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December 21, 2009
File No.: 241982.00437/14186

VIA E-MAIL

British Columbia Utilities Commission
6th floor, 900 Howe Street
Box 250
Vancouver, B.C. V6Z 2N3

**Attention: Erica M. Hamilton
Commission Secretary**

Dear Sirs/Mesdames:

**Re: British Columbia Power and Hydro Authority
Application re Acquisition from Teck Metals Ltd. of an Undivided
One-third Interest in its Waneta Dam and Associated Assets
Project No. 3698565**

Further to our letter dated December 17, 2009, we enclose the Brief of Authorities of Teck Metals Ltd. with respect to the above proceeding.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Original signed by C.B. Johnson

C.B. Johnson, Q.C.

CBJ/vde

Encl.

cc: Registered Intervenors

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* Fasken Martineau DuMoulin LLP is a limited liability partnership and includes law corporations.

**BRITISH COLUMBIA UTILITIES COMMISSION
IN THE MATTER OF THE *UTILITIES COMMISSION ACT*
R.S.B.C. 1996, Chapter 473**

and

**IN THE MATTER OF A FILING
BY BRITISH COLUMBIA POWER AND HYDRO AUTHORITY**

**REGARDING THE ACQUISITION FROM TECK METALS LTD.
OF AN UNDIVIDED ONE-THIRD INTEREST IN THE
WANETA DAM AND ASSOCIATED ASSETS**

**BRIEF OF AUTHORITIES OF
TECK METALS LTD.**

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INDEX

	Tab
Cases	
<i>Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)</i> , 2009 BCCA 67	1
<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010	2
<i>Haida Nation v. British Columbia (Minister of Forests)</i> , [2004] 3 S.C.R. 511, 2004 SCC 73	3
<i>Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)</i> , 2003 BCSC 1422	4
<i>Nlaka'pamux Nation Tribal Council v. Griffin</i> , 2009 BCSC 1275	5
<i>R. v. Van der Peet</i> , [1996] 2 S.C.R. 507	6
Legislation	
Water Regulation, B.C. Reg. 204/88 as amended (excluding Schedules C and D)	7

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Carrier Sekani Tribal Council v.
British Columbia (Utilities Commission),
2009 BCCA 67***

Date: 20090218
Docket: CA035715; CA035791

Between:

The Carrier Sekani Tribal Council

Appellant
(Applicant/Intervenor)

And

**The British Columbia Utilities Commission and
British Columbia Hydro and Power Authority and Alcan Inc.
and The Attorney General of British Columbia**

Respondents
(Respondents)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

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Place and Date of Hearing:

Vancouver, British Columbia
November 24 and 25, 2008

Place and Date of Judgment:

Vancouver, British Columbia
February 18, 2009

Written Reasons by:

The Honourable Mr. Justice Donald

Concurred in by:

The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[1] This is one of those cases foreseen by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, where the broad general principles of the Crown's duty to consult and, if necessary, accommodate Aboriginal interests are to be applied to a concrete set of circumstances.

[2] Consultation arises here in relation to the decision of British Columbia Hydro and Power Authority (B.C. Hydro) to buy electricity from Rio Tinto Alcan Inc. (Alcan) which is surplus to its smelter requirements, in accordance with an Energy Purchase Agreement (EPA) made in 2007.

[3] For the EPA to be enforceable, B.C. Hydro needs the approval of the British Columbia Utilities Commission (Commission) under s. 71 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473.

[4] The Carrier Sekani Tribal Council (the appellant) sought to be heard in the s. 71 proceeding before the Commission on the issue of whether the Crown fulfilled its duty to consult before B.C. Hydro entered into the EPA.

[5] The appellant's interest (asserted both in a pending action for Aboriginal title and within the treaty process) is in the water and related resources east of the discharge of the Nechako Reservoir created by Alcan in the early 1950s to drive its generators in Kemanon for use at the Kitimat aluminum smelter.

[6] The appellant claims that the diversion of water for Alcan's use is an infringement of its rights and title and that no consultation has ever taken place.

[7] The Commission considered the appellant's request as a reconsideration of its decision, made prior to the appellant's involvement, that consultation was not relevant and, thus, not within the scope of its proceeding and oral hearing (the Scoping Order). It was held not to be relevant then because the only First Nations groups involved at that point were the Haisla First Nation and the Haisla Hereditary Chiefs, who did not press the issue of consultation.

[8] The Commission addressed the reconsideration in two phases. At Phase I, the Commission "concluded that the CSTC [Carrier Sekani Tribal Council] established a *prima facie* case sufficient to warrant a reconsideration of the Scoping Order", and that the ground for reconsideration was "the impacts on the water flows arising from the 2007 EPA": Reasons for Decision, "Impacts on Water Flows", 29 November 2007 (Letter No. L-95-07). Within Phase I, the Commission conducted a fact-finding hearing into water flow impacts and concluded as follows:

The Commission Panel accepts the submissions of counsel for BC Hydro regarding the determinations that should be made at this time in the proceeding. The Commission Panel concludes as a matter of fact that:

- a) the 2007 EPA will have no impact on the volume, timing or source of water flows into the Nchako River;
- b) the 2007 EPA will not change the volume of water to be released into the Keman River; and
- c) the 2007 EPA may cause reservoir elevations to vary approximately one or two inches which will be an imperceptible change in the water levels of the Nchako Reservoir. This

change to reservoir levels will not affect water flows other than the timing of releases to the Kemano River.

[9] Then, in Phase II, the Commission received argument based on, *inter alia*, the facts found as described above and on certain assumptions built into the question framed by the Commission as follows:

Assuming there has been a historical, continuing infringement of aboriginal title and rights and assuming there has been no consultation or accommodation with CSTC on either the historical, continuing infringement or the 2007 EPA, would it be a jurisdictional error for the Commission to accept the 2007 EPA?

[10] On December 17, 2007, the Commission dismissed the appellant's reconsideration motion for reasons given in the overall s. 71 decision, January 29, 2008.

[11] In brief, the Commission rejected the appellant's motion because it found as a fact that since there were no "new physical impacts" created by the EPA, the duty to consult was not triggered:

... assuming a failure of the duty of consultation for the historical, continuing infringement and no consultation on the 2007 EPA, the Commission Panel concludes that acceptance of the 2007 EPA is not a jurisdictional error because a duty to consult does not arise by acceptance of the 2007 EPA and because a failure of the duty of consultation on the historical, continuing infringement cannot be relevant to acceptance of the 2007 EPA where there are no new physical impacts.

[12] Among other points taken in the appeal, the appellant says that the Commission was wrong in narrowing the inquiry to “new physical impacts” and ignoring other “non-physical impacts” affecting the appellant’s interests.

[13] But of greater importance from my viewpoint as a reviewing judge is the Commission’s decision not to decide whether B.C. Hydro had a duty to consult. It decided that it did not need to address that question because of its conclusion on the triggering issue. As I will explain later, I consider that to be an unreasonable disposition for, amongst other reasons, the fact that B.C. Hydro, as a Crown corporation, was taking commercial advantage of an assumed infringement on a massive scale, without consultation. In my view, that is sufficient to put the Commission on inquiry whether the honour of the Crown was upheld in the making of the EPA.

[14] There is an institutional dimension to this error. The Commission has demonstrated in several cases an aversion to assessing the adequacy of consultation. In three other decisions, the Commission deferred the consultation question to the environmental assessment process: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06; *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07; *Re British Columbia Transmission Corporation*

Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project, First Nations Scoping Issue, B.C.U.C. Letter Decision No. L-6-08, 5 March 2008. (The appeal from the last decision (*Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, CA035864) was heard together with the appeal in the present case.)

[15] The Commission is a quasi-judicial tribunal with authority to decide questions of law. As such, it has the jurisdiction, and in my opinion the obligation, to decide the constitutional question of whether the duty to consult exists and, if so, whether it has been discharged: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585. That obligation is not met by deciding, as a preliminary question, an adverse impact issue that properly belongs within an inquiry whether a duty is owed and has been fulfilled.

[16] B.C. Hydro may be able to defend the Crown's honour on a number of powerful grounds, including the impact question, but this should happen in a setting where the tribunal accepts the jurisdiction to make a decision on the duty to consult.

Factual Background

[17] I have said that the infringement, if such it is, associated with the Alcan/Kemano Power Project is on a massive scale. The project involved reversing the flow of a river and the creation of a watershed that discharges west into a long tunnel through a mountain down to sea level at Kemano where it drives the generators at the power station and then flows into the Kemano River. To the east

the watershed discharges into the Nechako River which eventually joins the Fraser River at Prince George. The westerly diversion is manmade. The natural water flows into the Nechako River system were altered by the project with implications for fish and wildlife, especially salmon. Alcan holds a water licence in perpetuity for the reservoir. It is obliged by the licence and an agreement made in 1987 settling litigation involving the Provincial and Federal Governments to maintain water flows that meet specifications for migratory fish.

[18] At the outset of the project in the late 1940s, Alcan envisioned a smelter at Kitimat and power station at Kemano roughly twice their present size. The water licence and related permits for the Nechako Reservoir were issued provisionally with the idea that when the plants were enlarged as planned, the licence would be made permanent.

[19] In the course of an expansion project, sometimes referred to as Kemano II, the Government of British Columbia changed its mind about allowing the full utilization of the reservoir. This shut down the project and prompted a law suit by Alcan. The parties settled the dispute in 1997 on terms which included a power deal whereby the Province would supply Alcan should it enlarge the smelter and need more electricity. The settlement also granted Alcan the water licence on a permanent basis.

[20] Alcan has been selling its excess power since the beginning of its operations, at first directly to neighbouring industries and communities, and later to those

customers through the B.C. Hydro grid and to B.C. Hydro for general distribution, and to Powerex Corporation (B.C. Hydro's exporting affiliate).

[21] The Commission found as a fact in the decision under appeal that (1) Alcan can sell its electricity to anyone – B.C. Hydro is not the only potential customer; and (2) water flows will not be influenced by the EPA.

[22] In written submissions on the motion for reconsideration, the appellant articulated a number of ways in addition to “new physical impacts” where the EPA might affect their interests:

18. There are many aspects of the EPA which demonstrate that it is an important decision in relation to the infringements of the Intervenor’s rights and title, within the context set out by recent caselaw. This decision:
 - (a) Approves an EPA that will confirm and mandate extended electricity sales for a very long time – to 2034;
 - (b) Approves the sale to BC Hydro of all electricity which is surplus to Alcan’s power needs – and therefore authorizes the sale of power resulting from diversions of water that are causing existing impacts and infringements;
 - (c) Removes or affects the flexibility to release additional water, because that power is now the subject of an agreement with BC Hydro;
 - (d) Changes the ‘operator’ – by creating a “Joint Operating Committee” (s.4.13), by authorizing B.C. Hydro to ‘jointly develop’ the reservoir operating model (s.4.17), and by requiring B.C. Hydro approval for any amendments to operating agreements “which constrain the availability of Kemano to generate electricity” (App.1, 70 “Operating Constraints”);
 - (e) Changes in objective – this agreement confirms that power will now be devoted to long-term ‘capacity’ for B.C. Hydro (Even if there had been a ‘compelling social

- objective' to grant the water to Alcan (in 1950) for the production of aluminum, that objective is no longer operative under this agreement. A new 'objective' requires further consultation.);
- (f) Creates added incentives to maximize power sales (rather than release water for conservation);
 - (g) Provides incentives to Alcan to 'optimize' efficiency of their operations (meaning additional power sales);
 - (h) Encourages sales (i.e. diversion of water) through financial incentives in the most significant low water months (January to March);
 - (i) Affects the complexity required for proper environmental management – e.g. temperature, variable flows, timing, over-spills etc. – in order to accommodate BC Hydro sales;
 - (j) Approves an agreement that contains no positive conditions protecting fish and First Nations rights and which will preclude (by financial disincentives) those conditions from being added later;
 - (k) Fails to include First Nations in any way in management decisions.
19. If, despite the jurisprudence pointing to the contrary, the BC Utilities Commission is not prepared to examine the impacts of existing operations, and instead views the EPA solely as a financial model, there are nevertheless clear impacts on the Intervenor's interests arising from this agreement:
- (a) Increases the cost of compensation to Alcan;
 - (b) Any change to the 1987 Settlement Agreement flows will be more difficult to achieve;
 - (c) Additional sales (and therefore diversions) may well occur (evidence of other purchasers – under all conditions and at all times of the year – is speculative).

[Emphasis in original.]

[23] To the extent that the Commission addressed those points, it did so broadly by distinguishing between issues relating to the use of power and the production of power and by noting that its authority under s. 71 is limited:

There may be steps contemplated by the Crown that have no new impacts that would nevertheless trigger the duty to consult because of a historical, continuing infringement. However, a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing would not be a jurisdictional error. That is, it is the combination of no new physical impacts together with the limited scope of a section 71 review that answers the principal question – there is no jurisdictional error in this Decision. Alcan states: “The Crown’s fiduciary duty arises in specific situations, in particular, when the Crown assumes discretionary control over specific Aboriginal interests” (Alcan Submission, para. 5.3). The decision to accept or declare unenforceable the 2007 EPA under section 71 of the Act does not affect underlying water resources or any CSTC aboriginal interests there may be in that resource (Alcan Submissions, para. 5.5).

The CSTC submits:

“The 2007 EPA will also constitute a significant change in use (from power produced for aluminum smelting purposes to power for general provincial consumption) which, if approved by the BCUC, will amount to approval by the Crown of that change in use – without consultation” (CSTC Submission, para. A6).

The 2007 EPA may change the use of power in the sense suggested by the CSTC. However, such change in the use of the power could be effected by Alcan without the 2007 EPA and by means that are beyond the authority of the Commission. Nevertheless, the important question is whether or not there is a change in water flows, not whether or not there is a change in use of power. And, as found by the Commission in Letter No. L-95-07, water flows will not change.

Relevant Enactments

[24] The Commission’s authority regarding energy supply contracts comes from s. 71 of the *Utilities Commission Act*, which, including amendments effective May 1, 2008, now reads:

71. (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must

- (a) file a copy of the contract with the commission under rules and within the time it specifies, and
 - (b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.
- (1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.
- (2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.
- (2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider
- (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,
 - (c) whether the energy supply contract is consistent with requirements imposed under section 64.01 or 64.02, if applicable,
 - (d) the interests of persons in British Columbia who receive or may receive service from the public utility,
 - (e) the quantity of the energy to be supplied under the contract,
 - (f) the availability of supplies of the energy referred to in paragraph (e),
 - (g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and
 - (h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).
- (2.2) Subsection (2.1) (a) to (c) does not apply if the commission considers that the matters addressed in the energy supply contract filed under subsection (1) were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

- (2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.
- (2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.
- (2.5) In considering the public interest under subsection (2.4), the commission must consider
 - (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1,
 - (c) whether the application for the proposed contract is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable, and
 - (d) the interests of persons in British Columbia who receive or may receive service from the public utility.
- (2.6) If the commission issues an order under subsection (2.4), the commission may not issue an order under subsection (3) with respect to a contract
 - (a) entered into exclusively on the terms and conditions, and
 - (b) as a result of the process referred to in subsection (2.3).
- (3) If subsection (2) applies, the commission may
 - (a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
 - (b) make any other order it considers advisable in the circumstances.
- (4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those

rights may then be enforced as fully as if no proceedings had been taken under this section.

- (5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

[25] Provisions of that Act bearing on the relationship between the British Columbia Government and the Commission include:

- 3 (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.
- (2) The commission must comply with a direction issued under subsection (1), despite
- (a) any other provision of
 - (i) this Act, except subsection (3) of this section, or
 - (ii) the regulations, or
 - (b) any previous decision of the commission.
- (3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly
- (a) declare an order or decision of the commission to be of no force or effect, or
 - (b) require the commission to rescind an order or a decision.

* * *

- 5 (0.1) In this section, "**minister**" means the minister responsible for the administration of the *Hydro and Power Authority Act*.
- (1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.

- (2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.
- (3) The commission may carry out a function or perform a duty delegated to it under an enactment of British Columbia or Canada.
- (4) The commission, in accordance with subsection (5), must conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the inquiry begins or, if the terms of reference given under subsection (6) specify a different period, for that period.
- (5) An inquiry under subsection (4) must begin
 - (a) by March 31, 2009, and
 - (b) at least once every 6 years after the conclusion of the previous inquiry,unless otherwise ordered by the Lieutenant Governor in Council.
- (6) For an inquiry under subsection (4), the minister may specify, by order, terms of reference requiring and empowering the commission to inquire into the matter referred to in that subsection, including terms of reference regarding the manner in which and the time by which the commission must issue its determinations under subsection (4).
- (7) The minister may declare, by regulation, that the commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made under subsection (4).
- (8) Despite section 75, if a regulation is made for the purposes of subsection (7) of this section with respect to a determination, the commission is bound by that determination in any hearing or proceeding held during the period specified in the regulation.
- (9) The commission may order a public utility to submit an application under section 46, by the time specified in the order, in relation to a determination made under subsection (4).

* * *

71

...

- (2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider
 - (a) the government's energy objectives, ...

[26] The provisions of the *Utilities Commission Act* dealing with the Commission's jurisdiction and appeals are:

- 79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

* * *

- 99 The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

* * *

- 101 (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.
- (2) The party appealing must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.
- (3) If leave is granted, within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.
- (4) The commission and the Attorney General may be heard by counsel on the appeal.
- (5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

* * *

- 105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.
- (2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

[27] B.C. Hydro's relationship with government is defined in the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, as follows:

- 3 (1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.
- (2) The Minister of Finance is the fiscal agent of the authority.
- (3) The authority, on behalf of the government, may contract in its corporate name without specific reference to the government.
- 4 (1) The Lieutenant Governor in Council appoints the directors of the authority who hold office during pleasure.
- (2) The Lieutenant Governor in Council must appoint one or more of the directors to chair the authority.
- (3) A chair or other director must be paid by the authority the salary, directors' fee and other remuneration the Lieutenant Governor in Council determines.
- 5 The directors must manage the affairs of the authority or supervise the management of those affairs, and may
 - (a) exercise the powers conferred on them under this Act,
 - (b) exercise the powers of the authority on behalf of the authority, and
 - (c) delegate the exercise or performance of a power or duty conferred or imposed on them to anyone employed by the authority.

[28] The authority to purchase power is found in s. 12(1)(m) of the *Hydro and Power Authority Act*:

12 (1) Subject to the approval of the Lieutenant Governor in Council, which may be given by order of the Lieutenant Governor in Council, the authority has the power to do the following:

* * *

(m) purchase power from or sell power to a firm or person;

[29] Section 35 of the *Constitution Act, 1982* reads:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Issues

[30] The appellant frames the grounds for appeal in its factum as follows:

22. The appellant submits that the Commission committed errors of law and jurisdiction in determining:
 - a) That the failure of the Crown to consult and, if necessary, accommodate the member tribes of the CSTC was not relevant to the proceeding;
 - b) to refuse to allow evidence or cross-examination on the on-going existing impacts of the operations of the Nechako reservoir and the Kemano Project on the

- aboriginal rights and title of the member tribes of the CSTC; and
- c) that the acceptance of the EPA between BC Hydro and Alcan does not trigger a duty to consult and, if necessary accommodate the member tribes of the CSTC.

[31] The Attorney General's factum identifies the question of law in the appeal as follows:

23. The Attorney General says that the question of law in this appeal is whether the Commission correctly refused to amend the Scoping Order to consider the adequacy of Crown consultation with First Nations regarding the impact of the Kemano System upon their asserted Aboriginal rights. In particular:

Is the duty to consult triggered by the Crown contemplating conduct which does not adversely impact claimed Aboriginal rights, but is nonetheless related to historical Crown conduct which does impact claimed Aboriginal rights?

[32] Alcan poses a threshold question about the Commission's jurisdiction and a further question on the merits:

35. This proposition [the appellant's contention that the Commission had a duty to ensure consultation took place] raises a threshold question about the jurisdiction of the Commission:

In a s. 71 review of an energy supply contract, does the Commission have the jurisdiction to decide whether the Crown's duty to consult under s. 35 of the *Constitution Act, 1982* arises and has been met in relation to that contract?

36. If the answer is "no", the appeal must be dismissed, because the CSTC's complaint about consultation will have been taken to the wrong forum. If the answer is "yes", then this Court must address a second question:

Did the 2007 EPA or the Commission's review of the 2007 EPA give rise to a duty to consult under s. 35 of the *Constitution Act, 1982*?

[33] B.C. Hydro's breakdown of the issues is this:

BC Hydro submits that the primary issue on appeal is as follows:

1. Did the review conducted by the BCUC in respect of the 2007 EPA pursuant to s. 71 of the UCA amount to the Crown contemplating conduct that might adversely affect the CSTC's aboriginal interests so as to give rise to the duty to consult with the CSTC?
2. If and only if the primary question is answered in the affirmative, then BC Hydro submits that there is a secondary issue on appeal as follows:

If the answer to question 1 is yes, does the UCA empower and require the Commission to adjudicate a dispute between the Crown and the CSTC regarding the sufficiency of consultation to discharge the Crown's obligation in respect of the original authorization, construction and operation of the Nechako Reservoir before the BCUC can exercise its jurisdiction under s. 71?

3. If and only if the secondary question is answered in the affirmative, then BC Hydro submits that there is a third issue on appeal as follows:

If the answer to both questions 1 and 2 is yes, what remedy is appropriate?

[34] I will analyze the issues according to this framework:

- A. Was the Commission, in reviewing the enforceability of the EPA under s. 71 of the *Utilities Commission Act*, obliged to decide whether the Crown had a duty to consult and whether it fulfilled the duty?
- B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question defined too strictly and in terms which did not include all of the interests asserted by the appellant?

- C. What is the appropriate remedy if the appellant establishes a reviewable error?

Discussion

A. The Power and Duty to Decide

1. The Power

- [35] Under the heading of power to decide, I will discuss three propositions:
- (a) As a quasi-judicial tribunal with authority to decide questions of law, the Commission is competent to decide relevant constitutional questions, including whether the Crown has discharged a duty to consult.
 - (b) Section 71 of the *Utilities Commission Act* mandates review of the enforceability of an energy purchase agreement according to factors which include the public interest. This agreement engages the honour of the Crown in its dealings with Aboriginal peoples.
 - (c) The Commission has the capacity to address the adequacy of consultation.

(a) Competency

- [36] The Commission has not explicitly declared that it has no jurisdiction to decide a consultation issue. But since the Commission has shown a disinclination to grapple with the issue, and the proponents of the EPA have questioned whether it

lies within the Commission's statutory mandate, I think the court should settle the point.

[37] In *Paul v. British Columbia (Forest Appeals Commission)*, the Supreme Court of Canada decided, at para. 38, "there is no principled basis for distinguishing s. 35 rights from other constitutional questions."

[38] Moving on to whether administrative tribunals have the power to decide constitutional law questions, the Court in *Paul* stated, at para. 39:

The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision.

[39] I take those statements to be of broad application and not limited to the facts particular to *Paul*. In my opinion, they apply to the instant case, notwithstanding that the determination for the Forest Appeals Commission would have had a more direct effect on Mr. Paul's use of the forest resource than would the effects of B.C. Hydro's involvement in the EPA on the appellant's interests in the water resource.

[40] It can be inferred from the *Utilities Commission Act* that the Commission has the authority to decide relevant questions of law. Section 79, "findings of fact conclusive", implies that the right to appeal under s. 101 is restricted to questions of law or jurisdiction. Further, consideration of the exclusive jurisdiction clause in s. 105 indicates that the Legislature must have empowered the Commission to decide questions of law, otherwise the appellate review would be meaningless.

[41] The Commission is therefore presumed to have the jurisdiction to decide relevant constitutional questions, including whether the Crown has a duty to consult and whether it has fulfilled the duty. These are issues of law arising from Part II of the *Constitution Act, 1982*, ss. 35 and 35.1 that the Commission is competent to decide.

(b) Construction of Section 71

[42] Section 71 of the *Utilities Commission Act* focuses on whether the EPA is in the public interest. I think the respondents advance too narrow a construction of public interest when they define it solely in economic terms. How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry. In saying that, I do not lose sight of the fact that the regulatory scheme revolves around the economics of energy: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, and that Aboriginal law is not in the steady diet of the Commission. But there is no other forum more appropriate to decide consultation issues in a timely and effective manner. As I will develop later, the rationale for the duty to consult, explained in *Haida Nation v. British Columbia (Minister of Forests)*, discourages resort to the ordinary courts for injunctive relief and encourages less contentious measures while reconciliation is pursued. It would seem to follow that the appropriate forum for enforcement of the duty to consult is in the first instance the

tribunal with jurisdiction over the subject-matter – here the Commission in relation to the EPA.

[43] B.C. Hydro cites this Court's decision in *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, as support for the argument that s. 71 should not be interpreted to include the power to assess adequacy of consultation. It was held in that case that the governing statute, then the *Utilities Commission Act*, S.B.C. 1980, c. 60, did not confer jurisdiction on the Commission to enforce as mandatory the guidelines it developed on resource planning. One of the guidelines required public consultation, the inadequacy of which, as perceived by the Commission, led it to issue directions to B.C. Hydro in connection with an application for a certificate of public convenience and necessity. The Court examined the contested power to enforce guidelines against the language of the *Act*, its purpose and object, and found that no explicit provision enabled the Commission to promulgate mandatory guidelines which intruded on the management of the utility and none should be implied.

[44] On the strength of that case, B.C. Hydro turns to *Dunsmuir v. New Brunswick*, 2008 SCC 9, 291 D.L.R. (4th) 577, for the following general proposition that it says applies to the present matter:

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial

review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234, 127 D.L.R. (3d) 1; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, 223 D.L.R. (4th) 599, at para. 21.

[Emphasis added.]

[45] I do not accept B.C. Hydro's argument. The rule in question sought to be enforced through proceedings before the Commission arises not as an internal prescription, as in the *B.C. Hydro v. British Columbia (Utilities Commission)* decision just discussed, but from the *Constitution* itself. *Haida*, at paras. 60-63, contemplates review of consultation by administrative tribunals. It is not necessary to find an explicit grant of power in the statute to consider constitutional questions; so long as the Legislature intended that the tribunal decide questions of law, that is sufficient.

[46] It is necessary to address a case cited by all the respondents as standing for the proposition that a tribunal's power to decide the adequacy of consultation requires an explicit provision in the constituent statute. In *Dene Tha' First Nation v. Energy and Utilities Board (Alta.)*, 2005 ABCA 68, 363 A.R. 234, the Alberta Court of Appeal held that the Board's refusal to accept an intervention in the matter of

licences for well drilling and access roads was not reviewable as it was based on a factual finding that the First Nation seeking to intervene had not demonstrated an adverse impact. The court said it had no jurisdiction to review findings of fact. Therein lies the *ratio decidendi* of the judgment. The court noted at para. 24 that it was common ground that neither the Utility nor the Board had a duty to consult. As to the duty on the Crown, the court said, *obiter dicta*:

[28] A suggestion made to us in argument, but not made to the Board, was that the Board had some supervisory role over the Crown and its duty to consult on aboriginal or treaty rights. No specific section of any legislation was pointed out, and we cannot see where the Board would get such a duty. We will now elaborate on that.

[47] The court went on to record that consultation was not addressed at the Board level. I regard the above quoted remarks as having been made *en passant* in an oral judgment rather than a definitive judicial opinion made with the benefit of full argument. With respect, I do not find it persuasive authority for the proposition advanced by the respondents in the present case.

(c) Capacity to decide

[48] I turn to consider the Commission's capacity to decide. As I understand Alcan's submission, the issues surrounding the consultation duty are so remote from the Commission's usual terms of reference that the Commission should not be expected to decide them. Alcan argues that the appellant should go to court for redress. I quote from paras. 88 and 89 of Alcan's factum:

88. ... to accept the CSTC's invitation [to entertain the consultation issue] would mire the Commission in complex questions of fact and law to which its mandate, statutory powers and remedies are ill-suited.

89. In the end, the argument comes full circle: the CSTC are seeking redress for their grievances in the wrong forum.

[49] *Paul* rejected the argument that Aboriginal law issues may be too complex and burdensome for an administrative tribunal, at para. 36:

To the extent that aboriginal rights are unwritten, communal or subject to extinguishment, and thus a factual inquiry is required, it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an inferior position to undertake such tasks. Indeed, the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim.

[50] I heard nothing in the appeal which causes me to doubt the capacity of the Commission to hear and decide the consultation issue. Expressed in more positive terms, I am confident that the Commission has the skill, expertise and resources to carry out the task.

2. The Duty to Decide

[51] Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

[52] The process of consultation envisaged in *Haida* requires discussion at an early stage of a government plan that may impact Aboriginal interests, before matters crystallize, so that First Nations do not have to deal with a plan that has become an accomplished fact. *Haida* said this on the question of timing, at para. 35:

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

As to timing, see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 3:

... the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples.

[53] If First Nations are entitled to early consultation, it logically follows that the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation. Otherwise, the First Nations are driven to seek an interlocutory injunction, which, according to *Haida* at para. 14, is often an unsatisfactory route:

Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para.

31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

[54] While the Commission is a quasi-judicial tribunal bound to observe the duty of fairness and to act impartially, it is a creature of government, subject to government direction on energy policy. The honour of the Crown requires not only that the Crown actor consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its regulation. It is useful to remember the relationship between government and administrative tribunals generally.

[55] In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, the issue was the independence of members of the Liquor Appeal Board given their terms of appointment. The Court contrasted the ordinary courts with administrative tribunals in the following analysis at para. 24:

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of

that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

[56] No one suggests the Commission has a duty itself to consult: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 183. The obligation arising from its status as a Crown entity is to grasp the nettle and decide the consultation dispute.

[57] The honour of the Crown as a basis for the duty to decide is compelling on the facts here: one Crown entity, the responsible Ministry, granted the water licence, allegedly infringing Aboriginal interests without prior consultation; another Crown entity, B.C. Hydro, purchases electricity generated by the alleged infringement on a long-term contract; and a third, the tribunal, dismisses the appellant's claim for consultation on a preliminary point.

B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question?

[58] In this part, I identify the appropriate standard of review and apply the standard to the decision under appeal. I conclude that (1) the standard is reasonableness; (2) the Commission set an unreasonably high threshold for the

appellant to meet; and (3) it took too narrow a view of the Aboriginal interests asserted.

1. Standard of Review

[59] The appellant argues that the Commission has to be correct in disposing of constitutional issues such as those that arise here. The respondents submit the standard is reasonableness.

[60] I accept the respondents' position. The Commission's decision involves matters of fact, some assumed and others actually found, some questions of mixed fact and law and procedure. While I think the Commission took the wrong approach to the dispute, I cannot isolate a pure question of law for review on a correctness standard. Guidance on the standard is provided by *Haida*, at para. 61:

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

2. Reasoning Error

[61] In my respectful judgment, the Commission wrongly decided something as a preliminary matter which properly belonged in a hearing of the merits. The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the appellant would win the point as a precondition for a hearing into the very same point.

[62] I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. I refer to the assumed facts, namely, that there is an infringement without consultation and on the unquestioned fact that B.C. Hydro, a Crown agent, takes advantage of the power produced by the infringement by signing the EPA. In my opinion, this is enough to clear any reasonable hurdle. As stated in *Mikisew*, at para. 55:

The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty.

[Emphasis added.]

Whether the EPA triggered a duty is for a hearing on the merits.

[63] Deciding whether a trigger occurred at the threshold becomes all the more problematic when the range of issues presented by the appellant went beyond the "new physical impacts" test formulated by the Commission. The process deprived the appellant the opportunity to develop a case for the non-physical impacts listed in

their written application for reconsideration and reproduced earlier at para. 22 of these reasons. For instance, the decision in question does not deal in any substantive way with the appellant's allegations that the EPA tends to perpetuate an historical infringement and to make less likely a satisfactory resolution of the appellant's claimed right to manage the water resource in the future. They say the power sale has cemented the current regime for many years in the future. Arguably, the surface facts would seem to indicate that B.C. Hydro will at least participate in the infringement.

[64] Again, these points may not carry the day for the appellant, but the appellant should have had the opportunity to develop them.

[65] Finally, the consultation duty is not a concept that lends itself to hard-edged tests. The trigger formula in *Haida* is to be applied within the proceeding, not on a threshold inquiry. The duty is to discuss, not necessarily to agree or to make compromises. It is to be open to accommodation, if necessary. The discussion itself has intrinsic value as a tool of reconciliation. It is not always possible to say in advance that consultation would be either productive or futile – the Crown may be influenced by the Aboriginal perspective in the way it carries out a project. At the very least, the First Nation will have had a chance to put its views forward.

[66] In reviewing the history of the duty to consult, the Court in *Haida* said, at para. 24:

The Court's seminal decision in *Delgamuukw, supra*, at para. 168, in the context of a claim for title to land and resources,

confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

- [67] According to *Haida*, at para. 38, the consultation may advance the goal of reconciliation by improving the relationship between the Crown and First Nations:

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

[Emphasis added.]

- [68] In summary, I would allow the appeal on the ground that the Commission unreasonably refused to include the consultation issue in the scope of the proceeding and oral hearing.

Remedy

- [69] As I have indicated, the merits of the consultation issue are for the Commission to decide in the first instance. The issue should be remitted to it for

consideration. The order I would make is in terms similar to those suggested by B.C. Hydro in the event the appeal is allowed:

THAT the proceeding identified as “Re: British Columbia Hydro and Power Authority Project No. 3698475/Order No. G-100-07 Filing of 2007 Electricity Purchase Agreement with RTA as an Energy Supply Contract Pursuant to section 71” be re-opened for the sole purpose of hearing evidence and argument on whether a duty to consult and, if necessary, accommodate the appellant exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA.

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Madam Justice Huddart”

I agree:

“The Honourable Mr. Justice Bauman”

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010

**Delgamuukw, also known as Earl Muldoe, suing on his own behalf
and on behalf of all the members of the Houses of Delgamuukw and
Haaxw (and others suing on their own behalf and on behalf
of thirty-eight Gitksan Houses and twelve
Wet'suwet'en Houses as shown in Schedule 1)**

*Appellants/
Respondents on the cross-appeal*

v.

**Her Majesty The Queen in Right of
the Province of British Columbia**

*Respondent/
Appellant on the cross-appeal*

and

The Attorney General of Canada

Respondent

and

**The First Nations Summit,
the Musqueam Nation *et al.* (as shown in Schedule 2),
the Westbank First Nation,
the B.C. Cattlemen's Association *et al.* (as shown in Schedule 3),
Skeena Cellulose Inc.,
Alcan Aluminum Ltd.**

Intervenors

Indexed as: Delgamuukw v. British Columbia

File No.: 23799.

1997: June 16, 17; 1997: December 11.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka,^{*} Cory, McLachlin and Major JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Aboriginal rights -- Aboriginal land title -- Claim made for large tract -- Content of aboriginal title -- How aboriginal title protected by s. 35(1) of Constitution Act, 1982 -- What required to prove aboriginal title -- Whether claim to self-government made out -- Whether province could extinguish aboriginal rights after 1871, either under own jurisdiction or through the operation of s. 88 of the Indian Act (incorporating provincial laws of general application by reference) -- Constitution Act, 1982, s. 35(1) -- Indian Act, R.S.C., 1985, c. I-5, s. 88.

Constitutional law -- Aboriginal rights -- Aboriginal land title -- Evidence -- Oral history and native law and tradition -- Weight to be given evidence -- Ability of Court to interfere with trial judge's factual findings.

Courts -- Procedure -- Land claims -- Aboriginal title and self-government -- Claim altered but no formal amendments to pleadings made -- Whether pleadings precluded the Court from entertaining claims.

The appellants, all Gitksan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their "Houses", claimed separate portions of 58,000 square kilometres 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 Gitksan Houses. Their claim was originally

* Sopinka J. took no part in this judgment.

for “ownership” of the territory and “jurisdiction” over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) 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 Gitksan Houses have an “adaawk” 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 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 Gitksan 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 feast has a ceremonial purpose but is also used for making important decisions.

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. No order for costs was made. 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. 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*.

Held: The appeal should be allowed in part and the cross-appeal should be dismissed.

Whether the Claims Were Properly Before the Court

Per Lamer C.J. and Cory, McLachlin, and Major JJ.: The claims were properly before the Court. Although the pleadings were not formally amended, the trial judge did allow a *de facto* amendment to permit a claim for aboriginal rights other than ownership and jurisdiction. The respondents did not appeal this *de facto* amendment and the trial judge's decision on this point must accordingly stand.

No amendment was made with respect to the amalgamation of the individual claims brought by the individual Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. The collective

claims were simply not in issue at trial and to frame the case on appeal in a different manner would retroactively deny the respondents the opportunity to know the appellants' case.

A new trial is necessary. First, the defect in the pleadings prevented the Court from considering the merits of this appeal. The parties at a new trial would decide whether any amendment was necessary to make the pleadings conform with the other evidence. Then, too, appellate courts, absent a palpable and overriding error, should not substitute their own findings of fact even when the trial judge misapprehended the law which was applied to those facts. Appellate intervention is warranted, however, when the trial court fails to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when applying the rules of evidence and interpreting the evidence before it.

Per La Forest and L'Heureux-Dubé JJ.: The amalgamation of the appellants' individual claims technically prevents a consideration of the merits. However, there is a more substantive problem with the pleadings. The appellants sought a declaration of "aboriginal title" but attempted, in essence, to prove that they had complete control over the territory. It follows that what the appellants sought by way of declaration and what they set out to prove by way of the evidence were two different matters. A new trial should be ordered.

McLachlin J. was in substantial agreement.

The Ability of the Court to Interfere with the Trial Judge's Factual Findings

Per Lamer C.J. and Cory, McLachlin and Major JJ.: The factual findings made at trial could not stand because the trial judge's treatment of the various kinds of oral histories did not satisfy the principles laid down in *R. v. Van der Peet*. The oral histories were used in an attempt to establish occupation and use of the disputed territory which is an essential requirement for aboriginal title. The trial judge refused to admit or gave no independent weight to these oral histories and then concluded that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different.

The Content of Aboriginal Title, How It Is Protected by s. 35(1) of the Constitution Act, 1982, and the Requirements Necessary to Prove It

Per Lamer C.J. and Cory, McLachlin and Major JJ.: 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.

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. 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. Such a use is certainly not a traditional one.

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. 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 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. 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.

Aboriginal title at common law was recognized well before 1982 and is accordingly protected in its full form by s. 35(1). The constitutionalization of common law aboriginal rights, however, does not mean that those rights exhaust the content of s. 35(1). The existence of an aboriginal right at common law is sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1).

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.

Aboriginal title is a right to the land itself. 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). Those activities are 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, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land.

The test for the identification of aboriginal rights to engage in particular activities and the test for the identification of aboriginal title, although 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. 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.

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 subject to the title. 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. 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 and traditions and those influenced or introduced by European contact. 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.

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. 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. 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. 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 aborigines.

At sovereignty, occupation must have been exclusive. 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.

Per La Forest and L'Heureux-Dubé JJ.: “Aboriginal title” is based on the continued occupation and use of the land as part of the aboriginal peoples’ traditional way of life. This *sui generis* interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. It is personal in that it is generally inalienable except to the Crown and, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat the aboriginal peoples fairly. There is reluctance to define more precisely the right of aboriginal peoples to live on their lands as their forefathers had lived.

The approach to defining the aboriginal right of occupancy is highly contextual. A distinction must be made between (1) the recognition of a general right

to occupy and possess ancestral lands and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area. The latter has been defined as the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose. By contrast, a general claim to occupy and possess vast tracts of territory is the right to use the land for a variety of activities related to the aboriginal society's habits and mode of life. As well, in defining the nature of "aboriginal title", reference need not be made to statutory provisions and regulations dealing with reserve lands.

In defining the nature of "aboriginal title", reference need not be made to statutory provisions and regulations dealing specifically with reserve lands. Though the interest of an Indian band in a reserve has been found to be derived from, and to be of the same nature as, the interest of an aboriginal society in its traditional tribal lands, it does not follow that specific statutory provisions governing reserve lands should automatically apply to traditional tribal lands.

The "key" factors for recognizing aboriginal rights under s. 35(1) are met in the present case. First, the nature of an aboriginal claim must be identified precisely with regard to particular practices, customs and traditions. When dealing with a claim of "aboriginal title", the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life.

Second, an aboriginal society must specify the area that has been continuously used and occupied by identifying general boundaries. Exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society. It is possible that two

or more aboriginal groups may have occupied the same territory and therefore a finding of joint occupancy would not be precluded.

Third, the aboriginal right of possession is based on the continued occupation and use of traditional tribal lands since the assertion of Crown sovereignty. However, the date of sovereignty may not be the only relevant time to consider. Continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area. Also, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, it is not necessary to establish an unbroken chain of continuity.

Fourth, if aboriginal peoples continue to occupy and use the land as part of their traditional way of life, the land is of central significance to them. Aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas but also to the use of adjacent lands and even remote territories used to pursue a traditional mode of life. Occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness. The *Royal Proclamation, 1763* supports this approach to occupancy.

McLachlin J. was in substantial agreement.

Infringements of Aboriginal Title: The Test of Justification

Per Lamer C.J. and Cory, McLachlin and Major JJ.: 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. 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. There is always a duty of consultation and, in most cases, the duty will be significantly deeper than mere consultation. And third, lands held pursuant to aboriginal title have an inescapable economic component which suggests that compensation is relevant to the question of justification as well. Fair compensation will ordinarily be required when aboriginal title is infringed.

Per La Forest and L'Heureux-Dubé JJ.: Rights that are recognized and affirmed are not absolute. Government regulation can therefore infringe upon aboriginal rights if it meets the test of justification under s. 35(1). The approach is highly contextual.

The general economic development of the interior of British Columbia, through agriculture, mining, forestry and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations, are valid legislative objectives that, in principle, satisfy the first part of the justification analysis. Under the second part, these legislative objectives are subject to accommodation of the aboriginal

peoples' interests. This accommodation must always be in accordance with the honour and good faith of the Crown. One aspect of accommodation of "aboriginal title" entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect is fair compensation.

McLachlin J. was in substantial agreement.

Self-Government

Per The Court: The errors of fact made by the trial judge, and the resultant need for a new trial, made it impossible for this Court to determine whether the claim to self-government had been made out.

Extinguishment

Per Lamer C.J. and Cory, McLachlin and Major JJ.: Section 91(24) of the *Constitution Act, 1867* (the federal power to legislate in respect of Indians) carries with it the jurisdiction to legislate in relation to aboriginal title, and by implication, the jurisdiction to extinguish it. The ownership by the provincial Crown (under s. 109) of lands held pursuant to aboriginal title is separate from jurisdiction over those lands. Notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands.

A provincial law of general application cannot extinguish aboriginal rights. First, a law of general application cannot, by definition, meet the standard "of clear and plain intention" needed to extinguish aboriginal rights without being *ultra vires* the province. Second, s. 91(24) protects a core of federal jurisdiction even from provincial

laws of general application through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on “Indianness” or the “core of Indianness”.

Provincial laws which would otherwise not apply to Indians *proprio vigore* are allowed to do so by s. 88 of the *Indian Act* which incorporates by reference provincial laws of general application. This provision, however, does not “invigorate” provincial laws which are invalid because they are in relation to Indians and Indian lands.

Per La Forest and L'Heureux-Dubé JJ.: The province had no authority to extinguish aboriginal rights either under the *Constitution Act, 1867* or by virtue of s. 88 of the *Indian Act*.

McLachlin J. was in substantial agreement.

Cases Cited

By Lamer C.J.

Considered: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, aff'g *sub nom. St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *Guerin v. The Queen*,

[1984] 2 S.C.R. 335; **referred to:** *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Mabo v. Queensland* (1992), 107 A.L.R. 1; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Uukw v. R.*, [1987] 6 W.W.R. 155; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657; *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *R. v. Sutherland*, [1980] 2 S.C.R. 451; *R. v. Francis*, [1988] 1 S.C.R. 1025; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

By La Forest J.

Considered: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Wesley*, [1932] 4 D.L.R. 774; *Sikyea v. The Queen*, [1964] S.C.R. 642, aff'g *R. v. Sikyea* (1964), 43 D.L.R. (2d) 150.

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APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (1993), 30 B.C.A.C. 1, 49 W.A.C. 1, 104 D.L.R. (4th) 470, [1993] 5 W.W.R. 97, [1993] 5 C.N.L.R. 1, [1993] B.C.J. No. 1395 (QL), varying an order of McEachern C.J., [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. xiii, (1991), 79 D.L.R. (4th) 185, [1991] B.C.J. No. 525 (QL), and dismissing British Columbia's cross-appeal as abandoned. Appeal allowed in part; cross-appeal dismissed.

Stuart Rush, Q.C., Peter Grant, Michael Jackson, Louise Mandell and David Paterson, for the appellants and respondents on the cross-appeal, the Gitksan Hereditary Chiefs *et al.*

Marvin R. V. Storrow, Q.C., Joanne R. Lysyk and Joseph C. McArthur, for the appellants and respondents on the cross-appeal, the Wet'suwet'en Hereditary Chiefs *et al.*

Joseph J. Arvay, Q.C., Mark G. Underhill and Brenda Edwards, for the respondent and appellant on the cross-appeal, Her Majesty the Queen in Right of the Province of British Columbia.

Graham Garton, Q.C., Judith Bowers, Q.C., Murray T. Wolf and Geoffrey S. Lester, for the respondent the Attorney General of Canada.

Arthur Pape, Harry A. Slade, Peter Hogg and Jean Teillet, for the intervener the First Nations Summit.

Jack Woodward and Albert C. Peeling, for the intervener the Westbank First Nation.

Marvin R. V. Storrow, Q.C., Joanne R. Lysyk and Joseph C. McArthur, for the intervenors the Musqueam Nation *et al.*

J. Keith Lowes, for the intervenors the B.C. Cattlemen's Association *et al.*

Charles F. Willms, for the intervener Skeena Cellulose Inc.

J. Edward Gouge, Q.C., and *Jill M. Marks*, for the intervener Alcan Aluminum Ltd.

//*The Chief Justice*//

The judgment of Lamer C.J. and Cory and Major JJ. was delivered by

THE CHIEF JUSTICE --

I. Introduction

1 This appeal is the latest in a series of cases in which it has fallen to this Court to interpret and apply the guarantee of existing aboriginal rights found in s. 35(1) of the *Constitution Act, 1982*. Although that line of decisions, commencing with *R. v. Sparrow*, [1990] 1 S.C.R. 1075, proceeding through the *Van der Peet* trilogy (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723), and ending in *R. v. Pamajewon*, [1996] 2 S.C.R. 821, *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139, have laid down the jurisprudential framework for s. 35(1), this appeal raises a set of interrelated and novel questions which revolve around a single issue -- the nature and scope of the constitutional protection afforded by s. 35(1) to common law aboriginal title.

2 In *Adams*, and in the companion decision in *Côté*, I considered and rejected the proposition that claims to aboriginal rights must also be grounded in an underlying claim to aboriginal title. But I held, nevertheless, that aboriginal title was a distinct species of aboriginal right that was recognized and affirmed by s. 35(1). Since aboriginal title was not being claimed in those earlier appeals, it was unnecessary to say more. This appeal demands, however, that the Court now explore and elucidate the implications of the constitutionalization of aboriginal title. The first is the specific content of aboriginal title, a question which this Court has not yet definitively addressed,

either at common law or under s. 35(1). The second is the related question of the test for the proof of title, which, whatever its content, is a right in land, and its relationship to the definition of the aboriginal rights recognized and affirmed by s. 35(1) in *Van der Peet* in terms of activities. The third is whether aboriginal title, as a right in land, mandates a modified approach to the test of justification first laid down in *Sparrow* and elaborated upon in *Gladstone*.

3 In addition to the relationship between aboriginal title and s. 35(1), this appeal also raises an important practical problem relevant to the proof of aboriginal title which is endemic to aboriginal rights litigation generally — the treatment of the oral histories of Canada's aboriginal peoples by the courts. In *Van der Peet*, I held that the common law rules of evidence should be adapted to take into account the *sui generis* nature of aboriginal rights. In this appeal, the Court must address what specific form those modifications must take.

4 Finally, given the existence of aboriginal title in British Columbia, this Court must address, on cross-appeal, the question of whether the province of British Columbia, from the time it joined Confederation in 1871, until the entrenchment of s. 35(1) in 1982, had jurisdiction to extinguish the rights of aboriginal peoples, including aboriginal title, in that province. Moreover, if the province was without this jurisdiction, a further question arises -- whether provincial laws of general application that would otherwise be inapplicable to Indians and Indian lands could nevertheless extinguish aboriginal rights through the operation of s. 88 of the *Indian Act*, R.S.C., 1985, c. I-5.

II. Facts

5 At the British Columbia Supreme Court, McEachern C.J. heard 374 days of evidence and argument. Some of that evidence was not in a form which is familiar to common law courts, including oral histories and legends. Another significant part was the evidence of experts in genealogy, linguistics, archeology, anthropology, and geography.

6 The trial judge's decision (reported at [1991] 3 W.W.R. 97) is nearly 400 pages long, with another 100 pages of schedules. Although I am of the view that there must be a new trial, I nevertheless find it useful to summarize some of the relevant facts, so as to put the remainder of the judgment into context.

A. *The Claim at Trial*

7 This action was commenced by the appellants, who are all Gitksan or Wet'suwet'en hereditary chiefs, who, both individually and on behalf of their "Houses" claimed separate portions of 58,000 square kilometres 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 Gitksan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) The province of 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.

B. *The Gitksan and Wet'suwet'en Peoples*

(1) Demography

8 The Gitksan consist of approximately 4,000 to 5,000 persons, most of whom now live in the territory claimed, which is generally the watersheds of the north and central Skeena, Nass and Babine Rivers and their tributaries. The Wet'suwet'en consist of approximately 1,500 to 2,000 persons, who also predominantly live in the territory claimed. This territory is mainly in the watersheds of the Bulkley and parts of the Fraser-Nechako River systems and their tributaries. It lies immediately east and south of the Gitksan.

9 Of course, the Gitksan and Wet'suwet'en are not the only people living in the claimed territory. As noted by both McEachern C.J. at trial (at p. 440) and Lambert J.A. on appeal (at p. 243), there are other aborigines who live in the claimed territory, notably the Carrier-Sekani and Nishga peoples. Some of these people have unsettled land claims overlapping with the territory at issue here. Moreover, there are also numerous non-aboriginals living there. McEachern C.J. found that, at the time of the trial, the non-aboriginal population in the territory was over 30,000.

(2) History

10 There were numerous theories of the history of the Gitksan and Wet'suwet'en peoples before the trial judge. His conclusion from the evidence was that their ancestors migrated from Asia, probably through Alaska, and spread south and west into the areas which they found to be liveable. There was archeological evidence, which he accepted, that there was some form of human habitation in the territory and its surrounding areas from 3,500 to 6,000 years ago, and intense occupation of the Hagwilget Canyon site (near Hazelton), prior to about 4,000 to 3,500 years ago. This

occupation was mainly in or near villages on the Skeena River, the Babine River or the Bulkley River, where salmon, the staple of their diet, was easily obtainable. The other parts of the territory surrounding and between their villages and rivers were used for hunting and gathering for both food and ceremonial purposes. The scope of this hunting and gathering area depended largely on the availability of the required materials in the areas around the villages. Prior to the commencement of the fur trade, there was no reason to travel far from the villages for anything other than their subsistence requirements.

(3) North American Exploration

11 There was little European influence in western Canada until the arrival of Capt. Cook at Nootka on Vancouver Island in 1778, which led to the sea otter hunt in the north Pacific. This influence grew with the establishment of the first Hudson's Bay trading post west of the Rockies (although east of the territories claimed) by Simon Fraser in 1805-1806. Trapping for the commercial fur trade was not an aboriginal practice, but rather one influenced by European contact. The trial judge held that the time of direct contact between the Aboriginal Peoples in the claimed territory was approximately 1820, after the trader William Brown arrived and Hudson's Bay had merged with the North West Company.

(4) Present Social Organization

12 McEachern C.J. set out a description of the present social organization of the appellants. In his opinion, this was necessary because "one of the ingredients of aboriginal land claims is that they arise from long-term communal rather than personal use or possession of land" (at p. 147). The fundamental premise of both the Gitksan and

the Wet'suwet'en peoples is that they are divided into clans and Houses. Every person born of a Gitksan or Wet'suwet'en woman is automatically a member of his or her mother's House and clan. There are four Gitksan and four Wet'suwet'en clans, which are subdivided into Houses. Each House has one or more Hereditary Chief as its titular head, selected by the elders of their House, as well as possibly the Head Chief of the other Houses of the clan. There is no head chief for the clans, but there is a ranking order of precedence within communities or villages, where one House or clan may be more prominent than others.

13 At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. The trial judge held that these are marked, in some cases, by physical and tangible indicators of their association with the territories. He cited as examples totem poles with the Houses' crests carved, or distinctive regalia. In addition, the Gitksan Houses have an "adaawk" 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 or performance which ties them to their land. Both of these were entered as evidence on behalf of the appellants (see my discussion of the trial judge's view of this evidence, *infra*).

14 The most significant evidence of spiritual connection between the Houses and their territory is a feast hall. This is where the Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose, but is also used for making important decisions. The trial judge also noted the *Criminal Code* prohibition on aboriginal feast ceremonies, which existed until 1951.

III. Judgments Below

A. *Supreme Court of British Columbia*

(1) General Principles

15 The trial judge began his analysis by considering the significant cases in this area: *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.), *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *R. v. Sioui*, [1990] 1 S.C.R. 1025, and *Sparrow, supra*. On the basis of this jurisprudence, he set out four propositions of law. First, aboriginal interests arise out of occupation or use of specific land for aboriginal purposes for an indefinite or long, long time before the assertion of sovereignty. Second, aboriginal interests are communal, consisting of subsistence activities and are not proprietary. Third, at common law, aboriginal rights exist at the pleasure of the Crown and may be extinguished when the intention of the Crown is clear and plain. This power reposed with the Imperial Crown during the colonial period. Upon Confederation the province obtained title to all Crown land in the province subject to the “interests” of the Indians. Finally, unextinguished aboriginal rights are not absolute. Crown action and aboriginal rights may, in proper circumstances, be reconciled. Generally speaking, aboriginal rights may be regulated by the Crown only when such regulation operates to interfere with aboriginal rights pursuant to legitimate Crown objectives which can honourably be justified, without undue interference with such rights. Moreover, when regulating, government must be mindful of the appropriate level of priority which aboriginal rights have over competing, inconsistent activities.

16 With respect to the appellants’ claims, McEachern C.J. divided his analysis into three parts: (1) jurisdiction over the territory; (2) ownership of the territory; and (in

the alternative) (3) particular aboriginal rights over the territory. In the ownership claim, the appellants asserted they were “absolutely entitled to occupy and possess the individual territories” claimed (at p. 126). The claim to jurisdiction was understood by the trial judge as comprising jurisdiction over land and people in the territory, and amounted to aboriginal sovereignty, a right to “govern the territory free of provincial control in all matters where their aboriginal laws conflict with the general law” (at p. 128). Although the claim advanced at trial was advanced by individual chiefs on behalf of themselves or their House members, the trial judge held that since aboriginal rights are communal in nature, any judgment must be for the benefit of the Gitksan and Wet’suwet’en peoples generally.

(2) Aboriginal Ownership

17 McEachern C.J. started from the proposition, for which he cited *St. Catharines Milling*, that aboriginal rights are not proprietary in nature, but rather “personal and usufructuary”, and dependent upon the good will of the Sovereign. He was satisfied that at the date of British sovereignty, the appellants’ ancestors were living in their villages on the great rivers, in a form of communal society. He was satisfied that they were occupying or possessing fishing sites and the adjacent lands, as their ancestors had done for the purpose of hunting and gathering that which they required for sustenance. However, he was not satisfied that they owned the territory in its entirety in any sense that would be recognized by the law.

18 There were several specific claims of the plaintiffs as to their uses of the land before the assertion of sovereignty. He concluded that the appellants’ ancestors lived within the territory, but predominantly at the village sites. He accepted, at p. 372, that they harvested the resources of the lands, but that there was only evidence of

“commonsense subsistence practices . . . entirely compatible with bare occupation for the purposes of subsistence”. He was not persuaded that there was any system of governance or uniform custom relating to land outside the villages. He refused to accept that the spiritual beliefs exercised within the territory were necessarily common to all the people or that they were universal practices. He was not persuaded that the present institutions of the plaintiffs’ society were recognized by their ancestors. Rather, he found, at p. 373, that “they more likely acted as they did because of survival instincts”. He stated that the maintenance and protection of the boundaries were unproven because of the numerous intrusions into the territory by other peoples. The oral histories, totem poles and crests were not sufficiently reliable or site specific to discharge the plaintiff’s burden of proof. Although McEachern C.J. recognized the social importance of the feast system and the fact that it evolved from earlier practices, he did not accept its role in the management and allocation of lands, particularly after the fur trade. McEachern C.J. concluded, at p. 383, that “I cannot infer from the evidence that the Indians possessed or controlled any part of the territory, other than for village sites and for aboriginal use in a way that would justify a declaration equivalent to ownership”.

19 Although he was of the opinion that the status of the villages and their immediate surrounding area may be different from the territory as a whole, they were already predominantly reserve lands. Hence, the question of the Gitksan and Wet’suwet’en peoples’ rights to these particular lands did not need to be dealt with. Moreover, to the extent that there were hunting grounds not included on those lands, McEachern C.J. believed he had no jurisdiction to extend their boundaries.

(3) Aboriginal Sovereignty

20 McEachern C.J. interpreted the appellants' claim for "jurisdiction" as a claim to govern the territories in question. This would include the right to enforce existing aboriginal law, as well as make and enforce new laws, as required for the governance of the people and their land. Most notably, this would also include a right to supersede the laws of British Columbia if the two were in conflict. McEachern C.J. rejected the appellants' claim for a right of self-government, relying on both the sovereignty of the Crown at common law, and what he considered to be the relative paucity of evidence regarding an established governance structure. First, he stated, at p. 386, that when British Columbia was united with Canada, "all legislative jurisdiction was divided between Canada and the province, and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts". Second, he characterized the Gitksan and Wet'suwet'en legal system, at p. 379, as a "most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves". He continued, at pp. 379-80, stating:

I heard many instances of prominent Chiefs conducting themselves other than in accordance with these rules, such as logging or trapping on another chief's territory, although there always seemed to be an aboriginal exception which made almost any departure from aboriginal rules permissible. In my judgment, these rules are so flexible and uncertain that they cannot be classified as laws.

As a result of the flexibility and uncertainty of the customs and rules, McEachern C.J. rejected the appellants' claim to jurisdiction or sovereignty over the territories.

(4) Aboriginal Rights

21 After rejecting the appellants' claim for ownership of and jurisdiction over the disputed territories, McEachern C.J. turned to the possibility that the appellants

nevertheless have aboriginal rights exercisable therein. He set out, at p. 388, the four part test from *Baker Lake* for an aboriginal right:

1. That they (the plaintiffs) and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England.

McEachern C.J. noted that the requirement for an organized society had been satisfied, even though he did not believe the appellants' ancestors had institutions and governed themselves. However, he held that no specific level of sophistication ought to be required in satisfying this requirement. He then stated that there was evidence that the ancestors of the plaintiffs occupied specific locations in the territory (the villages) and they used surrounding lands. Although there was evidence that the Gitksan and Wet'suwet'en would not have been able to keep invaders or traders out of their territory, no other organized societies had established themselves in the core areas on any permanent basis. Moreover, he noted at the outset of his reasons on this point that he was uncertain about the requirement for exclusivity.

