First Nations Right to Timber with respect to the Management of Lands for Hunting, Fishing & Livelihood, and Housing:

Case Law Summary

by

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For

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Introduction

The following paper is first a summary of the major Aboriginal Rights and Title litigation. Besides a summary, the author has also provided some commentary and given and outline of the resulting Forest and Range agreements that British Columbia has entered into with community members. However, most of these agreements are in place because the Crown was nudged into action by a legal challenge.

Those legal challenges are situated in the Aboriginal rights, treaty rights and title debate, where Aboriginal rights and title are considered to be *sui generis* in nature, as their definition and content do not originate in English, French or First Nation law or property law. As such it appears that what determines to be the content of aboriginal rights is associated with practices that pre-date European contact, and are activities that indicate the distinctive nature of the aboriginal society claiming the right. These rights may be proven through reference to their history and their legal structures. Similarly, aboriginal title, like aboriginal rights, is also considered to be *sui generis* in nature, in that this title does not originate in English, French or First Nation property laws. The main feature that distinguishes Aboriginal title from other property rights is that it does not originate in a grant from the Crown in Canada. In essence, although these rights are seated in the particular society in which they originate, they are inalienable to anyone except the Crown; and although the uses of aboriginal title lands may be put to non-traditional uses, such as forestry and mining, the use in question must not be contrary to the community's relationship with the land. However, even though aboriginal rights and title are shaped within the community by the historic practice of the community and their distinctive relationship with the land, the community may exercise their traditional livelihood or act on their traditional aboriginal activities in a contemporary manner[1], and the only limitation placed on the exercise of these rights is conservation of resource itself.

Since *Calder*[2], government can no longer dismiss debating aboriginal rights and title issues or deny that there is a pre-existing relationship that is situated, in the first the peaceful surrender of a community's territory in order that others may settle and prosper, and second that the community rights include participation in the decisions that affect

[1] *R. v. Sparrow*, [1990], 1 S.C.R. 1075 [*Sparrow*].
[2] *Calder v. the Attorney General of BC*, [1973] S.C.R. 313 [*Calder*].

their ability to exercise their aboriginal rights. The Gitxsan in the *Delgam'uukw*[3] litigation, as in the Nisga'a in the *Calder* suit, argued that they had legitimate land and aboriginal rights to most of their territories in order to provide the Crown with a compelling reason to negotiate a treaty with them. The Nisga'a people's expected relationship was unlike the Gitxsan and their ensuing Treaty relationship could very well have been written up in 1919. In as far as the Nisga'a were concerned, they achieved their goal of creating a homeland, jurisdiction over language and culture, control over resource management within their contiguous land base, and legitimized their central government with the signing of their treaty into law in the year 2000. The Gitxsan concept of Treaty is distinctly different than that of the Nisga'a or other First Nation communities who are in the BC Treaty making process. The Gitxsan may end up litigating their claims to aboriginal title and rights. The stumbling block in their situation is seated in the terms of the current "treaty," "comprehensive claims," or "aboriginal title definitions," which assumes surrender in exchange for defined rights (even if they are more expansive than those east of the Rockies), the tactic of negotiating within these parameters may in itself be the limitation.

Yet, even within the narrow definition of what aboriginal title is and what uses it may be put to, or even the current "comprehensive claims policy," the fiduciary obligations of the Crown has been added to. It was stated in *Delgam'Uukw* that the honour of the Crown is now contingent on "good faith negotiation," a consultation procedure before it "takes up the land," even in situations where there may be an aboriginal title claim, and most definitely where there is a possible aboriginal rights claim. These issues of consultation are clearly articulated in the *Haida*[4] case, and similarly in the *Mikisew Cree*[5] decision. In these decisions the Supreme Court has taken the perspective that although Government may not "run rough-shod" over Aboriginal rights, treaty or title where the community may have a *prima facia* claim to title, rights or treaty rights, the Haida, Gitxsan, nor any other First Nation community does not have the right to veto the proposed legislative development, pending final proof of their claim. In

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[3] *Delgam'uukw v. the Attorney General of BC*, [1997] 3 S.C.R. 1010 [*Delgam'uukw*].
[4] *Haida v. British Columbia*, [2004] 3 S.C.R. 511 [*Haida*].
[5] *Mikisew Cree v. Canada* (Minister of Canadian Heritage), [2005] 3 S.C.R. 388 [*Mikisew Cree*].

areas where there are known treaty rights the communities should expect consultation, however they may expect accommodation/compensation only if the aspect of the aboriginal or treaty right would have a direct affect on their traditional livelihood. For example, if the proposed development affected a trapline or the area was specific to an animal's migratory path or was a specific habitat. These rulings, like *Delgam'Uukw*, expect a negotiated resolve. A resolve, as the Court has pointed out, which the Crown is "bound to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims," and "may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns[6]."

With communities who hold treaties with the Crown, rights could be considered to be more certain, yet at the same time there is not a lot of latitude to develop additional aboriginal rights, except through test cases using the *Van de Peet* aboriginal rights test, or through negotiation. It appears from examining the *Bernard* and *Marshall*[7] decisions that the Supreme Court did not take a liberal interpretation of the traditional "trade" as it was stated in the 1752 to 1759 Treaties[8] as it applied had applied previously to the Communities fisheries. However when it came to their claim of aboriginal title to the land they logged, and their claim of a treaty right to a "trade in logs" the Court backed away from such a determination. First off, it looked to the instances of pre-existing trade; and second to commodities that First Nation Community members were likely to be trading with the Settlers.

In the latest judgment, that of *Sappier* and *Grey*, the Court has applied the distinctive cultural and integral aspect of the *Van der Peet* test. However, unlike the application of the *Van der Peet* test to the potential commercial aspects of access to forest products for timber for lumber or fiber sales the Court applied the test to determine the pre-contact use of timber for housing, fuel and furniture and re-tooled the claim of "treaty right," into an "aboriginal right that held no commercial value. The Court dismissed the idea that there could be a commercial application or even the opportunity for the integration of co-management practices by maintaining that there was no "commercial or

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[6] *Haida supra* note 4 at para. 45.
[7] *R. v. Marshall/Bernard*, [2005] 2 S.C.R. 220 [*Marshall/Bernard*]
[8] *Belcher's Proclamation* (1762) & Mi'kmaq Treaties of 1760-61.

retail value" to be assigned to this timber as all the labour was considered to be personal or voluntary, harkening back to the *St. Catherine's* decision. Commercial rights to timber or fiber claimed by the First Nation community would be considered to be outside of the Crown's current definition what aboriginal rights are, and would have to be brought forth as a challenge using the *Van der Peet*[9] test. If the community is to use the *Van der Peet* test to claim a commercial right to timber (log or fibre), the community should frame the right in such a manner as to indicate that the commercial practice is an integral and distinct aspect of the community's culture. Even if the right in question is proven, the right may be infringed upon. The Crown has reserved the right to "balance a range of societal needs" when allocating to a First Nation the permission to exercise rights that fall outside known aboriginal rights. This result is most clearly seen in the four cases that have gone to trial at either the British Columbia Supreme Court or the British Columbia Court of Appeal.

In the series of British Columbia Forestry judgments of *Gitxsan and other First Nations*[10]*, Gitanyow First Nation*[11]*, Hupacasath First Nation*[12]*,* and *Huu-Ay-Aht First Nation*[13] all were about consultation in the pre-treaty political environment. Although in each case the judge ruled in the favour of the First Nation community, in that it was found the consultation process either absent or inadequate, they also clearly stated that the Community and the Province seek a negotiated end. In addition, each judge reminded the Community in question that they would not receive a declaration that reflected a position that would give the community a veto to the Crown's legislative initiative, and that accommodation of their interests, either their aboriginal rights or claimed aboriginal title, would have to be achieved through negotiation.

However, if a First Nation community were to successfully argue for the commercial right to timber for fiber or lumber, the argument would have to be

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[9] *R. Van der Peet*, [1996] 2 S.C.R. [*Van der Peet*].
[10] *Gitxsan and other First Nations v. British Columbia (Minister of Forests)*, 2002 BCSC 1701.
[11] *Gitanyow First Nation v. Minister of Forests, Skeena Cellulose, NWBC Timber& Pulp Ltd.* 2004 BCSC 1734.
[12] *Hupacasath First Nation v. British Columbia (Minister of Forests) et. al.*, 2005 BCSC 1712.
[13] *Huu-Ay-Aht First Nation et. al. v. The Minister of Forests et. al.*, 2005 BCSC 69.

characterize in such a manner that shifts the debate away from specific activities, such has hunting fishing and gathering foodstuffs for food, ceremonial and social purposes; to one that examines the nature of the community's economy, the integrated uses of the lands of the community, its laws, and procedures related to sharing. In essence what the First Nation community's goal would be to argue for, instead of "aboriginal rights uses," an equivalent livelihood to their pre-contact one, where although there would have been fluctuations in a "regional economy" in part of the year, the community would have still been able to afford its obligations to both the elderly and those within the community who did not derive their livelihood from aboriginal right activities. Thus, the community would be preparing arguments which point to their laws that defined territories, dispute resolution, and most importantly sharing, and organization of labour in order to access the needed surplus within their economy to be able to afford to act in such a culturally distinctive manner.

There is historical support for such an argument that could shift the debate away from "the aboriginal right activities," to one that provides a space for First Nation/Crown relationship to develop into the broader partnership that is situated in "co-management of Provincial resources." Clearly stated in the Report of the Special Commissioners, appointed on the 8th of September, 1856 to Investigate Indian Affairs in Canada[14], the Commissioners came to the conclusion that First Nation community members had a strong claim on their English neighbours to be compensated for loss of lands in which in the past community members derived their livelihood from, and that this compensation ought to be to invested or be available to maintain community members in a condition that is of at least equal advantage to that which they would have enjoyed in their former state.

[14] Canada, *Report of the Special Commissioners, appointed on the 8th of September, 1856 to Investigate Indian Affairs in Canada* (Toronto, Ont.: Stewart Derbishire & George Desbarts, Printer to the Queen, 1858) at 103 to 104.

***St Catherine's*[15]**

The question at the appeal to the Privy Council in 1888 was whether certain lands situated within the boundaries of Ontario belonged to the Province of Ontario, or to the Dominion of Canada. The case originates in the situation that the appellants, members of the St. Catherine's Milling and Timber Co., cut timber on the lands, which were on Crown lands, without authority from the Ontario Government, who accordingly sued for an injunction and damages. Those associated with St. Catherine's Milling and Timber Co., the appellants felt they were justified in cutting timber as they obtained a licence from the Dominion Government, May 1st, 1883. The Courts in Canada decided in favour of the Province.

The lands in question prior to Treaty 3 (October 3rd, 1873)[16] were occupied by the Ojibwa (Ojibbeway) Indians, who by that treaty ceded the whole area to the Government of the Dominion[17]. The provincial government was not party to this treaty, and it was admitted that no surrender had been made of Indian title except to the Dominion. Documentary evidence was referred to, to show the nature and character of the Indian title. It was contended that from the earliest times the Indians had, and were always recognized as having, a complete proprietary interest, limited by an imperfect power of alienation.

British and Canadian legislation was referred to, to show that such complete title had been uniformly recognized: see Royal Proclamation October 7, 1763, held by Lord Mansfield in *Campbell v. Hall*[18] to have the same force as a statute, under which the lands in suit were reserved to the Indians in absolute proprietary right. The proclamation

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[15] *St. Catherine's Milling and Lumber Co. v. The Queen*, (1888), 14 (A.C. 46) 541 [*St. Catherine's*].

[16] Treaty 3 between Her Majesty, The Queen and the Saulteaux Tribe of Indians and the Ojibbeway Indians at the Northwest Angle of the Lake of the Woods with Adhesions (Transcribed by: Roger Duhamel, F.R.S.C., Queen's Printer and Controller of Stationery, Ottawa, 1966).

[17] See: *The Constitution Act, 1867* [*BNA Act*], sect. 91, sub-sect. 24, which gives to the Dominion exclusive legislative authority over "Indians and lands reserved for the Indians" as compared with sect. 92, sub-sect. 5, which assigns "the management and sale of public lands belonging to the Province, and of the timber and wood thereon" to the legislative authority of the Province.

[18] *Campbell v. Hall* 1 Cowp. 204.

in 1763 was uniformly acted on and recognized by the Government as well as the legislature, and was regarded by the Indians as their charter. It was not superseded by the Quebec Act[19] but it was held by the Supreme Court of the United States to be still in force in 1823[20].

The Dominion argued that the absolute title that the Indians held was ceded by them, subject to certain reservations, and the treaty to that effect did not extend to the benefit of the Province in any way. The Dominion contended that the Province could not claim property in the land except by virtue of the BNA Act of 1867, and as regards to that Act the lands did not belong to the Province within the meaning of sect. 109[21]; that is, they were not in 1867 public property which the Province could retain under sect. 117 and they were not public lands of the Province within the meaning of sect. 92, sub-sect. 5.

Although Mowat, Q.C., and Blake, Q.C. ruled in favour Province, they contended that both before and after the treaty of 1873 the title to the lands in question was in the Crown, and not in the Indians. Their reasoning was seated in the argument that the lands, in question, were within the limits of the Province, and the beneficial interest passed to the Province under the BNA Act of 1867, and the Dominion retained no such interest of "ownership" as it claimed. For sake of argument, they stated "even if they were lands reserved for the Indians within the meaning of the BNA Act the Dominion gained only a power of legislating in respect to them," it did not gain full ownership or a right to become owner by purchase from the Indians.

Likewise under section 109, whether reserved to the Indians or not, the land goes to the Province subject to any interest on the part of the Indians[22]. With regard to the alleged absolute title of the Indians to which the Dominion is said to have succeeded by treaty, no such title existed on their part either as against the King of France before the conquest or against the Crown of England, or since the conquest.

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[19] *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo. 3, c. 83 (1774).
[20] See *Johnson v. McIntosh* 8 Wheaton, 543; *The Cherokee Nation v. The State of Georgia* 5 Peters, 1 and *Worcester v. The State of Georgia* 6 Peters, 515.
[21] *BNA Act supra* note 14 sect.109
[22] *Ibid*. Sect. 108 and Sect. 91, sub-sect. 9.

Regarding the Ojibwa's title, it was determined to be a personal right of occupation, held at the pleasure of the Crown, and it was not a legal or an equitable title. For example, the Crown made grants of land in every part of British North America both before and after the proclamation of 1763 without any previous extinguishment of the Indian claim. The grantees in those cases had to deal with the Indian claims, but the legal validity of the grants themselves was undeniably recognized by both the Canadian and the American Courts. As for the meaning and intent of the Royal Proclamation, it was not intended to divest, and did not divest, the Crown of its absolute title to the lands, and the "reservation," or "lands reserved" was expressed to last only "for the present and until Our further pleasure be known." Furthermore, the definition of the lands in question in St. Catherine's, were regarded as "added to the "Province" under the Imperial Act of 1774, known as the Quebec Act. It was not the intention of the Quebec Act to give to the Indians any new rights over and above the interest in which they possessed under the proclamation, and which was a "mere licence terminable at the will of the Crown"

As one may well imagine this analysis of aboriginal title is completely beneficial to any of the Provinces, especially to Ontario and British Columbia. In fact, prior to the St Catherine's Milling and Timber case, David Mills, a lawyer for Canada, was sent to British Columbia to settle the Indian Land Question. He was actually making headway with the then BC Provincial authorities of the time in sorting the issues surrounding the Aboriginal title question and equitable reserve size, which would have included compensation. It appears that however, on David Mills return to Ontario, and his subsequent election to Parliament (and quite possibly in an altercation with John A. MacDonald), he leaves the Tory Party and sides with Ontario's position half way through the trial part of the St. Catherine's case. The most disturbing aspect of the St. Catherine's trial is that first, the Ojibwa were not represented, and Ottawa's claim on the resource itself – the cut timber, lease revenues and the licence fee. Also second, that David Mills' research on the content of Aboriginal title was limited to John Locke, and other travel journalist accounts; in other words, the words of tourists from Europe. In addition, to not being able to properly present what the Indigenous title was, its sovereign as well as procedural aspects, these early writers were only able to describe that First Nation communities were engaged in agricultural pursuits, lived in villages and in these villages

lived in "communal houses." Assumptions about the procedural aspects of their title, that is how they shared, or determined and dealt with crimes, and more importantly how they made decisions regarding defense or raiding was only superficially alluded to. All in all, not much evidence was presented in defense any claim that could have made against even the claim of that Canada purportedly made that it still had an interest in the lands of western Ontario, vis-à-vis the fact that the Ojibwa entered into a treaty with the Dominion of Canada in 1873, and in the Ojibwa's concept of title was not represented, protected nor defended by the Crown.

Summary

- After surrender aboriginal title land and resources are vested in the Crown in Right of the Province
- The Federal government is responsible to legislate for Indians and Lands Reserved for Indians, which does not include Provincial Crown lands
- Aboriginal title before surrender was determined to be a personal right of occupation, held at the pleasure of the Crown, and it was not a legal or an equitable title

***Calder*[23]**

In an attempt to resurrect their assertion of aboriginal title in the Nass Valley, the Nisga'a, in 1967, argued before the B.C. Courts that aboriginal title was recognized as common law and that the Nisga'a could satisfy the requirements of establishing title. The Nisga'a goal was to obtain a declaration of their rights within traditional territory, in order to negotiate a Treaty. They did not claim that they were able to sell or alienate their right to possession, except to the Crown. They did, however, challenge the authority of British Columbia to make grants in derogation of their rights. The officers of the Nishga (Nisga'a) Indian Tribal Council, on their own behalf, brought an action against the Attorney-General of British Columbia for a declaration that the aboriginal or Indian title to certain lands had never been lawfully extinguished. They presented arguments to determine 1) whether the Royal Proclamation of 1763 was applicable to their lands in question; 2) whether pre-Confederation Proclamations and Ordinances made by Colony of British Columbia were an exercise of sovereignty, and lastly 3) whether their title was extinguished by the acts of the Crown.

[23] *Calder supra* note 2.

The Supreme Court decision was split; three judges held that the Nisga'a retained an unextinguished title; three held that whatever title the Nisga'a held was extinguished; and the seventh judge dismissed the claim as the Nisga'a had failed to obtain a *fiat* from British Columbia to proceed with the litigation, and, as the case was dismissed on a technicality, the Court did not address the content of aboriginal title[24]**.** All six judges agreed that aboriginal title could arise at common law without legislative recognition based on colonial constitutional principles that the sovereign ought to recognize the property rights of the inhabitants upon acquisition of a new territory.

The first three judges stated that although in the Royal Proclamation of 1763 that "the several Nations and tribes of Indians, who lived under British protection, should not be molested or disturbed in the "Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them as their Hunting Grounds" and providing that no Governor of any Colony grant warrants of survey or pass any patents for lands "until our further Pleasure be Known" on any lands "reserved to the Indians," did not apply to the lands historically occupied by the Nisga'a. Their reasoning was seated in the fact that the northern limit of British territory on the Pacific coast was not determined until 1825 and the 49th parallel as the southern boundary was not confirmed until 1846. Consequently, the Nisga'a people were not any of the several Nations or tribes of Indians who lived under British protection in 1763, and thus were outside the scope of the Proclamation[25].

