advance of $30,000 on May 15, 2012. The final $29,000 payment was never made as SCN failed to comply with the Contribution Agreement by failing to have the ATK Report ready by June 30, 2012. In fact, it has not been provided to date.

69 SCN did provide some information by way of an interim ATK Report. However, Genaille requested that the reports or maps which were included with the said interim ATK Report not be shared with the CEC.

70 On July 10, 2014, Genaille was informed by email that Hydro was awaiting outstanding items in relation to the ATK Report and specifically identified those items.

71 On June 2, 2014, by email to Genaille, Hydro asked for an accounting of the $60,000 which had been advanced earlier.

72 In the summer of 2013, Hydro approved payment of an additional sum of $48,000 to SCN subject to SCN fulfilling its full deliverables under the Contribution Agreement in a timely fashion. As SCN failed to do so, no additional funds were advanced by Hydro.

Funding for Review of EIS

73 In November 2011, SCN requested funding in the amount of $169,000 to review the EIS which had been prepared by Hydro. That request was denied by Hydro. Similar requests to a number of other parties were also denied. SCN was advised that funding for that purpose was available through the CEC. However, Hydro did provide funding to a number of First Nations, including SCN, to facilitate the gathering of traditional knowledge relevant to Bipole III and as well cover the cost of community meetings in which Hydro employees reviewed Bipole III and listened to concerns and answered questions.

74 On December 14, 2009, Hydro submitted its Environmental Act Proposal and Draft Environmental Scoping Document to MCW, which in turn posted it on its Public Registry which was accessible to the public at large.

75 On December 1, 2011, Hydro filed its EIS with Manitoba. It included seven ATK Reports from other First Nations. SCN points out that the EIS was completed even before they signed a Contribution Agreement. However, there were to be supplemental EIS reports to be filed with the intention of including ATK Reports from SCN and other First Nations who had not completed same.

76 The EIS included 24 Technical Reports that dealt with matters such aboriginal traditional knowledge, groundwater, heritage, lands of special interests and TLE, mammals, caribou, aquatics, birds, terrestrial ecosystems and vegetation, and environmental protection follow-up and monitoring. Supplemental reports were filed relating to matters such as caribou, moose, socio-economic issues and route adjustments.

77 On December 16, 2011, Hydro provided SCN with the completed EIS and all Technical Reports. They were also posted on both the Hydro and MCW Public Registry websites. As well, Hydro caused to be published in numerous newspapers, including the newspaper in The Pas, Manitoba (which is the nearest town to the SCN Reserve), inviting the public at large to comment on the EIS.

78 Hydro also held a number of meetings and open houses for First Nations including SCN and the Swampy Cree Tribal Council ("SCTC") of which SCN was a member. Interestingly, in Chapter 5 of the EIS, there is specific reference to the fact that "open houses" conducted by Hydro were not consultations.

79 On July 24, 2014, Hydro filed with Manitoba a more detailed summary of engagement efforts between February of 2008 and April of 2014. Hydro also furnished evidence of further engagement efforts between April 2014 and November 2014, as well as a list of communications and follow-ups with Genaille.

80 SCN has failed to provide any documented evidence of alleged refusals by Hydro to meet with Genaille whereas Hydro has furnished documented evidence of Genaille's refusal to meet with Hydro on several occasions.

CEC Funding

81 CEC public hearings were held between October 1, 2012 and March 2013, over a total of 35 days. At the hearings, Hydro representatives testified to efforts at engaging First Nations and also described the environmental protection measures that were being considered to mitigate the effects of Bipole III.

82 It was unclear whether SCN received or was approved for funding from the CEC in the amount of $35,000 to participate in the public hearings. SCN not only had the right to cross-examine Hydro representatives at the public hearings, but also had the opportunity to present their own evidence. Genaille and/or Council members were present but for a few of the hearing days. SCN had retained Whelan Enns to assist in the preparation of ATK documents. A representative of Whelan Enns attended the entire CEC hearing.

83 In November 2012, the CEC hearing was adjourned to allow for a further assessment and engagement of in-vicinity communities with respect to four possible route adjustments pursuant to a request by Manitoba. Hydro attempted to meet with SCN in late 2012 to discuss an adjustment to the route in the vicinity of the SCN community, but Genaille stated he would meet only with Hydro's president. Eventually Hydro accommodated him in that regard and a meeting was held in February 2013.

84 In June 2013, the CEC issued its Report on Public Hearing of Bipole III to Manitoba. The report was subsequently posted on the CEC website in July 2013 and available to the public at large. SCN apparently received a copy of the report as it was attached in its entirety as an exhibit to one of Genaille's affidavits.

(iv) Brennan Promise of Funding

Position of SCN

85 Genaille deposed to an offer of funding in the amount of $169,000 from Bob Brennan ("Brennan"), the then CEO of Hydro. SCN argues that since Genaille was never cross-examined on his affidavit, the assertion must be taken as the truth.

86 Genaille deposed that he informed Brennan that the cost of completing the ATK Study for SCN was going to be

$169,000. Genaille did not provide any breakdown for that amount, nor did he provide any information as to how that amount was determined. According to Genaille, Brennan informed him that securing funding of $100,000 or less was within his control and that Brennan went on to conclude the following agreement with Hydro:

(a) SCN would initially only interview 50 people instead of 100;

(b) SCN would focus the interviews in respect of the northern part and not the southern part of N4;

(c) SCN would submit a budget to Hydro for approximately $100,000; and

(d) at a later date SCN would submit a second and similar budget to interview 50 band members focussing on the southern part of N4.

87 According to Genaille, SCN submitted a funding proposal to Hydro on January 13, 2012, for the first half of the ATK Study as had been discussed with Brennan. The proposal however makes no specific reference as to it being applicable only to the northern half of N4.

Position of Hydro

88 Hydro's contention is that it considered additional funding for SCN for the preparation of the ATK Report but determined that additional funding was unavailable. That information was communicated to Genaille by letter dated January 5, 2012, one week prior to SCN's submitting its funding proposal.

Analysis

89 The documentation supports Hydro's contention that it only agreed to consider additional funding and did not make any commitment to same. After consideration, Hydro determined that additional funding was unavailable. SCN was made aware of that decision and appears to have accepted it as evidenced by the funding proposal which it submitted to Hydro on January 13, 2012 (although it appears to have been completed on December 1, 2011, as per the heading "December 1, 2011 Response to Manitoba Hydro, Aboriginal Relations Unit").

90 All told, the sum of $210,000 was either paid to or made available to SCN in relation to the Bipole III project:

(a) Hydro committed $89,000 for the completed ATK Report;

(b) Manitoba paid $38,000 to fund the consultation process;

(c) CEC offered $35,000 for SCN to participate in the public hearings; and

(d) Hydro offered an additional $48,000 to complete the ATK Report.

91 In addition, Hydro offered to fund the salary of a community liaison person in the amount of $37,000 per year for two years. Finally, Hydro offered SCN the sum of $161,000 per year for ten years for a community development fund.

Conclusion

92 As stated earlier, having found no legal requirement by Hydro to engage in the consultative process with SCN, the issue of funding is moot. Notwithstanding, on the evidence before me, SCN has failed to persuade me that the funding made available was inadequate.

MANITOBA

Position of SCN

93 SCN contends and Manitoba admits that it had a duty to consult with SCN in relation to Bipole III. SCN also admits that consultation between it and Manitoba took place. However, according to SCN, the consultation was not conducted on a "level playing field" in that SCN was underfunded and therefore incapable of participating fully in that process. SCN further argues that the consultation process should not have been terminated by Manitoba in July 2013 before SCN had a chance to fully inform Manitoba of the potential harmful effects of Bipole III. In fact, SCN goes beyond that and says that it was incapable of collecting the necessary information in order to properly inform Manitoba of those potential harmful effects due to the inadequacy of the funding provided by Manitoba.

94 SCN argues that the adequacy of the consultation process is a serious issue that needs to be tried.

95 SCN raises additional matters which it says constitute serious issues to be tried. One of those is the failure of the Manitoba Ministers to live up to promises made to SCN.

96 Finally, SCN contends that the requirement for Manitoba to consult with respect to Bipole III overlaps with the same requirement in relation to the TLE Framework Agreement.

97 SCN points out that it does not have a written consultation record but rather relies on the historical oral tradition of recording history by word of mouth from generation to generation. In his affidavits, Genaille deposes to matters which he recalls from memory rather than any written record. SCN submits that Genaille was not cross-examined on his affidavits and that since he was neither challenged nor refuted in that fashion, his evidence should be accepted by the court.

98 In his affidavit, Genaille says that the Bipole III transmission line in the N4 corridor was routed to run through Treaty 4 lands and partially within SCN's traditional land and SCN's Community Interest Zone. He claims that animals, birds and fish would be affected by the disturbance of their natural habitat.

99 As to how Bipole III affects SCN's TLE, Genaille says it would remove available land from the inventory for acquisition and it would fragment land near the reserve and other lands selected and waiting to be set apart as a reserve so as to make it more difficult to acquire contiguous parcels of land at an appropriate price. Genaille identified the lack of progress on talks regarding Manitoba's acquisition policy as being a "larger issue."

100 In relation to the consultation process, SCN correctly points out that Manitoba has a constitutional obligation to both consult with and accommodate SCN in relation to its concerns over Bipole III. SCN contends that neither the obligation to consult, nor the accommodation requirements have been met.

101 According to Genaille, on January 25, 2011, commitments were made personally to him in the presence of Chris Henderson ("Henderson"), Executive Director of the Treaty Land Entitlement Committee Inc. ("TLEC"), by Minister Rosanne Wowchuk ("Wowchuk") who was, at the time, Deputy Premier, Minister responsible for Hydro, and SCN's local MLA. From SCN's perspective, the meeting was to ensure that complete consultations would take place and that SCN would be properly funded for same. According to Genaille, Wowchuk promised that the consultation process would be fully funded and identified Manitoba as well as Hydro as sources for funding. Further, Wowchuk promised that the consultation process would include the following:

(a) Hydro would fund SCN to prepare an ATK of how it believed Bipole III would affect Aboriginal and treaty rights;

(b) Hydro would receive and consider that information and do whatever was required in order to cause an independent and thorough study to be conducted so that an EIS could be created that would document how Bipole III would specifically affect SCN's rights and address SCN's concerns identified in the ATK Report;

(c) once the EIS was completed, it would be provided to SCN for review and consideration. At that time, additional funds would be made available to SCN to hold meetings at their reserve and retain independent experts and technical assistance to:

(i) review the EIS;

(ii) explain the EIS to SCN membership;

(iii) obtain the feedback from the membership to the EIS; and

(iv) assist SCN in negotiations with Manitoba aimed at accommodating SCN's concerns with the proposed project;

(d) thereafter, Manitoba and SCN would sit down to discuss how each side could accommodate the other's interests.

102 In his affidavit, Henderson deposes that he took some notes of what took place at the meeting, but did not record the full extent of what was said. Attached to his affidavit was a transcribed version of his handwritten notes taken at the meeting. Those handwritten notes did not reflect the specific promises which Henderson says he recollected and which were word for word identical to Genaille's recollection.

103 Genaille says that Wowchuk's promises were not kept.

104 With respect to funding which was expected from Manitoba, Genaille states that the $38,328 made available for that purpose was insufficient. Furthermore, Genaille states that the EIS was completed prior to SCN being funded to complete the ATK and that whatever information SCN might have been provided would have been of no use as it would have been after the fact.

105 Genaille says that SCN subsequently approached Manitoba, Hydro and the CEC for funding, but were refused by each body.

106 Another concern raised by SCN was Manitoba's failure to consult in the development of a consultation protocol. SCN says it put forward a proposal on April 29, 2014, which sought to engage Manitoba in discussions aimed at consultation and accommodation. Manitoba refused to engage in any such discussions or to fund any such process claiming that its consultative obligations were fulfilled with the issuance of the Licence to Hydro on August 14, 2013.

107 Genaille points out that Manitoba's existing consultation policy is labelled a "draft" policy which means that Manitoba has never adopted a "final" policy. (Actually, Manitoba's existing consultation policy is identified as "interim" and not "draft")

108 SCN advanced a similar argument with respect to Manitoba's funding guidelines in relation to consultations. It claims it was entitled to be consulted by Manitoba with respect to the development of both the consultation policy and the funding guidelines. Manitoba's failure to do so is included in SCN's allegations of Manitoba's failure to consult and accommodate.

109 According to Genaille, Manitoba's involvement in Bipole III began on August 9, 2010, when it advised SCN by letter that Hydro would be preparing an EIS that was intended to assess the effects of Bipole III on the exercise of SCN's Aboriginal and treaty rights. Shortly thereafter, Manitoba confirmed to SCN that it recognized its responsibility to consult SCN regarding Bipole III.

110 On June 29, 2011, Genaille attended a meeting with Minister Bill Blaikie ("Blaikie"), Manitoba's Minister of Conservation. The requirement for consultations and the need for proper funding were discussed. Matters relating to key land acquisition rights were also discussed. Because the final route for Bipole III had not yet been determined, Genaille understood that SCN had time to address that issue.

111 During the months of July and August 2011, Genaille, as Chief of SCN and also as president of the TLEC, communicated with Manitoba with respect to acquisition rights as well as with respect to SCN's input into the development of a provincial policy for Crown consultations.

112 Genaille received correspondence on August 19, 2011, from Manitoba. His interpretation of Manitoba's position with respect to the consultative process was that Manitoba was prepared to discuss their position. (Actually, the letter states: "In terms of large scale projects such as Bipole III, you will have already been contacted by the project specific consultation team looking to set up a consultation plan and budget with your First Nation. Formal consultation will occur once Manitoba Hydro submits the project Environmental Impact Study and associated Crown land application now anticipated to occur this fall.")

113 The aforementioned letter was under the signature of Lori Stevenson ("Stevenson"), Senior Manager of Crown Land and Aboriginal Land Programs for Manitoba. The vast majority of the three pages of said correspondence dealt with TLE and other matters.