22 The activities that were to be protected were only those carried on at the time of contact or European influence and that were still carried on at the time of sovereignty. This included "all those sustenance practices and the gathering of all those products of the land and waters of the territory I shall define which they practised and used before exposure to European civilization (or sovereignty) for subsistence or survival" (at p. 391). This did not include trapping for the fur trade, or other land-based commercial enterprise. McEachern C.J. ultimately concluded, at p. 395 that "the plaintiffs have

established, as of the date of British sovereignty, the requirements for continued residence in their villages, and for non-exclusive aboriginal sustenance rights within [certain] portions of the territory”.

(5) Extinguishment and Fiduciary Duties

23 McEachern C.J. started with the proposition, at pp. 396-97, that the law “never recognized that the settlement of new lands depended upon the consent of the Indians”. All aboriginal rights existed at the pleasure of the Crown, and could be extinguished by unilateral act. He accepted the “clear and plain” intention test for extinguishment, but took the view that it need not be express or even mention aboriginal rights, if the intention can be identified by necessary implication. An example of such implied extinguishment might be a fee simple grant to a third party, or a grant of a lease, licence, permit or other tenure inconsistent with continuing aboriginal interest.

24 McEachern C.J. held that any aboriginal rights to the land had been extinguished. The extinguishment arose out of certain colonial enactments which demonstrated an intention to manage Crown lands in a way that was inconsistent with continuing aboriginal rights. He stated, at p. 411, that “the Crown with full knowledge of the local situation fully intended to settle the colony and to grant titles and tenures unburdened by any aboriginal interests”. Crown grantees who received land in colonial times were clearly intended to receive the land free from any aboriginal encumbrances. Moreover, this intention to extinguish did not only apply to lands that had actually been granted to third parties, but rather all Crown land in British Columbia. However, it should be noted that he was careful to distinguish between land and fishing rights. Since McEachern C.J. was of the view that all aboriginal title to the territories in question had

been extinguished during colonial times, it was not necessary to consider whether the province had the power to extinguish aboriginal rights after Confederation.

25 Notwithstanding the complete extinguishment of all aboriginal rights in land, McEachern C.J. held, at p. 417, that the Crown was under a fiduciary obligation to continue to allow native persons to use vacant crown lands for lawful purposes until the land “is dedicated to another purpose”. This is not an aboriginal “right”, to which s. 35 can be applied, since any such “rights” over the land had been extinguished. However, he held that where the Crown extinguishes an aboriginal right, and makes a promise regarding use of Crown land at the same time, this creates the same fiduciary obligation as if the aboriginal people had surrendered the land to the Crown. In articulating guidelines for the application of the Crown’s fiduciary obligation, McEachern C.J. made it clear that the Crown must be free to direct resource management in the province in the best interests of both the aboriginal and non-aboriginal persons in the province. However, Crown authorities should always keep the “aboriginal interests of the plaintiffs very much in mind” (at p. 423) in developing policies for the territory, and should ensure that aboriginal activities on the land are not unduly impaired.

(6) Damages

26 Since the plaintiffs failed to establish that existing ownership, jurisdiction, or aboriginal rights had been breached, the claim for damages for wrongful appropriation of their territory was dismissed by McEachern C.J.

(7) Lands Subject to Aboriginal Rights at Sovereignty

27 McEachern C.J. felt it necessary to delineate the boundaries of the lands that were subject to aboriginal rights at the time of sovereignty in case he was wrong that these rights had been extinguished. He considered the evidence regarding the external boundary of the territory, and the internal boundaries therein. He found numerous inconsistencies, and generally did not find it to be reliable. He rejected the boundaries as put forth by the appellants.

28 Nevertheless, since he had held that the Gitksan and Wet'suwet'en had aboriginal sustenance rights over part of the land, he had to delineate their boundaries. He put forth three alternatives, and ultimately chose "Map 5" (at p. 400). This area recognized that the plaintiffs' ancestors likely used more distant areas in the territory. However, McEachern C.J. was not persuaded of such use in either the northernmost or southernmost portions of the territory. The northern boundary was drawn through the centre of the Skeena River, with 20 miles on the north side of the river being added. The southern boundary was drawn following some of the internal boundaries, but excluding several of the southern Wet'suwet'en individual territories. He selected this alternative because it worked less injustice for the Wet'suwet'en who lived more spread out and less concentrated near the rivers. However, he cut off the north and south portions of the claimed territory because he did not have confidence in the presence of the Gitksan or Wet'suwet'en in the areas north or south of the boundaries he drew.

(8) Other Matters

29 McEachern C.J. concluded his reasons by rejecting the province's argument that the plaintiffs' aboriginal rights to some of the lands had been abandoned. He did not think courts should be quick to treat aboriginal lands as abandoned. He could not say with confidence which lands should be abandoned, and which should not, even though

there was clearly declining aboriginal use of some of the lands. He also stressed that the onus of demonstrating abandonment rested with the province and that they had not discharged that onus. He also rejected the argument that the plaintiffs had waived their rights by accepting and using reserves and by conforming to the general law of the province. The honour of the Crown precluded the province from relying on this defence.

(9) Final Order

30 In result, therefore, McEachern C.J. 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. No order for costs was made.

B. *British Columbia Court of Appeal*

(1) Judgment of Macfarlane J.A. (Taggart J.A. concurring)

31 Macfarlane J.A. set out the following propositions of law which he indicated were the starting points for analysing aboriginal rights in land, which he garnered from *Baker Lake, Calder, Guerin, Sparrow*, and *Mabo v. Queensland* (1992), 107 A.L.R. 1 (H.C.). First, such rights arise from historic occupation and possession of the aboriginal peoples' tribal lands. Second, they arise by operation of law and do not depend on a grant from the Crown. Third, they are not absolute, but they are subject to regulation and extinguishment. Fourth, they are *sui generis* communal rights. Fifth, they cannot be alienated other than to the Crown. Finally, they are related to aboriginal activities which formed an integral part of traditional Indian life prior to sovereignty.

(a) *Ownership Rights*

32 Examining the appellants' ownership claim, Macfarlane J.A. agreed that an exclusive right to occupy land is required to support a claim akin to ownership. He noted that the use of the term "ownership" (which was used in the plaintiffs in their pleadings) was unfortunate, since *Guerin* specifically held that the aboriginal interest does not amount to beneficial ownership. In his view, the trial judge properly applied the law to the plaintiffs' claim of ownership. Similarly, he found no merit in the appellants' challenge to the trial judge's findings of fact on a number of points. Although some of the areas of the evidence were cause for concern, he concluded that the issues required an interpretation of the evidence as a whole and that it would be inappropriate for this court to intervene and substitute its opinions for that of the trial judge. Hence, he did not disturb the judge's conclusion with regard to ownership of the territory, nor his conclusion that any interest which the appellants have in the land is not proprietary.

(b) *Aboriginal Sustenance Rights*

33 Macfarlane J.A. canvassed the trial judge's findings regarding aboriginal sustenance rights. He noted that McEachern C.J.'s error in requiring a "time-depth" of a long time prior to contact in order to establish the rights did not affect his view of the territorial limits of the right. He agreed with the trial judge's application of the *Baker Lake* test. In particular, he viewed the significant question to be whether the practices were integral to aboriginal society or had only resulted from European influences. Macfarlane J.A. concluded that it would be inappropriate to intervene and substitute his view for that of the trial judge with respect to the weight of the evidence. Hence, if the

appellants succeeded on the appeal with respect to extinguishment, they were entitled to sustenance rights in the area as identified by McEachern C.J. on Map 5.

(c) *Jurisdiction*

34 Macfarlane J.A. essentially agreed with the trial judge with respect to his analysis of the jurisdiction, or sovereignty issue. He characterized the claim as the right to control and manage the use of lands and resources in the territory, as well as the right to govern the people within the territory, to the possible exclusion of laws of general application within the province. He stated that the Gitksan and Wet'suwet'en peoples do not need a court declaration to permit internal self-regulation, if they consent to be governed. However, the rights of self-government encompassing a power to make general laws governing the land, resources, and people in the territory are legislative powers which cannot be awarded by the courts. Such jurisdiction is inconsistent with the *Constitution Act, 1867* and its division of powers. When the Crown imposed English law on all the inhabitants of the colony and when British Columbia entered Confederation, the aboriginal people became subject to Canadian (and provincial) legislative authority. For this reason, the claim to jurisdiction failed.

(d) *Extinguishment*

35 Macfarlane J.A. began by noting that treaty-making is the most desirable way to resolve aboriginal land issues. However, he noted that prior to 1982, the rights of aboriginal people could be extinguished by the unilateral act of the sovereign, without the consent of the aboriginal people. Intention to extinguish must be clear and plain. Although express language is not strictly necessary, the honour of the Crown requires its intentions to be either express or manifested by unavoidable implication.

Unavoidable implication should not be easily found -- it occurs only where the interpretation of the instrument permits no other result. This, in turn, depends on the nature of the aboriginal interest and of the impugned grant.

36 Macfarlane J.A. disagreed with the trial judge that the colonial instruments manifested the required clear and plain intention to extinguish all aboriginal interests in land. The purpose of the colonial instruments in question was to facilitate an orderly settlement of the province, and to give the Crown control over grants to third parties. It is not inevitable, upon a reading of the statutory scheme, that the aboriginal interest was to be disregarded. They did not foreclose the possibility of treaties or of co-existence of aboriginal and Crown interests. Similarly, even fee simple grants to third parties do not necessarily exclude aboriginal use. For example, uncultivated vacant land held in fee simple does not necessarily preclude the exercise of hunting rights. Moreover, it is clear that, at common law, two or more interests in land less than fee simple can co-exist. However, since the record was not sufficiently specific to permit the detailed analysis of such issues, Macfarlane J.A. suggested that these issues be dealt with in negotiation. He concluded that extinguishment by a particular grant needed to be determined on a case by case basis.

37 Macfarlane J.A. considered the constitutional power of the province to extinguish aboriginal rights after 1871, and in particular, whether valid provincial legislation could extinguish aboriginal rights in land by incidental effect. After 1871, the exclusive power to legislate in relation to "Indians, and Lands reserved for the Indians" was given to the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. Valid provincial legislation may apply to Indians, so long as it is a law of general application and not one that affects their Indianness, their status, or their core values (*Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1

S.C.R. 1031; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Dick v. The Queen*, [1985] 2 S.C.R. 309). However, the proposition that provincial laws could extinguish Indian title by incidental effect must be examined in light of federal authority relating to Indians and of the aboriginal perspective. The traditional homelands of aboriginal people are integral to their traditional way of life and their self-concept. If the effect of provincial legislation were to strip the aboriginal people of the use and occupation of their traditional homelands, it would be an impermissible intrusion into federal jurisdiction, as such a law would “trench on the very core of the subject matter of s. 91(24)” (at p. 169). Hence, he concluded that provincial legislatures do not have the constitutional competence to extinguish common law aboriginal rights. Moreover, extinguishment by adverse dominion could only be accomplished by the federal government. Similarly, s. 88 of the *Indian Act* did not assist the province. Laws of general application which do not affect the “core of Indianness” apply by their own force. However, provincial laws which do affect that core rely on s. 88, which referentially incorporates them into federal law. For s. 88 of the *Indian Act* to give the province authority to extinguish aboriginal rights, it would have to show a clear and plain intention to do so. Since no such intention exists in s. 88 in particular or the *Indian Act* in general, it cannot authorize outright extinguishment. However, it may authorize provincial regulation of and interference with aboriginal rights. Of course, now the operation of such regulations are now subject to s. 35 of the *Constitution Act, 1982*.

(e) *Relief Allowed*

38 Macfarlane J.A. granted a declaration that the plaintiffs’ aboriginal rights were not all extinguished by the colonial instruments enacted prior to British Columbia’s entry into Confederation in 1871. He also granted a declaration that the appellants have unextinguished, non-exclusive aboriginal rights, formerly protected at common law, and

now protected under s. 35(1) of the *Constitution Act, 1982*. These rights are not ownership or property rights, and are located within the area indicated on Map 5. Their characteristics may vary depending on the particular context in which the rights are said to exist, and are dependent on the specific facts of each case.

39 Macfarlane J.A. did not grant a declaration with respect to jurisdiction over land and resources or people within the territory, leaving this to negotiation. He also did not interfere with the decision of the trial judge that the claim for damages must be dismissed. He noted that the parties wished to negotiate the precise location, scope, content and consequences of the aboriginal rights which the trial judge has held may be exercised in that part of the territory, the approximate area of which is illustrated on Map 5. However, no order of the court was required to permit the parties to enter into such negotiations.

40 Finally, Macfarlane J.A. stated that he would not give effect to the alternative declarations sought by the province relating to the alleged extinguishment of aboriginal rights by grants of fee simple and of lesser interests in the period from 1871-1982. The province did not have the power after 1871 to extinguish aboriginal rights. However, some provincial land and resource laws affecting aboriginal rights may be given force as federal laws through the operation of s. 88 of the *Indian Act*. The effect of fee simple and lesser grants on the particular aboriginal rights would require a detailed and complete analysis, which neither the record nor the submissions permitted. He made no order for costs, adopting the reasons of the trial judge.

(2) Wallace J.A. (concurring)

(a) *Scope of Appellate Review*

41 Wallace J.A. considered the appropriate principles for appellate review of a trial judge's findings of fact. An appellate court should find error on the part of the trial judge with respect to those aspects of the finding of facts which involve questions of credibility or weight to be given the evidence of a witness only if it is established that the trial judge made some "palpable and overriding error" which affected his assessment of the material facts. Such an error exists in three situations: firstly, when it can be demonstrated there was no evidence to support a material finding of fact of the trial judge; secondly, when the trial judge wrongly overlooked admissible evidence relevant and material to the issue before the court; or thirdly, where the trial judge's finding of fact cannot be supported as reasonable. In reversing the trial judge for "palpable and overriding error" the Court of Appeal must designate the specific error and state why the nature of the error justifies reversing the trial judge's finding of fact. Wallace J.A. held that these principles applied to the trial judge's determination of the nature and territorial scope of the aboriginal activities, the question of jurisdiction and control over the territory, and the weight to be attributed to the evidence of the various witnesses.

(b) *General Principles*

42 Wallace J.A. stated that aboriginal rights of occupation and use originate in the Indians' historic occupation and use of their tribal lands, and is recognized by the common law. Unlike the trial judge, he recognized that these rights may resemble a proprietary title, not unlike those in western property law systems, or they may be restricted to certain uses of the land. He set out the requirements for establishing aboriginal rights, varying from the *Baker Lake* test used by the trial judge. In Wallace J.A.'s formulation of the test, the practices supporting the rights in question had to be integral to the claimants' distinctive and traditional society or culture. Moreover, he resolved the trial judge's concerns about the requirement of exclusivity as follows: if the

plaintiffs claim exclusive occupation and use, the traditional occupation had to be to the exclusion of other organized societies.

(c) *Aboriginal Ownership*

43 Wallace J.A. considered there to be reasonable support for the trial judge's conclusions regarding the nature and scope of the appellants' interest in the territory. The standard of occupation required to support the claim of ownership depended on the nature of the interest. The appellants' claim was to manage the lands and natural resources. This suggests exclusive control and possession of the territory, requiring the appellants to demonstrate exclusive possession. Since they could not do so, he concluded that the trial judge correctly dismissed their claim for ownership.

(d) *Aboriginal Rights of Occupation and Use of Traditional Lands*

44 Even if the appellants' claim were characterized as a claim for aboriginal title, rather than ownership, Wallace J.A. agreed with the criteria applied by the trial judge: the occupation of specific territory, the exclusion of other organized societies, occupation at the time of British sovereignty and long-time aboriginal practices. Applying these principles to the trial judge's findings of fact, Wallace J.A. concluded that the appellants had not established a manifest or palpable error in concluding that the appellants' rights were non-exclusive, and confined to user rights. However, he was of the view that the court was not in a position to express an opinion on the specific territorial scope of these rights.

(e) *Aboriginal Jurisdiction or Self-Government*

45 Wallace J.A. agreed that the claim for “jurisdiction” was for an undefined form of government over land and people in the territory, which would be paramount as against provincial laws in the case of a conflict. Wallace J.A. held, at p. 225, that this claim was “incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846”. Moreover, British Columbia’s entry into Canada in 1871 exhaustively distributed legislative power between the province and the federal government. Section 35 of the *Constitution Act, 1982* could not revive and protect any sovereignty rights which the Gitksan and Wet’suwet’en may have had.

(f) *Extinguishment*

46 Wallace J.A. agreed with Macfarlane J.A. on this issue. He set out the test (“clear and plain intention”) and decided that the rights of use and occupation discussed above had not been extinguished.

(g) *Miscellaneous*

47 Wallace J.A. agreed that the appellants’ damages claim should be dismissed, without deciding whether damages might be payable for wrongful interference with the Gitksan’s and Wet’suwet’en’s non-exclusive aboriginal rights in the territory. He also considered the appellants’ claim that the appeal be adjourned in part for two years, during which time the parties would attempt to negotiate an agreement regarding the geographic parameters of the claimed territory. The court would retain jurisdiction to determine issues or refer them to the trial court if the parties failed to reach an agreement during the two-year period. However, he noted that the role of the Court of Appeal is not to tailor its judgment to facilitate negotiation. The Court of Appeal is restricted to declaring the legal status of rights claimed, on the basis of the trial record.

(3) Lambert J.A. (dissenting)

(a) *General Principles*

48 Lambert J.A. considered at length the leading cases with regard to aboriginal rights in British Columbia. He set out a number of conclusions. He recognized that aboriginal title and aboriginal rights are *sui generis*, and not easily explicable in terms of ordinary western jurisprudential analysis or common law concepts. He noted that aboriginal title is a form of aboriginal rights, and is therefore protected by s. 35. All rights arise from the practices, customs and traditions which form an integral part of the distinctive culture of the aboriginal people, and were part of the social fabric of aboriginal society at the time of the arrival of the first Europeans. This co-existed with the settlers' common law rights from the time of contact until sovereignty. After that time, aboriginal rights that continued as part of the social fabric of the aboriginal society were protected by both their own internal institutions and the common law.

49 Lambert J.A. believed that aboriginal rights were not frozen at the time of contact. Rather, they must be permitted to maintain contemporary relevance in relation to the needs of the holders of the rights as those needs change along with the changes in overall society. The rights may be individual, or they may be collective, depending on how they were and are treated by aboriginal people. Moreover, they do not come from aboriginal practice dating from time immemorial. Rather, they come, under the doctrine of continuity, from the practices, customs and traditions of the aboriginal people.

50 Aboriginal rights are neither abrogated by the fact that similar rights may be held by non-aboriginal people nor because the holders of the rights participate in the

wage or cash economy. A right to occupy, possess, use and enjoy land to the exclusion of all others does not mean that it must be confined to the activities carried on in 1846, or that its exercise requires a renunciation of the contemporary world.

(b) *Extinguishment*

51 Lambert J.A. considered the test for extinguishment from *Calder*, and expressly rejected Judson J.'s views. He derived the authority to do so from the way in which extinguishment was dealt with in *Sparrow*. In considering implicit extinguishment, he stated that it will only be held to occur where no other conclusion is possible from the particular instrument or conduct. It could not take place through adverse dominion. In the case of an inconsistency between a Crown grant of land and aboriginal title, the title should not necessarily give way in the absence of a clear and plain intention to extinguish. In any case, no grants or other interests were granted in the territory prior to 1871, and after that date, the British Columbia legislature had no power to legislate to extinguish, by adverse dominion, or otherwise. Lambert J.A. recognized, at p. 312, that because of s. 91(24) of the *Constitution Act, 1867*, and the doctrine of interjurisdictional immunity, provincial legislation could not affect "Indians in their Indianness". This included aboriginal rights, since they are an integral part of aboriginal culture. This is not affected by s. 88 of the *Indian Act*.

52 Lambert J.A. applied the same principles to a consideration of whether the right to self-government had been extinguished. Neither the assertion of sovereignty nor the colonial enactments mentioned by the trial judge were sufficient to extinguish aboriginal rights in the claimed territory. He saw no incompatibility between statements that the Crown owned the land of the province and the notion that aboriginal title was a burden on the Crown's radical title. Moreover, there was no "inescapable inference"

that the colonial enactments were intended to extinguish aboriginal interests. If this were the case, aboriginal peoples would instantly become trespassers on any lands not reserved for them as soon as the Crown took title. Finally, the evidence that the aboriginal peoples of northern British Columbia surrendered their title under Treaty No. 8 also suggested that they had title interests to surrender.

(c) *Findings at Trial*

53 Lambert J.A. considered the factual findings made by the trial judge and made a number of general observations. First, if a finding of fact is necessary to the decision in the case, it should be given more deference than a fact which is merely made in the course of the decision or for some incidental reason. Second, findings of historical fact based on historical or anthropological evidence given by historians and anthropologists should be given only the kind of weight that other historians or anthropologists might have given them. These social scientists do not always agree, circumstances change, and new material is discovered and interpreted. Third, the appellants' oral evidence should be weighed, like all evidence, against the weight of countervailing evidence and not against an absolute standard so long as it is enough to support an air of reality. Fourth, with the election of an NDP government in British Columbia in 1991, the province reconsidered its legal stance in this case. As such, it invited the court to confirm the existence of aboriginal rights of unspecified content over unspecified areas and to permit the parties to negotiate the precise content and the precise areas. In Lambert J.A.'s view, the Crown, by adopting the position that it wished to negotiate the content and territorial scope of aboriginal rights, must be taken to have waived the argument that the findings of the trial judge must stand and that any aboriginal rights held by the Gitksan and Wet'suwet'en peoples must be confined to non-

exclusive sustenance rights over the area covered by Map 5. In short, reliance on the findings of fact of the trial judge is entirely inconsistent with negotiation.

54 Nonetheless, Lambert J.A. was of the view that the findings of fact with respect to boundaries and with respect to the scope and content of aboriginal rights, including both rights in land and rights of self-government, cannot stand even in accordance with the usual principles governing the consideration of findings of fact, because they are flawed by errors of law.

55 With regard to the ownership claim, Lambert J.A. identified the following errors in the trial judge's reasons. In his view, the trial judge erred: (1) in not treating the ownership claim as a claim to aboriginal title and applied incorrect legal standards as a result; (2) in treating the claim to aboriginal title as a claim to a proprietary interest in land; (3) in applying a test of indefinite or long, long time use and occupation before the assertion of sovereignty; (4) in treating evidence of commercial interaction with the first Europeans as not being evidence of aboriginal practices; (5) in treating the rights to trap as being the exercise of rights other than aboriginal rights; (6) in rejecting evidence about commercial trapping and the evidence of Dr. Ray, a historical geographer who gave evidence at trial; (7) in rejecting possession, occupation, use, and enjoyment in a social sense as sufficient to establish aboriginal title; (8) in treating the test of possession and occupation as being whether there was a law which would have required a trespasser to depart; (9) in considering that aboriginal rights cannot be held jointly by more than one people; (10) in not concluding that aboriginal title could rest on occupation, possession, use, and enjoyment of land even though that occupation may have diminished in the period after contact; (11) in his treatment of blanket extinguishment of aboriginal title; and (12) in concluding that all aboriginal rights had been extinguished by the colonial instruments. These errors of law led to an incorrect conclusion on the part of the trial

judge about the existence of aboriginal title. His findings of fact can be reconsidered on appellate review.

56 With regard to the jurisdiction claim, Lambert J.A. stated that the trial judge erred: (1) in treating the claim to jurisdiction as a claim to govern territory and assert sovereignty over the territory; (2) in trying to define the appellants' claim in terms of the answers given by one witness in cross-examination; (3) in concluding that the claim to jurisdiction must fail because the nature of aboriginal self-government and self-regulation was such that it does not produce a set of binding and enforceable laws; and (4) in considering that the existence of a legislative institution is an essential part of the existence of an aboriginal right to self-government. Because of these errors of law, the trial judge's conclusions were wrong.

57 With regard to the claim to aboriginal rights, Lambert J.A. was of the view that the trial judge erred: (1) in not treating the evidence of occupation, possession, use, and enjoyment of the territory in an organized way by the appellants for their purposes, but particularly for sustenance, as being sufficient to establish aboriginal title to much of the land within the territory; (2) in separating commercial practices of aboriginal people from other practices and saying that commercial practices were not aboriginal practices; (3) in not considering the evidence of trading practices with neighbouring peoples; (4) in his treatment of the question of exclusivity both in relation to aboriginal title and sustenance rights; and (5) in considering participation in the wage or cash economy in relation to the existence (or non-existence) of aboriginal title. Again, given these errors of law, Lambert J.A. asserted that an appellate court had jurisdiction to intervene and set aside the trial judge's findings.

(d) *Substituted Findings*

58 In light of these errors, Lambert J.A. substituted his own findings of fact for those of the trial judge. In his view, the evidence established that in 1846, the Gitksan and Wet'suwet'en peoples occupied, possessed, used and enjoyed their traditional ancestral lands in accordance with their own practices, customs and traditions which were an integral part of their distinctive culture. Those ancestral lands extend throughout the claimed territory, well beyond the area indicated in Map 5. In areas where there were no conflicting claims to user rights, the appellants' rights should be characterized as aboriginal title. In areas of shared occupancy and use, the appellants' title would be shared-exclusive aboriginal title. In areas where the Gitksan and Wet'suwet'en peoples did not occupy, possess or use the land as an integral part of their culture, they would not have title, but may have aboriginal sustenance rights. These rights were not extinguished through any blanket extinguishment in the colonial period. Precise legislation related to a specific area may have extinguished some rights. However, no such legislation was before the court. The geographic scope of the rights was a matter to be negotiated between the parties, and failing negotiation, needed to be determined by a new trial.

59 Lambert J.A. also concluded that in 1846, the appellants' ancestors had rights of self-government and self-regulation, which rested on the practices, customs and traditions of those people which formed an integral part of their distinctive cultures. It is true that the rights may have been diminished by the assertion of British sovereignty, but those rights that continue are protected by s. 35 of the *Constitution Act, 1982*.

60 Turning to aboriginal sustenance rights, Lambert J.A. stated that they are entirely encompassed within aboriginal title in those areas where Gitksan and Wet'suwet'en aboriginal title exists. They also may exist in areas outside of title lands. In areas where such rights were shared by a number of peoples, the appellants' rights

may be limited to specific sustenance activities as opposed to exclusive or shared-exclusive use and occupation.

(e) *Other Issues*

61 With regard to the *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No. 1, Lambert J.A. expressed no views on its application or effect in the claimed territory and its inhabitants. With regard to infringement or denial of the appellants' rights in the claimed territory, Lambert J.A. concluded that the evidence in the case did not permit a proper consideration of the issues. Each infringement or denial would have to be examined in relation to the specific circumstances.

(f) *Disposition*

62 Lambert J.A. would have allowed the appeal, and made a number of declarations. First, he would declare that the Gitksan and Wet'suwet'en peoples had, at the time of the assertion of British sovereignty in 1846, aboriginal title to occupy, possess, use and enjoy all or some of the land within the claimed territory. The land covered by aboriginal title at that time extended far beyond village sites and the immediate areas surrounding. Second, he would declare that the Gitksan and Wet'suwet'en peoples may have had aboriginal sustenance rights, including hunting, fishing, gathering, and similar rights over any parts of the land within the claimed territory to which aboriginal title did not extend. He would also declare that the aboriginal title and the aboriginal sustenance rights described may have been exclusive to the Gitksan in certain areas and exclusive to the Wet'suwet'en in others, and in some they may have shared with each other, or other aboriginal peoples, or non-aboriginals.

63 Lambert J.A. would have also declared that the appellants' ancestors had, at the time of the assertion of British sovereignty in 1846, aboriginal rights of self-government and self-regulation relating to their own organized society, its members, its institutions and its sustenance rights. These rights were recognized by, incorporated into, and protected by the common law after 1846. They have not been extinguished by any form of blanket extinguishment. Hence, they exist in modern form, subject only to specific extinguishment of the specific title or specific sustenance right in a specific area. However, the right of aboriginal self-government did not include any rights that were inconsistent with British sovereignty, any rights that are repugnant to natural justice, equity and good conscience, and have not been modified to overcome that repugnancy, and any rights which are contrary to the part of the common law that applied to the territory, the Gitksan and Wet'suwet'en peoples and their institutions.

64 Lambert J.A. would also declare that these aboriginal title rights, aboriginal rights of self-government and self-regulation, and aboriginal sustenance rights may have been subject, after 1846 to specific extinguishment by the clear and plain extinguishing intention of the Sovereign Power, legislatively expressed by Parliament. Any specific extinguishment of specific rights might have been express or implicit, and, if implicit, it may have been brought about by the legislation itself (implied extinguishment) or by acts authorized by the legislation (extinguishment by adverse dominion), provided the intention to extinguish was contained within the legislative expression and was clear and plain. Instances of such specific extinguishment could not be decided on this appeal.

65 Lambert J.A. would declare that the present aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples, exercisable in relation to their aboriginal title, would include the specific rights claimed in this appeal by the plaintiffs in relation to aboriginal title. He would also declare that

the present aboriginal rights of self-government and self-regulation of the Gitksan and Wet'suwet'en peoples would include rights of self-government and self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity.

66 Finally, Lambert J.A. would remit a number of questions back to trial. These include the question of the territorial boundaries for both title and sustenance rights; the degree of exclusivity or shared exclusivity which the appellants hold, on both the territories over which they have title and the territories over which they have sustenance rights; the scope and content of the sustenance rights; the scope and content of the rights to self-government and self-regulation; and all questions relating to the plaintiffs' entitlement to damages and the quantum of damages. He would have also awarded the plaintiffs their costs, both in the Court of Appeal, and at trial.

(4) Hutcheon J.A. (dissenting in part)

(a) *Rights to Land*

67 Hutcheon J.A. agreed with the trial judge that the *Royal Proclamation, 1763* did not apply to the territory or its inhabitants. Nonetheless, the policy reflected in the *Proclamation* was, generally speaking, acceptance of aboriginal rights to land. Moreover, Hutcheon J.A. concluded on the basis of *Calder* and *Sparrow* that the colonial enactments did not extinguish the aboriginal rights in the claimed territory. He found it unnecessary to decide whether a grant in fee simple extinguishes aboriginal title or whether entitlement to compensation arises in such circumstances.

(b) *Nature of the Rights*

68 Hutcheon J.A. accepted that aboriginal rights to land existed prior to 1846 over the claimed territory. He found it sufficient to say, at p. 389, that aboriginal rights can “compete on an equal footing” with proprietary interests. Additionally, he noted that these rights are collective, inalienable except to the Crown, and extend to the traditional territory of the particular people.

(c) *Territory*

69 Hutcheon J.A. disagreed with the trial judge’s conclusion that the appellants’ ancestors occupied or controlled only the villages in the territory and the immediately surrounding areas. In Hutcheon J.A.’s view, the trial judge misapprehended the legal test for occupation and disregarded the independent evidence which showed that the territory occupied or controlled by the appellants extended far beyond the villages.

(d) *Self-Regulation*

70 The traditions of the Gitksan and Wet’suwet’en peoples existed long before 1846 and continued thereafter. They included the right to names and titles, the use of masks and symbols in rituals, the use of ceremonial robes, and the right to occupy and control places of economic importance. The traditions also included the institution of the clans and the Houses in which membership descended through the mother and the feast system. They regulated marriage and relations with neighbouring societies. The right to practise these traditions was not lost, although the *Indian Act* and provincial laws have affected the appellants’ right to self-regulation. Only negotiations will define with greater specificity the areas and terms under which the appellants and the federal and provincial governments will exercise jurisdiction in respect of the appellants, their institutions, and laws.

(e) *Disposition*

71 Hutcheon J.A. would have allowed the appeal and have made a number of declarations. First, he would declare that all of the aboriginal rights of the appellants were not extinguished before 1871. Second, the appellants continue to have existing aboriginal rights to undefined portions of land within the claimed territory. Third, the appellants have rights of self-regulation exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity. He would have remitted the outstanding matters to the Supreme Court of British Columbia, and stayed the proceedings for two years from the date of the judgment, or such shorter or longer period, in order for the parties to agree about the lands in respect of which the appellants have aboriginal rights, the scope of such rights on and to such lands, the scope of the right of self-regulation, and the appellants' entitlement to and quantum of damages. Hutcheon J.A. would have awarded the appellants their costs throughout the proceedings.

IV. Issues

72 The following are the principal issues which must be addressed in this appeal. As will become apparent in my analysis, some of these issues in turn raise a number of sub-issues which I will address as well:

- A. Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government?
- B. What is the ability of this Court to interfere with the factual findings made by the trial judge?

- C. 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?
- D. Has a claim to self-government been made out by the appellants?
- E. Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*?

V. Analysis

- A. *Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government?*

73 In their pleadings, the appellants, 51 Chiefs representing most of the Houses of the Gitksan and Wet'suwet'en nations, originally advanced 51 individual claims on their own behalf and on behalf of their houses for "ownership" and "jurisdiction" over 133 distinct territories which together comprise 58,000 square kilometres of northwestern British Columbia. On appeal, that original claim was altered in two different ways. First, the claims for ownership and jurisdiction have been replaced with claims for aboriginal title and self-government, respectively. Second, the individual claims by each house have been amalgamated into two communal claims, one advanced on behalf of each nation. However, there were no formal amendments to the pleadings to this effect, and the respondents accordingly argue that claims which are central to this appeal are not properly before the Court. Furthermore, the respondents argue that they have suffered prejudice as a result because they might have conducted the defence quite differently had they known the case to meet.

74 I reject the respondents' submission with respect to the substitution of aboriginal title and self-government for the original claims of ownership and jurisdiction. Although it is true that the pleadings were not formally amended, the trial judge, at p. 158, did allow a *de facto* amendment to permit "a claim for aboriginal rights other than

ownership and jurisdiction". Had the respondents been concerned about the prejudice arising from this ruling, they could have appealed accordingly. However, they did not, and, as a result, the decision of the trial judge on this point must stand.

75 Moreover, in my opinion, that ruling was correct because it was made against the background of considerable legal uncertainty surrounding the nature and content of aboriginal rights, under both the common law and s. 35(1). The content of common law aboriginal title, for example, has not been authoritatively determined by this Court and has been described by some as a form of "ownership". As well, this case was pleaded prior to this Court's decision in *Sparrow, supra*, which was the first statement from this Court on the types of rights that come within the scope of s. 35(1). The law has rapidly evolved since then. Accordingly, it was just and appropriate for the trial judge to allow for an amendment to pleadings which were framed when the jurisprudence was in its infancy.

76 However, no such amendment was made with respect to the amalgamation of the individual claims brought by the 51 Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. Given the absence of an amendment to the pleadings, I must reluctantly conclude that the respondents suffered some prejudice. The appellants argue that the respondents did not experience prejudice since the collective and individual claims are related to the extent that the territory claimed by each nation is merely the sum of the individual claims of each House; the external boundaries of the collective claims therefore represent the outer boundaries of the outer territories. Although that argument carries considerable weight, it does not address the basic point that the collective claims were simply not in issue at trial. To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants' case.

77 This defect in the pleadings prevents the Court from considering the merits of this appeal. However, given the importance of this case and the fact that much of the evidence of individual territorial holdings is extremely relevant to the collective claims now advanced by each of the appellants, the correct remedy for the defect in pleadings is a new trial, where, to quote the trial judge at p. 368, “[i]t will be for the parties to consider whether any amendment is required in order to make the pleadings conform with the evidence”. Moreover, as I will now explain, there are other reasons why a new trial should be ordered.

B. *What is the ability of this Court to interfere with the factual findings made by the trial judge?*

(1) General Principles

78 I recently reviewed the principles governing the appellate review of findings of fact in *Van der Peet, supra*. As a general rule, this Court has been extremely reluctant to interfere with the findings of fact made at trial, especially when those findings of fact are based on an assessment of the testimony and credibility of witnesses. Unless there is a “palpable and overriding error”, appellate courts should not substitute their own findings of fact for those of the trial judge. The leading statement of this principle can be found in *Stein v. The Ship “Kathy K”*, [1976] 2 S.C.R. 802, *per* Ritchie J., at p. 808:

These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

The same deference must be accorded to the trial judge's assessment of the credibility of expert witnesses: see *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247.

79 The policy reason underlying this rule is protection of “[t]he autonomy and integrity of the trial process” (*Schwartz v. Canada*, [1996] 1 S.C.R. 254, at p. 278), which recognizes that the trier of fact, who is in direct contact with the mass of the evidence, is in the best position to make findings of fact, particularly those which turn on credibility. Moreover, *Van der Peet* clarified that deference was owed to findings of fact even when the trial judge misapprehended the law which was applied to those facts, a problem which can arise in quickly evolving areas of law such as the jurisprudence surrounding s. 35(1).

80 I recently held, in *Van der Peet*, that these general principles apply to cases litigated under s. 35(1). On the other hand, while accepting the general principle of non-interference, this Court has also identified specific situations in which an appeal court can interfere with a finding of fact made at trial. For example, appellate intervention is warranted “where the courts below have misapprehended or overlooked material evidence”: see *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474, at p. 493. In cases involving the determination of aboriginal rights, appellate intervention is also warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it. As I said in *Van der Peet*, at para. 68:

In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the

evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case. [Emphasis added.]

81 The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by “their bridging of aboriginal and non-aboriginal cultures” (at para. 42). Accordingly, “a court must take into account the perspective of the aboriginal people claiming the right. . . . while at the same time taking into account the perspective of the common law” such that “[t]rue reconciliation will, equally, place weight on each” (at paras. 49 and 50).

82 In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain “the Canadian legal and constitutional structure” (at para. 49). Both the principles laid down in *Van der Peet* -- first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit -- must be understood against this background.

83 A concrete application of the first principle can be found in *Van der Peet* itself, where I addressed the difficulties inherent in demonstrating a continuity between

current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies. As I reiterate below, the requirement for continuity is one component of the definition of aboriginal rights (although, as I explain below, in the case of title, the issue is continuity from sovereignty, not contact). However, given that many aboriginal societies did not keep written records at the time of contact or sovereignty, it would be exceedingly difficult for them to produce (at para. 62) “conclusive evidence from pre-contact times about the practices, customs and traditions of their community”.

Accordingly, I held that (at para. 62):

The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. [Emphasis added.]

The same considerations apply when the time from which title is determined is sovereignty.

84 This appeal requires us to apply not only the first principle in *Van der Peet* but the second principle as well, and adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past. Given that the aboriginal rights recognized and affirmed by s. 35(1) are defined by reference to pre-contact practices or, as I will develop below, in the case of title, pre-sovereignty occupation, those histories play a crucial role in the litigation of aboriginal rights.

85 A useful and informative description of aboriginal oral history is provided by the *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 1 (*Looking Forward, Looking Back*), at p. 33:

The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notions of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human-centred in the same way as the western scientific tradition, for it does not assume that human beings are anything more than one -- and not necessarily the most important -- element of the natural order of the universe. Moreover, the Aboriginal historical tradition is an oral one, involving legends, stories and accounts handed down through the generations in oral form. It is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.

In the Aboriginal tradition the purpose of repeating oral accounts from the past is broader than the role of written history in western societies. It may be to educate the listener, to communicate aspects of culture, to socialize people into a cultural tradition, or to validate the claims of a particular family to authority and prestige. . . .

Oral accounts of the past include a good deal of subjective experience. They are not simply a detached recounting of factual events but, rather, are “facts enmeshed in the stories of a lifetime”. They are also likely to be rooted in particular locations, making reference to particular families and communities. This contributes to a sense that there are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.

86 Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only “as a repository of historical knowledge for a culture” but also as an expression of “the values and mores of [that] culture”: Clay McLeod, “The Oral Histories of Canada’s Northern People, Anglo-Canadian Evidence Law, and Canada’s Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past” (1992), 30 *Alta. L. Rev.* 1276, at p. 1279. Dickson J. (as he then was) recognized as much when he stated in *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 109, that “[c]laims to aboriginal title are woven with

history, legend, politics and moral obligations.” The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial -- the determination of the historical truth. Another feature of oral histories which creates difficulty is that they largely consist of out-of-court statements, passed on through an unbroken chain across the generations of a particular aboriginal nation to the present-day. These out-of-court statements are admitted for their truth and therefore conflict with the general rule against the admissibility of hearsay.

87 Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and aboriginal peoples: *Sioui, supra*, at p. 1068; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), at p. 232. To quote Dickson C.J., given that most aboriginal societies “did not keep written records”, the failure to do so would “impose an impossible burden of proof” on aboriginal peoples, and “render nugatory” any rights that they have (*Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 408). This process must be undertaken on a case-by-case basis. I will take this approach in my analysis of the trial judge’s findings of fact.

88 On a final note, it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was “overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue” (*Schwartz, supra*, at p. 281).

(2) Application of General Principles

(a) *General Comments*

89 The general principle of appellate non-interference applies with particular force in this appeal. The trial was lengthy and very complex. There were 318 days of testimony. There were a large number of witnesses, lay and expert. The volume of evidence is enormous. To quote the trial judge at pp. 116-17:

A total of 61 witnesses gave evidence at trial, many using translators from their native Gitksan or Wet'suwet'en language; "word spellers" to assist the official reporters were required for many witnesses; a further 15 witnesses gave their evidence on commission; 53 territorial affidavits were filed; 30 deponents were cross-examined out of court; there are 23,503 pages of transcript evidence at trial; 5898 pages of transcript of argument; 3,039 pages of commission evidence and 2,553 pages of cross-examination on affidavits (all evidence and oral arguments are conveniently preserved in hard copy and on diskettes); about 9,200 exhibits were filed at trial comprising, I estimate, well over 50,000 pages; the plaintiffs' draft outline of argument comprises 3,250 pages, the province's 1,975 pages, and Canada's over 1,000 pages; there are 5,977 pages of transcript of argument in hard copy and on diskettes. All parties filed some excerpts from the exhibits they referred to in argument. The province alone submitted 28 huge binders of such documents. At least 15 binders of reply argument were left with me during that stage of the trial.

The result was a judgment of over 400 pages in length.

90 It is not open to the appellants to challenge the trial judge's findings of fact merely because they disagree with them. I fear that a significant number of the appellants' objections fall into this category. Those objections are too numerous to list in their entirety. The bulk of these objections, at best, relate to alleged instances of misapprehension or oversight of material evidence by the trial judge. However, the respondents have established that, in most situations, there was some contradictory evidence that supported the trial judge's conclusion. The question, ultimately, was one

of weight, and the appellants have failed to demonstrate that the trial judge erred in this respect.

91 One objection that I would like to mention specifically, albeit in passing, is the trial judge's refusal to accept the testimony of two anthropologists who were brought in as expert witnesses by the appellants. This aspect of the trial judge's reasons was hotly contested by the appellants in their written submissions. However, I need only reiterate what I have stated above, that findings of credibility, including the credibility of expert witnesses, are for the trial judge to make, and should warrant considerable deference from appellate courts.

92 On the other hand, the appellants have alleged that the trial judge made a number of serious errors relating to the treatment of the oral histories of the appellants. Those oral histories were expressed in three different forms: (i) the adaawk of the Gitksan, and the kungax of the Wet'suwet'en; (ii) the personal recollections of members of the appellant nations, and (iii) the territorial affidavits filed by the heads of the individual houses within each nation. The trial judge ruled on both the admissibility of, and the weight to be given to, these various forms of oral history without the benefit of my reasons in *Van der Peet*, as will become evident in the discussion that follows.

(b) *Adaawk and Kungax*

93 The adaawk and kungax of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the trial judge, at p. 164, as a "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House". The content of these special oral histories includes its physical representation totem poles, crests and blankets. The

importance of the adaawk and kungax is underlined by the fact that they are “repeated, performed and authenticated at important feasts” (at p. 164). At those feasts, dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the adaawk and kungax. Although they serve largely the same role, the trial judge found that there are some differences in both the form and content of the adaawk and the kungax. For example, the latter is “in the nature of a song . . . which is intended to represent the special authority and responsibilities of a chief” However, these differences are not legally relevant for the purposes of the issue at hand.

94 It is apparent that the adaawk and kungax are of integral importance to the distinctive cultures of the appellant nations. At trial, they were relied on for two distinct purposes. First, the adaawk was relied on as a component of and, therefore, as proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed by that appellant. In other words, it was offered as evidence of the Gitksan’s historical use and occupation of that territory. For the Wet’suwet’en, the kungax was offered as proof of the central significance of the claimed lands to their distinctive culture. As I shall explain later in these reasons, both use and occupation, and the central significance of the lands occupied, are relevant to proof of aboriginal title.

95 The admissibility of the adaawk and kungax was the subject of a general decision of the trial judge handed down during the course of the trial regarding the admissibility of all oral histories (incorrectly indexed as *Uukw v. R.*, [1987] 6 W.W.R. 155 (B.C.S.C.)). Although the trial judge recognized that the evidence at issue was a form of hearsay, he ruled it admissible on the basis of the recognized exception that declarations made by deceased persons could be given in evidence by witnesses as proof of public or general rights: see Michael N. Howard, Peter Crane and Daniel A.

Hochberg, *Phipson on Evidence* (14th ed. 1990), at p. 736. He affirmed that earlier ruling in his trial judgment, correctly in my view, by stating, at p. 180, that the adaawk and kungax were admissible “out of necessity as exceptions to the hearsay rule” because there was no other way to prove the history of the Gitksan and Wet’suwet’en nations.

96 The trial judge, however, went on to give these oral histories no independent weight at all. He held, at p. 180, that they were only admissible as “direct evidence of facts in issue . . . in a few cases where they could constitute confirmatory proof of early presence in the territory”. His central concern that the adaawk and kungax could not serve “as evidence of detailed history, or land ownership, use or occupation”. I disagree with some of the reasons he relied on in support of this conclusion.

97 Although he had earlier recognized, when making his ruling on admissibility, that it was impossible to make an easy distinction between the mythological and “real” aspects of these oral histories, he discounted the adaawk and kungax because they were not “literally true”, confounded “what is fact and what is belief”, “included some material which might be classified as mythology”, and projected a “romantic view” of the history of the appellants. He also cast doubt on the authenticity of these special oral histories (at p. 181) because, *inter alia*, “the verifying group is so small that they cannot safely be regarded as expressing the reputation of even the Indian community, let alone the larger community whose opportunity to dispute territorial claims would be essential to weight”. Finally, he questioned (at p. 181) the utility of the adaawk and kungax to demonstrate use and occupation because they were “seriously lacking in detail about the specific lands to which they are said to relate”.

98 Although he framed his ruling on weight in terms of the specific oral histories before him, in my respectful opinion, the trial judge in reality based his decision

on some general concerns with the use of oral histories as evidence in aboriginal rights cases. In summary, the trial judge gave no independent weight to these special oral histories because they did not accurately convey historical truth, because knowledge about those oral histories was confined to the communities whose histories they were and because those oral histories were insufficiently detailed. However, as I mentioned earlier, these are features, to a greater or lesser extent, of all oral histories, not just the adaawk and kungax. The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system, in contradiction of the express instruction to the contrary in *Van der Peet* that trial courts interpret the evidence of aboriginal peoples in light of the difficulties inherent in adjudicating aboriginal claims.

(c) *Recollections of Aboriginal Life*

99 The trial judge also erred when he discounted the "recollections of aboriginal life" offered by various members of the appellant nations. I take that term to be a reference to testimony about personal and family history that is not part of an adaawk or a kungax. That evidence consisted of the personal knowledge of the witnesses and declarations of witnesses' ancestors as to land use. This history had been adduced by the appellants in order to establish the requisite degree of use and occupation to make out a claim to ownership and, for the same reason as the adaawk and kungax, is material to the proof of aboriginal title.

100 The trial judge limited the uses to which the evidence could be put. He reasoned, at p. 177, that this evidence, at most, established "without question, that the

plaintiff's immediate ancestors, for the past 100 years or so" had used land in the claimed territory for aboriginal purposes. However, the evidence was insufficiently precise to demonstrate that the more distant ancestors of the witnesses had engaged in specific enough land use "far enough back in time to permit the plaintiffs to succeed on issues such as internal boundaries". In the language of *Van der Peet*, the trial judge effectively held that this evidence did not demonstrate the requisite continuity between present occupation and past occupation in order to ground a claim for aboriginal title.

101 In my opinion, the trial judge expected too much of the oral history of the appellants, as expressed in the recollections of aboriginal life of members of the appellant nations. He expected that evidence to provide definitive and precise evidence of pre-contact aboriginal activities on the territory in question. However, as I held in *Van der Peet*, this will be almost an impossible burden to meet. Rather, if oral history cannot conclusively establish pre-sovereignty (after this decision) occupation of land, it may still be relevant to demonstrate that current occupation has its origins prior to sovereignty. This is exactly what the appellants sought to do.

(d) *Territorial Affidavits*

102 Finally, the trial judge also erred in his treatment of the territorial affidavits filed by the appellant chiefs. Those affidavits were declarations of the territorial holdings of each of the Gitksan and Wet'suwet'en houses and, at trial, were introduced for the purposes of establishing each House's ownership of its specific territory. Before this Court, the appellants tried to amalgamate these individual claims into collective claims on behalf of each nation and the relevance of the affidavits changed accordingly. I have already held that it is not open to the appellants to alter fundamentally the nature of their claim in this way on appeal. Nevertheless, the treatment of the affidavits is

important because they will be relevant at a new trial to the existence and nature of the land tenure system within each nation and, therefore, material to the proof of title.

103 The affidavits rely heavily on the declarations of deceased persons of use or ownership of the lands, which are a form of oral history. But those declarations are a kind of hearsay and the appellants therefore argued that the affidavits should be admitted through the reputation exception to the hearsay rule. Although he recognized, at p. 438, that the territorial affidavits were “the best evidence [the appellants] could adduce on this question of internal boundaries”, the trial judge held that this exception did not apply and refused to admit the declarations contained in the affidavits.

104 I am concerned by the specific reasons the trial judge gave for refusing to apply the reputation exception. He questioned the degree to which the declarations amounted to a reputation because they were largely confined to the appellants’ communities. The trial judge asserted that neighbouring aboriginal groups whose territorial claims conflicted with those of the appellants, as well as non-aboriginals who potentially possessed a legal interest in the claimed territory, were unaware of the content of the alleged reputation at all. Furthermore, the trial judge reasoned that since the subject-matter of the affidavits was disputed, its reliability was doubtful. Finally, the trial judge questioned, at p. 441, “the independence and objectivity” of the information contained in the affidavits, because the appellants and their ancestors (at p. 440) “have been actively discussing land claims for many years”.

105 Although he regretted this finding, the trial judge felt bound to apply the rules of evidence because it did not appear to him (at p. 442) “that the Supreme Court of Canada has decided that the ordinary rules of evidence do not apply to this kind of case”. The trial judge arrived at this conclusion, however, without the benefit of *Van der*

Peet, where I held that the ordinary rules of evidence must be approached and adapted in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.

106 Many of the reasons relied on by the trial judge for excluding the evidence contained in the territorial affidavits are problematic because they run against this fundamental principle. The requirement that a reputation be known in the general community, for example, ignores the fact that oral histories, as noted by the Royal Commission on Aboriginal Peoples, generally relate to particular locations, and refer to particular families and communities and may, as a result, be unknown outside of that community, even to other aboriginal nations. Excluding the territorial affidavits because the claims to which they relate are disputed does not acknowledge that claims to aboriginal rights, and aboriginal title in particular, are almost always disputed and contested. Indeed, if those claims were uncontroversial, there would be no need to bring them to the courts for resolution. Casting doubt on the reliability of the territorial affidavits because land claims had been actively discussed for many years also fails to take account of the special context surrounding aboriginal claims, in two ways. First, those claims have been discussed for so long because of British Columbia's persistent refusal to acknowledge the existence of aboriginal title in that province until relatively recently, largely as a direct result of the decision of this Court in *Calder, supra*. It would be perverse, to say the least, to use the refusal of the province to acknowledge the rights of its aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights. Second, this rationale for exclusion places aboriginal claimants whose societies record their past through oral history in a grave dilemma. In order for the oral history of a community to amount to a form of reputation, and to be admissible in court, it must remain alive through the discussions of members of that community; those discussions are the very basis of that reputation. But if those histories are discussed too much, and too close to the date of litigation, they may be discounted as

being suspect, and may be held to be inadmissible. The net effect may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history in court.

(e) *Conclusion*

107 The trial judge's treatment of the various kinds of oral histories did not satisfy the principles I laid down in *Van der Peet*. These errors are particularly worrisome because oral histories were of critical importance to the appellants' case. They used those histories in an attempt to establish their occupation and use of the disputed territory, an essential requirement for aboriginal title. The trial judge, after refusing to admit, or giving no independent weight to these oral histories, reached the conclusion that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the trial judge assessed the oral histories correctly, his conclusions on these issues of fact might have been very different.

108 In the circumstances, the factual findings cannot stand. However, given the enormous complexity of the factual issues at hand, it would be impossible for the Court to do justice to the parties by sifting through the record itself and making new factual findings. A new trial is warranted, at which the evidence may be considered in light of the principles laid down in *Van der Peet* and elaborated upon here. In applying these principles, the new trial judge might well share some or all of the findings of fact of McEachern C.J.

C. *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?*

(1) Introduction

109 The parties disagree over whether the appellants have established aboriginal title to the disputed area. However, since those factual issues require a new trial, we cannot resolve that dispute in this appeal. But factual issues aside, the parties also have a more fundamental disagreement over the content of aboriginal title itself, and its reception into the Constitution by s. 35(1). In order to give guidance to the judge at the new trial, it is to this issue that I will now turn.

110 I set out these opposing positions by way of illustration and introduction because I believe that all of the parties have characterized the content of aboriginal title incorrectly. The appellants argue that aboriginal title is tantamount to an inalienable fee simple, which confers on aboriginal peoples the rights to use those lands as they choose and which has been constitutionalized by s. 35(1). The respondents offer two alternative formulations: first, that aboriginal title is no more than a bundle of rights to engage in activities which are themselves aboriginal rights recognized and affirmed by s. 35(1), and that the *Constitution Act, 1982*, merely constitutionalizes those individual rights, not the bundle itself, because the latter has no independent content; and second, that aboriginal title, at most, encompasses the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves, and that s. 35(1) constitutionalizes this notion of exclusivity.

111 The content of aboriginal title, in fact, lies somewhere in between these positions. Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they

must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.

(2) Aboriginal Title at Common Law

(a) *General Features*

112 The starting point of the Canadian jurisprudence on aboriginal title is the Privy Council’s decision in *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, which described aboriginal title as a “personal and usufructuary right” (at p. 54). The subsequent jurisprudence has attempted to grapple with this definition, and has in the process demonstrated that the Privy Council’s choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from “normal” proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.

113 The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. This Court

has taken pains to clarify that aboriginal title is only “personal” in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.

114 Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine’s Milling*. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, *Common Law Aboriginal Title* (1989), at p. 7. Thus, in *Guerin, supra*, Dickson J. described aboriginal title, at p. 376, as a “legal right derived from the Indians’ historic occupation and possession of their tribal lands”. What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, “The Meaning of Aboriginal Title”, in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that “aboriginal title pre-dated colonization by the British and survived British claims of sovereignty” (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title -- the relationship between common law and pre-existing systems of aboriginal law.

115 A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right

to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

(b) *The Content of Aboriginal Title*

116 Although cases involving aboriginal title have come before this Court and Privy Council before, there has never been a definitive statement from either court on the content of aboriginal title. In *St. Catherine's Milling*, the Privy Council, as I have mentioned, described the aboriginal title as a “personal and usufructuary right”, but declined to explain what that meant because it was not “necessary to express any opinion upon the point” (at p. 55). Similarly, in *Calder*, *Guerin*, and *Paul*, the issues were the extinguishment of, the fiduciary duty arising from the surrender of, and statutory easements over land held pursuant to, aboriginal title, respectively; the content of title was not at issue and was not directly addressed.

117 Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that 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; and second, that those protected uses must not be irreconcilable with the nature of the group’s attachment to that land. For the sake of clarity, I will discuss each of these propositions separately.

Aboriginal title encompasses the right to use the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal

practices, cultures and traditions which are integral to distinctive aboriginal cultures

118 The respondents argue that aboriginal title merely encompasses the right to engage in activities which are aspects of aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures of the aboriginal group claiming the right and, at most, adds the notion of exclusivity; i.e., the exclusive right to use the land for those purposes. However, the uses to which lands held pursuant to aboriginal title can be put are not restricted in this way. This conclusion emerges from three sources: (i) the Canadian jurisprudence on aboriginal title, (ii) the relationship between reserve lands and lands held pursuant to aboriginal title, and (iii) the *Indian Oil and Gas Act.*, R.S.C., 1985, c. I-7. As well, although this is not legally determinative, it is supported by the critical literature. In particular, I have profited greatly from Professor McNeil's article, "The Meaning of Aboriginal Title", *supra*.

(i) Canadian Jurisprudence on Aboriginal Title

119 Despite the fact that the jurisprudence on aboriginal title is somewhat underdeveloped, it is clear that the uses to which lands held pursuant to aboriginal title can be put is not restricted to the practices, customs and traditions of aboriginal peoples integral to distinctive aboriginal cultures. In *Guerin*, for example, Dickson J. described aboriginal title as an "interest in land" which encompassed "a legal right to occupy and possess certain lands" (at p. 382). The "right to occupy and possess" is framed in broad terms and, significantly, is not qualified by reference to traditional and customary uses of those lands. Any doubt that the right to occupancy and possession encompasses a broad variety of uses of land was put to rest in *Paul*, where the Court went even further and stated that aboriginal title was "more than the right to enjoyment and occupancy" (at p. 678). Once again, there is no reference to aboriginal practices, customs and traditions

as a qualifier on that right. Moreover, I take the reference to “more” as emphasis of the broad notion of use and possession.

(ii) Reserve Land

120 Another source of support for the conclusion that the uses to which lands held under aboriginal title can be put are not restricted to those grounded in practices, customs and traditions integral to distinctive aboriginal cultures can be found in *Guerin*, where Dickson J. stated at p. 379 that the same legal principles governed the aboriginal interest in reserve lands and lands held pursuant to aboriginal title:

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases. . . . [Emphasis added.]

121 The nature of the Indian interest in reserve land is very broad, and can be found in s. 18 of the *Indian Act*, which I reproduce in full:

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

(2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct. [Emphasis added.]

The principal provision is s. 18(1), which states that reserve lands are held “for the use and benefit” of the bands which occupy them; those uses and benefits, on the face of the *Indian Act*, do not appear to be restricted to practices, customs and traditions integral to distinctive aboriginal cultures. The breadth of those uses is reinforced by s. 18(2), which states that reserve lands may be used “for any other purpose for the general welfare of the band”. The general welfare of the band has not been defined in terms of aboriginal practices, customs and traditions, nor in terms of those activities which have their origin pre-contact; it is a concept, by definition, which incorporates a reference to the present-day needs of aboriginal communities. On the basis of *Guerin*, lands held pursuant to aboriginal title, like reserve lands, are also capable of being used for a broad variety of purposes.

(iii) *Indian Oil and Gas Act*

122 The third source for the proposition that the content of aboriginal title is not restricted to practices, customs and traditions which are integral to distinctive aboriginal cultures is the *Indian Oil and Gas Act*. The overall purpose of the statute is to provide for the exploration of oil and gas on reserve lands through their surrender to the Crown. The statute presumes that the aboriginal interest in reserve land includes mineral rights, a point which this Court unanimously accepted with respect to the *Indian Act* in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344. On the basis of *Guerin*, aboriginal title also encompasses mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands. This conclusion is reinforced by s. 6(2) of the Act, which provides:

(2) Nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.