In addition, whatever property right may have existed, they had been extinguished by properly constituted authorities in the exercise of their sovereign powers. It was argued that the Proclamation of December 2, 1858, the Governor of British Columbia enable the Crown to sell lands within the Colony and authorized the Crown to grant any land belonging to the Crown in the Colony. By Proclamation of February 14, 1859, "all lands in British Columbia and all mines and minerals there under" were declared to belong to the Crown. Other Proclamations and Ordinances recognized the claims of persons who acquired unoccupied, unreserved and unsurveyed Crown land and provided for the public sale of lands belonging to the Crown in fee. These Proclamations and

[24] *Ibid.* at 422 to 427.
[25] *Ibid.* at 328 to 335.

Ordinances revealed a unity of intention to exercise, and the legislative exercising of, absolute sovereignty over all the lands of British Columbia. This exercise of sovereignty was determined to be inconsistent with any conflicting interests, including that of "aboriginal title." Furthermore, the Terms of Union under which British Columbia entered into Confederation with the Dominion of Canada[26] which terms recognized the responsibility of the Government of the Colony of British Columbia in respect of the trusteeship and management of lands reserved for the Indians and, in consideration of the assumption by the federal Government of that responsibility, provided for the conveyance of such tracts of land as were necessary for the purpose, that is, the creation of reserves, and, further, the establishment of the railway belt under the Terms of Union without any reservation of Indian rights are both inconsistent with the recognition and continued existence of an aboriginal title. Finally, the negotiation by the federal Government of Treaty No. 8 in 1899, whereby the lands of certain tribes of north-eastern British Columbia were surrendered, did not constitute recognition of the rights of the appellants in 1899. Original Indian title had been in the Colony of British Columbia prior to Confederation and there were no Indian claims to transfer to the Dominion beyond those mentioned in term 13 of the Terms of Union. However, Hall J. set out the contours of the Nisga'a argument by saying:

> The appellants rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishga people came under British sovereignty they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did Parliament at Ottawa[27].

With Judson and Hall JJ. writing the principal judgment, the Court split three-three on the major issue of whether the Nisga'a Indians' aboriginal title to their ancient tribal territory had been extinguished by general land enactments in British Columbia. The Court also

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[26] *British Columbia Terms of Union*, (R.S.C., 1985, App. II, No. 10) art. 13).
[27] *Calder supra* note 2 at 402.

split on the issue of whether the Royal Proclamation of 1763 was applicable to Indian lands in that province. While Judson and Hall JJ. were in agreement that aboriginal title existed in Canada, at least where it had not been extinguished by appropriate legislative action, independently of the Royal Proclamation. Judson J. stated expressly that the Proclamation was not the "exclusive" source of Indian title[28] Hall J. said that "aboriginal Indian title does not depend on treaty, executive order or legislative enactment[29]."

While the Supreme Court's ruling was inconclusive as to the Nisga'as' claim, the *Calder* decision made it clear that aboriginal title was alive as a legal concept, despite the Government's denial of it. Besides the *Calder* action, in 1973 in the *Re: Paulette*[30] case, sixteen chiefs were successful in registering a caveat on the title to approximately 700,000 square kilometers of land in the North West Territories, based on the claim that they had never ceded their aboriginal rights to the Crown. Also, in 1973, the James Bay Cree obtained an injunction to halt the construction of a hydro-electric dam at James Bay[31]. Though the James Bay Cree injunction was nullified by the Court of Appeal, this action heralded the first contemporary treaty two years later in 1975[32]. The year 1973 was a year of change in law, policy and attitude towards First Nation grievances, especially for communities who had not formally ceded their territories to the Crown. After the *Calde*r case, the Federal government conceded that its earlier 1969 position was deficient and responded with a comprehensive claims policy in August of 1973[33]**.** Cabinet agreed that there were two types of claims, "Specific" and "Comprehensive," and Comprehensive Claims were based on traditional use and occupancy of land in areas

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[28] *Ibid.* at 322 to 323 & 328.
[29] *Ibid.* at 390.
[30] *Re: Paulette et al and Registrar of Titles* (No. 2) [1973] 6 W.W.R. 97.
[31] *La société de développement de la Baie James*, [1975] R.J.Q. 166.
[32] Quebec, Grand Council of the Crees (of Quebec) and Northern Quebec Inuit Association and Canada, Agreement between the Government of Quebec, Grand Council of the Crees (of Quebec) and Northern Quebec Inuit Association and the Government of Canada (Ottawa, Ont.: Department of Indian and Northern Affairs, 1975).
[33] See: "Top court 'rejects' Nishga land claim" [Times] *Colonist* (31 January 31) 1; "Calder to meet Trudeau to press Nishga campaign" [Vancouver] *Sun* (1 February 1973) 2.

where First Nation interests had yet to be extinguished by treaty or superseded by law. These claims were to be settled not only in cash, but also with additional lands[34].

Summary

- The Court was split 3-3 as to whether aboriginal title existed after declared sovereignty in British Columbia, however as the Nisga'a failed to receive a *fiat* from British Columbia and the case was dismissed
- The *Calder* case spurred the Federal Government to re-assess its position with respect to Comprehensive Claims

***Guerin*[35]**

In *Guerin* it is affirmed that the Indians' interest in their land is a pre-existing legal right not created by the Royal Proclamation of 1763, by s. 18(l) of the *Indian Act*[36], or by any other executive order or legislative provision. The nature of the Indians' interest is best characterized by its inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered.

The nature of Indian title and the framework of the statutory scheme established for disposing of Indian land place upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. Successive federal statutes including the present *Indian Act* provide for the general inalienability of Indian reserve land, except upon surrender to the Crown. The purpose of the surrender requirement is to interpose the Crown between the Indians and prospective purchasers or lessees of their land so as to prevent the Indians from being exploited. Through the confirmation in s. 18(1) of the *Indian Act* of the Crown's historic responsibility to protect the interests of the Indians in transactions with third parties, Parliament has conferred upon the Crown discretion to decide for itself where the Indians' best interests lie. Where by statute, by agreement or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus

[34] "Chrétien says gov't ready to settle Indian, Inuit claims with cash; land" [Vancouver] *Sun* (18 august 1973) 12.
[35] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [*Guerin*]
[36] *Indian Act* (R.S., 1985, c.1 -5) [*Indian Act*].

empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

Accordingly, section 18(1) of the *Indian Act* confers upon the Crown a broad discretion in dealing with the surrendered land. In Guerin, the document of surrender confirms this discretion in the clause conveying the land to the Crown. That is, when an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf. In this case, the Crown's agents promised the Band to lease the land in question on certain specified terms and then, after surrender, obtained a lease on different terms which was much less valuable. The Crown was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore these terms. In obtaining without consultation a much less valuable lease than that promised, the Crown breached the fiduciary obligation it owed to the Band and it must make good the loss suffered.

The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown. This speaks to the fact that an Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after "surrender has taken place," with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. This is still recognized in the surrender provisions of the *Indian Act.* The surrender requirement, and subsequent responsibility that this entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. In order to explore the character of this obligation, however, it is first necessary to consider the basis of aboriginal title and the nature of the interest in land which it represents.

Looking back to *Calder*[37], the Supreme Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. 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*[38]. The Royal Proclamation of 1763 reserved "under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid[39]"

The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in *Amodu Tijani v. Southern Nigeria (Secretary)*[40]. That principle supports the assumption implicit in *Calder*[41] that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it. Thus it follows that the situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, or by s. 18(1) of the *Indian Act*[42], or by any other executive order or legislative provision. It did not matter that in that the in *Guerin* the concern was centred on "an Indian Band in a reserve" rather than with "unrecognized aboriginal title in traditional tribal lands." However, the court determined that the Indian interest in the land is the same in both cases[43]: It is worth noting, however, that the reserve in question was created out of the ancient tribal territory of the Musqueam Band by the unilateral action of the Colony of British Columbia, prior to Confederation.

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[37] *Calder supra* note 2 at 390.
[38] *St Catherine's supra* note 12.
[39] *Royal Proclamation of 1763*, (R.S.C., 1985, App. II, No. 1).
[40] *Amodu Tijani v. Southern Nigeria (Secretary* [1921] *2* A.C. 399.
[41] *Calder supra* note 2 at 383, 385, 387 & 398.
[42] *Indian Act supra* note 33.
[43] See: *Attorney-General for Quebec v. Attorney-General for Canada,* [1921] 1 *A.C.* 401 at 410 to 411 (the *Star Chrome* case).

In the *St. Catherine's Milling*[44] case, the Privy Council held that the Indians had a "personal and usufructuary right" in the lands which they had traditionally occupied. Lord Watson said that "there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished[45]." He reiterated this idea, stating that the Crown "has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden[46]." Similarly, Chief Justice Marshall took a similar view in *Johnson v. M'Intosh*[47], saying, "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy ..." It should be noted that the Privy Council's emphasis on the personal nature of aboriginal title stemmed in part from constitutional arrangements peculiar to Canada.

When the land in question in *St. Catherine's Milling was* subsequently disencumbered of the native title upon its surrender to the federal government by the Ojibwa in 1873, the entire beneficial interest in the land was held to have passed, because of the personal and usufructuary nature of the Indians' right, to the Province of Ontario under s. 109 rather than to Canada. The same constitutional issue arose recently in this in *Smith v. The Queen*[48], in which the Supreme Court held that the Indian right in a reserve, being personal, could not be transferred to a grantee, whether an individual or the Crown. Upon surrender the right disappeared "in the process of release." No such constitutional problem arises in *Guerin,* since in 1938 the title to all Indian reserves in British Columbia was transferred by the provincial government to the Crown in right of Canada.

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive

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[44] *St. Catherine's Milling supra* note 12.
[45] *Ibid*. at 55.
[46] *Ibid*. at 58
[47] *Ibid*. at 588.
[48] *Smith v. The Queen* [1983] 1 S.C.R. 554.

fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered.

The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery. In Guerin its relevance is based on the requirement of "surrender The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay.

The purpose of this surrender requirement is clearly to place the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which makes the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians ...." Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the *Indian Act*. This discretion on the part of the Crown, far from ousting as the Crown contends, the jurisdiction of the courts to regulate the relationship between the Crown and the Indians, has the effect of transforming the Crown's obligation into a fiduciary one[49].

[49] It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As

Section 18(1) of the *Indian Act* confers upon the Crown a broad discretion in dealing with surrendered land. *Guerin*, the document of surrender, set out in part earlier in these reasons, by which the Musqueam Band surrendered the land, confirms this discretion in the clause conveying the land to the Crown "in trust to lease ... upon such terms as the Government of Canada may deem most conducive to our Welfare and that of our people[50]." When, as here, an Indian Band surrenders its interest to the Crown, a fiduciary obligation takes hold to regulate the manner in which the Crown exercises its discretion in dealing with the land on the Indians' behalf and that before surrender the Crown does not hold the land in trust for the Indians. The Court also argued that that the Crown's obligation does not "crystallize into a trust, express or implied, at the time of surrender." Not all of these elements of a "trust" are present in the relationship between an Indian community and the Crown. That is, upon unconditional surrender the Indians' right in the land disappears. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown is sufficient to give rise to a fiduciary obligation neither an express nor an implied trust arises upon surrender.

The Crown's fiduciary obligation to the Indians is therefore not a trust. The obligation is trust-like in character[51], and would be in the case with a "trust," the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach. The fiduciary relationship between the Crown and the Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian Bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties. But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the Band's behalf lack a basis in

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was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.

[50] *Guerin supra* note 32 at 385.

[51] *Ibid.* at 386.

contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal. The fiduciary obligation which is owed to the Indians by the Crown is *sui generis,* given the unique character both of the Indians' interest in land and of their historical relationship with the Crown.

Summary

- The Crown's fiduciary obligation to the Indians situated in a trust relationship, the obligation is trust-like in character
- Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown
- While their interest does not amount to beneficial ownership, it is the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee and therefore must be surrendered to the Crown
- The interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians.

***Sparrow*[52]**

Mr. Ron Sparrow 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*[53].

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*. The Supreme Court held that the appeal and cross-appeal should be dismissed and the constitutional question should be sent back to trial to be answered according to the analysis set out.

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[52] *Sparrow supra* note 1.
[53] *Constitution Act, 1982*, Schedule B, Part II, Sect. 35 (1).

It was determined that 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*[54]. Nothing in the *Fisheries Act* or its detailed regulations demonstrated a clear and plain intention to extinguish the Indian aboriginal right to fish. Fishing permits are 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. That is, the nature of government regulations cannot be determinative of the "content and scope of an existing aboriginal right." Government policy can only, however, regulate the exercise of that right but such regulation must be in keeping with s. 35(1).

In the first instance, 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. Secondly, 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 any 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). Thirdly, 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

[54] *Fisheries Act*, R.S.C. 1970, c. F-14, ss. 34, 61(1).

the government's responsibility to act in a fiduciary capacity[55] 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.

In order to be proactive the Court introduced a test for justification requiring 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 Court framed this test as a series of questions that government must ask itself, and the first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. The Court suggested that the inquiry begins with a reference to the characteristics or incidents of the right at stake. For example, in the *Sparrow* case, fishing rights were the focus. They are not traditional property rights and they, in the case of Aboriginal people they are held by a collective, and are in keeping with the culture and existence of that group. So in order to determine whether the Musqueam fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. That is: 1) is the limitation unreasonable?; 2) does the regulation impose undue hardship?; and 3) does the regulation deny to the holders of the right their preferred means of exercising that right[56]? Thus the onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

In the *Sparrow* situation the regulation was found to be a *prima facie* interference if it were found to be an adverse restriction on the exercise of the Musqueam peoples' right to

[55] *Sparrow supra* note 1 at 1109.
[56] *Ibid*. at 1111 to 1113.

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. At this point if a *prima facie* interference is found, the analysis moves to the issue of justification. Here the Court suggested that this test involved two steps. First is the question of whether there is a valid legislative objective[57]. 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 could then be scrutinized. The justification of conservation and resource management, however, is uncontroversial.

At this point in the analysis the second part of the justification test is applied, so that if a valid legislative objective is found, in other words, conservation and resource management regulations are used to limit the Aboriginal fishing right, then the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples[58]. 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. Lastly, within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include: whether there has been as little infringement as possible in order to affect 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[59]. This list is not exhaustive.

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[57] *Ibid* at 1114.
[58] *Ibid* at 1114.
[59] *Ibid* at 1114.

Summary

- Section 35(1) of the *Constitution Act, 1982*, provides a solid constitutional base upon which subsequent negotiations can take place and affords aboriginal peoples constitutional protection against provincial legislative power
- A generous, liberal interpretation of Section 35 (1) is required given that the provision is to affirm aboriginal rights.
- The words in Section 35(1) "recognition and affirmation" 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.
- The Court introduced a test for justification requiring 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 test asks a series of questions: whether the legislation in question has the effect of interfering with an existing aboriginal right. That is: 1) is the limitation unreasonable?; 2) does the regulation impose undue hardship?; and 3) does the regulation deny to the holders of the right their preferred means of exercising that right?
- Whether there has been as little infringement as possible in order to affect 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

***Van der Peet*[60]**

Dorothy Marie Van der Peet, a member of the Sto:lo Nation, 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 Mrs. Van der Peet'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 constitutional question before the Supreme Court queried whether s. 27(5) of the Regulations was applicable or not in the circumstances for the reason that the sale of fish were an aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982.* However, the Supreme Court determined that the trial judge made no clear and palpable error which would justify an

[60] *Van der Peet supra* note 10.

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 Sto:lo 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 this suggested that the exchange of fish was not a central part of Sto:lo culture. Mrs. Van der Peet, in the Courts eyes, 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*.

In the determination of what is an "aboriginal right," 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 therefore a generous and liberal interpretation should accordingly be given in favour of aboriginal peoples. Thus, any ambiguity as to the scope and definition of s. 35(1) must be resolved in favour of aboriginal peoples[61].

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*[62]. Yet s. 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. Specifically, 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[63]. The Court suggested that a number of factors must be considered in applying the "integral to a distinctive culture" test. In a challenge the court must take into

[61] *Ibid*. at 536 para. 23.
[62] *Sparrow supra* note 1 at 1111 to 1114.
[63] *Van der Peet supra* note 10 at 549 para. 47.

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 be 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 1) done pursuant to an aboriginal right, 2) the nature of the governmental regulation, statute or action being impugned, and 3) the practice, custom or tradition being relied upon to establish the right[64]. The activities in question must be considered at a general rather than specific level and they may be an exercise in modern form of a pre-contact practice, custom or tradition and the claim should be characterized accordingly[65].

To be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question; that is, the right in question is one of the things which made the culture of the society distinctive[66]. 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[67]. 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[68]. The concept of continuity is the means by which a "frozen rights" approach to s. 35(1) will be avoided. It does not require

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[64] *Ibid* at 553 para. 55.
[65] *Ibid.* at 559 para. 69.
[66] *Ibid.* at 560 to 561 para.70 to 71.
[67] *Ibid.* at 561 to 562 para. 73.
[68] *Ibid.* at 554 to555 para.60.

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[69]. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely to 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[70].

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

[69] Ibid. at 550 to 551 para. 49 to 50.
[70] *Ibid.* at 559 para. 69.

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[71]. 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.

Summary

- In assessing a claim to be 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 1) done pursuant to an aboriginal right, 2) the nature of the governmental regulation,

[71] *Ibid.* at 562 para. 74.

statute or action being impugned, and 3) the practice, custom or tradition being relied upon to establish the right

- The activities in question 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; that is, the right in question is one of the things which made the culture of the society distinctive
- 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
- In a challenge 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
- A court should approach the rules of evidence, 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
- 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

***Delgam'uukw*[72]**

The appellants, all Gitxsan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their "Houses", claimed separate portions of 58,000 square kilometers in British Columbia. For the purpose of the claim, this area was divided into 133 individual territories, claimed by the 71 Houses. This represents all of the Wet'suwet'en people, and all but 12 of the Gitxsan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it[73]. British Columbia counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada. At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. In addition, the Gitxsan Houses have an "adawaak", which is a collection of sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a "kungax", which is a spiritual song or dance

[72] *Delgam'uukw supra* note 3.
[73] At the Supreme Court the Gitxsan pleadings for "ownership" were transformed into a claim for aboriginal title over the land. See: *Ibid.* at 1028 to 1029 para. 7.

or performance which ties them to their land. Both of these were entered as evidence on behalf of the appellants. The most significant evidence of spiritual connection between the Houses and their territory was a feast hall where the Gitxsan and Wet'suwet'en people tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands.