114 Genaille claims that the decision to request funding in the sum of $38,328 for consultation process was at the suggestion of Tracy Campbell ("Campbell") of the Calliou Group, a company retained by Manitoba to assist in the consultation process. According to Genaille, by the time consultations were scheduled to begin on March 16, 2012, it had become clear to SCN that the funding commitment of $38,328 was inadequate. He wrote to Manitoba advising of the expected deficiency in funding and seeking additional funding. MCW, which was spearheading the consultative process on behalf of Manitoba, advised SCN that the funding as previously requested and arranged was believed to be sufficient.

115 Being dissatisfied with the position being taken by Manitoba, Genaille set up a meeting with Manitoba for May 9, 2012. He provided an agenda of matters which he wanted to discuss. Those included:

* the development of a consultation protocol with respect to Bipole III issues;
* the role of Manitoba in the consultation process;
* a commitment to capacity funding to enable meaningful consultation to occur;
* identification to procedures to be used to secure proper capacity funding;
* discussion of what role the Calliou Group had, if at all, in the consultation process and who they represented; and
* issues with respect to the acquisition of Crown lands under the TLE.

116 At the May 9, 2012 meeting, Genaille's agenda items were discussed including issues of meaningful consultations and property capacity funding to enable SCN to engage in those consultations. It was Genaille's recollection that agreement was reached that SCN would put forward a budget developing negotiations protocol and would submit that funding proposal to Manitoba for its consideration.

117 Genaille refers to a June 18, 2012 letter received from MCW. He understands Manitoba to say that they acknowledge a responsibility to consult in a meaningful way and that the Crown would continue to consult with Aboriginal communities to discuss issues and concerns and potential impacts to the exercise of treaty and Aboriginal rights. In fact, the letter was topic specific to Bipole III and in fact is referenced as "Manitoba Hydro Bipole III -- Update."

118 The letter goes on to explain that Hydro was seeking a Class 3 licence under ***The Environment Act*** as well as a licence for use and occupancy of Crown land for a portion of the Bipole III transmission line. The letter attaches an update regarding anticipated regulatory milestones relating to Bipole III which included Hydro having filed an EIS on December 1, 2011, and the ability for the public to comment on said EIS until March 16, 2012. The letter further

advised of CEC hearings beginning in October -- November 2012. Following the completion of those hearings, the Minister responsible would review all of the information available from Hydro, the Crown, the public and the hearings in order to make a licensing decision.

119 The letter concludes:

> The Crown will continue to consult with Aboriginal communities to discuss issues, concerns and potential impacts to the exercise of Treaty and Aboriginal Rights. The information received during this process will also be provided to the Minister for his review in advance of the licensing decision. The deadline for receiving written comments for your Nation for inclusion in the Crown-Aboriginal Consultation report is November 16, 2012.

120 The letter makes no reference to funding and references to consultations refer specifically and exclusively to Bipole III.

121 With the assistance of Whelan Enns, a report was prepared on behalf of SCN. It is referred to as "Confidential and Interim Report" and was dated March 21, 2013. According to Genaille, however, the report was delivered to Manitoba on July 3, 2012.

122 There was a further exchange of correspondence between Whelan Enns and Manitoba regarding SCN's participation in preparing a proposed budget for negotiating and establishing a consultation protocol. Genaille was informed by letter dated August 13, 2012, that those activities were not within the scope of the consultation process regarding Bipole III. The letter also indicated that additional funding for the consultation process would not be available to SCN.

123 Genaille makes reference to meeting with Minister David Chomiak ("Chomiak"), Minister of Innovation, Energy and Mines, wherein Chomiak pledged to look into the issue of funds needing to be made available to provide SCN with technical assistance and expertise to determine how Bipole III would affect its traditional territory and membership. Genaille's recollection was that he was told there would be a response forthcoming from Manitoba to the issues raised by him. Henderson's minutes indicate the only undertaking was to meet again at some future date.

124 SCN received a letter dated July 5, 2013, from MCW enclosing what Genaille referred to as a Record of Communication outlining communications that had occurred over the years. Genaille also indicated that MCW was seeking a response as to whether or not the Record of Communication was accurate.

125 The aforementioned correspondence actually provides what CWS refers to as a Summary of Concerns Report on Crown-Aboriginal Consultation Undertaken by Manitoba through CWS with representatives of SCN for Bipole III. The letter containing the Record of Communication states the Bipole III consultation process with SCN was initiated on August 9, 2010. The letter goes onto say that a consultation work plan and budget was developed with SCN and a Consultation Funding Agreement entered into on January 9, 2012. SCN was invited to submit a final version of community concerns if it felt that CWS's summary was incomplete.

126 The letter also indicated that Manitoba would make a decision with respect to the Bipole licence in the near future and that if a licence issued to Hydro, Manitoba would attempt in good faith to address any potential issues and concerns identified by SCN. Finally, the letter provided a Record of Communication from the time the consultation process commenced to June 21, 2013, and again SCN was invited to advise of any errors or omissions.

127 Genaille responded by letter dated July 22, 2013, informing CWS that the Record of Communication was inaccurate and that details would be forthcoming. Genaille went on to inform CWS that SCN had not been adequately consulted, nor had appropriate funding been provided for SCN to properly participate in the consultation process. Reference was also made to Bipole III occupying significant parts of SCN ancestral territory and also a

significant area that SCN wanted available for acquisition pursuant to the TLE. While Genaille believed a follow-up letter was sent to CWS detailing the deficiencies, he was unable to locate any such correspondence.

128 SCN received a letter dated November 7, 2013, from Gord Mackintosh ("Mackintosh"), Minister of CWS, summarizing the consultation process and the issues and concerns raised by SCN. The letter invited further input from SCN with an undertaking to address any such issues and concerns identified.

129 Genaille continued to raise the subject of inadequate funding as well as the effect of Bipole III on the ability of SCN to acquire Crown land under the TLE. Genaille followed with a letter dated January 6, 2014, to Mackintosh informing him that consultation between Manitoba and SCN regarding Bipole III had not yet taken place. He further advised that SCN would be preparing and forwarding a Consultation and Accommodation Proposal/Protocol for Manitoba's consideration.

130 On April 29, 2014, a draft SCN and Manitoba Consultation and Accommodation Protocol was forwarded to Manitoba.

131 In his affidavit, Genaille makes reference to a meeting on April 30, 2014, where he says SCN's concerns including lack of meaningful consultation and accommodation efforts by Manitoba and Hydro were discussed. As well, he states that Manitoba undertook to respond to SCN's draft Consultation Protocol. Genaille does not provide any information as to who attended the meeting or any other details, nor was there any documentation provided relating to such a meeting.

132 MCW sent SCN a letter dated June 9, 2014, which outlined a review of funds provided to that date. As well, SCN was informed that Manitoba would not be involved in negotiations relating to the Consultation and Accommodation Protocol as its consultation obligations had been completed with the issuance of the Licence. According to Genaille, this information came as a surprise to SCN as nobody had suggested earlier that consultations were at an end.

Position of Manitoba

133 Manitoba relies on an affidavit by Chloe Burgess ("Burgess"), affirmed December 9, 2014, who is a Manager with CWS since 2011 and a Senior Policy Analyst prior to that, which provides a documented record of the consultation process which Manitoba says it engaged in with SCN from August 2010 to August 2013. The record includes Manitoba's communication to SCN of its decision to issue the Licence as well as how the concerns of SCN which had been raised during the consultation process were considered in the licensing decision.

134 In February 2009, the Bipole III Transmission Project Crown-Aboriginal Inter-Departmental Consultation Steering Committee ("Steering Committee") was established to develop a framework for the consultation process, to carry out an Initial Assessment with respect to Bipole III Crown-Aboriginal Consultation and to guide the implementation of the process. The two principal decisions which triggered the establishment of the Steering Committee were the application by Hydro for a Class 3 licence under ***The Environment Act*** and Hydro's request for the use of and occupancy of Crown land for a portion of the route of the Bipole III transmission line. Both of the decisions fell under the responsibility of the Minister of CWS.

135 A document entitled "Crown-Aboriginal Consultation Initial Assessment and Record of Conclusion" was prepared and adopted by the Steering Committee on February 7, 2011. By way of introduction, it provided:

> **INTRODUCTION:**
>
> The Government of Manitoba recognizes it has a duty to consult in a meaningful way with First Nations, Métis communities and other Aboriginal communities when any proposed provincial law, regulation, decision or action may infringe upon or adversely affect the exercise of an Aboriginal right or treaty right of

> that Aboriginal community. This duty arises out of the recognition and affirmation of Aboriginal rights and treaty rights under section 35 of the *Constitution Act*, 1982.
>
> An initial assessment of the proposed law, regulation, decision or action must be conducted to determine if it will require consultation. The department or branch responsible for the Act that authorizes the decision or action has the lead role to consult on behalf of Government; with the support of other appropriate departments.
>
> Consultation is required with Aboriginal communities where it appears that a proposed Government decision or action might adversely affect the exercise of an Aboriginal or treaty right.
>
> If consultation is warranted, the appropriate level of consultation should be determined, with assistance from Manitoba Justice if necessary. The nature, scope and content of a consultation may vary from situation to situation depending on the particular circumstances. Factors that influence this are: strength of the case supporting the existence of the right or title and the seriousness of the potential adverse effect.

. . . . .

136 It concludes as follows:

> **INITIAL ASSESSMENT CONCLUSION:**
>
> Crown-Aboriginal consultation should be conducted as the project has potential to impact the ability of First Nations and other Aboriginal communities to exercise Aboriginal and treaty rights on provincial Crown lands. Given the scope of the project it will be critical to hear from the communities about potential impacts to significant cultural sites; e.g. burial, ceremonial, etc. on Crown land.

137 SCN was identified as one of the 26 First Nations needing to be consulted.

138 The Burgess affidavit provides a Communication/Activity Log identifying date and method of contact, with and by whom, a summary of the discussion and a reference to any follow-up that was considered necessary.

139 Burgess describes the Crown-Aboriginal Consultations as having taken place in four phases, with some of the phases overlapping. Phase 1 involved the determination of interest of the various First Nations in the consultation process. That was achieved through initial contacts by correspondence, telephone and meetings. With SCN, this phase began on August 9, 2010, and overlapped to some extent with Phase 2.

140 Phase 2 with SCN occurred between January 2011 and June 14, 2013. A consultation work plan and budget were developed setting out a mutually acceptable consultation process. The consultations would be undertaken according to the plans and schedules developed with each community to hear and understand their concerns as to how Bipole III might affect the exercise of Aboriginal or treaty rights and also to consider potential ways to address those concerns. Consultation support costs were made available to assist communities with coordination of the consultation through a Crown-Aboriginal Consultation Participation Funding Agreement.

141 During Phase 3, the Steering Committee undertook an analysis of the consultation information and considered how issues and concerns might be addressed. Some additional responses were sought from communities about potential recommendations for addressing concerns. Hydro was also requested to provide further information. A Record of Consultation was prepared for each community documenting the consultation process and any information received from the community to be considered in government decisions.

142 With respect to SCN, Phases 2 and 3 overlapped and concluded in August 2013.

143 As part of Phase 3, the Minister received the "Bipole III Transmission Project: Crown-Aboriginal Consultation Report" prepared by the Steering Committee.

144 During Phase 4, Manitoba communicated the licensing decision to the affected First Nations and also communicated the measures undertaken, or to be undertaken, to address potential effects on the exercise of Aboriginal or treaty rights. For SCN, this phase began on August 14, 2013, and communications commenced immediately thereafter.

145 SCN was informed of the commencement of the consultation process by letter dated August 9, 2010, from Serge Scrafield ("Scrafield"), Assistant Deputy Minister in CWS, to the then Chief of SCN, Alpheus Brass ("Brass").

146 By way of a follow-up letter dated December 14, 2010, from Scrafield to Genaille, SCN was informed that the consultation would be led by CWS. As well, SCN was informed that the Calliou Group had been retained by CWS to provide consultation coordination and facilitation services. The letter clearly expressed that Manitoba recognized its responsibility to consult and that it alone would be involved in that process.

147 By letter dated January 17, 2011, SCN was provided with a package of information relating to the Crown-Aboriginal Consultation Process for Bipole III. It included:

* a Government of Manitoba Crown Consultation Principles;
* a Government of Manitoba Crown Consultation Team Contact Information;
* Bipole III Crown-Aboriginal Consultation Plans;
* Anticipated Schedule of Regulatory Milestones;
* Manitoba Hydro Bipole III Project Information; and
* Environmental Assessment Scoping Document for Bipole III Project.

148 The January 17, 2011 letter also provided a Crown-Aboriginal Consultation Participation Fund Community Guide which purported to provide information about how the fund could be accessed for community support costs related to the Crown Consultation Processes with Manitoba. The guide was a multipage document containing detailed information about how funding could be accessed by First Nations.

149 On August 4, 2011, the first meeting between representatives of MCW and SCN was held. It was explained to SCN that Crown-Aboriginal Consultations were a separate process to Hydro's function which was to gather information for inclusion in the EIS. The importance of SCN identifying traditional territory and marking significant sites on a map was important to this project. Finally, Manitoba advised SCN that the environmental consultants who perform studies were independent and that the environmental assessment process was designed so that one assessment done by independent consultants should be sufficient. If SCN was concerned with information in the findings, they could submit those concerns in writing during the reviews/comments stage. At the conclusion of the meeting, it was determined that SCN would develop a community meeting in the last half of August 2011, and as well, provide an area of its traditional territory on a map.

150 Between July 2011 and the end of that year, there were numerous exchanges of email and other communications between Manitoba and SCN.

151 By letter dated January 6, 2012, Scrafield informed SCN that Hydro had filed an EIS on December 1, 2011, following which there was a 90 day review period. It was noted that the normal review period was 30 days, but that period was extended in order to enable SCN to provide their comments, concerns and potential impacts in writing to Manitoba. At the conclusion of the 90 day review and comment period, Manitoba indicated that it would enter into the community consultation phase to discuss issues, concerns and potential impacts to the exercise of Aboriginal and treaty rights.