The areas referred to in s. 6(2), at the very least, must encompass lands held pursuant to aboriginal title, since those lands by definition have not been surrendered under land claims agreements. The presumption underlying s. 6(2) is that aboriginal title permits the development of oil and gas reserves.

123 Although this is not determinative, the conclusion that the content of aboriginal title is not restricted to those uses with their origins in the practices, customs and traditions integral to distinctive aboriginal societies has wide support in the critical literature: Jocelyn Gagne, “The Content of Aboriginal Title at Common Law: A Look at the Nishga Claim” (1982-83), 47 *Sask. L. Rev.* 309 at pp. 336-37; Kent McNeil, *Common Law Aboriginal Title*, *supra*, at p. 242; Kent McNeil, “The Meaning of Aboriginal Title”, *supra*, at pp. 143-150; William Pentney, “The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II -- Section 35: The Substantive Guarantee” (1988), 22 *U.B.C. L. Rev.* 207, at p. 221; *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (*Restructuring the Relationship*), at p. 561; Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1982-83), 8 *Queen’s L.J.* 232, at pp. 268-9; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983), at p. 34; Brian Slattery, “Understanding Aboriginal Rights”, 66 *Can. Bar Rev.* 727, at pp. 746-48.

124 In conclusion, the content of aboriginal title is not restricted to those uses which are elements of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. However, nor does aboriginal title amount to a form of inalienable fee simple, as I will now explain.

(c) *Inherent Limit: Lands Held Pursuant to Aboriginal Title Cannot Be Used in a Manner that Is Irreconcilable with the Nature of the Attachment to the Land Which Forms the Basis of the Group's Claim to Aboriginal Title*

125 The content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This limit on the content of aboriginal title is a manifestation of the principle that underlies the various dimensions of that special interest in land -- it is a *sui generis* interest that is distinct from "normal" proprietary interests, most notably fee simple.

126 I arrive at this conclusion by reference to the other dimensions of aboriginal title which are *sui generis* as well. I first consider the source of aboriginal title. As I discussed earlier, aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

127 I develop this point below with respect to the test for aboriginal title. The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands

that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.

128 Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. 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. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).

129 It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and,

therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy “to ensure that Indians are not dispossessed of their entitlements”: see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 133. What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent 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.

130 I am cognizant that the *sui generis* nature of aboriginal title precludes the application of “traditional real property rules” to elucidate the content of that title (*St. Mary’s Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, at para. 14). Nevertheless, a useful analogy can be drawn between the limit on aboriginal title and the concept of equitable waste at common law. Under that doctrine, persons who hold a life estate in real property cannot commit “wanton or extravagant acts of destruction” (E. H. Burn, *Cheshire and Burn’s Modern Law of Real Property* (14th ed. 1988), at p. 264) or “ruin the property” (Robert E. Megarry and H. W. R. Wade, *The Law of Real Property* (4th ed. 1975), at p. 105). This description of the limits imposed by the doctrine of equitable waste capture the kind of limit I have in mind here.

131 Finally, what I have just said regarding 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 in the way I have described. 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.

132 The foregoing amounts to a general limitation on the use of lands held by virtue of aboriginal title. It arises from the particular physical and cultural relationship that a group may have with the land and is defined by the source of aboriginal title over it. This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.

(d) *Aboriginal Title under s. 35(1) of the Constitution Act, 1982*

133 Aboriginal title at common law is protected in its full form by s. 35(1). This conclusion flows from the express language of s. 35(1) itself, which states in full: “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” (emphasis added). On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were “existing” in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (e.g., *Calder*, *supra*), s. 35(1) has constitutionalized it in its full form.

134 I expressed this understanding of the relationship between common law aboriginal rights, including aboriginal title, and the aboriginal rights protected by s. 35(1)

in *Van der Peet*. While explaining the purposes behind s. 35(1), I stated that “it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law” (at para. 28). Through the enactment of s. 35(1), “a pre-existing legal doctrine was elevated to constitutional status” (at para. 29), or in other words, s. 35(1) had achieved “the constitutionalization of those rights” (at para. 29).

135 Finally, this view of the effect of s. 35(1) on common law aboriginal title is supported by numerous commentators: Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1991), 36 *McGill L.J.* 382, at pp. 447-48; Kent McNeil, “The Constitutional Rights of the Aboriginal Peoples of Canada” (1982), 4 *Sup. Ct. L. Rev.* 255, at pp. 256-57; James O'Reilly, “La Loi constitutionnelle de 1982, droit des autochtones” (1984), 25 *C. de D.* 125, at p. 137; William Pentney, “The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982* Part II -- Section 35: The Substantive Guarantee”, *supra*, at pp. 220-21; Douglas Sanders, “The Rights of the Aboriginal Peoples of Canada” (1983), 61 *Can. Bar Rev.* 314, at p. 329; Douglas Sanders, “Pre-Existing Rights: The Aboriginal Peoples of Canada”, in Gérald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), 707, at pp. 731-32; Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights”, *supra*, at p. 254; Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title*, *supra*, at p. 45.

136 I hasten to add that the constitutionalization of common law aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1). As I said in *Côté*, *supra*, at para. 52:

Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers.

I relied on this proposition in *Côté* to defeat the argument that the possible absence of aboriginal rights under French colonial law was a bar to the existence of aboriginal rights under s. 35(1) within the historic boundaries of New France. But it also follows that the existence of a particular aboriginal right at common law is not a *sine qua non* for the proof of an aboriginal right that is recognized and affirmed by s. 35(1). Indeed, none of the decisions of this Court handed down under s. 35(1) in which the existence of an aboriginal right has been demonstrated has relied on the existence of that right at common law. The existence of an aboriginal right at common law is therefore sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1).

137 The acknowledgement that s. 35(1) has accorded constitutional status to common law aboriginal title raises a further question — the relationship of aboriginal title to the “aboriginal rights” protected by s. 35(1). I addressed that question in *Adams, supra*, where the Court had been presented with two radically different conceptions of this relationship. The first conceived of aboriginal rights as being “inherently based in aboriginal title to the land” (at para. 25), or as fragments of a broader claim to aboriginal title. By implication, aboriginal rights must rest either in a claim to title or the unextinguished remnants of title. Taken to its logical extreme, this suggests that aboriginal title is merely the sum of a set of individual aboriginal rights, and that it therefore has no independent content. However, I rejected this position for another — that aboriginal title is “simply one manifestation of a broader-based conception of aboriginal rights” (at para. 25). Thus, although aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights

because it arises where the connection of a group with a piece of land “was of a central significance to their distinctive culture” (at para. 26).

138 The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the “occupation and use of the land” where the activity is taking place is not “sufficient to support a claim of title to the land” (at para. 26 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there 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. I put the point this way in *Adams*, at para. 30:

Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. [Emphasis added.]

At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title 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. What aboriginal title confers is the right to the land itself.

139 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. As I explained in *Adams*, this may occur in the case of nomadic peoples who varied “the location of their settlements with the season and changing circumstances” (at para. 27). The fact that aboriginal peoples were non-sedentary, however (at para. 27)

does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures.

(e) *Proof of Aboriginal Title*

(i) Introduction

140 In addition to differing in the degree of connection with the land, aboriginal title differs from other aboriginal rights in another way. To date, the Court has defined aboriginal rights in terms of activities. As I said in *Van der Peet* (at para. 46):

[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. [Emphasis added.]

Aboriginal title, however, is a right to the land itself. Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title.

141 This difference between aboriginal rights to engage in particular activities and aboriginal title requires that the test I laid down in *Van der Peet* be adapted accordingly. I anticipated this possibility in *Van der Peet* itself, where I stated that (at para. 74):

Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights. [Emphasis added; "and" emphasized in original.]

Since the purpose of s. 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that s. 35(1) must recognize and affirm both aspects of that prior presence — first, the occupation of land, and second, the prior social organization and distinctive cultures of aboriginal peoples on that land. To date the jurisprudence under s. 35(1) has given more emphasis to the second aspect. To a great extent, this has been a function of the types of cases which have come before this Court under s. 35(1) — prosecutions for regulatory offences that, by their very nature, proscribe discrete types of activity.

142 The adaptation of the test laid down in *Van der Peet* to suit claims to title must be understood as the recognition of the first aspect of that prior presence. However, as will now become apparent, the tests for the identification of aboriginal rights to engage in particular activities and for the identification of aboriginal title share broad similarities. The major distinctions are 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, and 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.

(ii) The Test for the Proof of Aboriginal Title

143 In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

The land must have been occupied prior to sovereignty

144 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 subject to the title. The relevant time period for the establishment of title is, therefore, different than for the establishment of aboriginal rights to engage in specific activities. In *Van der Peet*, I held, at para. 60 that “[t]he time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact . . .” This arises from the fact that in defining the central and distinctive attributes of pre-existing aboriginal societies it is necessary to look to a time prior to the arrival of Europeans. Practices, customs or traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights.

145 On the other hand, 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. Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make 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 and traditions and those influenced or introduced by European contact. 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, from a practical standpoint, it appears that the date of sovereignty is more certain than the date of first contact. It is often very difficult to determine the precise moment that each aboriginal group had first contact with European culture. I note that this is the approach has support in the academic literature: Brian Slattery, "Understanding Aboriginal Rights", *supra*, at p. 742; Kent McNeil, *Common Law Aboriginal Title*, *supra*, at p. 196. For these reasons, I conclude that aborigines must establish occupation of the land from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title. McEachern C.J. found, at pp. 233-34, and the parties did not dispute on appeal, that British sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846. This is not to say that circumstances subsequent to sovereignty may never be relevant to title or compensation; this might be the case, for example, where native bands have been dispossessed of traditional lands after sovereignty.

146 There was a consensus among the parties on appeal that proof of historic occupation was required to make out a claim to aboriginal title. However, the parties disagreed on how that occupancy could be proved. The respondents assert that in order to establish aboriginal title, the occupation must be the physical occupation of the land in question. The appellant Gitksan nation argue, by contrast, that aboriginal title may be established, at least in part, by reference to aboriginal law.

147 This debate over the proof of occupancy reflects two divergent views of the source of aboriginal title. The respondents argue, in essence, that aboriginal title arises from the physical reality at the time of sovereignty, whereas the Gitksan effectively take the position that aboriginal title arises from and should reflect the pattern of land holdings under aboriginal law. However, as I have explained above, the source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy. Indeed, there is precedent for doing so. In *Baker Lake, supra*, Mahoney J. held that to prove aboriginal title, the claimants needed both to demonstrate their “physical presence on the land they occupied” (at p. 561) and the existence “among [that group of] . . . a recognition of the claimed rights. . . . by the regime that prevailed before” (at p. 559).

148 This approach to the proof of occupancy at common law is also mandated in the context of s. 35(1) by *Van der Peet*. In that decision, as I stated above, I held at para. 50 that the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the “aboriginal perspective while at the same time taking into account the perspective of the common law” and that “[t]rue reconciliation will, equally, place weight on each”. I also held that the aboriginal perspective on the occupation of their lands can be gleaned, in

part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples: at para. 41. As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.

149 However, the aboriginal perspective must be taken into account alongside the perspective of the common law. Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land: *Common Law Aboriginal Title*, *supra*, at p. 73; also see *Cheshire and Burn's Modern Law of Real Property*, *supra*, at p. 28; and Megarry and Wade, *The Law of Real Property*, *supra*, at p. 1006. 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: see McNeil, *Common Law Aboriginal Title*, at pp. 201-2. In considering whether occupation sufficient to ground title is established, “one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed”: Brian Slattery, “Understanding Aboriginal Rights”, at p. 758.

150 In *Van der Peet*, I drew a distinction between those practices, customs and traditions of aboriginal peoples which were “an aspect of, or took place in” the society of the aboriginal group asserting the claim and those which were “a central and significant part of the society’s distinctive culture” (at para. 55). The latter stood apart because they “made the culture of the society distinctive . . . it was one of the things that truly made the society what it was” (at para. 55, emphasis in original). The same

requirement operates in the determination of the proof of aboriginal title. As I said in *Adams*, a claim to title is made out when a group can demonstrate “that their connection with the piece of land . . . was of a central significance to their distinctive culture” (at para. 26).

151 Although this remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.

If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation

152 In *Van der Peet*, I explained that it is the pre-contact practices, customs and traditions of aboriginal peoples which are recognized and affirmed as aboriginal rights by s. 35(1). But I also acknowledged it would be “next to impossible” (at para. 62) for an aboriginal group to provide conclusive evidence of its pre-contact practices, customs and traditions. What would suffice instead was evidence of post-contact practices, which was “directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact” (at para. 62). The same concern, and the same solution, arises with respect to the proof of occupation in claims for aboriginal title, although there

is a difference in the time for determination of title. Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a continuity between present and pre-sovereignty occupation, because the relevant time for the determination of aboriginal title is at the time before sovereignty.

153 Needless to say, there is no need to establish “an unbroken chain of continuity” (*Van der Peet*, at para. 65) between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk “undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect” aboriginal rights to land (*Côté, supra*, at para. 53). In *Mabo, supra*, the High Court of Australia set down the requirement that there must be “substantial maintenance of the connection” between the people and the land. In my view, this test should be equally applicable to proof of title in Canada.

154 I should also note that there is a strong possibility that the precise nature of occupation will have changed between the time of sovereignty and the present. I would like to make it clear that 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. The only limitation on this principle might be the internal limits on uses which land that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aborigines.

At sovereignty, occupation must have been exclusive

155 Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right. Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.

156 As with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective, placing equal weight on each. At common law, a premium is placed on the factual reality of occupation, as encountered by the Europeans. However, as the common law concept of possession must be sensitive to the realities of aboriginal society, so must the concept of exclusivity. Exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by “the intention and capacity to retain exclusive control” (McNeil, *Common Law Aboriginal Title*, *supra*, at p. 204). Thus, an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to

and attempted to enforce their exclusive occupation. Moreover, as Professor McNeil suggests, the presence of other aboriginal groups might actually reinforce a finding of exclusivity. For example, “[w]here others were allowed access upon request, the very fact that permission was asked for and given would be further evidence of the group’s exclusive control” (at p. 204).

157 A consideration of the aboriginal perspective may also lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title. For example, the aboriginal group asserting the claim to aboriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.

158 In their submissions, the appellants pressed the point that requiring proof of exclusive occupation might preclude a finding of joint title, which is shared between two or more aboriginal nations. The possibility of joint title has been recognized by American courts: *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941). I would suggest that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity. The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and

recognized each other's entitlement to that land but nobody else's. However, since no claim to joint title has been asserted here, I leave it to another day to work out all the complexities and implications of joint title, as well as any limits that another band's title may have on the way in which one band uses its title lands.

159 I should also reiterate that if aborigines can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title. These rights will likely be intimately tied to the land and may permit a number of possible uses. However, unlike title, they are not a right to the land itself. Rather, as I have suggested, they are a right to do certain things in connection with that land. If, for example, it were established that the lands near those subject to a title claim were used for hunting by a number of bands, those shared lands would not be subject to a claim for aboriginal title, as they lack the crucial element of exclusivity. However, they may be subject to site-specific aboriginal rights by all of the bands who used it. This does not entitle anyone to the land itself, but it may entitle all of the bands who hunted on the land to hunting rights. Hence, in addition to shared title, it will be possible to have shared, non-exclusive, site-specific rights. In my opinion, this accords with the general principle that the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the aboriginal system of governance. It also allows sufficient flexibility to deal with this highly complex and rapidly evolving area of the law.

(f) *Infringements of Aboriginal Title: the Test of Justification*

(i) Introduction

160 The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. However, s. 35(1) requires that those infringements satisfy the test of justification. In this section, I will review the Court's nascent jurisprudence on justification and explain how that test will apply in the context of infringements of aboriginal title.

(ii) General Principles

161 The test of justification has two parts, which I shall consider in turn. First, the infringement of the aboriginal right must be in furtherance of a legislative objective that is compelling and substantial. I explained in *Gladstone* that compelling and substantial objectives were those which were directed at either one of the purposes underlying the recognition and affirmation of aboriginal rights by s. 35(1), which are (at para. 72):

. . . the recognition of the prior occupation of North America by aboriginal peoples or . . . the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown.

I noted that the latter purpose will often "be most relevant" (at para. 72) at the stage of justification. I think it important to repeat why (at para. 73) that is so:

Because . . . distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a

necessary part of that reconciliation. [Emphasis added; “equally” emphasized in original.]

The conservation of fisheries, which was accepted as a compelling and substantial objective in *Sparrow*, furthers both of these purposes, because it simultaneously recognizes that fishing is integral to many aboriginal cultures, and also seeks to reconcile aboriginal societies with the broader community by ensuring that there are fish enough for all. But legitimate government objectives also include “the pursuit of economic and regional fairness” and “the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups” (para. 75). By contrast, measures enacted for relatively unimportant reasons, such as sports fishing without a significant economic component (*Adams, supra*) would fail this aspect of the test of justification.

162

The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the “legal and factual context” of each appeal (*Gladstone, supra*, at para. 56). *Sparrow* and *Gladstone*, for example, interpreted and applied the fiduciary duty in terms of the idea of priority. The theory underlying that principle is that the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first. However, the fiduciary duty does not demand that aboriginal rights always be given priority. As was said in *Sparrow, supra*, at pp. 1114-15:

The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. [Emphasis added.]

Other contexts permit, and may even require, that the fiduciary duty be articulated in other ways (at p. 1119):

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.

Sparrow did not explain when the different articulations of the fiduciary duty should be used. Below, I suggest that the choice between them will in large part be a function of the nature of the aboriginal right at issue.

163 In addition to variation in the form which the fiduciary duty takes, there will also be variation in degree of scrutiny required by the fiduciary duty of the infringing measure or action. The degree of scrutiny is a function of the nature of the aboriginal right at issue. The distinction between *Sparrow* and *Gladstone*, for example, turned on whether the right amounted to the exclusive use of a resource, which in turn was a function of whether the right had an internal limit. In *Sparrow*, the right was internally limited, because it was a right to fish for food, ceremonial and social purposes, and as a result would only amount to an exclusive right to use the fishery in exceptional circumstances. Accordingly, the requirement of priority was applied strictly to mean that (at p. 1116) “any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing”.

164 In *Gladstone*, by contrast, the right to sell fish commercially was only limited by supply and demand. Had the test for justification been applied in a strict form in *Gladstone*, the aboriginal right would have amounted to an exclusive right to exploit the fishery on a commercial basis. This was not the intention of *Sparrow*, and I accordingly modified the test for justification, by altering the idea of priority in the following way (at para. 62):

. . . the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.

After *Gladstone*, in the context of commercial activity, the priority of aboriginal rights is constitutionally satisfied if the government had taken those rights into account and has allocated a resource “in a manner respectful” (at para. 62) of that priority. A court must be satisfied that “the government has taken into account the existence and importance of [aboriginal] rights” (at para. 63) which it determines by asking the following questions (at para. 64):

Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are . . . questions such as whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced licence fees, for example), whether the government’s objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery (food *versus* commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.

(iii) Justification and Aboriginal Title

165 The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced

to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community” (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

166 The manner in which the fiduciary duty operates with respect to the second stage of the justification test -- both with respect to the standard of scrutiny and the particular form that the fiduciary duty will take -- will be a function of the nature of aboriginal title. Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses 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; and third, that lands held pursuant to aboriginal title have an inescapable economic component.

167 The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown’s fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. What is required is that the government demonstrate (at para. 62) “both that the process by which it allocated the resource and

the actual allocation of the resource which results from that process reflect the prior interest” of the holders of aboriginal title in the land. By analogy with *Gladstone*, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive. This is an issue that may involve an assessment of the various interests at stake in the resources in question. No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.

168 Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title 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. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown’s failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively

minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

169 Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.

D. *Has a claim to self-government been made out by the appellants?*

170 In the courts below, considerable attention was given to the question of whether s. 35(1) can protect a right to self-government, and if so, what the contours of that right are. The errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation. The parties seem to have acknowledged this point, perhaps implicitly, by giving the arguments on self-government much less weight on appeal. One source of the decreased emphasis on the right to self-government on appeal is this Court's judgment *Pamajewon*. There, I held that rights to self-government, if they existed, cannot be framed in excessively general terms. The appellants did not have the benefit of my judgment at trial. Unsurprisingly, as counsel for the Wet'suwet'en specifically concedes, the appellants advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1).

171 The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.

E. *Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the Indian Act?*

(1) Introduction

172 For aboriginal rights to be recognized and affirmed by s. 35(1), they must have existed in 1982. Rights which were extinguished by the sovereign before that time are not revived by the provision. In a federal system such as Canada's, the need to determine whether aboriginal rights have been extinguished raises the question of which level of government has jurisdiction to do so. In the context of this appeal, that general question becomes three specific ones. First, there is the question whether the province of British Columbia, from the time it joined Confederation in 1871, until the entrenchment of s. 35(1) in 1982, had the jurisdiction to extinguish the rights of aboriginal peoples, including aboriginal title, in that province. Second, if the province was without such jurisdiction, another question arises -- whether provincial laws which were not in pith and substance aimed at the extinguishment of aboriginal rights could have done so nevertheless if they were laws of general application. The third and final question is whether a provincial law, which could otherwise not extinguish aboriginal rights, be given that effect through referential incorporation by s. 88 of the *Indian Act*.

(2) Primary Jurisdiction

173 Since 1871, the exclusive power to legislate in relation to "Indians, and Lands reserved for the Indians" has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.

“Lands reserved for the Indians”

174 I consider the second part of this provision first, which confers jurisdiction to the federal government over “Lands reserved for the Indians”. The debate between the parties centred on whether that part of s. 91(24) confers jurisdiction to legislate with respect to aboriginal title. The province’s principal submission is that “Lands reserved for the Indians” are lands which have been specifically set aside or designated for Indian occupation, such as reserves. However, I must reject that submission, because it flies in the face of the judgment of the Privy Council in *St. Catherine’s Milling*. One of the issues in that appeal was the federal jurisdiction to accept the surrender of lands held pursuant to aboriginal title. It was argued that the federal government, at most, had jurisdiction over “Indian Reserves”. Lord Watson, speaking for the Privy Council, rejected this argument, stating that had the intention been to restrict s. 91(24) in this way, specific language to this effect would have been used. He accordingly held that (at p. 59):

. . . the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian occupation.

Lord Watson’s reference to “all lands” encompasses not only reserve lands, but lands held pursuant to aboriginal title as well. Section 91(24), in other words, carries with it the jurisdiction to legislate in relation to aboriginal title. It follows, by implication, that it also confers the jurisdiction to extinguish that title.

175 The province responds by pointing to the fact that underlying title to lands held pursuant to aboriginal title vested with the provincial Crown pursuant to s. 109 of

the *Constitution Act, 1867*. In its submission, this right of ownership carried with it the right to grant fee simples which, by implication, extinguish aboriginal title, and so by negative implication excludes aboriginal title from the scope of s. 91(24). The difficulty with the province's submission is that it fails to take account of the language of s. 109, which states in part that:

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces . . . subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Although that provision vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to the "any Interest other than that of the Province in the same". In *St. Catherine's Milling*, the Privy Council held that aboriginal title was such an interest, and rejected the argument that provincial ownership operated as a limit on federal jurisdiction. The net effect of that decision, therefore, was to separate the ownership of lands held pursuant to aboriginal title from jurisdiction over those lands. Thus, although on surrender of aboriginal title the province would take absolute title, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment -- although on extinguishment of aboriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government.

I conclude with two remarks. First, even if the point were not settled, I would have come to the same conclusion. The judges in the court below noted that separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result -- the government vested with primary constitutional responsibility for securing the welfare of Canada's aboriginal peoples would find itself unable to safeguard one of the most central of native interests — their interest in their

lands. Second, although the submissions of the parties and my analysis have focussed on the question of jurisdiction over aboriginal title, in my opinion, the same reasoning applies to jurisdiction over any aboriginal right which relates to land. As I explained earlier, *Adams* clearly establishes that aboriginal rights may be tied to land but nevertheless fall short of title. Those relationships with the land, however, may be equally fundamental to aboriginal peoples and, for the same reason that jurisdiction over aboriginal title must vest with the federal government, so too must the power to legislate in relation to other aboriginal rights in relation to land.

“Indians”

177 The extent of federal jurisdiction over Indians has not been definitively addressed by this Court. We have not needed to do so because the *vires* of federal legislation with respect to Indians, under the division of powers, has never been at issue. The cases which have come before the Court under s. 91(24) have implicated the question of jurisdiction over Indians from the other direction -- whether provincial laws which on their face apply to Indians intrude on federal jurisdiction and are inapplicable to Indians to the extent of that intrusion. As I explain below, the Court has held that s. 91(24) protects a “core” of Indianness from provincial intrusion, through the doctrine of interjurisdictional immunity.

178 It follows, at the very least, that this core falls within the scope of federal jurisdiction over Indians. That core, for reasons I will develop, encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1). Laws which purport to extinguish those rights therefore touch the core of Indianness which lies at the heart of s. 91(24), and are beyond the legislative competence of the provinces to enact. The core of Indianness encompasses the whole range of aboriginal rights that are

protected by s. 35(1). Those rights include rights in relation to land; that part of the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians". Provincial governments are prevented from legislating in relation to both types of aboriginal rights.

(3) Provincial Laws of General Application

179 The vesting of exclusive jurisdiction with the federal government over Indians and Indian lands under s. 91(24), operates to preclude provincial laws in relation to those matters. Thus, provincial laws which single out Indians for special treatment are *ultra vires*, because they are in relation to Indians and therefore invade federal jurisdiction: see *R. v. Sutherland*, [1980] 2 S.C.R. 451. However, it is a well-established principle that (*Four B Manufacturing Ltd.*, *supra*, at p. 1048):

The conferring upon Parliament of exclusive legislative competence to make laws relating to certain classes of persons does not mean that the totality of these persons' rights and duties comes under primary federal competence to the exclusion of provincial laws of general application.

In other words, notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands. Thus, this Court has held that provincial labour relations legislation (*Four B*) and motor vehicle laws (*R. v. Francis*, [1988] 1 S.C.R. 1025), which purport to apply to all persons in the province, also apply to Indians living on reserves.

180 What must be answered, however, is whether the same principle allows provincial laws of general application to extinguish aboriginal rights. I have come to the conclusion that a provincial law of general application could not have this effect, for two

reasons. First, a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being *ultra vires* the province. That standard was laid down in *Sparrow, supra*, at p. 1099, as one of “clear and plain” intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been “necessarily inconsistent” with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown “use language which refers expressly to its extinguishment of aboriginal rights” (*Gladstone, supra*, at para. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.

181 Second, as I mentioned earlier, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on “Indianness” or the “core of Indianness” (*Dick, supra*, at pp. 326 and 315; also see *Four B, supra*, at p. 1047 and *Francis, supra*, at pp. 1028-29). The core of Indianness at the heart of s. 91(24) has been defined in both negative and positive terms. Negatively, it has been held to not include labour relations (*Four B*) and the driving of motor vehicles (*Francis*). The only positive formulation of Indianness was offered in *Dick*. Speaking for the Court, Beetz J. assumed, but did not decide, that a provincial hunting law did not apply *proprio vigore* to the members of an Indian band to hunt and because those activities were “at the centre of what they do and what they are” (at p. 320). But in *Van der Peet*, I described and defined the aboriginal rights that are

recognized and affirmed by s. 35(1) in a similar fashion, as protecting the occupation of land and the activities which are integral to the distinctive aboriginal culture of the group claiming the right. It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application.

(4) Section 88 of the *Indian Act*

182 Provincial laws which would otherwise not apply to Indians *proprio vigore*, however, are allowed to do so by s. 88 of the *Indian Act*, which incorporates by reference provincial laws of general application: *Dick, supra*, at pp. 326-27; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at p. 297; *Francis, supra*, at pp. 1030-31. However, it is important to note, in Professor Hogg's words, that s. 88 does not "invigorate" provincial laws which are invalid because they are in relation to Indians and Indian lands (*Constitutional Law of Canada* (3rd ed. 1992), at p. 676; also see *Dick, supra*, at p. 322). What this means is that s. 88 extends the effect of provincial laws of general application which cannot apply to Indians and Indian lands because they touch on the Indianness at the core of s. 91(24). For example, a provincial law which regulated hunting may very well touch on this core. Although such a law would not apply to aboriginal people *proprio vigore*, it would still apply through s. 88 of the *Indian Act*, being a law of general application. Such laws are enacted to conserve game and for the safety of all.

183 The respondent B.C. Crown argues that since such laws are *intra vires* the province, and applicable to aboriginal persons, s. 88 could allow provincial laws to extinguish aboriginal rights. I reject this submission, for the simple reason that s. 88 does not evince the requisite clear and plain intent to extinguish aboriginal rights. The provision states in full:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.

I see nothing in the language of the provision which even suggests the intention to extinguish aboriginal rights. Indeed, the explicit reference to treaty rights in s. 88 suggests that the provision was clearly not intended to undermine aboriginal rights.

VI. Conclusion and Disposition

184 For the reasons I have given above, I would allow the appeal in part, and dismiss the cross-appeal. Reluctantly, I would also order a new trial.

185 I conclude with two observations. The first is that many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation.

186 Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base

upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.

//*La Forest J.*//

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

187 LA FOREST J. -- I have read the reasons of the Chief Justice, and while I agree with his conclusion, I disagree with various aspects of his reasons and in particular, with the methodology he uses to prove that aboriginal peoples have a general right of occupation of certain lands (often referred to as "aboriginal title").

188 I begin by considering why a new trial is necessary in this case. It is true, as the Chief Justice points out, that the amalgamation of the appellants' individual claims represents a defect in the pleadings and, technically speaking, this prevents us from considering the merits of the case. However, in my view, there is a more substantive problem with the pleadings in this case. Before this Court, the appellants sought a declaration of "aboriginal title" but attempted, in essence, to prove that they had complete control over the territory in question. The appellants effectively argued on appeal, as they did at trial, that by virtue of their social and land tenure systems -- consisting of Chief authority, Houses, feasts, crests, and totem poles -- they acquired an

absolute interest in the claimed territory, including ownership of and jurisdiction over the land. The problem with this approach is that it requires proof of governance and control as opposed to proof of general occupation of the affected land. Only the latter is the *sine qua non* of “aboriginal title”. It follows that what the appellants sought by way of declaration from this Court and what they set out to prove by way of the evidence were two different matters. In light of this substantive defect in the pleadings, a new trial should be ordered to permit a reassessment of the matter on the basis of these reasons.

189

In my view, the foundation of “aboriginal title” was succinctly described by Judson J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, where, at p. 328, he stated: “the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means . . .” Relying in part on Judson J.’s remarks, Dickson J. (as he then was) wrote in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 382, that aboriginal peoples have a “legal right to occupy and possess certain lands, the ultimate title to which is in the Crown”. As well, in *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, this Court stated, at p. 678: “The inescapable conclusion from the Court’s analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy although . . . it is difficult to describe what more in traditional property law terminology”. More recently, Judson J.’s views were reiterated in *R. v. Van der Peet*, [1996] 2 S.C.R. 507. There Lamer C.J. wrote for the majority, at para. 30, that the doctrine of aboriginal rights (one aspect of which is “aboriginal title”) arises from “one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries” (emphasis in original).

190 It follows from these cases that the aboriginal right of possession is derived from the historic occupation and use of ancestral lands by aboriginal peoples. Put another way, “aboriginal title” is based on the continued occupation and use of the land as part of the aboriginal peoples’ traditional way of life. This *sui generis* interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. The best description of “aboriginal title”, as set out above, is a broad and general one derived from Judson J.’s pronouncements in *Calder*, *supra*. Adopting the same approach, Dickson J. wrote in *Guerin*, *supra*, that the aboriginal right of occupancy is further characterized by two principal features. First, this *sui generis* interest in the land is personal in that it is generally inalienable except to the Crown. Second, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat aboriginal peoples fairly. Dickson J. went on to conclude, at p. 382, that “[a]ny description of Indian title which goes beyond these two features is both unnecessary and potentially misleading”. I share his views and am therefore reluctant to define more precisely the “right [of aboriginal peoples] to continue to live on their lands as their forefathers had lived”; see *Calder*, at p. 328.

191 The approach I adopt, in defining the aboriginal right of occupancy, is also a highly contextual one. More specifically, I find it necessary to make a distinction between: (1) the recognition of a general right to occupy and possess ancestral lands; and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area. I defined the latter in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 97, as “the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose”. The issue in *Côté*, as in *Van der Peet*, was whether the use of a particular fishing spot was really an aspect of the aboriginal peoples’ way of life in pre-contact times; see also in the *Van der Peet* trilogy *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672.

In all those cases, the fishing rights asserted by the aboriginal claimants were not associated with a more general occupancy of the affected land. By contrast, the present case deals with a general claim to occupy and possess vast tracts of territory (58,000 square kilometres). This type of generalized land claim is not merely a bundle of discrete aboriginal rights to engage in specific activities. Rather, it is, as the Chief Justice states, at para. 111, the “right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies”. These land-based activities are, of course, related to the aboriginal society’s habits and mode of life.

192 I note, as well, that in defining the nature of “aboriginal title”, one should generally not be concerned with statutory provisions and regulations dealing with reserve lands. In *Guerin, supra*, this Court held that the interest of an Indian band in a reserve is derived from, and is of the same nature as, the interest of an aboriginal society in its traditional tribal lands. Accordingly, the Court treated the aboriginal interest in reserve lands as one of occupation and possession while recognizing that the underlying title to those lands was in the Crown. It was not decided in *Guerin, supra*, and it by no means follows, that specific statutory provisions governing reserve lands should automatically apply to traditional tribal lands. For this reason, I am unable to assume that specific “reserve” provisions of the *Indian Act*, R.S.C., 1985, c. I-5, and the *Indian Oil and Gas Act*, R.S.C., 1985, c. I-7, apply to huge tracts of land which are subject to an aboriginal right of occupancy.

193 I turn next to this Court’s decision in *Van der Peet, supra*, where the Chief Justice identified a number of factors essential to the recognition of aboriginal rights under s. 35(1) of the *Constitution Act, 1982*. As I have already indicated, the *Van der Peet* trilogy dealt with activity-based discrete rights and, more specifically, with fishing

activities that were carried out in the face of statutory prohibitions. By contrast, the present case deals with a generalized claim over vast tracts of territory, a claim which is itself the foundation for particular rights and activities. Moreover, I agree with the appellants that this generalized claim should not be defined as merely a compendium of aboriginal rights, each of which must meet the test set out in *Van der Peet*. Nonetheless, I am of the view that the “key” factors identified in *Van der Peet*, namely precision, specificity, continuity, and centrality are still met by my approach in the present case.

194 First, it is clear that the nature of an aboriginal claim must be identified precisely with regard to particular practices, customs and traditions. As already mentioned, when dealing with a claim of “aboriginal title”, the court will focus on the occupation and use of the land as part of the aboriginal society’s traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. These uses, although limited to the aboriginal society’s traditional way of life, may be exercised in a contemporary manner; see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1099.

195 Second, it is self-evident that an aboriginal society asserting the right to live on its ancestral lands must specify the area which has been continuously used and occupied. That is, the general boundaries of the occupied territory should be identified. I recognize, however, that when dealing with vast tracts of territory it may be impossible to identify geographical limits with scientific precision. Nonetheless, this should not preclude the recognition of a general right of occupation of the affected land. Rather, the drawing of exact territorial limits can be settled by subsequent negotiations between the aboriginal claimants and the government.

196 Some would also argue that specificity requires exclusive occupation and use of the land by the aboriginal group in question. The way I see it, exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society. On the other hand, I recognize the possibility that two or more aboriginal groups may have occupied the same territory and used the land communally as part of their traditional way of life. In cases where two or more groups have accommodated each other in this way, I would not preclude a finding of joint occupancy. The result may be different, however, in cases where one dominant aboriginal group has merely permitted other groups to use the territory or where definite boundaries were established and maintained between two aboriginal groups in the same territory.

197 Third, as indicated above, the aboriginal right of possession is based on the continued occupation and use of traditional tribal lands. The Chief Justice concludes that the relevant time period for the establishment of “aboriginal title” is the time at which the Crown asserted sovereignty over the affected land. I agree that in the context of generalized land claims, it is more appropriate, from a practical and theoretical standpoint, to consider the time of sovereignty as opposed to the time of first contact between an aboriginal society and Europeans. However, I am also of the view that the date of sovereignty may not be the only relevant moment to consider. For instance, there may have been aboriginal settlements in one area of the province but, after the assertion of sovereignty, the aboriginal peoples may have all moved to another area where they remained from the date of sovereignty until the present. This relocation may have been due to natural causes, such as the flooding of villages, or to clashes with European settlers. In these circumstances, I would not deny the existence of “aboriginal title” in that area merely because the relocation occurred post-sovereignty. In other

words, continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area.

198 Also, on the view I take of continuity, I agree with the Chief Justice that it is not necessary for courts to have conclusive evidence of pre-sovereignty occupation. Rather, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, I agree that there is no need to establish an unbroken chain of continuity and that interruptions in occupancy or use do not necessarily preclude a finding of “title”. I would go further, however, and suggest that the presence of two or more aboriginal groups in a territory may also have an impact on continuity of use. For instance, one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange. In these circumstances, continuity of use and occupation, extending back to the relevant time, may very well be established; see Brian Slattery, “Understanding Aboriginal Rights” (1987), 66 *Can. Bar Rev.* 727, at p. 759.

199 Fourth, if aboriginal peoples continue to occupy and use the land as part of their traditional way of life, it necessarily follows that the land is of central significance to them. As already suggested, aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas. Rather, the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy. Viewed in this light, occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness. To use the language of *Van der Peet*, proof of occupancy is proof of centrality.

200 I would also add that my approach regarding the nature of aboriginal occupancy is supported by the terms of the *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No. 1. Although the *Proclamation* is not the sole source of “aboriginal title” in this country, it bears witness to the British policy towards aboriginal peoples which was based on respect for their right to occupy their ancestral lands; see *Sparrow, supra*, at p. 1103. Specifically, the *Proclamation* provides:

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve 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.

In clear terms vast tracts of territory (including large portions of the area now comprising Ontario, Quebec, and the prairie provinces) were reserved for aboriginal peoples. These huge tracts of land were by no means limited to villages or permanent settlements but were reserved more generally as “Hunting Grounds” and “for the use of the said Indians”. Aboriginal peoples had the right to possess the lands reserved for them and “not be molested or disturbed in the Possession” of such territory. In essence, the rights set out in the *Proclamation* -- which were applied in principle to aboriginal peoples across the country -- underlie the view I have taken of aboriginal occupancy; see *R. v. Wesley*, [1932] 4 D.L.R. 774 (Alta. S.C., App. Div.), at p. 787, and *R. v. Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.), aff’d *Sikyea v. The Queen*, [1964] S.C.R. 642.

201 The analysis thus far has focussed on the nature of the aboriginal right to occupy and possess certain lands -- a right recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*. Nonetheless, as Dickson C.J. and I wrote in *Sparrow, supra*, at p. 1109: “Rights that are recognized and affirmed are not absolute”. Thus, government

regulation can infringe upon aboriginal rights if it meets the test of justification under s. 35(1). It is important to emphasize as well that the approach adopted under s. 35(1) is a highly contextual one. This is also clear from the reasons I wrote jointly with Dickson C.J. in *Sparrow*, at p. 1111:

We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

202 In the context of the present case, I agree with the Chief Justice that the general economic development of the interior of British Columbia, through agriculture, mining, forestry, and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations are valid legislative objectives that, in principle, satisfy the first part of the justification analysis.

203 Under the second part of the justification test, these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of "aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of expropriation, one asks whether fair compensation is available to the aboriginal peoples; see *Sparrow, supra*, at p. 1119. Indeed, the treatment of "aboriginal title" as a

compensable right can be traced back to the *Royal Proclamation*, 1763. The relevant portions of the *Proclamation* are as follows:

... such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them [aboriginal peoples] or any of them, as their Hunting Grounds. . . .

We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians . . . but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name. . . . [Emphasis added.]

Clearly, the *Proclamation* contemplated that aboriginal peoples would be compensated for the surrender of their lands; see also Slattery, “Understanding Aboriginal Rights”, *supra*, at pp. 751-52. It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area. I add that account must be taken of the interdependence of traditional uses to which the land was put.

204 In summary, in developing vast tracts of land, the government is expected to consider the economic well being of all Canadians. But the aboriginal peoples must not be forgotten in this equation. Their legal right to occupy and possess certain lands, as confirmed by s. 35(1) of the *Constitution Act, 1982*, mandates basic fairness commensurate with the honour and good faith of the Crown.

205 With regard to the issue of self-government, I conclude, as does the Chief Justice, that there was insufficient evidence before this Court to make any determination regarding this aspect of the appellants’ claim.

206 As for the issue raised on the cross-appeal, I agree with the Chief Justice's conclusion. The respondent province had no authority to extinguish aboriginal rights either under the *Constitution Act, 1867* or by virtue of s. 88 of the *Indian Act*.

207 On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake. This point was made by Lambert J.A. in the Court of Appeal, [1993] 5 W.W.R. 97, at pp. 379-80:

So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this law suit is confined, and which allow no room for any approach other than the application of the law itself, and the legal rights of all aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead. [Emphasis added.]

(See also *Report of the Royal Commission on Aboriginal Peoples* (1996), vol. 2 (*Restructuring the Relationship*), Part 2, at pp. 561-62.)

208 Accordingly, I would allow the appeal in part and order a new trial on the basis of the principles set out in these reasons. I would also dismiss the cross-appeal.

//*McLachlin J.*//

The following are the reasons delivered by

McLACHLIN J. -- I concur with the Chief Justice. I add that I am also in substantial agreement with the comments of Justice La Forest.

* * *

SCHEDULE 1

Appellants

DELGAMUUKW, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Delgamuukw and Haaxw

GISDAY WA, also known as Alfred Joseph, suing on his own behalf and on behalf of all the members of the House of Gisday Wa

NII KYAP, also known as Gerald Gunanoot, suing on his own behalf and on behalf of all the members of the House of Nii Kyap

LELT, also known as Lloyd Ryan, suing on his own behalf and on behalf of all the members of the Houses of Lelt and Haak'w

ANTGULILBIX, also known as Mary Johnson, suing on her own behalf and on behalf of all the members of the House of Antgulilbix

TENIMGYET, also known as Arthur Matthews, Jr., suing on his own behalf and on behalf of all the members of the House of Tenimgyet

GOOHLAHT, also known as Lucy Namox, suing on her own behalf and on behalf of all the members of the Houses of Gooahlah and Samooh

KLIIYEM LAX HAA, also known as Eva Sampson, suing on her own behalf and on behalf of all the members of the Houses of Kluiyem Lax Haa and Wii'mugulsxw

GWIS GYEN, also known as Stanley Williams, suing on his own behalf and on behalf of all the members of the House of Gwis Gyen

KWEESE, also known as Florence Hall, suing on her own behalf and on behalf of all the members of the House of Kweese

DJOGASLEE, also known as Walter Wilson, suing on his own behalf and on behalf of all the members of the House of Djogaslee

GWAGL'LO, also known as Ernest Hyzims, suing on his own behalf and on behalf of all the members of the Houses of Gwagl'lo and Duubisxw

GYOLUGYET, also known as Mary McKenzie, suing on her own behalf and on behalf of all the members of the House of Gyolugyet

GYETM GALDOO, also known as Sylvester Green, suing on his own behalf and on behalf of all the members of the Houses of Gyetm Galdo and Wii'Goob'l

HAAK ASXW, also known as Larry Wright, suing on his own behalf and on behalf of all the members of the House of Haak Asxw

GEEL, also known as Walter Harris, suing on his own behalf and on behalf of all the members of the House of Geel

HAALUS, also known as Billy Morrison, suing on his own behalf and on behalf of all the members of the House of Haalus

WII HLENGWAX, also known as Herbert Burke, suing on his own behalf and on behalf of all the members of the House of Wii Hlengwax

LUUTKUDZIIWUS, also known as Ben McKenzie, Sr., suing on his own behalf and on behalf of all the members of the House of Luutkudziiwus

MA'UUS, also known as Jeffrey Harris, Jr., suing on his own behalf and on behalf of all the members of the House of Ma'uus

MILUU LAK, also known as Alice Jeffery, suing on her own behalf and on behalf of all the members of the Houses of Miluu Lak and Haiwas

NIKA TEEN, also known as James Woods, suing on his own behalf and on behalf of all the members of the House of Nika Teen

SKIICK'M LAX HA, also known as John Wilson, suing on his own behalf and on behalf of all the members of the House of Skiik'm Lax Ha

WII MINOSIK, also known as Robert Stevens, suing on his own behalf and on behalf of all the members of the House of Wii Minosik

GWININ NITXW, also known as Solomon Jack, suing on his own behalf and on behalf of all the members of the House of Gwinin Nitxw

GWOIMT, also known as Kathleen Wale, suing on her own behalf and on behalf of all the members of the Houses of Gwoimt and Tsabux

LUUS, also known as Jeffrey Harris, suing on his own behalf and on behalf of all the members of the House of Luus

NIIST, also known as David Blackwater, suing on his own behalf and on behalf of all the members of the Houses of Niist and Baskyelaxha

SPOOKW, also known as Steven Robinson, suing on his own behalf and on behalf of all the members of the Houses of Spookw and Yagosip

WII GAAK, also known as Neil Sterritt, Sr., suing on his own behalf and on behalf of all the members of the House of Wii Gaak

DAWAMUXW, also known as Charlie Clifford, suing on his own behalf and on behalf of all the members of the House of Dawamuxw

GITLUDAHL, also known as Peter Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Gitludahl and Wiigyet

GUXSAN, also known as Herbert Wesley, suing on his own behalf and on behalf of all the members of the House of Guxsan

HANAMUXW, also known as Joan Ryan, suing on her own behalf and on behalf of all the members of the House of Hanamuxw

YAL, also known as George Turner, suing on his own behalf and on behalf of all the members of the House of Yal

GWIIYEEHL, also known as Chris Skulsh, suing on his own behalf and on behalf of all the members of the House of Gwiyyehl

SAKXUM HIGOOKX, also known as Vernon Smith, suing on his own behalf and on behalf of all the members of the House of Sakxum Higookx

MA DEEK, also known as James Brown, suing on his own behalf and on behalf of all the members of the House of Ma Deek

WOOS, also known as Roy Morris, suing on his own behalf and on behalf of all the members of the House of Woos

KNEDEBEAS, also known as Sarah Layton, suing on her own behalf and on behalf of all the members of the House of Kneudebeas

SMOGELGEM, also known as Leonard George, suing on his own behalf and on behalf of all the members of the House of Smogelgem

KLO UM KHUN, also known as Patrick Pierre, suing on his own behalf and on behalf of all the members of the House of Klo Um Khun

HAG WIL NEGH, also known as Ron Mitchell, suing on his own behalf and on behalf of all the members of the House of Hag Wil Negh

WAH TAH KEG'HT, also known as Henry Alfred, suing on his own behalf and on behalf of all the members of the House of Wah Tah Keg'ht

WAH TAH KWETS, also known as John Namox, suing on his own behalf and on behalf of all the members of the House of Wah Tah Kwets

WOOSIMLAXHA, also known as Victor Mowatt, suing on his own behalf and on behalf of all the members of the House of Gutginuxw

XSGOGIMLAXHA, also known as Vernon Milton, suing on his own behalf and on behalf of all the members of the House of Xsgogimlaxha

WIIGYET, also known as Roy Wesley, suing on his own behalf and on behalf of all the members of the House of Wiigyet

WII ELAAST, also known as Jim Angus, Jr., suing on his own behalf and on behalf of all the members of the Houses of Wii Elaast and Amagyet

GAXSBGABAXS, also known as Gertie Watson, suing on her own behalf and on behalf of all the members of the House of Gaxsbagabaxs

WIGETIMSCHOL, also known as Dan Michell, suing on his own behalf and on behalf of all the members of the House of Namox

SCHEDULE 2

Those Intervening with the Musqueam Nation

Delbert Guerin

Gail Y. Sparrow

Jim Kew

Larry Grant

Leona M. Sparrow

Mary Charles

Myrtle McKay

Nolan Charles

Susan A. Point

Chief George Guerin

SCHEDULE 3

Those Intervening with the B.C. Cattlemen's Association

B.C. Chamber of Commerce

B.C. Wildlife Federation

Business Council of British Columbia

Council of Tourist Associations

Fisheries Council of British Columbia

Guideoutfitters Association of British Columbia

Mining Association of British Columbia

Pacific Fishermen's Defence Alliance

Appeal allowed in part; cross-appeal dismissed.

Solicitors for the appellants and respondents on the cross-appeal, the Gitksan Hereditary Chiefs et al.: Rush, Crane, Guenther & Adams, Vancouver.

Solicitors for the appellants and respondents on the cross-appeal, the Wet'suwet'en Hereditary Chiefs et al.: Blake, Cassels & Graydon, Vancouver.

Solicitors for the respondent and appellant on the cross-appeal, Her Majesty the Queen in Right of the Province of British Columbia: Arvay, Finlay, Victoria.

Solicitor for the respondent the Attorney General of Canada: The Attorney General of Canada, Ottawa.

Solicitors for the intervener the First Nations Summit: Ratcliff & Company, North Vancouver.

Solicitors for the intervener the Westbank First Nation: Woodward and Company, Victoria.

Solicitors for the interveners the Musqueam Nation et al.: Blake, Cassels & Graydon, Vancouver.

Solicitor for the interveners the B.C. Cattlemen's Association, et al.: J. Keith Lowes, Vancouver.

- 130 -

*Solicitors for the intervener Skeena Cellulose Inc.: Russell & DuMoulin,
Vancouver.*

*Solicitors for the intervener Alcan Aluminum Ltd.: Lawson, Lundell, Lawson
& McIntosh, Vancouver.*

Haida Nation *v.* British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004
SCC 73

**Minister of Forests and Attorney General of British Columbia
on behalf of Her Majesty The Queen in Right of the Province
of British Columbia** *Appellants*

v.

**Council of the Haida Nation and Guujaaw, on their own behalf
and on behalf of all members of the Haida Nation** *Respondents*

and between

Weyerhaeuser Company Limited *Appellant*

v.

**Council of the Haida Nation and Guujaaw, on their own behalf
and on behalf of all members of the Haida Nation** *Respondents*

and

**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of Nova Scotia,
Attorney General for Saskatchewan, Attorney General of Alberta,
Squamish Indian Band and Lax-kw'alaams Indian Band,
Haisla Nation, First Nations Summit, Dene Tha' First Nation,
Tenimpyet, aka Art Matthews, Gitxsan Hereditary Chief, Business
Council of British Columbia, Aggregate Producers Association
of British Columbia, British Columbia and Yukon Chamber of Mines,
British Columbia Chamber of Commerce, Council of Forest
Industries, Mining Association of British Columbia,
British Columbia Cattlemen's Association and
Village of Port Clements**

Interveners

Indexed as: Haida Nation v. British Columbia (Minister of Forests)

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

on appeal from the court of appeal for british columbia

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

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

petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

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

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

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

adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

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

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

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject

to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

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

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Immigration), [1999] 2 S.C.R. 817; *TransCanada Pipelines Ltd. v. Beardmore Township* (2000), 186 D.L.R. (4th) 403; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, aff'd [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

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

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

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

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

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

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

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

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

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

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

Allan Donovan, for the intervener the Haisla Nation.

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

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

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

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

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

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and

the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

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

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

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

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

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

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

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the

Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

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

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

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this

framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

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

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

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

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer

to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to “lose” outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, “Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction” (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

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

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

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

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

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown’s other, broader obligations. However, the duty’s fulfilment requires that the Crown act with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81,

the term “fiduciary duty” does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

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

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

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

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

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

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

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

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

24 The Court’s seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty

to consult, suggesting the content of the duty varied with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

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

C. When the Duty to Consult and Accommodate Arises

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

claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

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

legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be “sound practical and policy reasons” to do so.

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

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

31 The government’s arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if

appropriate, accommodate arises only upon final determination of the scope and content of the right.

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

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

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*,

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

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

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

based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

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

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

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

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

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

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

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

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

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

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

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

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Māori* (1997) provides insight (at pp. 21 and 31):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed

....

....

.... genuine consultation means a process that involves . . .:

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Māori opinion on those proposals
- informing Māori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Māori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

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

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

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

50 The Court’s decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands “cannot be accommodated to reasonable exercise of the Hurons’ rights”. And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights “can be accommodated with the Crown’s special fiduciary relationship with First Nations”. Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making

decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government “may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance”. It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries’ and agencies’ operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

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

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

53 It is suggested (*per* Lambert J.A.) that a third party’s obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown’s assumption of sovereignty over lands and

resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with “aboriginal people claiming an aboriginal interest in or to the area” (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

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

the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" ((2002), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

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

F. *The Province’s Duty*

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

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

59 The answer to this argument is that the Provinces took their interest in land subject to “any Interest other than that of the Province in the same” (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine’s Milling and Lumber Co. v. The*

Queen (1888), 14 App. Cas. 46 (P.C.), lands in the Province are “available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title” (p. 59). The Crown’s argument on this point has been canvassed by this Court in *Delgamuukw*, *supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine’s Milling*, *supra*. There is therefore no foundation to the Province’s argument on this point.

G. *Administrative Review*

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

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were

within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

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

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

H. *Application to the Facts*

(1) Existence of the Duty

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

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

66 The Province raises concerns over the breadth of the Haida’s claims, observing that “[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space. . . . The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space” (Crown’s factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a

right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

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

(2) Scope of the Duty

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

(i) *Strength of the Case*

69 On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their rights had not been extinguished by federal legislation. Their culture has

utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

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

- (1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;
- (2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

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

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

Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

(ii) *Seriousness of the Potential Impact*

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

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

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

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting

permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it “has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans” (Crown’s factum, at para. 64).

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

77 The last issue is whether the Crown’s duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with

the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L.

39. The chambers judge found, at para. 42:

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

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

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

III. Conclusion

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

Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

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- 44 -

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)*,
2003 BCSC 1422

Date: 20030918
Docket: 03 0746
Registry: Victoria

Between:

**Heiltsuk Tribal Council and Heiltsuk Hemas Society,
on their own behalf and on behalf of all other members
of the Heiltsuk Nation**

Petitioners

And

**Her Majesty the Queen in Right of British Columbia
as represented by the Minister of Sustainable Resource
Management, Land and Water British Columbia Inc.,
The Deputy Comptroller of Water Rights, The Regional
Water Manager (Cariboo Region) and Omega Salmon Group Ltd.**

Respondents

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for Petitioners

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Date and Place of Hearing:

June 16-20, 2003
and June 23-26, 2003

Victoria, B.C.

[1] The petitioners apply pursuant to **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241, to set aside the decisions of the Minister of Sustainable Resource Management (the Minister), the Deputy Comptroller of Water Rights, the Regional Water Manager (Cariboo Region) and Land and Water British Columbia (LWBC) (collectively, the decision makers) with respect to:

- Conditional water licence 116890 for Martin Lake dated December 19, 2001 (the Martin Lake water licence 2001) and the replacement licence no.

117538 dated August 29, 2002 (the Martin Lake water licence 2002);

- A licence of occupation to operate a commercial fish hatchery, dated January 15, 2002 (the hatchery licence of occupation);
- A licence of occupation for a salt water intake pipe, effluent pipe and general dock, dated October 1, 2002 (the dock and pipe licence of occupation); and
- Conditional water licence 116629 for Link River, dated November 18, 2002 (the Link River water licence).

(collectively, the licences)

[2] The licences were issued to Omega Salmon Group Ltd. (Omega) and, together with other licences issued to it, allow Omega to operate a land based fish hatchery in Ocean Falls, B.C.

[3] The Heiltsuk claim aboriginal rights and title to a large area of land encompassing approximately 33,735 square kilometres. The land being claimed includes the 8.83 hectares or .08 square kilometres granted to Omega under the hatchery licence of occupation and the dock and pipe licence of occupation.

[4] The land is described in the two licences as:

That part or those parts of the following described land shown outlined by bold line on the schedule attached to the Industrial Licence:

Those unalienated and unencumbered portions of District Lots 31 and 104; together with unsurveyed foreshore or land covered by water being part of the bed of Link River, all within Range 3 Coast District, containing 5.88 hectares more or less,
Except for those parts of the land that, on the January 15, 2002 Date, consisted of highways (as defined in the *Highway Act*) and land covered by water;

And

That part or those parts of the following described land shown outlined by bold line on the schedule attached to the Utility Licence:

That part of District Lot 847, together with unsurveyed foreshore or land covered by water being part of the bed of Cousins Inlet, Range 3, Cost District, containing 2.95 hectares, more or less,
Except for those parts of the land that, on October 1, 2002, consisted of highways (as defined by the *Highway Act*).

(hereinafter the "land")

[5] Much of the land impacted by the hatchery licence of occupation and the dock and pipe licence of occupation is filled land created prior to the construction of a pulp mill which was operated in Ocean Falls in the 1900s.

[6] The Heiltsuk also claim aboriginal title and rights to the water in their claimed territory and as a result take the position that they were owed a duty of consultation prior to the issuance of both the Martin Lake water licences and the Link Lake water licence.

[7] The Martin Lake water licence 2002 allows Omega to divert up to 100 cubic

feet per second of water from Martin Lake to Link Lake. The Link Lake water licence authorizes the diversion of up to 200 cubic feet per second of water from the Link River to the hatchery. The water which is diverted will pass through the hatchery and then be discharged to Cousins Inlet. If not diverted the water will spill over the existing dam into Cousins Inlet.

[8] The Heiltsuk are seeking the following orders and declarations:

- A declaration that the decision makers had a duty to consult with and accommodate the Heiltsuk's interests and concerns before issuing the licences and that the decision makers breached their duties.
- A declaration that Omega had a duty to consult with and accommodate the interests and concerns of the Heiltsuk and that Omega breached that duty.
- A declaration that the licences issued by the decision makers are of no force and effect and an order quashing and setting aside the licences.
- An order in the nature of a prohibition barring the issuance of any approvals, permits or other authorizations relating to the proposed Atlantic salmon hatchery development;
- An interim or interlocutory injunction prohibiting Omega from operating the hatchery until either a final disposition of the proceedings or order of the court.

[9] Both the petitioners and Omega object to portions of the affidavit material which has been filed. I agree with both the petitioners and Omega that many statements in the affidavits are irrelevant or inadmissible hearsay, opinion or argument. I am not going to deal with each objection raised, however I have disregarded the statements which are objectionable. In reaching my conclusions, I have relied on direct evidence and the oral histories contained in the affidavit material.

[10] The issues to be determined are:

- Have the Heiltsuk established a *prima facie* claim of aboriginal title or rights in respect of the lands and waters covered by the licences?
- Have the Heiltsuk established a *prima facie* infringement of the aboriginal title or rights which they claim?
- Was a duty of consultation and accommodation owed to the Heiltsuk by the decisions makers before they made their decisions to issue the licences and, if so, did they fulfill those duties?
- Was a duty of consultation and accommodation owed by Omega to the Heiltsuk and, if so, did Omega fulfill its duty?
- Is this an appropriate case for the court to exercise judicial review?
- If there were breaches of duty by the decisions makers or Omega what are the appropriate remedies?