The trial judge did not accept the appellants' evidence of oral history of attachment to the land. He dismissed the action against Canada, dismissed the plaintiffs' claims for ownership and jurisdiction and for aboriginal rights in the territory, granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land subject to the general law of the province, dismissed the claim for damages and dismissed the province's counterclaim. On appeal, the original claim was altered in two different ways. First, the claims for ownership and jurisdiction were replaced with claims for aboriginal title and self-government, respectively. Second, the individual claims by each House were amalgamated into two communal claims, one advanced on behalf of each nation, the Gitxsan and the Wet'suwet'en. There were no formal amendments to the pleadings to this effect. The appeal was dismissed by a majority of the Court of Appeal.

The principal issues on the appeal, some of which raised a number of sub-issues, were as follows: (1) whether the pleadings precluded the Court from entertaining claims for aboriginal title and self-government; (2) what was the ability of this Court to interfere with the factual findings made by the trial judge; (3) what is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof; (4) whether the appellants made out a claim to self-government; and, (5) whether the province had the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*. The Supreme Court held that the appeal should be allowed in part, and the cross-appeal should be dismissed.

Like in the *Sparrow* and *Van der Peet* challenges, the Supreme Court addressed the Gitxsan and Wet'suwet'en claim by laying the content of aboriginal title, make statements as to how aboriginal title is protected by s, 35(2) of the *Constitution Act* of 1982 and requirement necessary to prove aboriginal title. In general aboriginal 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 aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be irreconcilable with the nature of the group's attachment to that land. Above all aboriginal title is *sui generis*, and so distinguished from other proprietary interests, and characterized by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown. Another dimension of aboriginal title is its sources: its recognition by the *Royal Proclamation, 1763* and the relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing assertion of British sovereignty. Finally, aboriginal title is held communally.

The exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group's distinctive aboriginal culture[74]. Canadian jurisprudence on aboriginal title frames the "right to occupy and possess" in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom or tradition. The nature of the Indian interest in reserve land which has been found to be the same as the interest in tribal lands is very broad and incorporates present-day needs. Finally, aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation[75].

The content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands[76]. This inherent limit arises because the relationship of an aboriginal community with its land should not be prevented from continuing into the future. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. Land held by virtue of aboriginal title may not be alienated because the land has an inherent

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[74] *Ibid.* at 1101 to 1102 para. 150 to 151.
[75] *Ibid.* at 1088 para. 125
[76] *Ibid.* at 1090 to 1091 para. 130

and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value[77]. Finally, the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so[78].

Aboriginal title at common law was recognized well before 1982 and is accordingly protected in its full form by s. 35(1). In characterizing the constitutionally protected nature of aboriginal title the Supreme Court cited the nature of the constitutionally protected rights. Constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At the one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title to the land. In the middle are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. At the other end of the spectrum is aboriginal title itself which confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities[79].

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[77] *Ibid.* at 1089 to 1091 para. 128 to 129.
[78] *Ibid.* at 1091 para. 132.
[79] Ibid at 1091 to 1095 para. 133 to 139.

In all practicality Aboriginal title is a right to the land itself, and that land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). In this case, those activities are considered to be parasitic on the underlying title. Section 35(1), since its purpose is to reconcile the prior presence of aboriginal peoples with the assertion of Crown sovereignty, must recognize and affirm both aspects of that prior presence; first, by the occupation of land, and second, through the prior social organization and distinctive cultures of aboriginal peoples on that land.

In keeping with the ability of government to both recognize, infringe upon, and compensate for loss of aboriginal title, the test for the identification of aboriginal title the Supreme Court looked its test for aboriginal rights. However, the test for aboriginal rights to engage in particular activities and the test for the identification of aboriginal title are broadly similar, are distinct in two ways. First, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy[80]. Second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land[81].

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land[82]. In the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law[83]. Aboriginal title is a burden on the Crown's underlying title. The Crown, however, did not gain this title until it asserted sovereignty and it makes no sense to speak of a burden on the underlying title before that title existed. Aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs

[80] *Ibid.* at 1097 para. 143 to 144.
[81] *Ibid.* at 1098 para. 145
[82] *Ibid.* at1096 to 1097 para.141 to 142.
[83] *Ibid.* at 1097 to 1098 para. 143 to 144.

and traditions and those influenced or introduced by European contact[84]. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. Finally, the date of sovereignty is more certain than the date of first contact.

Accordingly both the common law and the aboriginal perspective on land should be taken into account in establishing the proof of occupancy. At common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land[85]. Physical occupation 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. In considering whether occupation sufficient to ground title is established, the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed must be taken into account[86]. Given the occupancy requirement, it was not necessary to include as part of the test for aboriginal title whether a group demonstrated a connection with the piece of land as being of central significance to its distinctive culture. Ultimately, the question of physical occupation is one of fact to be determined at trial.

If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation. Since conclusive evidence of pre-sovereignty occupation may be difficult, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. An unbroken chain of continuity need not be established between present and prior occupation. The fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained[87]. The only limitation on this principle might be that the land not be used in ways which are inconsistent with continued use by future generations of aboriginals.

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[84] *Ibid.* at 1098 to 1099 para. 145 to 146.
[85] *Ibid.* at 1100 to 1101 para. 149.
[86] *Ibid.* at 1102 to 1103 para. 152.
[87] *Ibid.* at 1102 to 1105 para. 152 to 156.

At sovereignty, occupation must have been exclusive[88]. This requirement flows from the definition of aboriginal title itself, which is defined in terms of the right to exclusive use and occupation of land. The test must take into account the context of the aboriginal society at the time of sovereignty. The requirement of exclusive occupancy and the possibility of joint title can be reconciled by recognizing that joint title can arise from shared exclusivity. As well, shared, non-exclusive aboriginal rights short of aboriginal title but tied to the land and permitting a number of uses can be established if exclusivity cannot be proved. The common law should develop to recognize aboriginal rights as they were recognized by either *de facto* practice or by aboriginal systems of governance.

Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal and provincial governments if the infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples 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, and the building of infrastructure and the settlement of foreign populations to support those aims, are objectives consistent with this purpose[89]. Three aspects of aboriginal title are relevant to the second part of the test. First, the right to exclusive use and occupation of land is relevant to the degree of scrutiny of the infringing measure or action. Second, the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples, suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands[90]. There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation[91]. And third, lands held pursuant to aboriginal title have an inescapable economic component which suggests that

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[88] *Ibid.* at 1104 para. 155.
[89] *Ibid.* at 1111 para. 165.
[90] *Ibid.* at 1111 to 11112 para. 166 to 167.
[91] *Ibid.* at 1112 to 1114 para. 168.

compensation is relevant to the question of justification as well. Fair compensation will ordinarily be required when aboriginal title is infringed[92].

Summary

- In the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy
- Accordingly both the common law and the aboriginal perspective on land should be taken into account in establishing the proof of occupancy
- Whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.
- Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal and provincial governments if the infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples.
- The right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples, suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands
- There is always a duty of consultation and, in most situations the duty will be significantly deeper than mere consultation
- Lands held pursuant to aboriginal title have an inescapable economic component which suggests that compensation is relevant to the question of justification
- Fair compensation will ordinarily be required when aboriginal title is infringed upon

***Haida*[93]**

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

[92] *Ibid.* at 1113 to 1114 para.169.
[93] *Haida supra* note 4.

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. The Haida asked of the Supreme Court whether there was a duty to consult and accommodate Aboriginal peoples; whether the 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; and, whether duty extends to third parties.

The Supreme Court determined that 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[94]. 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. Lastly the Supreme Court commented that 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[95].

Thus in laying out the procedural concerns the Supreme Court outlined 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. However, the Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in

[94] *Ibid.* at 526 para. 26 to 27.
[95] *Ibid.* at 530 to 531 para. 38.

good faith. That is the content of the duty varies with the circumstances and each case must be approached individually and with flexibly. It has been suggested by the Supreme Court that it is possible that the requirement to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people may entail "good faith consultation" that in itself may be to "reveal a duty to accommodate[96]." 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[97].

In addressing whether third parties could be held responsible for consultation and accommodation the Supreme Court found that third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. That is, the honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown[98]. However, this does not mean, that third parties can never be liable to Aboriginal peoples. Yet the more significant aspect to this duty to consult and accommodate may be in the fact that this procedure also applies to the provincial government. Here the Supreme Court uses s. 109 and nature of British Columbia's pre-existing sovereignty that pre-dates the Union, the Province took the lands subject to this duty[99].

The Supreme Court held that 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 are 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. The transfer of T.F.L. 39 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

[96] *Ibid*. at 534 to 535 para. 46 to 47.
[97] *Ibid.* at 536 para. 50.
[98] *Ibid.* at 539 para. 56.
[99] *Ibid.* at 539 to 540 para.57 to 59.

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.

Summary

- The Supreme Court determined that 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
- In laying out the procedural concerns the Supreme Court outlined 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.
- However, the Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith.

***Mikisew Cree*[100]**

Under Treaty 8, made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometers 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 kilometers. The

[100] *Mikisew Cree supra* note 5.

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 injunction 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. The Supreme Court determined that the appeal should be allowed and that the duty of consultation, which flows from the honour of the Crown, was breached and that the government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. Treaty

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[101].

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

[101] *Ibid.* at 405 to 406 para. 33 to 34 & 418 para. 59.

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[102]. It is at this instance that 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[103].

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 "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[104]. 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[105].

Summary

- 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
- Where the court is dealing with a proposed "taking up of the land", 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

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[102] *Ibid.* at 416 to 417 para. 55 to 56.
[103] *Ibid.* at 416 to 417 para. 54 to 55.
[104] *Ibid.* at 421 64.
[105] *Ibid.* at 421 to 423 64 to 67

***R v. Marshall/ Bernard*[106]**

The questions asked of the Supreme Court were whether Mi'kmaq holds aboriginal title to lands they logged and whether the Royal Proclamation of 1763 or Belcher's Proclamation of 1762 granted aboriginal title to Mi'kmaq. The appeal deals with two cases. In *Marshall*, 35 Mi'kmaq Indians were charged with cutting timber on Crown lands in Nova Scotia without authorization. In *Bernard*, a Mi'kmaq Indian was charged with unlawful possession of spruce logs he was hauling from the cutting site to the local saw mill. These logs had been cut on Crown lands in New Brunswick. In both cases, the accused argued that as Mi'kmaq Indians, they were not required to obtain provincial authorization to log because they have a right to log on Crown lands for commercial purposes pursuant to treaty or aboriginal title. The trial courts entered convictions which were upheld by the summary conviction courts. The Courts of Appeal set aside the convictions. A new trial was ordered in *Marshall* and an acquittal entered in *Bernard*. At the Supreme Court, the court was asked to determine if the Mi'kmaq in Nova Scotia and New Brunswick have treaty right to log on Crown lands for commercial purposes; whether the Mi'kmaq held aboriginal title to the land they logged, and lastly; whether Royal Proclamation of 1763 or Belcher's Proclamation of 1762 granted aboriginal title to Mi'kmaq.

The treaties of 1760-61 do not confer on modern Mi'kmaq a right to log contrary to provincial regulation. The truck house clause of the treaties was a trade clause which only granted the Mi'kmaq the right to continue to trade in items traditionally traded in 1760-61. While the right to trade in traditional products carries with it an implicit right to harvest those resources, this right to harvest is the adjunct of the basic right to trade in traditional products. The Court felt that there was nothing in the wording of the truck house clause that could translates to a general right to harvest or gather all natural resources then used. Instead, the truck house clauses is limited to the right to trade, and the emphasis therefore is not on what products were used[107], but on what trading activities were in the contemplation of the parties at the time the treaties were made, and

[106] *R v. Marshall/ Bernard supra* note 7.
[107] *Ibid.* at 233 para. 15.

only those trading activities are protected. Ancestral trading activities, however, are not frozen in time and the question in each case is whether the modern trading activity in issue represents a logical evolution from the traditional trading activities at the time the treaties were made. Here, the trial judges applied the proper test and the evidence supports their conclusion that the commercial logging that formed the basis of the charges against the accused was not the logical evolution of a traditional Mi'kmaq trading activity in 1760-61[108].

Accordingly, the accused did not establish that they hold aboriginal title to the lands they logged. In *Delgam'Uukw* the requirement for a claim for aboriginal title, stipulated that both aboriginal and European common law perspectives must be considered. The court must examine the nature and extent of the pre-sovereignty aboriginal practice and translate that practice into a modern common law right. Since different aboriginal practices correspond to different modern rights, the question is whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed. Here, the accused did not assert an aboriginal right to harvest forest resources but aboriginal title. Aboriginal title to land is established by aboriginal practices that indicate possession similar to that associated with title at common law.

The evidence must prove "exclusive" pre-sovereignty "occupation" of the land by their forebears. "Occupation" means "physical occupation," and "exclusive occupation" means an intention and capacity to retain exclusive control of the land. However, evidence of acts of exclusion is not required. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that the group could have excluded others had it chosen to do so. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or the exploitation of resources. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes.

Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are relied on for the right. On all these matters,

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[108] *Ibid.* at 234 to 235 para. 16 to 20, 25 & 240 para. 35.

evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The trial judges in both cases applied the proper test in requiring proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of the assertion of sovereignty, and there is no ground to interfere with their conclusions that the evidence did not establish aboriginal title[109]. The text, the jurisprudence and historic policy all support the conclusion that the *Royal Proclamation* of 1763 did not reserve aboriginal title to the Mi'kmaq in the former colony of Nova Scotia. On the evidence, there is also no basis for finding title to the cutting sites in *Belcher's Proclamation*[110].

In the context of aboriginal title claims, aboriginal conceptions of territoriality, land use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. However, the role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The patterns and nature of aboriginal occupation of land should inform the standard necessary to prove aboriginal title. The common law notion that "physical occupation is proof of possession" remains but is not the governing criterion: the nature of the occupation is shaped by the aboriginal perspective, which includes a history of nomadic or semi-nomadic modes of occupation. Since proof of aboriginal title relates to the manner in which the group used and occupied the land prior to the assertion of Crown sovereignty, the mere fact that an aboriginal group travelled within its territory and did not cultivate the land should not take away from its title claim. Therefore, anyone considering the degree of occupation sufficient to establish title must be mindful that aboriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture. Occupation should be proved by evidence not of regular and intensive use of the land but of the tradition and culture of the group that connect it with the land. Thus, intensity of use is related not only to common law notions of possession but also to the aboriginal perspective. The record in the courts below lacks

[109] *Ibid.* at 243 to 248 45 to 60, 251 to 252 para. 70 & 72.
[110] *Ibid.* at 260 para. 96 & 263 para. 106.

the evidentiary foundation necessary to make legal findings on the issue of aboriginal title in respect of the cutting sites in Nova Scotia and New Brunswick and, as a result, the accused in these cases have failed to sufficiently establish their title claim[111].

The protected treaty right includes not only a right to trade but also a corresponding right of access to resources for the purpose of engaging in trading activities. The treaty right comprises both a right to trade and a right of access to resources: there is no right to trade in the abstract because a right to trade implies a corresponding right of access to resources for trade. There are limits, however, to the trading activities and access to resources that are protected by the treaty. Only those types of resources traditionally gathered in the Mi'kmaq economy for trade purposes would reasonably have been in the contemplation of the parties to the treaties of 1760 to 61. In order to be protected under those treaties, trade in forest products must be the modern equivalent or a logical evolution of Mi'kmaq use of forest products at the time the treaties were signed. On the facts of these cases, the evidence supports the conclusion that trade in forest products was not contemplated by the parties and that logging is not a logical evolution of the activities traditionally engaged in by Mi'kmaq at the time the treaties were entered into[112].

Summary

Treaty Rights

- The treaties of 1760-61 do not confer on modern Mi'kmaq a right to log contrary to provincial regulation
- The truck house clause of the treaties was a trade clause which only granted the Mi'kmaq the right to continue to trade in items traditionally traded in 1760-61, and only those trading activities are protected
- The trial judges applied the proper test and the evidence supports their conclusion that the commercial logging that formed the basis of the charges against the accused was not the logical evolution of a traditional Mi'kmaq trading activity in 1760-61.

Aboriginal Title

- The accused did not establish that they hold aboriginal title to the lands they logged

[111] *Ibid.* at 271 to 279 para. 27 to 141.
[112] *Ibid.* at 265 to 268 para. 110 to 118.

- *Delgamuukw* requires that in analyzing a claim for aboriginal title, both aboriginal and European common law perspectives must be considered.
- The accused did not assert an aboriginal right to harvest forest resources but aboriginal title.
- Aboriginal title to land is established by aboriginal practices that indicate possession similar to that associated with title at common law.
- The trial judges in both cases applied the proper test in requiring proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of the assertion of sovereignty, and there was no ground to interfere with their conclusions as the evidence did not establish aboriginal title

***R Sappier/Grey*[113]**

The respondents, Mr. D. Sappier and Mr. C. Polchies who are Maliseet and Mr. D.J. Grey who is Mi'kmaq, were charged under New Brunswick's *Crown Lands and Forests Act* [114]with unlawful possession of or cutting of Crown timber from Crown lands. The logs had been cut or taken from lands traditionally harvested by the respondents' respective First Nations. Those taken by Mr. Sappier and Mr. Polchies were to be used for the construction of Mr. Polchies' house and the residue for community firewood. Those cut by Mr. Grey were to be used to fashion his furniture. The respondents had no intention of selling the logs or any product made from them. Their defence was that they possessed an aboriginal and treaty right to harvest timber for personal use. They were acquitted at trial. Mr. Sappier and Mr. Polchies' acquittals were upheld by the Court of Queen's Bench and the Court of Appeal. Mr. Grey's acquittal was set aside by the Court of Queen's Bench but restored on appeal. Mr. Grey did not pursue his treaty right claim before the Court of Appeal or before the Supreme Court.

Given the test for aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people[115] and that the way of life of the Maliseet and the Mi'kmaq during the pre-contact period was that of a migratory peoples who lived from fishing and hunting used the rivers and lakes of Eastern Canada for transportation. The record also showed that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel. The question directed at the Court was: whether the Maliseet and

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[113] *R. v. Sappier/Grey*, [2006] SCC 54.
[114] *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1, ss. 67(1)(*a*), (*c*), 67(2).
[115] *Van der Peet supra* note 10.

Mi'kmaq have an aboriginal right to harvest wood for personal uses on Crown lands, and therefore, must be characterized as a right to harvest wood for domestic uses as a member of the aboriginal community. This right was so characterized to have no commercial dimension, and thus the harvested wood cannot be sold, traded or bartered to produce assets or raise money, even if the object of such trade or barter is to finance the building of a dwelling. Further, it is a communal right; it cannot be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve. Lastly, the right is site-specific, such that its exercise is necessarily limited to Crown lands traditionally harvested by members' respective First Nations. Under these situations, the respondents possess an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by their respective First Nations[116].