152 On January 9, 2012, Manitoba and SCN signed a Crown-Aboriginal Consultation Participation Fund

Agreement ("Agreement") specifying the amount of funding and also the specific amounts allocated to specific functions. For example, $10,000 was allocated to Whelan Enns for the preparation of a summary of EIS with attention to how Bipole III might affect SCN's "rights, interests and impacts." It was also to include a "submission of written comments, concerns and potential impacts to rights" based on the review of the EIS and community meetings within the specified comment period.

153 The funding was for the entire consultation process as evidenced by the following provisions in the Preamble:

> WHEREAS:
>
> . . . . .
>
> B. Accordingly, Manitoba is engaging in a Crown consultation process with the Community with respect to the Bipole III transmission line (the "Consultation").
>
> C. Manitoba and the Community are entering into this Agreement to provide Consultation support funds (the "Funds") to the Community to enable the Community to meaningfully participate in the Consultation; and.
>
> . . . .

154 The Agreement also required SCN to provide documented accounting for use of the funds.

155 SCN never provided a final report as required by the aforementioned Agreement.

156 Genaille wrote to Scrafield on March 16, 2012, in response to Scrafield's January 6, 2012 correspondence. Genaille advised that SCN intended to participate fully in consultations and that it expected to be commenting on and dealing with the EIS filed the previous December. Genaille then stated that it would be most appropriate if SCN's comments on EIS be dealt with as part of the Crown consultation process. He concluded by indicating that the funding that had been agreed to was inadequate and indicated that it would have to be revisited or supplemented.

157 Scrafield replied to Genaille by letter dated April 11, 2012, advising that SCN was invited to provide comments on EIS prior to community consultations. However, he indicated that Manitoba was prepared to hear SCN's comments as part of the consultation process. Scrafield went on to say that the Agreement in the amount of $38,328 was deemed to be adequate and suggested that SCN proceed with their community consultation meetings.

158 Scrafield again wrote to Genaille on June 18, 2012. He reminded Genaille of SCN's opportunity to comment on the EIS until March 16, 2012. He also informed Genaille of the CEC hearings which were to be conducted later that year. He stated that once the CEC hearings were complete, all of the information obtained would be considered by the Minister in making the licensing decision. Finally, Scrafield informed Genaille that Manitoba would continue to consult with Aboriginal communities to discuss issues, concerns and potential impacts to the exercise of Aboriginal and treaty rights and that information received during that process would also be provided to the Minister for his review in advance of the licensing decision. A deadline for receipt of comments from SCN was set at November 16, 2012.

159 On July 3, 2012, Whelan Enns provided Manitoba with a draft project report. It contained several concerns about Bipole III and its impact on SCN. It also made reference to the concerns about TLE. It was the only report provided by SCN to Manitoba or Hydro in relation to Bipole III.

160 On August 13, 2012, Fred Meier ("Meier"), a Deputy Minister with CWS, wrote to Genaille advising him that negotiating and concluding the consultation protocol were not within the scope of the Bipole III consultation process and that further funding would not be made for that purpose. However, Meier left the door open for further

discussions with respect to the consultation protocol once the consultation process regarding Bipole III was concluded.

161 On February 28, 2013, Mackintosh wrote to both Genaille and Chief Charlie Boucher ("Boucher") of Pine Creek First Nation. In his letter, he thanked Genaille and Boucher for taking the time to meet with himself and Chomiak "to discuss various items of interest to your communities. We acknowledge that there have been numerous ongoing meetings and discussions with your community representatives and various departmental staff and we encourage you to continue those discussions on specific topics." It is apparent that neither Mackintosh nor Chomiak considered their meeting with Genaille to be a part of the formal consultation process.

162 On March 6, 2013, Scrafield wrote to Genaille to request a meeting to discuss proposed route changes for Bipole III. He noted that the CEC hearings were adjourned while Hydro conducted an environmental assessment and prepared a supplement to its EIS with respect to the route changes. In those circumstances, updated regulatory timeframes/milestones were provided. Scrafield requested a meeting with SCN in the context of the Bipole III Transmission Project Crown-Aboriginal Consultation Process. Scrafield indicated that CWS would be arranging a meeting with SCN to discuss amending the original Consultation Work Plan and Budget so that the route changes were included in the consultation process. A deadline of April 12, 2013, was indicated for the receipt of community consultation reports. However, Scrafield also informed that efforts would be made to incorporate information received after that date.

163 SCN did not respond to that request.

164 On April 19, 2013, Fran Mulhall ("Mulhall"), a Policy Analyst Intern with CWS, emailed Whelan Enns as the main contact with SCN and provided the following information:

. . . . .

> The Department has made previous attempts to discuss additional consultation with Sapotaweyak Cree Nation related to Manitoba Hydro's proposed Alternate Final Preferred Route, submitted on January 28, 2013. As the Crown-Aboriginal consultation process related to this project is nearing its end, any issues and concerns Sapotaweyak Cree Nation may have related to the Alternate Final Preferred Route can be included in the final report to the Department.
>
> As Sapotaweyak Cree Nation has not yet submitted a final report, it is important to note that in order to have its information included in the final consultation report, all consultation activities must be completed by May 24, 2013, including the report back to the Department of Conservation and Water Stewardship.
>
> We hope that this extension to the original deadline of April 12, 2013, will enable Sapotaweyak Cree Nation to complete the activities in Sapotaweyak Cree Nation's proposed workplan and submit the consultation report. If Sapotaweyak Cree Nation is unable to meet the date of May 24, 2013, it may provide its information directly to the Minister in advance of the licensing decision being made.

165 On July 5, 2013, Mulhall emailed Genaille (with a copy to Whelan Enns) providing the following information:

> As follow up to the Bipole III consultations undertaken by the Government of Manitoba, I have attached the following:
>
> * A letter from Assistant Deputy Minister of Conservation Programs, Serge Scrafield;
> * a Community Summary document outlining our understanding of the issues and concerns about the Bipole III Transmission Project we heard from your community,
> * a Record of Communication covering the consultation period up to June 21, 2013
>
> These documents are also being mailed to you in hard copy via priority post. We anticipate a licensing decision later this summer and wish to confirm that the comments we are analyzing with respect to your

> community are accurate and complete. To ensure that we have the best information from you consequently, as is noted in the letter, we would appreciate your feedback by **July 22, 2013**.
>
> [emphasis in original]

166 On July 22, 2013, Genaille wrote to Scrafield and advised him that the Record of Communication which had been provided was inaccurate. He stated that details of those deficiencies would be provided in a separate letter. He also stated that SCN did not consider itself to have been adequately consulted by the Crown with more details to be provided in due course. SCN neither provided details about deficiencies in the Record of Communication, nor a more detailed recitation of facts relating to its claim of having been inadequately consulted by the Crown.

167 In July 2013, the Crown completed its Bipole III Transmission Project: Crown-Aboriginal Consultation Report, a document in excess of 100 pages. It contained information for the Minister with reference to Hydro's request for an environmental licence. It set out specific concerns received from the First Nations affected, including SCN, and as well identified how those concerns might be addressed. It also made reference to the TLE Acquisition Process.

168 On November 7, 2013, Mackintosh wrote to Genaille outlining the consultation process that had taken place and identifying issues that had been raised during that process. Mackintosh also points out that SCN raised issues and concerns that fell outside the scope of the Crown-Aboriginal Consultation Process for Bipole III and stated those issues would be referred to the appropriate government department for follow-up. Mackintosh concluded by advising that the Consultation Team would be available to meet further to discuss decisions related to the Licence or the authorization for the use and occupancy of Crown land and stated that the date of the Consultation Agreement could be extended to include such a meeting, if necessary.

169 By letter dated January 6, 2014, Genaille informed Mackintosh that from SCN's perspective, consultations between the Crown and SCN in respect of Bipole III had not yet taken place. He also reiterated that funding for the consultation and accommodation process had been inadequate. He concluded by stating that SCN would be submitting a document outlining the nature of the consultation and accommodation expected by SCN.

170 Mackintosh responded to Genaille by correspondence dated February 25, 2014, stating that a Bipole III consultation meeting with CWS staff had been scheduled for January 24, 2014, but that it was being rescheduled at Genaille's request. There were follow-up communications with Genaille in an effort to reschedule the meeting.

171 On March 19, 2014, Scrafield wrote to Genaille thanking him for participating in the Crown-Aboriginal Consultation Process for Bipole III. He pointed out that although the Licence had been issued, input from SCN's final report was still required and would be used by Manitoba in future authorizations and approvals relating to Hydro's EPP's. He stated that EPP's were still in development as an ongoing initiative and that they required long-term monitoring and assessment of the effects of Bipole III. Scrafield further stated that the information garnered during the consultation process would be shared by Manitoba with Hydro. He also mentioned that conditions of the Licence required that Hydro work with First Nations, Métis communities and local Aboriginal communities to develop plans under Hydro's EPP that addresses issues and concerns identified during the consultation process. He closed by anticipating receipt of the final report for the Crown-Aboriginal Consultation Participation Funding Agreement and reminded that a financial report of all expenditures relating to the Agreement would be required before final payment could be made.

Analysis

172 Manitoba's "duty to consult in a meaningful way with First Nations, Métis communities and other Aboriginal communities when any proposed provincial law, regulation, decision or action may infringe upon or adversely affect the exercise of an Aboriginal right or treaty right of that Aboriginal community" is acknowledged in writing. That duty was acknowledged to SCN before and during the consultation process and even after it ended.

173 The duty to consult is triggered on Manitoba recognizing or being made aware that its action has a potential to

adversely affect Aboriginal or treaty rights. In this case, Manitoba recognized its duty to consult as arising by virtue it being asked to make two principal decisions related to applications by Hydro for Bipole III. Those decisions were:

(a) the issuance of a Class 3 licence under **The Environment Act;** and

(b) authorization for the use and occupancy of Crown land for a portion of the route of the transmission line.

174 Other specific actions by Manitoba can trigger the duty to consult such as the Selection and Acquisition Process under the TLE. However, that duty to consult is not at issue in these proceedings.

175 The issue before this court is whether SCN is entitled to injunctive relief as a result of inadequate consultation in relation to Bipole III. As Manitoba correctly argues, there are no identified rights under the TLE Framework Agreement that are being affected by the project that could form the basis of an injunction.

176 Since SCN has raised the issue of consultations regarding the TLE and its relevance to Bipole III consultations, some context may be useful in understanding the relationship, if any, between the two.

177 SCN is a party to the Treaty Entitlement Agreement with Canada, Manitoba and the TLEC dated July 30, 1998. It adopts a provision of the TLE Framework Agreement between Canada, Manitoba and the TLEC dated May 29, 1997 (the "TLE Agreements").

178 The TLE Agreements identify the amount of Crown land that may be selected by SCN ("Crown Land Amount") and the amount of other land that may be acquired on the market ("Other Land Amount"). The TLE Agreements also sets out "Principles for Land Selection and Acquisition," which serve as guidelines to the parties as to eligibility of categories of land to be set apart as reserve to fulfill the land entitlement of SCN.

179 To date, SCN has selected more than the Crown Land Amount set out in the TLE Agreements. It has selected 12 parcels of Crown land totalling 112,782.10 acres, of which eight parcels totalling 99,701.73 acres have been set apart as reserve.

180 The TLE Framework Agreement also sets out financial provisions. Certain payments under the Agreement are to be made to a trust to be established by each Entitlement First Nation. A Land Acquisition Payment of $7,100,823 was paid to SCN.

181 SCN has acquired substantially less than the Other Land Amount set out in the TLE Agreements and may use the funds in its trust from the Land Acquisition Payment to acquire lands from private sources on the open market.

182 The Bipole III route does not intersect with any reserve lands, Crown land selections made by SCN or lands acquired by SCN.

183 The TLE Agreements contains specific procedures to be followed to address the selection of land that includes a proposed transmission line right of way. If land had been selected by SCN in the area of the route of the Bipole III transmission line, that process would have applied.

184 A preamble of the TLE Framework Agreement states:

. . . . .

T. The parties acknowledge that insufficient unoccupied Crown Land is available to fulfil the requirements of the Per Capita Provision of certain Entitlement First Nations;

. . . . .

185 SCN is one of those Entitlement First Nations.

186 SCN has expressed interest in acquiring Manitoba Crown land as part of the "Other Land Amount" under the TLE Agreements. However, Manitoba and SCN have not agreed on a purchase and sale of any such Crown land. Given that state of affairs, there are no sale lands affected by Bipole III.

187 Under the TLE Agreements, there is no duty on the Crown to sell Crown land to SCN, nor is there any duty on the part of SCN to acquire any additional land. However, SCN is not precluded from working with the Crown to acquire land under the new Crown Land Sales Policy. As well, nothing precludes SCN from purchasing private lands for acquisition.

188 According to the TLE Framework Agreement, an Entitlement First Nation is not permitted to distribute any portion of the Land Acquisition Payment until the amount of land set apart as reserve for that entitlement First Nation has been increased by the Minimum Entitlement Acres. The amount of Crown land selected and set apart as reserve for SCN under the TLE Agreements exceeds the Minimum Entitlement Acres set out for SCN. Accordingly, SCN may lawfully distribute any portion of the Land Acquisition Payment from the trust for uses of its own choice.

189 Finally, the TLE Framework Agreement sets out detailed dispute resolution provisions which SCN is obliged to follow.

190 The Supreme Court of Canada has provided what effectively amounts to administrative law remedies relating to alleged failures to comply with a duty to consult. An allegation by a First Nation of a failure of the Crown to discharge its duty of consultation would normally be considered under administrative law principles. While this matter was initiated by Statement of Claim, I am satisfied that a determination of the question should be made under administrative law principles.