CHRONOLOGY REGARDING ISSUANCE OF LICENCES

[11] Omega began the application process in September 2001.

[12] The Heiltsuk became aware of a proposed salmon hatchery to be located at Ocean Falls in November 2001. Following the meeting at which they were advised by LWBC of the proposed salmon hatchery the Heiltsuk met with Omega in November 2001.

[13] On December 17, 2001 Mr. Williams, the Aquaculture Manager at LWBC, sent an email to the Heiltsuk in response to an inquiry from the Heiltsuk as to why there had been no referral regarding the proposed Omega hatchery. He advised the Heiltsuk that Omega had applied for a licence of occupation to construct a fish hatchery on the old industrial lands in Ocean Falls. He further advised that the Province was not sending out any referrals as the land was Crown granted in the past and had been developed. As well, the land was mainly filled foreshore and that, following the Aboriginal Consultation Guidelines, referrals were not required. However, Mr. Williams was aware that the Heiltsuk had at that point had one meeting and another planned with Omega. Omega had been told to document any feedback from the Heiltsuk in the meetings and provide it to LWBC. Mr. Williams further advised that the Martin Lake water licence 2001 was being assigned to Omega.

[14] An Aboriginal Interest Assessment Report was prepared December 19, 2001 by LWBC and a copy was provided to the Heiltsuk.

[15] The Martin Lake water licence 2001 was issued to Omega on December 19, 2001. The licence had originally been granted to Pacific Mills Ltd., who ran a pulp and paper mill on the site, in 1929. The Martin Lake water licence 2002 was issued to Omega on August 29, 2002 relocating the diversion. At the time the Martin Lake water licence 2002 was issued a report was prepared which stated that no referral was required as this was a minor modification to an existing licence.

[16] A letter was sent to Heiltsuk by LWBC regarding the decision not to consult on December 24, 2001 with an invitation to discuss the Aboriginal Interest Assessment report. The letter explained why a referral had not been made and advised the Heiltsuk that they would be kept apprised as the review process continued.

[17] The explanations given as to why the Province did not feel it was necessary to refer the issue to the Heiltsuk were:

- The site had been privately owned for nearly 80 years;
- The core areas of the town and millsite had been extensively disturbed and developed;
- The nature of the land use over that time effectively precluded the exercise of any aboriginal traditional uses;
- A significant portion of the application area was filled foreshore, i.e. land which did not exist prior to the development of the mill and town;
- There were extensive areas of relatively undisturbed vacant Crown land in the area surrounding Ocean Falls;
- Impacts which occurred were at the time of the original development of the site and any aboriginal issues associated with past activity on the land could not be resolved through consultation about the current land use proposal.

[18] Heiltsuk representatives visited another hatchery with Omega in December 2001. Following the meeting Omega advised the Heiltsuk that it wanted to continue an ongoing dialog with the Heiltsuk people.

[19] On January 7, 2001 a letter was sent by the Heiltsuk to LWBC expressing disappointment that there would be no referral and requesting that the Province reconsider its position.

[20] The Heiltsuk attended an open house at Bella Bella with Omega on January 9, 2002 where the Heiltsuk expressed their concerns. The Heiltsuk advised that they did not consider the meeting to be consultation.

[21] On January 11, 2002 Omega sent a letter to Heiltsuk expressing a willingness to work with the Heiltsuk and enter into a partnership with the Heiltsuk.

[22] On January 16, 2002 LWBC sent a letter to the Heiltsuk expressing that although there had been no referral, staff had communicated with members of the Heiltsuk regarding the proposed project and an information package was sent. LWBC advised the Heiltsuk it had requested Omega meet with the Heiltsuk, and understood that Omega had expressed a willingness to enter into a commercial arrangement with the Heiltsuk. LWBC made an offer to assist the Heiltsuk in preparing an application for other lands in the vicinity which could be utilized for the Heiltsuk proposed salmon enhancement facility and in exploring potential opportunities to maximize the benefits from the Omega hatchery. As well, the Heiltsuk were advised that the provincial agencies responsible would ensure that the hatchery was in compliance with all regulatory requirements relating to the Heiltsuk's concerns about the potential for the introduction of diseases or chemical effluent into the marine environment and the escape of Atlantic salmon.

[23] Memos were sent by Omega to the Heiltsuk providing information on January 15 and 16, 2002 which responded to concerns expressed by the Heiltsuk.

[24] The hatchery licence of occupation was issued to Omega on January 15, 2002.

[25] LWBC sent a referral package to the Heiltsuk on April 10, 2002 with respect to the dock and pipe licence of occupation.

[26] On May 7, 2002 the Heiltsuk sent a letter expressing concerns regarding effluent, clean up of the contaminated site and Atlantic salmon escapes. As well, the Heiltsuk expressed concern that the dock and pipe licence of occupation and project as a whole would impact the Heiltsuk's ability to site a village and a wild salmon enhancement facility in Ocean Falls.

[27] A meeting was held on May 30, 2002 between representatives of the Heiltsuk, Omega and the Province where details of the project were discussed and the time line for approvals and construction of the project was provided to the Heiltsuk.

[28] Omega sent a follow up letter and information package to the Heiltsuk on June 11, 2002 addressing concerns raised by the Heiltsuk.

[29] Omega sent a letter and video to the Heiltsuk showing various underwater and foreshore video clips from Omega's habitat survey on June 21, 2002 in response to some of the questions raised by the Heiltsuk.

[30] The Dock and Pipe licence of occupation was issued to Omega on October 1,

2002.

[31] A referral package was sent by LWBC to the Heiltsuk on August 28, 2002 regarding the Link River water licence.

[32] The Heiltsuk responded to the referral on October 15, 2002 outlining their aboriginal claims to Ocean Falls.

[33] A Report for **Water Act** decision was prepared November 15, 2002.

[34] On November 18, 2002 a letter was sent to the Heiltsuk attaching a copy of the Link River water licence issued to Omega on November 18, 2002.

DUTY OF CONSULTATION

[35] In the cases dealing with the issue of consultation the courts have considered the factual context, including:

- whether there is a general right to occupy lands or whether there is a right to engage in an activity;
- whether there is or has been an infringement; and
- if there is or has been an infringement, whether there is any justification for the infringement.

[36] It is in the final stage of the analysis, i.e., whether there is any justification for the infringement, that the courts have considered whether the Crown has met its fiduciary and constitutional duty of consultation and whether there has been an attempt to accommodate the First Nations. **R. v. Sparrow**, [1990] 1 S.C.R. 1075, ¶ 64 - 72 and ¶ 81 - 82, **R. v. Adams**, [1996] 3 S.C.R. 101, ¶ 46 and 51 - 52.

[37] In **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010, Lamer C.J. discussed the issue of consultation in the context of the justification of an infringement of aboriginal title and stated at ¶ 168:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: **Guerin**. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal rights.

[38] In **Haida Nation v. British Columbia (Minister of Forests)** 2002 BCCA 147 (**Haida No. 1**), Lambert J.A. recognized a three stage analysis in determining whether the Crown has breached its duty to consult consisting of:

1. consideration of whether aboriginal title or rights have been established on a balance of probabilities and a decision regarding the nature and scope of the title and rights;
2. determination of whether the particular title or rights have been infringed by a specific action; and
3. a consideration of whether the Crown has discharged its onus to show justification, including whether it has fulfilled its obligation to consult.

(¶ 46)

[39] Lambert J.A. acknowledged that although both the consultation and the infringement are likely to precede the determination of the aboriginal rights and title, that when determining if there has been a breach of duty the Court must first look at whether the First Nation has proved the title and then whether there has been an infringement of the right. Once those elements are established the onus shifts to the Crown to establish that there was justification for the infringement both before and at the time the infringement occurred. (¶ 46)

[40] In **Haida No. 1** the Court of Appeal held that due to the circumstances surrounding the Minister's consent to the transfer of tenure from MacMillan Bloedel to Weyerhaeuser, the Minister had a legally enforceable duty to consult with respect to the transfer. The main issue in **Haida No. 1** was whether any consultation had taken place in the face of a good *prima facie* case of infringement of aboriginal rights to red cedar.

[41] In **TransCanada Pipelines Ltd. v. Beardmore (Township)** (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), the Court held that it was only after a First Nation has established an infringement of an existing aboriginal or treaty right that the duty of the Crown to consult with the First Nation was a factor for the Court to consider in the justificatory phase of the proceeding. Borins J.A. stated at ¶ 120:

As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the **Constitution Act, 1982**. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.

[42] In **Taku River Tlingit First Nation v. Tulsequah Chief Mine Project** 2002 BCCA 59, it was argued that aboriginal right or title had to be established before there was duty to consult with the aboriginal peoples. In rejecting the argument, Rowles J.A. held that while the onus of proving a *prima facie* infringement of an aboriginal right or title is on the group challenging the legislation (or in this case the decisions of the statutory decision makers), it did not follow that until there was court ruling the right did not exist. (¶ 183)

[43] In **Taku**, the court accepted as findings of fact that the proposed road would impose serious impacts on the resources used by the Tinglit, that the Tinglits were not adequately prepared to handle the predicted impacts and that there was no plausible mitigation or compensation possible. The project had not been commenced and it was found that the proposed road would have a profound

impact on the Tinglit's aboriginal way of life and their ability to sustain it. The Tinglit's were willing to participate in the environmental review process to have their needs accommodated but the project approval certificate had been issued without their concerns being met. (¶ 132 and 202)

[44] In the circumstances, the court felt it was appropriate to dismiss the appeal of the order quashing the certificate and remit the matter to the Ministers to consider afresh the issuance of the project approval certificate. In her dissent, Southin J.A. referred to the fact that the right to be consulted is not a right of veto and was of the view that to remit the matter back to the Ministers would prolong the agony for both the proponent of the project and the Tinglit. (¶ 100 and 101)

[45] Although the Court in *Haida No. 1* agreed that the requirement to consult could arise prior to the aboriginal right or title having been established in court proceedings, and that the Crown and Weyerhaeuser were in breach of an enforceable duty to consult and to seek accommodation with the Haida, it did not necessarily follow that the replacement of the licence was invalid. The Court was not prepared to make a finding regarding the validity, invalidity or partial validity of the transfer of the licence but was of the view that it was a matter that could be more readily determined after the extent of the infringement of title and rights had been determined. (¶ 58 and 59)

[46] Lambert J.A. stated that the courts have considerable discretion in shaping the appropriate remedy in a judicial review proceeding before the final determination of the title and rights of the aboriginal people and that the aim of the remedy should be to protect the parties pending the final determination of the nature and scope of title and rights. At the time of the final determination of rights and title the issues of the nature and extent of the infringement and the issue of justification could be dealt with. (¶ 53 and 54)

HAVE THE HEILTSUK ESTABLISHED A *PRIMA FACIE* CLAIM OF ABORIGINAL TITLE OR RIGHTS IN RESPECT OF THE LANDS AND WATERS COVERED BY THE LICENCE?

[47] The Heiltsuk advance claims based on aboriginal rights and title that have not yet been judicially determined. I am of the view that in interim proceedings of this type, I am not in a position to do more than make preliminary general assessments of the strength of the *prima facie* claims and potential infringement.

[48] I agree with Tysoe J.'s comment in *Gitxsan and other First Nations v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 that the Court should avoid making detailed evidentiary findings on affidavit material unless it is essential to do so. Critical findings of admissibility or assessing the weight to be given to oral histories should be left to the trial judge responsible for making the final determinations of the claims of rights or title. (¶ 70)

[49] The Heiltsuk's evidence is that they have been engaged in treaty negotiations with the Province regarding their land claim since 1981 when they filed a Statement of Comprehensive Aboriginal Rights Claim. In 1993, the Heiltsuk filed a Statement of Intent with the B.C. Treaty Commission and were accepted into treaty negotiations with the Provincial and Federal government. Throughout that time, the Heiltsuk have continuously asserted title over the land, including the area described in the licences.

[50] As well, the Heiltsuk have established an aboriginal right to harvest herring spawn on kelp. *R. v. Gladstone*, [1996] 2 S.C.R. 723.

[51] The Heiltsuk argue that based on the affidavit material they have a strong

or good *prima facie* claim of aboriginal rights or title with respect to their territory including Ocean Falls.

[52] Given that I am of the view it is not appropriate for me to assess the weight to be given to the oral history or make findings of admissibility on the basis of the affidavit material, I have accepted the evidence contained in the oral histories at face value for the purpose of determining if the Heiltsuk have a *prima facie* claim of aboriginal rights and title to Ocean Falls.

[53] The evidence contained in the affidavit material regarding the oral history is that one of the main winter villages of the Heiltsuk was located at Ocean Falls. The Heiltsuk moved away around the time the pulp mill was constructed in 1909. Approximately 300 - 400 Heiltsuk lived in Ocean Falls prior to industrialization in the early 1900s. The area was a good village site in the winter because it was sheltered from the winds and open waters of the outer coast. Link Lake provided fresh water and Cousins Inlet provided seafood including halibut, ling cod, rock cod, spring salmon, crabs, prawns and herring. The evidence is that the Heiltsuk were forced to relocate from the area when the pulp mill was built.

[54] Although the Heiltsuk assert that the village of Tuxvnaq or Duxwana'ka was located in Ocean Falls prior to the establishment of the pulp mill, there is also evidence that in the early 1900s there may have only been one First Nations individual living at Ocean Falls. The survey map prepared at the time of the original Crown grant in 1901 shows one Indian house near the tide flats with an Indian trail leading to it.

[55] There is little direct evidence and no documentary evidence of a forced relocation of the Heiltsuk at the time the pulp mill was constructed. There is no evidence in support of a forced relocation in the *Bella Bella* story, a book which was referred to by both the Heiltsuk and the Crown. As well, there has been no mention of a forced relocation in the materials filed by the Heiltsuk in the treaty negotiations.

[56] "... [C]laims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim." **Mitchell v. M.R.N.**, [2001] S.C.R. 911 at ¶ 51.

[57] Chief Justice McLachlin was clear that **Mitchell** did not impose upon aboriginal claimants the requirement of producing indisputable or conclusive evidence from pre-contact times. However, she observed that there was a "distinction between sensitively applying evidentiary principles and straining those principles beyond reason". In **Gladstone**, for example, the recognition of an aboriginal right to engage in trading herring roe on kelp was based on an indisputable historical and anthropological record corroborated by written documentation. The Court in **Gladstone** concluded that there was clear evidence from which it could be inferred that the Heiltsuk were involved in trading herring roe on kelp prior to contact. (¶ 52)

[58] I am of the view that there is insufficient evidence before me to make a finding that the Heiltsuk were forcibly removed from Ocean Falls and I decline to make any finding in that regard.

[59] There is evidence that another First Nation, the Nuxalk Nation, asserts that Ocean Falls, including the land impacted by the licences, is within its territorial boundaries. The Nuxalk have put the Heiltsuk, Omega and the Crown on notice of their claim. The Nuxalk oppose the construction of the hatchery and have advised both Omega and the Crown that they will not permit salmon

aquaculture in their territory.

[60] Although the petitioners argue that I should ignore the claims of the Nuxalk, I am of the view that making any findings regarding the Heiltsuk claim of rights and title which could potentially impact the overlapping claim of the Nuxalk in this proceeding is inappropriate.

[61] As set out in **Delmaguukw**, there are a number of criteria that must be satisfied by the group asserting aboriginal title including exclusive occupancy at the time of sovereignty:

Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.

(¶ 155)

[62] Although Lamer C.J. recognizes the possibility of a finding of joint title shared between two or more aboriginal nations, which would involve the right to exclude others except with whom possession is shared, no claim to joint title has been asserted by the Heiltsuk and the Nuxalk are not represented on this application. It is not possible therefore to assess the relative strengths of the two competing claims to the land or what impact the two claims have on each other.

[63] Based on the evidence before me of the overlapping claims, the only conclusion I have been able to reach is that both Heiltsuk and Nuxalk assert aboriginal title over the land, but I am unable to determine whether either has a good *prima facie* case of aboriginal title.

[64] However, the oral history of the Heiltsuk, which I accept at face value for the purpose of this application, is that the area of Ocean Falls was used as a winter village and the Heiltsuk have fished in the area. I find, therefore, that the Heiltsuk have a strong *prima facie* case of aboriginal rights to fish in the area and to non-exclusive use of the land. The Heiltsuk's *prima facie* claim for aboriginal rights does not require exclusivity.

HAVE THE HEILTSUK SHOWN AN INFRINGEMENT OF AN ABORIGINAL RIGHT?

[65] The Heiltsuk take the position that the licences infringe their claims for aboriginal rights to the land impacted by the licences.

[66] In **Gladstone**, the Court refers to the **Sparrow** test for determining whether the government has infringed aboriginal rights which involves:

- asking whether the legislation, or in this case the decisions to grant the licences, has the effect of interfering with an existing aboriginal right; and
- determining whether the interference was unreasonable, imposed undue hardship, or denied the right to the holders of their preferred means of exercising the right.

[67] Even if the answer to one of the questions is no, that does not prevent the court from finding that a right has been infringed, rather it will be a factor for the court to consider in determining whether there has been a *prima*

facie infringement. The onus of proving a *prima facie* infringement of rights lies on the Heiltsuk, i.e., the challengers of the decisions. **Gladstone**, ¶ 39 and 43.

[68] Because aboriginal rights are not absolute and do not exist in a vacuum, claimants must assert both a right and the infringement of the right. **Cheslatta Carrier Nation v. British Columbia**, 2000 BCCA 539, ¶ 18 and 19, **Delgamuukw**, ¶ 160, 162 and 165.

[69] In **Cheslatta**, the Court of Appeal referred to **R. v. Nikal** [1996], 1 S.C.R. 1013 for the proposition that aboriginal rights are like all other rights recognized by our legal system. The rights which are exercised by either a group or individual involve the balancing of those rights with the recognized interests of others. Any declaration regarding an aboriginal right would not be absolute in that it may be subject to infringement or restriction by government where such infringement is not unreasonable and can be justified. (¶ 18 and 19)

[70] The Heiltsuk have raised concerns that the issuances of the licences adversely affect their fishing rights and their non exclusive use of the land.

[71] They say the *prima facie* infringements regarding their right to the use of the land are:

- the hatchery licence of occupation allowing Omega to operate a hatchery is not their chosen use of the land;
- that it will prevent them from utilizing the area as a village site in the future;
- that the diversion of water will result in an inadequate amount of water for the future village;
- the hatchery will impact the availability of electricity to service a village; and
- the Heiltsuk do not support Atlantic salmon aquaculture, and take the position that their right to self government is irreparably harmed by the imposition of the hatchery in a territory over which they have asserted a claim.

[72] The Heiltsuk say the *prima facie* infringements regarding their fishing rights are:

- That the discharge from the factory into Cousins Inlet will cause pollution and disease thereby impacting the Heiltsuk fishing rights in the area;
- The construction of the facility has potentially caused pollution as a result of hazardous wastes, in particular asbestos, which was disturbed during construction; and
- The fish reared in the hatchery may escape from the hatchery, or alternatively, from fish farms outside Heiltsuk claimed waters and enter Heiltsuk claimed waters thereby impacting their fishing rights.

(i) **Have the Heiltsuk established a *prima facie* infringement of their right to non exclusive use of the land?**

[73] The Heiltsuk argue that this case falls within the cases referred to in **Delgamuukw** which may require the full consent of the aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. (¶ 168) They argue that the Province's actions authorize aquaculture over Heiltsuk title through the regulation of farmed fish and therefore the Province should have obtained the consent of the Heiltsuk.

[74] I do not agree that the issuance of the licences in question is analogous to the type of situation contemplated in **Delgamuukw** which would require the full consent of the aboriginal nation. There is no evidence that the Province by issuing the four licences is impacting the right of the Heiltsuk to hunt or fish in the area.

[75] There is no evidence that the Heiltsuk will not be able to locate a village there because of the licences of occupation. The hatchery in issue is a land based facility. The licences of occupation over the .08 square kilometres are for 10 years. Most of the land on which the hatchery is located is filled land created prior to the construction of the pulp mill. The site was a contaminated industrial site which has required significant expenditure by Omega to clean up. There is evidence that Omega has removed 700 tons of industrial debris from the site and plans to continue a process of remediation of the site in co-operation with LWBC.

[76] The Heiltsuk have not established that the issuances of the licences have resulted in a *prima facie* infringement to their right to non exclusive use of the land.

[77] There is a large area adjacent to the pulp mill site where the town of Ocean Falls was located which had a population of 4,000 people that could be used as a village site. The total population has declined to less than 100 since the closure of the pulp mill 20 years ago.

[78] The diversion of water is not new. The original licence to divert water from Martin Lake was issued 70 years ago and there was sufficient water and electricity to service the town of Ocean Falls.

[79] There is no evidence that the issuance of the licences allowing construction and operation of the hatchery will impact the Heiltsuk's ability to pursue their negotiations with the Province regarding their claim of aboriginal title or locate a village there in the event they decide to do so.

[80] As well, there is no evidence that the licences will prevent the Heiltsuk from establishing a wild salmon enhancement facility in the future.

[81] With respect to the Heiltsuk's assertion about self government, there is no evidence to support their position that the hatchery will cause irreparable harm. On the contrary, the evidence is that Omega has cleaned up industrial waste from the site and is committed to continuing rehabilitation of a contaminated site. The licences are of fixed duration.

[82] The right to self govern is, in my view, inextricably bound up in the Heiltsuk's aboriginal claim to title and their right to use the land for their preferred use, i.e., the Heiltsuk want to decide what the land will be used for and the ability to veto uses of the land which do not accord with their philosophy. The Heiltsuk's complaint in this regard is that they are opposed to Atlantic salmon aquaculture and do not want any Atlantic salmon aquaculture in their territory.

[83] The necessary factual basis on which to determine whether the claim for

self government has been made out is lacking. As set out above, the Nuxalk Nation is also claiming title to the same area and is not before me on this application. A determination regarding the Heiltsuk's right to self govern in the area would by necessity impact the Nuxalk.

[84] There is no evidence that the construction and operation of the hatchery pursuant to the licences will impact the Heiltsuk's ability to negotiate or establish the right to self govern in the area in the future. There is no evidence that the construction and operation of the hatchery either has or will cause irreparable harm whereby the Heiltsuk will not be able to utilize the land as they choose in the future.

[85] It is not within the ambit of this application to deal with the many difficult issues which would have to be addressed in order to make a determination of the Heiltsuk's right to self government beyond the finding that, in my view, there is no evidence to support the Heiltsuk argument that their asserted right to self govern, i.e., the right of the Heiltsuk to make decisions as to the use of the land in the event that they establish their aboriginal title in the future, has been infringed by the issuance of the licences.

[86] Accordingly, I find that the Heiltsuk have not discharged their burden of establishing a *prima facie* infringement of their aboriginal rights to non-exclusive use of the land.

(ii) **Have the Heiltsuk established a *prima facie* infringement or their aboriginal right to fish?**

[87] In **Nikal** the Supreme Court of Canada, in the course of finding that the bare requirement for a licence did not constitute an infringement of aboriginal fishing rights, rejected the proposition that any government action which affects or interferes with the exercise of aboriginal rights constitutes a *prima facie* infringement of the right. The Court held that the government must ultimately be able to balance competing interests. (¶ 91-94)

[88] In **Gladstone**, Lamer C.J. sets out that the threshold requirement for infringement and states that legislation infringes an aboriginal right when it "clearly impinges" upon the rights. (¶ 53 and 151) An infringement has been defined "as any real interference with or diminution of the right." **Mikisew Cree First Nation v. Canada**, 2001 FCT 1426 at ¶ 104.

[89] The Heiltsuk argue that their right to fish could be infringed by discharge of deleterious substances or disease into the marine environment during the construction or operation of the hatchery, the diversion of water and the potential impact of escaped Atlantic salmon on the wild native stock.

[90] There is evidence from Omega's expert that the construction of the facility will not impact the marine habitat in the area and that the discharge from the hatchery during operation will not pose a threat to marine life.

[91] The Minister of Fisheries and Oceans confirmed on August 16, 2002 that "a harmful alteration, disruption, or destruction (HADD) of fish habitat will not occur as a result of the construction and operation of this facility as proposed." The Regional Waste Manager, pursuant to the **Waste Management Act**, R.S.B.C. 1996, c. 482 and regulations confirmed on April 29, 2002 that the hatchery was a regulated site under the **Land-Based Fin Fish Waste Control Regulation**, B.C. Regulation. 68/94. Neither the Federal Minister of Fisheries nor the Provincial Minister of Water, Land and Air Protection are parties to this petition.

[92] Omega's expert report was provided to the Heiltsuk and he was in attendance at a meeting with the Heiltsuk in May 2002 in Bella Bella to provide information.

[93] The Heiltsuk presented no evidence that the effluent or construction will impact the marine environment in an adverse way thereby impacting the Heiltsuk's fishing rights in the area. Although they have presented evidence that asbestos may have been present on the site, the Heiltsuk have presented no evidence that any asbestos or other deleterious substances leached into the marine environment during construction of the hatchery.

[94] The Heiltsuk have expressed concern regarding the possibility of escape of smolts from the hatchery which could adversely impact the wild Pacific salmon in the area. Omega explained that the discharge pipe will have a triple screening system, as required by Provincial and Federal regulations, in order to prevent the escape of fish from its tanks. The likelihood of escapes from a land based facility is remote. The screening criteria and requirements to prevent smolts being introduced into the ocean are governed by the terms of the aquaculture licensing tenure, not by the licences in issue in this application. A federal permit is required for the transporting of smolts. The evidence is that the smolts will be removed by boat from the area.

[95] In my view, the Heiltsuk's concern about potential escape of salmon from fish farms outside Heiltsuk claimed territory is not an issue before the Court. The issues before me are whether the decision makers erred in granting the four licences to Omega, not whether fish farms, aquatic or land based, should exist in B.C.

[96] The Heiltsuk also argue that the diversion of water could possibly infringe their fishing rights in the area. The original Martin Lake water licence was granted over 70 years and there is no evidence that the diversion of water allowed by it has infringed the Heiltsuk's asserted right to fish in the area. There is no evidence that the water diverted pursuant to the Link River water licence infringes the fishing rights in the area. The water, although diverted through the hatchery, eventually flows into Cousins Inlet and as a result there is no impact on the volume of water in the Inlet.

[97] On the evidence before me, I find that the Heiltsuk have not discharged their burden of establishing a *prima facie* infringement of the aboriginal right to fish in the area of Ocean Falls.

IS THERE A DUTY TO CONSULT AND, IF SO, HAS THERE BEEN CONSULTATION?

[98] The Crown has acknowledged that it has a duty to consult with the Heiltsuk regarding any licences it issues to Omega. This is a change of position from when the initial licence, the Martin Lake water licence 2001, was granted to Omega at which time the Crown took the position that it did not need to consult with the Heiltsuk.

[99] In light of the Crown's concession that it has the duty to consult with the Heiltsuk regarding issuance of the licences, I am granting the order sought by the Heiltsuk that the Crown has a duty to consult with the Heiltsuk regarding the licences.

[100] The Heiltsuk also take the position that Omega owes them a duty of consultation. While not making a formal concession that it owes a duty to consult to the Heiltsuk, Omega has been clear from the commencement of the project that it is willing to consult with the Heiltsuk and says that it has made attempts to do so.

[101] As set out by Lamer C.J. in *Delgamuukw*, the duty to consult can range from a duty to discuss important decisions that will be taken in respect of lands held pursuant to aboriginal title to a requirement for the full consent of the aboriginal nation depending on the circumstances. Consultation must be in good faith and with the intention to substantially address the concerns of the aboriginal people whose lands are in issue. (¶ 168)

[102] The Crown may rely on consultation which it knows is taking place between aboriginal groups and third parties. In *Kelly Lake Cree Nation v. Ministry of Energy and Mines et al.*, also known as *Calliou*, [1999] 3 C.N.L.R. 126, (B.C.S.C.), Mr. Justice Taylor dealt with the issue:

[154] There is no question that there is a duty on government to consult with First Nation people before making decisions that will affect rights either established through litigation or recognized by government as existing....It is my view that a consideration of the question of consultation must be taken into account not only the aspects of direct consultation between First Nations people and the provincial government whose officials were charged with responsibility to decide upon these applications, but also the consultations between First Nations people and Amoco that were known to the government to have occurred. The process of consultation cannot be viewed in a vacuum and must take into account the general process by which government deals with First Nations people, including any discussions between resource developers such as Amoco and First Nations people.

[103] The Heiltsuk take the position they have not been consulted at all with respect to the issuance of the licences and that any meetings held between the Heiltsuk and the Province or between Heiltsuk and Omega do not constitute consultation.

[104] In *Ryan et al. v. Fort St. James Forest District (District Manager)*, Smithers Registry, No. 7855 (BCSC) aff'd (1994), 40 B.C.A.C. 91, Macdonald J. dealt with the issue of whether the Gitksan could argue that there had not been adequate consultation when they had refused to participate in the process:

¶ 23 I accept that the Gitksan are entitled to be consulted in respect of such activities. They do not need the doctrine of legitimate expectations to support that right, because the *Forest Act* itself and the fiduciary obligations toward Native Indians discussed in *Delgamuukw*, establish that right beyond question. However, consultation did not work here because the Gitksan did not want it to work. The process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met.

. . .

¶ 26 I accept the submission that the M.O.F. more than satisfied any duty to consult which is upon it. It was the failure of the Petitioners to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute.

[105] A similar finding was made in *Halfway River First Nation v. BC (Ministry of Forests)*, 1999 BCCA 470. On a review of the consultation which took place in that case, Mr. Justice Finch held:

There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider

the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan et al v. Fort St. James Forest District (District Manager)* (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.

(¶ 161)

[106] Here the evidence is that Omega attempted to meet with and consult with the Heiltsuk:

- Omega met with the Heiltsuk in Bella Bella concerning the proposed hatchery in October 2001 just after it had commenced the application process for the licences.
- Omega met with the Heiltsuk in Campbell River in December 2001.
- Omega requested a meeting with the Heiltsuk in January 2002 and met with them in Bella Bella on January 9, 2002.
- Omega provided information to the Heiltsuk in January 2002 following the meeting in response to questions and concerns raised by the Heiltsuk.
- Omega met with the Heiltsuk in Bella Bella on May 30, 2002 and provided additional information following the meeting.

[107] During the various meetings and correspondence with Omega and the Crown the Heiltsuk have taken the position that they have zero tolerance to Atlantic salmon aquaculture and do not want the hatchery in their claimed territory, i.e., they have asserted a right to veto all Atlantic salmon aquaculture operations in their claimed territory.

[108] The Heiltsuk have remained firm in their position that they are opposed to any type of Atlantic salmon aquaculture in the territory over which they are asserting a claim. I find on the evidence that prior to the petition the Heiltsuk have been unwilling to enter into consultation regarding any type of accommodation concerning the hatchery. This is apparent both from the position they have taken throughout the meetings where they have clearly indicated that they do not consider the meetings to be consultation and from correspondence between counsel in which the Heiltsuk have continued to express the view that no consultation has taken place.

[109] The Heiltsuk have never advised the Crown or Omega of any terms upon which they would be willing to withdraw their opposition to the hatchery. Rather, they have maintained their position of zero tolerance for Atlantic fish farming in their claimed territory, including this hatchery site. It is apparent on the evidence that the Heiltsuk do not want a hatchery on the site; i.e., they want a veto with respect to what use the land can be put.

[110] In oral submissions, counsel for the Heiltsuk attempted to characterize the "zero tolerance" of the Heiltsuk as "zero tolerance to law breaking" in that Heiltsuk law prohibits any activities that damage the environment and the Heiltsuk are of the view that the hatchery has the potential to damage the environment.

[111] However, the Heiltsuk clearly advised the Crown and Omega at the various meetings and in correspondence that the Heiltsuk had zero tolerance for fish farms and this hatchery. They told Omega in January 2002 that they did not want

the hatchery in Ocean Falls. As of January 2003, their stated position that the proposed hatchery was not welcome in Heiltsuk territory had not changed and they advised Omega and the Crown that they were opposed to the hatchery and wanted it removed.

[112] The conduct of the Heiltsuk both in stating their position as one of zero tolerance to Atlantic salmon aquaculture and in attending meetings at which they stated they did not consider the meeting to be consultation indicates, in my view, an unwillingness to avail themselves of the consultation process.

[113] On all of the evidence, it is clear that the Heiltsuk seek a veto over Omega's operations. They "want it removed". While saying they want to consult, their position has reflected an unwillingness to consult.

[114] No authority has been provided to me to support the proposition that the right to consultation carries with it a right to veto a use of the land. On the contrary, the Supreme Court of Canada has recognized that the general economic development of the Province, the protection of the environment or endangered species, as well as building infrastructure and settlement of foreign populations may justify the infringement of aboriginal title. The government is expected to consider the interests of all Canadians including the aboriginal people when considering claims that are unique to the aboriginal people. It is in the end a balancing of competing rights by the government. Any accommodation must be done in good faith and honour. When dealing with generalized claims over vast areas, the court held that accommodation was much broader than a simple matter of determining whether licences had been fairly allocated.

(*Delgamuukw*, ¶ 165, 202, 203)

[115] Although the Crown took the position that consultation was not required regarding the initial two licences, the evidence is that the Crown changed its position and attempted to consult with the Heiltsuk prior to the issuance of the dock and pipe licence of occupation and the Link Lake water licence. There is evidence that there are ongoing opportunities for consultation and accommodation with respect to the hatchery.

[116] Additionally, the evidence is that Omega has made and is making ongoing efforts to provide information to the Heiltsuk about the impact of discharge from the hatchery on the marine environment and to consult in relation to the procedures that are in place to prevent escapes from the hatchery. Omega has expressed a willingness to work with the Heiltsuk to create jobs and establish a wild salmon enhancement facility in the area.

[117] The Heiltsuk have not disclosed their position about the terms they would find acceptable to withdraw their objection to the issuance of the licences to Omega. They have not suggested any terms that should be added to the licences or identified any specific impacts the licences have had on their rights.

[118] In the circumstances, I find that the duty of the Crown to consult was adequately discharged by the Crown and Omega. The process has been frustrated by the Heiltsuk's failure "to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute". *Ryan*, at ¶ 6, 24 and 26.

WHETHER THIS IS AN APPROPRIATE CASE TO EXERCISE JUDICIAL REVIEW AND, IF SO, WHAT ARE THE APPROPRIATE REMEDIES?

[119] The Heiltsuk are seeking to have the licences quashed.

[120] Relief under s. 8(1) of the *Judicial Review Act* is discretionary.

[121] In **Klahoose First Nation v. British Columbia (Minister of Forests)** (1995), 13 B.C.L.R. (3d) 59 (S.C.), Mackenzie J., as he then was, dismissed an application by a First Nation to quash the Minister's consent to the transfer of a tree licence. The Court assumed, without deciding, that the Minister had acted in breach of a duty to consult, but exercised its discretion to deny the petitioners their remedy under the **Judicial Review Procedure Act**. Mackenzie J. held that although the Band had lost the opportunity to consult before the Minister gave his consent, the consent was for the transfer of an existing tenure and no additional interests were alienated which could prejudice the Band's aboriginal claims. (p. 65)

[122] In this case, not only is there no evidence that the Heiltsuk's aboriginal claims are prejudiced by the issuance of the licences, but the fact that the Heiltsuk have zero tolerance for Atlantic salmon aquaculture within their claimed territory must also be considered.

[123] Although the Heiltsuk speak to their willingness to consult in regard to the licences which provide the tenures necessary for Omega to operate the hatchery this must be questioned in light of their consistently stated position to the Crown and Omega.

[124] Section 11 of the **Judicial Review Procedure Act** provides that an application for judicial review is not barred by the passage of time unless: "(b) the court considers that substantial prejudice and hardship will result to any other person affected by reason of delay."

[125] The Heiltsuk were advised that Omega's plans for construction and operation of the facility were progressing. In addition, information was provided to them about the amount of the planned investment and the timelines for completion of the project. It is clear from the Heiltsuk's evidence that they were aware of the issuance of the hatchery licence of occupation and the lack of consultation as early as mid December 2001. At that time, no significant investment had been made by Omega.

[126] The Heiltsuk chose neither to bring the petition at the time nor to apply for an injunction prior to construction of the facility commencing in late 2002. Rather, they waited 13 months after they were aware that the Crown had determined that no consultation about the initial licences was required. The evidence is that as of March 2003 Omega had invested \$9.5 million in cleaning up the site and building the facility. Further losses will be incurred if the facility cannot be operated.

[127] Given my findings that the Heiltsuk have not established that there has been a *prima facie* infringement of their aboriginal rights and that the Crown and Omega have attempted to consult with the Heiltsuk, it is my view this is not an appropriate case to exercise my discretion to either quash the licences or make a prohibition order barring issuance of approvals or licences relating to the hatchery.

[128] I suggest that the parties continue to consult to determine whether the hatchery may adversely affect the Heiltsuk's rights and, if so, seek a workable accommodation with the Heiltsuk through negotiation. Given the expressed desire of Omega to continue to seek agreements with the Heiltsuk, I find that it is not necessary at this time to make an order in that regard.

CONCLUSION

[129] The following orders and declarations are made:

- The decision makers had in December 2001 and continue to have a duty to consult with the Heiltsuk in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Heiltsuk and the short and long term objectives of the Crown and Omega with respect to the licences;
- The decision makers are to provide the Heiltsuk with all relevant information reasonably requested by them;
- The parties are at liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation;
- The relief in the petition to quash the licences and for a prohibition order is adjourned generally;
- The balance of the relief sought in the petition regarding the decision makers, including the application for a declaration that the decision makers breached their duty to consult and accommodate the Heiltsuk interests and concerns is dismissed.
- The application regarding a declaration that Omega had a duty to consult and seek accommodation with the Heiltsuk is adjourned generally.
- The balance of the relief sought in the petition with respect to Omega, including,, that it was in breach of its duty to consult, is dismissed.
- As well the application for an interim or interlocutory injunction is dismissed.

[130] Given the divided success on the petition, I order that each party bear its own costs.

"L.B. Gerow, J."
The Honourable Madam Justice L.B. Gerow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Nlaka'pamux Nation Tribal Council v.
Griffin,***
2009 BCSC 1275

Date: 20090917
Docket: S092162
Registry: Vancouver

Between:

Nlaka'pamux Nation Tribal Council

Petitioner

And

**Derek Griffin in his capacity as Project Assessment Director,
Environmental Assessment Office, Belkorp Environmental
Services Inc. and Village of Cache Creek**

Respondents

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for Petitioner: Reidar Mogerman and M. Underhill

Counsel for the Respondent Derek Griffin in his capacity as Project Assessment Director, Environmental Assessment Office: P. Foy, Q.C. and E. Christie

Counsel for the Respondent Belkorp Environmental Services Inc.: S. Fitterman

For the Village of Cache Creek: No one appearing

Place and Date of Hearing: Vancouver, B.C.
August 4, 5, 6, & 7, 2009

Place and Date of Judgment: Vancouver, B.C.
September 17, 2009

[1] Every year the people and businesses of Metro Vancouver create hundreds of thousands of metric tons of solid waste. Currently a significant part of that solid waste is trucked to a landfill located in the southern part of the village of Cache Creek (the Cache Creek Landfill). The Cache Creek Landfill in its present form began accepting the garbage created in the Lower Mainland of British Columbia in or about 1987. It is expected that sometime in 2010 the Cache Creek Landfill will reach its capacity. Accordingly, Metro Vancouver has turned its attention to the question of what to do with its solid waste.

[2] There is considerable controversy about how to deal with Metro Vancouver's solid waste. Recently a number of proposals have been put forward. All of them have encountered significant opposition. The proposal which has given rise to this litigation involves an extension of the Cache Creek Landfill (the "Extension Project"), which proposes an approximately 40 hectare extension to the Cache Creek Landfill. Metro Vancouver is not a proponent of the Extension Project. The respondents Belkorp Environmental Services Inc. and Village of Cache Creek are the proponents. They, of course, hope to be able to continue to receive waste from Metro Vancouver. If they do, depending on the rate at which Metro Vancouver produces waste, the lifespan of the Extension Project is expected to range from 20 to 30 years.

[3] The Extension Project is located within the municipal boundaries of the village of Cache Creek, west of the existing Cache Creek Landfill and immediately south of the village of Cache Creek.

[4] The Cache Creek Landfill is located on or near the boundary of the traditional territory of the Secwepemc Nation, formerly called the Shuswap Nation, and the Nlaka'pamux Nation, formerly called the Thomson River Nation. The Bonaparte Indian Band, a member of the Secwepemc Nation, occupies land which is most closely proximate to the Extension Project. The Ashcroft First Nation Band (the "Ashcroft Band"), a member of the Nlaka'pamux Nation, occupies land slightly to the south of the Extension Project closer to the village of Ashcroft.

[5] Not surprisingly, there is the same diversity of opinion with respect to landfills in general and the Extension Project in particular among the members of the Nlaka'pamux Nation as there is among the members of the public of British Columbia generally. Some members of the Nlaka'pamux Nation favour the Extension Project and are of the view that it will provide a net benefit to the members of the Nation. Others are opposed to it. The current representatives of the Ashcroft Band are among those who generally favour it. The petitioner, the Nlaka'pamux Nation Tribal Council (the "NNTC") is among those who oppose it.

[6] On this application the NNTC applies for the following relief:

- (a) An order in the nature of *certiorari* quashing the order issued on October 22, 2008 pursuant to section 11 of the *Environment Assessment Act, S.B.C. 2002, c. 43* (the "Act") by Derek Griffin, Project Assessment Director, Environmental Assessment Office (the "Director"), in respect of the Cache Creek Landfill Extension Project (the "Project");
- (b) An order in the nature of *certiorari* quashing the Director's approval of the Terms of Reference for the Project on January 30, 2009;
- (c) A declaration that the Director owes a constitutional and legal duty to consult with the Nlaka'pamux Nation Tribal Council ("NNTC") in good faith and endeavour to seek accommodations in respect of the environmental assessment of the Project;
- (d) A declaration that the Director has failed to comply with his constitutional and legal duty to consult with the NNTC in good faith and endeavour to seek accommodations in respect of the environmental assessment of the Project;
- (e) In the alternative, an order:
 - (i) in the nature of mandamus requiring the Director to consult with the NNTC in good faith and endeavour to seek accommodations in respect of the environmental assessment of the Project;
 - (ii) in the nature of mandamus requiring the Director to add the NNTC to the definition of "First Nations" in Schedule A of the section 11 order issued by the Director on October 22, 2008;
 - (iii) in the nature of mandamus requiring the Director to add the NNTC to the definition of "First Nations" in Section 2.0 of the Terms of Reference for the Project approved by the Director on January 30, 2009;

[7] The NNTC is one of two organizations that represent members of the Nlaka'pamux Nation. The other organization is the Nicola Tribal Association. The Ashcroft Band is a member of the NNTC but its views with respect to the Extension Project are at odds with those of the NNTC and in particular the views of Chief Robert Pasco, the chair of the NNTC.

[8] The government of British Columbia exercises regulatory control over the environmental aspects of the Extension Project through the Environmental Assessment Office (the "EAO") pursuant to the *Environmental Assessment Act*, SBC, 2002 Ch. 43 (the "EAA"). For convenience I have set out the relevant portions of the EAA in Schedule A to these reasons.

[9] The EAO acknowledges that it has an obligation to consult with and, if appropriate, accommodate the views of the First Nations whose Aboriginal title and rights may be affected by the Extension Project. On the evidence before me it would appear that the First Nations whose title and rights may be affected by the Extension Project are the Secwepemc and the Nlaka'pamux. The Bonaparte Indian Band, as a member of the Secwepemc Nation, supports the Extension Project and no complaints about the process of environmental review have to my knowledge been raised by any other member of the Secwepemc Nation. On the other hand, as indicated above, there is a clear division of opinion about the Extension Project among the members of the Nlaka'pamux Nation.

[10] The issue with which the Environmental Assessment Office has had to deal, and upon which I am being asked to pass judgment is how it should fulfill its duty to consult the Nlaka'pamux Nation with respect to its environmental review of the Extension Project, taking into account, among other things, the division of opinion within the Nation.

[11] To appreciate the impact of the government action in issue it is necessary to understand the various stages of the environmental assessment process required by the EAA. The process is initiated by the proponents submitting a Project Description, which is general description of the project which the proponents

propose to undertake. A Project Description must contain sufficient information to permit the Executive Director of the EAO to determine whether the proposed project is a reviewable project under the EAA. In this case the proponents submitted a Project Description for the Extension Project on August 8, 2008.

[12] Under the EAA the Executive Director may delegate his or her powers to a member of the EAO. In this case the powers of the Executive Director were delegated to the respondent, Derek Griffin, who exercised them as the Project Assessment Director.

[13] The next step in the process is for the Project Assessment Director to determine whether the proposed project is a reviewable project which requires an Environmental Assessment Certificate (an “EAC”). The importance of an EAC is made clear by Sec. 9(1) of the EAA. In this case the Project Assessment Director issued an order under Sec.10(1)(c) of the EAA stating that the Extension Project was a reviewable project on August 28, 2008.

[14] The next step in the process is for the Project Assessment Director to issue an order under Sec. 11 of the EAA determining the scope of and the procedures and methods for conducting the assessment of the proposed project. In this case the challenged Sec. 11 order (The Order) was issued on October 22, 2008.

[15] An order under Sec. 11 typically requires the proponents to prepare Terms of Reference to identify the issues to be addressed and the information to be provided in the required application for an EAC. The drafting of the Terms of Reference is undertaken in consultation with persons and entities who are determined in the Sec. 11 order as parties with whom the proponents must consult.

[16] Both the Sec. 11 order and the Terms of Reference typically require that the proponents consult with interested parties, including specified First Nations. In this case the Terms of Reference were approved by the Project Assessment Director on January 30, 2009.

[17] After the approval of the Terms of Reference the proponents prepare a formal application for an EAC. The Project Assessment Director must approve the form of the application. In this case the proponents first submitted their application on February 9, 2009. However the Project Assessment Director required further information and a revised application was submitted on May 19, 2009. On June 19, 2009 the application was accepted by the Project Assessment Director, with the result that the process of considering the application formally could begin.

[18] Under the EAA, the Project Assessment Director, representing the Executive Director, must, within the prescribed time limit, refer the application to the ministers having jurisdiction. The Project Assessment Director must provide an assessment report to the ministers and may provide recommendations with respect to the application. If the Project Assessment Director provides recommendations, he or she must also provide reasons for the recommendations. The prescribed time limit is 180 days, but that time can be extended.

[19] On receipt of the referral the ministers must consider the assessment report and any recommendations accompanying the assessment report and may consider any other matters they consider relevant in making their decision on the application. After such consideration, the ministers must either issue an EAC, with or without conditions, refuse to issue an EAC or order further assessment to be carried out.

[20] To put this dispute in context, I must make reference to three other proposed landfill projects. The first is what is known as the Ashcroft Ranch Landfill Project. This was a proposal to locate a new landfill on the Ashcroft Ranch which had been purchased by what was then called the GVRD as a possible replacement for the Cache Creek Landfill. The second project is referred to as the Highland Valley Copper Landfill Project. This was a project which proposed utilizing the worked out pit from the Highland Valley Copper Mine as a repository for landfill. Both the Ashcroft Ranch Landfill Project and the Highland Valley Copper Landfill Projects were deemed to be reviewable projects requiring an EAC. A third project, which is known as the Cache Creek Landfill Annex, contemplates a small expansion of the

existing Cache Creek Landfill to extend its life for a year or two. No EAC was deemed necessary with respect to the Cache Creek Landfill Annex. In reviewing some of the correspondence it is necessary to distinguish among these various projects. In particular, at times the Cache Creek Landfill Annex Project is referred to as an extension or expansion. In these reasons I will endeavour to use specific terms with respect to the four projects.

[21] The relevant history of the Cache Creek Landfill itself begins in 1987. On March 18, 1987 the Director of Waste Management, acting pursuant to the *Waste Management Act*, R.S.B.C., 1996, Ch. 482 (now repealed) authorized the issuance of a waste management permit to allow the discharge of Municipal refuse, including light industrial waste, from the Greater Vancouver Regional District into the Cache Creek Landfill.

[22] Various parties, including the Bonaparte Indian Band and the Ashcroft Ranchers' Association, represented by, among others, Chief Robert Pasco appealed the issuance of the waste management permit to the Environmental Appeal Board. On September 21, 1987, the appeals were dismissed and with some minor modifications the waste management permit was upheld.

[23] At the hearing before me counsel for the respondents pointed out that the NNTC was not an appellant at that appeal. The Bonaparte Indian Band was an appellant and on the appeal advanced grounds of appeal based on its claim to aboriginal title to the Cache Creek Landfill site, apparently without objection from the NNTC. In his oral submissions, counsel for NNTC replied that the NNTC had sought to be granted appellant status but its application had been dismissed, principally on the basis that the Environmental Appeal Board at that time took the position that questions of Aboriginal title and rights were beyond its jurisdiction.

[24] In my view, the proceedings which took place in 1987 under the regulatory scheme then in place are of little or no assistance in assessing the issues on this application. Both the jurisprudence and the legislative framework with respect to the recognition of Aboriginal title and rights have changed dramatically since 1987. It

would certainly be inappropriate and wrong to draw any adverse conclusions with respect to the NNTC or the rights it asserts from events which occurred prior to the present legislation being put in place and prior to the seminal decisions of the Supreme Court of Canada defining the nature and extent of the rights constitutionally protected under Sec. 35 of the *Constitution Act*.

[25] On February 23, 2003, the Greater Vancouver Sewerage and Drainage District applied to the Executive Director under the EAA for an order that the Ashcroft Ranch Landfill Project be designated as a reviewable project under what was then Sec. 7.1 of the EAA.

[26] On March 3, 2003, the Executive Director designated the Ashcroft Ranch Landfill Project as a reviewable project under what was then Sec. 7.3 of the EAA and on March 20, 2003, the Project Assessment Director ordered that an environmental assessment of the Ashcroft Ranch Landfill Project be conducted.

[27] The Project Assessment Director directed that he would invite all levels of governments and First Nations in the vicinity of the Ashcroft Ranch Landfill Project to submit comments on the application within a time framework to be determined by him. The Project Assessment Director ordered the proponent to consult with First Nations and report the results of any meetings with the first nations conducted as part of the assessment.

[28] On August 29, 2003, the EAO issued Terms of Reference with respect to the application for an EAC for the Ashcroft Ranch Landfill Project. Under the Terms of Reference relating to First Nations involvement in consultation, the EAO stated as follows:

A.4.3.2.4 Proponent Response

The Proponent provided written responses to all First Nations comments on the Draft Terms of Reference on July 30, 2003. First Nations comments and respective responses by the Proponent are summarized in the Agency and First Nations Issues Tracking Document (Volume 2, Part A).

Some First Nations comments on the Draft Terms of Reference included issues that are beyond the scope of the assessment and that will not be directly addressed as part of the EA Review. These included:

- GVRD solid waste management and waste reduction programs (i.e., alternatives to the Ashcroft Ranch Landfill Project), including the transport of municipal solid waste from the GVRD and other jurisdictions;
- the day-to-day operations of the Ashcroft Ranch (e.g., use of Nutrifor); and
- the operations and closure of the existing Cache Creek Landfill.

The EAO is satisfied that First Nations comments received that are within the scope of the assessment have been properly considered to the extent possible at this stage of the review.

[Italics and bold in original.]

[29] The GVRD did not submit a formal application for an EAC with respect to the Ashcroft Ranch Landfill Project until August 2, 2004. On November 14, 2004, the NNTC made a comprehensive submission with respect to the Ashcroft Ranch Landfill Project to the EAO. At that time judgment had not yet been delivered in the Supreme Court of Canada in the two seminal cases with respect to Aboriginal title and rights; *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 and *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550.

[30] I think it is fair to say that the submission made by the NNTC with respect to the Ashcroft Ranch Landfill Project placed particular reliance on a strong *prima facie* claim to aboriginal title to the land in question. I think it is also fair to say that the general approach taken by the NNTC was one of complete opposition to the location of a landfill on land within the traditional territory of the Nlaka'pamux Nation.

[31] On June 7, 2005, the Minister of Sustainable Resource Management made an order Sec. 30 of the EAA suspending the environmental assessment with respect to the Ashcroft Ranch Landfill Project.

[32] On March 13, 2006, a Project Assessment Manager made an order under Sec. 11 of the EAA with respect to the Highland Valley Copper Landfill Project. Schedule A to the Highland Valley Copper Landfill Project Sec. 11 order contained a definition section defining, amongst other things, First Nations. First Nations were defined to include a number of Bands affiliated with the NNTC, the Nicola Tribal

Association, and the Shuswap Nation Tribal Council. Sec. 15.1 of the Sec. 11 order directed the proponent to provide copies of the application to the First Nations and provided that the First Nations may respond to an invitation from the Project Assessment Director to submit comments on the application, either through their participation in the working group or independently.

[33] In June of 2006, the Province of British Columbia, Metro Vancouver (then the Greater Vancouver Regional District ("GVRD"), and the First Nations Leadership Council formally commenced a tripartite process to consider replacements for the Cache Creek Landfill (the "Replacement Process"). The Replacement Process included an Advisory Panel. The Leadership Council appointed former Court of Appeal Justice Douglas Lambert as a First Nations representative to the Advisory Panel. The Advisory Panel ultimately began looking at interim solutions for waste disposal, including a proposed extension to the Cache Creek Landfill. That process appeared to come to a conclusion in January of 2008 when the GVRD announced that it was suspending consideration of interior landfilling as an option to meet its waste disposal needs.

[34] In December of 2007, just prior to the GVRD's announcement, Mr. Griffin, acting on behalf of the EAO, wrote to the NNTC and advised them of the process that the EAO intended to follow to directly involve the NNTC in the environmental assessment of projects within the Nlaka'pamux Nation's indigenous territory. Mr. Griffin specifically indicated that, if and when a proposed extension to the Cache Creek Landfill formally entered the Environmental Assessment process, the EAO would want to meet with the NNTC to discuss their interests and concerns with respect to the project, including what Aboriginal title and rights were asserted by the Nation.

[35] I was not provided with copies of the communications leading up to the letter of December 7, 2007. However, from a review of the letter itself, I conclude that the NNTC was urging on the government a process of consultation which would involve the NNTC in a decision-making role as to whether a proposed project should be

prohibited from entering the environmental assessment process at all. In the December 7 letter Mr. Griffin also stated that the EAO was prepared to ensure that the NNTC had an opportunity to consult on a government-to-government basis outside of the EA working group process for any project under review. Mr. Griffin added the following:

In saying this, it is also important to note that we believe the purpose of such government-to-government discussions must be to address any outstanding *Haida* obligations that are not sufficiently discharged in the working group, and that there is not a duty to reach agreement on all issues of interest to First Nations (although we certainly prefer to do so where possible).

[36] On May 26, 2008, the solicitors for the NNTC wrote to the Honourable Barry Penner, then Minister of the Environment. This letter was written with respect to the solid waste management amendment process being undertaken by the GVRD. It expressed concern about reports that, notwithstanding its stated intention to abandon an in Province solution to its solid waste requirements, the GVRD and the Ministry were considering about 23 other options in the solid waste management plan process, including landfills in Nlaka'pamux territory. In the letter counsel for the NNTC took the position that if the Province had any intention to return to an in Province solution for the disposal of waste a fair, transparent and unbiased review of alternatives must be completed.

[37] On July 31, 2008, in response the May 26, 2008 letter, Lynn Bailey, an Assistant Deputy Minister in the Environmental Protection Division wrote to NNTC with respect to private third party proposals for the creation of waste disposal projects. Ms. Bailey stated that as these projects were being proposed by independent third parties, the projects themselves would not require an amendment to Metro Vancouver's solid waste management plan but would, of course, be subject to applicable provincial regulatory processes including, in most cases, an assessment under the EAA and that First Nations' consultation would occur in relation to those processes prior to project approval.

[38] On August 15, 2008, Front Counter B.C. wrote to the NNTC to the attention of Chief Robert Pasco with respect to an application by the Village of Cache Creek for

the Cache Creek Landfill Annex, which was described in the letter as an extension to the existing Cache Creek Landfill site, to add an annex of approximately 7 hectares to permit the continued operation of the landfill. The proposal called for the annex to be operated to the same standard as that of the existing Cache Creek Landfill.

[39] The July 31 letter from Lynn Bailey and Front Counter B.C.'s referral of the proposal for the Cache Creek Landfill Annex prompted a letter dated August 28, 2008, from counsel for the NNTC. I pause here to say there was some discrepancy in the evidence as to the date of this letter. The copy of the letter provided in the evidence is dated September 5, 2008. However, in correspondence the letter is referred to as dated August 28, 2008. Counsel are agreed that there is only one letter, dated August 28, 2008, and speculate that the dating discrepancy may arise from the idiosyncrasies of the auto-dating programs on the computers on which copies of this document had been retained.

[40] In my view, the August 28, 2008 letter is important to understanding the approach taken by the Project Assessment Director in dealing with the Extension Project. The specific subject matter of the letter is the Cache Creek Landfill Annex. In the letter NNTC's counsel objects to the de-linking of the Cache Creek Landfill Annex from the ongoing review being undertaken of Metro Vancouver's Waste Management Plan. In particular, on page 2 of the letter counsel for NNTC takes the following position:

A Cache Creek Expansion cannot even been contemplated unless and until Nlaka'pamux's Title and Rights are properly addressed in respect of the historic, existing and ongoing impacts and infringements of the entire Cache Creek landfill. We want to be very clear that this will embroil the Province and Metro Vancouver in an examination and accommodation of the unjustified infringements created by the Cache Creek landfill from its inception.

[41] I take two things from the letter. The first is that the NNTC was opposed to a consideration of the Cache Creek Landfill Annex outside of the Replacement Process. The second is that it was NNTC's position that any further expansion of the Cache Creek Landfill could not be undertaken without addressing the asserted historical infringements on Nlaka'pamux's title and rights resulting from the original

Cache Creek Landfill. Further, in the letter NNTC took the position that the Cache Creek Landfill and the transportation corridor providing access to it constituted one of the most serious on-going infringements of Nlaka'pamux title and rights.

[42] I find that any reasonable person reading this letter would conclude that the concerns expressed by NNTC went far beyond concerns related directly to any application for an environmental assessment of any specific project being brought forward in respect of the Cache Creek Landfill.

[43] In my mind it is also significant that the letter states that litigation would be the likely result of the positions outlined in the July 31, 2008, letter from Ms. Bailey. It is to be remembered that that letter makes as its essential point the fact that any future projects brought forward by private third party proponents would be subject to review pursuant to the EAA but that that review would not initially require an amendment to Metro Vancouver's Solid Waste Management Plan. The position of Ms. Bailey was that such an amendment would be required only if Metro Vancouver elected to enter into an agreement with the operator of such a facility. Thus, by August 28, 2008, the expressed position of the NNTC was that any process of environmental review of landfill projects must be undertaken as part of the Replacement Process and if it was not, would likely result in litigation.

[44] On September 16, 2008, the Ashcroft Band Council wrote to Ms. Bailey taking the position that the NNTC was not acting on behalf of the Nlaka'pamux Nation in its dealings with respect to the Cache Creek Landfill Annex. The letter took the position that NNTC did not reflect the position of the Nlaka'pamux Nation with respect to the Cache Creek Landfill Annex. On November 6, 2008, Ms. Bailey responded to the August 28, 2008, letter from counsel, and enclosed a copy of the Ashcroft Band Council letter raising the issue of the authority of NNTC to speak on behalf of the Nlaka'pamux Nation.