Although very little evidence was led with respect to the actual harvesting practice, an aboriginal right can be based on evidence showing the importance of a resource to the pre-contact culture of an aboriginal people. Courts must be flexible and be prepared to draw necessary inferences about the existence and integrality of a practice when direct evidence is not available. The evidence in these cases established that wood was critically important to the pre-contact Maliseet and Mi'kmaq, and it can be inferred from the evidence that the practice of harvesting wood for domestic uses was significant, though undertaken primarily for survival purposes[117].

A practice undertaken for survival purposes can be considered integral to an aboriginal community's distinctive culture. The nature of the practice which founds an aboriginal right claim must be considered in the context of the pre-contact distinctive culture. "Culture" is an inquiry into the pre-contact way of life of a particular aboriginal community, including means of survival, socialization methods, legal systems, and, potentially, trading habits. The qualifier "distinctive" incorporates an element of aboriginal specificity but does not mean "distinct". The notion of aboriginality must not be reduced to racialized stereotypes of aboriginal peoples. A court, therefore, must first inquire into the way of life of the pre-contact peoples and seek to understand how the particular pre-contact practice relied upon by the rights claimants relates to that way of

[116] *Sappier supra* note 114 at 21, 24 to 26 & 72.
[117] *Ibid.* at 27 to 28 & 33.

life. A practice of harvesting wood for domestic uses undertaken in order to survive is directly related to the pre-contact way of life and meets the "integral to a distinctive culture" threshold[118].

The nature of the right cannot be frozen in its pre-contact form but rather must be determined in light of present-day circumstances[119]. The right to harvest wood for the construction of temporary shelters must be allowed to evolve into one to harvest wood by modern means to be used in the construction of a modern dwelling. The site-specific requirement was also met. The Crown conceded in the case of Mr. Sappier and Mr. Polchies and the evidence established in the case of Mr. Grey that the harvesting of trees occurred within Crown lands traditionally used for this activity by members of their respective First Nations as one of their treaty rights[120].

Summary

- Aboriginal rights are founded upon practices, customs, or traditions which were integral to the distinctive pre-contact culture of an aboriginal people
- The way of life of the Maliseet and of the Mi'kmaq during the pre-contact period was that of migratory peoples who lived from fishing and hunting and who used the rivers and lakes of Eastern Canada for transportation and the record showed that wood was used to fulfill the communities' domestic needs for such things as shelter, transportation, tools and fuel
- The relevant practice in the present cases was characterized as a right to harvest wood for domestic uses as a member of the aboriginal community, and this right has no commercial dimension and the harvested wood cannot be sold, traded or bartered to produce assets or raise money, even if the object of such trade or barter is to finance the building of a dwelling
- It was found to be a communal right; it cannot be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve
- The right is site-specific, such that its exercise is necessarily limited to Crown lands traditionally harvested by members' respective First Nations.
- In these cases, the respondents possessed an aboriginal right to harvest wood for domestic uses on Crown lands traditionally used for that purpose by their respective First Nations
- The Court upheld the right to harvest timber for shelter, transportation, tools and fuel

[118] *Ibid.* at 38 & 45 to 48.
[119] *Sparrow supra* note 1.
[120] *Ibid.* at 48 & 52 to 53.

***Gitxsan and other First Nations*[121]**

On December 10, 2002, Mr. Justice Tysoe issued a single set of Reasons for Judgment for three proceedings under the citation of *Gitxsan and other First Nations v. British Columbia (Minister of Forests)*. He held that in each of the petitioning First Nations they had a good *prima facie* claim of Aboriginal title and a strong *prima facie* claim of Aboriginal rights with respect to at least part of the areas included within the lands covered by Skeena's tree farm and forest licenses. He further held that the Minister had not satisfied his duty of consultation and accommodation before he consented to the change in control of Skeena. However, Mr. Justice Tysoe declined to quash the decision of the Minister at that time, with the view that he should be given further opportunity to fulfill his duty. He did granted liberty to each of the Petioners to apply again to the Courts with respect to any question regarding the fulfillment of his duty, and to be able to re-apply to quash the decision in the event that the Minister failed to fulfill his duty. In each of these three proceedings, the Petitioners challenged the decision of the Minister of Forests (the "Minister") to consent to the change of control of Skeena Cellulose Inc. to that of NWBC Timber & Pulp Ltd. (who became the owner of all of the shares in the capital of Skeena). The Gitanyow First Nation further challenged the degree of consultation that they received and were not satisfied with the level accommodation they had been afforded by the Minister.

Skeena Cellulose (Skeena) has been involved in the forestry industry in northwestern British Columbia for many years. The company, besides holding several licences issued under the *Forest Act*[122], R.S.B.C. 1996, c. 157 (the "*Act*") in connection with its operations, has a pulp mill in Prince Rupert and, either directly or indirectly through subsidiaries, it operates several saw mills. The main licence held by Skeena is a tree farm licence which gives it the exclusive right to harvest timber in three areas covered by it to the extent of the annual allowable cut attached to the licence in the approximate amount of 600,000 cubic metres of timber. Parts of the areas covered by the tree farm licence are among the lands claimed by the Gitxsan, Gitanyow, the Metlakatla and the Lax Kw'alaams First Nations.

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[121] *Gitxsan supra* note 11.
[122] *Forest Act,* R.S.B.C. 1996, c. 157 (*Forest Act*).

As with all other tree farm licences issued under the *Act*, Skeena's tree farm licence has a term of 25 years. Section 36 of the *Act* sets out a procedure for the replacement of a tree farm licence every five years and each replacement licence has a term of 25 years, so that the practical effect of a replacement is to extend the term by five years. If a licence is not replaced at the end of the five year period, the licence continues in existence for the remaining 20 years of its term and it then expires with no right of replacement. Forest licences give the holder the right to harvest an annual volume of timber within timber supply areas. Unlike a tree farm licence, a forest licence does not give its holder the exclusive right to harvest timber within a timber supply area. The chief forester determines the allowable annual cut for a particular timber supply area and the volume is then apportioned among the holders of licences. A holder of a forest licence harvests timber in particular areas within the timber supply area in accordance with cutting permits issued by the Ministry of Forests.

Forest licences held by Skeena (and the forest licence held by Buffalo Head) relate to timber supply areas within the territories claimed by the petitioning First Nations. Skeena also holds at least six forest licences and a seventh forest licence is held by Buffalo Head Forest Products Ltd. ("Buffalo Head"), a company which was owned by Skeena until the transaction in question. Skeena has been encountering financial difficulties for the past decade. It sought the protection of the[123], in the mid-1990s and its two principal creditors, the Crown and The Toronto-Dominion Bank, became its shareholders through a numbered holding company (with an agreement to give shares to Skeena's employees in consideration of a 10% wage cut over 7 years). When there was a change in the provincial government in May 2001, the Ministry holding Skeena's shares was given the mandate of returning Skeena to private sector ownership.

Skeena's financial difficulties were continuing and it sought protection under the *CCAA* for a second time on September 5, 2001. These proceedings were supervised by Brenner C.J.S.C. A stay of proceedings was granted in the *CCAA* proceedings and it was extended several times while Skeena attempted to reorganize its financial affairs, principally through the mechanism of a sale of its assets or shares. On February 20, 2002, the Crown executed a purchase agreement with NWBC for the sale of its shares in

[123] *Companies' Creditors Arrangement Act*, R.S.C. 195, c. C-36 *(CCAA)*.

Skeena to NWBC. Based on the purchase agreement, a restructuring plan was formulated to give a limited recovery to Skeena's creditors ($6 million for the secured creditors and $2 million, or 10 cents on the dollar, for the unsecured creditors). Skeena's creditors approved the restructuring plan at creditor meetings on April 2. The plan was sanctioned by Brenner C.J.S.C. on April 4, 2002. The closing of the share transaction and the implementation of Skeena's restructuring plan were scheduled for April 29, 2002. The latest extension of the stay in the *CCAA* proceedings was set to expire on April 30, 2002 and, if the restructuring was not completed by April 30, 2002, Skeena was to be assigned into bankruptcy. These deadlines were capable of further extension but it is not known whether Brenner C.J.S.C. or NWBC would have been prepared to grant an extension of any significant length. One of the conditions of the purchase agreement was that the Minister consent to the change of control of Skeena. As the transaction was scheduled to complete by April 29, 2002, the Minister was required to make his decision by this date.

By letters dated March 27, 2002, the Ministry of Forests wrote to the First Nations which it considered would be potentially impacted by the transfer of control of Skeena to NWBC. The letters stated that the Ministry would arrange a meeting with each First Nation between April 3 and 12, at which it proposed to outline the transaction, and that it would then look forward to hearing from the First Nation regarding the nature and extent of any aboriginal interests that the First Nation felt may be impacted by the proposed transaction. Representatives of the Ministry subsequently met with some of the First Nations between April 9 and 22, 2002. A representative of NWBC also attended these meetings[124].

***Yal*[125]**

Representatives of the Ministry of Forests met with representatives of the Gitxsan First Nation on April 12 and 19, 2002. The April 12 meeting was public and it was attended by non-Gitxsan persons as well as Gitxsan representatives. It is unclear whether the meeting was expressed as a consultation on aboriginal rights and title. A Gitxsan

[124] *Gitxsan supra* note 11 at para.12.
[125] *Yal et al v. the Minister of Forests of BC and Skeena Cellulose Inc.*, 2005 BCSC 994 (*Yal*).

representative asked to see a copy of the agreement between the Crown and NWBC, and was told that it was confidential. One of the Gitxsan speakers expressed the view that there was nothing upon which the Gitxsan could make a decision to approve or disapprove of the transaction. Another Gitxsan speaker stated that some of the Gitxsan Houses opposed the transfer because they were not consulted on activities occurring within their territories. Employment concerns were also raised by the Gitxsan. At the conclusion of the meeting, the Gitxsan stated that there had to be a thorough consultation process and that "mere consultation" was not sufficient. On April 15, the Chair of the Gitxsan Treaty Society wrote to the Minister about the April 12 meeting and future meetings. The letter stated that there must be a discussion of the process for consultation and accommodation. The letter listed a number of issues in respect of which the Gitxsan wished to be consulted. It requested seven items of information. The letter concluded by expressing the view that the Gitxsan needed to be fully informed of the implications of the transaction before they could be properly consulted. The Gitxsan First Nation has never received a reply to this letter. The April 19 meeting lasted approximately 1 ½ hours. A number of Gitxsan speakers expressed concerns about such matters as unemployment, the lack of any offers of partnership and the removal of resources from their territories. The meeting concluded with a Gitxsan speaker stating that the Gitxsan did not view the meeting as a consultation meeting and that they were prepared to enter into proper consultation when they had full information. One of the Ministry's representatives responded that the concerns expressed by the Gitxsan at the meeting would be forwarded to the Minister[126].

***Lax Kw'alaams*[127]**

No meetings occurred between representatives of the Ministry and the Lax Kw'alaams First Nation. A meeting was scheduled for April 16 but it was postponed by the First Nation after a letter dated April 9 was written to the Minister by the Chief Councilor of the Lax Kw'alaams Indian Band and the President of the Allied Tsimshian Tribes Association (the "Association"). The letter requested that the Minister withhold

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[126] *Gitxsan supra* note 11 at para. 14 to 16.
[127] *LaxKw'alaams Indian Band v. Minister of Forests of BC and West Fraser Mills Ltd.*, 2004 BCCA 392.

his consent to the transfer of control of the forest tenures until he had completed a full and appropriate consultation process with the Lax Kw'alaams Indian Band. It expressed the view that a proper consultation would (1) involve a distinct and separate process, (2) involve a full discussion of the proper allocation of forest resources in the aboriginal title lands of the Lax Kw'alaams and (3) involve discussion of compensation for past and future infringements of their aboriginal rights and title. No response to this correspondence was received until May 8, when the Minister sent a letter in which he stated, among other things, that he had consented to the proposed change of control after reviewing all of the information provided to him. On April 23, 2002, legal counsel for the Lax Kw'alaams and the Association wrote to the lawyer with the Ministry of Attorney General who was involved in the meetings with the other First Nations. The lack of response to the April 9 letter was noted and a request was made for a consultation meeting with the Minister or his representative. No meeting took place. The Lax Kw'alaams band manager was told by a Ministry official on April 24 that there was no point in holding a meeting and that nothing could be done in view of the timetable for the transaction[128].

***Metlakatla*[129]**

One meeting was held on April 15, 2002 between representatives of the Metlakatla Indian Band and Ministry officials. The meeting lasted for approximately one hour. At the outset of the meeting, a Metlakatla representative stated that it was a highly flawed consultation process with inadequate time frames and that the Metlakatla could not support the transaction or the process without proper and meaningful consultation. The representative stated that he considered the meeting to be an information sharing meeting. At one point in the meeting one of the Metlakatla asked if the meeting was a result of the *Haida* case consultation ruling (*Haida No. 1*[130]) had been issued less than two months earlier), the lawyer from the Ministry of Attorney General responded that it was and she concurred that the process was less than adequate as far as consultation was concerned. She also stated that the government officials were not at the meeting to

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[128] *Gitxsan supra* note 11 at para.17 to 18
[129] *Ibid.* at para. 19 to 29.
[130] *Haida v. British Columbia (Minister of Forests),* 2004 3 S.C.R. 511 [*Haida*].

request approval of either the transaction or the process. Concerns were expressed by the Metlakatla at the meeting about such matters as the management of their own resources, the environment and unemployment. A request was made for more specific accommodation of the Metlakatla concerns. The Attorney General's lawyer said that the concerns, including the concerns about the short time frame and lack of information, would be presented to the Minister[131].

The Judgment

In Justice Tysoe's opinion there was no meaningful consultation by the Crown of the petitioning First Nations with respect to the Minister's decision and there was no attempt whatsoever to accommodate their concerns. As it was stated in *Mikisew Cree First Nation*[132] consultation must be undertaken with the genuine intention of substantially addressing First Nation concerns. It is not sufficient for the communication to be the same as the communication with other interested stakeholders. In *Halfway River*[133], the B.C. Court of Appeal said that the duty to consult imposes on the Crown the obligation to reasonably ensure that the aboriginal peoples are provided with all necessary information in a timely way and to ensure that their representations are seriously considered and, where possible, integrated into the proposed course of action. Tysoe found as follows:

1. the level of communication by the Crown with the petitioning First Nations was not significantly different from the level of communication with other stakeholders;
2. the petitioning First Nations were not provided with all necessary information in a timely way (or at all) prior to the Minister's decision (two examples are the refusal of the Crown to disclose any of the terms of the sale agreement and the fact that the Minister did not require a business plan to be produced until after the change in control had taken place); and
3. the Crown did not undertake the consultation with a genuine intention of substantially addressing the concerns of the petitioning First Nations because, as reflected in the letters comprising the Minister's consent, the Crown considered the transaction to be neutral with respect to any aboriginal right or title[134].

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[131] *Gitxsan supra* note 11 at para 19 to 22
[132] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388.
[133] *Halfway River First Nation v. BC (Minister of Forests)* 1999 BCSC 470.
[134] *Gitxsan supra* note 11 at para. 88.

In the case of consultation with the Lax Kw'alaams First Nation, it was nonexistent. It was not unreasonable for the Lax Kw'alaams to decline to meet until they had received a response to their April 9, 2002 letter. Their request for a consultation meeting by way of the letter dated April 23 from their legal counsel was essentially ignored by the Minister. Similarly, at the meeting with the Metlakatlas on April 15, 2002 the legal counsel for the Crown conceded that the meeting did not constitute consultation as required by *Haida No. 1*[135]. However, in his submissions, counsel for the Crown made reference to the time constraints facing the Minister in view of the April 29, 2002 deadline and he argued that the Minister acted reasonably in striking a balance between the concerns of the First Nations and the interests of creditors, employees and contractors of Skeena. However it was noted by the Court that the Crown did not initiate any communication with the First Nation groups until over a month after it entered into the sale agreement with NWBC. The sale agreement was signed on February 20, 2002 and the first letter to the First Nations was sent on March 27, 2002. Hence, the Crown itself contributed to the short length of the time constraints. On a legal basis, the shortness of time and economic interests are not sufficient to obviate the duty of consultation.

As Mr. Justice Tysoe found that that the Minister did not satisfy his duty of consultation and accommodation as it relates to the petitioning First Nations before he made his decision to consent to the change of control of Skeena and he made the following orders and declarations:

> (a) I declare that the Minister had in April 2002 and continues to have a legally enforceable duty to each of the petitioning First Nations to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of each of the petitioning First Nations, on the one hand, and the short-term and the long-term objectives of the Crown and Skeena to manage such of the lands covered by the licences issued to Skeena under the *Act* as are claimed by the petitioning First Nations in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand;
> (b) I declare that that the Minister is required to provide the Petitioners with all relevant information reasonably requested by them;

[135] *Haida supra* note 10.

(c) I order that the parties have liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation, including the production of documents and other provision of information;
(d) I order that the relief in the Petitions seeking to quash or set aside the decision of the Minister to consent to the change of control of Skeena is adjourned generally, with liberty to re-apply in the event that any of the Petitioners do not believe that the Minister is fulfilling the duty which I have declared in clause (a);
(e) I order that the Petitioners are entitled to their party and party costs of their respective proceedings up to the date hereof; and
(f) I order that the balance of the relief sought in the Petitions, including the request by the Gitanyow for a declaration that the Minister breached a duty to negotiate a treaty in good faith and the claim of the Gitanyow relating to the major amendment of the forest licence of one of Skeena's subsidiaries and the plan for the small business forest enterprise program, is dismissed[136].

Summary

- It was held that each of the petitioning First Nations had a good *prima facie* claim of Aboriginal title and a strong *prima facie* claim of Aboriginal rights with respect to at least part of the areas included within the lands covered by Skeena's tree farm and forest licenses.
- It was further held that the Minister had not satisfied his duty of consultation and accommodation before he consented to the change in control of Skeena.
- The judge declined to quash the decision of the Minister at that time, in order that the Minister should be given further opportunity to fulfill his duty
- The judge granted liberty to the First Nation Communities to apply with respect to any question relation to the fulfillment of his duty and to re-apply to quash the decision in the event that the Minister failed to fulfill his duty.