191 In ***Haida Nation v. British Columbia (Minister of Forests)***, *2004 SCC 73*, *[2004] 3 S.C.R. 511*, the Supreme Court of Canada directed the courts to conduct the review as follows:

> (a) review the consultation process on a standard of reasonableness; and
>
> (b) review the government's initial assessment of the existence or extent of the duty on the correctness standard "To the extent that the issue is one of pure law, and can be isolated from the issues of fact ..." (at para. 61). Whether the government is correct on these matters and acts on the appropriate standard, the decision will only be set aside if the government's process is unreasonable.

192 The same principles have recently been considered by this court in ***Pimicikamak et al. v. Manitoba et al.***, 2014 MBQB 143, 308 Man.R. (2d) 49. Joyal C.J.Q.B. states (at para. 48):

> Administrative law remedies have been provided for by the Supreme Court of Canada in respect of alleged failures to comply with the duty of consultation. In other words, where a First Nation or Aboriginal community alleges a failure of the Crown to discharge its duty of consultation, the issue is normally determined pursuant to administrative law principles in the context of a judicial review.

193 The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse affect upon the right or title claimed. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. See ***Haida Nation***.

194 When the Crown exercises its right to "take up" land, its duty to act honourably dictates the content of that process. The question in each case is to determine the degree to which conduct contemplated by the Crown would

adversely affect the rights of the Aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. See ***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, *2005 SCC 69*, *[2005] 3 S.C.R. 388*.

195 While a duty to consult is triggered at a low threshold, the adverse impact is a matter of degree as is the extent of the content of the Crown's duty. In other words, the greater the impact, the greater the Crown's duty.

196 The following facts are relevant in determining the impact of Bipole III on SCN's inherent Aboriginal and/or treaty rights.

197 The total area to be cleared for the Bipole III corridor in N4 is 13.2 square kilometres. Of those 13.2 square kilometres, two square kilometres are privately owned, leaving a net of 11.2 square kilometres of Crown land in dispute.

198 SCN has selected 112,782.10 acres of Crown land for reserve designation. That exceeds the amount to which they are entitled. However, no part of the Bipole III corridor intersects any of those 112,782.10 acres.

199 SCN claims however that their interests and rights are not confined to the lands they have selected for designation as a reserve. They referred to their "traditional lands" which they say occupy an area of approximately 28,000 square kilometres. The Bipole III right of way intersects 0.0005% of these "traditional lands" and even at that, not all of the intersection is on Crown land. As the "potential for infringement" and the "extent of the right" are factors to be considered in assessing the impact to a First Nation's right, given the fact that not only is SCN's Reserve not affected, but the 112,872.10 acres of Crown land they have selected for reserve designation is not affected, it is clear that the extent of potential infringement of SCN's rights is slight.

200 While SCN maintains that the consultation process was inadequate in a number of ways, they have not provided any meaningful evidence to support that allegation.

201 SCN agreed in writing to both the consultation process and to the funding arrangements. Apart from the funding made available by Manitoba for the consultation process, SCN was or could have been the recipient of substantial additional funds to participate in the CEC hearings, to prepare the ATK Reports, to liaise with Hydro during the actual cutting and clearing in N4. In fact, by virtue of SCN's non-compliance with reporting requirements, it deprived itself of some of that funding.

202 Manitoba has put into evidence a comprehensive record of consultation detailing virtually every contact or communication it had with SCN. In contrast, SCN offers Genaille's recollection of events which in instances proved to be less than totally accurate or in conflict with documented evidence. That is not to cast any aspersions on Genaille's integrity or credibility, but only to point out that memory can be faulty.

203 SCN's demands that it participate in the preparation of a consultation protocol or consultation funding arrangements are without basis. There is no requirement on Manitoba, constitutional or otherwise, to include such participation, nor does SCN have any right to insist on same. Unfortunately, that insistence on SCN's part appears to have undermined, to some extent, its opportunity to participate in the consultation process that was available to it.

204 There is a reciprocal duty that attaches to First Nations during the process of consultation where the Honour of the Crown gives rise to a duty to consult. That reciprocal duty to "bring forward" requires First Nations and communities to constructively furnish relevant information and to do so in a clear and focussed way during the consultation process. In this way, the government in question is assisted in being able to share information and, in turn, respond to its duty to reconcile and accommodate the interests and concerns raised. See ***Pimicikamak***.

205 In ***Halfway River First Nation v. British Columbia (Ministry of Forests) et al.***, *1999 BCCA 470*, *129 B.C.A.C. 32*, the British Columbia Court of Appeal stated (at para. 161):

> There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see **Ryan et al v. Fort St. James Forest District (District Manager) et al., *[1994] B.C.J. No. 2642*,** (25 January, 1994) Smithers No. 7855, affirmed *(1994), 40 B.C.A.C. 91*; 65 W.A.C. 91(C.A.).

206 The same sentiments were expressed by the Alberta Court of Appeal in ***Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)***, *2013 ABCA 443*, *566 A.R. 259* (at para. 29):

> The First Nations contend that the record is silent as to the location and frequency of the traditional activities and the extent to which traditional activities could potentially be adversely impacted by the proposed campground expansion. The First Nations submit that the Crown had a duty to acquire the information about Aboriginal practices and did not. This argument was raised for the first time on appeal. In our view this did not form part of the Crown's obligation. Both parties have reciprocal duties to facilitate an assessment of the asserted rights and to outline concerns with clarity: *Haida* at para 36. We do not view this as a gap in the record for which the Crown is responsible. The First Nations argue that the Crown had a duty to provide full information about historic Aboriginal uses of the land in question. They rely on a passage in *Tsilhqot'in Nation v British Columbia*, *2007 BCSC 1700* at paras 1293-94, available on line, which seems to suggest such a duty. However, the facts in that case are very different and the issue was not discussed on appeal: *2012 BCCA 285*, *324 BCAC 214*. There is no suggestion here that the Crown had or withheld such information. In our opinion, the Crown should not ordinarily be required to conduct such research in lieu of the First Nations, as the First Nations should be in a much better position to ascertain their own historical practices.
>
> [emphasis added]

207 Hydro committed funds to SCN in the amount of $89,000 for an ATK Report to be completed. Of that amount, $60,000 was actually paid by Hydro with the remaining $29,000 withheld because SCN failed to provide a completed final ATK Report.

208 Manitoba paid SCN the sum of $38,000 to enable it to participate in the consultation process. Of those funds, $10,000 were allocated to Whelan Enns for their assistance in preparing a report on how Bipole III might potentially impact SCN's traditional harvesting rights or interfere with SCN's sacred sites and burial grounds.

209 Whelan Enns prepared a Sapotaweyak Cree Nation Base Map ("Map") which purported to identify, among other things, what were described as "traditional points." These "traditional points" show up as small brown circles on the Map. There appear to be hundreds of them although counting them is virtually impossible. The Map provides no information as to how many there are. Moreover, the Map provides no information as to the precise nature of those traditional points, that is are they burial grounds, hunting sites, unique fauna or flora, etcetera? Whoever provided Whelan Enns with the information to locate those traditional points on the Map would also have known what they represented. It is unclear why that information was not communicated to Whelan Enns and, if it was, why it was not included in the Map.

210 During oral submission, SCN's counsel informed that neither Manitoba nor Hydro asked what any of the brown dots represented, suggesting their failure to do so reflected their inadequate engagement in the consultative process. I found that question to reflect, to some extent, the overall approach SCN appears to have taken to the consultation process. It appears that SCN did not necessarily view it as a reciprocal obligation to exchange and share information. The court's concern in this instance is why that information would not have been forthcoming from SCN if it was their intention to inform Hydro and Manitoba of specific sites in relation to which they had specific concerns. That was the whole purpose of the exercise. It was the reason funding was provided to SCN in return for which they had an obligation to inform.

211 It is the court's function, on the basis of evidence presented, to determine the extent of the duty to consult and then to ascertain whether Manitoba discharged that duty.

212 The N4 corridor of Bipole III did not directly affect SCN's reserve land or even the additional approximately 113,000 acres of Crown land selected by SCN for reserve designation. The N4 corridor of Bipole III right of way intersects less than 0.0005% of SCN's traditional lands.

213 In these circumstances, I conclude that Manitoba's duty to consult and accommodate lies at the lower end of the spectrum.

214 Further, Manitoba immediately recognized its duty to consult and took steps to embark on that process. The duty to consult is not a duty to negotiate. The duty to consult in this case relates only to the N4 corridor of Bipole III. Manitoba's record clearly establishes that it took reasonable steps to both consult with SCN and to accommodate their reasonable needs specific to Bipole III. In my view, the difficulty experienced by SCN during the consultation process has more to do with SCN's reluctance to focus on the issues relating to Bipole III then to any significant lack of effort on the part of Manitoba.

215 For these reasons, I find that SCN has failed to raise a serious issue to be tried.

2. Irreparable Harm

216 The test of "serious issue to be tried" was dealt with separately as it applied to Hydro and Manitoba as there were specific facts and principles applicable to each of them. However, there are common facts and principles in relation to the thresholds of irreparable harm and balance of convenience and, accordingly, there is no need to separate those issues as between Manitoba and Hydro.

217 The three-part test outlined by the House of Lords in ***American Cyanamid Co. v. Ethicon Ltd.***, [1975] UKHL1, [1975] AC 396, has been generally accepted by Canadian courts. At the first stage, an applicant seeking interlocutory injunctive relief must show, on a balance of probabilities, that there is a serious issue to be tried. Notwithstanding the court's finding as to whether there is a serious issue to be tried, unless the case on the merits is frivolous or vexatious, the court must, as a general rule, consider the second and third stages.

218 At the second stage, an applicant is required to demonstrate that irreparable harm will result if the relief is not granted. "Irreparable" refers to the nature of the harm rather than to its magnitude.

219 Here, SCN argues that irreparable harm will result if the cutting and clearing of the N4 corridor of Bipole III is not delayed. SCN does not advocate the termination of Bipole III. One must assume therefore that SCN is concerned that appropriate mitigative policies are put into place so as not to unduly affect the flora and fauna, the wildlife or the sacred sites and burial grounds. One concludes, therefore, that SCN's concern is that appropriate mitigative policies and measures are put into place so as not to unduly affect its harvesting rights or its sacred sites and burial grounds.

220 As observed earlier, SCN failed, to a large degree, to share these concerns with Manitoba or Hydro by failing to participate in the CEC process and by failing to provide a final ATK Report. In this application, SCN has alluded to irreparable harm in general rather than specific terms. It is not enough for SCN to simply allege that harvesting rights and culturally significant sites or burial grounds stand to be negatively affected by the clearing and cutting. In order to establish irreparable harm, SCN is required to specifically identify what harvesting rights will be affected and how and what significant sites and burial grounds will be disturbed. In this case, both Manitoba and Hydro have furnished ample evidence as to the mitigative measures that have been and will continue to be put into place. I will be referring to some of those mitigative measures.

221 From the point of view of providing actual evidence of irreparable damage, SCN has failed to do so.

222 SCN advances the further argument that the loss of opportunity to engage in adequate consultations is in itself sufficient to establish irreparable harm and refers to ***Wahgoshig First Nation v. Ontario et al.***, *2011 ONSC 7708* at para. 53, in support of that contention.

223 The facts in ***Wahgoshig*** are significantly different. ***Wahgoshig*** held, asserted and exercised inherent Aboriginal and/or treaty rights throughout its traditional territory including hunting, fishing, trapping, berry picking, plant and wood harvesting, cultivation of medicinal plants, use of water, practising of sacred traditional lifestyle and ceremonial activities, the use and preservation of sacred sites, prayer areas, and burial grounds. Its reserve lands were situated within its traditional territory on the south shore of Lake Abitibi. Wahgoshig First Nation were seeking an injunction to prevent Solid Gold, a publicly traded junior mining exploration company headquartered in Ontario, from conducting further exploration on Treaty 9 Crown lands without consultation and accommodation.

224 Solid Gold staked its claims from November 2007 through 2010. In July 2009, the Crown advised Solid Gold that it should contact Wahgoshig First Nation to consult regarding its intended mineral exploration and offered to facilitate the process.

225 No consultation occurred before Solid Gold's drilling began in the spring of 2011. The drilling involved clearing 25 square metre "pads," clearing forest, bulldozing access routes to the drilling sites, and transportation and storage of fuels and equipment.

226 In 1995, the Ministry of Natural Resources determined that the Treaty 9 lands were an "area of cultural heritage potential." The study was stated to "serve as a preliminary planning tool to indicate the areas that require field assessment prior to land disturbance though timber harvesting or other development activities."

227 Wahgoshig First Nation first discovered the drilling activity in the spring of 2011. Wahgoshig First Nation attempted to contact Solid Gold and consult, but no meaningful consultation occurred. On November 8, 2011, the Crown advised Solid Gold in writing that consultation must occur, but it did not. Since legal proceedings were instituted, the drilling activities increased.

228 Ontario admitted that the duty to consult was triggered and that it delegated the operational aspects of the duty to Solid Gold which failed to fulfill that duty.

229 In ***Wahgoshig***, there was a deliberate refusal on the part of Solid Gold to consult with Wahgoshig First Nation notwithstanding the directive from Ontario to do so. That conduct was tantamount to trampling on Wahgoshig First Nation's constitutional rights. Moreover, the land which is being affected was identified as traditional lands in which the Wahgoshig First Nation Reserve was located.

230 In this case, Manitoba discharged its constitutional obligation to consult and accommodate. Moreover, the impact on SCN's traditional lands is relatively minor.

231 SCN advances the further argument that its Treaty Land Acquisition Rights will be negatively affected as lands within N4 are removed from the inventory of available lands to be acquired. Further, the use of those lands for hydro transmission purposes will have a negative effect on their use, their availability, and their cost.

232 SCN has not furnished any hard evidence about the economic impact Bipole III will have on their ability to acquire lands in the N4 corridor. However, if any such economic impact arises, it can be addressed ultimately by damages.