[45] Against the background of this correspondence Belcorp Environmental Services Inc. and the Village of Cache Creek prepared a joint proposal for the Extension Project, which proposed the expansion and extension of the Cache Creek

Landfill by a further 40 hectares to provide an additional 15 million tons of disposal capacity.

[46] As indicated above, the Executive Director delegated to Mr. Derek Griffin as Project Assessment Director, the powers and functions of the Executive Director under the EAA with respect to the Extension Project.

[47] On August 28, 2008, the Project Assessment Director issued an order under Sec. 10.1(c) of the EAA stating the Extension Project required an EAC and that the proponents may not proceed with the Extension Project without an assessment.

[48] On October 22, 2008, Mr. Griffin made the Order which is challenged on this application. Certain portions of the order should be hi-lighted.

[49] Firstly, the Order states that the Extension Project is located within the asserted territory of the Bonaparte Indian Band of the Secwepemc Nation and appears to be close to or within the asserted traditional territory of the Nlaka'pamux Nation, with the Ashcroft Indian Band being the Nlaka'pamux Nation Band that appears to be most closely associated with the extended project area. Secondly, First Nations are defined in Schedule A to the Order to mean the Ashcroft and Bonaparte Indian Bands, and such other Bands as are added by way of written notification to the proponent by the EAO.

[50] Section 10 of Schedule A provided that:

For the purpose of developing the Application the proponent must consult with First Nations with respect to their perspectives and opinions about the project and the potential effects of the project on their aboriginal interests.

It is to be noted that the defined term "First Nations" does not include the NNTC.

[51] On December 3, 2008, counsel for the NNTC wrote to the Ministry of Environment with a copy to Mr. Griffin taking the position that the Order was issued in violation of the honour of Crown, was unconstitutional and was of no force and effect. The letter also took the strong position that it was the NNTC which had the authority to speak for and protect the title and rights of the Nlaka'pamux Nation.

[52] On January 30, 2009, the Terms of Reference prepared by the proponents for the application for an EAC for the Extension Project were approved.

[53] The Terms of Reference contained the following provisions with respect to consultation with First Nations:

Preamble

This section will provide information on consultation with First Nations, impact and benefit sharing agreements, and involvement of First Nations in all phases of the environmental assessment. "First Nations" means Ashcroft and Bonaparte Indian Bands and such other bands as are added to this list by way of written notification to the Proponents by the Environmental Assessment Office.

Subsections	Coverage
2.1	Consultation <ul style="list-style-type: none">General description of history of Bonaparte and Ashcroft Indian Bands, and the consultation efforts and outcomes.
2.2	Impact and Benefit Sharing Agreement <ul style="list-style-type: none">Rationale for developing the agreements, communication principles, capacity building, funding commitments, and promotion of culture.
2.3	Involvement of First Nations <ul style="list-style-type: none">Description of Bonaparte and Ashcroft Indian Bands' involvement in all phases (including the identification of the "valued ecosystem components", the scope, environmental and archeological studies) and project implementation.

[54] On June 19, 2009, the EAO accepted the application for an Environmental Assessment Certificate and began the formal review of that application. The NNTC was informed of this by letter dated June 22, 2009.

[55] In paragraph 53 of his affidavit Mr. Griffin summarizes the considerations on which he based his assessment of entities with which it would be most appropriate

for the proponents to engage in consultation. He states that he considered the following factors:

- (a) the absence of any single entity that clearly represented the interests of the Nlaka'pamux Nation as a whole;
- (b) the geographic proximity of the Ashcroft Indian Band and location of its reserves showing that within the Nlaka'pamux Nation the Ashcroft Indian Band would potentially be the most directly impacted by design issues for the Extension Project;
- (c) the fact that the EAO had received no responses when it wrote to all bands of the Nlaka'pamux Nation with copies to the NNTC or the Nicola Tribal Association as appropriate advising it that he proposed to name the Ashcroft and Bonaparte Indian Bands in the Sec. 11 order and specifically asking if any other Bands wished to be engaged directly in consultation.

[56] Mr. Griffin has deposed that the EAO is prepared to consult with the NNTC, including sharing all EAO correspondence, meeting with the NNTC, addressing NNTC positions in the report to the responsible ministers, allowing the NNTC to review and comment on the draft report to the ministers required by Sec. 17 of the EAA, and providing the NNTC the opportunity to provide their own submission directly to the ministers.

[57] The task which faces me is to determine whether the issuance of the Order and approval of the Terms of Reference violated the honour of the Crown by depriving the Nlaka'pamux Nation of the opportunity to consult meaningfully with respect to the environment assessment of the Extension Project.

[58] This application raises the difficult question of the effect of the Order and its interplay with the duty to consult and endeavour to accommodate. Broadly speaking the government action being undertaken is the environmental assessment of the Extension Project, culminating in a decision by the ministers as to whether to issue an EAC. As I have already outlined, there are a number of stages in that process. The stages in issue in this case all predate the EAO's acceptance of an application from the proponents. It is common ground that the honour of the Crown requires the government to consult with and attempt to accommodate the Nlaka'pamux Nation with respect to the decision whether to issue an EAC. The question before me is when and in what form that consultation must take place.

[59] The NNTC's position is that the Project Assessment Director's decision to exclude it, as the representative of the Nlaka'pamux Nation, from the definition of First Nation in the Order and from the working group means that there has not been and cannot be adequate consultation with the Nlaka'pamux Nation with respect to the decision whether to issue an EAC. The government's position is that there can be adequate and effective consultation undertaken by the EAO and the Project Assessment Director during the project assessment of the application for an EAC. As I understand the government's position, it is that given the nature of the concerns expressed by the NNTC and the issues raised by it, in fact the only truly effective consultation is on a government to government basis and that the proponents really have no useful role to play in that consultation.

[60] This position can be usefully compared to the provisions of the Terms of Reference for the Ashcroft Ranch Landfill Project described in paragraph 28 of these reasons. In both cases it appears that the EAO draws a distinction between issues directly relating to the project under consideration and issues of wider concern.

[61] The EAO also points out that every member band of the NNTC was notified of the initiation of the assessment process and was informed that the EAO would be consulting with the Ashcroft Band and asked whether each Band wanted to be consulted separately and received no response. The NNTC was copied with each of these letters.

[62] In his affidavit Mr. Griffin outlines in detail the letters which were sent to member Bands of the Nlaka'pamux Nation. In each case the letter to the Band associated with the Nlaka'pamux Nation was copied to the tribal organization with which the Band in question was affiliated. For example, the letter of September 3, 2008, to the Cooks Ferry Indian Band was copied to the Nicola Tribal Association and letters to the Boothroyd Band and the Spuzzum and Boston Bar First Nations were copied to the NNTC.

[63] Chief Jennifer Bob of the Spuzzum Indian Band has filed an affidavit stating that that Band has no record of having received the correspondence from the EAO.

In the course of argument I asked counsel whether I needed to determine whether the letters referred to in Mr. Griffin's affidavit were, in fact, received by the various member Bands of the Nlaka'pamux Nation. Mr. Mogerman, counsel for NNTC, submitted that it did not matter whether those letters were, in fact, received. It was his submission that even if the letters had been received they were not relevant to the issues before me. However, as the lack of response to these letters was amongst the reasons that Mr. Griffin gave for naming only the Bonaparte and Ashcroft Bands in the Order, I think I must make a finding with respect to the receipt of these letters.

[64] On the basis of all of the evidence before me, I conclude that the NNTC and its member Bands did, in fact, receive the September letters. Apart from Chief Jennifer Bob and Chief Robert Pasco, none of the other member Bands of the NNTC have denied receipt of the letters. In addition the affidavit material filed by Chief Jennifer Bob and Chief Robert Pasco does not specifically deny that they had knowledge of the letters but rather says that neither the Band or the NNTC have any record of having received them. However, Mr. Griffin's affidavit does give detailed evidence of the mailing of the letters. None of the letters addressed to Bands which support the NNTC or the copies sent to the NNTC were returned. I therefore conclude that the member Bands of the NNTC and the NNTC office did receive the September letters.

[65] This petition was filed on March 20, 2009.

[66] After the petition was issued the Project Assessment Director made an order under Sec. 13 of the EAA amending the Order. The purpose of the amendment was to address the issue of consultation with First Nations. It added a new paragraph 22 to the Order in the following terms:

22.2. This order is not intended to restrict the full scope or extent of the Crown's duty to consult in respect of a decision on an EA certificate, and the EAO may engage in additional consultations with an aboriginal entity, whether or not it is named as a First Nation in section 1 of this order, if the EAO believes that such consultation is necessary to discharge the Crown's duty or the EAO is otherwise prepared to do so.

[67] These amendments were not satisfactory to the NNTC and this petition accordingly proceeded to hearing.

[68] The issue before me resolves itself into a number of sub-issues. The first is how the EAO as representative of the Crown should go about discharging its duty to consult with a First Nation when it is clear that there is no consensus within the First Nation with respect to the subject matter of the consultation. In this case, that issue is made even more difficult by the fact that the government is dealing with two nations, the Nlaka'pamux Nation and the Secwepemc.

[69] In analysing this problem, it must not be forgotten that the EAO also has a statutory duty to ensure that there was a thorough, effective and expeditious environmental review of the proposed Extension Project.

[70] In *Haida Nation* the Supreme Court of Canada said the following at paras. 16 and 17:

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

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

[71] The petitioner in this case is the NNTC. The action is not framed as a representative action brought on behalf of all members of the Nlaka'pamux First Nation. In the course of argument, I was referred to the reasons for judgment of Mr. Justice Vickers in *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700. At para. 470 His Lordship said the following:

470 I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people

were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other sub- group within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.

[72] The difficulty in this case is that the authority of NNTC to speak on behalf of all Nlaka'pamux people is disputed. The authority of the NNTC to speak on behalf of the people of the Ashcroft Band was expressly put in issue before the EAO.

[73] What is the government to do when faced with a diversity of putative representation on behalf of a First Nation. In my view, the government must discharge its duty to consult by taking reasonable steps to ensure that all points of view within a First Nation are given appropriate consideration. As I indicated above, government also has a duty to carry out its statutory mandate under applicable legislation. It must therefore balance its obligation to consult with its obligation to carry out its statutory duty in an effective manner. It is to be expected that this balancing will require a flexible approach by Government to adapt to the particular circumstances of each case.

[74] In this case the Project Assessment Director does not dispute that the EAO has a duty to consult with the NNTC with respect to the environmental assessment of the Extension Project. In the course of the argument I asked Mr Foy what the respondents' position was on the question of the authority of NNTC to represent the Nlaka'pamux Nation. His response was that the respondents acknowledge that the NNTC does represent some members of the Nation but he was not specific as to which members of the Nation it represented. It is however clear on the evidence that the Project Assessment Director has recognized that the NNTC has sufficient authority to be treated as a party with whom the government should engage in government-to-government consultation with respect to the Extension Project.

[75] I have concluded that the government acted appropriately in this case in making a decision to implement separate consultation protocols with the Ashcroft Band and the NNTC. I can see no objection in principle to requiring the proponents

to consult with a specific Band if the government also undertakes appropriate consultation with the First Nation. That must be particularly so when there is a clear divergence of opinion between the putative representative of the Nation and the representatives of the Band.

[76] The next issue between the parties is at what stage in the approval process that consultation must take place. The NNTC's position is that it should have been named in the Order as a First Nation with whom the proponents were required to consult and should have been included in the working group. NNTC's counsel submits that anything less would not constitute adequate consultation.

[77] In *Hupacasath First Nation v. British Columbia*, 2005 BCSC 1712, Madam Justice Smith pointed out that in *Haida*, the Supreme Court of Canada held that the content of a duty to consult and accommodate varies with the circumstances and is proportionate to a preliminary assessment of the strength of the case supporting the existence of the title or rights and seriousness of the potentially adverse effects upon the title or rights claimed. The authorities are clear that a process of consultation does not give aboriginal groups a veto over what can be done with land pending final resolution of a claim.

[78] At paras. 48 and 49 of the *Haida* decision Chief Justice McLachlin stated the following:

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

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

[79] Based on the limited material before me, my preliminary assessment is that the claim of the Nlaka'pamux Nation to aboriginal title to the land on which the Extension Project is proposed to be located is weak. I base this assessment on the fact that in the original land claim made by the Nlaka'pamux Nation stated that Ashcroft was the northern boundary of its territorial land claim. Further, on the evidence before me it appears that it is the Bonaparte Indian Band, a member of the Secwepemc Nation, which had had historical possession of the lands in question. In this regard, it is to be noted that the affidavit of Leslie Edmonds, an elder of the Village of Stassh, which is located on the Ashcroft Indian Reserve No. 2, does not specifically assert that the Extension Project is on land which has been exclusively occupied by the Nlaka'pamux Nation. As pointed out by counsel for the respondents, Mr. Edmonds is, of course, a member of the Cache Creek Band.

[80] The seriousness of the impact of the government action also bears close scrutiny in this case. The petitioners submit that the impact of their exclusion from the Order and the working group effectively deprives them of any meaningful consultation and consequential accommodation with respect to the environment review process and with respect to consideration of whether to issue an EAC. The specific relief sought in this case is an order quashing the Order and the approval of the Terms of Reference.

[81] The respondents' position is that in the circumstances it was unnecessary and inappropriate to name the NNTC in the Order or require it to be named in the Terms of Reference. Their submission is that it is more appropriate to carry on consultation with the NNTC on a government-to-government basis and take the views of the NNTC into account in preparing the assessment report and making any recommendation to the ministers, and by offering the consultation opportunities outlined in paragraph 56 of these reasons.

[82] I conclude that the decision of the Project Assessment Director to exclude the NNTC from the working group established pursuant to the Order and to amend the Sec. 11 order to provide that consultation with First Nations can be done on a

government-to-government basis cannot, at this stage, be said to be a failure on the part of the Crown to discharge its duty to consult with the Nlaka'pamux Nation.

[83] In reviewing the decision which the EAO has made with respect to the form of consultation, I conclude the appropriate standard of review is reasonableness. In this case, the EAO has clearly recognized that it has a duty to consult with the Nlaka'pamux Nation. The EAO has proposed a procedure pursuant to which that consultation can take place.

[84] In my view, given the following factors, that procedure cannot at this stage be said to be unreasonable:

- (a) the EAO has recognized that the NNTC represents at least some portion of the Nlaka'pamux Nation;
- (b) the EAO I think correctly, has identified that the stated objective of NNTC is the abandonment of any proposal to construct or extend landfills which will receive refuse from Metro Vancouver anywhere in the vicinity of its territory;
- (c) the position of the NNTC that any assessment of landfill projects must be part of the Replacement Process;
- (d) the stated position of NNTC is that no project can proceed without addressing the underlying land and rights of the Nlaka'pamux Nation to the territory in question;
- (e) the fact that the mandate of the EAO is to ensure a thorough and expeditious review of the environmental impacts of the Extension Project;
- (f) my preliminary assessment that the Nlaka'pamux Nation's claim to aboriginal title to the actual location of the Extension Project is weak.

[85] I think that I should accept as sincere of the stated willingness of the EAO to engage in government-to-government consultations with the NNTC with respect to the Extension Project in the course of the EAO's review of the proponents' application. Having read the letters containing the stated position of the NNTC with respect to the Extension Project and landfill projects in general and taking into account the fact that the NNTC has been effectively able to make its voice heard

with respect to environmental concerns about the existing Cache Creek Landfill, I consider that the promise made by the EAO in its amendment to the Order can provide an adequate opportunity to the NNTC to consult fully with respect to the Extension Project.

[86] I wish to emphasize in these reasons that my decision is limited to the matters before me, and, in particular, is limited to the attack made in the petition on the Order, and on the approval by the Project Assessment Director of the Terms of Reference.

[87] It is clearly too early in the process to determine whether the EAO will, in fact, discharge its duty to consult and accommodate if appropriate with respect to the environmental assessment of the Extension Project. At this stage, I have simply concluded that it cannot be said that the NNTC has been denied an appropriate and effective opportunity to be consulted and accommodated with respect to the environmental assessment of the project.

[88] On behalf of NNTC Mr. Mogerman submitted that the authorities have consistently held that to be meaningful, consultation must occur at the strategic planning stage of a proposed government action. For example in *Haida*, the Supreme Court rejected an argument that the Crown could discharge its duty to consult at the stage of granting cutting permits under a Tree Farm Licence and therefore need not consult with the Haida with respect to the renewal of the Tree Farm Licence itself. At paragraph 76 of *Haida*, Madam Justice McLachlin pointed out that decisions made during the strategic planning stage may have serious impacts on Aboriginal rights and title.

[89] Mr. Mogerman drew a parallel between such cases and the present case in arguing that it was essential for NNTC to be named in the Order and for the Terms of Reference to require consultation with it.

[90] Mr. Mogerman relied on *Kwikwetlem First Nation v British Columbia Transmission Corporation*, 2009 BCCA 68. At paragraph 65 the Court stated as follows:

65 Where a decision-maker is called upon to approve a Crown activity that gives rise to the duty to consult, the first task of the decision-maker in assessing the adequacy of that duty, is to determine its scope and content in that particular case. Only when the scope of the duty to consult has been determined, can a decision-maker decide whether that duty has been fulfilled. In *Haida*, the Supreme Court of Canada clearly stated there is no one model of consultation; the Crown's obligations will vary with the individual circumstances of the case. Neither explicitly nor implicitly did the Commission attempt to define its obligations in this case. As it had in the two earlier cases, *VITR* and *Revelstoke*, it simply deferred to the ministers with ultimate responsibility for deciding whether to grant the project an EAC.

[91] In my view this paragraph succinctly sets out the issue I must address in this case. I must decide whether the decision maker, that is, the Project Assessment Director, has adequately determined the scope and content of the duty to consult with the NNTC. If the Project Assessment Director has adequately determined the scope and content of the duty to consult it is premature to determine whether that duty has been adequately discharged given the stage the approval process has now reached.

[92] The facts of this case are distinguishable from *Kwikwetlem*. In *Kwikwetlem* the British Columbia Utilities Commission had decided that it was not necessary to consult with First Nations with respect to question of issuing a Certificate of Public Convenience for a proposed new transmission line from the Interior to the Lower Mainland. The Commission was of the view that there would be adequate consultation with First Nations in the course of the application process under the EAA and it was therefore unnecessary for it to consult with respect to the issuance of a Certificate of Public Convenience.

[93] The Court of Appeal held that the Commission erred in failing to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the application before it, that is, the application for a Certificate of Public Convenience. As I understand the *Kwikwetlem* decision, it stands for the proposition

that a decision maker must consider whether the Crown's duty to consult and accommodate has been appropriately dealt with at each stage of an approval process. The error which the Commission fell into was to decline to consider this issue at all and to rely on the process under the EAA to address the Crown's duty to consult.

[94] What the Court did not do was to dictate what form of consultation was required to fulfill the duty. This is made clear from paragraph 65 of the reasons for judgment quoted at paragraph 90 above. In this case it seems to me that the EAO did define the scope and content of consultation which would be appropriate given the particular circumstances it had to consider.

[95] I have already set out the circumstances which faced Mr. Griffin. Those circumstances led Mr. Griffin to conclude that it would be more effective to consult directly with the NNTC on a government-to-government basis throughout the approval process rather than direct the proponents to consult with NNTC pursuant to the Order. It remains to be seen whether the EAO carries through with its stated intention to consult with the NNTC. However, at this stage I consider it to be appropriate to accept the stated intention to consult as genuine.

[96] The role of an environmental review under the EAA is summed up in paragraph 57 of *Kwikwetlem* as follows:

57 The current *Environmental Assessment Act* provides a process designed to obtain sufficient information from the proponent of a reviewable project about any "adverse effects" of that project to permit an intelligent decision by the responsible ministers as to whether to grant an EAC for that project. I see the ministerial review as a wrap-up decision, where two ministers have unconstrained discretion to prevent a proposed activity, public or private, for profit or not-for-profit, that has potential "adverse effects" from going forward. The *Act* does not specify effects on whom or what. It can be inferred from the provisions of s. 10(1)(c) that the ministers are to consider any "significant adverse environmental, economic, social, heritage or health effect" revealed by the assessment. In this case, potential adverse effects on the appellants' asserted Aboriginal title and rights are undoubtedly included, although not identified in the current *Act*.

[97] In my view, if the EAO does provide the consultation opportunities outlined in paragraph 56 above, it will have satisfied its obligations to consult pursuant to the

Constitution Act and the EAA. It is now up to the EAO to carry through on its promise and up to the NNTC to make a good faith attempt to take advantage of this opportunity.

[98] Because I have concluded that the EAO had made a genuine offer of consultation and has recognized its duty to consult and endeavour to accommodate it would be inappropriate to make the alternative declarations sought.

[99] I therefore dismiss the claims set out in the petition.

"The Honourable Mr. Justice Sewell"

SCHEDULE A

This Act is Current to April 8, 2009

ENVIRONMENTAL ASSESSMENT ACT
[SBC 2002] CHAPTER 43

Assented to May 30, 2002

Contents

Section

Part 1 — Definitions

1 Definitions

Part 2 Administration and Application of the Environmental Assessment Process

- 2 Environmental Assessment Office
- 3 Appointment of executive director
- 4 Delegation by executive director
- 5 Reviewable projects established by regulation
- 6 Minister's power to designate a project as reviewable
- 7 Application to executive director for reviewable project designation
- 8 Requirement for environmental assessment certificate
- 8.1 Reviewable projects on treaty lands
- 9 Effect on approvals under other enactments

Part 3 — Environmental Assessment Process

- 10 Determining the need for assessment
- 11 Executive director determines assessment scope, procedures and methods
- 12 Limits on discretion of executive director
- 13 Variation of scope, procedures and methods by executive director
- 14 Minister determines assessment scope, procedures and methods for referred project
- 15 Variation of scope, procedures and methods by minister
- 16 Applying for environmental assessment certificate
- 17 Decision on application for environmental assessment certificate
- 18 Duration and effect of certificate
- 19 Amending environmental assessment certificate

Part 4 — Special Provisions for Environmental Assessment Process

- 20 Class assessments and their effect on application requirements
- 21 Policy direction from ministers during assessment
- 22 Advice from consultants and mediators during assessment
- 23 Concurrent approval process under another enactment
- 24 Time limits
- 25 Project information centre
- 26 Discretion as to non-written comments
- 27 Agreements

- 28 Variations to accommodate agreements with other jurisdictions
- 29 Agreements with Nisga'a Nation
- 29.1 Agreements and consultations with treaty first nations
- 30 Suspension of assessment process pending other inquiries
- 31 Varying assessment process for emergency or other circumstance
- 32 Assessment costs may be recovered

Part 5 Sanctions

- 33 Inspection power
- 34 Ministers order to cease or remedy
- 35 Supreme Court order for compliance
- 36 Compliance agreement
- 37 Suspension, cancellation and amendment of certificates
- 38 Notice requirements
- 39 Opportunity to be heard
- 40 Reinstatement of certificate
- 41 Offences
- 42 Effect of voluntary compliance agreement
- 43 Penalties
- 44 Remedies preserved
- 45 Court order to comply
- 46 Limitation period
- 47 Restitution

Part 6 General Provisions

- 48 Ministerial delegation
- 49 Assessment of policies and practices
- 50 Power to make regulations
- 51 Transitional provisions
- 52-57 Consequential Amendments
- 58 Repeal
- 59 Commencement

Part 1 — Definitions**Definitions**

1 In this Act:

"approval under another enactment" means an approval, licence, permit or other authorization under another enactment and **"approvals under other enactments"** has a corresponding meaning;

"assessment" means an assessment under this Act of a reviewable projects potential effects that is conducted in relation to an application for

- (a) an environmental assessment certificate, or
- (b) an amendment of an environmental assessment certificate;

“assessment report” means a written report submitted to ministers under section 17 (2), summarizing the procedures followed during, and the findings of, an assessment;

“class assessment” means an assessment conducted under section 20 of some or all of the potential effects of a specified category of projects, and includes a set of measures or conditions for managing some or all of the potential adverse effects of the specified category of projects to the satisfaction of the executive director;

“environmental assessment certificate” means an environmental assessment certificate issued by the ministers under section 17 (3);

“executive director” means the individual appointed under section 3 as the Executive Director of the Environmental Assessment Office;

“ministers” means the minister, the Minister of Water, Land and Air Protection and the responsible minister, if other than the Minister of Water, Land and Air Protection;

“project” means any

(a) activity that has or may have adverse effects, or

(b) construction, operation, modification, dismantling or abandonment of a physical work;

“proponent” means a person or an organization that proposes to undertake a reviewable project, and includes the government of Canada, British Columbia, a municipality or regional district, another province, another jurisdiction and a first nation;

“responsible minister” means the member of the Executive Council that the Lieutenant Governor in Council designates by order as the minister responsible for a specified reviewable project or specified category of reviewable projects;

“reviewable project” means a project that is within a category of projects prescribed under section 5 or that is designated by the minister under section 6 or the executive director under section 7, and includes

(a) the facilities at the main site of the project,

(b) any off-site facilities related to the project that the executive director or the minister may designate, and

(c) any activities related to the project that the executive director or the minister may designate.

Effect on approvals under other enactments

9 (1) Despite any other enactment, a minister who administers another enactment, or an employee or agent of the government or of a municipality or regional district, must not issue an approval under another enactment for a person to

- (a) undertake or carry on an activity that is a reviewable project, or
 - (b) construct, operate, modify, dismantle or abandon all or part of the facilities of a reviewable project, unless satisfied that
 - (c) the person has a valid environmental assessment certificate for the reviewable project, or
 - (d) there is in effect a determination under section 10 (1) (b) that an environmental assessment certificate is not required for the project.
- (2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

Determining the need for assessment

- 10 (1)** The executive director by order
- (a) may refer a reviewable project to the minister for a determination under section 14,
 - (b) if the executive director considers that a reviewable project will not have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that
 - (i) an environmental assessment certificate is not required for the project, and
 - (ii) the proponent may proceed with the project without an assessment, or
 - (c) if the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that
 - (i) an environmental assessment certificate is required for the project, and
 - (ii) the proponent may not proceed with the project without an assessment.
- (2) The executive director may attach conditions he or she considers necessary to an order under subsection (1) (b).

(3) A determination under subsection (1) (b) does not relieve the proponent from compliance with the applicable requirements pertaining to the reviewable project under other enactments.

Executive director determines assessment scope, procedures and methods

11 (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order

- (a) the scope of the required assessment of the reviewable project, and
- (b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.

(2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:

- (a) the facilities at the main site of the reviewable project, any of its off-site facilities and any activities related to the reviewable project, which facilities and activities comprise the reviewable project for the purposes of the assessment;
- (b) the potential effects to be considered in the assessment;
- (c) the information required from the proponent
 - (i) in relation to or to supplement the proponent's application, and
 - (ii) at specified times during the assessment, in relation to potential effects specified under paragraph (b);
- (d) the role of any class assessment in fulfilling the information requirements for the assessment of the reviewable project;
- (e) any information to be obtained from persons other than the proponent with respect to the potential effects specified under paragraph (b);
- (f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;

- (g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;
- (h) the time limits for steps in the assessment procedure that are additional to the time limits prescribed for section 24 or under section 50 (2) (a).
- (3) The assessment of the potential effects of a reviewable project must take into account and reflect government policy identified for the executive director, during the course of the assessment, by a government agency or organization responsible for the identified policy area.

Variation of scope, procedures and methods by executive director

13 The executive director may vary the scope, procedures and methods determined under section 11

- (a) to take into account modifications proposed for the reviewable project by the proponent, including modifications proposed in relation to an application submitted under section 16, or
- (b) if necessary in his or her opinion to complete an effective and timely assessment of the reviewable project.

Applying for environmental assessment certificate

16 (1) The proponent of a reviewable project for which an environmental assessment certificate is required under section 10 (1) (c) may apply for an environmental assessment certificate by applying in writing to the executive director and paying the prescribed fee, if any, in the prescribed manner.

(2) An application for an environmental assessment certificate must contain the information that the executive director requires.

(3) The executive director must not accept the application for review unless he or she has determined that it contains the required information.

(4) On accepting the application for review, the executive director

- (a) must notify the proponent of the acceptance for review, and
- (b) may require the proponent, for the purpose of the review, to supply a specified number of paper or electronic copies of the application, in the format specified by the executive director.

(5) On receipt of the copies of the application required under subsection (4), the executive director must proceed with and administer the review of the

application in accordance with the assessment procedure determined under section 11 (1) or as varied under section 13.

(6) The proponent of a reviewable project for which the minister has made a determination under section 14 may apply for an environmental assessment certificate in the manner determined by the minister, and must pay any prescribed fee in the prescribed manner.

Decision on application for environmental assessment certificate

17 (1) On completion of an assessment of a reviewable project in accordance with the procedures and methods determined or varied

- (a) under section 11 or 13 by the executive director,
- (b) under section 14 or 15 by the minister, or
- (c) under section 14 or 15 by the executive director, a commission member, hearing panel member or another person

the executive director, commission, hearing panel or other person, as the case may be, must refer the proponents application for an environmental assessment certificate to the ministers for a decision under subsection (3).

(2) A referral under subsection (1) must be accompanied by

- (a) an assessment report prepared by the executive director, commission, hearing panel or other person, as the case may be,
- (b) the recommendations, if any, of the executive director, commission, hearing panel or other person, and
- (c) reasons for the recommendations, if any, of the executive director, commission, hearing panel or other person.

(3) On receipt of a referral under subsection (1), the ministers

- (a) must consider the assessment report and any recommendations accompanying the assessment report,
- (b) may consider any other matters that they consider relevant to the public interest in making their decision on the application, and
- (c) must

(i) issue an environmental assessment certificate to the proponent, and attach any conditions to the certificate that the ministers consider necessary,

(ii) refuse to issue the certificate to the proponent, or

(iii) order that further assessment be carried out, in accordance with the scope, procedures and methods specified by the ministers.

(4) The executive director must deliver to the proponent the decision and the environmental assessment certificate, if granted.

R. v. Van der Peet, [1996] 2 S.C.R. 507

Dorothy Marie Van der Peet

Appellant

v.

Her Majesty The Queen

Respondent

and

**The Attorney General of Quebec,
the Fisheries Council of British Columbia,
the British Columbia Fisheries Survival Coalition and
the British Columbia Wildlife Federation,
the First Nations Summit,
Delgamuukw et al., Howard Pamajewon,
Roger Jones, Arnold Gardner, Jack Pitchenese
and Allan Gardner**

Intervenors

Indexed as: R. v. Van der Peet

File No.: 23803.

1995: November 27, 28, 29; 1996: August 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

*Constitutional law -- Aboriginal rights -- Right to sell fish on
non-commercial basis -- Fish caught under native food fish licence -- Regulations*

prohibiting sale or barter of fish caught under that licence -- Fish sold to non-aboriginal and charges laid -- Definition of "existing aboriginal rights" as used in s. 35 of Constitution Act, 1982 -- Whether an aboriginal right being exercised in the circumstances -- Constitution Act, 1982, s. 35(1) -- Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1) -- British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5).

The appellant, a native, was charged with selling 10 salmon caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, which prohibited the sale or barter of fish caught under such a licence. The restrictions imposed by s. 27(5) were alleged to infringe the appellant's aboriginal right to sell fish and accordingly were invalid because they violated s. 35(1) of the *Constitution Act, 1982*. The trial judge held that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell such fish and found the appellant guilty. The summary appeal judge found an aboriginal right to sell fish and remanded for a new trial. The Court of Appeal allowed the Crown's appeal and restored the guilty verdict. The constitutional question before this Court queried whether s. 27(5) of the Regulations was of no force or effect in the circumstances by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*.

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

The Aboriginal Right

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: A purposive analysis of s. 35(1) must take place in light of the general principles applicable to the legal relationship between the Crown and aboriginal peoples. This relationship is a fiduciary one and a generous and liberal interpretation should accordingly be given in favour of aboriginal peoples. Any ambiguity as to the scope and definition of s. 35(1) must be resolved in favour of aboriginal peoples. This purposive analysis is not to be limited to an analysis of why a pre-existing doctrine was elevated to constitutional status.

Aboriginal rights existed and were recognized under the common law. They were not created by s. 35(1) but subsequent to s. 35(1) they cannot be extinguished. They can, however, be regulated or infringed consistent with the justificatory test laid out in *R. v. Sparrow*.

Section 35(1) provides the constitutional framework through which the fact that aborigines lived on the land in distinctive societies, with their own practices, customs and traditions, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose. The French version of the text, prior jurisprudence of this Court and the courts of Australia and the United States, academic commentators and legal literature support this approach.

To be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. A number of factors must be considered in applying the “integral to a distinctive culture” test. The court must take into account the perspective of the aboriginal peoples, but that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.

In assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right. To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. The activities must be considered at a general rather than specific level. They may be an exercise in modern form of a pre-contact practice, custom or tradition and the claim should be characterized accordingly.

To be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question -- one of the things which made the culture of the society distinctive. A court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) or at those aspects of the aboriginal society that are only incidental or occasional to that society. It is those distinctive features that need to be acknowledged and reconciled with the sovereignty of the Crown.

The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior

to contact with European society. Conclusive evidence from pre-contact times about the practices, customs and traditions of the community in question need not be produced. The evidence simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. The concept of continuity is the means by which a "frozen rights" approach to s. 35(1) will be avoided. It does not require an unbroken chain between current practices, customs and traditions and those existing prior to contact. A practice existing prior to contact can be resumed after an interruption.

Basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the inclusion of the Métis in the definition of "aboriginal peoples of Canada" in s. 35(2) of the *Constitution Act, 1982*. The history of the Métis and the reasons underlying their inclusion in the protection given by s. 35 are quite distinct from those relating to other aboriginal peoples in Canada. The manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined.

A court should approach the rules of evidence, and interpret the evidence that exists, conscious of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions and customs engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards applied in other contexts.

Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group

claiming the right. Claims to aboriginal rights are not to be determined on a general basis.

In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

A practice, custom or tradition, to be recognized as an aboriginal right need not be distinct, meaning "unique", to the aboriginal culture in question. The aboriginal claimants must simply demonstrate that the custom or tradition is a defining characteristic of their culture.

The fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. A practice, custom or tradition will not meet the standard for recognition of an aboriginal right, however, where it arose solely as a response to European influences.

The relationship between aboriginal rights and aboriginal title (a sub-category of aboriginal rights dealing solely with land claims) must not confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive

cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look both at the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

The first step in the application of the integral to a distinctive culture test requires the Court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. Here, the appellant claimed that the practices, customs and traditions of the Sto:lo include as an integral element the exchange of fish for money or other goods. The significance of the practice, tradition or custom is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. The claim must be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

The trial judge made no clear and palpable error which would justify an appellate court's substituting its findings of fact. These findings included: (1) prior to contact exchanges of fish were only "incidental" to fishing for food purposes; (2) there was no regularized trading system amongst the appellant's people prior to contact; (3) the trade that developed with the Hudson's Bay Company, while of significance to the Sto:lo of the time, was qualitatively different from what was typical of Sto:lo culture prior to contact; and, (4) the Sto:lo's exploitation of the fishery was not specialized and that suggested that the exchange of fish was not a central part of Sto:lo culture. The appellant failed to demonstrate that the exchange of fish for money or other goods was

an integral part of the distinctive Sto:lo culture which existed prior to contact and was therefore protected by s. 35(1) of the *Constitution Act, 1982*.

Per L'Heureux-Dubé J. (dissenting): Aboriginal rights find their origin in the historic occupation and use of native ancestral lands. These rights relate not only to aboriginal title but also to the component elements of this larger right, such as aboriginal rights to hunt, fish or trap, and their accompanying practices, customs and traditions. They also include other matters, not related to land, that form part of a distinctive aboriginal culture.

Aboriginal rights can exist on reserve lands, aboriginal title lands, and aboriginal right lands. Reserve lands are reserved by the federal government for the exclusive use of Indian people. Title to aboriginal title lands -- lands which the natives possess for occupation and use at their own discretion -- is founded on common law and is subject to the Crown's ultimate title. It exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land. Aboriginal title can also be founded on treaties. Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. These types of lands are not static or mutually exclusive.

Prior to 1982, aboriginal rights were founded only on the common law and they could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign". Now, s. 35(1) of the *Constitution Act, 1982* protects aboriginal interests arising out of the native historic occupation and use of

ancestral lands through the recognition and affirmation of "existing aboriginal and treaty rights of the aboriginal peoples of Canada".

The *Sparrow* test deals with constitutional claims of infringement of aboriginal rights. This test involves three steps: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a *prima facie* infringement of such right; and, (3) the justification of the infringement.

Section 35(1) must be given a generous, large and liberal interpretation and ambiguities or doubts should be resolved in favour of the natives. Aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people. Most importantly, aboriginal rights protected under s. 35(1) must be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. It is not appropriate that the perspective of the common law be given an equal weight with the perspective of the natives.

The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Two approaches have emerged.

The first approach focuses on the particular aboriginal practice, custom or tradition. It considers that what is common to both aboriginal and non-aboriginal cultures is non-aboriginal and hence not protected by s. 35(1). This approach should not be adopted. This approach misconstrues the words "distinctive culture", used in *Sparrow*, by interpreting it as if it meant "distinct culture". It is also overly majoritarian. Finally, this approach is unduly restrictive as it defines aboriginal culture and aboriginal

rights as that which is left over after features of non-aboriginal cultures have been taken away.

The second approach describes aboriginal rights in a fairly high level of abstraction and is more generic. Its underlying premise is that the notion of "integral part of [aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Section 35(1) should be viewed as protecting, not a catalogue of individualized practices, customs or traditions but the "distinctive culture" of which aboriginal activities are manifestations. The emphasis is on the significance of these activities to natives rather than on the activities themselves. These aboriginal activities should be distinguished from the practices or habits which were merely incidental to the lives of a particular group of aboriginal people and, as such, would not warrant protection under s. 35(1).

The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, customs and traditions which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). A generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. What constitutes a practice, custom or tradition distinctive to native culture and society must be examined through the eyes of aboriginal people.

The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, custom or tradition has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized

as a right under s. 35(1). Two basic approaches exist: the "frozen right" approach and the "dynamic right" approach. The latter should be preferred.

The "frozen right" approach would recognize practices, customs and traditions that existed from time immemorial and that continued to exist at the time of British sovereignty. This approach overstates the impact of European influence on aboriginal communities, crystallizes aboriginal practice as of an arbitrary date, and imposes a heavy burden on the persons claiming an aboriginal right even if evidentiary standards are relaxed. In addition, it embodies inappropriate and unprovable assumptions about aboriginal culture and society and is inconsistent with *Sparrow* which refused to define existing aboriginal rights so as to incorporate the manner in which they were regulated in 1982.

Underlying the "dynamic right" approach is the premise that "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. Aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, customs and traditions change and evolve with the overall society in which they live. This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality. Practices, customs and traditions need not have existed prior to British sovereignty or European contact. British sovereignty, instead of being considered the turning point in aboriginal culture, would be regarded as having recognized and affirmed practices, customs and traditions which are sufficiently significant and fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity".

The aboriginal activity must have formed an integral part of a distinctive aboriginal culture for a substantial continuous period of time. This period should be assessed based on: (1) the type of aboriginal practices, customs and traditions; (2) the particular aboriginal culture and society; and, (3) the reference period of 20 to 50 years. This approach gives proper consideration to the perspective of aboriginal people on the meaning of their existing rights.

As regards the delineation of the aboriginal right claimed, the purposes of aboriginal practices, customs and traditions are highly relevant in assessing if they are sufficiently significant to the culture for a substantial continuing period of time. The purposes should not be strictly compartmentalized but rather should be viewed on a spectrum, with aboriginal activities undertaken solely for food at one extreme, those directed to obtaining purely commercial profit at the other extreme, and activities relating to livelihood, support and sustenance at the centre.

An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. Whether an activity is sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time will have to be determined on the specific facts giving rise to each case, as proven by the Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right.

Nevertheless, the facts did not support framing the issue in this case in terms of commercial fishing. Appellant did not argue that her people possessed an aboriginal right to fish for commercial purposes but only the right to sell, trade and barter fish for their livelihood, support and sustenance. Finally, the legislative provision under

constitutional challenge was not only aimed at commercial fishing but also at the non-commercial sale, trade and barter of fish.

The trial judge and the Court of Appeal erred in framing the issue and in using a "frozen right" approach. The trial judge, since he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1), made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. An appellate court, given these palpable and overriding errors affecting the trial judge's assessment of the facts, is accordingly justified in intervening in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial.

The fishery always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. These activities formed part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time -- for centuries before the arrival of Europeans -- and continued in modernized forms until the present day. The criteria regarding the characterization and the time requirement of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* were met.

Per McLachlin J. (dissenting): A court considering the question of whether a particular practice is the exercise of a s. 35(1) constitutional aboriginal right must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is

true to the Crown's position as fiduciary for the first peoples. The legal perspectives of both the European and the aboriginal societies must be incorporated and the common law being applied must give full recognition to the pre-existing aboriginal tradition.

The sale at issue should not be labelled as something other than commerce. One person selling something to another is commerce. The critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

An aboriginal right must be distinguished from the exercise of an aboriginal right. Rights are generally cast in broad, general terms and remain constant over the centuries. The exercise of rights may take many forms and vary from place to place and from time to time. The principle that aboriginal rights must be ancestral rights is reconciled with this Court's insistence that aboriginal rights not be frozen by the determination of whether the modern practice at issue may be characterized as an exercise of the right. The rights are ancestral: their exercise takes modern forms.

History is important. A recently adopted practice would generally not qualify as being aboriginal. A practice, however, need not be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights do not find their source in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question, which existed prior to the imposition of European law and which often dated from time immemorial.

Continuity -- a link -- must be established between the historic practice and the right asserted. The exercise of a right can lapse, however, for a period of time.

Aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982.

Neither the “integral part” nor the “dynamic rights” approach provides a satisfactory test for determining whether an aboriginal right exists, even though each captures important facets of aboriginal rights. The “integral-incidental” test is too broad, too indeterminative and too categorical.

Aboriginal rights should be defined through an empirical approach. Inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1) should be drawn from history rather than attempting to describe *a priori* what an aboriginal right is.

The common law predicated dealings with aborigines on two fundamental principles: (1) that the Crown asserted title subject to existing aboriginal interests in their traditional lands and adjacent waters, and (2) that those interests were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for their sustenance is a fundamental aboriginal right which is supported by the common law and by the history of this country and which is enshrined in s. 35(1) of the *Constitution Act, 1982*.

The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained therefrom. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. The right is not

the right to trade, but the right to continue to use the resource in the traditional way to provide for traditional needs, albeit in their modern form. If the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what they traditionally obtained from the resource -- basic housing, transportation, clothing and amenities -- over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers.

All aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. Any right, aboriginal or other, also carries with it the obligation to use it responsibly. The Crown must establish a regulatory regime which respects these objectives.

The evidence conclusively established that over many centuries the fishery was used not only for food and ceremonial purposes but also for a variety of other needs. The scale of fishing here fell well within the limit of the traditional fishery.

Extinguishment

Per L'Heureux-Dubé J. (dissenting): The question of the extinguishment of the right found to exist must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain." No government of the day considered either the aboriginal right or the effect of its proposed action on that right, as required by the "clear and plain" test, in effecting any regulations which allegedly had the effect of extinguishing the aboriginal right to fish commercially.

Prima Facie Infringement

Per L'Heureux-Dubé J. (dissenting): The question of *prima facie* infringement must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): The inquiry into infringement involves two stages: (1) the person charged must show that he or she had a *prima facie* right to his or her actions, and (2) the Crown must then show that the regulatory scheme satisfied the particular aboriginal entitlement to fish for sustenance. The second requirement was not met.

Justification

Per L'Heureux-Dubé J. (dissenting): The question of justification must be remitted to trial since there was insufficient evidence to enable this Court to decide it.

Per McLachlin J. (dissenting): A large view of justification which cuts back the aboriginal right on the ground that this is required for reconciliation and social harmony should not be adopted. It runs counter to the authorities, is indeterminate and ultimately more political than legal. A more limited view of justification, that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use, should be adopted.

A government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Limits that have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified.

Subject to the limitations relating to conservation and prevention of harm to others, the aboriginal people have a priority to fish for food, ceremony and supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times. Non-aboriginal peoples may use the resource subject to these conditions.

The regulation at issue was not justified.

Cases Cited

By Lamer C.J.

Applied: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **considered:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1; **referred to:** *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *R. v. Oakes*, [1986] 1 S.C.R. 103; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. George*, [1966] S.C.R. 267; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), [1976] 2 S.C.R. v.; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247.

By L'Heureux-Dubé J. (dissenting)

R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *R. v. Sioui*, [1990]

1 S.C.R. 1025; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Mabo v. Queensland* [No. 2] (1992), 175 C.L.R. 1; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46; *R. v. Lewis*, [1996] 1 S.C.R. 921; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Horseman*, [1990] 1 S.C.R. 901; *R. v. Badger*, [1996] 1 S.C.R. 771; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *R. v. George*, [1966] S.C.R. 267; *Sikyea v. The Queen*, [1964] S.C.R. 642; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *Jack v. The Queen*, [1980] 1 S.C.R. 294; *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *Attorney General of Quebec v. Blaikie (No. 1)*, [1979] 2 S.C.R. 1016; *Re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031; *Frank v. The Queen*, [1978] 1 S.C.R. 95; *R. v. Jones* (1993), 14 O.R. (3d) 421; *R. v. King*, [1993] O.J. No. 1794; *R. v. Fraser*, [1994] 3 C.N.L.R. 139; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2; *Lensen v. Lensen*, [1987] 2 S.C.R. 672; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *LaPointe v. Hôpital Le*

Gardeur, [1992] 1 S.C.R. 351; *R. v. Burns*, [1994] 1 S.C.R. 656; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

By McLachlin J. (dissenting)

R. v. Sparrow, [1990] 1 S.C.R. 1075; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Mabo v. Queensland* [No. 2] (1992), 175 C.L.R. 1; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516; *In re Southern Rhodesia*, [1919] A.C. 211; *Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399; *Oyekan v. Adele*, [1957] 2 All E.R. 785; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *United States v. Dion*, 476 U.S. 734 (1986); *Jack v. The Queen*, [1980] 1 S.C.R. 294.

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APPEAL from a judgment of the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 75, 29 B.C.A.C. 209, 48 W.A.C. 209, 83 C.C.C. (3d) 289, [1993] 5 W.W.R. 459, [1993] 4 C.N.L.R. 221, allowing an appeal from a judgment of Selbie J. (1991), 58 B.C.L.R. (2d) 392, [1991] 3 C.N.L.R. 161, allowing an appeal from conviction by Scarlett Prov. Ct. J., [1991] 3 C.N.L.R. 155. Appeal dismissed, L'Heureux-Dubé and McLachlin JJ. dissenting.

Louise Mandell and Leslie J. Pinder, for the appellant.

S. David Frankel, Q.C., and *Cheryl J. Tobias*, for the respondent.

René Morin, for the intervener the Attorney General of Quebec.

J. Keith Lowes, for the intervener the Fisheries Council of British Columbia.

Christopher Harvey, Q.C., and *Robert Lonergan*, for the intervenors the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation.

Harry A. Slade, Arthur C. Pape and *Robert C. Freedman*, for the intervener the First Nations Summit.

Stuart Rush, Q.C., and Michael Jackson, for the interveners Delgamuukw et al.

Arthur C. Pape and Clayton C. Ruby, for the interveners Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner.

//The Chief Justice//

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. was delivered by

THE CHIEF JUSTICE --

I. Introduction

1. This appeal, along with the companion appeals in *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, raises the issue left unresolved by this Court in its judgment in *R. v. Sparrow*, [1990] 1 S.C.R. 1075: How are the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* to be defined?

2. In *Sparrow*, Dickson C.J. and La Forest J., writing for a unanimous Court, outlined the framework for analyzing s. 35(1) claims. First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been

extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the infringement is justified. In *Sparrow*, however, it was not seriously disputed that the Musqueam had an aboriginal right to fish for food, with the result that it was unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) are to be defined. It is this question and, in particular, the question of whether s. 35(1) recognizes and affirms the right of the Sto:lo to sell fish, which must now be answered by this Court.

3. In order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible. As Dickson J. (as he then was) said in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, a constitutional provision must be understood "in the light of the interests it was meant to protect". This principle, articulated in relation to the rights protected by the *Canadian Charter of Rights and Freedoms*, applies equally to the interpretation of s. 35(1).
4. This judgment will thus, after outlining the context and background of the appeal, articulate a test for identifying aboriginal rights which reflects the purposes underlying s. 35(1), and the interests which that constitutional provision is intended to protect.

II. Statement of Facts

5. The appellant Dorothy Van der Peet was charged under s. 61(1) of the *Fisheries Act*, R.S.C. 1970, c. F-14, with the offence of selling fish caught under the

authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248. At the time at which the appellant was charged s. 27(5) read:

27. . . .

(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

6. The charges arose out of the sale by the appellant of 10 salmon on September 11, 1987. The salmon had been caught by Steven and Charles Jimmy under the authority of an Indian food fish licence. Charles Jimmy is the common law spouse of the appellant. The appellant, a member of the Sto:lo, has not contested these facts at any time, instead defending the charges against her on the basis that in selling the fish she was exercising an existing aboriginal right to sell fish. The appellant has based her defence on the position that the restrictions imposed by s. 27(5) of the Regulations infringe her existing aboriginal right to sell fish and are therefore invalid on the basis that they violate s. 35(1) of the *Constitution Act, 1982*.

III. Judgments Below

Provincial Court, [1991] 3 C.N.L.R. 155

7. Scarlett Prov. Ct. J. rejected the appellant's argument that she sold fish pursuant to an aboriginal right. On the basis of the evidence from members of the appellant's band, and anthropological experts, he found that, historically, the Sto:lo people clearly fished for food and ceremonial purposes, but that any trade in salmon that occurred was incidental and occasional only. He found, at p. 160, that there was no trade

of salmon "in any regularized or market sense" but only "opportunistic exchanges taking place on a casual basis". He found that the Sto:lo could not preserve or store fish for extended periods of time and that the Sto:lo were a band rather than a tribal culture; he held both of these facts to be significant in suggesting that the Sto:lo did not engage in a market system of exchange. On the basis of these findings regarding the nature of the Sto:lo trade in salmon, Scarlett Prov. Ct. J. held that the Sto:lo's aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. He therefore found the accused guilty of violating s. 61(1) of the *Fisheries Act*.

Supreme Court of British Columbia (1991), 58 B.C.L.R. (2d) 392

8. Selbie J. of the Supreme Court of British Columbia held that Scarlett Prov. Ct. J. erred when he looked at the evidence in terms of whether or not it demonstrated that the Sto:lo participated in a market system of exchange. The evidence should not have been considered in light of "contemporary tests for 'marketing'" (at para. 15) but should rather have been viewed so as to determine whether it "is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise" (at para. 16). He held, at para. 16, that the evidence in this case was consistent with an aboriginal right to sell fish because it suggested that aboriginal societies had no stricture or prohibition against the sale of fish, with the result that "when the first Indian caught the first salmon he had the 'right' to do anything he wanted with it -- eat it, trade it for deer meat, throw it back or keep it against a hungrier time". Selbie J. therefore held that the Sto:lo had an aboriginal right to sell fish and that the trial judge's verdict against the appellant was inconsistent with the evidence. He remanded for a new trial on the questions of whether this right had been extinguished, whether the regulations infringed the right and whether any infringement of the right had been justified.

The Court of Appeal (1993), 80 B.C.L.R. (2d) 75

9. The British Columbia Court of Appeal allowed the Crown's appeal and restored the guilty verdict of Scarlett Prov. Ct. J. Macfarlane J.A. (Taggart J.A. concurring) held, at para. 20, that a practice will be protected as an aboriginal right under s. 35(1) of the *Constitution Act, 1982* where the evidence establishes that it had "been exercised, at the time sovereignty was asserted, for a sufficient length of time to become integral to the aboriginal society". To be protected as an aboriginal right, however, the practice cannot have become "prevalent merely as a result of European influences" (para. 21) but must rather arise from the aboriginal society itself. On the basis of this test Macfarlane J.A. held that the Sto:lo did not have an aboriginal right to sell fish. The question was not, he held at para. 30, whether the Sto:lo could support a right to dispose of surplus food fish on a casual basis but was rather whether they had a right to "sell fish allocated for food purposes on a commercial basis" which should be given constitutional priority in the allocation of the fishery resource. Given that this was the question, Macfarlane J.A. held that the assessment of the evidence by the trial judge was correct. The evidence, while indicating that surplus fish would have been disposed of or traded, did not establish that the "purpose of fishing was to engage in commerce" (para. 41). While the Sto:lo did trade salmon with the Hudson's Bay Company prior to the British assertion of sovereignty in a manner that could be characterized as commercial, this trade was "not of the same nature and quality as the aboriginal traditions disclosed by the evidence" (para. 41) and did not, therefore, qualify for protection as an aboriginal right under s. 35(1).

10. In his concurring judgment Wallace J.A. articulated a test for aboriginal rights similar to that of Macfarlane J.A. in so far as he too held, at para. 78, that the

practices protected as aboriginal rights by s. 35(1) are those "traditional and integral to the native society pre-sovereignty". Wallace J.A. emphasized that s. 35(1) should not be interpreted as having the purpose of enlarging the pre-1982 concept of aboriginal rights; instead it should be seen as having the purpose of protecting from legislative encroachment those aboriginal rights that existed in 1982. Section 35(1) was not enacted so as to facilitate the current objectives of the aboriginal community but was rather enacted so as to protect "traditional aboriginal practices integral to the culture and traditional way of life of the native community" (para. 78). Wallace J.A. held, at para. 104, that rights should not be "determined by reference to the economic objectives of the rights-holders". He concluded from this analytical framework that the trial judge was correct in determining that the commercial sale of fish is different in nature and kind from the aboriginal right of the Sto:lo to fish for sustenance and ceremonial purposes, with the result that the appellant could not be said to have been exercising an aboriginal right when she sold the fish.

11. Lambert J.A. dissented. While he agreed that aboriginal rights are those aboriginal customs, traditions and practices which are an integral part of a distinctive aboriginal culture, he added to that proposition the proviso that to determine whether a practice is in fact integral it is necessary first to describe it correctly. In his view, the appropriate description of a right or practice is one based on the significance of the practice to the particular aboriginal culture. As such, in determining the extent to which aboriginal fishing is a protected right under s. 35(1) a court should look not to the purpose for which aboriginal people fished, but should rather look at the significance of fishing to the aboriginal society; it is the social significance of fishing which is integral to the distinctive aboriginal society and which is, therefore, protected by s. 35(1) of the *Constitution Act, 1982*. Lambert J.A. found support for this proposition in this Court's judgment in *Sparrow, supra*, in the American case law arising out of disputes over the

terms of treaties signed with aboriginal people in the Pacific northwest (see, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979)), and in the general principle that the definition of aboriginal rights must take into account the perspective of aboriginal people. Lambert J.A. held that the social significance of fishing for the Sto:lo was that fishing was the means by which they provided themselves with a moderate livelihood; he therefore held at para. 150 that the Sto:lo had an aboriginal right protected by s. 35(1)

to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood. . . . [Emphasis in original.]

Lambert J.A. rejected the position of the majority that the commercial dimension of the fishery was introduced by Europeans and therefore outside of the protection of s. 35(1). The key point, he suggested, is not that the Europeans introduced commerce, but is rather that as soon as the Europeans arrived the Sto:lo began trading with them. In doing so the Sto:lo were not breaking with their past; the trade with the Hudson's Bay Company "represented only a response to a new circumstance in the carrying out of the existing practice" (para. 180). Lambert J.A. went on to hold that the Sto:lo right to fish for a moderate livelihood had not been extinguished and that it had been infringed by s. 27(5) of the Regulations in a manner not justified by the Crown. He would thus have dismissed the appeal of the Crown and entered a verdict of acquittal.

12. Hutcheon J.A. also dissented. He did so on the basis that there is no authority for the proposition that the relevant point for identifying aboriginal rights is prior to contact with Europeans and European culture. Hutcheon J.A. held that the relevant historical time is instead 1846, the time of the assertion of British sovereignty

in British Columbia. Since it is undisputed that by 1846 the Sto:lo were trading commercially in salmon, the Sto:lo can claim an aboriginal right to sell fish protected by s. 35(1) of the *Constitution Act, 1982*. Hutcheon J.A. held further that this right had not been extinguished prior to 1982. In the result, he would have remanded for a new trial on the issues of infringement and justification.

IV. Grounds of Appeal

13. Leave to appeal to this Court was granted on March 10, 1994. The following constitutional question was stated:

Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

The appellant appealed on the basis that the Court of Appeal erred in defining the aboriginal rights protected by s. 35(1) as those practices integral to the distinctive cultures of aboriginal peoples. The appellant argued that the Court of Appeal erred in holding that aboriginal rights are recognized for the purpose of protecting the traditional way of life of aboriginal people. The appellant also argued that the Court of Appeal erred in requiring that the Sto:lo satisfy a long-time use test, in requiring that they demonstrate an absence of European influence and in failing to adopt the perspective of aboriginal peoples themselves.

14. The First Nations Summit intervened in support of the appellant as did Delgamuukw et al. and Pamajewon et al. The Fisheries Council of British Columbia, the

Attorney General of Quebec, the British Columbia Fisheries Survival Coalition and the British Columbia Wildlife Federation intervened in support of the respondent Crown.

V. Analysis

Introduction

15. I now turn to the question which, as I have already suggested, lies at the heart of this appeal: How should the aboriginal rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982* be defined?

16. In her factum the appellant argued that the majority of the Court of Appeal erred because it defined the rights in s. 35(1) in a fashion which "converted a Right into a Relic"; such an approach, the appellant argued, is inconsistent with the fact that the aboriginal rights recognized and affirmed by s. 35(1) are rights and not simply aboriginal practices. The appellant acknowledged that aboriginal rights are based in aboriginal societies and cultures, but argued that the majority of the Court of Appeal erred because it defined aboriginal rights through the identification of pre-contact activities instead of as pre-existing legal rights.

17. While the appellant is correct to suggest that the mere existence of an activity in a particular aboriginal community prior to contact with Europeans is not, in itself, sufficient foundation for the definition of aboriginal rights, the position she would have this Court adopt takes s. 35(1) too far from that which the provision is intended to protect. Section 35(1), it is true, recognizes and affirms existing aboriginal rights, but it must not be forgotten that the rights it recognizes and affirms are aboriginal.

18. In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected: *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136; *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 336.
19. Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. As academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality", Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991), 29 *Alta. L. Rev.* 498, at p. 502; they are the rights held by "Indians *qua* Indians", Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 776.
20. The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.

21. The way to accomplish this task is, as was noted at the outset, through a purposive approach to s. 35(1). It is through identifying the interests that s. 35(1) was intended to protect that the dual nature of aboriginal rights will be comprehended. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J. explained the rationale for a purposive approach to constitutional documents. Courts should take a purposive approach to the Constitution because constitutions are, by their very nature, documents aimed at a country's future as well as its present; the Constitution must be interpreted in a manner which renders it "capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers": *Hunter, supra*, at p. 155. A purposive approach to s. 35(1), because ensuring that the provision is not viewed as static and only relevant to current circumstances, will ensure that the recognition and affirmation it offers are consistent with the fact that what it is recognizing and affirming are "rights". Further, because it requires the court to analyze a given constitutional provision "in the light of the interests it was meant to protect" (*Big M Drug Mart Ltd., supra*, at p. 344), a purposive approach to s. 35(1) will ensure that that which is found to fall within the provision is related to the provision's intended focus: aboriginal people and their rights in relation to Canadian society as a whole.
22. In *Sparrow, supra*, Dickson C.J. and La Forest J. held at p. 1106 that it was through a purposive analysis that s. 35(1) must be understood:

The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. [Emphasis added.]