***Gitanyow First Nation*[137]**

Consultation and Accommodation

In a separate judgment, Mr. Justice Tysoe determined that the concerns raised by the Gitanyow warranted a separate ruling. The concerns of the Gitanyow were in addition to the degree of consultation undertaken by the Minister and reached into the area of accommodation, by means of compensation as well as being able to be intimately associated with forest management and planning the cutting. The Gitanyow, unlike the other First Nation communities, initiated correspondence with the Minister as early as March 19, 2002, although the communications between the Ministry of Forests and the

[136] *Gitxsan supra* note 11 at para.157.
[137] *Gitanyow supra* note 12.

other First Nations commenced with the Ministry's March 27 letter, making reference to media reports of a sale of Skeena to NWBC and requesting confirmation that the forest tenures held by Skeena would not be transferred until the completion of "legally required consultation with a view of accommodating the Aboriginal rights and title of the Gitanyow". After a series of letters, the on April 9, the Gitanyow tabled a draft of a framework agreement for consultation and accommodation with the B.C. treaty negotiators (a copy was also given to NWBC). The purpose of this draft agreement was to set out a process for consultation and accommodation with respect to forestry operations and the granting or transferring of forest tenures affecting the territory claimed by the Gitanyow. No comments on the form of the agreement have been made by the Crown (although a letter written by the Deputy Minister of Forests on the business day immediately preceding the hearing of the Gitanyow's Petition on October 21, 2002 has indicated a willingness to hold a workshop to discuss the draft agreement). At the April 12, 2002 meeting the Gitanyow stated that they did not view the meeting as a consultation. During the meeting, the Gitanyow expressed concerns about the environment, unemployment of their people, a dwindling of resources and the effect of logging on fishing and game. A Gitanyow speaker raised the topic of NWBC's business plan and was told that NWBC was not prepared to discuss its business plan in detail until the transaction closed. An issue was also raised about the fact that the Buffalo Head tenure was being excluded from the transaction and NWBC's President replied that it was expedient to exclude it. On April 21, 2002 the chief treaty negotiator for the Gitanyow wrote to the Minister requesting certain information with respect to the proposed change of control of Skeena. The letter stated that the April 12 meeting did not constitute even a beginning of consultation and that the requested information was needed to start the consultation process. The only response to this letter was the Minister's May 8, 2002 letter stating that he had consented to the change of control of Skeena[138].

The Gitanyow First Nation was not satisfied with the level of consultation and accommodation which they had been afforded by the Minister. They applied for various forms of relief, including a declaration that the Minister had failed to provide meaningful and adequate consultation and accommodation, and an order quashing the decision of the

[138] *Ibid.* 18 at para. 23 to 29.

Minister to consent to the change in control of Skeena. Starting in October 18, 2002, the Deputy Minister of Forests wrote to Glen Williams, Chief Negotiator for the Gitanyow Hereditary Chiefs, offering to have the Ministry of Forests (1) provide capacity funding of $25,000 to the Gitanyow, (2) enter into negotiations with the Gitanyow for a consultation work plan, and (3) participate in a workshop to discuss the consultation framework agreement which had been drafted by the Gitanyow. On November 18, 2002, Mr. Williams replied favourably to the Deputy Minister but requested more capacity funds and a funding agreement for $40,000 was entered into by the parties.
On November 21, 2002, the Government of British Columbia, as represented by the Ministry of Forests, the Ministry of Sustainable Resource Management and the Treaty Negotiation Office, provided the Gitanyow with a draft document entitled Memorandum of Understanding on Recognition and Consultation (Memorandum of Understanding). The draft Memorandum of Understanding covered topics such as consultation funding, consultation on anticipated forest development activities and administrative decisions, communication and dialogue, a workshop on sustainable resource management planning and exploring economic opportunities for the Gitanyow in the Cranberry and Buffalo Head tenure areas[139].

Legal counsel for the Gitanyow reviewed the draft Memorandum of Understanding and produced a revised version of it on November 25, 2002. The revisions included a recognition by the Province of the Gitanyow having a good *prima facie* case of title, the right of the Gitanyow to share the land and resources of the territory it claimed, an acknowledgement that the statutory decision maker must consider various aspects of Aboriginal title, including the economic component, and a commitment that the parties would endeavour in the Memorandum of Understanding to provide for an economic component for the Gitanyow. Negotiations between the Province and the Gitanyow on the Memorandum of Understanding continued over the course of the following six months in the form of all day meetings and correspondence. By April 2003, the negotiations had expanded beyond the scope of a consultation process. The Province offered to pay the Gitanyow the sum of $325,000 annually to address the economic component of the infringement of the Gitanyow's *prima facie*

[139] *Ibid.* at para. 5 to 6.

claim to Aboriginal title. The Province was also willing to give the Gitanyow the opportunity to access 400,000 cubic metres of timber. The negotiations had also become linked to the treaty process, for example, there was an issue whether land use planning should be linked to or contingent upon the parties entering into an agreement in principle in the treaty process. An impasse was reached on June 24, 2003 and these unresolved issues included the basis of revenue sharing, details of the tenure to be made available to the Gitanyow and the silvicultural obligations associated with the Buffalo Head tenure. At this point in time the Province held that it had been following the consultation process set out in the Memorandum of Understanding, this too was disputed by the Gitanyow, who say that the Gitanyow Forest Consultation Council had not been created as contemplated in the Memorandum[140].

In February 2003, the Province announced that it intended to pursue two initiatives with First Nations, which were revenue sharing and access to forest tenures, and in March 2003, the Province introduced the *Forestry Revitalization Act*[141], which took back from licensees 20% of the annual allowable cut from replaceable forest licenses and tree farm licenses, with the view of allocating these forest tenures to First Nations. The Province also appropriated the sum of $95 million for forestry revenue sharing with First Nations over the period from 2003 to 2005. The intent of these two initiatives by the Province was to reach accords with participating First Nations in the form of an agreement known by several different names, including a Forest and Range Agreement[142].

Apparently, as a result of the ongoing negotiations with the Gitanyow in respect of the Memorandum of Agreement, the Province initially decided to forgo the negotiation of a Forest and Range Agreement with the Gitanyow and to incorporate the topics of revenue sharing and tenure allocation into the ongoing negotiations. It was these topics which led, at least in part, to the impasse in the negotiations on the Memorandum of Agreement. Although there were further meetings and letters between the Province and the Gitanyow in the summer and fall of 2003, but nothing of substance was accomplished

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[140] *Ibid.* at para. 7 to 10.
[141] *Forestry Revitalization Act* S.B.C. 2003, c. 17.
[142] *Gitanyow supra* note 12 at para.11.

with respect to their Memorandum of Understanding. On December 5, 2003, Mr. Friesen, an Assistant Deputy Minister of Forests, wrote to Mr. Williams stating that the Ministry of Forests was prepared to meet with the Gitanyow to outline the components of a five year Forest and Range Agreement, which would include economic benefits of revenue sharing of $340,000 per year and access to 86,000 cubic metres of timber per year. The letter also stated that the Agreement would deal with economic benefits, but that the Province would still have the obligation to consult and seek workable accommodations of the cultural interests of the Gitanyow[143].

Legal counsel for the Gitanyow replied to this letter by proposing a meeting to discuss the Forest and Range Agreement. A draft of the Agreement was sent by the Province to Mr. Williams in early January 2004. The affidavit materials filed in connection with this application did not include a copy of the draft Agreement, but they did include two versions of the form of the Agreement entered into by two of the other First Nations which had also challenged the decision of the Minister to consent to the change of control of Skeena, the Lax Kw'alaams Indian Band and the Metlakatla Indian Band. The Agreements are approximately 15 pages in length, and some of the more important provisions are as follows:

> (a) a forest licence will be made available by the Minister to enable the First Nation to harvest a specified volume of timber over the 5 year term of the Agreement (650,000 cubic metres in the case the Lax Kw'alaams and 160,000 cubic metres in the case of the Metlakatla);
> (b) the Province will provide a specified amount of money to the First Nation to develop a tenure business plan ($40,000 in the case of the Lax Kw'alaams and $25,000 in the case of the Metlakatla);
> (c) the Province will provide a specified annual amount of money to the First Nation as a revenue sharing economic benefit to address workable interim accommodation of the First Nation's economic interest during the term of the Agreement ($1,370,000 in the case of the Lax Kw'alaams and $345,000 in the case of the Metlakatla);
> (d) The Province will consult with the First Nation on all forest development plans, forest stewardship plans and range plans;
> (e) the First Nation agreed that the Province has fulfilled its duties to consult and seek workable interim accommodation with respect to the Minister's consent to the change of control of Skeena and the economic component of potential infringements of Aboriginal interests from logging operations

[143] *Ibid*. at para. 12 to 13.

and decisions made by a Ministry of Forests statutory decision maker during the term of the Agreement;

(f) The First Nation will participate in the timber supply review processes affecting the lands claimed by the First Nation;

(g) The payments of the annual sums under the Agreements can be suspended or cancelled by the Province in certain specified circumstances[144].

The two Agreements are similar, but they are not identical. For example, the Metlakatla Agreement has an express provision making it clear that the Province is still required to fulfill its duty to consult and seek a workable accommodation if a statutory decision maker is of the opinion that a decision will create a potential infringement beyond the economic component of Metlakatla's Aboriginal interests, including the cultural component of the Aboriginal interests, more specifically culturally modified trees. Mr. Williams replied to the Province that the draft Forest and Range Agreement did not incorporate two critical elements which had been negotiated in the context of the Memorandum of Understanding; namely, (1) an acknowledgement of the Gitanyow's *prima facie* case of Aboriginal rights and title, and (2) negotiations with respect to long term land use planning for the Gitanyow territory. By letter dated January 27, 2004, the Province replied to Mr. Williams that the Forest and Range Agreements were intended to provide interim economic accommodation during the negotiations of treaties and that the only negotiations available in connection with the Agreements were restricted to the topics of specific elements of the forest tenures and process elements for consultation and accommodation of non-economic components. Additional correspondence was exchanged in February and March 2004, but no progress was achieved[145]. On May 18, 2004, Mr. Williams wrote to Mr. Friesen outlining the major four areas of disagreement in connection with the attempts to reach a forestry accommodation agreement; namely, revenue sharing, consultation in advance, forest tenure and joint planning.

Mr. Williams' May 18, 2004 letter grouped the areas of disagreement into four categories relating to revenue sharing, consultation in advance, forest tenure and joint planning. In his submissions, counsel for the Gitanyow argued that the conduct of the Minister was inconsistent with the Crown's duty in five respects, three of which coincide

[144] *Ibid.* at para.14.
[145] *Ibid.* at para.15 to 17.

with Mr. Williams' letter. First, the Province had offered access to 86,000 cubic metres of timber a year. Mr. Williams' point was that the specifics of the offered tenure were left to be determined in the future. He reiterated the Gitanyow proposal that they be provided with 100,000 cubic metres of timber a year and that the specifics of the tenure be contained in the Agreement. With respect to revenue sharing, the amount which the Province has offered to each First Nation as a revenue sharing economic benefit under the Forest and Range Agreements was calculated on the basis of $500 a year for each member of the First Nation according to the records of the Federal Department of Indian and Northern Affairs. As at March 31, 2003, there were 680 Gitanyow registered with the Department of Indian and Northern Affairs, and this figure was the basis of the $340,000 offer made by the Province to the Gitanyow. The Gitanyow make two points about the basis of the calculation. First, they say that, rather than basing the economic benefit on the number of people in each First Nation, it should be more properly based on the volume of timber harvested in their territory. Second, they say that, if they are to accept the per capita basis of calculation, the revenue sharing should be based on the Gitanyow's Wilp (house) membership rather than the number of people registered with the Department of Indian and Northern Affairs. On the second point, the Gitanyow point to the treaty negotiations, where it has been agreed with the Province and Canada that the Gitanyow are an Aboriginal group whose membership is not based on membership under the *Indian Act*. As part of the treaty negotiations, it has been agreed that participation in the final treaty will be determined in accordance with a chapter in the draft Agreement in Principle entitled Eligibility and Enrolment. Under that chapter, a person is eligible to be enrolled under the final treaty if the person is a member of a Wilp by birth or adoption or is a descendant of such a person. Mr. Williams estimates that the approximate number of Gitanyow members on this basis of eligibility is 2,500. If this figure is used in place of the 680 registered Gitanyow, the annual per capita payment would increase from $340,000 to $1,250,000. In his June 17, 2004 reply to Mr. Williams, Mr. Friesen stated that the Province was willing to include a clause in the Forest and Range Agreement that would amend the calculation of the revenue sharing benefit once a satisfactory enrolment and eligibility review is concluded as part of the treaty process. Counsel for the Gitanyow submitted that this position is disingenuous because the Province has refused to

provide the capacity funding for the Gitanyow to conduct a proper census based on the provisions of the Eligibility and Enrolment chapter[146].

The third point has to do with "Consultation in Advance of the transfer of the control of Skeena Tree Farm Licences. The Gitanyow, in addition to agreeing in the Forest and Range Agreement that the Minister has satisfied his duty of consultation and accommodation with respect to his decision to consent to the change of control of Skeena, the Gitanyow were being asked to agree that the Province has fulfilled its duty with respect to the economic component of potential infringements of their Aboriginal interests for the next five years. In essence, the Province is offering the annual payment in exchange for the Gitanyow agreeing to waive their interim rights with respect to the economic aspect of infringement for a period of 5 years, together with the Minister's past action in consenting to the change of control of Skeena[147].

The fourth point, that of Joint Planning, the Gitanyow wanted to be involved in strategic joint planning of higher level decisions. There was a section of the draft Memorandum of Understanding dealing with the joint preparation of a sustainable resource management plan, but the Province stipulated that it would be dependent on an agreement with either Canada or the Province on funding being provided through a treaty related measure. It was then proposed that there would be a pilot landscape unit planning process for the Gitanyow territory. However, things did not progress further when the impasse on the Memorandum of Understanding was reached in June 2003[148].

The fifth point that was raised was related to extend in which pilot landscape unit panning would indeed allow the Gitanyow in higher level strategic planning. Although the Ministry of Sustainable Resource Management, which has the mandate for resource planning, has an interest in engaging the Gitanyow in higher level planning, it does not have the funds to support a planning initiative in the Gitanyow territory. The original proposal touted by the Ministry of Sustainable Resource Management would include the Gitanyow gathering and mapping information relating to their interests in the area, followed by the joint development of an ecosystem network map providing for integrated

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[146] *Ibid.* at para. 26.
[147] *Ibid.* at para. 29.
[148] *Ibid.* at para.30.

management objectives. The subsequent exchange of correspondence between Mr. Williams and Mr. Friesen clarified that (1) the process was not intended to be the same as the pilot project contained in the draft Memorandum of Understanding, (2) the process was intended to assist the District Manager in determining the availability of additional timber in the Cranberry timber supply area in a manner that incorporates Gitanyow interests, and (3) any management objectives developed by the joint planning team would be used by licensees on a voluntary basis only. The Gitanyow said that this process does not offer any meaningful form of joint land use planning[149].

With respect to the present case, Mr. Justice Tysoe already held that the Gitanyow had a good *prima facie* claim of Aboriginal title and a strong *prima facie* claim of Aboriginal rights with respect to at least part of the territories claimed by them. He also held that there was an infringement of asserted Aboriginal title or rights which required the Minister to fulfill the Crown's duty of consultation and accommodation prior to consenting to the change of control. In this latter regard, he held that (1) the decision of the Minister to give his consent to the change of control of Skeena did have an impact on the Gitanyow and, in any event, (2) (a) the duty is continuing and the Crown was obliged to honour its duty each time it deals with the license if it has not fulfilled its duty when previously dealing with the licence, and (b) the Crown did not fulfill its duty of consultation and accommodation when it had last replaced the forest tenure licences[150]. It was assumed by the Court that the Crown has probably had knowledge of the Gitanyow's claims for many years, and the affidavit materials in this case demonstrate that the Crown has had knowledge of the claims since at least 1993, when the Gitanyow submitted it's Statement of Intent for the purpose of entering into treaty negotiations. All of Skeena's licences have been replaced since 1993 without adequate consultation and accommodation by the Crown[151].

[149] *Ibid.* at para.22 to 28.
[150] *Ibid.* at para.43.
[151] *Ibid.* at para. 46.

Negotiation of the Forest and Range Agreement

With respect to the negotiation of the Forest and Range Agreement, Mr. Justice Tysoe felt that it would not be appropriate for him to reach any conclusions at this time. However, he offered a set of non-binding observations that he hoped would assist the parties in the event that they decide to continue their negotiations on the Agreement. It appeared that for all intensive purposes, the Province had demonstrated a limited degree of flexibility in changing the terms of the Agreement. He agreed the position of the Gitanyow that it is more theoretically logical for the First Nations to be compensated in respect of the economic component of infringement on the basis of the volume of trees harvested in their claimed territory. However, the Province has committed itself to a system of compensation based on the number of Aboriginal people. It is understandable that the Province would not want to deviate from this system of compensation once established. On the one hand, if compensation is to be based on the number of Aboriginal people, it is reasonable for the Gitanyow to be compensated on the basis of their true numbers, as opposed to their numbers according to the records of the Department of Indian and Northern Affairs. Yet on the other hand, it was not unreasonable for the Province to look to the number of registered Gitanyow in view of the fact that the 1993 Statement of Intent filed by the Gitanyow stated that there were 714 Aboriginal people represented by them. The Province has offered to include a clause in the Agreement which would adjust the revenue sharing calculation when the census pursuant to the Eligibility and Enrolment chapter is completed. One potential solution would be to make the adjustment retroactive to the beginning of the Agreement. While Mr. Tysoe understood the desire of the Gitanyow to be involved in a joint planning process, I also appreciate at least two of the Province's difficulties. The first is that, while input of the Gitanyow may be desirable, they are not entitled to a veto. The second is the cost of funding of such a process[152].

[152] *Ibid.* at para. 57.

Remedies

The relief sought by the Gitanyow on this application was as follows:

1. a declaration that the Minister has failed to provide meaningful and adequate consultation and accommodation to the Gitanyow with respect to his consent to the change of control of Skeena;
2. an order quashing or setting aside the Minister's decision to consent to the change of control of Skeena;
3. a declaration that the decision of the Minister to give consent to the change of control of Skeena was a breach of the Crown's duty of consultation and accommodation and of the Crown's constitutional duties towards the Gitanyow;
4. a declaration that the Crown's duty to consult is not an obligation owed to "status" Indians under the *Indian Act* but rather is an obligation owed to all persons who have the right to exercise their Aboriginal rights in the affected territory and, in this case, is an obligation to the Gitanyow;
5. a declaration that the conduct of the Minister subsequent to the Initial Reasons was a breach of the Crown's duty of consultation and accommodation in that the Minister made the Forest and Range Agreement conditional on the requirement that the Gitanyow agree that consultation and accommodation had been fulfilled in respect of other decisions on forestry activities within the Gitanyow territory; and
6. an order prohibiting the Minister and the District Manager from advertising for sale any forest tenures arising out of Skeena's licences.