233 Manitoba argues that the finding of irreparable harm is generally a higher threshold than that attaching to the first criterion of a serious question to be tried. In ***Simon et al. v. New Brunswick et al.*** *(2014), 426 N.B.R. (2d) 304*, the New Brunswick Court of Appeal observed (at para. 16):

> ... I would adopt the words of Russell J. in *Fraser Papers Inc. v. New Brunswick (Superintendant of Pensions)*, *2007 NBQB 196*, *[2007] N.B.J. No. 193* (QL) when he says: "Evidence of irreparable harm cannot be inferred and must be clear and not be speculative" (para. 14).

234 As to whether or not inadequate consultation in itself is sufficient to constitute irreparable harm, Manitoba refers to the decision in ***Musqueam Indian Band v. Canada (Minister of Public Works and Government Services) et al.***, *2008 FCA 214*, *378 N.R. 335*, where the Federal Court of Appeal stated (at para. 52):

> In this case, the loss of an opportunity for Musqueam to consult and be accommodated is insufficient to constitute irreparable harm. I agree with the appellant that if an allegation of inadequate consultation always constituted irreparable harm, that could constitute a veto over the government transferring any title to property which is located in an area claimed as a traditional territory of an Aboriginal group. That would explicitly contradict the comments of the Supreme Court of Canada in **Haida Nation** at para. 48: "This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim." Rather, it is necessary to look deeper in each case and discern whether the failure to consult constitutes irreparable harm.
>
> [emphasis in original]

235 Where actual harm has not yet occurred, a higher standard is afforded to *quia timet* injunctions based simply on the speculation or prediction that harm would occur. That higher standard should be imposed here. See ***Simon*** at para. 18.

236 Manitoba says that the potential harmful effects of Bipole III are addressed by specific measures outlined in the various conditions attached to the EPP Licences. Examples of potential harm so addressed relate to the impact of Bipole III on bird populations, moose populations, other animal populations, ground water, native vegetation, lands used for traditional use and activities important for perpetuating SCN's cultural heritage.

237 Finally, Manitoba argues that SCN has failed to demonstrate irreparable harm in relation to the exercise of its right under the TLE Framework Agreement. To the extent that any such issues might arise in the future, there are appropriate mechanisms within the TLE Framework Agreement to address same.

238 Hydro submits that the clearing of less than 11.2 square kilometres of Crown land constituting N4 minimally impacts the environment, the historical and archeological history of the area, and SCN's traditional lands. Hydro says that all of these potential impacts were considered and evaluated by the CEC prior to the issuance of its report and, as well, by the Minister who issued the Licence.

239 Hydro points out that it has offered to continue to work with SCN to address any concerns that may arise. It has offered up to $37,000 per year for two years to hire an individual from within SCN's community to act as a liaison with Hydro as the clearing and construction proceeds through N4.

240 Finally, Hydro says it is bound to comply with the conditions imposed by the EPP Licences. There are more than 600 such conditions. Some examples relating to heritage resources are:

> EC-5.01 All archeological finds discovered during site preparation and construction will be left in their original position until the Project Archeologist is contacted and provides instruction.
>
> EC-5.02 Construction activities will not be carried out within established buffer zones for heritage resources except as approved by Project Archeologist.
>
> EC-5.03 Environmental protection measures for heritage resources will be reviewed with the Contractor and employees prior to commencement of any construction activities.
>
> EC-5.04 Orientation for project staff working in construction areas will include heritage resource awareness and training including the nature of heritage resources and the management of any resources encountered.

. . . . .

EC-5.06 The Contractor will report heritage resource materials immediately to the Construction Supervisor will cease construction activities in the immediate vicinity until the Project Archeologist is contacted and prescribes instruction.

EC-5.07 The Culture and Heritage Resource Protection Plan will be adhered to during Preconstruction and construction activities.

Analysis

241 SCN's argument that Manitoba and Hydro's failure to consult amount to irreparable harm fails for the following reasons. Firstly, Hydro did not have a duty to consult. Secondly, Manitoba's duty to consult was fulfilled. Moreover, the circumstances before me would not have persuaded me that a failure to consult on the part of either Manitoba or Hydro, if that had been the case, would have constituted irreparable harm. The evidence SCN has furnished to establish potential harm is speculative at best. As well, SCN has failed to show that any such potential harm could not be compensated with damages.

242 The process which led to the issuance of the Licence was thorough and comprehensive. More than 600 conditions were attached to the Licence compelling Hydro to take both mitigative and preventative measures to ensure minimal impact on both SCN's Aboriginal and treaty rights. The Licence requires Hydro to be sensitive to the concerns expressed by SCN and other First Nations and to ensure minimal interference with their cultural and spiritual practices.

243 It is difficult to understand why SCN has thus far refused Hydro's offer of a community liaison person as that would ensure a direct line of communication between Hydro and SCN with respect to the cutting and clearing in N4. SCN might want to reconsider its refusal of Hydro's offer.

244 Regarding SCN's argument that Bipole III obstructs their ability to acquire future lands, I note the main concern expressed seems to be about what constitutes a fair price. Manitoba has recently put forward a proposal which might alleviate those concerns. In any event, that concern, if valid, could ultimately be addressed by damages.

245 I conclude that SCN has failed to meet the second threshold of establishing irreparable harm as against both Hydro and Manitoba.

3. Balance of Convenience

246 The third test, as established in ***RJR -- MacDonald Inc.***, is whether the balance of convenience, taking into account the public interest, favours granting an interlocutory injunction.

247 SCN argues that the balancing of the commercial interests of a Crown corporation against the fulfillment of constitutional obligations owed by the Crown to an Aboriginal people must be determined in favour of the latter. SCN refers to promises unfulfilled over a period of 138 years. I take that reference to be in relation to the complaint of First Nations being unable to acquire lands in fulfillment of their TLE rights. While First Nations may be correct in that assertion, that is not an issue which I am required to address.

248 The thrust of SCN's argument is that the cutting and clearing in the N4 corridor should be delayed to afford SCN the opportunity to engage in what it considers to be appropriate and reasonable consultations. Those appropriate and reasonable consultations, according to SCN, would include an opportunity to negotiate funding for consultation, have a voice in the manner in which the consultation process is to take place, and have an opportunity to exercise their Treaty Land Acquisition Rights at a price which it considers reasonable.

249 SCN argues that the public interest in assuring a safe, reliable and cheap source of electricity is outweighed by the Crown's requirement to honour its constitutional commitments of consultation.

250 According to SCN, the costs of any delay as represented by both Manitoba and Hydro were grossly exaggerated. As well, considerable argument was advanced as to the necessity of Bipole itself.

251 Finally, SCN submits that the granting of the interim injunction will facilitate reconciliation between the parties. That is one of the underlying goals of the Crown's duty to consult and accommodate. An interim injunction for a specific period of time together with the condition that consultations take place is the best way of achieving the ultimate goal of reconciliation.

252 Both Hydro and Manitoba argue that the balance of convenience favours the denial of the injunctive relief being sought by SCN. They say that, given the factual circumstances, an unfortunate precedent would be set where a failure by a First Nation to participate in the consultation process could form the basis for injunctive relief. They say that SCN failed to fully engage in the consultation process and granting interim injunctive relief is inappropriate in these circumstances.

253 In ***Rio Tinto Alcan***, the Supreme Court of Canada stated (at para. 34):

> ... Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.

254 Manitoba offers the following three reasons, from the perspective of consultation and reconciliation, that the injunctive relief should not be ordered:

(a) an injunction will not provide the relief being sought by SCN, particularly with respect to its concerns about the TLE process. Manitoba says negotiation is the preferable way of reconciling these interests and there are consultation processes in place to accommodate such negotiation;

(b) an injunction would not balance the interests of SCN with other interests that would be impacted. Injunctions act as a stop-gap remedy in the context of pending litigation. SCN's claim in this litigation is complex and may require years to resolve in the courts. Interlocutory injunctions placed over a long period of time are likely to cause unnecessary prejudice on innocent parties; and

(c) an injunction would diminish Manitoba's authority to control and manage Crown land in the public interest by undermining the exhaustive licensing process under **The Environment Act,** including the integrity of the Clean Environment Commission Processes.

255 Finally, granting the injunctive relief sought by SCN would be equivalent to granting it a veto over the entire Bipole III project, contrary to the cautions expressed by the courts in ***Musqueam*** and other cases.

256 According to Hydro, the costs of a temporary cessation of the cutting and clearing in the N4 corridor will result in significant losses to Hydro as well as to others involved in the work. In addition, an interruption in the cutting and clearing would result in a delay of at least a year of the completion of Bipole III and the costs associated with such a delay would be enormous.

257 There is a finite time during which cutting and clearing can occur in order to minimize the environmental impact. The cutting and clearing must take place during the winter months and even minor delays would have the potential effect of seriously altering the construction schedule which Hydro has put into place.

Analysis

258 A decision was made by Hydro, and supported by Manitoba, to construct a new transmission line to carry hydro-electric power from its source in northern Manitoba to the City of Winnipeg and its environs. While there are existing transmission lines, Bipoles I and II, which transmit hydro-electric power from northern to southern Manitoba, it was determined there was a need for an alternate transmission line to prevent wholesale hydro-electric blackouts in the event of extensive damage to Bipoles I and II.

259 It is not within my mandate to examine the appropriateness of the decision to construct Bipole III. In applying the third test, I am asked to determine whether the balance of convenience favours the granting of an injunction which would delay the completion of Bipole III with significant monetary effects to Hydro and the potential for the destruction of hydro-electric power to the citizens of Manitoba. On the opposite end is the claim by SCN that delays in the cutting and clearing of N4 are necessary to give them a better opportunity to participate in the consultation process.

260 I have already concluded that SCN was afforded a reasonable opportunity to participate in the consultation and accommodation process. To some extent, SCN's conduct in refusing to participate when there were opportunities to do so has reduced the effectiveness of what the consultation process otherwise might have been.

261 While the court recognizes that a project of this magnitude will necessarily result in some damage to the environment, I am satisfied that the conditions imposed by the original Licence and by the supplementary Licences will reasonably mitigate any damage that may arise.

262 The opportunity exists for SCN to play a role in ensuring that Hydro abides by those conditions and employs whatever mitigative measures are required. SCN also has an opportunity to pursue its TLE remedies through other appropriate mechanisms already in place.

263 I am satisfied in these circumstances that the balance of convenience lies heavily with Manitoba and Hydro and the construction of Bipole III in the N4 corridor without interruption.

IV. COSTS

264 If any of the parties wish to address the issue of costs, appropriate arrangements can be made with the trial coordinator for a hearing date.

D.P. BRYK J.

Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 257

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Heard: November 7, 2013;

Judgment: June 26, 2014.

File No.: 34986.

[2014] 2 S.C.R. 257 | [2014] 2 R.C.S. 257 | [2014] S.C.J. No. 44 | [2014] A.C.S. no 44 | 2014 SCC 44

Roger William, on his own behalf, on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation, Appellant; v. Her Majesty The Queen in Right of the Province of British Columbia, Regional Manager of the Cariboo Forest Region and Attorney General of Canada, Respondents, and Attorney General of Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Te'mexw Treaty Association, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assembly of First Nations, Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, Hul'qumi'num Treaty Group, Council of the Haida Nation, Office of the Wet'suwet'en Chiefs, Indigenous Bar Association in Canada, First Nations Summit, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation, Kwakiutl First Nation, Coalition of Union of [page258] British Columbia Indian Chiefs, Okanagan Nation Alliance, Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands, Amnesty International, Canadian Friends Service Committee, Gitxaala Nation, Chilko Resorts and Community Association and Council of Canadians, Interveners.

(153 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Aboriginal law — Aboriginal title — Land claims — Elements of test for establishing Aboriginal title to land — Rights and limitations conferred by Aboriginal title — Duties owed by Crown before and after Aboriginal title to land established — Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether test for Aboriginal title requiring proof of regular and exclusive occupation or evidence of intensive and site-specific occupation — Whether trial judge erred in finding Aboriginal title established — Whether Crown breached procedural duties to consult and accommodate before issuing logging licences — Whether Crown incursions on Aboriginal interest justified under s. 35 Constitution Act, 1982 framework — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

Aboriginal law — Aboriginal title — Land claims — Provincial laws of general application — Constitutional [page259] constraints on provincial regulation of Aboriginal title land — Division of powers — Doctrine of interjurisdictional immunity — Infringement and justification framework under s. 35 Constitution Act, 1982

— Province issuing commercial logging licence in area regarded by semi-nomadic First Nation as traditional territory — First Nation claiming Aboriginal title to land — Whether provincial laws of general application apply to Aboriginal title land — Whether Forest Act on its face applies to Aboriginal title land — Whether application of Forest Act ousted by operation of Constitution — Whether doctrine of interjurisdictional immunity should be applied to lands held under Aboriginal title — Forest Act, R.S.B.C. 1995, c. 157 — Constitution Act, 1982, s. 35.

Summary:

For centuries the Tsilhqot'in Nation, a semi-nomadic grouping of six bands sharing common culture and history, have lived in a remote valley bounded by rivers and mountains in central British Columbia. It is one of hundreds of indigenous groups in B.C. with unresolved land claims. In 1983, B.C. granted a commercial logging licence on land considered by the Tsilhqot'in to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the Province reached an impasse and the original land claim was amended to include a claim for Aboriginal title to the land at issue on behalf of all Tsilhqot'in people. The federal and provincial governments opposed the title claim.

The Supreme Court of British Columbia held that occupation was established for the purpose of proving title by showing regular and exclusive use of sites or territory within the claim area, as well as to a small area outside that area. Applying a narrower test based on site-specific occupation requiring proof that the Aboriginal group's ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established.

[page260]

Held: The appeal should be allowed and a declaration of Aboriginal title over the area requested should be granted. A declaration that British Columbia breached its duty to consult owed to the Tsilhqot'in Nation should also be granted.