In that case, however, the Court did not have the opportunity to articulate the purposes behind s. 35(1) as they relate to the scope of the rights the provision is intended to protect. Such analysis is now required to be undertaken.

General Principles Applicable to Legal Disputes Between Aboriginal Peoples and the Crown

23. Before turning to a purposive analysis of s. 35(1), however, it should be noted that such analysis must take place in light of the general principles which apply to the legal relationship between the Crown and aboriginal peoples. In *Sparrow*, *supra*, this Court held at p. 1106 that s. 35(1) should be given a generous and liberal interpretation in favour of aboriginal peoples:

When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. [Emphasis added].

24. This interpretive principle, articulated first in the context of treaty rights -- *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 402; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 36; *R. v. Horseman*, [1990] 1 S.C.R. 901, at p. 907; *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1066 -- arises from the nature of the relationship between the Crown and aboriginal peoples. The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aborigines the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a generous and liberal interpretation: *R. v. George*, [1966] S.C.R. 267, at p. 279. This general principle must

inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

25. The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favour of aboriginal peoples. In *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 464, Dickson J. held that paragraph 13 of the Memorandum of Agreement between Manitoba and Canada, a constitutional document, "should be interpreted so as to resolve any doubts in favour of the Indians, the beneficiaries of the rights assured by the paragraph". This interpretive principle applies equally to s. 35(1) of the *Constitution Act, 1982* and should, again, inform the Court's purposive analysis of that provision.

Purposive Analysis of Section 35(1)

26. I now turn to a purposive analysis of s. 35(1).

27. When the court identifies a constitutional provision's purposes, or the interests the provision is intended to protect, what it is doing in essence is explaining the rationale of the provision; it is articulating the reasons underlying the protection that the provision gives. With regards to s. 35(1), then, what the court must do is explain the rationale and foundation of the recognition and affirmation of the special rights of aboriginal peoples; it must identify the basis for the special status that aboriginal peoples have within Canadian society as a whole.

28. In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal

rights; aboriginal rights existed and were recognized under the common law: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights: *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 112; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.), [1976] 2 S.C.R. v; it is this which distinguishes the aboriginal rights recognized and affirmed in s. 35(1) from the aboriginal rights protected by the common law. Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*, *supra*.

29. The fact that aboriginal rights pre-date the enactment of s. 35(1) could lead to the suggestion that the purposive analysis of s. 35(1) should be limited to an analysis of why a pre-existing legal doctrine was elevated to constitutional status. This suggestion must be resisted. The pre-existence of aboriginal rights is relevant to the analysis of s. 35(1) because it indicates that aboriginal rights have a stature and existence prior to the constitutionalization of those rights and sheds light on the reasons for protecting those rights; however, the interests protected by s. 35(1) must be identified through an explanation of the basis for the legal doctrine of aboriginal rights, not through an explanation of why that legal doctrine now has constitutional status.
30. In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

31. More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aborigines lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.
32. That the purpose of s. 35(1) lies in its recognition of the prior occupation of North America by aboriginal peoples is suggested by the French version of the text. For the English "existing aboriginal and treaty rights" the French text reads "*[l]es droits existants -- ancestraux ou issus de traités*". The term "*ancestral*", which *Le Petit Robert I* (1990) dictionary defines as "*[q]ui a appartenu aux ancêtres, qu'on tient des ancêtres*", suggests that the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence -- the ancestry -- of aboriginal peoples in North America.
33. This approach to s. 35(1) is also supported by the prior jurisprudence of this Court. In *Calder, supra*, the Court refused an application by the Nishga for a declaration that their aboriginal title had not been extinguished. There was no majority in the Court as to the basis for this decision; however, in the judgments of both Judson J. and Hall J. (each speaking for himself and two others) the existence of aboriginal title was recognized. Hall J. based the Nishga's aboriginal title in the fact that the land to which they were claiming title had "been in their possession from time immemorial" (*Calder, supra*, at p. 375). Judson J. explained the origins of the Nishga's aboriginal title as follows, at p. 328:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. [Emphasis added.]

The position of Judson and Hall JJ. on the basis for aboriginal title is applicable to the aboriginal rights recognized and affirmed by s. 35(1). Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in *Calder, supra*, can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries" (p. 328).

34. The basis of aboriginal title articulated in *Calder, supra*, was affirmed in *Guerin v. The Queen*, [1984] 2 S.C.R. 335. The decision in *Guerin* turned on the question of the nature and extent of the Crown's fiduciary obligation to aboriginal peoples; because, however, Dickson J. based that fiduciary relationship, at p. 376, in the "concept of aboriginal, native or Indian title", he had occasion to consider the question of the existence of aboriginal title. In holding that such title existed, he relied, at p. 376, on *Calder, supra*, for the proposition that "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". [Emphasis added.]

35. The view of aboriginal rights as based in the prior occupation of North America by distinctive aboriginal societies, finds support in the early American decisions of Marshall C.J. Although the constitutional structure of the United States is different

from that of Canada, and its aboriginal law has developed in unique directions, I agree with Professor Slattery both when he describes the Marshall decisions as providing "structure and coherence to an untidy and diffuse body of customary law based on official practice" and when he asserts that these decisions are "as relevant to Canada as they are to the United States" -- "Understanding Aboriginal Rights", *supra*, at p. 739. I would add to Professor Slattery's comments only the observation that the fact that aboriginal law in the United States is significantly different from Canadian aboriginal law means that the relevance of these cases arises from their articulation of general principles, rather than their specific legal holdings.

36. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the first of the Marshall decisions on aboriginal title, the Supreme Court held that Indian land could only be alienated by the U.S. government, not by the Indians themselves. In the course of his decision (written for the court), Marshall C.J. outlined the history of the exploration of North America by the countries of Europe and the relationship between this exploration and aboriginal title. In his view, aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations. The substance and nature of aboriginal rights to land are determined by this intersection (at pp 572-74):

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other,

to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy. [Emphasis added.]

It is, similarly, the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation of aboriginal rights in s. 35(1) is directed.

37. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) the U.S. Supreme Court invalidated the conviction under a Georgia statute of a non-Cherokee man for the offence of living on the territory of the Cherokee Nation. The court held that the law under which he was convicted was *ultra vires* the State of Georgia. In so doing the court considered the nature and basis of the Cherokee claims to the land and to governance

over that land. Again, it based its judgment on its analysis of the origins of those claims which, it held, lay in the relationship between the pre-existing rights of the "ancient possessors" of North America and the assertion of sovereignty by European nations (at pp. 542-43 and 559):

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

...

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed. [Emphasis added.]

Marshall C.J.'s essential insight that the claims of the Cherokee must be analyzed in light of their pre-existing occupation and use of the land -- their "undisputed" possession

of the soil "from time immemorial" -- is as relevant for the identification of the interests s. 35(1) was intended to protect as it was for the adjudication of Worcester's claim.

38. The High Court of Australia has also considered the question of the basis and nature of aboriginal rights. Like that of the United States, Australia's aboriginal law differs in significant respects from that of Canada. In particular, in Australia the courts have not as yet determined whether aboriginal fishing rights exist, although such rights are recognized by statute: *Halsbury's Laws of Australia* (1991), vol. 1, paras. 5-2250, 5-2255, 5-2260 and 5-2265. Despite these relevant differences, the analysis of the basis of aboriginal title in the landmark decision of the High Court in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1, is persuasive in the Canadian context.

39. The *Mabo* judgment resolved the dispute between the Meriam people and the Crown regarding who had title to the Murray Islands. The islands had been annexed to Queensland in 1879 but were reserved for the native inhabitants (the Meriam) in 1882. The Crown argued that this annexation was sufficient to vest absolute ownership of the lands in the Crown. The High Court disagreed, holding that while the annexation did vest radical title in the Crown, it was insufficient to eliminate a claim for native title; the court held at pp. 50-51 that native title can exist as a burden on the radical title of the Crown: "there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty".

40. From this premise, Brennan J., writing for a majority of the Court, went on at p. 58 to consider the nature and basis of aboriginal title:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty, as Moynihan J. perceived in the present case. It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled "with the institutions or the legal ideas of civilized society", *In re Southern Rhodesia*, [1919] A.C., at p. 233, that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown. These fictions denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited" in fact, it is necessary to ascertain by evidence the nature and incidents of native title. [Emphasis added.]

This position is the same as that being adopted here. "Traditional laws" and "traditional customs" are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition" -- that which is "handed down [from ancestors] to posterity", *The Concise Oxford Dictionary* (9th ed. 1995), -- implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights.

41. Academic commentators have also been consistent in identifying the basis and foundation of the s. 35(1) claims of aboriginal peoples in aboriginal occupation of North America prior to the arrival of Europeans. As Professor David Elliott, at p. 25, puts it in his compilation *Law and Aboriginal Peoples of Canada* (2nd ed. 1994), the "prior aboriginal presence is at the heart of the concept of aboriginal rights". Professor Macklem has, while also considering other possible justifications for the recognition of aboriginal rights, described prior occupancy as the "familiar" justification for aboriginal rights, arising from the "straightforward conception of fairness which suggests that, all

other things being equal, a prior occupant of land possesses a stronger claim to that land than subsequent arrivals": Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 *Queen's L.J.* 173, at p. 180. Finally, I would note the position of Professor Pentney who has described aboriginal rights as collective rights deriving "their existence from the common law's recognition of [the] prior social organization" of aboriginal peoples: William Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II -- Section 35: The Substantive Guarantee" (1988), 22 *U.B.C. L. Rev.* 207, at p. 258.

42. I would note that the legal literature also supports the position that s. 35(1) provides the constitutional framework for reconciliation of the pre-existence of distinctive aboriginal societies occupying the land with Crown sovereignty. In his comment on *Delgamuukw v. British Columbia* ("British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350), Mark Walters suggests at pp. 412-13 that the essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures:

The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. . . . a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives. [Emphasis added.]

Similarly, Professor Slattery has suggested that the law of aboriginal rights is "neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities" (Brian Slattery, "The Legal Basis of Aboriginal Title", in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (1992), at pp. 120-21) and that such rights concern "the

status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions" ("Understanding Aboriginal Rights", *supra*, at p. 737).

43. The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes; the next section of the judgment, as well as that which follows it, will attempt to accomplish this task.

The Test for Identifying Aboriginal Rights in Section 35(1)

44. In order to fulfil the purpose underlying s. 35(1) -- i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions -- the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

45. In *Sparrow, supra*, this Court did not have to address the scope of the aboriginal rights protected by s. 35(1); however, in their judgment at p. 1099 Dickson C.J. and La Forest J. identified the Musqueam right to fish for food in the fact that:

The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. [Emphasis added.]

The suggestion of this passage is that participation in the salmon fishery is an aboriginal right because it is an "integral part" of the "distinctive culture" of the Musqueam. This suggestion is consistent with the position just adopted; identifying those practices, customs and traditions that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans.

46. In light of the suggestion of *Sparrow, supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

47. I would note that this test is, in large part, consistent with that adopted by the judges of the British Columbia Court of Appeal. Although the various judges disagreed on such crucial questions as how the right should be framed, the relevant time at which the aboriginal culture should be examined and the role of European influences in limiting the scope of the right, all of the judges agreed that aboriginal rights must be

identified through the practices, customs and traditions of aboriginal cultures. Macfarlane J.A. held at para. 20 that aboriginal rights exist where "the right had been exercised . . . for a sufficient length of time to become integral to the aboriginal society" (emphasis added); Wallace J.A. held at para. 78 that aboriginal rights are those practices "traditional and integral to the native society" (emphasis added); Lambert J.A. held at para. 131 that aboriginal rights are those "custom[s], tradition[s], or practice[s] . . . which formed an integral part of the distinctive culture of the aboriginal people in question" (emphasis added). While, as will become apparent, I do not adopt entirely the position of any of the judges at the Court of Appeal, their shared position that aboriginal rights lie in those practices, customs and traditions that are integral is consistent with the test I have articulated here.

Factors to be Considered in Application of the Integral to a Distinctive Culture Test

48. The test just laid out -- that aboriginal rights lie in the practices, customs and traditions integral to the distinctive cultures of aboriginal peoples -- requires further elaboration with regards to the nature of the inquiry a court faced with an aboriginal rights claim must undertake. I will now undertake such an elaboration, concentrating on such questions as the time period relevant to the court's inquiry, the correct approach to the evidence presented, the specificity necessary to the court's inquiry, the relationship between aboriginal rights and the rights of aboriginal people as Canadian citizens, and the standard that must be met in order for a practice, custom or tradition to be said to be "integral".

Courts must take into account the perspective of aboriginal peoples themselves

49. In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In *Sparrow*, *supra*, Dickson C.J. and La Forest J. held, at p. 1112, that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake". It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

50. It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.

Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right

51. Related to this is the fact that in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.

52. I would note here by way of illustration that, in my view, both the majority and the dissenting judges in the Court of Appeal erred with respect to this aspect of the inquiry. The majority held that the appellant's claim was that the practice of selling fish "on a commercial basis" constituted an aboriginal right and, in part, rejected her claim on the basis that the evidence did not support the existence of such a right. With respect, this characterization of the appellant's claim is in error; the appellant's claim was that the practice of selling fish was an aboriginal right, not that selling fish "on a commercial basis" was. It was however, equally incorrect to adopt, as Lambert J.A. did, a "social" test for the identification of the practice, tradition or custom constituting the aboriginal right. The social test casts the aboriginal right in terms that are too broad and in a manner which distracts the court from what should be its main focus -- the nature of the aboriginal community's practices, customs or traditions themselves. The nature of an applicant's claim must be delineated in terms of the particular practice, custom or tradition under which it is claimed; the significance of the practice, custom or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom or tradition is integral to the distinctive culture, but the significance of a practice, custom or tradition cannot, itself, constitute an aboriginal right.

53. To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the practice, custom or tradition being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the practices, customs and traditions she invokes in support of her claim.
54. It should be acknowledged that a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly.

In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question

55. To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.

56. This aspect of the integral to a distinctive culture test arises from fact that aboriginal rights have their basis in the prior occupation of Canada by distinctive aboriginal societies. To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is to what makes those societies distinctive that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).

57. Moreover, the aboriginal rights protected by s. 35(1) have been said to have the purpose of reconciling pre-existing aboriginal societies with the assertion of Crown sovereignty over Canada. To reconcile aboriginal societies with Crown sovereignty it is necessary to identify the distinctive features of those societies; it is precisely those distinctive features which need to be acknowledged and reconciled with the sovereignty of the Crown.

58. As was noted earlier, Lambert J.A. erred when he used the significance of a practice, custom or tradition as a means of identifying what the practice, custom or tradition is; however, he was correct to recognize that the significance of the practice, custom or tradition is important. The significance of the practice, custom or tradition does not serve to identify the nature of a claim of acting pursuant to an aboriginal right; however, it is a key aspect of the court's inquiry into whether a practice, custom or tradition has been shown to be an integral part of the distinctive culture of an aboriginal community. The significance of the practice, custom or tradition will inform a court as

to whether or not that practice, custom or tradition can be said to be truly integral to the distinctive culture in question.

59. A practical way of thinking about this problem is to ask whether, without this practice, custom or tradition, the culture in question would be fundamentally altered or other than what it is. One must ask, to put the question affirmatively, whether or not a practice, custom or tradition is a defining feature of the culture in question.

The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact

60. The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

61. The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown.

62. That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

63. I would note in relation to this point the position adopted by Brennan J. in *Mabo, supra*, where he holds, at p. 60, that in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to the present day:

. . . when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim (I take no position on that matter), but rather in its suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those

present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

64. The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow, supra*, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. Because the practices, customs and traditions protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

65. I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom

or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, *infra*, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.

66. Further, I would note that basing the identification of aboriginal rights in the period prior to contact is not inconsistent with the fact that s. 35(2) of the *Constitution Act, 1982* includes within the definition of "aboriginal peoples of Canada" the Métis people of Canada.

67. Although s. 35 includes the Métis within its definition of "aboriginal peoples of Canada", and thus seems to link their claims to those of other aboriginal peoples under the general heading of "aboriginal rights", the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis

of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.

Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims

68. In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

Claims to aboriginal rights must be adjudicated on a specific rather than general basis

69. Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. In the case of *Kruger, supra*, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal;

their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists

70. In identifying those practices, customs and traditions that constitute the aboriginal rights recognized and affirmed by s. 35(1), a court must ensure that the practice, custom or tradition relied upon in a particular case is independently significant to the aboriginal community claiming the right. The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. Incidental practices, customs and traditions cannot qualify as aboriginal rights through a process of piggybacking on integral practices, customs and traditions.

The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct

71. The standard which a practice, custom or tradition must meet in order to be recognized as an aboriginal right is not that it be distinct to the aboriginal culture in question; the aboriginal claimants must simply demonstrate that the practice, custom or tradition is distinctive. A tradition or custom that is distinct is one that is unique --

"different in kind or quality; unlike" (*Concise Oxford Dictionary, supra*). A culture with a distinct tradition must claim that in having such a tradition it is different from other cultures; a claim of distinctness is, by its very nature, a claim relative to other cultures or traditions. By contrast, a culture that claims that a practice, custom or tradition is distinctive -- "distinguishing, characteristic" -- makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture what it is, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture. The person or community claiming the existence of an aboriginal right protected by s. 35(1) need only show that the particular practice, custom or tradition which it is claiming to be an aboriginal right is distinctive, not that it is distinct.

72. That the standard an aboriginal community must meet is distinctiveness, not distinctness, arises from the recognition in *Sparrow, supra*, of an aboriginal right to fish for food. Certainly no aboriginal group in Canada could claim that its culture is "distinct" or unique in fishing for food; fishing for food is something done by many different cultures and societies around the world. What the Musqueam claimed in *Sparrow, supra*, was rather that it was fishing for food which, in part, made Musqueam culture what it is; fishing for food was characteristic of Musqueam culture and, therefore, a distinctive part of that culture. Since it was so it constituted an aboriginal right under s. 35(1).

The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.

73. The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.

Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples

74. As was noted in the discussion of the purposes of s. 35(1), aboriginal rights and aboriginal title are related concepts; aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land. The relationship between aboriginal title and aboriginal rights must not, however, confuse the analysis of what constitutes an aboriginal right. Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land and at the practices, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal

peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

75. With these factors in mind I will now turn to the particular claim made by the appellant in this case to have been acting pursuant to an aboriginal right.

Application of the Integral to a Distinctive Culture Test to the Appellant's Claim

76. The first step in the application of the integral to a distinctive culture test requires the court to identify the precise nature of the appellant's claim to have been exercising an aboriginal right. In this case the most accurate characterization of the appellant's position is that she is claiming an aboriginal right to exchange fish for money or for other goods. She is claiming, in other words, that the practices, customs and traditions of the Sto:lo include as an integral part the exchange of fish for money or other goods.

77. That this is the nature of the appellant's claim can be seen through both the specific acts which led to her being charged and through the regulation under which she was charged. Mrs. Van der Peet sold 10 salmon for \$50. Such a sale, especially given the absence of evidence that the appellant had sold salmon on other occasions or on a regular basis, cannot be said to constitute a sale on a "commercial" or market basis. These actions are instead best characterized in the simple terms of an exchange of fish for money. It follows from this that the aboriginal right pursuant to which the appellant is arguing that her actions were taken is, like the actions themselves, best characterized as an aboriginal right to exchange fish for money or other goods.

78. Moreover, the regulations under which the appellant was charged prohibit all sale or trade of fish caught pursuant to an Indian food fish licence. As such, to argue that those regulations implicate the appellant's aboriginal right requires no more of her than that she demonstrate an aboriginal right to the exchange of fish for money (sale) or other goods (trade). She does not need to demonstrate an aboriginal right to sell fish commercially.

79. The appellant herself characterizes her claim as based on a right "to sufficient fish to provide for a moderate livelihood". In so doing the appellant relies on the "social" test adopted by Lambert J.A. at the British Columbia Court of Appeal. As has already been noted, however, a claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question. The definition of aboriginal rights is determined through the process of determining whether a particular practice, custom or tradition is integral to the distinctive culture of the aboriginal group. The significance of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. As such, the appellant's claim cannot be characterized as based on an assertion that the Sto:lo's use of the fishery, and the practices, customs and traditions surrounding that use, had the significance of providing the Sto:lo with a moderate livelihood. It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.

80. Having thus identified the nature of the appellant's claim, I turn to the fundamental question of the integral to a distinctive culture test: Was the practice of exchanging fish for money or other goods an integral part of the specific distinctive culture of the Sto:lo prior to contact with Europeans? In answering this question it is

necessary to consider the evidence presented at trial, and the findings of fact made by the trial judge, to determine whether the evidence and findings support the appellant's claim that the sale or trade of fish is an integral part of the distinctive culture of the Sto:lo.

81. It is a well-settled principle of law that when an appellate court reviews the decision of a trial judge that court must give considerable deference to the trial judge's findings of fact, particularly where those findings of fact are based on the trial judge's assessment of the testimony and credibility of witnesses. In *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, Ritchie J., speaking for the Court, held at p. 808 that absent a "palpable and overriding error" affecting the trial judge's assessment of the facts, an appellate court should not substitute its own findings of fact for those of the trial judge:

These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial.

This principle has also been followed in more recent decisions of this Court: *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, at pp. 8-9; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at p. 794; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 426. In the recently released decision of *Schwartz v. Canada*, [1996] 1 S.C.R. 254, La Forest J. made the following observation at para. 32, with which I agree, regarding appellate court deference to findings of fact:

Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are

allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact . . . This explains why the rule applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. . . .

I would also note that the principle of appellate court deference has been held to apply equally to findings of fact made on the basis of the trial judge's assessment of the credibility of the testimony of expert witnesses, *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247, at pp. 1249-50.

82. In the case at bar, Scarlett Prov. Ct. J., the trial judge, made findings of fact based on the testimony and evidence before him, and then proceeded to make a determination as to whether those findings of fact supported the appellant's claim to the existence of an aboriginal right. The second stage of Scarlett Prov. Ct. J.'s analysis -- his determination of the scope of the appellant's aboriginal rights on the basis of the facts as he found them -- is a determination of a question of law which, as such, mandates no deference from this Court. The first stage of Scarlett Prov. Ct. J.'s analysis, however -- the findings of fact from which that legal inference was drawn -- do mandate such deference and should not be overturned unless made on the basis of a "palpable and overriding error". This is particularly the case given that those findings of fact were made on the basis of Scarlett Prov. Ct. J.'s assessment of the credibility and testimony of the various witnesses appearing before him.

83. In adjudicating this case Scarlett Prov. Ct. J. obviously did not have the benefit of direction from this Court as to how the rights recognized and affirmed by s. 35(1) are to be defined, with the result that his legal analysis of the evidence was not entirely correct; however, that Scarlett Prov. Ct. J. was not entirely correct in his legal

analysis of the facts as he found them does not mean that he made a clear and palpable error in reviewing the evidence and making those findings of fact. Indeed, a review of the transcript and exhibits submitted to this Court demonstrate that Scarlett Prov. Ct. J. conducted a thorough and compelling review of the evidence before him and committed no clear and palpable error which would justify this Court, or any other appellate court, in substituting its findings of fact for his. Moreover, I would note that the appellant, while disagreeing with Scarlett Prov. Ct. J.'s legal analysis of the facts, made no arguments suggesting that in making findings of fact from the evidence before him Scarlett Prov. Ct. J. committed a palpable and overriding error.

84. Scarlett Prov. Ct. J. carefully considered all of the testimony presented by the various witnesses with regards to the nature of Sto:lo society and came to the following conclusions at p. 160:

Clearly, the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularized market system in the exchange of fish. Such fish as were exchanged through individual trade, gift, or barter were fish surplus from time to time. Natives did not fish to supply a market, there being no regularized trading system, nor were they able to preserve and store fish for extended periods of time. A market as such for salmon was not present but created by European traders, primarily the Hudson's Bay Company. At Fort Langley the Sto:lo were able to catch and deliver fresh salmon to the traders where it was salted and exported. This use was clearly different in nature and quantity from aboriginal activity. Trade in dried salmon with the fort was clearly dependent upon Sto:lo first satisfying their own requirements for food and ceremony.

This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This Court accepts the evidence of Dr. Stryd and John Dewhurst [sic] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.

Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic.

I would add to Scarlett Prov. Ct. J.'s summation of his findings only the observation, which does not contradict any of his specific findings, that the testimony of the experts appearing before him indicated that such limited exchanges of salmon as took place in Sto:lo society were primarily linked to the kinship and family relationships on which Sto:lo society was based. For example, under cross-examination Dr. Daly described trade as occurring through the "idiom" of maintaining family relationships:

The medium or the idiom of much trade was the idiom of kinship, of providing hospitality, giving gifts, reciprocating in gifts. . . .

Similarly, Mr. Dewhirst testified that the exchange of goods was related to the maintenance of family and kinship relations.

85. The facts as found by Scarlett Prov. Ct. J. do not support the appellant's claim that the exchange of salmon for money or other goods was an integral part of the distinctive culture of the Sto:lo. As has already been noted, in order to be recognized as an aboriginal right, an activity must be of central significance to the culture in question -- it must be something which makes that culture what it is. The findings of fact made by Scarlett Prov. Ct. J. suggest that the exchange of salmon for money or other goods, while certainly taking place in Sto:lo society prior to contact, was not a significant, integral or defining feature of that society.

86. First, Scarlett Prov. Ct. J. found that, prior to contact, exchanges of fish were only "incidental" to fishing for food purposes. As was noted above, to constitute an aboriginal right, a custom must itself be integral to the distinctive culture of the aboriginal community in question; it cannot be simply incidental to an integral custom. Thus, while the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture, this is not sufficient, absent a demonstration that the exchange of salmon was itself a significant and defining feature of Sto:lo society, to demonstrate that the exchange of salmon is an integral part of Sto:lo culture.

87. For similar reasons, the evidence linking the exchange of salmon to the maintenance of kinship and family relations does not support the appellant's claim to the existence of an aboriginal right. Exchange of salmon as part of the interaction of kin and family is not of an independent significance sufficient to ground a claim for an aboriginal right to the exchange of fish for money or other goods.

88. Second, Scarlett Prov. Ct. J. found that there was no "regularized trading system" amongst the Sto:lo prior to contact. The inference drawn from this fact by Scarlett Prov. Ct. J., and by Macfarlane J.A. at the British Columbia Court of Appeal, was that the absence of a market means that the appellant could not be said to have been acting pursuant to an aboriginal right because it suggests that there is no aboriginal right to fish commercially. This inference is incorrect because, as has already been suggested, the appellant in this case has only claimed a right to exchange fish for money or other goods, not a right to sell fish in the commercial marketplace; the significance of the absence of regularized trading systems amongst the Sto:lo arises instead from the fact that it indicates that the exchange of salmon was not widespread in Sto:lo society. Given that the exchange of salmon was not widespread it cannot be said that, prior to contact,

Sto:lo culture was defined by trade in salmon; trade or exchange of salmon took place, but the absence of a market demonstrates that this exchange did not take place on a basis widespread enough to suggest that the exchange was a defining feature of Sto:lo society.

89. Third, the trade engaged in between the Sto:lo and the Hudson's Bay Company, while certainly of significance to the Sto:lo society of the time, was found by the trial judge to be qualitatively different from that which was typical of the Sto:lo culture prior to contact. As such, it does not provide an evidentiary basis for holding that the exchange of salmon was an integral part of Sto:lo culture. As was emphasized in listing the criteria to be considered in applying the "integral to" test, the time relevant for the identification of aboriginal rights is prior to contact with European societies. Unless a post-contact practice, custom or tradition can be shown to have continuity with pre-contact practices, customs or traditions, it will not be held to be an aboriginal right. The trade of salmon between the Sto:lo and the Hudson's Bay Company does not have the necessary continuity with Sto:lo culture pre-contact to support a claim to an aboriginal right to trade salmon. Further, the exchange of salmon between the Sto:lo and the Hudson's Bay Company can be seen as central or significant to the Sto:lo primarily as a result of European influences; activities which become central or significant because of the influence of European culture cannot be said to be aboriginal rights.

90. Finally, Scarlett Prov. Ct. J. found that the Sto:lo were at a band level of social organization rather than at a tribal level. As noted by the various experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour -- for example, specialization in the gathering and trade of fish -- whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive, in the same way

that the absence of regularized trade or a market is suggestive, that the exchange of fish was not a central part of Sto:lo culture. I would note here as well Scarlett Prov. Ct. J.'s finding that the Sto:lo did not have the means for preserving fish for extended periods of time, something which is also suggestive that the exchange or trade of fish was not central to the Sto:lo way of life.

91. For these reasons, then, I would conclude that the appellant has failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society which existed prior to contact. The exchange of fish took place, but was not a central, significant or defining feature of Sto:lo society. The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*.

The Sparrow Test

92. Since the appellant has failed to demonstrate that the exchange of fish was an aboriginal right of the Sto:lo, it is unnecessary to consider the tests for extinguishment, infringement and justification laid out by this Court in *Sparrow, supra*.

VI. Disposition

93. Having concluded that the aboriginal rights of the Sto:lo do not include the right to exchange fish for money or other goods, I would dismiss the appeal and affirm the decision of the Court of Appeal restoring the trial judge's conviction of the appellant for violating s. 61(1) of the *Fisheries Act*. There will be no order as to costs.

94. For the reasons given above, the constitutional question must be answered as follows:

Question Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

Answer No.

\|*L'Heureux-Dubé J.*\|

The following are the reasons delivered by

95. L'HEUREUX-DUBÉ J. (dissenting) -- This appeal, as well as the appeals in *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, and *R. v. Gladstone*, [1996] 2 S.C.R. 723, in which judgment is handed down concurrently, and the appeal in *R. v. Nikal*, [1996] 1 S.C.R. 1013, concern the definition of aboriginal rights as constitutionally protected under s. 35(1) of the *Constitution Act, 1982*.

96. While the narrow issue in this particular case deals with whether the Sto:lo, of which the appellant is a member, possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, the broader issue is the interpretation of the nature and extent of constitutionally protected aboriginal rights.

97. The Chief Justice concludes that the Sto:lo do not possess an aboriginal right to exchange fish for money or other goods and that, as a result, the appellant's conviction under the *Fisheries Act*, R.S.C. 1970, c. F-14, should be upheld. Not only do I disagree with the result he reaches, but I also diverge from his analysis of the issue at bar, specifically as to his approach to defining aboriginal rights and as to his delineation of the aboriginal right claimed by the appellant.

98. The Chief Justice has set out the facts and judgments and I will only briefly refer to them for a better understanding of what follows.

99. Dorothy Van der Peet, the appellant, was charged with violating s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, and, thereby, committing an offence contrary to s. 61(1) of the *Fisheries Act*. These charges arose out of the appellant's sale of 10 salmon caught by her common law spouse and his brother under the authority of an Indian food fish licence, issued pursuant to s. 27(1) of the Regulations. Section 27(5) of the *British Columbia Fishery (General) Regulations*, is the provision here under constitutional challenge; it provides:

27. . . .

(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence.

100. The appellant, her common law husband and his brother are all members of the Sto:lo Band, part of the Coast Salish Nation. Both parties to this dispute accept that the appellant sold the fish, that the sale of the fish was contrary to the Regulations and that the fish were caught pursuant to a recognized aboriginal right to fish. The parties

disagree, however, as to the nature of the Sto:lo's relationship with the fishery, particularly whether their right to fish encompasses the right to sell, trade and barter fish.

101. Scarlett Prov. Ct. J., the trial judge found on the evidence, [1991] 3 C.N.L.R. 155, that trade by the Sto:lo was incidental to fishing for food and was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. He held, therefore, that the aboriginal right to fish for food and ceremonial purposes did not include the right to sell and found the appellant guilty as charged.
102. On appeal to the British Columbia Supreme Court, (1991), 58 B.C.L.R. (2d) 392, Selbie J., the summary appeal judge, gave a different interpretation to the oral testimony, expert evidence and archaeological records. In his view, the evidence demonstrated that the Sto:lo's relationship with the fishery was broad enough to include the trade of fish since the Sto:lo who caught fish in their original aboriginal society could do whatever they wanted with that fish. He overturned the appellant's conviction and entered an acquittal.
103. At the British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 75, the findings and verdict of the trial judge were restored. The majority of the Court of Appeal, *per* Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., found that the Sto:lo engaged only in casual exchanges of fish and that this was entirely different from fishing for commercial and market purposes. Lambert J.A., dissenting, held that the best description of the aboriginal practices, traditions and customs of the Sto:lo was one which included the sale, trade and barter of fish. Also dissenting, Hutcheon J.A. focused on the evidence demonstrating that by 1846, the date of British sovereignty, trade in salmon was taking place in the Sto:lo community.

104. Leave to appeal was granted by this Court and the Chief Justice stated the following constitutional question:

Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

105. In my view, the definition of aboriginal rights as to their nature and extent must be addressed in the broader context of the historical aboriginal reality in Canada. Therefore, before going into the specific analysis of aboriginal rights protected under s. 35(1), a review of the legal evolution of aboriginal history is in order.

I. Historical and General Background

106. It is commonly accepted that the first aboriginal people of North America came from Siberia, over the Bering terrestrial bridge, some 12,000 years ago. They found a *terra nullius* and gradually began to explore and populate the territory. These people have always enjoyed, whether as nomadic or sedentary communities, some kind of social and political structure. Accordingly, it is fair to say that prior to the first contact with the Europeans, the native people of North America were independent nations, occupying and controlling their own territories, with a distinctive culture and their own practices, traditions and customs.

107. In that regard, it is useful to acknowledge the findings of Marshall C.J. of the United States Supreme Court in the so-called trilogy, comprised of *Johnson v. M'Intosh*,

21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Particularly in *Worcester*, Marshall C.J.'s general description of aboriginal societies in North America is apropos (at pp. 542-43):

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.

This passage was quoted, with approval, by Hall J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 383. Also in *Calder*, Judson J., for the majority in the result, made the following observations at p. 328:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. [Emphasis added.]

See also, regarding the independent character of aboriginal nations, the remarks of Lamer J. (as he then was) in *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1053.

108. At the time of the first formal arrival of the Europeans, in the sixteenth century, most of the territory of what is now Canada was occupied and used by aboriginal people. From the earliest point, however, the settlers claimed sovereignty in the name of their home country. Traditionally, there are four principles upon which states have relied to justify the assertion of sovereignty over new territories: see Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (1979). These are: (1) conquest, (2) cession, (3)

annexation, and (4) settlement, i.e., acquisition of territory that was previously unoccupied or is not recognized as belonging to another political entity.

109. In the eyes of international law, the settlement thesis is the one rationale which can most plausibly justify European sovereignty over Canadian territory and the native people living on it (see Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995), 21 *Queen's L.J.* 173) although there is still debate as to whether the land was indeed free for occupation. See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991), 29 *Osgoode Hall L.J.* 681, and Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (1984).

110. In spite of the sovereignty proclamation, however, the early practices of the British recognized aboriginal title or rights and required their extinguishment by cession, conquest or legislation: see André Émond, "Existe-t-il un titre indien originaire dans les territoires cédés par la France en 1763?" (1995), 41 *McGill L.J.* 59, at p. 62. This tradition of the British imperial power (either applied directly or after French capitulation) was crystallized in the *Royal Proclamation of 1763*, R.S.C., 1985, App. II, No. 1.

111. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, Dickson C.J. and La Forest J. wrote the following regarding Crown sovereignty and British practices *vis-à-vis* aboriginal people at p. 1103:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness,

there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.

...

See also André Émond, "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale" (1996), 30 *R.J.T.* 1, at p. 1.

112. As a result, it has become accepted in Canadian law that aboriginal title, and aboriginal rights in general, derive from historic occupation and use of ancestral lands by the natives and do not depend on any treaty, executive order or legislative enactment: see *Calder v. Attorney-General of British Columbia*, *supra*, at p. 390, *per* Hall J., confirmed in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 379, *per* Dickson J. (as he then was), and *Sparrow*, *supra*; see also the decision of the High Court of Australia in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1. See also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1983), 8 *Queen's L.J.* 232, at p. 242, and Peter W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992) at p. 679. This position is known as the "inherent theory" of aboriginal rights, as contrasted with the "contingent theory" of aboriginal rights: see Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991), 29 *Alta. L. Rev.* 498, Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991), 36 *McGill L.J.* 382, and Kent McNeil, *Common Law Aboriginal Title* (1989).

113. Aboriginal people's occupation and use of North American territory was not static, nor, as a general principle, should be the aboriginal rights flowing from it. Natives migrated in response to events such as war, epidemic, famine, dwindling game reserves, etc. Aboriginal practices, traditions and customs also changed and evolved,

including the utilisation of the land, methods of hunting and fishing, trade of goods between tribes, and so on. The coming of Europeans increased this fluidity and development, bringing novel opportunities, technologies and means to exploit natural resources: see Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at pp. 741-42. Accordingly, the notion of aboriginal rights must be open to fluctuation, change and evolution, not only from one native group to another, but also over time.

114. Aboriginal interests arising out of natives' original occupation and use of ancestral lands have been recognized in a body of common law rules referred to as the doctrine of aboriginal rights: see Brian Slattery, "Understanding Aboriginal Rights", *supra*, at p. 732. These principles define the terms upon which the Crown acquired sovereignty over native people and their territories.

115. The traditional and main component of the doctrine of aboriginal rights relates to aboriginal title, i.e., the *sui generis* proprietary interest which gives native people the right to occupy and use the land at their own discretion, subject to the Crown's ultimate title and exclusive right to purchase the land: see *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.), at p. 54, *Calder v. Attorney-General of British Columbia*, *supra*, at p. 328, *per* Judson J., and at p. 383, *per* Hall J., and *Guerin*, *supra*, at pp. 378 and 382, *per* Dickson J. (as he then was).

116. The concept of aboriginal title, however, does not capture the entirety of the doctrine of aboriginal rights. Rather, as its name indicates, the doctrine refers to a broader notion of aboriginal rights arising out of the historic occupation and use of native ancestral lands, which relate not only to aboriginal title, but also to the component

elements of this larger right — such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs — as well as to other matters, not related to land, that form part of a distinctive aboriginal culture: see W. I. C. Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990), 15 *Queen's L.J.* 217, and Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314.

117. This brings me to the different type of lands on which aboriginal rights can exist, namely reserve lands, aboriginal title lands, and aboriginal right lands: see Brian Slattery, "Understanding Aboriginal Rights", *supra*, at pp. 743-44. The common feature of these lands is that the Canadian Parliament and, to a certain extent, provincial legislatures have a general legislative authority over the activities of aboriginal people, which is the result of the British assertion of sovereignty over Canadian territory. There are, however, important distinctions to draw between these types of lands with regard to the legislation applicable and claims of aboriginal rights.

118. Reserve lands are those lands reserved by the Federal Government for the exclusive use of Indian people; such lands are regulated under the *Indian Act*, R.S.C., 1985, c. I-5. On reserve lands, federal legislation, pursuant to s. 91(24) of the *Constitution Act, 1867*, as well as provincial laws of general application, pursuant to s. 88 of the *Indian Act*, are applicable. However, under s. 81 of the *Indian Act*, band councils can enact by-laws, for particular purposes specified therein, which supplant incompatible provincial legislation — even that enacted under s. 88 of the Act — as well as incompatible federal legislation — in so far as the Minister of Indian Affairs has not disallowed the by-laws pursuant to s. 82 of the Act. The latter scenario was the

foundation of the claims in *R. v. Lewis*, [1996] 1 S.C.R. 921, and partly in *R. v. Nikal*, *supra*.

119. Aboriginal title lands are lands which the natives possess for occupation and use at their own discretion, subject to the Crown's ultimate title (see *Guerin v. The Queen*, *supra*, at p. 382); federal and provincial legislation applies to aboriginal title lands, pursuant to the governments' respective general legislative authority. Aboriginal title of this kind is founded on the common law and strict conditions must be fulfilled for such title to be recognized: see *Calder v. Attorney-General of British Columbia*, *supra*, and *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518. In fact, aboriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land. It follows that aboriginal rights can be incidental to aboriginal title but need not be; these rights are severable from and can exist independently of aboriginal title. As I have already noted elsewhere, the source of these rights is the historic occupation and use of ancestral lands by the natives.

120. Aboriginal title can also be founded on treaties concluded between the natives and the competent government: see *Simon v. The Queen*, [1985] 2 S.C.R. 387, and *R. v. Horseman*, [1990] 1 S.C.R. 901. Where this occurs, the aboriginal rights crystallized in the treaty become treaty rights and their scope must be delineated by the terms of the agreement. The rights arising out of a treaty are immune from provincial legislation — even that enacted under s. 88 of the *Indian Act* — unless the treaty incorporates such legislation, as in *R. v. Badger*, [1996] 1 S.C.R. 771. A treaty, however, does not exhaust aboriginal rights; such rights continue to exist apart from the treaty,

provided that they are not substantially connected to the rights crystallized in the treaty or extinguished by its terms.

121. Finally, aboriginal right lands are those lands on which only specific aboriginal rights exist (e.g., the right to hunt for food, social and ceremonial purposes) because the occupation and use by the particular group of aboriginal people is too limited and, as a result, does not meet the criteria for the recognition, at common law, of aboriginal title. In these cases, the aboriginal rights on the land are restricted to residual portions of the aboriginal title — such as the rights to hunt, fish or trap — or to other matters not connected to land; they do not, therefore, entail the full *sui generis* proprietary right to occupy and use the land.
122. Both the Canadian Parliament and provincial legislatures can enact legislation, pursuant to their respective general legislative competence, that affect native activities on aboriginal right lands. As Cory J. puts it in *Nikal, supra* (at para. 92): "[t]he government must ultimately be able to determine and direct the way in which these rights [of the natives and of the rest of Canadian society] should interact". See also, *Calder v. Attorney-General of British Columbia, supra*, at pp. 328-29, *per* Judson J., and at p. 401, *per* Hall J; *Guerin, supra*, at pp. 377-78, *Sparrow, supra*, at p. 1103, and *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 109.
123. These types of lands are not static or mutually exclusive. A piece of land can be conceived of as aboriginal title land and later become reserve land for the exclusive use of Indians; such land is then, reserve land on aboriginal title land. Further, aboriginal title land can become aboriginal right land because the occupation and use by the particular group of aboriginal people has narrowed to specific activities. The bottom line

is this: on every type of land described above, to a larger or smaller degree, aboriginal rights can arise and be recognized.

124. This being said, the instant case is confined to the recognition of an aboriginal right and does not involve by-laws on a reserve or claims of aboriginal title, nor does it relate to any treaty rights. The contention of the appellant is simply that the Sto:lo, of which she is one, possess an aboriginal right to fish — arising out of the historic occupation and use of their lands — which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes.

125. Prior to 1982, the doctrine of aboriginal rights was founded only on the common law and aboriginal rights could be extinguished by treaty, conquest and legislation as they were "dependent upon the good will of the Sovereign": see *St. Catherine's Milling and Lumber Co. v. The Queen*, *supra*, at p. 54, also *R. v. George*, [1966] S.C.R. 267, *Sikyea v. The Queen*, [1964] S.C.R. 642, and *Calder v. Attorney-General of British Columbia*, *supra*; see also, regarding the mode of extinguishing aboriginal rights, Kenneth Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of Calder" (1973), 51 *Can. Bar Rev.* 450.

126. Since then, however, s. 35(1) of the *Constitution Act, 1982* provides constitutional protection to aboriginal interests arising out of the native historic occupation and use of ancestral lands through the recognition and affirmation of "existing aboriginal and treaty rights of the aboriginal peoples of Canada": see Brian Slattery, "First Nations and the Constitution: A Question of Trust" (1992), 71 *Can. Bar Rev.* 261, at p. 263. Consequently, as I shall examine in some detail, the general

legislative authority over native activities is now limited and legislation which infringes upon existing aboriginal or treaty rights must be justified.

127. The general analytical framework developed under s. 35(1) will now be outlined before proceeding with the interpretation of the nature and extent of constitutionally protected aboriginal rights.

II. Section 35(1) of the Constitution Act, 1982 and the Sparrow Test

128. The analysis of the issue before us must start with s. 35(1) of the *Constitution Act, 1982*, found in Part II of that Act entitled "Rights of the Aboriginal Peoples of Canada", which provides:

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

129. The scope of s. 35(1) was discussed in *Sparrow, supra*. In that case, a member of the Musqueam Band, Ronald Edward Sparrow, was charged under s. 61(1) of the *Fisheries Act* with the offence of fishing with a drift-net in excess of the 25-fathom depth permitted by the terms of the band's Indian food fishing licence. The fishing occurred in a narrow channel of the Fraser River, a few miles upstream from Vancouver International Airport. Sparrow readily admitted having fished as alleged, but he contended that, because the Musqueam had an aboriginal right to fish, the attempt to regulate net length was inconsistent with s. 35(1) and was thus rendered of no force or effect by s. 52 of the *Constitution Act, 1982*.

130. I pause here to note that in *Sparrow*, Dickson C.J. and La Forest J. stressed the importance of taking a case-by-case approach to the interpretation of the rights involved in s. 35(1). They stated at p. 1111:

We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

See also *Kruger v. The Queen*, [1978] 1 S.C.R. 104, and *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.).

131. The Court, nevertheless, developed a basic analytical framework for constitutional claims of aboriginal right protection under s. 35(1). The test set out in *Sparrow* includes three steps, namely: (1) the assessment and definition of an existing aboriginal right (including extinguishment); (2) the establishment of a *prima facie* infringement of such right; and (3) the justification of the infringement. I shall briefly discuss each of them in turn.

132. The rights of aboriginal people constitutionally protected in s. 35(1) are those in existence at the time of the enactment of the *Constitution Act, 1982*. However, the manner in which they were regulated in 1982 is irrelevant to the definition of aboriginal rights because they must be assessed in their contemporary form; aboriginal rights are not frozen in time: see *Sparrow*, at p. 1093; see also Brian Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights", *supra*, Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *Sup. Ct. L. Rev.* 255, and William Pentney, "The Rights of the Aboriginal Peoples of Canada in the

Constitution Act, 1982, Part II — Section 35: The Substantive Guarantee" (1988), 22 U.B.C. L. Rev. 207. The onus is on the claimant to prove that he or she benefits from an existing aboriginal right. I will return later to this first step to elaborate on the interpretation of the nature and extent of aboriginal rights.

133. Also, the Crown could extinguish aboriginal rights by legislation prior to 1982, but its intention to do so had to be clear and plain. Therefore, the regulation of an aboriginal activity does not amount to its extinguishment (*Sparrow*, at p. 1097) and legislation necessarily inconsistent with the continued enjoyment of aboriginal rights is not sufficient to meet the test. The "clear and plain" hurdle for extinguishment is, as a result, quite high: see *Simon, supra*. The onus of proving extinguishment is on the party alleging it, that is, the Crown.

134. As regards the second step of the *Sparrow* test, when an existing aboriginal right has been established, the claimant must demonstrate that the impugned legislation constitutes a *prima facie* infringement of the right. Put another way, the question becomes whether the legislative provision under scrutiny is in conflict with the recognized aboriginal right, either because of its object or its effects. In *Sparrow*, Dickson C.J. and La Forest J. provided the following guidelines, at p. 1112, regarding infringement:

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We

wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

135. Thirdly, after the claimant has demonstrated that the legislation in question constitutes a *prima facie* infringement of his or her aboriginal right, the onus then shifts again to the Crown to prove that the infringement is justified. Courts will be asked, at this stage, to balance and reconcile the conflicting interests of native people, on the one hand, and of the rest of Canadian society, on the other. Specifically, this last step of the *Sparrow* test requires the assessment of both the validity of the objective of the legislation and the reasonableness of the limitation.

136. As to the objective, there is no doubt that a legislative scheme aimed at conservation and management of natural resources will suffice (*Sparrow*, at p. 1113). Other legislative objectives found to be substantial and compelling, such as the security of the public, can also be valid, depending on the circumstances of each case. The notion of public interest, however, is too vague and broad to constitute a valid objective to justify the infringement of an aboriginal right (*Sparrow*, at p. 1113).

137. With respect to the reasonableness of the limits upon the existing aboriginal right, the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people have to be contemplated. At a minimum, this fiduciary duty commands that some priority be afforded to the natives in the regulatory scheme governing the activity recognized as aboriginal right: see *Sparrow*, at pp. 1115-17, also *Jack v. The Queen*, [1980] 1 S.C.R. 294, and *R. v. Denny* (1990), 55 C.C.C. (3d) 322 (N.S.C.A.).

138. A number of other elements may have to be weighed in the assessment of justification. In *Sparrow*, Dickson C.J. and La Forest J. drew up the following non-exhaustive list of factors relating to justification at p. 1119:

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

139. In the case at bar, the issue relates only to the interpretation of the nature and extent of the Sto:lo's aboriginal right to fish and whether it includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes; i.e., the very first step of the *Sparrow* test, dealing with the assessment and definition of aboriginal rights. If it becomes necessary to proceed to extinguishment or to the questions of *prima facie* infringement and justification, the parties agreed that the case should be remitted to trial, as the summary appeal judge did, given that there is insufficient evidence to enable this Court to decide those issues.

140. In order to determine whether the Sto:lo benefit from an existing aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, it is necessary to elaborate on the appropriate approach to interpreting the nature and extent of aboriginal rights in general. That I now propose to do.

III. Interpretation of Aboriginal Rights

141. While I am in general agreement with the Chief Justice on the fundamental interpretative canons relating to aboriginal law which he discussed, the application of those rules to his definition of aboriginal rights under s. 35(1) of the *Constitution Act, 1982* does not, in my view, sufficiently reflect them. For the sake of convenience, I will summarize them here.
142. First, as with all constitutional provisions, s. 35(1) must be given a generous, large and liberal interpretation in order to give full effect to its purposes: see, regarding the *Constitution Act, 1867*, *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), *Attorney General of Quebec v. Blaikie (No. 1)*, [1979] 2 S.C.R. 1016, *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; in the context of the *Charter*, *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, *R. v. Keegstra*, [1990] 3 S.C.R. 697; and, particular to aboriginal rights in s. 35(1), *Sparrow*, *supra*, at p. 1108, where Dickson C.J. and La Forest J. wrote that "s. 35(1) is a solemn commitment that must be given meaningful content".
143. Further, the very nature of ancient aboriginal records, such as treaties, agreements with the Crown and other documentary evidence, commands a generous interpretation, and uncertainties, ambiguities or doubts should be resolved in favour of the natives: see *R. v. Sutherland*, [1980] 2 S.C.R. 451, *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282, *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, *Simon*, *supra*, *Horseman*, *supra*, *Sioui*, *supra*, *Sparrow*, *supra*, and *Mitchell*, *supra*; see also William

Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II -- Section 35: The Substantive Guarantee", *supra*, at p. 255.

144. Second, aboriginal rights must be construed in light of the special trust relationship and the responsibility of the Crown *vis-à-vis* aboriginal people: see *Taylor, supra*, and *Guerin, supra*. This fiduciary obligation attaches because of the historic power and responsibility assumed by the Crown over aboriginal people. In *Sparrow, supra*, the Court succinctly captured this obligation at p. 1108:

That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aborigines is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Emphasis added.]

See also Alain Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones" (1995), 36 *C. de D.* 669.

145. Finally, but most importantly, aboriginal rights protected under s. 35(1) have to be interpreted in the context of the history and culture of the specific aboriginal society and in a manner that gives the rights meaning to the natives. In that respect, the following remarks of Dickson C.J. and La Forest J. in *Sparrow*, at p. 1112, are particularly apposite:

While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. [Emphasis added.]

Unlike the Chief Justice, I do not think it appropriate to qualify this proposition by saying that the perspective of the common law matters as much as the perspective of the natives when defining aboriginal rights.

146. These principles of interpretation are important to keep in mind when determining the proper approach to the question of the nature and extent of aboriginal rights protected in s. 35(1) of the *Constitution Act, 1982*, to which I now turn.

147. The starting point in contemplating whether an aboriginal practice, tradition or custom warrants constitutional protection under s. 35(1) was hinted at by this Court in *Sparrow, supra*. Dickson C.J. and La Forest J. made this observation, at p. 1099, regarding the role of the fishery in Musqueam life:

The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture.[Emphasis added.]

148. The crux of the debate at the British Columbia Court of Appeal in the present appeal, and in most of the appeals heard contemporaneously, lies in the application of this standard of "integral part of their distinctive culture" to defining the nature and extent of the particular aboriginal right claimed to be protected in s. 35(1) of the *Constitution Act, 1982*. This broad statement of what characterizes aboriginal rights must be elaborated and made more specific so that it becomes a defining criterion. In particular, two aspects must be examined in detail, namely (1) what are the necessary characteristics of aboriginal rights, and (2) what is the period of time relevant to the assessment of such characteristics.

Characteristics of aboriginal rights

149. The issue of the nature and extent of aboriginal rights protected under s. 35(1) is fundamentally about characterization. Which aboriginal practices, traditions and customs warrant constitutional protection? It appears from the jurisprudence developed in the courts below (see the reasons of the British Columbia Court of Appeal and the decision in *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470) that two approaches to this difficult question have emerged. The first one, which the Chief Justice endorses, focuses on the particular aboriginal practice, tradition or custom. The second approach, more generic, describes aboriginal rights in a fairly high level of abstraction. For the reasons that follow, I favour the latter approach.

150. The approach based on aboriginal practices, traditions and customs considers only discrete parts of aboriginal culture, separating them from the general culture in which they are rooted. The analysis turns on the manifestations of the "integral part of [aboriginals'] distinctive culture" introduced in *Sparrow, supra*, at p. 1099. Further, on this view, what makes aboriginal culture distinctive is that which differentiates it from non-aboriginal culture. The majority of the Court of Appeal adopted this position, as the following passage from Macfarlane J.A.'s reasons reveals (at para. 37):

What was happening in the aboriginal society before contact with the Europeans is relevant in identifying the unique traditions of the aborigines which deserved protection by the common law. It is also necessary to separate those traditions from practices which are not a unique part of Indian culture, but which are common to Indian and non-Indian alike. [Emphasis added.]

Accordingly, if an activity is integral to a culture other than that of aboriginal people, it cannot be part of aboriginal people's distinctive culture. This approach should not be adopted for the following reasons.

151. First, on the pure terminology angle of the question, this position misconstrues the words "distinctive culture", used in the above excerpt of *Sparrow*, by interpreting it as if it meant "distinct culture". These two expressions connote quite different meanings and must not be confused. The word "distinctive" is defined in *The Concise Oxford Dictionary* (9th ed. 1995) as "distinguishing, characteristic" where the word "distinct" is described as **a** (often foll. by *from*) not identical; separate; individual. **b** different in kind or quality; unlike". While "distinct" mandates comparison and evaluation from a separate vantage point, "distinctive" requires the object to be observed on its own. While describing an object's "distinctive" qualities may entail describing how the object is different from others (i.e., "distinguishing"), there is nothing in the term that requires it to be plainly different. In fact, all that "distinctive culture" requires is the characterization of aboriginal culture, not its differentiation from non-aboriginal cultures.

152. While the Chief Justice recognizes the difference between "distinctive" and "distinct", he applies it only as regards the manifestations of the distinctive aboriginal culture, i.e., the individualized practices, traditions and customs of a particular group of aboriginal people. As I will examine in more detail in a moment, the "distinctive" aboriginal culture has, in my view, a generic and much broader application.

153. Second, holding that what is common to both aboriginal and non-aboriginal cultures must necessarily be non-aboriginal and thus not aboriginal for the purpose of

s. 35(1) is, to say the least, an overly majoritarian approach. This is diametrically opposed to the view propounded in *Sparrow, supra*, that the interpretation of aboriginal rights be informed by the fiduciary responsibility of the Crown *vis-à-vis* aboriginal people as well as by the aboriginal perspective on the meaning of the rights. Such considerations command that practices, traditions and customs which characterize aboriginal societies as the original occupiers and users of Canadian lands be protected, despite their common features with non-aboriginal societies.

154. Finally, an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away. Such a strict construction of constitutionally protected aboriginal rights flies in the face of the generous, large and liberal interpretation of s. 35(1) of the *Constitution Act, 1982* advocated in *Sparrow*.

155. A better approach, in my view, is to examine the question of the nature and extent of aboriginal rights from a certain level of abstraction and generality.

156. A generic approach to defining the nature and extent of aboriginal rights starts from the proposition that the notion of "integral part of [aboriginals'] distinctive culture" constitutes a general statement regarding the purpose of s. 35(1). Instead of focusing on a particular practice, tradition or custom, this conception refers to a more abstract and profound concept. In fact, similar to the values enshrined in the *Canadian Charter of Rights and Freedoms*, aboriginal rights protected under s. 35(1) should be contemplated on a multi-layered or multi-faceted basis: see Andrea Bowker, "*Sparrow's*

Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995), 53 *Toronto Fac. L. Rev.* 1, at pp. 28-29.

157. Accordingly, s. 35(1) should be viewed as protecting, not a catalogue of individualized practices, traditions or customs, as the Chief Justice does, but the "distinctive culture" of which aboriginal activities are manifestations. Simply put, the emphasis would be on the significance of these activities to natives rather than on the activities themselves.

158. Although I do not claim to examine the question in terms of liberal enlightenment, an analogy with freedom of expression guaranteed in s. 2(b) of the *Charter* will illustrate this position. Section 2(b) of the *Charter* does not refer to an explicit catalogue of protected expressive activities, such as political speech, commercial expression or picketing, but involves rather the protection of the ability to express: see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, *Keegstra, supra*; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199. In other words, the constitutional guarantee of freedom of expression is conceptualized, not as protecting the possible manifestations of expression, but as preserving the fundamental purposes for which one may express oneself, i.e., the rationales supporting freedom of expression.

159. Similarly, aboriginal practices, traditions and customs protected under s. 35(1) should be characterized by referring to the fundamental purposes for which aboriginal rights were entrenched in the *Constitution Act, 1982*. As I have already noted

elsewhere, s. 35(1) constitutionalizes the common law doctrine of aboriginal rights which recognizes aboriginal interests arising out of the historic occupation and use of ancestral lands by natives. This, in my view, is how the notion of "integral part of a distinctive aboriginal culture" should be contemplated. The "distinctive aboriginal culture" must be taken to refer to the reality that, despite British sovereignty, aboriginal people were the original organized society occupying and using Canadian lands: *Calder v. Attorney-General of British Columbia*, *supra*, at p. 328, *per* Judson J., and *Guerin*, *supra*, at p. 379, *per* Dickson J. (as he then was).

160. This rationale should inform the characterization of aboriginal activities which warrant constitutional protection as aboriginal rights. The practices, traditions and customs protected under s. 35(1) should be those that are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. See *Delgamuukw v. British Columbia*, *supra*, at pp. 646-47, *per* Lambert J.A., dissenting; see also Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*", *supra*, at p. 505, and Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II -- Section 35: The Substantive Guarantee", *supra*, at pp. 258-59.