The declaration which Mr. Justice Tysoe was prepared to make only addressed clauses (1) and (3) above. With respect to the relief referred to in clause (2) above, I continue to believe that it would not be appropriate to quash or set aside the Minister's consent to the change of control of Skeena for the reasons expressed in the Initial Reasons and for the additional reason that the Crown has demonstrated a willingness to consult with the Gitanyow and accommodate their interests, albeit not yet adequately. It was the opinion of Tysoe that the relief referred to in each of clauses (4), (5) and (6) goes beyond the parameters of the relief requested in the Gitanyow's Petition and, in any event, he did not grant such relief. The relief requested in clauses (4) and (5) were for declarations on isolated aspects of the negotiations related to the Forest and Range Agreement, and he held that negotiations on the Agreement did not constitute consultation and accommodation for the purposes of the Minister's consent to the change of control of Skeena. The relief requested in clause (6) relates to the forest tenure which the Crown has taken back from Skeena as a result of Skeena's undercut over the past two years and the take-back provisions of the *Forest Act* and the *Forestry Revitalization Act*. Although

the Gitanyow were hoping to obtain some of this forest tenure and it has been part of the negotiations to date, Tysoe could not conclude that "no form of accommodation by the Crown would be adequate unless it included this forest tenure being given to the Gitanyow." Although Tysoe declared that the Crown has not yet fulfilled its duty of consultation and accommodation with respect to the decision of the Minister to consent to the change of control of Skeena, he encouraged the parties to resume negotiations[153]. As a result, Mr. Justice Tysoe felt that it would not be appropriate for him to reach any conclusions with respect to the negotiations of the Forest and Range Agreement. However, he offered the following non-binding observations to assist the parties in the event that they decided to continue their negotiations on the Agreement:

1. The Province has demonstrated a limited degree of flexibility in changing the terms of the Agreement. I can understand the reluctance of the Province to make substantial changes to the form of the Agreement in a round of negotiations with a First Nation because it would provide an impetus for further changes in the ensuing rounds of negotiations.
2. I agree with the position of the Gitanyow that it is more theoretically logical for the First Nations to be compensated in respect of the economic component of infringement on the basis of the volume of trees harvested in their claimed territory. However, the Province has committed itself to a system of compensation based on the number of Aboriginal people. It is understandable that the Province would not want to deviate from this system of compensation once established.
3. On the one hand, if compensation is to be based on the number of Aboriginal people, it is reasonable for the Gitanyow to be compensated on the basis of their true numbers, as opposed to their numbers according to the records of the Department of Indian and Northern Affairs. On the other hand, it was not unreasonable for the Province to look to the number of registered Gitanyow in view of the fact that the 1993 Statement of Intent filed by the Gitanyow stated that there were 714 Aboriginal people represented by them. The Province has offered to include a clause in the Agreement which would adjust the revenue sharing calculation when the census pursuant to the Eligibility and Enrolment chapter is completed. One potential solution would be to make the adjustment retroactive to the beginning of the Agreement.
4. While I certainly understand the desire of the Gitanyow to be involved in a joint planning process, I also appreciate at least two of the Province's difficulties. The first is that, while input of the Gitanyow may be desirable, they are not entitled to a veto. The second is the cost of funding of such a process.

[153] *Ibid.* at para. 65 to 67.

. **Negotiation of the Memorandum of Understanding**

The parties began negotiations on the Memorandum of Understanding as a means of establishing a framework for consultation. The negotiations expanded to address the economic component of the infringement of Aboriginal interests, but an impasse was reached in June 2003. It was the opinion of Mr. Justice Tysoe that the Crown had not yet fulfilled its duty of consultation and accommodation with respect to this issue. This was a unique situation because the Crown was a part owner of Skeena and benefited from the change of control. NWBC did not want to be burdened with the obligations associated with Buffalo Head, and the shares were transferred to a numbered company owned by the Crown. However, the affidavit evidence is unclear whether Timber Baron Contracting Ltd. acquired the shares of Buffalo Head from the Crown's numbered company or whether it acquired the forest licence from Buffalo Head. In these circumstances, the Crown's duty of consultation and accommodation is not fulfilled in my opinion by the fact that Buffalo Head's unfulfilled silviculture obligations appear to have been assumed by Timber Baron Contracting Ltd. (either as a result of a provision of the share purchase agreement or the provisions of s. 54.6 of the *Forest Act*). There is no evidence that Timber Baron Contracting Ltd. has the capability or intention of fulfilling these obligations. The Province at this point has not indicated what will done if Timber Baron does not fulfill the obligations. Apart from the other aspects of the negotiations, the Crown's failure to adequately address the issue of the Buffalo Head silviculture obligations led Mr. Justice Tysoe to conclude that it has not fulfilled its duty of consultation and accommodation as a result of the offers it made in the course of the negotiations on the Memorandum of Understanding. However, the situation with respect to the Buffalo Head silviculture obligations was unique as a result of the fact that these obligations relate to the replenishment of timber which has already been harvested in the territory claimed by the Gitanyow. There are also the facts that the Crown had an ownership interest in Skeena and that the Crown became the indirect owner of Buffalo Head when it was excluded from NWBC's acquisition of Skeena. It may be possible to address this issue by way of a monetary payment to the Gitanyow, but there has been no suggestion that a part of the compensation offered during the negotiations on the

Memorandum of Understanding was intended to provide an accommodation in respect of this aspect[154].

Remedies

The relief sought by the Gitanyow on this application was the following:

1. a declaration that the Minister has failed to provide meaningful and adequate consultation and accommodation to the Gitanyow with respect to his consent to the change of control of Skeena;
2. an order quashing or setting aside the Minister's decision to consent to the change of control of Skeena;
3. a declaration that the decision of the Minister to give consent to the change of control of Skeena was a breach of the Crown's duty of consultation and accommodation and of the Crown's constitutional duties towards the Gitanyow;
4. a declaration that the Crown's duty to consult is not an obligation owed to "status" Indians under the *Indian Act* but rather is an obligation owed to all persons who have the right to exercise their Aboriginal rights in the affected territory and, in this case, is an obligation to the Gitanyow;
5. a declaration that the conduct of the Minister subsequent to the Initial Reasons was a breach of the Crown's duty of consultation and accommodation in that the Minister made the Forest and Range Agreement conditional on the requirement that the Gitanyow agree that consultation and accommodation had been fulfilled in respect of other decisions on forestry activities within the Gitanyow territory; and
6. an order prohibiting the Minister and the District Manager from advertising for sale any forest tenures arising out of Skeena's licences[155].

Although it was noted by Tysoe that the parties had made significant progress it was still determined that the Crown had not yet fulfilled its duty of consultation and accommodation with respect to the decision of the Minister to consent to the change of control of Skeena (1 & 3). Mr. Justice Tysoe was prepared to make a declaration to that effect, but he did not believe that the remaining relief sought by the Gitanyow was appropriate or necessary at this stage. It is his view that the parties should resume negotiations on the Memorandum of Understanding (or the Forest and Range Agreement if both parties wish to do so) with the benefit of his views. Regarding clause (2) above, he believed that it would not be appropriate to quash or set aside the Minister's consent to the change of control of Skeena for the reasons expressed in the Initial Reasons and for

[154] *Ibid.* at para. 57 to 63.
[155] *Ibid.* at para. 64.

the additional reason that the Crown has demonstrated a willingness to consult with the Gitanyow and accommodate their interests, albeit not yet adequately. It was the opinion of Tysoe that the relief referred to in each of clauses (4), (5) and (6) goes beyond the parameters of the relief requested in the Gitanyow's Petition and, in any event, he did not grant such relief. The relief requested in clauses (4) and (5) was for declarations on isolated aspects of the negotiations related to the Forest and Range Agreement, and Tysoe held that the negotiations on the Agreement do not constitute consultation and accommodation for the purposes of the Minister's consent to the change of control of Skeena. The relief requested in clause (6) relates to the forest tenure which the Crown has taken back from Skeena as a result of Skeena's undercut over the past two years and the take-back provisions of the *Forest Act* and the *Forestry Revitalization Act*. Although the Gitanyow were hoping to obtain some of this forest tenure and it has been part of the negotiations to date, Tysoe could not conclude that "no form of accommodation by the Crown would be adequate unless it included this forest tenure being given to the Gitanyow." Although Tysoe declared that the declared that the Crown has not yet fulfilled its duty of consultation and accommodation with respect to the decision of the Minister to consent to the change of control of Skeena, he encouraged the parties to resume negotiations.

Summary

- The judge declared that the Crown has not yet fulfilled its duty of consultation and accommodation with respect to the decision of the Minister to consent to the change of control of Skeena
- The judge encouraged the parties to resume negotiations on both the Memorandum of Understanding with respect to the Consultation agreement and the accommodation agreement
- Each of the parties will continue to have liberty to re-apply to the Court with respect to any question relating to the duty of consultation and accommodation, and the Gitanyow will continue to have liberty to re-apply for an order quashing or setting aside the consent of the Minister to the change of control of Skeena.

***Hupacasath First Nation*[156]**

Madame Justice Lynn Smith of the BC Supreme Court ruled that "the Crown had a duty to consult with the Hupacasath regarding the removal of the land from TFL 44, and regarding the consequences of the removal of that land on the remaining (Crown land) portion of TFL 44. The court declared that making the removal decision on July 9, 2004 without consultation was inconsistent with the honour of the Crown in right of British Columbia in its dealings with the Hupacasath First Nation (HFN). The Hupacasath have consistently maintained the right to be consulted because of the many rights exercised on the removed private lands and the fact that they have always had access to those lands and were extensively consulted on the lands for many years. The 70,000 hectares of lands that were removed represents almost one third of the Hupacasath's territory and the impacts of that removal of the land from the TFL was an incursion onto their rights and title. However, the court refused to quash the Minister's decision removing the lands from the TFL and the Hupacasath express deep disappointment with that ruling. This suggests that substantial prejudice to third parties is more important than constitutionally protected rights and title. The court stated "that meaningful remedy can be granted pending the completion of consultation." With that the court has ordered the Crown to set up a government to government consultation process with Hupacasath so that their interests can be addressed and sets out 7 conditions that Brascan must fulfill in the interim. The court has also order mediation or directions from the court if the parties cannot agree on the process or the consultation.

The Hupacasath have always lived near Port Alberni, on Vancouver Island. They assert aboriginal rights and title with respect to some 232,000 hectares of land in central Vancouver Island. They claim that most of the privately owned Removed Lands are within their traditional territory. The territory which they claim is described in the affidavit of Chief Sayers as encompassing:

> … the headwaters of the Ash and Elsie River systems in the northwest, east to the height of land on the Beaufort Range and then southeast to Mount Arrowsmith to Labour Day Lake and the Cameron River system; the southeast boundary includes the China Creek, Franklin River, Corrigan

[156] *Hupacasath supra* note 13.

> Creek Areas and the north part of the Coleman Creek Area; the southern boundary follows Alberni Inlet to Handy Creek then northwest to follow the height of land between Henderson Lake and Nahmint Lake; the west boundary includes the headwaters of the Sproat Lake and Great Central Lake Areas; and including the river beds and lake beds of all bodies of water[157].

The Removed Lands are located in the centre of Vancouver Island. The area of the Removed Lands is about 70,000 hectares and is largely within the HFN claimed traditional territory. The Removed Lands roughly form a rectangle that runs along the northwest/southeast plane of Vancouver Island, but exclude an area around Port Alberni that stretches northeast. Their western border cuts through the eastern tip of Great Central Lake and Sterling Arm in Sprout Lake, and their eastern border stops short of Home and Cameron Lakes. Smaller pockets of the Removed Lands are located within the borders of TFL 44, primarily around Great Central Lake and Sprout Lake, Alberni Inlet, Bamfield and Ucluelet. These lands, the Removed Lands have been privately owned since 1887 when the Dominion of Canada transferred a tract of land (the "Railway Lands") to the Esquimalt and Nanaimo Railway Company. The Dominion had received the lands from the British Columbia Government in 1884 under the *Settlement Act*[158]. MacMillan Bloedel Limited owned the lands for a time, and Weyerhaeuser owned them until May, 2005[159].

Chief Judith Sayers deposed that the consultation processes dealt with the following concerns: protecting and enhancing fish habitat and rebuilding salmon runs, protecting and enhancing water quality, protecting sacred sites, protecting and managing red and yellow cedar and maintaining old growth trees, protecting culturally modified trees, protecting and enhancing bird and wildlife habitat, protecting uncommon tree and plant species such as Yew which are used for cultural and medicinal purposes, and providing access to the territory for HFN members to exercise spiritual practices and aboriginal hunting and fishing rights. She swore that between 1998 and June 2004, the HFN and Weyerhaeuser met almost monthly to consult on forestry-related issues and by

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[157] *Ibid.* at para. 21.
[158] *Settlement Act*, 1884, c. 14 S.B.C. (*An Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province*).
[159] *Hupacasath supra* note 13 para. 22 to 24

2001 had developed an efficient process for considering and integrating aboriginal interests into the operational-level planning of forestry operations, with the result that Ministry intervention was rarely required.

On November 30, 2000, Weyerhaeuser entered into a Memorandum of Understanding with the HFN, which included a consultation protocol regarding the Ash River lands, which at that time were being transferred from the Crown to Weyerhaeuser. They form part of the Removed Lands. On October 1, 2003, the HFN announced that it had completed the first phase of a *Land Use Plan* for its claimed traditional territory. Weyerhaeuser wrote to the Minister of Forests on December 5, 2003, requesting removal of private land from both TFL 39 and TFL 44[160].

Chief Sayers deposed, and her evidence was not contradicted in this respect, that no representative of the Minister or Chief Forester ever contacted her or any other HFN representative to propose consultation regarding the removal of the lands from the TFL. On June 11, 2004, Chief Sayers, at a meeting with Weyerhaeuser discussing the Removed Lands, proposed certain conditions before Weyerhaeuser could "get the land out." The evidence thus showed that the HFN, through West Island Woodlands Community Advisory Group (WIWAG) meetings with Weyerhaeuser became aware of Weyerhaeuser's desire to remove the lands from the TFL as early as 2002, and learned of the company's pursuit of the issue with government in early 2004. The evidence does not show, however, any formal consultation or indeed any discussion between the Minister or other agent of the Crown and the HFN regarding Weyerhaeuser's initiative. The Minister of Forests made the removal decision on July 9, 2004, pursuant to the newly-enacted s. 39.1 of the *Forest Act*. The HFN received notice of the removal decision on July 13, 2004, and on July 19, 2004, gave notice to the Minister of Forests that it considered that the removal decision infringed its aboriginal rights and title. The HFN informed the Minister that accommodation of HFN rights could be achieved by respecting the HFN *Land Use Plan* and on August 12, 2004, Chief Sayers outlined a list of conditions that Weyerhaeuser would have to satisfy in order to gain HFN acceptance of the removal decision. Weyerhaeuser informed the HFN on August 20, 2004, that Weyerhaeuser no

[160] Ibid. at para. 37 & 39 to 40.

longer had an obligation to consult with them with respect to activities on the Removed Lands[161].

On August 26, 2004, the Deputy Chief Forester amended the allowable annual cut for TFL 44, retroactive to July 9, 2004. In his *Rationale for AAC Adjustment Resulting from the Deletion of Private Lands* (the "*Amendment Rationale*"), the Deputy Chief Forester stated:

> I am satisfied that the assessment provided by Weyerhaeuser is a reasonable portrayal of the impact of reducing the THLB assumed in the 2003 AAC determination. Based on the assessment, my knowledge of the previous analysis, and on expert advice from Ministry staff, I hereby determine that the AAC for TFL 44 is 1 327 000 cubic metres, effective July 9, 2004.
>
> Within the AAC, I also conclude that harvesting in the Clayoquot Working Circle should not exceed 29 hectares per year[162].

The evidence indicated that the amendment were based on a Weyerhaeuser assessment and was simply mathematical; the allowable annual cut was reduced by the proportion that the Removed Lands bore to the total TFL area. Kenneth Baker, the Deputy Chief Forester at the time, deposed that the information and factors on which the original determination had been based 13 months earlier had not changed, that he had considered "concerns regarding identified wildlife, wildlife habitat and retention of old growth forests", and that he decided on that basis that a proportional reduction was appropriate. The province confirmed in September, 2004, that it was ready to resume Stage Four treaty negotiations with the Hupacasath directly. Weyerhaeuser advised the HFN of the allowable annual cut amendment on September 14, 2004[163].

In October 2004, Brascan began to negotiate with Weyerhaeuser for the purchase of all of Weyerhaeuser's coastal forestry assets and operations. Brascan has produced evidence, which was uncontradicted, that the removal of the privately owned lands from TFL 44 was a critical consideration in its decision to proceed with the transaction. Its business plan was based on the premise that it would be able to conduct two different

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[161] *Ibid.* at para. 48 to 54.
[162] *Ibid.* at para. 55.
[163] *Ibid.* at para. 56 to 58.

logging operations, through two different entities, under different management regimes for the Crown land than for the private land. Unlike lands in the TFL system, private timberlands can be "harvested to market", thus allowing private owners to harvest the species commanding the best prices in the market. A further benefit for private owners is that they are not subject to TFL restrictions on the export of logs that are surplus to the demands of domestic mills. On November 16, 2004, the District Manager of the South Island Forest District sent the HFN the *Amendment Rationale* for the allowable annual cut amendment[164].

Brascan made a proposal to Weyerhaeuser on December 6, 2004, regarding the purchase of Weyerhaeuser's coastal timber assets, including the Removed Lands. Weyerhaeuser accepted that proposal on December 14, 2004. The parties entered into an exclusivity agreement, which thereafter precluded Brascan from making inquiries of the Crown or of the HFN regarding the legal validity of the removal decision. This petition was filed on December 15, 2004, and Brascan learned of it on December 16, 2004.

Weyerhaeuser and Brascan publicly announced the agreement for purchase and sale on February 17, 2005, and government approvals were obtained. On April 27, 2005, Weyerhaeuser was joined as a party to the petition by consent and an amended petition was filed. The sale to Brascan for the total purchase price of $1.4 billion closed on May 30, 2005. The purchase included 258,000 hectares of privately owned timberlands, the annual harvesting rights to 3.6 million cubic metres of Crown timberlands, five coastal sawmills and two remanufacturing facilities. After receiving Weyerhaeuser's coastal assets, Brascan transferred the Removed Lands to Island Timberlands GP Ltd. to be held beneficially for Island Timberlands Limited Partnership (Island Timberlands) and it transferred its interest in TFL 44 and the Crown land based operations to Cascadia Forest Products Ltd. (Cascadia). Island Timberlands is a limited partnership in which Brascan holds the majority interest and Cascadia is a wholly owned subsidiary of Brascan[165].

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[164] *Ibid.* at para. 59 & 61.
[165] *Ibid.* at para. 63 to 69.

The following will be terms of this Court's order and will be in effect for two years from the date of entry of this order or until the province has completed consultations with the HFN, whichever is sooner:

1. Brascan will maintain the current status of "managed forest" on the Removed Lands and will keep the land under the *Private Managed Forest Land Act*[166], subject to all of its provisions and regulations governing planning, soil conservation, harvesting rate and reforestation;
2. Brascan will maintain variable retention and stewardship zoning on old growth areas in the Removed Lands;
3. Brascan will fulfill its commitments in the Minister's letter regarding maintenance of water quality on the Removed Lands;
4. Brascan will maintain all current wildlife habitat areas on the Removed Lands;
5. Brascan will maintain ISO or CSA certifications and will continue to subject the Removed Lands to the public advisory process as per CSA standards;
6. Brascan will maintain current access for aboriginal groups to the Removed Lands;
7. Brascan will provide to the HFN seven days notice of any intention to conduct activities on the land which may interfere with the exercise of aboriginal rights asserted by the HFN[167].