The trial judge was correct in finding that the Tsilhqot'in had established Aboriginal title to the claim area at issue. The claimant group, here the Tsilhqot'in, bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. Aboriginal title flows from occupation in the sense of regular and exclusive use of land. To ground Aboriginal title "occupation" must be sufficient, continuous (where present occupation is relied on) and exclusive. In determining what constitutes sufficient occupation, which lies at the heart of this appeal, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

In finding that Aboriginal title had been established in this case, the trial judge identified the correct legal test and applied it appropriately to the evidence. While the population was small, he found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in, which supports the conclusion of sufficient occupation. The geographic proximity between sites for which evidence of recent occupation was tendered and those for which direct evidence of historic occupation existed also supports an inference of continuous occupation. And from the evidence that prior to the assertion of sovereignty the Tsilhqot'in repelled other people from their land and demanded permission from outsiders who wished to pass over it, he concluded that the Tsilhqot'in treated the land as exclusively theirs. The Province's criticisms of the trial judge's findings on the facts are primarily rooted in the erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. Moreover, it was the trial judge's task to sort out conflicting evidence and

make findings of fact. [page261] The presence of conflicting evidence does not demonstrate palpable and overriding error. The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. Absent demonstrated error, his findings should not be disturbed.

The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to the restriction that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Prior to establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group. This means the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations, and the duty infuses an obligation of proportionality into the justification process: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be outweighed by adverse effects on the Aboriginal interest (proportionality of impact). Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group. This s. 35 [page262] framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

The alleged breach in this case arises from the issuance by the Province of licences affecting the land in 1983 and onwards, before title was declared. The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in.

While unnecessary for the disposition of the appeal, the issue of whether the *Forest Act* applies to Aboriginal title land is of pressing importance and is therefore addressed. As a starting point, subject to the constitutional constraints of s. 35 of the *Constitution Act, 1982* and the division of powers in the *Constitution Act, 1867*, provincial laws of general application apply to land held under Aboriginal title. As a matter of statutory construction, the *Forest Act* on its face applied to the land in question at the time the licences were issued. The British Columbia legislature clearly intended and proceeded on the basis that lands under claim remain "Crown land" for the purposes of the *Forest Act* at least until Aboriginal title is recognized. Now that title has been established, however, the timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. It remains open to the legislature to amend the Act to cover lands over which Aboriginal title has been established, provided it observes applicable constitutional restraints.

This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands, such as the *Forest Act*, is ousted by the s. 35 framework or by the limits on provincial power under the *Constitution Act, 1867*. Under s. 35, a right will be infringed by legislation if the limitation is unreasonable, imposes undue hardship, or denies the holders of the right their preferred means of exercising the right. General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass this test and [page263] no infringement will result. However, the issuance of timber licences on Aboriginal title land is a direct transfer of Aboriginal property rights to a third party and will plainly be a meaningful diminution in the Aboriginal group's ownership right amounting to an infringement that must be justified in cases where it is done without Aboriginal consent.

Finally, for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, the framework under s. 35 displaces the doctrine of interjurisdictional immunity. There is no role left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are

at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*. The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction. The problem in cases such as this is not competing provincial and federal power, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province. Interjurisdictional immunity -- premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments -- is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. Interjurisdictional immunity may thwart such productive cooperation.

In the result, provincial regulation of general application, including the *Forest Act*, will apply to exercises of Aboriginal rights such as Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity. The result is a balance that [page264] preserves the Aboriginal right while permitting effective regulation of forests by the province. In this case, however, the Province's land use planning and forestry authorizations under the *Forest Act* were inconsistent with its duties owed to the Tsilhqot'in people.

Cases Cited

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **distinguished:** *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915; **referred to:** *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Western Australia v. Ward* (2002), 213 C.L.R. 1; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *R. v. Marshall*, [1999] 3 S.C.R. 533; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 11.

Constitution Act, 1867, ss. 91, 92, 109.

Constitution Act, 1982, Part I, Part II, s. 35.

Forest Act, R.S.B.C. 1996, c. 157, s. 1 "Crown land", "Crown timber", "private land".

Royal Proclamation (1763) (reprinted in R.S.C. 1985, App. II, No. 1).

Authors Cited

Black's Law Dictionary, 9th ed. St. Paul, Minn.: West, 2009, "vested".

Hogg, Peter W. "The Constitutional Basis of Aboriginal Rights", in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw*. Aurora, Ont.: Canada Law Book, 2009, 3.

McNeil, Kent. "Aboriginal Title and the Supreme Court: What's Happening?" (2006), 69 *Sask. L. Rev.* 281.

[page265]

McNeil, Kent. *Common Law Aboriginal Title*. Oxford: Clarendon Press, 1989.

Slattery, Brian. "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

Ziff, Bruce. *Principles of Property Law*, 5th ed. Toronto: Carswell, 2010.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Tysoe and Groberman JJ.A.), *2012 BCCA 285*, *33 B.C.L.R. (5th) 260*, *324 B.C.A.C. 214*, 551 W.A.C. 214, *[2012] 3 C.N.L.R. 333*, *[2012] 10 W.W.R. 639*, *26 R.P.R. (5th) 67*, *[2012] B.C.J. No. 1302* (QL), *2012 CarswellBC 1860*, upholding the order of Vickers J., *2007 BCSC 1700*, *[2008] 1 C.N.L.R. 112*, *65 R.P.R. (4th) 1*, *[2007] B.C.J. No. 2465* (QL), *2007 CarswellBC 2741*. Appeal allowed.

Counsel

David M. Rosenberg, *Q.C.*, *Jay Nelson*, *David M. Robbins* and *Dominique Nouvet*, for the appellant.

Patrick G. Foy, *Q.C.*, and *Kenneth J. Tyler*, for the respondents Her Majesty The Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region.

Mark R. Kindrachuk, *Q.C.*, *Brian McLaughlin* and *Jan Brongers*, for the respondent the Attorney General of Canada.

Alain Gingras and *Hubert Noreau-Simpson*, for the intervener the Attorney General of Quebec.

Heather Leonoff, *Q.C.*, for the intervener the Attorney General of Manitoba.

P. Mitch McAdam, *Q.C.*, and *Sonia Eggerman*, for the intervener the Attorney General for Saskatchewan.

Sandra Folkins, for the intervener the Attorney General of Alberta.

Robert J. M. Janes and *Karey Brooks*, for the intervener the Te'mexw Treaty Association.

[page266]

Charles F. Willms and *Kevin O'Callaghan*, for the interveners the Business Council of British Columbia, the Council of Forest Industries, the Coast Forest Products Association, the Mining Association of British Columbia and the Association for Mineral Exploration British Columbia.

Joseph J. Arvay, *Q.C.*, *Catherine J. Boies Parker* and *Patrick Macklem*, for the intervener the Assembly of First Nations.

Diane Soroka, for the interveners the Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, and the Office of the Wet'suwet'en Chiefs.

Robert B. Morales and *Renée Racette*, for the intervener the Hul'qumi'num Treaty Group.

Written submissions only by *Louise Mandell*, *Q.C.*, *Stuart Rush*, *Q.C.*, *Michael Jackson*, *Q.C.*, *Terri-Lynn Williams-Davidson*, *David Paterson* and *Angela D'Elia*, for the intervener the Council of the Haida Nation.

David C. Nahwegahbow and *Guy Régimbald*, for the intervener the Indigenous Bar Association in Canada.

Maria Morellato, *Q.C.*, *Cheryl Sharvit* and *Stacey Edzerza Fox*, for the intervener the First Nations Summit.

Written submissions only by *John W. Gailus* and *Christopher G. Devlin*, for the intervener the Tsawout First Nation, the Tsartlip First Nation, the Snuneymuxw First Nation and the Kwakiutl First Nation.

Louise Mandell, *Q.C.*, *Michael Jackson*, *Q.C.*, *Ardith Walkem* and *Nicole Schabus*, for the intervener the Coalition of the Union of British Columbia Indian Chiefs, the Okanagan Nation Alliance and the Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands.

[page267]

Justin Safayeni and *Paul Joffe*, for the interveners Amnesty International and the Canadian Friends Service Committee.

Tim A. Dickson, for the intervener the Gitxaala Nation.

Gregory J. McDade, *Q.C.*, and *F. Matthew Kirchner*, for the interveners the Chilko Resorts and Community Association and the Council of Canadians.

TABLE OF CONTENTS

[page268]

The judgment of the Court was delivered by

McLACHLIN C.J.

I. Introduction

1 What is the test for Aboriginal title to land? If title is established, what rights does it confer? Does the British Columbia *Forest Act*, *R.S.B.C. 1996, c. 157*, apply to land covered by Aboriginal title? What are the constitutional constraints on provincial regulation of land under Aboriginal [page269] title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? These are among the important questions raised by this appeal.

2 These reasons conclude:

* Aboriginal title flows from occupation in the sense of regular and exclusive use of land.

* In this case, Aboriginal title is established over the area designated by the trial judge.
* Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.
* Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.
* Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.
* In this case, the Province's land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people.

[page270]

II. The Historic Backdrop

3 For centuries, people of the Tsilhqot'in Nation - a grouping of six bands sharing common culture and history - have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.

4 Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

5 The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xeni Gwet'in First Nations government (one of the six bands that make up the Tsilhqot'in Nation) objected and sought a declaration prohibiting commercial logging on the land. The dispute led to the blockade of a bridge the forest company was upgrading. The blockade ceased when the Premier promised that there would be no further logging without the consent of the Xeni Gwet'in. Talks between the Ministry of Forests and the Xeni Gwet'in ensued, but reached an impasse over the Xeni Gwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people.

6 The claim is confined to approximately five percent of what the Tsilhqot'in - a total of about [page271] 3,000 people - regard as their traditional territory. The area in question is sparsely populated. About 200 Tsilhqot'in people live there, along with a handful of non-indigenous people who support the Tsilhqot'in claim to title. There are no adverse claims from other indigenous groups. The federal and provincial governments both oppose the title claim.

7 In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons which are no longer relied on by the Province, he refused to make a declaration of title (*2007 BCSC 1700*, *[2008] 1 C.N.L.R. 112*).

8 In 2012, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area

claimed. For the rest of the claimed territory, the Tsilhqot'in were confined to Aboriginal rights to hunt, trap and harvest (*2012 BCCA 285*, *33 B.C.L.R. (5th) 260*).

9 The Tsilhqot'in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding, affirm their title to the area he designated, and confirm that issuance of forestry licences on the [page272] land unjustifiably infringed their rights under that title.

III. The Jurisprudential Backdrop

10 In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise: *Calder v. Attorney-General of British Columbia*, *[1973] S.C.R. 313*. Although the majority in *Calder* divided on whether title had been extinguished, its affirmation of Aboriginal rights to land led the Government of Canada to begin treaty negotiations with First Nations without treaties mainly in British Columbia -- resuming a policy that had been abandoned in the 1920s: P. W. Hogg, "The Constitutional Basis of Aboriginal Rights", in M. Morellato, ed., *Aboriginal Law Since Delgamuukw* (2009), 3.

11 Almost a decade after *Calder*, the enactment of s. 35 of the *Constitution Act, 1982* "recognized and affirmed" existing Aboriginal rights, although it took some time for the meaning of this section to be fully fleshed out.

12 In *Guerin v. The Queen*, *[1984] 2 S.C.R. 335*, this Court confirmed the potential for Aboriginal title in ancestral lands. The actual dispute concerned government conduct with respect to reserve lands. The Court held that the government had breached a fiduciary duty to the Musqueam Indian Band. In a concurring opinion, Justice Dickson (later Chief Justice) addressed the theory underlying Aboriginal title. He held that the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty. However, this title was burdened by the "pre-existing legal right" of [page273] Aboriginal people based on their use and occupation of the land prior to European arrival (pp. 379-82). Dickson J. characterized this Aboriginal interest in the land as "an independent legal interest" (at p. 385), which gives rise to a *sui generis* fiduciary duty on the part of the Crown.

13 In 1990, this Court held that s. 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights: *R. v. Sparrow*, *[1990] 1 S.C.R. 1075*. The Court held that under s. 35, legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a "compelling and substantial" purpose and account for the "priority" of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (pp. 1113-19).

14 The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, *[1997] 3 S.C.R. 1010*. This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.

15 The Court in *Delgamuukw* summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, "[A]boriginal [page274] title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures" (para. 117). Negatively, the "protected uses must not be irreconcilable with the nature of the group's attachment to that land" (*ibid.*) - that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

16 The Court in *Delgamuukw* confirmed that infringements of Aboriginal title can be justified under s. 35 of the *Constitution Act, 1982* pursuant to the *Sparrow* test and described this as a "necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part" (at para. 161), quoting *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73. While *Sparrow* had spoken of *priority* of Aboriginal rights infringed by regulations over non-aboriginal interests, *Delgamuukw* articulated the "different" (at para. 168) approach of involvement of Aboriginal peoples - varying depending on the severity of the infringement - in decisions taken with respect to their lands.

17 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the Court applied the *Delgamuukw* idea of involvement of the affected Aboriginal group in decisions about its land to the situation where development is proposed on land over which Aboriginal title is asserted but has not yet been established. The Court affirmed a spectrum of consultation. The Crown's duty to consult and accommodate the asserted Aboriginal interest "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39). Thus, the idea of proportionate balancing implicit in *Delgamuukw* reappears in *Haida.* The Court in [page275] *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.

18 The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

* Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
* Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
* Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.
* Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
* Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

IV. Pleadings in Aboriginal Land Claims Cases

19 The Province, to its credit, no longer contends that the claim should be barred because of [page276] defects in the pleadings. However, it may be useful to address how to approach pleadings in land claims, in view of their importance to future land claims.

20 I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.

21 First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.

22 Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic

practices of the Aboriginal group in question will be expounded, tested and clarified. The Court of Appeal correctly recognized that determining whether Aboriginal title is made out over a pleaded area is not an "all or nothing" proposition (at para. 117):

> The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid... . [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]

23 Third, cases such as this require an approach that results in decisions based on the best [page277] evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

V. Is Aboriginal Title Established?

A. *The Test for Aboriginal Title*

24 How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

25 As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

26 The test was set out in *Delgamuukw*, *per* Lamer C.J., at para. 143:

> In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[page278]

27 The trial judge in this case held that "occupation" was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.

28 The Court of Appeal disagreed and applied a narrower test for Aboriginal title - site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

29 For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

30 Against this backdrop, I return to the requirements for Aboriginal title: sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

31 Should the three elements of the *Delgamuukw* test be considered independently, or as related aspects of a single concept? The High Court of Australia has expressed the view that there is little merit in considering aspects of occupancy separately. In *Western Australia v. Ward* (2002), 213 C.L.R. 1, the court stated as follows, at para 89:

[page279]

> The expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

32 In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

1. Sufficiency of Occupation

33 The first requirement - and the one that lies at the heart of this appeal - is that the occupation be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?