161. Put another way, the aboriginal practices, traditions and customs which form the core of the lives of native people and which provide them with a way and means of living as an organized society will fall within the scope of the constitutional protection under s. 35(1). This was described by Lambert J.A., dissenting at the Court of Appeal, as the "social" form of description of aboriginal rights (see para. 140), a formulation the Chief Justice rejects. Lambert J.A. distinguished these aboriginal activities from the practices or habits which were merely incidental to the lives of a particular group of

aboriginal people and, as such, would not warrant protection under s. 35(1) of the *Constitution Act, 1982*. I agree with this description which, although flexible, provides a defining criterion for the interpretation of the nature and extent of aboriginal rights and, contrary to what my colleague McLachlin J. suggests, does not suffer from vagueness or overbreadth, as defined by this Court (see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, and *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031).

162. Further comments regarding this approach are in order. The criterion of "distinctive aboriginal culture" should not be limited to those activities that only aboriginal people have undertaken or that non-aboriginal people have not. Rather, all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies should be viewed as deserving the protection of s. 35(1). Further, a generous, large and liberal construction should be given to these activities in order to give full effect to the constitutional recognition of the distinctiveness of aboriginal culture. Finally, it is almost trite to say that what constitutes a practice, tradition or custom distinctive to native culture and society must be examined through the eyes of aboriginal people, not through those of the non-native majority or the distorting lens of existing regulations.
163. It is necessary to discuss at this point the period of time relevant to the assessment of the practices, traditions and customs which form part of the distinctive culture of a particular group of aboriginal people.

Period of time relevant to aboriginal rights

164. The question of the period of time relevant to the recognition of aboriginal rights relates to whether the practice, tradition or custom has to exist prior to a specific date, and also to the length of time necessary for an aboriginal activity to be recognized as a right under s. 35(1). Here, again, two basic approaches have been advocated in the courts below (see the decisions of the British Columbia Court of Appeal in this case, and in *Delgamuukw v. British Columbia, supra*), namely the "frozen right" approach and the "dynamic right" approach. An examination of each will show that the latter view is to be preferred.
165. The "frozen right" approach would recognize practices, traditions and customs — forming an integral part of a distinctive aboriginal culture — which have long been in existence at the time of British sovereignty: see Slattery, "Understanding Aboriginal Rights", *supra*, at pp. 758-59. This requires the aboriginal right claimant to prove two elements: (1) that the aboriginal activity has continuously existed for "time immemorial", and (2) that it predated the assertion of sovereignty. Defining existing aboriginal rights by referring to pre-contact or pre-sovereignty practices, traditions and customs implies that aboriginal culture was crystallized in some sort of "aboriginal time" prior to the arrival of Europeans. Contrary to the Chief Justice, I do not believe that this approach should be adopted, for the following reasons.
166. First, relying on the proclamation of sovereignty by the British imperial power as the "cut-off" for the development of aboriginal practices, traditions and customs overstates the impact of European influence on aboriginal communities: see Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal", *supra*, at p. 22. From the native people's perspective, the coming of the settlers constitutes one of many factors, though a very significant one, involved in their continuing societal change

and evolution. Taking British sovereignty as the turning point in aboriginal culture assumes that everything that the natives did after that date was not sufficiently significant and fundamental to their culture and social organization. This is no doubt contrary to the perspective of aboriginal people as to the significance of European arrival on their rights.

167. Second, crystallizing aboriginal practices, traditions and customs at the time of British sovereignty creates an arbitrary date for assessing existing aboriginal rights: see Sébastien Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*" (1991), 36 *McGill L.J.* 1382, at pp. 1403-4. In effect, how would one determine the crucial date of sovereignty for the purpose of s. 35(1)? Is it the very first European contacts with native societies, at the time of the Cabot, Verrazzano and Cartier voyages? Is it at a later date, when permanent European settlements were founded in the early seventeenth century? In British Columbia, did sovereignty occur in 1846 — the year in which the *Oregon Boundary Treaty, 1846* was concluded — as held by the Court of Appeal for the purposes of this litigation? No matter how the deciding date is agreed upon, it will not be consistent with the aboriginal view regarding the effect of the coming of Europeans.

168. As a third point, in terms of proof, the "frozen right" approach imposes a heavy and unfair burden on the natives: the claimant of an aboriginal right must prove that the aboriginal practice, tradition or custom is not only sufficiently significant and fundamental to the culture and social organization of the aboriginal group, but has also been continuously in existence, but as the Chief Justice stresses, even if interrupted for a certain length of time, for an indeterminate long period of time prior to British sovereignty. This test embodies inappropriate and unprovable assumptions about

aboriginal culture and society. It forces the claimant to embark upon a search for a pristine aboriginal society and to prove the continuous existence of the activity for "time immemorial" before the arrival of Europeans. This, to say the least, constitutes a harsh burden of proof, which the relaxation of evidentiary standards suggested by the Chief Justice is insufficient to attenuate. In fact, it is contrary to the interpretative approach propounded by this Court in *Sparrow, supra*, which commands a purposive, liberal and favourable construction of aboriginal rights.

169. Moreover, when examining the wording of the constitutional provisions regarding aboriginal rights, it appears that the protection should not be limited to pre-contact or pre-sovereignty practices, traditions and customs. Section 35(2) of the *Constitution Act, 1982* provides that the “‘aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada” (emphasis added). Obviously, there were no Métis people prior to contact with Europeans as the Métis are the result of intermarriage between natives and Europeans: see Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II -- Section 35: The Substantive Guarantee", *supra*, at pp. 272-74. Section 35(2) makes it clear that aboriginal rights are indeed guaranteed to Métis people. As a result, according to the text of the Constitution of Canada, it must be possible for aboriginal rights to arise after British sovereignty, so that Métis people can benefit from the constitutional protection of s. 35(1). The case-by-case application of s. 35(2) of the *Constitution Act, 1982* proposed by the Chief Justice does not address the issue of the interpretation of s. 35(2).

170. Finally, the "frozen right" approach is inconsistent with the position taken by this Court in *Sparrow, supra*, which refused to define existing aboriginal rights so as

to incorporate the manner in which they were regulated in 1982. The following passage from Dickson C.J. and La Forest J.'s reasons makes this point (at p. 1093):

Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights," *supra*, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected. [Emphasis added.]

This broad proposition should be taken to relate, not only to the meaning of the word "existing" found in s. 35(1), but also to the more fundamental question of the time at which the content of the rights themselves is determined. Accordingly, the interpretation of the nature and extent of aboriginal rights must "permit their evolution over time".

171. The foregoing discussion shows that the "frozen right" approach to defining aboriginal rights as to their nature and extent involves several important restrictions and disadvantages. A better position, in my view, would be evolutive in character and give weight to the perspective of aboriginal people. As the following analysis will demonstrate, a "dynamic right" approach to the question will achieve these objectives.

172. The "dynamic right" approach to interpreting the nature and extent of aboriginal rights starts from the proposition that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time" (*Sparrow*, at p. 1093). According to this view, aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live.

This generous, large and liberal interpretation of aboriginal rights protected under s. 35(1) would ensure their continued vitality.

173. Distinctive aboriginal culture would not be frozen as of any particular time but would evolve so that aboriginal practices, traditions and customs maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world. Instead of considering it as the turning point in aboriginal culture, British sovereignty would be regarded as having recognized and affirmed practices, traditions and customs which are sufficiently significant and fundamental to the culture and social organization of aboriginal people. This idea relates to the "doctrine of continuity", founded in British imperial constitutional law, to the effect that when new territory is acquired the *lex loci* of organized societies, here the aboriginal societies, continues at common law.

174. See, on the doctrine of continuity in general, Sir William Blackstone, *Commentaries on the Laws of England* (1769), vol. 2, at p. 51, Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (1820), at p. 119, and Sir William Searle Holdsworth, *A History of English Law* (1938), vol. 11, at pp. 3-274. See also, in the context of Canadian aboriginal law, Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (1983), Kent McNeil, *Common Law Aboriginal Title* (1989), Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350, Lafontaine, "La coexistence de l'obligation de fiduciaire de la Couronne et du droit à l'autonomie gouvernementale des peuples autochtones", *supra*, at p. 719; and Émond, "Le sable dans l'engrenage du droit inhérent des autochtones à l'autonomie gouvernementale", *supra*, at p. 96.

175. Consequently, in order for an aboriginal right to be recognized and affirmed under s. 35(1), it is not imperative for the practices, traditions and customs to have existed prior to British sovereignty and, *a fortiori*, prior to European contact, which is the cut-off date favoured by the Chief Justice. Rather, the determining factor should only be that the aboriginal activity has formed an integral part of a distinctive aboriginal culture — i.e., to have been sufficiently significant and fundamental to the culture and social organization of the aboriginal group — for a substantial continuous period of time as defined above.

176. Such a temporal requirement is less stringent than the "time immemorial" criterion developed in the context of aboriginal title: see *Calder v. Attorney-General of British Columbia, supra*; and, *Baker Lake v. Minister of Indian Affairs and Northern Development, supra*; see also Grammond, "La protection constitutionnelle des droits ancestraux des peuples autochtones et l'arrêt *Sparrow*", *supra*, at p. 1394. This qualification of the time immemorial test finds support in the *obiter dicta* of this Court in *Sparrow, supra*, at p. 1095, regarding the Musqueam Band's aboriginal right to fish:

It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it. [Emphasis added.]

177. The substantial continuous period of time for which the aboriginal practice, tradition or custom must have been engaged in will depend on the circumstances and on the nature of the aboriginal right claimed. However, as proposed by Professor Slattery, in "Understanding Aboriginal Rights", *supra*, at p. 758, in the context of aboriginal title,

"in most cases a period of some twenty to fifty years would seem adequate". This, in my view, should constitute a reference period to determine whether an aboriginal activity has been in existence for long enough to warrant constitutional protection under s. 35(1).

178. In short, the substantial continuous period of time necessary to the recognition of aboriginal rights should be assessed based on (1) the type of aboriginal practices, traditions and customs, (2) the particular aboriginal culture and society, and (3) the reference period of 20 to 50 years. Such a time frame does not minimize the fact that in order to benefit from s. 35(1) protection, aboriginal activities must still form the core of the lives of native people; this surely cannot be characterized as an extreme position, as my colleague Justice McLachlin affirms.

179. The most appreciable advantage of the "dynamic right" approach to defining the nature and extent of aboriginal rights is the proper consideration given to the perspective of aboriginal people on the meaning of their existing rights. It recognizes that distinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic that has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society. This, in the aboriginal people's perspective, is no doubt the true sense of the constitutional protection provided to aboriginal rights through s. 35(1) of the *Constitution Act, 1982*.

Summary

180. In the end, the proposed general guidelines for the interpretation of the nature and extent of aboriginal rights constitutionally protected under s. 35(1) can be summarized as follows. The characterization of aboriginal rights should refer to the

rationale of the doctrine of aboriginal rights, i.e., the historic occupation and use of ancestral lands by the natives. Accordingly, aboriginal practices, traditions and customs would be recognized and affirmed under s. 35(1) of the *Constitution Act, 1982* if they are sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people. Furthermore, the period of time relevant to the assessment of aboriginal activities should not involve a specific date, such as British sovereignty, which would crystallize aboriginal's distinctive culture in time. Rather, as aboriginal practices, traditions and customs change and evolve, they will be protected in s. 35(1) provided that they have formed an integral part of the distinctive aboriginal culture for a substantial continuous period of time.

181. This approach being set out, I will turn to the specific issue raised by this case, namely whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Before examining the distinctive aboriginal culture of the Sto:lo people in that respect, a brief review of the case law on aboriginal trade activities, which shows that aboriginal practices, traditions and customs can have different purposes, will be helpful to delineate the issue at bar.

IV. Case Law on Aboriginal Trade Activities

182. At the British Columbia Court of Appeal, the majority framed the issue as being whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the fish. Macfarlane J.A. put the question that way because "[i]n essence, [this case] is about an asserted Indian right to sell fish allocated for food purposes on a commercial basis" (see para. 30). I leave aside for the moment the delineation of the aboriginal right claimed in this case in order, first, to examine the case

law on treaty and aboriginal rights regarding trade to demonstrate that there is an important distinction to be drawn between, on the one hand, the sale, trade and barter of fish for livelihood, support and sustenance purposes and, on the other, the sale, trade and barter of fish for purely commercial purposes.

183. This Court, in *Sparrow*, *supra*, proposed to leave to another day the discussion of commercial aspects of the right to fish, since (at p. 1101) "the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes" (emphasis added). Accordingly, Dickson C.J. and La Forest J. confined their reasons to the aboriginal right to fish for food, social and ceremonial purposes. In so doing, however, it appears that they implicitly distinguished between (1) the right to fish for food, social and ceremonial purposes (which was recognized for the Musqueam Band), (2) the right to fish for livelihood, support and sustenance purposes, and (3) the right to fish for purely commercial purposes (see *Sparrow*, at pp. 1100-1101). The differentiation between the last two classes of purposes, which is of key interest here, was discussed and elaborated upon by Wilson J. in *Horseman*, *supra*.

184. In *Horseman*, this Court examined the scope of the Horse Lakes Indian Band's right to hunt under *Treaty No. 8*, 1899, as amended by the *Natural Resources Transfer Agreement*, 1930 (Alberta) ("NRTA"). In that case, the appellant, Bert Horseman, was charged with the offence of unlawfully "trafficking" in wildlife, contrary to s. 42 of the *Wildlife Act*, R.S.A. 1980, c. W-9, which was defined as "any single act of selling, offering for sale, buying, bartering, soliciting or trading". The appellant had killed a grizzly bear in self-defence, while legally hunting moose for food, and he sold the bear hide because he was in need of money to support his family. Horseman argued

that the *Wildlife Act* did not apply to him because he was within his *Treaty No. 8* rights when he sold the grizzly hide.

185. Cory J. (Lamer, La Forest and Gonthier JJ. concurring), for the majority, held that the *Treaty No. 8* right to hunt generally has been circumscribed by the *NRTA* to the right to hunt for "food" only. He made it clear, however, that before the *NRTA* (1930), the Horse Lakes people had the right to hunt for commercial purposes under *Treaty No. 8* (at pp. 928-29):

The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life.

...

I am in complete agreement with the finding of the trial judge that the original Treaty right clearly included hunting for purposes of commerce. The next question that must be resolved is whether or not that right was in any way limited or affected by the Transfer Agreement of 1930. [Emphasis added.]

This passage recognizes that the practices, traditions and customs of the Horse Lakes people were not frozen at the time of British sovereignty and that when *Treaty No. 8* was concluded in 1899, their activities had evolved so that commercial hunting and fishing formed an "integral part" of their culture and society.

186. Furthermore, Cory J. upheld the findings of the courts below that the sale of the grizzly hide constituted a commercial hunting activity which, as a consequence, fell outside the ambit of the treaty rights to hunt. He wrote at p. 936:

It has been seen that the Treaty No. 8 hunting rights have been limited by the provisions of the 1930 Transfer Agreement to the right to hunt for food, that is to say, for sustenance for the individual Indian or the Indian's family. In the case at bar the sale of the bear hide was part of a "multi-stage process" whereby the product was sold to obtain funds for purposes which might include purchasing food for nourishment. The courts below correctly found that the sale of the bear hide constituted a hunting activity that had ceased to be that of hunting "for food" but rather was an act of commerce. As a result it was no longer a right protected by Treaty No. 8, as amended by the 1930 Transfer Agreement. [Emphasis added.]

Cory J. concluded that the *Wildlife Act* applied and found the appellant guilty of unlawfully trafficking in wildlife.

187. Wilson J. (Dickson C.J. and L'Heureux-Dubé J. concurring), dissenting, was of the view that, from an aboriginal perspective, a simple dichotomy between hunting for domestic use and hunting for commercial purposes should not be determinative of the treaty rights. Rather, *Treaty No. 8* and the *NRTA* should be interpreted so as to preserve the Crown's commitment to respecting the lifestyle of the Horse Lakes people and the way in which they had traditionally pursued their livelihood.

188. Contrary to Cory J., Wilson J. held that the words "for food" in the *NRTA* did not have the effect of placing substantial limits on the range of hunting activities permitted under *Treaty No. 8*. After reviewing the decisions of this Court in *Frank v. The Queen*, [1978] 1 S.C.R. 95, and *Moosehunter, supra*, Wilson J. found that the treaty right to hunt "for food" amounted to a right to hunt for support and sustenance. She explained her view as follows, at p. 919:

And if we are to give para. 12 [of the *NRTA*] the "broad and liberal" construction called for in *Sutherland*, a construction that reflects the principle enunciated in *Nowegijick* and *Simon* that statutes relating to Indians must be given a "fair, large and liberal construction", then we should

be prepared to accept that the range of activity encompassed by the term "for food" extends to hunting for "support and subsistence", i.e. hunting not only for direct consumption but also hunting in order to exchange the product of the hunt for other items as was their wont, as opposed to purely commercial or sport hunting.

And, indeed, when one thinks of it this makes excellent sense. The whole emphasis of Treaty No. 8 was on the preservation of the Indian's traditional way of life. But this surely did not mean that the Indians were to be forever consigned to a diet of meat and fish and were to have no opportunity to share in the advances of modern civilization over the next one hundred years. Of course, the Indians' hunting and fishing rights were to be preserved and protected; the Indians could not have survived otherwise. But this cannot mean that in 1990 they are to be precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children. Provided the purpose of their hunting is either to consume the meat or to exchange or sell it in order to support themselves and their families, I fail to see why this is precluded by any common sense interpretation of the words "for food". It will, of course, be a question of fact in each case whether a sale is made for purposes of sustenance or for purely commercial profit. [Emphasis added.]

Wilson J. concluded that the *Wildlife Act* could not forbid the activities which fall within the aboriginal traditional way of life and that are linked to the Horse Lakes people's support and sustenance. Consequently, she would have acquitted the appellant because he sold the grizzly hide to buy food for his family, not for commercial profit.

189. As far as this case is concerned, there are two points which stand out from the foregoing review of the reasons in *Horseman, supra*. First, the Horse Lakes people's original practices, traditions and customs regarding hunting were held to have evolved to include, at the time *Treaty No. 8* was concluded, the right to make some commercial use of the game. Second, and more importantly, when determining whether a treaty right exists (which no doubt extends to aboriginal rights), there should be a distinction drawn between, on the one side, activities relating to the support and sustenance of the natives and, on the other, ventures undertaken purely for commercial profit. Such a differentiation is far from being artificial, as McLachlin J. seems to suggest, and, in fact,

this distinction ought to be used in the context of s. 35(1) of the *Constitution Act, 1982* as in other contexts; in short, there are sales which do not qualify as commercial sales (see, for example, *Loi sur la protection du consommateur*, L.R.Q. 1977, c. P-40.1).

190. This differentiation was adopted by the Ontario Court (Prov. Div.) in *R. v. Jones* (1993), 14 O.R. (3d) 421. In that case, the defendants, members of the Chippewas of Nawash, were charged with the offence of taking more lake trout than permitted by the band's commercial fishing licence, *contrary to the Ontario Fishery Regulations, 1989*, authorized by the *Fisheries Act*. The defendants argued that the quota imposed by the Band's licence interfered with their protected aboriginal right or treaty right to engage in commercial fishing. After referring to both the reasons of Cory J. and of Wilson J. in *Horseman, supra*, Fairgrieve Prov. Ct. J. reached the following conclusions at pp. 440-41:

Consideration of the historical, anthropological and archival evidence leaves an existing aboriginal right to fish for commercial purposes that essentially coincides with the treaty right already stated: the Saugeen have a collective ancestral right to fish for sustenance purposes in their traditional fishing grounds. Apart from the waters adjacent to the two reserves and their unsurrendered islands, the aboriginal commercial fishing right is not exclusive, but does allow them to fish throughout their traditional fishing grounds on both sides of the peninsula. To use Ms. Blair's language [for the Defendants], the nature of the aboriginal right exercised is one directed "to a subsistence use of the resource as opposed to a commercially profitable enterprise". It is the band's continuing communal right to continue deriving "sustenance" from the fishery resource which has always been an essential part of the community's economic base. [Emphasis added.]

See also, *R. v. King*, [1993] O.J. No. 1794 (Ont. Ct. Prov. Div.), at para. 51, and *R. v. Fraser*, [1994] 3 C.N.L.R. 139 (B.C. Prov. Ct.), at p. 145, as well as the commentators Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?", *supra*,

at pp. 234-35, and Bowker, "Sparrow's Promise: Aboriginal Rights in the B.C. Court of Appeal", *supra*, at p. 8.

191. In sum, as *Sparrow*, *supra*, suggests, when assessing whether aboriginal practices, traditions and customs have been sufficiently significant and fundamental to the culture and social organization of a particular group of aboriginal people for a substantial continuing period of time, the purposes for which such activities are undertaken should be considered highly relevant. An aboriginal activity can form an integral part of the distinctive culture of a group of aboriginal people if it is done for certain purposes — e.g., for livelihood, support and sustenance purposes. However, the same activity could be considered not to be part of their distinctive aboriginal culture if it is done for other purposes — e.g., for purely commercial purposes. The Chief Justice fails to draw this distinction, which I believe to be highly relevant, although he agrees that the Court of Appeal mischaracterized the aboriginal right here claimed.

192. This contemplation of aboriginal or treaty rights based on the purpose of the activity is aimed at facilitating the delineation of the rights claimed as well as the identification and evaluation of the evidence presented in their support. However, as in *Horseman*, *supra*, to respect aboriginal perspective on the matter, the purposes for which aboriginal activities are undertaken cannot and should not be strictly compartmentalized. Rather, in my view, such purposes should be viewed on a spectrum, with aboriginal activities undertaken solely for food, at one extreme, those directed to obtaining purely commercial profit, at the other extreme, and activities relating to livelihood, support and sustenance, at the centre.

193. This being said, in this case, as I have already noted elsewhere, the British Columbia Court of Appeal framed the issue as being one of whether the Sto:lo possess an aboriginal right to fish which includes the right to make commercial use of the fish. To state the question in that fashion not only disregards the above distinction between the purposes for which fish can be sold, traded and bartered but also mischaracterizes the facts of this case, misconceives the contentions of the appellant and overlooks the legislative provision here under constitutional challenge.

194. First, the facts giving rise to this case do not support the Court of Appeal's framing of the issue in terms of commercial fishing. The appellant, Dorothy Van der Peet, was charged with the offence of selling salmon which were legally caught by her common law spouse and his brother. The appellant sold 10 salmon. There is no evidence as to the purposes of the sale or as to what the money was going to be used for. It is clear, however, that the offending transaction proven by the Crown is not part of a commercial venture, nor does it constitute an act directed at profit. It would be different if the Crown had shown, for instance, that the appellant sold 10 salmon every day for a year or that she was selling fish to provide for commercial profit. This is not, however, the scenario presented to us and, as the facts stand on the record, it is reasonable to infer from them that the appellant sold the 10 salmon, not for profit, but for the support and sustenance of herself and her family.

195. Furthermore, the appellant did not argue in the courts below or before this Court that the Sto:lo possess an aboriginal right to fish for commercial purposes. The submissions were only to the effect that the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for their livelihood, support and sustenance. In fact, before this Court, the appellant relied on the dissenting opinion of Lambert J.A., at the

Court of Appeal, who stated (at para. 150) that the Sto:lo had the right to "catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood" (italics omitted, underlining added). It is well settled that in framing the issue in a case courts cannot overlook the contentions of the parties; in the case at bar, the appellant did not seek the recognition and affirmation of an aboriginal right to fish for commercial purposes.

196. Finally, the legislative provision under constitutional challenge is not only aimed at commercial fishing, but also forbids both commercial and non-commercial sale, trade and barter of fish. For convenience, here is again s. 27(5) of the *British Columbia Fishery (General) Regulations*:

27. . . .

(5) No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence. [Emphasis added.]

The scope of s. 27(5) encompasses any sale, trade or barter of fish caught under an Indian food fish licence. If the prohibition were directed at the sale, trade and barter of fish for commercial purposes, the question of the validity of the Regulations would raise a different issue, one which does not arise on the facts of this case since an aboriginal right to fish commercially is not claimed here. Section 27(5) prohibits the sale, trade and barter of fish for livelihood, support and sustenance, and we must determine whether, as it stands, this provision complies with the constitutional protection afforded to aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

197. An aboriginal activity does not need to be undertaken for livelihood, support and sustenance purposes to benefit from s. 35(1) protection. In other words, the above distinction based on the purposes of aboriginal activities does not impose an additional burden on the claimant of an aboriginal right. It may be that, for a particular group of aboriginal people, the practices, traditions and customs relating to some commercial activities meet the test for the recognition of an aboriginal right, i.e., to be sufficiently significant and fundamental to the culture and social organization for a substantial continuing period of time. This will have to be determined on the specific facts giving rise to each case, as proven by the Crown, in view of the particular aboriginal culture and the evidence supporting the recognition of such right. In fact, the consideration of aboriginal activities based on their purposes is simply aimed at facilitating the delineation of the aboriginal rights claimed as well as the identification and evaluation of the evidence presented in support of the rights.

198. In the instant case, this Court is only required to decide whether the Sto:lo's right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes, and not whether it includes the right to make commercial use of the fish. In that respect, it is necessary to review the evidence to determine whether such activities have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time so as to give rise to an aboriginal right. That is what I now propose to do.

V. The Case

199. The question here is whether the particular group of aboriginal people, the Sto:lo Band, of which the appellant is a member, has engaged in the sale, trade and barter

of fish for livelihood, support and sustenance purposes, in a manner sufficiently significant and fundamental to their culture and social organization, for a substantial continuous period of time, entitling them to benefit from a constitutionally protected aboriginal right to that extent.

200. At trial, after having examined the historical evidence presented by the parties, Scarlett Prov. Ct. J. arrived at the following conclusions (at p. 160):

This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This court accepts the evidence of Dr. Stryd and John Dewhurst [sic] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.

Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic. This court concludes on the evidence, therefore, that the Sto:lo aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish. [Emphasis added.]

201. I agree with the Chief Justice that it is well established, both in criminal and civil contexts, that an appellate court will not disturb the findings of fact made by a trial judge in the absence of "some palpable and overriding error which affected his [or her] assessment of the facts" (emphasis added): see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at p. 808; see also *Beaudoin-Daigneault v. Richard*, [1984] 1 S.C.R. 2, *Lensen v. Lensen*, [1987] 2 S.C.R. 672, *Laurentide Motels Ltd. v. Beauport (City)*, [1989]

1 S.C.R. 705, *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, *R. v. Burns*, [1994] 1 S.C.R. 656, *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, and *Schwartz v. Canada*, [1996] 1 S.C.R. 254.

202. At the British Columbia Supreme Court, Selbie J. was of the view that the trial judge committed such an error and, as a consequence, substituted his own findings of fact (at paras. 15 and 16):

With respect, in my view the learned judge erred in using contemporary tests for "marketing" to determine whether the aboriginal acted in ways which were consistent with trade albeit in a rudimentary way as dictated by the times.

In my view, the evidence in this case, oral, historical and opinion, looked at in the light of the principles of interpreting aboriginal rights referred to earlier, is more consistent with the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so. We are, after all, basically considering the existence in antiquity of an aboriginal's right to dispose of his fish other than by eating it himself or using it for ceremonial purposes — the words "sell", "barter", "exchange", "share", are but variations on the theme of "disposing". It defies common sense to think that if the aboriginal did not want the fish for himself, there would be some stricture against him disposing of it by some other means to his advantage. We are speaking of an aboriginal "right" existing in antiquity which should not be restrictively interpreted by today's standards. I am satisfied that when the first Indian caught the first salmon he had the "right" to do anything he wanted with it — eat it, trade it for deer meat, throw it back or keep it against a hungrier time. As time went on and for an infinite variety of reasons, that "right" to catch the fish and do anything he wanted with it became hedged in by rules arising from religion, custom, necessity and social change. One such restriction requiring an adjustment to his rights was the need dictated by custom or religion to share the first catch — to do otherwise would court punishment by his god and by the people. One of the social changes that occurred was the coming of the white man, a circumstance, as any other, to which he must adjust. With the white man came new customs, new ways and new incentives to colour and change his old life, including his trading and bartering ways. The old customs, rightly or wrongly, for good or for bad, changed and he must needs change with them — and he did. A money economy eventually developed and he adjusted to that also — he traded his fish for money. This was a long way from his ancient sharing, bartering and trading practices but it was the

logical progression of such. It has been held that the aboriginal right to hunt is not frozen in time so that only the bow and arrow can be used in exercising it — the right evolves with the times: see *Simon v. R.*, [1985] 2 S.C.R. 387 . . . So, in my view, with the right to fish and dispose of them, which I find on the evidence includes the right to trade and barter them. The Indian right to trade his fish is not frozen in time to doing so only by the medium of the potlatch and the like; he is entitled, subject to extinguishment or justifiable restrictions, to evolve with the times and dispose of them by modern means, if he so chooses, such as the sale of them for money. It is thus my view that the aboriginal right of the Sto:lo peoples to fish includes the right to sell, trade or barter them after they have been caught. It is my view that the learned judge imposed a verdict inconsistent with the evidence and the weight to be given it. [Emphasis added.]

203. At the British Columbia Court of Appeal, Macfarlane J.A. (Taggart J.A. concurring) and Wallace J.A., for the majority, took the position that an aboriginal right would be recognized only if the manifestations of the distinctive aboriginal culture — i.e., the particular aboriginal practices, traditions or customs — were particular to native culture and not common to non-aboriginal societies. Further, the evidence would need to show that the activities in question have been engaged in for time immemorial at the time sovereignty was asserted by Britain. Macfarlane J.A. wrote (at para. 21):

To be so regarded those practices must have been integral to the distinctive culture of the aboriginal society from which they were said to have arisen. A modernized form of such a practice would be no less an aboriginal right. A practice which had not been integral to the organized society and its distinctive culture, but which became prevalent merely as a result of European influences, would not qualify for protection as an aboriginal right. [Emphasis added.]

The majority of the Court of Appeal agreed with the trial judge's findings and held that the Sto:lo's practices, traditions and customs did not justify the recognition of an aboriginal right to fish for commercial purposes.

204. Lambert J.A., in dissent, applied what he called a "social" form of description of aboriginal rights, one which does not "freeze" native practices, traditions and customs in time. In light of the evidence, he concluded that the distinctive aboriginal culture of the Sto:lo warranted the recognition of an aboriginal right to sell, trade and barter fish in order to provide them with a "moderate livelihood". He stated (at para. 150):

For those reasons I conclude that the best description of the aboriginal customs, traditions and practices of the Sto:lo people in relation to the sockeye salmon run on the Fraser River is that their aboriginal customs, traditions and practices have given rise to an aboriginal right, to be exercised in accordance with their rights of self-regulation including recognition of the need for conservation to catch and, if they wish, sell, themselves and through other members of the Sto:lo people, sufficient salmon to provide all the people who wish to be personally engaged in the fishery, and their dependent families, when coupled with their other financial resources, with a moderate livelihood, and, in any event, not less than the quantity of salmon needed to provide every one of the collective holders of the aboriginal right with the same amount of salmon per person per year as would have been consumed or otherwise utilized by each of the collective holders of the right, on average, from a comparable year's salmon run, in, say, 1800. [Italics in original; emphasis added.]

205. It appears from the foregoing review of the judgments that the conclusions on the findings of fact relating to whether the Sto:lo possess an aboriginal right to sell, trade and barter fish varied depending on the delineation of the aboriginal right claimed and on the approach used to interpreting such right. The trial judge, as well as the majority of the Court of Appeal, framed the issue as being whether the Sto:lo possess an aboriginal right to fish for commercial purposes and used an approach based on the manifestations of distinctive aboriginal culture which differentiates between aboriginal and non-aboriginal practices and which "freezes" aboriginal rights in a pre-contact or pre-sovereignty aboriginal time. The summary appeal judge, as well as Lambert J.A. at the Court of Appeal, described the issue in terms of whether the Sto:lo possess an

aboriginal right to sell, trade and barter fish for livelihood. Further, they examined the aboriginal right claimed at a certain level of abstraction, which focused on the distinctive aboriginal culture of the Sto:lo and which was evolutive in nature.

206. As I have already noted elsewhere, the issue in the present appeal is whether the Sto:lo's aboriginal right to fish includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. Accordingly, the trial judge and the majority of the Court of Appeal erred in framing the issue. Furthermore, it is my view that the nature and extent of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* must be defined by referring to the notion of "integral part of a distinctive aboriginal culture", i.e., whether an aboriginal practice, tradition or custom has been sufficiently significant and fundamental to the culture and social organization of the particular group of aboriginal people for a substantial continuous period of time. Therefore, by using a "frozen right" approach focusing on aboriginal practice to defining the nature and extent of the aboriginal right, Scarlett Prov. Ct. J. and the majority of the Court of Appeal were also in error.

207. Consequently, when the trial judge assessed the historical evidence presented at trial, he asked himself the wrong questions and erred as to the proper evidentiary basis necessary to establish an aboriginal right under s. 35(1) of the *Constitution Act, 1982*. He thus made no finding of fact, or insufficient findings of fact, as regards the Sto:lo's distinctive aboriginal culture relating to the sale, trade and barter of fish for livelihood, support and sustenance purposes. It is also noteworthy that the first appellate judge, who asked himself the right questions, made diametrically opposed findings of fact on the evidence presented at trial.

208. The result of these palpable and overriding errors, which affected the trial judge's assessment of the facts, is that an appellate court is justified in intervening — as did the summary appeal judge — in the trial judge's findings of fact and substituting its own assessment of the evidence presented at trial: see *Stein v. The Ship "Kathy K"*, *supra*. I note also that this Court, as a subsequent appellate court in such circumstances, does not have to show any deference to the assessment of the evidence made by lower appellate courts. Since this Court is in no less advantageous or privileged position than the lower appellate courts in assessing the evidence on the record, we are free to reconsider the evidence and substitute our own findings of fact (see *Schwartz v. Canada*, *supra*, at paras. 36-37). I find myself, however, in general agreement with the findings of fact of Selbie J., the summary appeal judge, and of Lambert J.A. Nonetheless, I will revisit the evidence to determine whether it reveals that the sale, trade and barter of fish for livelihood, support and sustenance purposes have formed an integral part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time.
209. The Sto:lo, who are part of the Coast Salish Nation, have lived in their villages along the Fraser River from Langley to above Yale. They were an organized society, whose main socio-political unit was the extended family. The Fraser River was their main source of food the year around and, as such, the Sto:lo considered it to be sacred. It is interesting to note that their name, the "Sto:lo", means "people of the river": see Wilson Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia (Anthropology in British Columbia — Memoir No. 1)*, 1952, at p. 11.

210. Archaeological evidence demonstrates that the Sto:lo have relied on the fishery for centuries. Located near the mouth of the Fraser River, the Sto:lo fishery consists of five species of salmon — sockeye, chinook, coho, chum and pink — as well

as sturgeon, eulachons and trout. The Sto:lo used many methods and devices to fish salmon, such as dip-nets, harpoons, weirs, traps and hooks. Both the wind and the heat retention capacity of the geography of the Fraser Canyon result in an excellent area for wind drying fish. Therefore, although fresh fish were procurable year around, they dried or smoked large amounts at the end of the summer to use for the hard times of winter.

211. The Sto:lo community is geographically located between two biogeoclimatic zones: the interior plateau region and the coastal maritime area. As such, they have long enjoyed the exchange of regional goods with the people living in these zones. See, in that respect, the report of Dr. Richard Daly, an expert in social and cultural anthropology called by the appellant and who gave expert opinion evidence on the social structure and culture of the Sto:lo, and also Duff, *The Upper Stalo Indians of the Fraser Valley, British Columbia, supra*, at p. 95.

212. The oral histories, corroborated by expert evidence, show a long tradition of trading relationships among the Sto:lo and with their neighbours, both before the arrival of Europeans and to the present day. Dr. Arnoud Henry Stryd, an expert in archaeology with a strong background in anthropology called by the respondent to give expert opinion evidence and to speak to the archaeological record, testified that exchanging goods has been a feature of the human condition from the earliest times:

Q. Yes. You say there's evidence for trade in non-perishable items throughout much of the archaeological record for British Columbia.

A. Well, that's right. In my point of view, the tendency to trade is one that's very human and if you have things that you have that you don't need and your neighbours have something that you would like that they are willing to, that they don't need, that it seems very obvious that some kind of exchange of goods would take place and the earliest part of the human condition to exchange items. [Emphasis added.]

213. Likewise, John Trevor Dewhirst, an anthropologist and ethno-historian called by the respondent, gave expert opinion evidence on the aboriginal trade of salmon of the Sto:lo. Although he insisted that there was no "organized regularized large scale exchange of salmon" in pre-contact or pre-sovereignty aboriginal time, he testified to the effect that the Sto:lo did exchange, trade and barter salmon among themselves and with other native people, and that such activities were rooted in their culture:

Q. We had reached the stage, sir, as I understand it where — we're now at the point with your evidence, sir, that the exchange of salmon amongst the Indians — you've mentioned that, sir, there was some exchange of salmon amongst the Indians?

A. Oh, yes, very definitely.

Q. Yes. Could you expand on that, please?

A. Yes. I think it's very clear from the — both from the historical record and — and from the anthropological evidence, the ethnographic evidence collected by various workers, Wilson Duff, Marion Smith, Dr. Daly and others whom we've mentioned — and Suttles — exchange of salmon for other foodstuffs and perhaps non-food items definitely took place amongst the Sto:Lo and was a definite feature of their society and culture.

What I'd like to do is go over some of that material evidence regarding the exchange of salmon and examine that in terms of — of trade and the — try — try to determine — try to develop a context for in fact what was happening at least in some of these instances.

...

A. That — I believe that the record does not indicate the presence of an organized regularized large scale exchange of salmon amongst the Sto:Lo or between the Sto:Lo and other Native peoples and by this large scale exchange I — I think — rather, by the exchange of salmon I think it's important to look at this context and see if in fact there is a kind of a market situation. I mean, most cultures, most societies do exchange items between relatives and friends and so on. I think that this is debatable whether you can call this trade in — in the sense of a — of a kind of a marketplace and I'd like to turn now to some of the — some of the evidence that's been presented. [Emphasis added.]

214. It seems well founded to conclude, as the expert witnesses for the respondent did, that no formalized market system of trade of salmon existed in the original Sto:lo society because, as a matter of fact, organized large scale trade in salmon appears to run contrary to the Sto:lo's aboriginal culture. They viewed salmon as more than just food; they treated salmon with a degree of respect since the Sto:lo community was highly reliant and dependant on the fish resources. On the one hand, the Sto:lo pursued salmon very aggressively in order to get them for livelihood, support and sustenance purposes. On the other, however, they were sufficiently mindful not to exploit the abundance of the river and they taught their children a thoughtful attitude towards salmon and also how to conserve them.

215. As the social and cultural anthropologist Dr. Richard Daly explained at trial, the exchange of salmon among the Sto:lo and with their neighbours was informed by the ethic of feeding people, catching and trading only what was necessary for their needs and the needs of face-to-face relationships:

- Q. Is the sale of fish or other foodstuff, in you opinion, also part of the Sto:lo culture?
- A. The way it is explained to me by people in the Sto:lo community, that it's all part of feeding yourself and feeding others. You're looking after your basic necessities. And today it's all done through the medium of cash. And you may not have anything to reciprocate when — when other native people from a different area come to you with say tanned hides from the Interior for making — for handicraft work. You may not have anything to give them in return at that time and you pay for it, like anyone else would. But then when you — you've put up your salmon or you're able to take them a load of fresh salmon you reciprocate and they pay you. But it's — it's considered to be a similar procedure as the bartering because it's satisfying the basic needs.

And also people tell me that they go fishing in order to get the money for the gas to drive to the fishing sites, to look after the repair of their nets and to — to make some of the necessary amounts of cash needed for their day-to-day existence. And I have observed people going out to fish with an intention of selling. They don't go to get a maximum number of fish and sell

them on the market for the — the going price. They sell it at the going price but they — they won't take any more fish than they have orders for because that's — that's the wrong attitude towards the fish and fishing. So I think in a sense it — it's very consistent with the type of bartering that has preceded it and it's sort of still couched in that same idiom, as well. [Emphasis added.]

216. The foregoing review of the historical evidence on the record reveals that there was trade of salmon for livelihood, support and sustenance purposes among the Sto:lo and with other native people and, more importantly, that such activities formed part of, and were undoubtedly rooted in, the distinctive aboriginal culture of the Sto:lo. In short, the fishery has always provided a focus for life and livelihood for the Sto:lo and they have always traded salmon for the sustenance and support of themselves and their families. Accordingly, to use the terminology of the test propounded above, the sale, trade and barter of fish for livelihood, support and sustenance purposes was sufficiently significant and fundamental to the culture and social organization of the Sto:lo.

217. The period of intensive trade of fish in a market-type economy involving the Sto:lo began after the coming of the Europeans, in approximately 1820, when the Hudson's Bay Company established a post at Fort Langley on the Fraser River. Following that, the Sto:lo participated in a thriving commercial fishery centred around the trade of salmon. According to Jamie Morton, an historian called by the appellant to give expert opinion evidence on the history of the European trade with native people, approximately 1,500 to 3,000 barrels of salmon (with 60-90 fish per barrel) were cured per year, which the Hudson's Bay Company bought and shipped to Hawaii and other international ports. (See also Lambert J.A., at para. 121.)

218. This trade of salmon in a market economy, however, is not relevant to determine whether the Sto:lo possess an aboriginal right to sell, trade and barter fish for

livelihood, support and sustenance purposes. I note, in passing, that such commercial use of the fish would seem to be intrinsically incompatible with the pre-contact or pre-sovereignty culture of the Sto:lo which commanded that the utilization of the salmon, including its sale, trade and barter, be restricted to providing livelihood, support and sustenance, and did not entail obtaining purely commercial profit.

219. As far as the issue here is concerned, the sale, trade and barter of fish for livelihood, support and sustenance purposes have always been sufficiently significant and fundamental to the culture and social organization of the Sto:lo. This conclusion is no doubt in line with the perspective of the Sto:lo regarding the importance of the trade of salmon in their society. Consequently, the criterion regarding the characterization of aboriginal rights protected under s. 35(1) of the *Constitution Act, 1982* is met.

220. Furthermore, there is no doubt that these activities did form part of the Sto:lo's distinctive aboriginal culture for a substantial continuous period of time. In that respect, we must consider the type of aboriginal practices, traditions and customs, the particular aboriginal culture and society, and the reference period of 20 to 50 years. Here, the historical evidence shows that the Sto:lo's practices, traditions and customs relating to the trade of salmon for livelihood, support and sustenance purposes have existed for centuries before the arrival of Europeans. As well, it appears that such activities have continued, though in modernized forms, until the present day. Accordingly, the time requirement for the recognition of an aboriginal right is also met in this case.

221. As a consequence, I conclude that the Sto:lo Band, of which the appellant is a member, possess an aboriginal right to sell, trade and barter fish for livelihood,

support and sustenance purposes. Under s. 35(1) of the *Constitution Act, 1982* this right is protected.

VI. Disposition

222. In the result, I would allow the appeal on the question of whether the Sto:lo possess an aboriginal right to fish which includes the right to sell, trade and barter fish for livelihood, support and sustenance purposes. The question of the extinguishment of such right, as well as the issues of *prima facie* infringement and justification, must be remitted to trial since there is insufficient evidence to enable this Court to decide upon them. Consequently, the constitutional question can only be answered partially:

Question: Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant?

Answer: The aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant, are recognized and the question of whether s. 27(5) of the *British Columbia Fishery (General) Regulations* is of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, will depend on the issues of extinguishment, *prima facie* infringement and justification as determined in a new trial.

223. There will be no costs to either party.

\McLachlin J.\

The following are the reasons delivered by

224. McLACHLIN J. (dissenting) -- This appeal concerns the right of the Sto:lo of British Columbia to sell fish caught in the Fraser River. The appellant, Mrs. Van der Peet, sold salmon caught under an Indian food fishing licence by her common law husband and his brother. The sale of salmon caught under an Indian food licence was prohibited. Mrs. Van der Peet was charged with selling fish contrary to the Regulations of the *Fisheries Act*, R.S.C. 1970, c. F-14. At trial, she raised the defence that the regulations under which she was charged was invalid because it infringed her aboriginal right, confirmed by s. 35 of the *Constitution Act, 1982* to catch and sell fish. If so, s. 52 of the *Constitution Act, 1982* acts to invalidate the regulation to the extent of the conflict.
225. The inquiry thus focuses on s. 35(1) of the *Constitution Act, 1982*, which provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Section 35(1) gives constitutional protection not only to aboriginal rights codified through treaties at the time of its adoption in 1982, but also to aboriginal rights which had not been formally recognized at that date: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, per Dickson C.J. and La Forest J., at pp. 1105-6. The Crown has never entered into a treaty with the Sto:lo. They rely not on a codified aboriginal right, but on one which they ask the courts to recognize under s. 35(1).
226. Against this background, I turn to the questions posed in this appeal:

1. Do the Sto:lo possess an aboriginal right under s. 35(1) of the *Constitution Act, 1982* which entitles them to sell fish?
 - (a) Has a *prima facie* right been established?
 - (b) If so, has it been extinguished?
2. If a right is established, do the government regulations prohibiting sale infringe the right?
3. If the regulations infringe the right, are they justified?

227. My conclusions on this appeal may be summarized as follows. The issue of what constitutes an aboriginal right must, in my view, be answered by looking at what the law has historically accepted as fundamental aboriginal rights. These encompass the right to be sustained from the land or waters upon which an aboriginal people have traditionally relied for sustenance. Trade in the resource to the extent necessary to maintain traditional levels of sustenance is a permitted exercise of this right. The right endures until extinguished by treaty or otherwise. The right is limited to the extent of the aboriginal people's historic reliance on the resource, as well as the power of the Crown to limit or prohibit exploitation of the resource incompatible with its responsible use. Applying these principles, I conclude that the Sto:lo possess an aboriginal right to fish commercially for purposes of basic sustenance, that this right has not been extinguished, that the regulation prohibiting the sale of any fish constitutes a *prima facie* infringement of it, and that this infringement is not justified. Accordingly, I conclude that the appellant's conviction must be set aside.

1. Do the Sto:lo Possess an Aboriginal Right to Sell Fish Protected under Section 35(1) of the *Constitution Act, 1982*?

A. *Is a Prima Facie Right Established?*

228. I turn first to the principles which govern the inquiry into the existence of an aboriginal right.

(i) General Principles of Interpretation

229. This Court in *Sparrow, supra*, discussed the dual significance of s. 35(1) of the *Constitution Act, 1982* in the context of fishing. Section 35(1) is significant, first, because it entrenches aboriginal rights as of the date of its adoption in 1982. Prior to that date, aboriginal rights to fish were subject to regulation and extinguishment by unilateral government act. After the adoption of s. 35, these rights can be limited only by treaty. But s. 35(1) is significant in a second, broader sense. It may be seen as recognition of the right of aboriginal peoples to fair recognition of aboriginal rights and settlement of aboriginal claims. Thus Dickson C.J. and La Forest J. wrote in *Sparrow*, at p. 1105:

. . . s. 35(1) of the *Constitution Act, 1982*, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible. . . . Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

Quoting from Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26

Osgoode Hall L.J. 95, at p. 100, Dickson C.J. and La Forest J. continued at p. 1106:

. . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

230. It may not be wrong to assert, as the Chief Justice does, that the dual purposes of s. 35(1) are first to recognize the fact that the land was occupied prior to European settlement and second, to reconcile the assertion of sovereignty with this prior occupation. But it is, with respect, incomplete. As the foregoing passages from *Sparrow* attest, s. 35(1) recognizes not only prior aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist, absent extinguishment. And it seeks not only to reconcile these claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims consistent with the high standard which the law imposes on the Crown in its dealings with aboriginal peoples.

231. Following these precepts, this Court in *Sparrow* decreed, at pp. 1106-7, that s. 35(1) be construed in a generous, purposive and liberal way. It represents "a solemn commitment that must be given meaningful content" (p. 1108). It embraces and confirms the fiduciary obligation owed by the government to aboriginal peoples (p. 1109). It does not oust the federal power to legislate with respect to aborigines, nor does it confer absolute rights. Federal power is to be reconciled with aboriginal rights by means of the doctrine of justification. The federal government can legislate to limit

the exercise of aboriginal rights, but only to the extent that the limitation is justified and only in accordance with the high standard of honourable dealing which the Constitution and the law imposed on the government in its relations with aborigines (p. 1109).

232. To summarize, a court approaching the question of whether a particular practice is the exercise of a constitutional aboriginal right under s. 35(1) must adopt an approach which: (1) recognizes the dual purposes of s. 35(1) (to preclude extinguishment and to provide a firm foundation for settlement of aboriginal claims); (2) is liberal and generous toward aboriginal interests; (3) considers the aboriginal claim in the context of the historic way of life of the people asserting it; and (4) above all, is true to the position of the Crown throughout Canadian history as trustee or fiduciary for the first peoples of this country. Finally, I would join with the Chief Justice in asserting, as Mark Walters counsels in "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350, at pp. 413 and 412, respectively, that "a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives" of the "two vastly dissimilar legal cultures" of European and aboriginal societies. We apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal tradition.

(ii) The Right Asserted -- the Right to Fish for Commercial Purposes

233. The first step is to ascertain the aboriginal right which is asserted by Mrs. Van der Peet. Are we concerned with the right to fish, the right to sell fish on a small sustenance-related level, or commercial fishing?

234. The Chief Justice and Justice L'Heureux-Dubé state that this appeal does not raise the issue of the right of the Sto:lo to engage in commercial fishery. They argue that the sale of one or two fish to a neighbour cannot be considered commerce, and that the British Columbia courts erred in treating it as such.

235. I agree that this case was defended on the ground that the fish sold by Mrs. Van der Peet were sold for purposes of sustenance. This was not a large corporate money-making activity. In the end, as will be seen, I agree with Justice L'Heureux-Dubé that a large operation geared to producing profits in excess of what the people have historically taken from the river might not be constitutionally protected.

236. This said, I see little point in labelling Mrs. Van der Peet's sale of fish something other than commerce. When one person sells something to another, that is commerce. Commerce may be large or small, but commerce it remains. On the view I take of the case, the critical question is not whether the sale of the fish is commerce or non-commerce, but whether the sale can be defended as the exercise of a more basic aboriginal right to continue the aboriginal people's historic use of the resource.

237. Making an artificial distinction between the exchange of fish for money or other goods on the one hand and for commercial purposes on the other, may have serious consequences, if not in this case, in others. If the aboriginal right at issue is defined as the right to trade on a massive, modern scale, few peoples may be expected to establish a commercial right to fish. As the Chief Justice observes in *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, "[t]he claim to an aboriginal right to exchange fish commercially places a more onerous burden" on the aboriginal claimant "than a claim to an aboriginal right to exchange fish for money or other goods" (para. 20). In the

former case, the trade must be shown to have existed pre-contact "on a scale best characterized as commercial" (para. 20). With rare exceptions (see the evidence in *R. v. Gladstone*, [1996] 2 S.C.R. 723, released concurrently) aboriginal societies historically were not interested in massive sales. Even if they had been, their societies did not afford them mass markets.

(iii) Aboriginal Rights versus the Exercise of Aboriginal Rights

238. It is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.

239. If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago. So if we ask whether there is an aboriginal right to a particular kind of trade in fish, i.e., large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer may be quite different. Having defined the basic underlying right in general terms, the question then becomes whether the modern practice at issue may be characterized as an exercise of the right.

240. This is how we reconcile the principle that aboriginal rights must be ancestral rights with the uncompromising insistence of this Court that aboriginal rights

not be frozen. The rights are ancestral; they are the old rights that have been passed down from previous generations. The exercise of those rights, however, takes modern forms. To fail to recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live.

241. I share the concern of L'Heureux-Dubé J. that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no aboriginal right where a different analysis might find one. By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right.

242. To constitute a right under s. 35(1) of the *Constitution Act, 1982*, the right must be of constitutional significance. A right of constitutional significance may loosely be defined as a right which has priority over ordinary legal principles. It is a maxim which sets the boundaries within which the law must operate. While there were no formal constitutional guarantees of aboriginal rights prior to 1982, we may nevertheless discern certain principles relating to aboriginal peoples which were so fundamental as to have been generally observed by those charged with dealing with aboriginal peoples and with making and executing the laws that affected them.

243. The activity for which constitutional protection is asserted in this case is selling fish caught in the area of the Fraser River where the Sto:lo traditionally fished for

the purpose of sustaining the people. The question is whether this activity may be seen as the exercise of a right which has either been recognized or which so resembles a recognized right that it should, by extension of the law, be so recognized.

(iv) The Time Frame

244. The Chief Justice and L'Heureux-Dubé J. differ on the time periods one looks to in identifying aboriginal rights. The Chief Justice stipulates that for a practice to qualify as an aboriginal right it must be traceable to pre-contact times and be identifiable as an "integral" aspect of the group's culture at that early date. Since the barter of fish was not shown to be more than an incidental aspect of Sto:lo society prior to the arrival of the Europeans, the Chief Justice concludes that it does not qualify as an aboriginal right.

245. L'Heureux-Dubé J., by contrast, minimizes the historic origin of the alleged right. For her, all that is required is that the practice asserted as a right have constituted an integral part of the group's culture and social organization for a period of at least 20 to 50 years, and that it continue to be an integral part of the culture at the time of the assertion of the right.

246. My own view falls between these extremes. I agree with the Chief Justice that history is important. A recently adopted practice would generally not qualify as being aboriginal. Those things which have in the past been recognized as aboriginal rights have been related to the traditional practices of aboriginal peoples. For this reason, this Court has always been at pains to explore the historical origins of alleged aboriginal rights. For example, in *Sparrow*, this Court began its inquiry into the

aboriginal right to fish for food with a review of the fishing practices of the Musqueam Band prior to European contact.

247. I cannot agree with the Chief Justice, however, that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question. As Brennan J. (as he then was) put it in *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1, at p. 58, "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory." The French version of s. 35(1) aptly captures the governing concept. "*Les droits existants -- ancestraux ou issus de traités --*" tells us that the rights recognized and affirmed by s. 35(1) must be rooted in the historical or ancestral practices of the aboriginal people in question. This Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, adopted a similar approach: Dickson J. (as he then was) refers at p. 376 to "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands". One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right. The governing concept is simply the traditional customs and laws of people prior to imposition of European law and customs. What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people. Most often, that law or tradition will be traceable to time immemorial; otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only moment to consider. What went before and after can be relevant too.

248. My concern is that we not substitute an inquiry into the precise moment of first European contact -- an inquiry which may prove difficult -- for what is really at issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory. For example, there are those who assert that Europeans settled the eastern maritime regions of Canada in the 7th and 8th centuries A.D. To argue that aboriginal rights crystallized then would make little sense; the better question is what laws and customs held sway before superimposition of European laws and customs. To take another example, in parts of the west of Canada, over a century elapsed between the first contact with Europeans and imposition of "Canadian" or "European" law. During this period, many tribes lived largely unaffected by European laws and customs. I see no reason why evidence as to the laws and customs and territories of the aborigines in this interval should not be considered in determining the nature and scope of their aboriginal rights. This approach accommodates the specific inclusion in s. 35(1) of the *Constitution Act, 1982* of the aboriginal rights of the Métis people, the descendants of European explorers and traders and aboriginal women.

249. Not only must the proposed aboriginal right be rooted in the historical laws or customs of the people, there must also be continuity between the historic practice and the right asserted. As Brennan J. put it in *Mabo*, at p. 60:

The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.

The continuity requirement does not require the aboriginal people to provide a year-by-year chronicle of how the event has been exercised since time immemorial.

Indeed, it is not unusual for the exercise of a right to lapse for a period of time. Failure to exercise it does not demonstrate abandonment of the underlying right. All that is required is that the people establish a link between the modern practice and the historic aboriginal right.

250. While aboriginal rights will generally be grounded in the history of the people asserting them, courts must, as I have already said, take cognizance of the fact that the way those rights are practised will evolve and change with time. The modern exercise of a right may be quite different from its traditional exercise. To deny it the status of a right because of such differences would be to deny the reality that aboriginal cultures, like all cultures, change and adapt with time. As Dickson C.J. and La Forest J. put it in *Sparrow*, at p. 1093 "[t]he phrase 'existing aboriginal rights' [in s. 35(1) of the *Constitution Act, 1982*] must be interpreted flexibly so as to permit their evolution over time".

(v) The Procedure for Determining the Existence of an Aboriginal Right

251. Aboriginal peoples, like other peoples, define themselves through a myriad of activities, practices and claims. A few of these, the *Canadian Charter of Rights and Freedoms* tells us, are so fundamental that they constitute constitutional "rights" of such importance that governments cannot trench on them without justification. The problem before this Court is how to determine what activities, practices and claims fall within this class of constitutionally protected rights.

252. The first and obvious category of constitutionally protected aboriginal rights and practices are those which had obtained legal recognition prior to the adoption of

s. 35(1) of the *Constitution Act, 1982*. Section 35(1) confirms "existing" aboriginal rights. Rights granted by treaties or recognized by the courts prior to 1982 must, it follows, remain rights under s. 35(1).

253. But aboriginal rights under s. 35(1) are not confined to rights formally recognized by treaty or the courts before 1982. As noted above, this Court has held that s. 35(1) "is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples": *Sparrow*, at p. 1106, quoting Noel Lyon, "An Essay on Constitutional Interpretation", *supra*, at p. 100. This poses the question of what new, previously unrecognized aboriginal rights may be asserted under s. 35(1).

254. The Chief Justice defines aboriginal rights as specific pre-contact practices which formed an "integral part" of the aboriginal group's "specific distinct culture". L'Heureux-Dubé J., adopting a "dynamic" rights approach, extends aboriginal rights to any activity, broadly defined, which forms an integral part of a distinctive aboriginal group's culture and social organization, regardless of whether the activity pre-dates colonial contact or not. In my respectful view, while both these approaches capture important facets of aboriginal rights, neither provides a satisfactory test for determining whether an aboriginal right exists.

(vi) The "Integral-Incidental" Test

255. I agree with the Chief Justice, at para. 46, that to qualify as an aboriginal right "an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right". I also agree with

L'Heureux-Dubé J. that an aboriginal right must be "integral" to a "distinctive aboriginal group's culture and social organization". To say this is simply to affirm the foundation of aboriginal rights in the laws and customs of the people. It describes an essential quality of an aboriginal right. But, with respect, a workable legal test for determining the extent to which, if any, commercial fishing may constitute an aboriginal right, requires more. The governing concept of integrality comes from a description in the *Sparrow* case where the extent of the aboriginal right (to fish for food) was not seriously in issue. It was never intended to serve as a test for determining the extent of disputed exercises of aboriginal rights.

256. My first concern is that the proposed test is too broad to serve as a legal distinguisher between constitutional and non-constitutional rights. While the Chief Justice in the latter part of his reasons seems to equate "integral" with "not incidental", the fact remains that "integral" is a wide concept, capable of embracing virtually everything that an aboriginal people customarily did. *The Shorter Oxford English Dictionary*, vol. 1 (3rd ed.1973), offers two definitions of "integral": **1.** "Of or pertaining to a whole . . . constituent, component"; and **2.** "Made up of component parts which together constitute a unity". To establish a practice as "integral" to a group's culture, it follows, one must show that the practice is part of the unity of practices which together make up that culture. This suggests a very broad definition: anything which can be said to be part of the aboriginal culture would qualify as an aboriginal right protected by the *Constitution Act, 1982*. This would confer constitutional protection on a multitude of activities, ranging from the trivial to the vital. The Chief Justice attempts to narrow the concept of "integral" by emphasizing that the proposed right must be part of what makes the group "distinctive", the "specific" people which they are, stopping short, however, of asserting that the practice must be unique to the group and adhere to none other. But

the addition of concepts of distinctness and specificity do not, with respect, remedy the overbreadth of the test. Minor practices, falling far short of the importance which we normally attach to constitutional rights, may qualify as distinct or specific to a group. Even the addition of the notion that the characteristic must be central or important rather than merely "incidental", fails to remedy the problem; it merely poses another problem, that of determining what is central and what is incidental to a people's culture and social organization.