This order applies to Brascan, Island Timberlands, and their successors. The parties were asked to exchange positions as to what kinds of activities might interfere with the exercise of aboriginal rights and if there is a failure to agree on a framework, the matter is to go to mediation. The Crown was asked to facilitate the operation of this term of the order, including, if requested by the petitioners and Brascan, to provide the services of independent mediators at Crown expense. The petitioners also sought orders for disclosure of information relevant to the consultation. Madame Justice Smith ordered that the Crown and the petitioners provide to each other with such information that would be reasonably necessary for the consultation to be completed. As well, the Crown and the petitioners were to attempt to agree on a consultation process, however, if they were

[166] *Private Managed Forest Land Act,* 2003 S.B.C. c.88.
[167] *Hupacasath supra* note 13 para. 321.

unable to agree on such a process, they were to go to mediation. If and only if mediation fails, the parties could seek further directions from the Court[168].

Summary

- The Minister of Forests' decision to remove lands from TFL 44 gave rise to a duty on the Provincial Crown to consult the Hupacasath , and the Crown failed to meet that duty
- The Chief Forester's decision to amend the allowable annual cut for TFL 44 gave rise to a duty on the Provincial Crown to consult the Hupacasath and the Crown met that duty.
- The judge declined to order that the removal decision be quashed or suspended
- However, certain conditions regarding the use of the Removed Lands for up to two years, pending the completion of consultation and accommodation, are imposed as terms of this order
- Where the parties fail to agree on matters regarding the consultation they will go to mediation

***Huu-ay-aht*[169]**

Prior to the assertion of British sovereignty, the Huu-ay-aht First Nation (HFN) claim that "they occupied a traditional territory called the "Hahoothlee," which is located on the western coast of Vancouver Island in and near Barclay Sound, Pachena Bay, and southern portions of Alberni inlet, including the watersheds of the Sarita River, Pachena River, Klanawa River and Coleman Creek." The HFN asserted for this action that most of their traditional territory falls within a tree farm licence held by Weyerhaeuser ("Tree Farm License 44"- TFL44). The Province has issued TFL 44, granted subsequent replacements of the licence pursuant to provincial forestry legislation, and directly authorized harvesting within the territory covered by TFL 44. The HFN claimed that their aboriginal title and rights were being infringed upon by the logging taking place within their traditional territory pursuant to TFL 44. The HFN claimed that their rights and title were infringed from "March 2004 to January 18, 2005, when logging operations continued within HFN territory despite the fact that the Province has not consulted with the HFN about the level of forestry operations within the Hahoothlee and despite the fact that HFN title and rights interests have not been accommodated." The HFN also claimed that such an infringement warrants economic accommodation and they "seek a forest

[168] *Ibid.* at para.322 to 326.
[169] *Huu-Ay-Aht supra* note 14.

tenure to take a fair allocation for the development of their lands, and revenue sharing until a treaty is determined[170]."

At the time of this dispute the HFN were engaged in negotiations towards a comprehensive treaty settlement within the British Columbia treaty process as part of the Maa-nulth Treaty Group. The Maa-nulth First Nations (MFN) entered the treaty process in January 1994, as part of the Nuu-chah-nulth Tribal Council (NTC). On March 10, 2001, a draft Agreement in Principle (AIP) was initialed at the NTC treaty table. Each of the 12 First Nations that comprised the NTC undertook consultations and requests for ratification with their respective communities. Six of the NTC First Nations, including the HFN, ratified the AIP, and six did not. Five of the six First Nations, including the HFN, that ratified the AIP joined to form the MFN. The MFN is composed of the HFN, the Uchucklesaht Tribe, the Ucluelet First Nation, the Toquaht Nation, and the Ka:'yu:t'h'/Chek:k'tles7et'h'[171].

The MFN approached British Columbia and Canada to negotiate a final agreement based on the draft 2001 AIP and accordingly the MFN are now at their own treaty table as the Maa-nulth Treaty Group. The MFN signed the AIP on October 3, 2003. Among other things, the AIP provides that each MFN member will own forest resources on their land and will have exclusive authority to determine charges relating to the harvesting of forest resources on its land. However, the AIP does not provide any detail regarding forest resources as this is to be determined in the final agreement which takes place at the end of stage 5 of the treaty process. The AIP itself does not legally recognize aboriginal rights and title. The MFN are presently at stage 5 of the treaty process, namely negotiation towards a final agreement. In stage 5 of the treaty process, technical and legal issues are resolved to produce a final agreement that embodies the principles outlined in the AIP and formalizes the new relationship among the parties. Once signed and formally ratified, the final agreement becomes a treaty and legally recognizes aboriginal rights and title. Stage 6 of the treaty process is merely implementation of the agreement reached at in stage 5. The land component of the AIP includes up to 20,900 hectares of provincial Crown land and 2,105 hectares of existing

[170] *Ibid.* at para. 4 to 5.
[171] *Ibid.* at para. 7.

Indian reserve land, which will include the existing HFN Indian reserve land and up to 6,500 hectares of additional lands. According to the Crown, the capital transfer provided by Canada is $62.5 million. The AIP outlines major components of a treaty, including rights to resources such as wildlife, fish and timber, culture and related self-government provisions[172].

The HFN assert that approximately 95% of the HFN traditional territory is within the boundaries of TFL 44. A TFL is a large area based tenure granting the rights to manage the forest lands and to apply for cutting permits to harvest timber. MOF is responsible for the administration of TFLs and for dealing with all TFL licenses. The present licensee of TFL 44 is Weyerhaeuser whose current forest development plan contemplates a further 5.4 million cubic metres of timber ("m3") out of the Hahoothlee territory within the next 5 years. The estimated stumpage payable to the Province in relation to the anticipated volume of harvest of 5.4 million m3 over the next 5 years is in the range of $143 million. The Province will receive additional revenues from income, property and sales tax. The HFN claim, and the respondents have not disputed, that between 1940 and 1996, approximately 35,000,000 m3 has been harvested from the Hahoothlee. Over 56% of old growth forests within the Hahoothlee were harvested from 1940 to 1996. The HFN has submitted that the rate of harvest proposed for the HFN territory far exceeds the geographic proportion of the annual allowable cut (AAC) for the entire TFL. The HFN maintain that a sustainable AAC in their territory would be limited to 225,000 m3 per year, whereas Weyerhaeuser plans to harvest approximately 1,000,000 m3 per year out of the Hahoothlee in each of the next 5 years. The HFN is claiming that much of this future harvesting will take place within areas of significant cultural importance to the HFN and that the removal of this economically valuable timber represents a serious, ongoing, and unaccommodated infringement of HFN's aboriginal title and forestry rights[173].

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[172] *Ibid*. at para. 8 to 9.
[173] *Ibid*. at para. 11 to 12.

Previous Accommodation Agreements, Interim Measures Agreement and Interim Measures Extension Agreement

As part of the effort to participate in the forestry processes within the Hahoothlee, in 1998 the HFN signed an Interim Measures Agreement (IMA) with the Ministry of Forestry (MOF. The term of the IMA was for 3 years, and provided for:

1. an inter-governmental working relationship between the HFN and the MOF;
2. the establishment of a joint forest council to resolve issues of forest management, cultural heritage and economic development;
3. joint planning in relation to forestry activities in the HFN territory;
4. protection of cultural heritage resources; (e) the creation of economic development opportunities; and
5. dispute resolution processes.

The IMA arose out of a conflict regarding harvest levels in TFL 44 and the HFN request for accommodation. It hoped to address economic development issues through direct funding from MOF and by engaging Forestry Renewal BC multi-year funding for forest restoration and enhancement. The IMA also established at section 11 that "the agreement does not define or limit the aboriginal rights, title and interests of the HFN" and that the map of the Hahoothlee was to be used for the purposes of the IMA agreement was to "define the territorial scope of the application of this agreement only." Later on March 5, 2001, the parties renewed the IMA through the Interim Measures Extension Agreement (IMEA), and included the Uchucklesaht First Nation as an additional party. Section 11 of the IMEA mirrored section 11 in the IMA. However, the IMEA included an agreement regarding a direct tenure award, which was not part of the original IMA. Recent amendments to the *Forest Act* had allowed MOF to enter into a direct tenure award agreement. In accordance with the direct tenure award agreement included in the IMEA and s. 47.3 of the *Forest Act*, the MOF invited the HFN and the Uchucklesaht to jointly apply for a timber sale licence for a volume of up to 265,000 m3. This licence agreement was dated January 28, 2003. On March 5, 2004, the IMEA expired. In the fall of 2003, the HFN attempted to negotiate a renewal of the IMA and IMEA. The HFN claim that the Province refused to enter into a renewal unless the HFN entered into a Forest and Range Agreement (FRA). The MOF, on the other hand, claims that it was impossible for it to renew the IMEA in its current form due to significant changes in the mandate and structure of MOF during the period between 2002 and 2004. As of April 24, 2004, MOF

was no longer involved in strategic planning, inventory, or restoration and enhancement priority setting and funding. The Ministry of Sustainable Resource Management is now responsible for economic sustainable development of Crown land. Further, new legislation, namely the *Forest and Range Practices Act*[174], changed the operations planning and approvals process within the MOF. As a result of these changes, the MOF claims that the referral process under the IMEA did not reflect the provisions of the *Forest and Range Practices Act*[175].

The Forest and Range Agreement Policy

In March 2003, the MOF announced its forest revitalization plan. Part of that plan included the enactment of the *Forestry Revitalization Act*[176] to take back 20% of the annual allowable cut from major replaceable forest licences and tree farm licences throughout the Province. This decision was made, in part, in order to provide volume for direct awards of forest tenures to First Nations. The 20% take-back is to be re-allocated and divided so that 10% is sold through a market-based system, the British Columbia Timber Sales Program. Approximately 8% is to be used for First Nation tenure opportunities to address accommodation of potential aboriginal interests, and the remaining amount is to be used for small tenures. At the same time, the Province appropriated a total of $95 million for forestry revenue sharing with First Nations throughout British Columbia over the period of 2003-2005. The Ministry claims that these initiatives have provided it with the means to provide significant interim economic accommodation to those First Nations that choose to negotiate forestry agreements with the Province. The FRA programme is based on an assumption that there is a potential that exists somewhere in the asserted traditional territory of each First Nation for a *prima facie* claim for title. The FRA programme is based on an offer of forest revenue sharing and tenure allocation in an amount calculated on the registered population of the Indian Band to whom the offer is made. The calculation is based on population alone and has no relation to the strength of a First Nation's claim of aboriginal title and rights, the amount of timber or timber harvesting in the First Nation's territory, or the seriousness of the

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[174] *Forest and Range Practices Act*, S.B.C. 2002, c. 69
[175] *Huu-Ay-Aht supra* note 14 at para.13 to 15.
[176] *Forestry Revitalization Act,* S.B.C. 2003, c. 17

potential infringement of title and rights. The MOF claims that they extensively reviewed a number of complex distribution models, including those considering values and amounts of timber harvested from specific areas, as well as regional approaches. The MOF claims that it ultimately chose the population-based approach because it had the fewest variations and disparities for an equitable distribution across the province[177].

A proper consultation process considering appropriate criteria must involve active consideration of the specific interests of HFN. The conduct of the Crown from February 2004 through to the end of negotiations was intransigent. Although the government gave the appearance of willingness to consider HFN's responses, it fundamentally failed to do so. This is particularly apparent in correspondence of February 25, April 7, April 19, and April 26 2004 and in the immediate aftermath of those correspondences. The government never wavered from its position as expressed in the FRA policy. The policy was always intended to be a form of IMA so changing the name on the HFN's FRA was within the policy. The amounts offered in revenue and tenure were always within the policy guidelines with the government starting at the lowest offer available. No effort was made to work with other ministries, particularly the Ministry of Sustainable Resources, to consider what options might be available throughout government to accommodate HFN concerns. No alternative was offered to the HFN despite repeated requests by the HFN for consideration of their specific situation. No formal consultation process was ever suggested. No continuing consultation occurred when the HFN did not accept the FRA. Logging continued The government has failed to accord the HFN the status that a treaty level 5 First Nation should receive. Presumably, this conduct would be considered in determining whether the infringement of HFN title and rights were justified.

Remedies

The centre of the dispute lay for the HFN in the questions that arose when the Province applied its formula based on the population criteria. Since most or all of the cutting for TFL 44 is to occur almost entirely in the in the Hahoothlee, and to base accommodation only on a population criteria may not be adequate. The court did determined that in all practical sense that the HFN and the MOF should negotiate an

[177] *Huu-Ay-Aht supra* note 14 at para.17 & 20.

agreement and this was not the place to comment on the appropriateness or adequacy of the accommodation that might be achieved at the end of the consultation process. It may be that the substance of the offer of accommodation contained in the FRA may be sufficient accommodation. However, that should not be entirely determined by only an offer based in a population based criteria, but by a strength of claim and degree of infringement. The fact that some First Nations have accepted the FRA based on the population criteria only indicates that those groups made a business decision to accept the offer, and can not reflect the sufficiency either of the consultation process or of the accommodation offered. Thus the Court awarded the HFN relief as stated in their petition[178]. That is, the Huu-Ay-aht First Nation received a declaration:

1. that the Crown as represented by the Ministry of Forests (MOF) has a legally enforceable duty to the Huu-Ay-aht First Nation (HFN) to exercise its discretion pursuant to the *Forestry Revitalization Act*, S.B.C. 2003, c. 17 and section 47.3 of the *Forest Act*, R.S.B.C. 1996, c. 157, as amended by the *Forestry (First Nations Development) Amendment Act*, S.B.C. 2002, c. 44, in a manner consistent with the Crown's duty to consult in good faith and to endeavour to seek workable economic accommodation between aboriginal rights and title interests of the HFN, on the one hand, and the short-term and long-term objectives of the Crown to manage forestry permits and approvals in HFN traditional territory in accordance with the public interest, both aboriginal and non-aboriginal;
2. that in its application of the Forest and Range Agreement (FRA) program pursuant to the *Forestry Revitalization Act* and the *Forest Act,* the MOF as an agent of the Crown in right of British Columbia has an administrative duty to endeavour in good faith to reach accommodation agreements with the HFN that are responsive to the degree of infringement of the HFN aboriginal rights and title represented by forestry operations in HFN traditional territory;
3. that application of a population-based formula to determine accommodation pursuant to the FRA programme does not constitute good faith consultation and accommodation in respect of the HFN aboriginal rights and title interests;
4. that application of a population-based formula to determine accommodation arrangements pursuant to the FRA programme does not fulfill the administrative obligations of the Crown to provide accommodation for the aboriginal rights and title interests of the HFN;
5. that application of a population-based formula to determine accommodation agreements for the HFN pursuant to the FRA programme has no rational connection with the legislative objectives of the FRA programme, including but not limited to, the objective of

[178] *Ibid.* at para. 127 to 128.

promoting economic development by addressing asserted aboriginal rights and title; and

6. an order in the nature of mandamus, directing the provincial Crown, through its agent the MOF, to negotiate with the HFN in good faith, including negotiating in a manner which takes into account the HFN's claim of aboriginal title and rights, and the infringement of that claim of title and rights in respect of decisions pursuant to the *Forestry Revitalization Act* and the *Forest Act* within the HFN[179]

Summary

- A proper consultation process considering appropriate criteria must involve active consideration of the specific interests of HFN and the conduct of the Crown from February 2004 through to the end of negotiations was intransigent
- Although the government gave the appearance of willingness to consider HFN's responses, it fundamentally failed to do so
- The government never wavered from its position as expressed in the FRA policy. The policy was always intended to be a form of IMA so changing the name on the HFN's FRA was within the policy
- The amounts offered in revenue and tenure were always within the policy guidelines with the government starting at the lowest offer available; however, no effort was made to work with other ministries, particularly the Ministry of Sustainable Resources, to consider what options might be available throughout government to accommodate HFN concerns
- The government has failed to accord the HFN the status that a treaty level 5 First Nation should receive
- This is not to comment at all on the appropriateness or adequacy of the accommodation that might be achieved at the end of the consultation process
- The petitioners shall have declaratory relief as set out in the petition

***R. v. Powley*[180]**

The Supreme Court determined that members of the Métis community in and around Sault Ste. Marie have an aboriginal right to hunt for food under s. 35(1). This was determined by their fulfillment of the requirements set out in *Van der Peet*[181], modified to fit the distinctive purpose of s. 35 in protecting the Métis. A secondary argument was advanced for justification, based on the alleged difficulty in identifying who is a Métis[182]. While the Supreme Court's finding of a Métis right to hunt for food is not species-specific, the evidence on justification related primarily to the Ontario moose population.

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[179] *Ibid.* at para. 1.
[180] *R. v. Powley*, [2003] 2 S.C.R. 207.
[181] *Van der Peet supra* note at 10 at para 67.
[182] *Powley supra* note 181 at 232 & 233 at para. 49 & 53.

The justification of other hunting regulations will require adducing evidence relating to the particular species affected. It was suggested by the Supreme Court that 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.

The *Van der Peet* Test

Characterization of the Right

The first step of the *Van der Peet* test is to characterize the right being claimed[183]. In *Powley,* the right claimed was the right to hunt for food in a particular territory. That is, Mr. S. Powley and Mr. R. Powley shot a bull moose near Old Goulais Bay Road, in the area of Sault Ste. Marie and within the traditional hunting grounds of that Métis community. The Powley's made a point of documenting that the moose was intended to provide meat for the winter and the trial judge determined that they were hunting for food. 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 argued that subjecting them to the moose hunting provisions of the *Game and Fish Act*[184] violates their rights under s. 35 (1) of the *Constitution Act, 1982*. 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. The question before the Supreme Court was whether ss. 46 and 47(1) of the *Game and Fish Act*, which prohibit hunting moose without a licence, unconstitutionally infringed on Mr. Steve and Roddy's aboriginal right to hunt for food, as recognized in s. 35 (1) of the *Constitution Act, 1982*.

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[183] *Van der Peet supra* note 10 at 76.
[184] *Game and Fish Act*, R.S.O. 1990, c. G.1, ss. 46, 47(1).

In addition the secondary argument advanced was for a justification on the alleged difficulty of identifying who is Métis[185].

Identification of the Historic Rights-Bearing Community

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. 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. The historical record also 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[186].

Identification of the Contemporary Rights-Bearing Community

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. Accordingly, aboriginal rights are communal rights, and as such 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 from the mid-19th century to the 1970s, we do not take this to mean that the community ceased to exist or disappeared entirely[187].

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[185] *Powley supra* note 181 at 213 – 214 & 219 at para. 4 to 9 & 19.
[186] *Ibid.* at 220 & 228 at para. 21 & 40
[187] *Ibid.* at 221 & 222 at para. 23 to 24.