34 The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Van der Peet*, *[1996] 2 S.C.R. 507*.

[page280]

35 The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (*Delgamuukw*, at para. 148). In considering this perspective for the purpose of Aboriginal title, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 758, quoted with approval in *Delgamuukw*, at para. 149.

36 The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.

37 Sufficiency of occupation is a context-specific inquiry. "[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be

considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

38 To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There [page281] must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

39 In *R. v. Marshall*, *2003 NSCA 105*, *218 N.S.R. (2d) 78*, at paras. 135-38, Cromwell J.A. (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain. Cromwell J.A. cites (at para. 136) the following extract from K. McNeil, *Common Law Aboriginal Title* (1989), at pp. 198-200:

> What, then, did one have to do to acquire a title by occupancy? ... [I]t appears ... that ... a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts "being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider". There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation - it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the [page282] vacant estate, for the law cast it upon him by virtue of his occupation alone... .
>
> Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used. [Emphasis added.]

40 Cromwell J.A. in *Marshall* went on to state that this standard is different from the doctrine of constructive possession. The goal is not to *attribute* possession in the absence of physical acts of occupation, but to define the quality of the physical acts of occupation that demonstrate possession at law (para. 137). He concluded:

> I would adopt, in general terms, Professor McNeil's analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner... . Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly, ... it is impossible to confine the evidence to the very precise spot on which the cutting was done: Pollock and Wright at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant. [para. 138]

41 In summary, what is required is a culturally sensitive approach to sufficiency of occupation [page283] based on

the dual perspectives of the Aboriginal group in question - its laws, practices, size, technological ability and the character of the land claimed - and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession - which requires an intention to occupy or hold land for the purposes of the occupant - must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.

42 There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

43 The Province argues that this Court in *R. v. Marshall; R. v. Bernard*, *2005 SCC 43*, *[2005] 2 S.C.R. 220*, rejected a territorial approach to title, relying on a comment by Professor K. McNeil that the Court there "appears to have rejected the territorial approach of the Court of Appeal" ("Aboriginal Title and the Supreme Court: What's Happening?" (2006), 69 *Sask. L. Rev.* 281, cited in British Columbia factum, para. 100). In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be "proof of sufficiently regular and exclusive use" of the land in question, a requirement established in *Delgamuukw*.

[page284]

44 The Court in *Marshall; Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. While "[n]ot every nomadic passage or use will ground title to land", the Court confirmed that *Delgamuukw* contemplates that "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation is a "question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used" (*ibid.*).

2. Continuity of Occupation

45 Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises - continuity between present and pre-sovereignty occupation.

46 The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet*, at para. 65). The same applies to Aboriginal title. Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

3. Exclusivity of Occupation

47 The third requirement is *exclusive* occupation of the land at the time of sovereignty. The [page285] Aboriginal group must have had "the intention and capacity to retain exclusive control" over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

48 Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant

group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

49 As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. The Court in *Delgamuukw* explained as follows, at para. 157:

> A consideration of the [A]boriginal perspective may also lead to the conclusion that trespass by other [A]boriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the [A]boriginal group asserting title. For example, the [A]boriginal group asserting the claim to [page286] [A]boriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, [A]boriginal laws under which permission may be granted to other [A]boriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the [A]boriginal nations in question, those treaties would also form part of the [A]boriginal perspective.

4. Summary

50 The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

B. *Was Aboriginal Title Established in This Case?*

51 The trial judge applied a test of regular and exclusive use of the land. This is consistent with [page287] the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case.

52 Whether the evidence in a particular case supports Aboriginal title is a question of fact for the trial judge: *Marshall; Bernard*. The question therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.

53 I approach the question through the lenses of sufficiency, continuity and exclusivity discussed above.

54 I will not repeat my earlier comments on what is required to establish sufficiency of occupation. Regular use of the territory suffices to establish sufficiency; the concept is not confined to continuously occupied village sites. The question must be approached from the perspective of the Aboriginal group as well as the common law, bearing in mind the customs of the people and the nature of the land.

55 The evidence in this case supports the trial judge's conclusion of sufficient occupation. While the population was small, the trial judge found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in. The Court of Appeal did not take serious issue with these findings.

56 Rather, the Court of Appeal based its rejection of Aboriginal title on the legal proposition that regular use of territory could not ground Aboriginal title - only the regular presence on or intensive occupation of particular tracts would suffice. That view, as discussed earlier, is not supported by the jurisprudence; on the contrary, *Delgamuukw* affirms a territorial use-based approach to Aboriginal title.

[page288]

57 This brings me to continuity. There is some reliance on present occupation for the title claim in this case, raising the question of continuity. The evidence adduced and later relied on in parts 5 to 7 of the trial judge's reasons speak of events that took place as late as 1999. The trial judge considered this direct evidence of more recent occupation alongside archeological evidence, historical evidence, and oral evidence from Aboriginal elders, all of which indicated a continuous Tsilhqot'in presence in the claim area. The geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic occupation existed, further supported an inference of continuous occupation. Paragraph 945 states, under the heading of "Continuity", that the "Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion". I see no reason to disturb this finding.

58 Finally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.

59 The Province goes on to argue that the trial judge's conclusions on how particular parts of the land were used cannot be sustained. The Province says:

* The boundaries drawn by the trial judge are arbitrary and contradicted by some of the evidence (factum, at paras. 141-142).
* The trial judge relied on a map the validity of which the Province disputes (para. 143).

[page289]

* The Tsilhqot'in population, that the trial judge found to be 400 at the time of sovereignty assertion, could not have physically occupied the 1,900 sq. km of land over which title was found (para. 144).
* The trial judge failed to identify specific areas with adequate precision, instead relying on vague descriptions (para. 145).
* A close examination of the details of the inconsistent and arbitrary manner in which the trial judge defined the areas subject to Aboriginal title demonstrates the unreliability of his approach (para. 147).

60 Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. The concern with the small size of the Tsilhqot'in population in 1846 makes sense only if one assumes a narrow test of intensive occupation and if one ignores the character of the land in question which was mountainous and could not have sustained a much larger population. The alleged failure to identify particular areas with precision likewise only makes sense if one assumes a narrow test of intensive occupation. The other criticisms amount to pointing out conflicting evidence. It was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error.

61 The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. The trial judge was faced with the herculean task of drawing conclusions from a huge [page290] body of evidence produced over 339 trial days spanning a five-year period. Much of the evidence was historic evidence and therefore by its nature sometimes imprecise. The trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used. Absent demonstrated error, his findings should not be disturbed.

62 This said, I have accepted the Province's invitation to review the maps and the evidence and evaluate the trial judge's conclusions as to which areas support a declaration of Aboriginal title. For ease of reference, I attach a map showing the various territories and how the trial judge treated them (Appendix; see Appellant's factum, "Appendix A"). The territorial boundaries drawn by the trial judge and his conclusions as to Aboriginal title appear to be logical and fully supported by the evidence.

63 The trial judge divided the claim area into six regions and then considered a host of individual sites within each region. He examined expert archeological evidence, historical evidence and oral evidence from Aboriginal elders referring to these specific sites. At some of these sites, although the evidence did suggest a Tsilhqot'in presence, he found it insufficient to establish regular and exclusive occupancy. At other sites, he held that the evidence did establish regular and exclusive occupancy. By examining a large number of individual sites, the trial judge was able to infer the boundaries within which the Tsilhqot'in regularly and exclusively occupied the land. The trial judge, in proceeding this way, made no legal error.

64 The Province also criticises the trial judge for offering his opinion on areas outside the claim area. This, the Province says, went beyond the [page291] mandate of a trial judge, who should pronounce only on pleaded matters.

65 In my view, this criticism is misplaced. It is clear that no declaration of title could be made over areas outside those pleaded. The trial judge offered his comments on areas outside the claim area, not as binding rulings in the case, but to provide assistance in future land claims negotiations. Having canvassed the evidence and arrived at conclusions on it, it made economic and practical sense for the trial judge to give the parties the benefit of his views. Moreover, as I noted earlier in discussing the proper approach to pleadings in cases where Aboriginal title is at issue, these cases raise special considerations. Often, the ambit of a claim cannot be drawn with precision at the commencement of proceedings. The true state of affairs unfolds only gradually as the evidence emerges over what may be a lengthy period of time. If at the end of the process the boundaries of the initial claim and the boundaries suggested by the evidence are different, the trial judge should not be faulted for pointing that out.

66 I conclude that the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, which was additionally buttressed by evidence of more recent continuous occupation.

VI. What Rights Does Aboriginal Title Confer?

67 As we have seen, *Delgamuukw* establishes that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" (para. 117), including non-traditional purposes, provided these [page292] uses can be reconciled with the communal and ongoing nature of the group's attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

68 I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

A. *The Legal Characterization of Aboriginal Title*

69 The starting point in characterizing the legal nature of Aboriginal title is Dickson J.'s concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

70 The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the *Constitution Act, 1867*; *Delgamuukw*. As we have seen, *Delgamuukw* establishes that Aboriginal title gives "the right to exclusive use and occupation of the land ... for a variety of purposes", not confined to traditional or "distinctive" uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land - to use it, enjoy it and profit from its economic development. As such, the Crown does [page293] not retain a beneficial interest in Aboriginal title land.

71 What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements - a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act*, *1982*.

72 The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is - the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership - for example, fee simple - may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts".

B. *The Incidents of Aboriginal Title*

73 Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

[page294]

74 Aboriginal title, however, comes with an important restriction - it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes - even permanent changes -- to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

75 The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group - most notably the right to control how the land is

used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.

76 The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

[page295]

C. *Justification of Infringement*

77 To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.

78 The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

79 The degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*. In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right. "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties" (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

80 Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, [page296] where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

81 I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in *Gladstone*, at para. 72:

> ... the objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or - and at the level of justification it is this purpose which may well be most relevant - at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown. [Emphasis added.]

82 As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

83 What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can [page297] be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para. 165.]

84 If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal people.

85 The Crown's fiduciary duty in the context of justification merits further discussion. The Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group. This impacts the justification process in two ways.

86 First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

87 Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty [page298] to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida*'s insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39).

88 In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out - that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

D. *Remedies and Transition*

89 Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect

upon the interest claimed. If the Crown fails [page299] to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37.

90 After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

91 The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong - for example, shortly before a court declaration of title - appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

[page300]

92 Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. *What Duties Were Owed by the Crown at the Time of the Government Action?*

93 Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

94 With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

[page301]

VII. Breach of the Duty to Consult

95 The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The

honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

96 The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

97 I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

VIII. Provincial Laws and Aboriginal Title

98 As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal.

99 However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

[page302]

100 The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how? (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title? and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. *Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?*

101 Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

102 As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

103 Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act, 1982*. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

[page303]

104 This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3)

whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. As stated in *Gladstone*:

> Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [para. 43]

105 It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

106 Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

B. *Does the Forest Act on its Face Apply to Aboriginal Title Land?*

107 Whether a statute of general application such as the *Forest Act* was *intended* to apply to lands subject to Aboriginal title - the question [page304] at this point - is always a matter of statutory interpretation.

108 The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

109 Under the *Forest Act*, the Crown can only issue timber licences with respect to "Crown timber". "Crown timber" is defined as timber that is on "Crown land", and "Crown land" is defined as "land, whether or not it is covered by water, or an interest in land, vested in the Crown" (s. 1). The Crown is not empowered to issue timber licences on "private land", which is defined as anything that is not Crown land. The Act is silent on Aboriginal title land, meaning that there are three possibilities: (1) Aboriginal title land is "Crown land"; (2) Aboriginal title land is "private land"; or (3) the *Forest Act* does not apply to Aboriginal title land at all. For the purposes of this appeal, there is no practical difference between the latter two.

110 If Aboriginal title land is "vested in the Crown", then it falls within the definition of "Crown land" and the timber on it is "Crown timber".

111 What does it mean for a person or entity to be "vested" with property? In property law, an interest is vested when no condition or limitation stands in the way of enjoyment. Property can be vested in possession or in interest. Property is vested in possession where there is a present entitlement to enjoyment of the property. An example of this is a life estate. Property is vested in interest where there is a fixed right to taking possession in the future. A remainder interest is vested in interest but not [page305] in possession: B. Ziff, *Principles of Property Law* (5th ed. 2010), at p. 245; *Black's Law Dictionary* (9th ed. 2009), *sub verbo*"vested".

112 Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown's underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.

113 The second consideration in statutory construction is more equivocal. Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida*. At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.

114 It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain "Crown land" under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands [page306] of hectares and represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words "vested in the Crown" to cover at least lands to which Aboriginal title had not yet been confirmed.

115 I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order.* To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are "vested" in the Aboriginal group and the lands are no longer Crown lands.

116 Applied to this case, this means that as a matter of statutory construction, the lands in question were "Crown land" under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. I add the obvious - it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.

C. *Is the Forest Act Ousted by the Constitution?*

117 The next question is whether the provincial legislature lacks the constitutional power to legislate with respect to forests on Aboriginal title land. Currently, the *Forest Act* applies to lands under claim, but not to lands over which Aboriginal title has been confirmed. However, the provincial [page307] legislature could amend the Act so as to explicitly apply to lands over which title has been confirmed. This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands is ousted by the Constitution.

1. Section 35 of the *Constitution Act, 1982*

118 Section 35 of the *Constitution Act, 1982* represents "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights" (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.