Verification of the Claimant's Membership in the Relevant Contemporary Community

The Supreme Court suggested that while determining membership in the Métis community might not be as simple as verifying membership in 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. Thus, Supreme Court adopted the guidelines that were proposed by Vaillancourt Prov. J. and O'Neill J.. In particular there were 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[188].

. 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. 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. In this case, the Powleys' Métis ancestry is not disputed. 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

[188] *Ibid.* at 223 – 224 at para. 29 to 30.

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 contextual understanding of the membership requirements of the organization and its role in the Métis community. In this case, the Powleys' Métis ancestry was not disputed[189].

Identification of the Relevant Time Frame

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.

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 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[190].

[189] *Ibid.* at 224 – 225 at para 31 to 33.
[190] *Ibid.* at 226 – 227 at para. 36 to 37.

Determination of Whether the Practice is Integral to the Claimants' Distinctive Culture

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[191].

Establishment of Continuity Between the Historic Practice and the Contemporary Right Asserted

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 falls squarely within the bounds of the historical practice grounding the right[192].

Determination of Whether or Not the Right Was Extinguished

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[193].

If There Is a Right, Determination of Whether There Is an Infringement

Ontario currently does not recognize any Métis right to hunt for food, or any "special access rights to natural resources" for the Métis whatsoever. This lack of recognition, and the consequent application of the challenged provisions to the Powleys, infringed on their aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community[194].

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[191] *Ibid.* at 229 at para. 41.
[192] *Ibid.* at 230 – 231 at para. 45.
[193] *Ibid.* at 231 at para. 46.
[194] *Ibid.* at 231 at para. 47.

Summary

- Characterization of the Right
- The relevant right is not to hunt moose but to hunt for food in the designated territory
- Identification of the Historic Rights-Bearing Community
- 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
- Identification of the Contemporary Rights-Bearing 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
- Verification of the Claimant's Membership in the Relevant Contemporary Community
- In particular there were 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
- Identification of the Relevant Time Frame
- 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
- Determination of Whether the Practice is Integral to the Claimants' Distinctive Culture
- 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
- Determination of Whether or Not the Right Was Extinguished
- There is no evidence of extinguishment here, as determined by the trial judge
- If There Is a Right, Determination of Whether There Is an Infringement
- Ontario's lack of recognition of any Métis right to hunt for food, or any "special access rights to natural resources" has infringed on their aboriginal right to hunt for food as a continuation of the protected historical practices of the Sault Ste. Marie Métis community

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Huu-ay-aht and Uchucklesaht Interim Measures Agreement Regarding a Direct Award Tenure

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R. v. Sparrow, [1990], 1 S.C.R. 1075.

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St. Catherine's Milling and Lumber Co. v. The Queen, (1888), 14 (A.C. 46) 541**.**

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The Cherokee Nation v. The State of Georgia, 5 Peters 1.

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Treaty 3 between Her Majesty, The Queen and the Saulteaux Tribe of Indians and the Ojibbeway Indians at the Northwest Angle of the Lake of the Woods with Adhesions, 1871 (Transcribed by: Roger Duhamel, F.R.S.C., Queen's Printer and Controller of Stationery, Ottawa, 1966).

Worcester v. The State of Georgia, 6 Peters 515.

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Appendix 1: Forest and Range Agreements

Laid out are the main points of the Lax Kw'alaams Indian Band Forestry/Range Interim Measures Agreement, the Metlakatla Forestry Interim Measures Agreement, the Gitanyow Forestry Agreement, the Gitxsan Short-Term Forestry Agreement and the Huu-ay-aht and Uchucklesaht Interim Measures Agreement Regarding a Direct Award Tenure. It is hoped that setting out the terms of the following agreements will illustrate the direction that the Province of British Columbia is taking with respect to engaging the concerns of the specific community with respect to economic development, control over planning and cut rates, consultation in the general, and lastly, revenue sharing. Please note, not all categories in the agreements are discussed, nor are they represented in all of the Agreements.

Lax Kw'alaams Indian Band Forestry/Range Interim Measures Agreement, October 3, 2003

Economic Benefits to the Lax Kw'alaams Indian Band

Invitation to apply for a licence

- Lax Kw'alaams Indian Band have been invited to apply for a non-replaceable for licence, under the Forest Act to harvest a total of 135,000 cubic metres from underscut in the Kalum Forest District over a two to five year term
- Lax Kw'alaams Indian Band have been invited to apply for forest licence in the North Coast Timber Supply Area under the Forest Act to harvest timber over a five year term in both the Kalum and North Coast up to 650,000 cubic metres
- The Lax Kw'alaams Indian Band are required to submit a business plan
- The Lax Kw'alaams Indian Band will get assistance up to $40,000 to create their business plan
- Although the above licences are non-replaceable, the Province has put in renewal provisions and may invite a new licence upon the expiry at no lesser AAC

Revenue Sharing

- The Government of BC will provide a revenue sharing economic benefit to the Lax Kw'alaams Indian Band of $1,370,000 annually to address interim accommodation during the term of this Agreement

Consultation and Accommodation Respecting Operational Plans

- The Government of BC has agreed to consult with the Lax Kw'alaams Indian Band and the Allied Tsimshian Tribes in a timely manner on all Operational Plans

- Lax Kw'alaams Indian Band and the Allied Tsimshian Tribes will participate fully and in a timely manner to review all Operational Plans within the Lax Kw'alaams Indian Band and the Allied Tsimshian Tribes traditional territories
- Lax Kw'alaams Indian Band and the Allied Tsimshian Tribes will provide information about their aboriginal interests potentially affected by the development proposed in the operational plan area
- Workable accommodation (means modifications to the Operational Plans) will be initiated when concerns are raised by the Lax Kw'alaams Indian Band and the Allied Tsimshian Tribes of infringements to their aboriginal rights are likely to be infringed upon

Consultation and Accommodation Respecting Administrative Decisions

- Lax Kw'alaams Indian Band and the Allied Tsimshian Tribes agree that Government of BC has fulfilled its duty of consultation and seeks workable economic benefits, aboriginal rights infringements and related activities authorized by or resulting from the following Administrative decisions during the term of this agreement:
    1. The Minister of Forests' consent to the transfer of shares of Skeena Cellulose Inc. to NWBC Timber and Pulp Ltd.
    2. The Regional Manger's decision respecting cut control penalties of New Skeena's Forest Products's tenure (TLF 1, FL A16835)
    3. The Minister of Forests' disposition of undercut volume associated with New Skeena Forest Products' forest tenures (TLF 1, FL A16835)
    4. The Minister of Forests consent to replace TLF 1 and the Regional Managers' consent to replace FL A16835
    5. Any administrative decision made by statutory decision makers form time to time related to Lax Kw'alaams Indian Band and the Allied Tsimshian Tribes traditional territory
- The Government of BC has no further duty to consult
- The Government of BC will include the Lax Kw'alaams Indian Band and the Allied Tsimshian Tribes in the Timber Supply Review process for the North Coast Timber Supply Area and the Kalum Timber Supply Area
- Lax Kw'alaams Indian Band and the Allied Tsimshian will provide timely information on aboriginal rights infringements affected by the AAC

Land and Resource Stability

- Any legal proceedings by the Lax Kw'alaams Indian Band and the Allied Tsimshian may suspend or terminate this Agreement

Dispute Resolution

- Any disputes that arise the parties will appoint a representative to meet as soon as possible to resolve the issue
- Lax Kw'alaams Indian band and the Allied Tsimshian will not support , condone or encourage any of unlawful interference with activities related to timber harvesting or other forest and range activities covert by this agreement

Metlakatla Indian Band Forestry Interim Measures Agreement, December 8, 2003

Economic Benefits to the Metlakatla

Invitation to apply for a licence

- Metlakatla Indian Band have been invited to apply for a non-replaceable for licence, under the Forest Act to harvest a total of 50,000 cubic metres from undercut in the North Coast Timber Supply Area over a two to five year term
- Metlakatla Indian Band have been invited to apply for forest licence in the North Coast Timber Supply Area under the Forest Act to harvest timber over a five year term in North Coast up to 160,000 cubic metres (32,000 annually)
- The Metlakatla Indian Band are required to submit a business plan
- The Metlakatla Indian Band will get assistance up to $25,000 to create their business plan

Revenue Sharing

- The Government of BC will provide a revenue sharing economic benefit to the Metlakatla Indian Band of $345,000 annually to address interim accommodation during the term of this Agreement
- Maintenance of financial records and an audited statement

Consultation and Accommodation Respecting Operational Plans

- The Government of BC has agreed to consult with the Metlakatla Indian Band in a timely manner on all Operational Plans
- Metlakatla Indian Band in a timely manner to review all Operational Plans within the Metlakatla Indian Band's traditional territories
- Metlakatla Indian Band will provide information about their aboriginal interests potentially affected by the development proposed in the operational plan area
- Workable accommodation (means modifications to the Operational Plans) will be initiated when concerns are raised by the Metlakatla Indian Band of infringements to their aboriginal rights are likely to be infringed upon

Consultation and Accommodation Respecting Administrative Decisions

- Metlakatla Indian Band agrees that Government of BC has fulfilled its duty of consultation and seeks workable economic benefits, aboriginal rights infringements and related activities authorized by or resulting from the following Administrative decisions during the term of this agreement:
    1. The Minister of Forests' consent to the transfer of shares of Skeena Cellulose Inc. to NWBC Timber and Pulp Ltd.
    2. The Regional Manger's decision respecting cut control penalties of New Skeena's Forest Products's tenure (TLF 1, FL A16835)
    3. The Minister of Forests' disposition of undercut volume associated with New Skeena Forest Products' forest tenures (TLF 1, FL A16835)
    4. The Minister of Forests consent to replace TLF 1 and the Regional Managers' consent to replace FL A16835

5. Any administrative decision made by statutory decision makers form time to time related to Metlakatla Indian Band traditional territory

- The Government of BC will include the Metlakatla Indian Band in the Timber Supply Review process for the North Coast Timber Supply Area
- Metlakatla Indian Band will provide timely information on aboriginal rights infringements affected by the AAC

Land and Resource Stability

- Metlakatla Indian Band will respond in a timely manner to any decisions made by the Government of BC, work co-operatively to resolve any issues that may arise where acts of intentional interference occur

Dispute Resolution

- Any disputes that arise the parties will appoint a representative to meet as soon as possible to resolve the issue

Gitanyow Forestry Agreement, July 28, 2006

Forest Planning

- Gitanyow will continue to work collaboratively on implementing with the British Columbia the Cranberry/Kispiox Timber Supply Area planning exercise with the 92,000 funding (Already provided)
- The parties agree to work with the Integrated Land Management Bureau to merge management objectives jointly developed through the Cranberry/Kispiox landscape plan with the South Nass Sustainable Resource Management Plan to encompass the entire Gitanyow Traditional Territory
- The Gitanyow and British Columbia are undertaking a Sustainable Resource Management Plan and British Columbia has provided $145,000 to support this project in the 2006/2007 fiscal year
- The Gitanyow and British Columbia have agreed to encourage the Licencees to develop Operational Plans with the joint landscape level plans

Forest Restoration

- British Columbia has agreed to establish a Northwest Reforestation/Enhancement Program with a budget of $1 Million over the 2005 to 2010 period for reforestation and enhancement
- British Columbia has agreed to provide an additional $1 Million through the Northwest Reforestation/Enhancement Program for reforestation and enhancement over the 2005 to 2010 in the Nass Timber Supply Area and Orenda Forest licence A16883 operating areas
- British Columbia has agreed to provide $25,000 in the 2006/2007 period for planning with respect to reforestation and enhancement in the Nass Timber Supply Area through the Northwest Reforestation/Enhancement Program

Joint Resources Council

- British Columbia and the Gitanyow agree to establish and operate a Joint Resources Council for the purpose of:
    1. cooperatively address Gitanyow's aboriginal interests at the appropriate level of Crown land use planning
    2. Consultative processes and provisions to identify and resolving strategic issues early in the forest planning process
    3. completion and administration of the Gitanyow Kispiox-Cranberry Landscape Unit Plan and the Gitanyow Nass Strategic Resource Management Plan
- British Columbia has provided $10,000 in the 2006/2007 year to the Gitanyow to support the establishment of the Joint Resource Council's activities over the next year

Economic Opportunities to Gitanyow

Forest Tenure

- The Minister is to invite the Gitanyow to apply for a non-replaceable Licence on a non-competitive basis for up to 86,000 cubic metres in the Cranberry Timber Supply Area and 18,000 cubic metres in the Nass Timber Supply Area, and up to 430,000 cubic metres over a five year period
- British Columbia will provide $35,000 for developing capacity for the Gitanyow to market the timber and to develop forest tenure planning

Interim Payment

- British Columbia will pay the Gitanyow $357,000 annually

Specific Accommodation

- That BC Timber Sales halts all road construction in the Hanna-Tintina Watershed pending the completion of the South Nass Sustainable Resource Management Plan
- That Timber Barron Forest Products Ltd. halts all road construction in the Hanna-Tintina Watershed pending the completion of the South Nass Sustainable Resource Management Plan

Capacity Funding

- British Columbia will pay the Gitanyow $275,000 per year in order that the Gitanyow is able to engage in ongoing consultative efforts with the Joint Resource Council, to assist with participation in and implementation of joint planning ventures and to resolve key issues with respect to forestry planning

Consultation and Accommodation respecting Administrative and Operational

- Gitanyow agrees that Government of BC has fulfilled its duty of consultation and seeks workable economic benefits, aboriginal rights infringements and related activities authorized by or resulting from the following Administrative decisions during the term of this agreement:
    1. The Minister of Forests' consent to the transfer of shares of Skeena Cellulose Inc. to NWBC Timber and Pulp Ltd.

2. The Regional Manger's decision respecting cut control penalties of New Skeena's Forest Products's tenure (TLF 1, FL A16831, FL A16883)
3. The Minister of Forests' disposition of undercut volume associated with New Skeena Forest Products' forest tenures (TLF 1, FL A16831, FL A16883)
4. The Minister of Forests consent to transfer shares of Buffalo Head forest Products (holder of FL A16884) to KAOS Holding Ltd.
5. replace TLF 1 under the *Forest Act*

Dispute Resolution

- Any disputes that arise the parties will appoint a representative to meet as soon as possible to resolve the issue

Gitxsan Short-Term Forestry Agreement, August 4, 2006

Forest Stewardship and Planning

- British Columbia and the Gitxsan agree to initiate a pilot planning project for the Gitsegukla Watershed to create a sustainable watershed plan
- From this pilot project the parties will define a long term forestry agreement within the entire traditional territory
- The project will include collecting existing information such as timber harvesting history, silviculture backlogs, cultural heritage inventories, wildlife species inventories, and state of the habitat, and other resource features

Economic Opportunities

Forest Tenure

- The Gitxsan will be invited to apply for one or more non-replaceable forest licences under the Forest Act to harvest up to 1.2 million cubic metres over a 5 year term from the undercut of the former New Skeena Forest Products licence within the Kispiox Timber Supply Area
- If the Minister has determined if there is sufficient volume of timber available in the Bulkley, Nass, Prince George and/or Cranberry Timber Supply Area the Minster will invite the Gitxsan to apply for one or more licences

Interim Payment

- British Columbia agrees to pay the Gitxsan $2,775,310 annually
- During the term of this agreement, British Columbia, through the Ministry of Forests and Range and the Ministry of Aboriginal Relations and Reconciliation will establish a working group to explore alternative benefits and revenue sharing options with the Gitxsan

Forest Restoration

- British Columbia will direct $60,000 in contracts to the Gitxsan for the fiscal year of 2006.2007 as a partial effort to restore the failed pine plantations in the Kispiox Timber Supply Area

- It is anticipated that British Columbia will be spending at least $1 million over the next four years on the Northwest Reforestation/Forest Enhancement Program in the Gitxsan Traditional Territories
- That the Gitxsan be part of the collaborative planning process with the Ministry of Forests and Range to implement the activities under the Northwest Reforestation/Forest Enhancement Program
- British Columbia will spend $1 million over the next four years on the Northwest Reforestation/Forest Enhancement Program in the Nass Timber Supply Area, including the Orenda Forest Licence, A 16883

Consultation and Accommodation Respecting Administrational Decisions

- Gitxsan agrees that Government of BC has fulfilled its duty of consultation with this agreement and seeks workable economic benefits, aboriginal rights infringements and related activities authorized by or resulting from the following Administrative decisions during the term of this agreement:
    1. The Minister of Forests' consent to the transfer of shares of Skeena Cellulose Inc. to NWBC Timber and Pulp Ltd.
    2. The Regional Manger's decision respecting cut control penalties of New Skeena's Forest Products's tenure (TLF 1, FL A16829, FL A16831. FL A16883)
    3. The Minister of Forests' disposition of undercut volume associated with New Skeena Forest Products' forest tenures (TLF 1, FL A16829, FL A16831. FL A16883, FL A16835, FL A16883)
    4. The Minister of Forests consent to transfer of FL A16829 from Skeena to West Fraser Mills Ltd.
    5. The Minister of Forests consent to transfer shares of Buffalo Head Forest Products (FL A16884) to KAOS Holding Ltd. Skeena to West Fraser Mills Ltd
    6. The Minister of Forests consent to transfer of Woodlot 132 from Randy Castle to Robert Wagner
    7. replace TLF 1 under the *Forest Act*
    8. Forest Licence Replacements
- British Columbia will provide the Gitxsan with a list of Administrative decisions
- British Columbia will meet with the Gitxsan throughout the year to provide an opportunity to hear Gitxsan concerns
- British Columbia will include the Gitxsan in the Timber Supply review process that will lead to the AAC Determinations

Stability within Gitxsan Traditional Territory

- The Gitxsan will respond in a timely manner to any decisions made by the Government of BC, work co-operatively to resolve any issues that may arise where acts of intentional interference occur

Huu-ay-aht and Uchucklesaht Interim Measures Agreement Regarding a Direct Award Tenure, January 28, 2003

Tenure Opportunity

- Huu-ay-aht and Uchucklesaht invited to apply for a timber sales licence for a volume up to 265,000 metres under s. 47.3 of the *Forest Act*, after the agreement has been signed
- Any timber sales licence as a result of this agreement subject to policies, regulations, and statues of British Columbia
- Any timber sales as a result of this agreement, the Huu-ay-aht and Uchucklesaht must comply with the terms of the Agreement as specified in the Forest Act, and are liable for the obligations under it
- Any timber sales as a result of this Agreement is not transferable without the consent of the Minister of Forests and is not replaceable

Operational Stability on Crown Lands

- Huu-ay-aht and Uchucklesaht agree to engage in a timely manner with the Ministry of Forests, and other licensees in an information sharing and consultation process regarding forestry decisions and forestry activities within the asserted territory
- A Joint Forest Council was established as of February 26, 2001 and will make reasonable efforts to continue participate in the cooperative process to resolve forest management issues as conducted by the Joint Forest Council
- The Huu-ay-aht and Uchucklesaht will make reasonable efforts to minimize impacts on the economic activity of all other forest tenure holders within their asserted traditional territory