119 Section 35(1) states that existing Aboriginal rights are hereby "recognized and affirmed". In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. "[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights" (*Sparrow*, at p. 1109). Dickson C.J. and La Forest J. elaborated on this

purpose as follows, at p. 1110:

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive [page308] promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any [A]boriginal right protected under s. 35(1).

120 Where legislation affects an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, two inquiries are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

121 A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (*Delgamuukw*, at para. 166).

122 Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone*. As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112).

123 General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders of the right their preferred means of exercising it. In such cases, no infringement will result.

[page309]

124 General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example - a direct transfer of Aboriginal property rights to a third party - will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

125 As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

126 While unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties going forward. I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province - the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation - were not supported by the evidence. After

considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle.

[page310]

127 Before the Court of Appeal, the Province no longer argued that the forestry activities were undertaken to combat the mountain pine beetle, but maintained the position that the trial judge's findings on economic viability were unreasonable, because unless logging was economically viable, it would not have taken place. The Court of Appeal rejected this argument on two grounds: (1) levels of logging must sometimes be maintained for a tenure holder to keep logging rights, even if logging is not economically viable; and (2) the focus is the economic value of logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder. In short, the Court of Appeal found no error in the trial judge's reasoning on this point. I would agree. Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

2. The Division of Powers

128 The starting point, as noted, is that, as a general matter, the regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. To put it in constitutional terms, regulation of forestry is in "pith and substance" a provincial matter. Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.

129 "Indians, and Lands reserved for the Indians" falls under federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. As such, forestry on Aboriginal title land falls under both [page311] the provincial power over forestry in the province and the federal power over "Indians". Thus, for constitutional purposes, forestry on Aboriginal title land possesses a double aspect, with both levels of government enjoying concurrent jurisdiction. Normally, such concurrent legislative power creates no conflicts - federal and provincial governments cooperate productively in many areas of double aspect such as, for example, insolvency and child custody. However, in cases where jurisdictional disputes arise, two doctrines exist to resolve them.

130 First, the doctrine of paramountcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament's power over "Indians", the latter would trump the former. No such inconsistency is alleged in this case.

131 Second, the doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government. Interjurisdictional immunity is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the other level may not intrude. In considering whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity, the court must ask two questions. First, does the provincial legislation touch on a protected core of federal power? And second, would application of the provincial law significantly trammel or impair the federal power? (*Quebec (Attorney General) v. [page312] Canadian Owners and Pilots Association*, *2010 SCC 39*, *[2010] 2 S.C.R. 536*).

132 The trial judge held that interjurisdictional immunity rendered the provisions of the *Forest Act* inapplicable to land held under Aboriginal title because provisions authorizing management, acquisition, removal and sale of timber on such lands affect the core of the federal power over "Indians". He placed considerable reliance on *R. v. Morris*,

2006 SCC 59, [2006] 2 S.C.R. 915, in which this Court held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of the federal power over "Indians". It follows, the trial judge reasoned, that, since Aboriginal rights are akin to treaty rights, the Province has no power to legislate with respect to forests on Aboriginal title land.

133 The reasoning accepted by the trial judge is essentially as follows. Aboriginal rights fall at the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. Interjurisdictional immunity applies to matters at the core of s. 91(24). Therefore, provincial governments are constitutionally prohibited from legislating in a way that limits Aboriginal rights. This reasoning leads to a number of difficulties.

134 The critical aspect of this reasoning is the proposition that Aboriginal rights fall at the core of federal regulatory jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

135 The jurisprudence on whether s. 35 rights fall at the core of the federal power to legislate with respect to "Indians" under s. 91(24) is somewhat mixed. While no case has held that Aboriginal [page313] rights, such as Aboriginal title to land, fall at the core of the federal power under s. 91(24), this has been stated in *obiter dicta.* However, this Court has also stated in *obiter dicta* that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s. 35 of the *Constitution Act, 1982* -- this latter proposition being inconsistent with the reasoning accepted by the trial judge.

136 In *R. v. Marshall*, [1999] 3 S.C.R. 533, this Court suggested that interjurisdictional immunity did not apply where provincial legislation conflicted with treaty rights. Rather, the s. 35 *Sparrow* framework was the appropriate tool with which to resolve the conflict:

> ... the federal and provincial governments [have the authority] within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives ... . [para. 24]

137 More recently however, in *Morris*, this Court distinguished *Marshall* on the basis that the treaty right at issue in *Marshall* was a commercial right. The Court in *Morris* went on to hold that interjurisdictional immunity prohibited any provincial infringement of the non-commercial treaty right in that case, whether or not such an infringement could be justified under s. 35 of the *Constitution Act, 1982*.

138 Beyond this, the jurisprudence does not directly address the relationship between interjurisdictional immunity and s. 35 of the *Constitution Act, 1982*. The ambiguous state of the jurisprudence has created unpredictability. It is clear that where valid *federal* law interferes with an Aboriginal or treaty right, the s. 35 *Sparrow* framework governs the law's applicability. It is less clear, however, that [page314] it is so where valid *provincial* law interferes with an Aboriginal or treaty right. The jurisprudence leaves the following questions unanswered. Does interjurisdictional immunity prevent provincial governments from ever limiting Aboriginal rights even if a particular infringement would be justified under the *Sparrow* framework? Is provincial interference with Aboriginal rights treated differently than treaty rights? And, are commercial Aboriginal rights treated differently than non-commercial Aboriginal rights? No case has addressed these questions explicitly, as I propose to do now.

139 As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.

140 What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that

Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*? The answer is none.

141 The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

[page315]

142 The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government - they operate to *prohibit* certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government's powers.

143 An analogy with *Charter* jurisprudence may illustrate the point. Parliament enjoys exclusive jurisdiction over criminal law. However, its criminal law power is circumscribed by s. 11 of the *Charter* which guarantees the right to a fair criminal process. Just as Aboriginal rights are fundamental to Aboriginal law, the right to a fair criminal process is fundamental to criminal law. But we do not say that the right to a fair criminal process under s. 11 falls at the core of Parliament's criminal law jurisdiction. Rather, it is a *limit* on Parliament's criminal law jurisdiction. If s. 11 rights were held to be at the core of Parliament's criminal law jurisdiction such that interjurisdictional immunity applied, the result would be absurd: provincial breaches of s. 11 rights would be judged on a different standard than federal breaches, with only the latter capable of being saved under s. 1 of the *Charter*. This same absurdity would result if interjurisdictional immunity were applied to Aboriginal rights.

[page316]

144 The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers; it does so by carving out areas of exclusive jurisdiction for each level of government. But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.

145 Moreover, application of interjurisdictional immunity in this area would create serious practical difficulties.

146 First, application of interjurisdictional immunity would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights. Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified pursuant to s. 35 of the *Constitution Act, 1982*. Pursuant to interjurisdictional immunity, provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable. The result would be dueling tests directed at answering the same question: How far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?

147 Second, in this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests - some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as [page317] pests and fires, a situation desired by neither level of government.

148 Interjurisdictional immunity - premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments - is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not impair the core of federal jurisdiction over "Indians" and would also have to scrutinize any federal legislation to ensure that it did not impair the core of the province's power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

149 This Court has recently stressed the limits of interjurisdictional immunity. "[C]onstitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'" and as such "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (*Canadian Western Bank v. Alberta*, *2007 SCC 22*, *[2007] 2 S.C.R. 3*, at paras. 24 and 37 (emphasis deleted)). Because of this, interjurisdictional immunity is of "limited application" and should be applied "with restraint" [page318] (paras. 67 and 77). These propositions have been confirmed in more recent decisions: *Marine Services International Ltd. v. Ryan Estate*, *2013 SCC 44*, *[2013] 3 S.C.R. 53*; *Canada (Attorney General) v. PHS Community Services Society*, *2011 SCC 44*, *[2011] 3 S.C.R. 134*.

150 *Morris*, on which the trial judge relied, was decided prior to this Court's articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* and *Canadian Owners and Pilots Association*, and so is of limited precedential value on this subject as a result (see *Marine Services*, at para. 64). To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

151 For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves [page319] the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

152 The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government - an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this - but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act*, *1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

IX. Conclusion

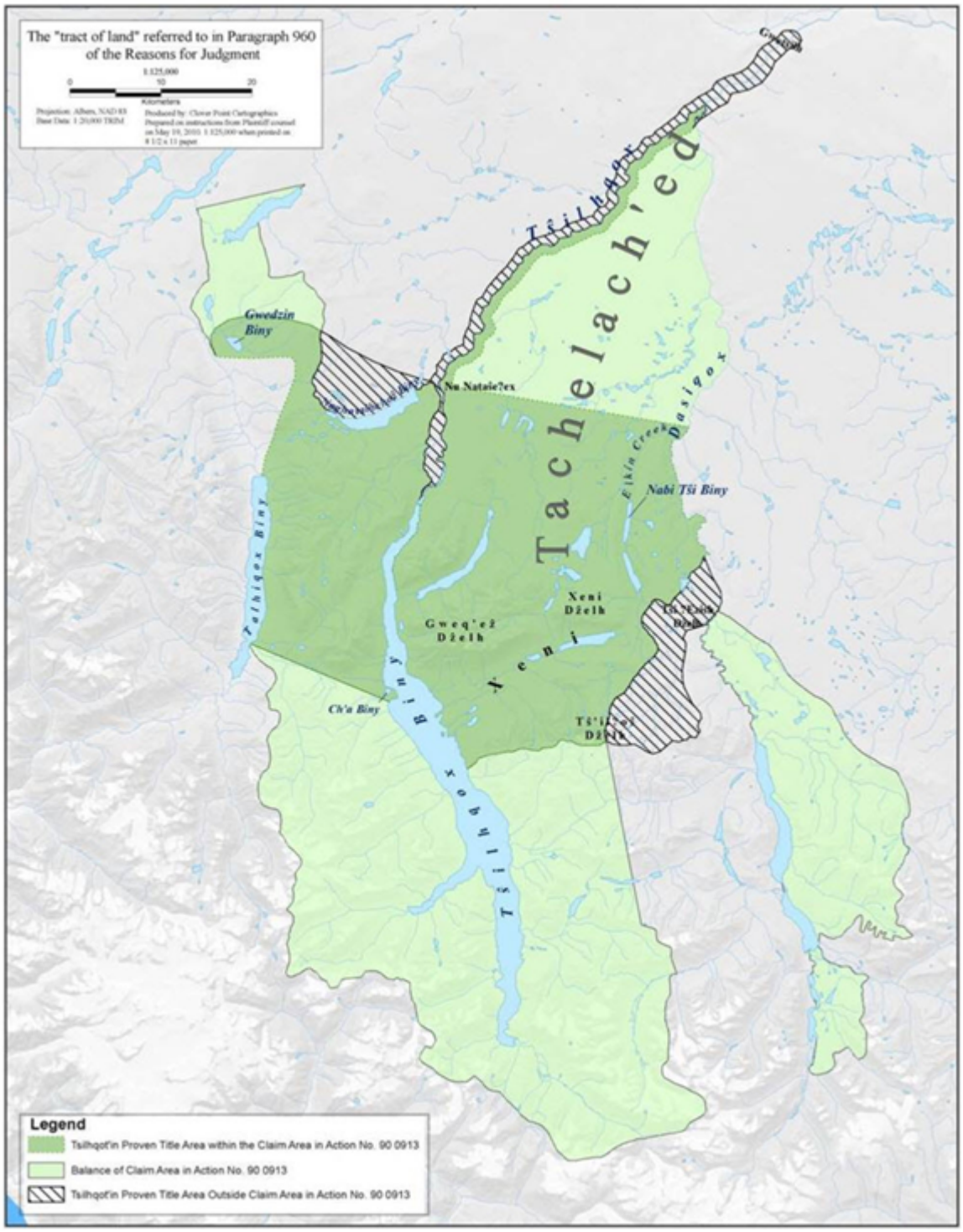
153 I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

* * * * *

[page320]

APPENDIX

PROVEN TITLE AREA - VISUAL AID



[page321]

Appeal allowed.

Solicitors:

Solicitors for the appellant: Rosenberg & Rosenberg, Vancouver; Woodward & Company, Victoria.

Solicitors for the respondents Her Majesty The Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region: Borden Ladner Gervais, Vancouver.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitors for the intervener the Te'mexw Treaty Association: Janes Freedman Kyle Law Corporation, Vancouver.

Solicitors for the interveners the Business Council of British Columbia, the Council of Forest Industries, the Coast Forest Products Association, the Mining Association of British Columbia and the Association for Mineral Exploration British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Arvay Finlay, Vancouver.

Solicitors for the interveners the Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and [page322] on behalf of all Gitanyow, and the Office of the Wet'suwet'en Chiefs: Peter Grant & Associates, Vancouver.

Solicitor for the intervener the Hul'qumi'num Treaty Group: Robert B. Morales, Ladysmith, British Columbia.

Solicitors for the intervener the Council of the Haida Nation: White Raven Law Corporation, Surrey, British Columbia.

Solicitors for the intervener the Indigenous Bar Association in Canada: Nahwegahbow, Corbiere Genoodmagejig, Rama, Ontario; Gowling Lafleur Henderson, Ottawa.

Solicitors for the intervener the First Nations Summit: Mandell Pinder, Vancouver; Morgan & Associates, West Vancouver.

Solicitors for the interveners the Tsawout First Nation, the Tsartlip First Nation, the Snuneymuxw First Nation and the Kwakiutl First Nation: Devlin Gailus, Victoria.

Solicitors for the intervener the Coalition of the Union of British Columbia Indian Chiefs, the Okanagan Nation Alliance and the Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands: Mandell Pinder, Vancouver; University of British Columbia, Vancouver; Thompson Rivers University, Kamloops.

Solicitors for the interveners Amnesty International and the Canadian Friends Service Committee: Stockwoods, Toronto; Paul Joffe, Saint-Lambert, Quebec.

Solicitors for the intervener the Gitxaala Nation: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the interveners the Chilko Resorts and Community Association and the Council of Canadians: Ratcliff & Company, North Vancouver.

End of Document