257. The problem of overbreadth thus brings me to my second concern, the problem of indeterminacy. To the extent that one attempts to narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right.

258. Finally, the proposed test is, in my respectful opinion, too categorical. Whether something is integral or not is an all or nothing test. Once it is concluded that a practice is integral to the people's culture, the right to pursue it obtains unlimited protection, subject only to the Crown's right to impose limits on the ground of justification. In this appeal, the Chief Justice's exclusion of "commercial fishing" from the right asserted masks the lack of internal limits in the integral test. But the logic of the test remains ineluctable, for all that: assuming that another people in another case establishes that commercial fishing was integral to its ancestral culture, that people will, on the integral test, logically have an absolute priority over non-aboriginal and other less

fortunate aboriginal fishers, subject only to justification. All others, including other native fishers unable to establish commercial fishing as integral to their particular cultures, may have no right to fish at all.

259. The Chief Justice recognizes the all or nothing logic of the "integral" test in relation to commercial fishing rights in his reasons in *Gladstone, supra*. Having determined in that case that an aboriginal right to commercial fishing is established, he notes at para. 61 that unlike the Indian food fishery, which is defined in terms of the peoples' need for food, the right to fish commercially "has no internal limitations". Reasoning that where the test for the right imposes no internal limit on the right, the court may do so, he adopts a broad justification test which would go beyond limiting the use of the right in ways essential to its exercise as envisioned in *Sparrow*, to permit partial reallocation of the aboriginal right to non-natives. The historically based test for aboriginal rights which I propose, by contrast, possesses its own internal limits and adheres more closely to the principles that animated *Sparrow*, as I perceive them.

(vii) The Empirical Historic Approach

260. The tests proposed by my colleagues describe qualities which one would expect to find in aboriginal rights. To this extent they may be informative and helpful. But because they are overinclusive, indeterminate, and ultimately categorical, they fall short, in my respectful opinion, of providing a practically workable principle for identifying what is embraced in the term "existing aboriginal rights" in s. 35(1) of the *Constitution Act, 1982*.

261. In my view, the better approach to defining aboriginal rights is an empirical approach. Rather than attempting to describe *a priori* what an aboriginal right is, we should look to history to see what sort of practices have been identified as aboriginal rights in the past. From this we may draw inferences as to the sort of things which may qualify as aboriginal rights under s. 35(1). Confronted by a particular claim, we should ask, "Is this like the sort of thing which the law has recognized in the past?". This is the time-honoured methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis.
262. Just as there are two fundamental types of scientific reasoning -- reasoning from first principles and empirical reasoning from experience -- so there are two types of legal reasoning. The approach adopted by the Chief Justice and L'Heureux-Dubé J. in this appeal may be seen as an example of reasoning from first principles. The search is for a governing principle which will control all future cases. Given the complexity and sensitivity of the issue of defining hitherto undefined aboriginal rights, the pragmatic approach typically adopted by the common law -- reasoning from the experience of decided cases and recognized rights -- has much to recommend it. In this spirit, and bearing in mind the important truths captured by the "integral" test proposed by the Chief Justice and L'Heureux-Dubé J., I turn to the question of what the common law and Canadian history tell us about aboriginal rights.

(viii) The Common Law Principle: Recognition of Pre-Existing Rights and Customs

263. The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread -- the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement.

264. For centuries, it has been established that upon asserting sovereignty the British Crown accepted the existing property and customary rights of the territory's inhabitants. Illustrations abound. For example, after the conquest of Ireland, it was held in *The Case of Tanistry* (1608), Davis 28, 80 E.R. 516, that the Crown did not take actual possession of the land by reason of conquest and that pre-existing property rights continued. Similarly, Lord Sumner wrote in *In re Southern Rhodesia*, [1919] A.C. 211, at p. 233 that "it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected [pre-existing aboriginal rights] and forborne to diminish or modify them". Again, Lord Denning affirmed the same rule in *Oyekan v. Adele*, [1957] 2 All E.R. 785, at p. 788:

In inquiring . . . what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law. . . . [Emphasis added.]

265. Most recently in *Mabo*, the Australian High Court, after a masterful review of Commonwealth and American jurisprudence on the subject, concluded that the Crown must be deemed to have taken the territories of Australia subject to existing aboriginal rights in the land, even in the absence of acknowledgment of those rights. As Brennan J. put it at p. 58: "an inhabited territory which became a settled colony was no more a legal desert than it was 'desert uninhabited' . . ." Once the "fictions" of *terra nullius* are stripped away, "[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs" of the indigenous people.
266. In Canada, the Courts have recognized the same principle. Thus in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, at p. 328, Judson J. referred to the asserted right "to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished". In the same case, Hall J. (dissenting on another point) rejected at p. 416 as "wholly wrong" "the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer". Subsequent decisions in this Court are consistent with the view that the Crown took the land subject to pre-existing aboriginal rights and that such rights remain in the aboriginal people, absent extinguishment or surrender by treaty.
267. In *Guerin, supra*, this Court re-affirmed this principle, stating at pp. 377-78:

In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson v. M'Intosh*, 8 Wheaton 543 (1823), and

Worcester v. State of Georgia, 6 Peters 515 (1832), cited by Judson and Hall JJ. in their respective judgments.

In *Johnson v. M'Intosh* Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. [Emphasis added.]

This Court's judgment in *Sparrow*, *supra*, re-affirmed that approach.

(ix) The Nature of the Interests and Customs Recognized by the Common Law

268. This much is clear: the Crown, upon discovering and occupying a "new" territory, recognized the law and custom of the aboriginal societies it found and the rights in the lands they traditionally occupied that these supported. At one time it was suggested that only legal interests consistent with those recognized at common law would be recognized. However, as Brennan J. points out in *Mabo*, at p. 59, that rigidity has been relaxed since the decision of the Privy Council in *Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399, "[t]he general principle that the common law will recognize a customary title only if it be consistent with the common law is subject to an exception in favour of traditional native title".

269. It may now be affirmed with confidence that the common law accepts all types of aboriginal interests, "even though those interests are of a kind unknown to English law": *per* Lord Denning in *Oyekan*, *supra*, at p. 788. What the laws, customs

and resultant rights are "must be ascertained as a matter of fact" in each case, *per* Brennan J. in *Mabo*, at p. 58. It follows that the Crown in Canada must be taken as having accepted existing native laws and customs and the interests in the land and waters they gave rise to, even though they found no counterpart in the law of England. In so far as an aboriginal people under internal law or custom had used the land and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty.

270. This much appears from the *Royal Proclamation of 1763*, R.S.C., 1985, App. II, No. 1, which set out the rules by which the British proposed to govern the territories of much of what is now Canada. The Proclamation, while not the sole source of aboriginal rights, recognized the presence of aborigines as existing occupying peoples. It further recognized that they had the right to use and alienate the rights they enjoyed the use of those territories. The assertion of British sovereignty was thus expressly recognized as not depriving the aboriginal people of Canada of their pre-existing rights; the maxim of *terra nullius* was not to govern here. Moreover, the Proclamation evidences an underlying concern for the continued sustenance of aboriginal peoples and their descendants. It stipulated that aboriginal people not be permitted to sell their land directly but only through the intermediary of the Crown. The purpose of this stipulation was to ensure that the aboriginal peoples obtained a fair exchange for the rights they enjoyed in the territories on which they had traditionally lived -- an exchange which would ensure the sustenance not only of the current generation but also of generations to come. (See *Guerin, supra*, at p. 376; see also Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727.)

271. The stipulation against direct sale to Europeans was coupled with a policy of entering into treaties with various aboriginal peoples. The treaties typically sought to provide the people in question with a land base, termed a reserve, as well as other benefits enuring to the signatories and generations to come -- cash payments, blankets, foodstuffs and so on. Usually the treaties conferred a continuing right to hunt and fish on Crown lands. Thus the treaties recognized that by their own laws and customs, the aboriginal people had lived off the land and its waters. They sought to preserve this right in so far as possible as well as to supplement it to make up for the territories ceded to settlement.
272. These arrangements bear testimony to the acceptance by the colonizers of the principle that the aboriginal peoples who occupied what is now Canada were regarded as possessing the aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so. The fundamental understanding -- the *Grundnorm* of settlement in Canada -- was that the aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown, on terms that would ensure to them and to their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them. (In making this comment, I do not foreclose the possibility that other arguments might be made with respect to areas in Canada settled by France.)

273. The same notions held sway in the colony of British Columbia prior to union with Canada in 1871. An early governor, Governor Douglas, pronounced a policy of negotiating solemn treaties with the aboriginal peoples similar to that pursued elsewhere in Canada. Tragically, that policy was overtaken by the less generous views that

accompanied the rapid settlement of British Columbia. The policy of negotiating treaties with the aborigines was never formally abandoned. It was simply overridden, as the settlers, aided by administrations more concerned for short-term solutions than the duty of the Crown toward the first peoples of the colony settled where they wished and allocated to the aborigines what they deemed appropriate. This did not prevent the aboriginal peoples of British Columbia from persistently asserting their right to an honourable settlement of their ancestral rights -- a settlement which most of them still await. Nor does it negate the fundamental proposition acknowledged generally throughout Canada's history of settlement that the aboriginal occupants of particular territories have the right to use and be sustained by those territories.

274. Generally speaking, aboriginal rights in Canada were group rights. A particular aboriginal group lived on or controlled a particular territory for the benefit of the group as a whole. The aboriginal rights of such a group inure to the descendants of the group, so long as they maintain their connection with the territory or resource in question. In Canada, as in Australia, "many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it" (p. 59). But "[w]here a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence" (*Mabo*, at pp. 59-60).

275. It thus emerges that the common law and those who regulated the British settlement of this country predicated dealings with aborigines on two fundamental principles. The first was the general principle that the Crown took subject to existing

aboriginal interests in the lands they traditionally occupied and their adjacent waters, even though those interests might not be of a type recognized by British law. The second, which may be viewed as an application of the first, is that the interests which aboriginal peoples had in using the land and adjacent waters for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the *Constitution Act, 1982*.

(x) The Right to Fish for Sale

276. Against this background, I come to the issue at the heart of this case. Do aboriginal people enjoy a constitutional right to fish for commercial purposes under s. 35(1) of the *Constitution Act, 1982*? The answer is yes, to the extent that the people in question can show that it traditionally used the fishery to provide needs which are being met through the trade.

277. If an aboriginal people can establish that it traditionally fished in a certain area, it continues to have a similar right to do so, barring extinguishment or treaty. The same justice that compelled those who drafted treaties with the aborigines in the nineteenth century to make provision for the continuing sustenance of the people from the land, compels those dealing with aborigines with whom treaties were never made, like the Sto:lo, to make similar provision.

278. The aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained from the portion of the river or sea. If the aboriginal people show that they traditionally sustained themselves from the river or sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. At its base, the right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in their modern form. However, if the people demonstrate that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.

279. The right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historical reliance on the resource. There is therefore no justification for extending it beyond what is required to provide the people with reasonable substitutes for what it traditionally obtained from the resource. In most cases, one would expect the aboriginal right to trade to be confined to what is necessary to provide basic housing, transportation, clothing and amenities -- the modern equivalent of what the aboriginal people in question formerly took from the land or the fishery, over and above what was required for food and ceremonial purposes. Beyond this, aboriginal fishers have no priority over non-aboriginal commercial or sport fishers. On this principle, where the aboriginal people can demonstrate that they historically have drawn a moderate livelihood from the fishery, the aboriginal right to a "moderate livelihood" from the fishery may be

established (as Lambert J.A. concluded in the British Columbia Court of Appeal). However, there is no automatic entitlement to a moderate or any other livelihood from a particular resource. The inquiry into what aboriginal rights a particular people possess is an inquiry of fact, as we have seen. The right is established only to the extent that the aboriginal group in question can establish historical reliance on the resource. For example, evidence that a people used a water resource only for occasional food and sport fishing would not support a right to fish for purposes of sale, much less to fish to the extent needed to provide a moderate livelihood. There is, on this view, no generic right of commercial fishing, large-scale or small. There is only the right of a particular aboriginal people to take from the resource the modern equivalent of what by aboriginal law and custom it historically took. This conclusion echos the suggestion in *Jack v. The Queen*, [1980] 1 S.C.R. 294, approved by Dickson C.J. and La Forest J. in *Sparrow*, of a "limited" aboriginal priority to commercial fishing.

280. A further limitation is that all aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation. These aboriginal rights are founded on the right of the people to use the land and adjacent waters. There can be no use, on the long term, unless the product of the lands and adjacent waters is maintained. So maintenance of the land and the waters comes first. To this may be added a related limitation. Any right, aboriginal or other, by its very nature carries with it the obligation to use it responsibly. It cannot be used, for example, in a way which harms people, aboriginal or non-aboriginal. It is up to the Crown to establish a regulatory regime which respects these objectives. In the analytic framework usually used in cases such as this, the right of the government to limit the aboriginal fishery on grounds such as these is treated as a matter of justifying a limit on a "*prima facie*" aboriginal right.

Following this framework, I will deal with it in greater detail under the heading of justification.

(xi) Is an Aboriginal Right to Sell Fish for Commerce Established in this Case?

281. I have concluded that subject to conservation needs, aboriginal peoples may possess a constitutional right under s. 35(1) of the *Constitution Act, 1982*, to use a resource such as a river site beside which they have traditionally lived to provide the modern equivalent of the amenities which they traditionally have obtained from the resource, whether directly or indirectly, through trade. The question is whether, on the evidence, Mrs. Van der Peet has established that the Sto:lo possessed such a right.

282. The evidence establishes that by custom of the aboriginal people of British Columbia, the Sto:lo have lived since time immemorial at the place of their present settlement on the banks of the Fraser River. It also establishes that as a fishing people, they have for centuries used the fish from that river to sustain themselves. One may assume that the forest and vegetation on the land provided some of their shelter and clothing. However, their history indicates that even in days prior to European contact, the Sto:lo relied on fish, not only for food and ceremonial purposes, but also for the purposes of obtaining other goods through trade. Prior to contact with Europeans, this trade took place with other tribes; after contact, sales on a larger scale were made to the Hudson's Bay Company, a practice which continued for almost a century. In summary, the evidence conclusively establishes that over many centuries, the Sto:lo have used the fishery not only for food and ceremonial purposes, but also to satisfy a variety of other needs. Unless that right has been extinguished, and subject always to conservation

requirements, they are entitled to continue to use the river for these purposes. To the extent that trade is required to achieve this end, it falls within that right.

283. I agree with L'Heureux-Dubé J. that the scale of fishing evidenced by the case at bar falls well within the limit of the traditional fishery and the moderate livelihood it provided to the Sto:lo.

284. For these reasons I conclude that Mrs. Van der Peet's sale of the fish can be defended as an exercise of her aboriginal right, unless that right has been extinguished.

B. *Is the Aboriginal Right Extinguished?*

285. The Crown has never concluded a treaty with the Sto:lo extinguishing its aboriginal right to fish. However, it argues that any right the Sto:lo people possess to fish commercially was extinguished prior to 1982 through regulations limiting commercial fishing by licence. The appellant, for her part, argues that general regulations controlling the fishery do not evidence the intent necessary to establish extinguishment of an aboriginal right.

286. For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow, supra*, at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the "clear and plain" test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

287. Following this approach, this Court in *Sparrow* rejected the Crown's argument that pre-1982 regulations imposing conditions on the exercise of an aboriginal right extinguished it to the extent of the regulation. To accept that argument, it reasoned at p. 1091, would be to elevate such regulations as applied in 1982 to constitutional status and to "incorporate into the Constitution a crazy patchwork of regulations". Rejecting this "snapshot" approach to constitutional rights, the Court distinguished between regulation of the exercise of a right, and extinguishment of the right itself.

288. In this case, the Crown argues that while the regulatory scheme may not have extinguished the aboriginal right to fish for food (*Sparrow*) it nevertheless extinguished any aboriginal right to fish for sale. It relies in particular on Order in Council, P.C. 2539, of September 11, 1917, which provided:

Whereas it is represented that since time immemorial, it has been the practice of the Indians of British Columbia to catch salmon by means of spears and otherwise after they have reached the upper non-tidal portions of the rivers;

And whereas while after commercial fishing began it became eminently desirable that all salmon that succeeded in reaching the upper waters should be allowed to go on to their spawning beds unmolested, in view of the great importance the Indians attached to their practice of catching salmon they have been permitted to do so for their own food purposes only

And whereas the Department of the Naval Service is informed that the Indians have concluded that this regulation is ineffective, and this season arrangements are being made by them to carry on fishing for commercial purposes in an extensive way;

And whereas it is considered to be in the public interest that this should be prevented and the Minister of the Naval Service, after consultation with the Department of Justice on the subject, recommends that action as follows be taken;

Therefore His Excellency the Governor General in Council, under the authority of section 45 of the Fisheries Act, 4-5 George V, Chapter 8, is pleased to order and it is hereby ordered as follows: --

2. An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose

289. The argument that Regulation 2539 extinguished any aboriginal right to fish commercial faces two difficulties. The first is the absence of any indication that the government of the day considered the aboriginal right on the one hand, and the effect of its proposed action on that right on the other, as required by the "clear and plain" test. There is no recognition in the words of the regulation of any aboriginal right to fish. They acknowledge no more than an aboriginal "practice" of fishing for food. The regulation takes note of the aboriginal position that the regulations confining them to food fishing are "ineffective". However, it does not accept that position. It rather rejects it and affirms that free fishing by natives for sale will not be permitted. This does not meet the test for regulatory extinction of aboriginal rights which requires: acknowledgment of right, conflict of the right proposed with policy, and resolution of the two.

290. The second difficulty the Crown's argument encounters is that the passage quoted does not present a full picture of the regulatory scheme imposed. To determine the intent of Parliament, one must consider the statute as a whole: *Driedger on the Construction of Statutes* (3rd ed. 1994). Similarly, to determine the intent of the Governor in Council making a regulation, one must look to the effect of a regulatory scheme as a whole.

291. The effect of Regulation 2539 was that Indians were no longer permitted to sell fish caught pursuant to their right to fish for food. However, Regulation 2539 was only a small part of a much larger regulatory scheme, dating back to 1908, in which aboriginal peoples played a significant part. While the 1917 regulation prohibits aboriginal peoples from selling fish obtained under their food rights, it did not prevent them from obtaining licences to fish commercially under the general regulatory scheme laid down in 1908 and modified through the years. In this way, the regulations recognized the aboriginal right to participate in the commercial fishery. Instead of barring aboriginal fishers from the commercial fishery, government regulations and policy before and after 1917 have consistently given them preferences in obtaining the necessary commercial licences. Far from extinguishing the aboriginal right to fish, this policy may be seen as tacit acceptance of a "limited priority" in aboriginal fishers to the commercial fishery of which Dickson J. spoke in *Jack* and which was approved in *Sparrow*.

292. Evidence of the participation in commercial fishing by aboriginal people prior to the regulations in 1917 in commercial fishing was discussed by Dickson J. in *Jack, supra*. That case was concerned with the policy of the Colonialists prior to Confederation. Without repeating the entirety of that discussion here, it is sufficient to note the conclusion reached at p. 311:

. . . the Colony gave priority to the Indian fishery as an appropriate pursuit for the coastal Indians, primarily for food purposes and, to a lesser extent, for barter purposes with the white residents.

293. This limited priority for aboriginal commercial fishing is reflected in the government policy of extending preferences to aborigines engaged in the fishery. The

1954 Regulations, as amended in 1974, provided for reduced licensing fees for aboriginal fishers. For example, either a gill-net fishing licence that would cost a non-aboriginal fisher \$2,000, or a seine fishing licence that would cost a non-native fisher \$200, would cost a native fisher \$10. Moreover, the evidence available indicates that there has been significant aboriginal participation in the commercial fishery. Specifically, a review of aboriginal participation in the commercial fishery for 1985 found that 20.5 per cent of the commercial fleet was Indian-owned or Indian-operated and that that segment of the commercial fleet catches 27.7 per cent of the commercial catch. Since the regulatory scheme is cast in terms of individual rights, it has never expressly recognized the right of a particular aboriginal group to a specific portion of the fishery. However, it has done so implicitly by granting aboriginal fishers preferences based on their membership in an aboriginal group.

294. It thus emerges that the regulatory scheme in place since 1908, far from extinguishing the aboriginal right to fish for sale, confirms that right and even suggests recognition of a limited priority in its exercise. I conclude that the aboriginal right of the Sto:lo to fish for sustenance has not been extinguished.

295. The remaining questions are whether the regulation infringes the Sto:lo's aboriginal right to fish for trade to supplement the fish they took for food and ceremonial purposes and, if so, whether that infringement constitutes a justifiable limitation on the right.

2. Is the Aboriginal Right Infringed?

296. The right established, the next inquiry, following *Sparrow*, is whether the regulation constitutes a *prima facie* infringement of the aboriginal right. If it does, the inquiry moves on to the question of whether the *prima facie* infringement is justified.
297. The test for *prima facie* infringement prescribed by *Sparrow* is "whether the legislation in question has the effect of interfering with an existing aboriginal right" (p. 1111). If it has this effect, the *prima facie* infringement is made out. Having set out this test, Dickson C.J. and La Forest J. supplement it by stating that the court should consider whether the limit is unreasonable, whether it imposes undue hardship, and whether it denies to the holders of the right their "preferred means of exercising that right" (p. 1112). These questions appear more relevant to the stage two justification analysis than to determining the *prima facie* right; as the Chief Justice notes in *Gladstone* (at para. 43), they seem to contradict the primary assertion that a measure which has the effect of interfering with the aboriginal right constitutes a *prima facie* violation. In any event, I agree with the Chief Justice that a negative answer to the supplementary questions does not negate a *prima facie* infringement.
298. The question is whether the regulatory scheme under which Mrs. Van der Peet stands charged has the "effect" of "interfering with an existing aboriginal right", in this case the right of the Sto:lo to sell fish to the extent required to provide for needs they traditionally by native law and custom took from the section of the river whose banks they occupied. The inquiry into infringement in a case like this may be viewed in two stages. At the first stage, the person charged must show that he or she had a *prima facie*

right to do what he or she did. That established, it falls to the Crown to show that the regulatory scheme meets the particular entitlement of the Sto:lo to fish for sustenance.

299. The first requirement is satisfied in this case by demonstration of the aboriginal right to sell fish prohibited by regulation. The second requirement, however, has not been satisfied. Notwithstanding the evidence that aboriginal fishers as a class enjoy a significant portion of the legal commercial market and that considerable fish caught as "food fish" is illegally sold, the Crown has not established that the existing regulations satisfy the particular right of the Sto:lo to fish commercially for sustenance. The issue is not the quantity of fish currently caught, which may or may not satisfy the band's sustenance requirements. The point is rather that the Crown, by denying the Sto:lo the right to sell any quantity of fish, denies their limited aboriginal right to sell fish for sustenance. The conclusion of *prima facie* infringement of the collective aboriginal right necessarily follows.

300. The Crown argued that regulation of a fishery to meet the sustenance needs of a particular aboriginal people is administratively unworkable. The appellant responded with evidence of effective regulation in the State of Washington of aboriginal treaty rights to sustenance fishing. I conclude that the sustenance standard is not so inherently indeterminate that it cannot be regulated. It is for the Crown, charged with administering the resource, to determine effective means to regulate its lawful use. The fact that current regulations fail to do so confirms the infringement, rather than providing a defence to it.

3. Is the Government's Limitation of Mrs. Van der Peet's Right to Fish for Sustenance Justified?

301. Having concluded that the Sto:lo possess a limited right to engage in fishing for commerce and that the regulation constitutes a *prima facie* infringement of this right, it remains to consider whether the infringement is justified. The inquiry into justification is in effect an inquiry into the extent the state can limit the exercise of the right on the ground of policy.
302. Just as I parted company with the Chief Justice on the issue of what constitutes an aboriginal right, so I must respectfully dissent from his view of what constitutes justification. Having defined the right at issue in such a way that it possesses no internal limits, the Chief Justice compensates by adopting a large view of justification which cuts back the right on the ground that this is required for reconciliation and social harmony: *Gladstone*, at paras. 73 to 75. I would respectfully decline to adopt this concept of justification for three reasons. First, it runs counter to the authorities, as I understand them. Second, it is indeterminate and ultimately more political than legal. Finally, if the right is more circumspectly defined, as I propose, this expansive definition of justification is not required. I will elaborate on each of these difficulties in turn, arguing that they suggest a more limited view of justification: that the Crown may prohibit exploitation of the resource that is incompatible with its continued and responsible use.
303. I turn first to the authorities. The doctrine of justification was elaborated in *Sparrow*. Dickson C.J. and La Forest J. endorsed a two-part test. First, the Crown must establish that the law or regulation at issue was enacted for a "compelling and

substantial" (p. 1113) purpose. Conserving the resource was cited as such a purpose. Also valid, "would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves" (p. 1113). Second, the government must show that the law or regulation is consistent with the fiduciary duty of the Crown toward aboriginal peoples. This means, Dickson C.J. and La Forest J. held, that the Crown must demonstrate that it has given the aboriginal fishery priority in a manner consistent with the views of Dickson J. (as he then was) in *Jack*: absolute priority to the Crown to act in accordance with conservation; clear priority to Indian food fishing; and "limited priority" for aboriginal commercial fishing "over the competing demands of commercial and sport fishing" (p. 311).

304. The Chief Justice interprets the first requirement of the *Sparrow* test for justification, a compelling and substantial purpose, as extending to any goal which can be justified for the good of the community as a whole, aboriginal and non-aboriginal. This suggests that once conservation needs are met, the inquiry is whether the government objective is justifiable, having regard to regional interests and the interests of non-aboriginal fishers. The Chief Justice writes in *Gladstone* (at para. 75):

. . . I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. [Emphasis added.]

305. Leaving aside the undefined limit of "proper circumstances", the historical reliance of the participation of non-aboriginal fishers in the fishery seems quite different from the compelling and substantial objectives this Court described in *Sparrow* --

conservation of the resource, prevention of harm to the population, or prevention of harm to the aboriginal people themselves. These are indeed compelling objectives, relating to the fundamental conditions of the responsible exercise of the right. As such, it may safely be said that right-thinking persons would agree that these limits may properly be applied to the exercise of even constitutionally entrenched rights. Conservation, for example, is the condition upon which the right to use the resource is itself based; without conservation, there can be no right. The prevention of harm to others is equally compelling. No one can be permitted to exercise rights in a way that will harm others. For example, in the domain of property, the common law has long provided remedies against those who pollute streams or use their land in ways that detrimentally affect others.

306. Viewed thus, the compelling objectives foreseen in *Sparrow* may be seen as united by a common characteristic; they constitute the essential pre-conditions of any civilized exercise of the right. It may be that future cases may endorse limitation of aboriginal rights on other bases. For the purposes of this case, however, it may be ventured that the range of permitted limitation of an established aboriginal right is confined to the exercise of the right rather than the diminution, extinguishment or transfer of the right to others. What are permitted are limitations of the sort that any property owner or right holder would reasonably expect -- the sort of limitations which must be imposed in a civilized society if the resource is to be used now and in the future. They do not negate the right, but rather limit its exercise. The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not

limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*.

307. The Chief Justice, while purporting to apply the *Sparrow* test for justification, deviates from its second requirement as well as the first, in my respectful view. Here the stipulations are that the limitation be consistent with the Crown's fiduciary duty to the aboriginal people and that it reflect the priority set out by Dickson J. in *Jack*. The duty of a fiduciary, or trustee, is to protect and conserve the interest of the person whose property is entrusted to him. In the context of aboriginal rights, this requires that the Crown not only preserve the aboriginal people's interest, but also manage it well: *Guerin*. The Chief Justice's test, however, would appear to permit the constitutional aboriginal fishing right to be conveyed by regulation, law or executive act to non-native fishers who have historically fished in the area in the interests of community harmony and reconciliation of aboriginal and non-aboriginal interests. Moreover, the Chief Justice's scheme has the potential to violate the priority scheme for fishing set out in *Jack*. On his test, once conservation is satisfied, a variety of other interests, including the historical participation of non-native fishers, may justify a variety of regulations governing distribution of the resource. The only requirement is that the distribution scheme "take into account" the aboriginal right. Such an approach, I fear, has the potential to violate not only the Crown's fiduciary duty toward native peoples, but also to render meaningless the "limited priority" to the non-commercial fishery endorsed in *Jack* and *Sparrow*.

308. Put another way, the Chief Justice's approach might be seen as treating the guarantee of aboriginal rights under s. 35(1) as if it were a guarantee of individual rights

under the *Charter*. The right and its infringement are acknowledged. However, the infringement may be justified if this is in the interest of Canadian society as a whole. In the case of individual rights under the *Charter*, this is appropriate because s. 1 of the *Charter* expressly states that these rights are subject to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". However, in the case of aboriginal rights guaranteed by s. 35(1) of the *Constitutional Act, 1982*, the framers of s. 35(1) deliberately chose not to subordinate the exercise of aboriginal rights to the good of society as a whole. In the absence of an express limitation on the rights guaranteed by s. 35(1), limitations on them under the doctrine of justification must logically and as a matter of constitutional construction be confined, as *Sparrow* suggests, to truly compelling circumstances, like conservation, which is the *sine qua non* of the right, and restrictions like preventing the abuse of the right to the detriment of the native community or the harm of others -- in short, to limitations which are essential to its continued use and exploitation. To follow the path suggested by the Chief Justice is, with respect, to read judicially the equivalent of s. 1 into s. 35(1), contrary to the intention of the framers of the Constitution.

309. A second objection to the approach suggested by the Chief Justice is that it is indeterminate and ultimately may speak more to the politically expedient than to legal entitlement. The imprecision of the proposed test is apparent. "In the right circumstances", themselves undefined, governments may abridge aboriginal rights on the basis of an undetermined variety of considerations. While "account" must be taken of the native interest and the Crown's fiduciary obligation, one is left uncertain as to what degree. At the broadest reach, whatever the government of the day deems necessary in order to reconcile aboriginal and non-aboriginal interests might pass muster. In narrower incarnations, the result will depend on doctrine yet to be determined. Upon challenge

in the courts, the focus will predictably be on the social justifiability of the measure rather than the rights guaranteed. Courts may properly be expected, the Chief Justice suggests, not to be overly strict in their review; as under s. 1 of the *Charter*, the courts should not negate the government decision, so long as it represents a "reasonable" resolution of conflicting interests. This, with respect, falls short of the "solid constitutional base upon which subsequent negotiations can take place" of which Dickson C.J. and La Forest J. wrote in *Sparrow*, at p. 1105.

310. My third observation is that the proposed departure from the principle of justification elaborated in *Sparrow* is unnecessary to provide the "reconciliation" of aboriginal and non-aboriginal interests which is said to require it. The Chief Justice correctly identifies reconciliation between aboriginal and non-aboriginal communities as a goal of fundamental importance. This desire for reconciliation, in many cases long overdue, lay behind the adoption of s. 35(1) of the *Constitution Act, 1982*. As *Sparrow* recognized, one of the two fundamental purposes of s. 35(1) was the achievement of a just and lasting settlement of aboriginal claims. The Chief Justice also correctly notes that such a settlement must be founded on reconciliation of aboriginal rights with the larger non-aboriginal culture in which they must, of necessity, find their exercise. It is common ground that ". . . a morally and politically defensible conception of aboriginal rights will incorporate both [the] legal perspectives" of the "two vastly dissimilar legal cultures" of European and aboriginal cultures": Walters, *supra*, at pp. 413 and 412, respectively. The question is how this reconciliation of the different legal cultures of aboriginal and non-aboriginal peoples is to be accomplished. More particularly, does the goal of reconciliation of aboriginal and non-aboriginal interests require that we permit the Crown to require a judicially authorized transfer of the aboriginal right to

non-aboriginals without the consent of the aboriginal people, without treaty, and without compensation? I cannot think it does.

311. My reasons are twofold. First, as suggested earlier, if we adopt a conception of aboriginal rights founded in history and the common law rather than what is "integral" to the aboriginal culture, the need to adopt an expansive concept of justification diminishes. As the Chief Justice observes, the need to expand the *Sparrow* test stems from the lack of inherent limits on the aboriginal right to commercial fishing he finds to be established in *Gladstone*. On the historical view I take, the aboriginal right to fish for commerce is limited to supplying what the aboriginal people traditionally took from the fishery. Since these were not generally societies which valued excess or accumulated wealth, the measure will seldom, on the facts, be found to exceed the basics of food, clothing and housing, supplemented by a few amenities. This accords with the "limited priority" for aboriginal commercial fishing that this Court endorsed in *Sparrow*. Beyond this, commercial and sports fishermen may enjoy the resource as they always have, subject to conservation. As suggested in *Sparrow*, the government should establish what is required to meet what the aboriginal people traditionally by law and custom took from the river or sea, through consultation and negotiation with the aboriginal people. In normal years, one would expect this to translate to a relatively small percentage of the total commercial fishing allotment. In the event that conservation concerns virtually eliminated commercial fishing, aboriginal commercial fishing, limited as it is, could itself be further reduced or even eliminated.

312. On this view, the right imposes its own internal limit -- equivalence with what by ancestral law and custom the aboriginal people in question took from the resource. The government may impose additional limits under the rubric of justification

to ensure that the right is exercised responsibly and in a way that preserves it for future generations. There is no need to impose further limits on it to affect reconciliation between aboriginal and non-aboriginal peoples.

313. The second reason why it is unnecessary to adopt the broad doctrine of justification proposed by the Chief Justice is that other means, yet unexploited, exist for resolving the different legal perspectives of aboriginal and non-aboriginal people. In my view, a just calibration of the two perspectives starts from the premise that full value must be accorded to such aboriginal rights as may be established on the facts of the particular case. Only by fully recognizing the aboriginal legal entitlement can the aboriginal legal perspective be satisfied. At this stage of the process -- the stage of defining aboriginal rights -- the courts have an important role to play. But that is not the end of the matter. The process must go on to consider the non-aboriginal perspective -- how the aboriginal right can be legally accommodated within the framework of non-aboriginal law. Traditionally, this has been done through the treaty process, based on the concept of the aboriginal people and the Crown negotiating and concluding a just solution to their divergent interests, given the historical fact that they are irretrievably compelled to live together. At this stage, the stage of reconciliation, the courts play a less important role. It is for the aboriginal peoples and the other peoples of Canada to work out a just accommodation of the recognized aboriginal rights. This process -- definition of the rights guaranteed by s. 35(1) followed by negotiated settlements -- is the means envisioned in *Sparrow*, as I perceive it, for reconciling the aboriginal and non-aboriginal legal perspectives. It has not as yet been tried in the case of the Sto:lo. A century and one-half after European settlement, the Crown has yet to conclude a treaty with them. Until we have exhausted the traditional means by which aboriginal and non-aboriginal legal perspectives may be reconciled, it seems difficult to assert that it is

necessary for the courts to suggest more radical methods of reconciliation possessing the potential to erode aboriginal rights seriously.

314. I have argued that the broad approach to justification proposed by the Chief Justice does not conform to the authorities, is indeterminate, and is, in the final analysis unnecessary. Instead, I have proposed that justifiable limitation of aboriginal rights should be confined to regulation to ensure their exercise conserves the resource and ensures responsible use. There remains a final reason why the broader view of justification should not be accepted. It is, in my respectful opinion, unconstitutional.

315. The Chief Justice's proposal comes down to this. In certain circumstances, aborigines may be required to share their fishing rights with non-aboriginals in order to effect a reconciliation of aboriginal and non-aboriginal interests. In other words, the Crown may convey a portion of an aboriginal fishing right to others, not by treaty or with the consent of the aboriginal people, but by its own unilateral act. I earlier suggested that this has the potential to violate the Crown's fiduciary duty to safeguard aboriginal rights and property. But my concern is more fundamental. How, without amending the Constitution, can the Crown cut down the aboriginal right? The exercise of the rights guaranteed by s. 35(1) is subject to reasonable limitation to ensure that they are used responsibly. But the rights themselves can be diminished only through treaty and constitutional amendment. To reallocate the benefit of the right from aborigines to non-aboriginals, would be to diminish the substance of the right that s. 35(1) of the *Constitution Act, 1982* guarantees to the aboriginal people. This no court can do.

316. I therefore conclude that a government limitation on an aboriginal right may be justified, provided the limitation is directed to ensuring the conservation and

responsible exercise of the right. Limits beyond this cannot be saved on the ground that they are required for societal peace or reconciliation. Specifically, limits that have the effect of transferring the resource from aboriginal people without treaty or consent cannot be justified. Short of repeal of s. 35(1), such transfers can be made only with the consent of the aboriginal people. It is for the governments of this country and the aboriginal people to determine if this should be done, not the courts. In the meantime, it is the responsibility of the Crown to devise a regulatory scheme which ensures the responsible use of the resource and provides for the division of what remains after conservation needs have been met between aboriginal and non-aboriginal peoples.

317. The picture of aboriginal rights that emerges resembles that put forward by Dickson J. (as he then was) in *Jack* and endorsed in *Sparrow*. Reasoning from the premise that the *British Columbia Terms of Union*, R.S.C., 1985, App. II, No. 10, required the federal government to adopt an aboriginal "policy as liberal" as that of the colonial government of British Columbia, Dickson J. opined at p. 311:

. . . one could suggest that "a policy as liberal" would require clear priority to Indian food fishing and some priority to limited commercial fishing over the competing demands of commercial and sport fishing. Finally, there can be no serious question that conservation measures for the preservation of the resource -- effectively unknown to the regulatory authorities prior to 1871 -- should take precedence over any fishing, whether by Indians, sportsmen, or commercial fishermen.

318. The relationship between the relative interests in a fishery with respect to which an aboriginal right has been established in the full sense, that is of food, ceremony and articles to meet other needs obtained directly from the fishery or through trade and barter of fish products, may be summarized as follows:

1. The state may limit the exercise of the right of the aboriginal people, for purposes associated with the responsible use of the right, including conservation and prevention of harm to others;
2. Subject to these limitations, the aboriginal people have a priority to fish for food, ceremony, as well as supplementary sustenance defined in terms of the basic needs that the fishery provided to the people in ancestral times;
3. Subject to (1) and (2) non-aboriginal peoples may use the resource.

319. In times of plentitude, all interests may be satisfied. In times of limited stocks, aboriginal food fishing will have priority, followed by additional aboriginal commercial fishing to satisfy the sustenance the fishery afforded the particular people in ancestral times. The aboriginal priority to commercial fishing is limited to satisfaction of these needs, which typically will be confined to basic amenities. In this sense, the right to fish for commerce is a "limited" priority. If there is insufficient stock to satisfy the entitlement of all aboriginal peoples after required conservation measures, allocations must be made between them. Allocations between aboriginal peoples may also be required to ensure that upstream bands are allowed their fair share of the fishery, whether for food or supplementary sustenance. All this is subject to the overriding power of the state to limit or indeed, prohibit fishing in the interests of conservation.

320. The consequence of this system of priorities is that the Crown may limit aboriginal fishing by aboriginal people found to possess a right to fish for sustenance on two grounds: (1) on the ground that a limited amount of fish is required to satisfy the

basic sustenance requirement of the band, and (2) on the ground of conservation and other limits required to ensure the responsible use of the resource (justification).

321. Against this background, I return to the question of whether the regulation preventing the Sto:lo from selling any fish is justified. In my view it is not. No compelling purpose such as that proposed in *Sparrow* has been demonstrated. The denial to the Sto:lo of their right to sell fish for basic sustenance has not been shown to be required for conservation or for other purposes related to the continued and responsible exploitation of the resource. The regulation, moreover, violates the priorities set out in *Jack* and *Sparrow* and breaches the fiduciary duty of the Crown to preserve the rights of the aboriginal people to fish in accordance with their ancestral customs and laws by summarily denying an important aspect of the exercise of the right.

4. Conclusion

322. I would allow the appeal to the extent of confirming the existence in principle of an aboriginal right to sell fish for sustenance purposes, and set aside the appellant's conviction. I would answer the constitutional question as follows:

Question: Is s. 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, of no force or effect with respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

Answer: Section 27(5) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read on September 11, 1987, is of no force or effect with

respect to the appellant in the circumstances of these proceedings, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, as invoked by the appellant.

Appeal dismissed, L'HEUREUX-DUBÉ and McLACHLIN JJ. dissenting.

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Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

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Solicitors for the interveners Delgamuukw et al.: Rush Crane, Guenther & Adams, Vancouver.

Solicitors for the interveners Howard Pamajewon, Roger Jones, Arnold Gardner, Jack Pitchenese and Allan Gardner: Pape & Salter, Vancouver.

B.C. Reg. 204/88
O.C. 889/88

Deposited May 13, 19⁸⁸
effective June 1, 19⁸⁸

Water Act
WATER REGULATION

[includes amendments up to B.C. Reg. 195/2009, August 20, 2009]

Contents

Part 1 — Interpretation

- 1 Interpretation
- 1.1 Industrial purpose

Part 2 — Acquisition of Water Rights

- 2 Application for licence
- 3 Notice requirements
- 3.1 Quick licensing procedures

Part 3 — Fees, Rentals and Charges

- 4 Tariff of fees, rentals and charges
- 5 Application for several purposes
- 6 Repealed
- 7 Rentals
- 8 Local authorities
- 9 Unauthorized diversion or works
- 10 Schedule B indexing factors
- 11 Penalty on overdue accounts
- 12 Rentals due 1/2 yearly where rentals exceed \$100 000
- 13 Certain fees and rentals remitted under *Financial Administration Act*

Part 4 — Power Developments

- 14 Application
- 15 Power use categories
- 16 Determination of fees, rentals and charges
- 17 First annual rental — when due
- 18 Rate adjustments in certain circumstances
- 19 Additional fees in respect of certain downstream benefits
- 20 Calculating biennial installment rentals
- 21 Indexing factor for years after 1994
- 22 Exception to annual rental requirement
- 23 Consignment agreements
- 23.1 Remission of annual rentals payable for orders under section 88 of the Act
- 23.2 Remission of annual rentals payable for water use plans

Part 5 — Expropriation of Land by Licensees

- 24 Interpretation
- 25 Consent under section 27 (4) of the Act, respecting dams
- 26 Commencement of expropriation proceedings
- 27 Substitute service
- 28 Amendment of documents after commencement
- 29 Owner may refuse or accept offer of compensation
- 30 Applications to Supreme Court
- 31 Procedures on application, and method and basis of compensation
- 32 Costs of expropriation proceedings
- 33 Repealed
- 34 Repealed

Part 6 — Water Districts

35 Water districts

Part 7 — Changes in and about a Stream

- 36 Definitions
- 37 Authority to make a change in and about a stream
- 38 Limits on the authority to make a change in and about a stream
- 39 Failure to comply with this regulation when making a change in and about a stream
- 40 Notification
- 41 Protection of water quality
- 42 Protection of habitat
- 43 Protection of other water users
- 44 Authorization for changes in and about a stream

Schedule A

Schedule B

Schedule C

Schedule D

Part 1 — Interpretation

Interpretation

1 (1) In this regulation:

"Act" means the *Water Act*;

"approval" means an approval of the comptroller or regional water manager under section 8 of the Act;

"authorized capacity", with reference to a power development, means

- (a) the capacity that the comptroller estimates is obtainable, using the total licenced flow for the power development over the available head, at an anticipated efficiency,
- (b) the capacity stated in the licence for the power development, or
- (c) if there is more than one licence for the power development,
 - (i) the accumulated capacity of each licence, or
 - (ii) the total capacity stated in the latest licence issued with respect to the power development,

and, for the purposes of paragraph (b) or (c), the capacity stated in a licence may be

- (d) the estimated capacity at the time the licence is issued, or

- (e) the total of the nameplate ratings of all generating units, including those not yet placed in service, stated as the capacity in an amended licence;

"construction capacity", in relation to a power development, means the portion of the authorized capacity that has not been placed in service;

"instrument" means a document relating to the transfer, charging or otherwise dealing with or affecting land or evidencing title to it;

"local authority" means a water district incorporated under an Act, municipality, improvement district, water utility under the *Water Utility Act* or development district;

"output" means the hydro electrical or hydro mechanical energy produced by a power development;

"point of diversion" means the place on the natural channel of a stream where an applicant

proposes, or a licensee is authorized, to divert water from the stream;

"power development" means, as the context requires, either the works authorized by a single licence issued for power purpose or the works authorized in common by several such licences;

"quantity allowed" means the maximum quantity which under a licence is authorized to be diverted at a certain time or during a certain period;

"rental" means the annual rental, or rental for any other period set under this regulation, with respect to a licence, permit or authorization, whenever issued, and includes the rental set under this regulation for water diverted or used under the *Water Act* or another Act;

"water district", except in the definition of "local authority", means a water district referred to in section 35 and described in Schedule C.

[am. B.C. Regs. 154/94, s. 1; 414/98, s. 1; 348/2004, s. (a).]

Industrial purpose

- 1.1** Any use of water in British Columbia, and any use of water at a place in British Columbia, that is listed in items 1 (c), 2 (a), 4 (b), 5 (a) or 6 (b) of Part 2 of Schedule A, is designated as a use included under industrial purpose.

[en. B.C. Reg. 549/2004, s. 2 (a).]

Part 2 — Acquisition of Water Rights

Application for licence

- 2** (1) An application to the comptroller or regional water manager for a licence must be signed in duplicate by the applicant or his agent and shall include the following information:
- (a) the full name of the applicant, a mailing address and a telephone number where the applicant or his agent may be contacted;
 - (b) the official name or a clear description of the proposed reservoir or source of supply or reservoir and source of supply;
 - (c) the stream or body of water, if any, to which the proposed source of supply discharges or is immediately tributary;
 - (d) the purpose for which the water is to be used;
 - (e) the quantity of water proposed to be diverted or stored, or diverted and stored, or the amount of power to be generated;
 - (f) the legal description of the land, mine or location where the water is to be used;
 - (g) the applicant's title to or interest in the land, mine or location where the water is to be used;
 - (h) the area of land to be irrigated, if applicable;
 - (i) the location of the point of diversion or storage, or diversion and storage, relative to some other known point;
 - (j) details of the proposed works and the legal description of all lands on which it is proposed to construct works, or that will be affected by flooding;
 - (k) an accurate, labeled drawing showing the land, mine or location where water is proposed to be used, the approximate location of the proposed works and any land that may be physically affected.

(2) Repealed. [B.C. Reg. 456/2003, s. 1 (b).]

- (3) At the time of application, the person applying must pay the appropriate application fee, as set out in Part 1 of Schedule A.

[am. B.C. Regs. 221/89, s. 1; 337/91 (a); 45/2000, s. 2; 456/2003, s. 1.]

Notice requirements

- 3** (1) The comptroller or regional water manager may require that the applicant place signed copies of the application in a secure manner at locations specified by the comptroller or regional water manager.
- (2) At a time or times the comptroller or regional water manager considers appropriate during consideration of an application for a licence, notice of the application shall be given to
- (a) any licensee or applicant for a water licence whose rights will not be protected by the precedence of his licence or application,
 - (b) any riparian owner whose rights may be prejudiced by the granting of the application,
 - (c) any owner whose property may be physically affected by the applicant's works, and
 - (d) any other person, agency or minister of the Crown whose input the comptroller or regional water manager considers advisable.
- (3) The comptroller or regional water manager may, in an appropriate case, require the applicant for a licence to publish notice of the application in a newspaper approved by the comptroller or regional water manager.
- (4) The time within which a notice of objection to the granting of an application for a licence may be filed under section 11 (1) of the Act is the 30 day period commencing on the day notice of the application is given.
- (5) A licensee, riparian owner or applicant for a licence who considers that his rights would be prejudiced by the granting of a licence and who satisfies the comptroller or regional water manager that he was not given notice of the application for the licence may file an objection to the granting of the licence at any time before issuance of the licence applied for.

Quick licensing procedures

- 3.1** (1) In this section, "**application for a change of works**" means, in respect of a licence,
- (a) a proposal to amend the licence under section 18 of the Act,
 - (b) an application for a transfer of appurtenancy under section 19 of the Act, or
 - (c) a proposal for an apportionment under section 20 of the Act,
- if the proposal or application proposes one or both of
- (d) works additional to the works previously authorized by the licence, and
 - (e) changes to the works previously authorized by the licence.
- (2) A reference in this section to "owner" does not include an owner that is the government but, despite this, section 26 of the Act continues to apply in the case of Crown land that is or is likely to be physically affected by proposed works or by changes to authorized works.
- (3) Section 3 does not apply to a licence application that is accepted for filing under section 12.1 of the Act.
- (4) An application for a licence does not qualify as an eligible application under section 12.1 of the Act unless, before the application is considered,
- (a) the applicant delivers or causes to be delivered, in accordance with subsection (6) of this section, a copy of the following to each owner, if any, whose parcel of land is or is likely to be physically affected by the applicant's works:

- (i) a copy of the application;
 - (ii) a copy of the drawing referred to in section 2 (1) (k) of this regulation;
 - (iii) a copy of a Landowner's Consent Form in Form 1 of Schedule D, and
- (b) the applicant submits, for each parcel of land referred to in paragraph (a), a Landowner's Consent Form in Form 1 of Schedule D, completed and signed by the owner of the parcel or by that owner's agent and to which is attached
- (i) a copy of the application, and
 - (ii) a copy of the drawing referred to in paragraph (a) (ii) signed by the owner of the parcel or by that owner's agent.
- (5) An application for a change of works does not qualify as an eligible application under section 12.1 of the Act unless, before the application is approved,
- (a) the holder of the licence authorizing the works to be changed delivers or causes to be delivered, in accordance with subsection (6) of this section, a copy of the following to each owner, if any, whose parcel of land is or is likely to be physically affected by the proposed change to the works:
- (i) the application, including an accurate description of the proposed change to the works;
 - (ii) one or more accurate, labeled drawings showing
 - (A) the scale of the drawing,
 - (B) the location of all existing and proposed works, and
 - (C) the following if applicable:
 - (I) in the case of a transfer of appurtenancy, the existing and proposed appurtenancies;
 - (II) in the case of an apportionment, the subdivision or the proposed subdivision, as the case may be, of the land appurtenant to the licence, including the boundaries of each parcel in the subdivision;
 - (iii) a Landowner's Consent Form in Form 2 of Schedule D;
 - (iv) the plat issued with the licence or, if no such plat was issued, the drawing referred to in section 2 (1) (k) of this regulation, and
- (b) the holder of the licence submits, for each parcel of land referred to in paragraph (a), a Landowner's Consent Form in Form 2 of Schedule D, completed and signed by the owner of the parcel or by that owner's agent, and to which is attached
- (i) a copy of the application, and
 - (ii) a copy of the drawings referred to in paragraph (a) (ii) signed by the owner of the parcel or by that owner's agent.
- (6) Delivery to an owner of the materials referred to in subsection (4) or (5) must be effected by
- (a) personally delivering a copy of the materials to the owner or the owner's agent,
 - (b) leaving a copy of the materials at the residence of the owner or of the owner's agent, or
 - (c) sending a copy of the materials by registered mail to the owner or the owner's agent.
- [en. B.C. Reg. 45/2000, s. 3.]

Part 3 — Fees, Rentals and Charges

Tariff of fees, rentals and charges

- 4** (1) Schedule A, together with the relevant provisions of this regulation, is established as the tariff

of the fees, rentals and charges referred to in section 100 of the Act.

- (2) A reference in this regulation to a fee, rental or charge is reference to the applicable fee, rental or charge payable at the rate or rates set out in Schedule A.

[am. B.C. Reg. 309/2004, s. (a).]

Application for several purposes

- 5 Where an application for a water licence indicates that water is to be used for more than one purpose, the application fee shall be the sum of the fees that would be payable if a separate application were made in respect of each purpose.

Repealed

- 6 Repealed. [B.C. Reg. 456/2003, s. 2.]

Rentals

- 7 (1) When issuing a licence, the comptroller, in accordance with this section, must set
- (a) the date that the first rental is due and the rental due date for subsequent rental periods, and
 - (b) the duration of the first rental period and the duration of the ordinary rental period for the purpose of all subsequent rental periods.
- (2) For the purposes of all licences except those to which subsection (4) applies,
- (a) the rental period, except for the first rental period, is one year, and
 - (b) the first rental period is one year or any period less than one year.
- (3) Payment of the rental for each rental period under a licence is due,
- (a) except for the first rental period, on the rental due date set under subsection (1) for ordinary rental periods for the licence, and
 - (b) for the first rental period, on the date set by the comptroller.
- (4) If the total amount of annual rental or rentals, determined under Schedule A, for all licences held by a licensee in a region on the date for which the rental statement is calculated is or would be \$60 or less, the comptroller must, for each licence,
- (a) set the duration of the ordinary rental period of the licence for a period of 3 years, and
 - (b) set the duration of the first rental period for a period less than or equal to 3 years to accord with the date on which rentals for the 3 year ordinary rental period for that region are payable.
- (5) If a licensee holds licences appurtenant to parcels of land located in different regions but the total amount of annual rentals for the purposes of subsection (4) is or would be \$60 or less, subsection (4) applies and the comptroller must administer the licences for rental billing purposes as if all of the licences related to land located in only one of the regions.
- (6) If a licence referred to in subsection (4) is transferred to a new owner and the land to which it is appurtenant is situated in a different region than the region chosen as the administrative region for the purposes of the group of licences of which it previously formed a part, subsection (4) (b) or (5) applies so that the comptroller can reconcile the billing schedule for that licence with that of other licences held by the new owner.
- (7) Repealed. [B.C. Reg. 456/2003, s. 3.]
- (8) The first rental must be calculated by adjusting the appropriate rental according to the number of days left until the next rental due date.

(9) Repealed. [B.C. Reg. 456/2003, s. 3.]

(10) Rentals for a rental period are payable in advance on the rental due date to the government by the licensee in respect of every purpose for which the licence is issued, whether or not the rights granted under the licence are exercised.

(11) Rentals must be calculated and are payable when due in accordance with the tariff in effect on the rental due date.

(12) If, by the amendment of a licence or the substitution of one licence for another, the maximum quantity of water which may be diverted or the maximum amount of power which may be developed is changed or the conditions of or purpose of the licence changes, the comptroller must make an appropriate adjustment of the rental and must determine the effective date of the adjustment.

(13) If, for the purposes of subsection (12) the comptroller makes an adjustment of the rental for a licence resulting in a higher rental, the comptroller must issue a rental statement for the additional rental prorated for the balance of the appropriate rental period taking into account whether the total annual rentals, including the additional rental, are or would be \$60 or less.

(14) If, for the purposes of subsection (12) the comptroller makes an adjustment of the rental for a licence resulting in a lower rental, the next rental statement must be for a period that takes into account whether the total annual rentals are or would be \$60 or less, and subsection (4) (b) applies.

[en. B.C. Reg. 414/98, s. 2; am. B.C. Regs. 456/2003, s. 3; 549/2004, s. 2 (b).]

Local authorities

8 (1) Every local authority shall annually pay a single rental consisting of

(a) the rental determined under the tariff and based on the quantity of water that the comptroller determines has been used by the local authority, for waterworks purposes, irrigation purposes or both, and

(b) the aggregate of all rentals due with respect to any other licences or permits, for purposes other than waterworks purposes or irrigation purposes, held or exercised by the local authority.

(2) For the purpose of determining the rental in subsection (1), the comptroller shall require that every local authority complete a report on its consumption of water for the previous calendar year.

(3) Where a report required under subsection (2) has not been filed by the time the rental is to be calculated or the comptroller considers that an accurate measurement of the water diverted is not available, he may determine the quantity of water which has been used, based

(a) for waterworks purposes, on rates of consumption per person served or per connection, and

(b) for irrigation purposes, on irrigation water applied per acre,

that he considers reflect an average for the climatic area concerned.

Unauthorized diversion or works

9 The fees, rentals and charges in Schedule A apply and are payable in respect of

(a) water diverted or used from a stream, other than a diversion referred to in, and done in accordance with, section 42 of the Act, and

(b) works constructed or being constructed,

whether the diversion, use or works are under the authority of a licence or not, and whether the quantity of water diverted or used is within the amount authorized under a licence or not.

Schedule B indexing factors

- 10** Where a fee, rental or charge is indicated as being indexed, the amount due for the 1989 and each subsequent calendar year shall be computed using the base rate shown, multiplied by an indexing factor determined in accordance with the procedures set out in Schedule B, with the result rounded off to the nearest cent.

Penalty on overdue accounts

- 11** (1) If a balance of a fee, rental or charge in respect of a licence remains unpaid on the rental due date for the licence, there shall, on the next day, be added to the fee, rental or charge a percentage of that unpaid balance that is one percent higher than the percentage component of the prime lending rate on that day of the principal banker to the Province.
- (2) The percentage addition under subsection (1) is due and payable as part of the fee, rental or charge, as the case may be.

Rentals due 1/2 yearly where rentals exceed \$100 000

- 12** Where the total amount of annual rentals payable by a licensee on all licences held by him exceeds \$100 000, that total amount shall be payable in 2 approximately equal installments on March 31 and September 30 of each year.

Certain fees and rentals remitted under *Financial Administration Act*

- 13** (1) Remission is hereby authorized of the application fees for a licence, permit or approval or any amendment thereof, and of the rentals with respect to a licence or permit, if
- (a) the Crown, as represented by any minister appointed by the Lieutenant Governor of British Columbia or the Governor General of Canada, is the applicant for the licence, permit or approval or is the holder of the licence or permit, or
- (b) subject to subsection (2), the licence or approval would authorize the use of water on land reserved for Indians under the *Indian Act* (Canada), or the permit would authorize the occupation or flooding of Crown land by Indians as defined in that Act.
- (2) Notwithstanding the remission authorized by subsection (1), rentals shall be payable at the rates set out in Schedule A in respect of any licence authorizing the use of water on land reserved for Indians under the *Indian Act* (Canada) if the land is wholly or partly leased by any person who is not an Indian as defined in that Act, and the amount of the rentals shall be calculated based on the proportion of the water that is utilized by persons who are not Indians.
- (3) Remission is authorized of a fee payable in respect of
- (a) an approval as defined in the Act, or
- (b) a permit issued under section 26 of the Act given to the holder of an approval as defined in the Act, authorizing the flooding of Crown land or the construction, maintenance or operation on the land of works authorized under the approval,

if the approval is granted or the permit is issued by the Oil and Gas Commission under section 17 of the *Oil and Gas Commission Act*.

[am. B.C. Reg. 348/2004, s. (b)]

Part 4 — Power Developments

Application

- 14** (1) This Part applies only to
- (a) licences and applications for power purpose,

- (b) licences and applications for storage purpose, where water is, or is intended to be, used for generation of power, and
 - (c) permits and applications for permits, where the land is, or is intended to be, used in connection with the generation of power, and a reference in this Part to a rate, fee, rental or charge is a reference to the applicable rate, fee, rental or charge in Part 2 of Schedule A.
- (2) Except where a provision in this Part conflicts or is inconsistent with the other provisions of this regulation, those other provisions also apply.
- (3) Where the rate, fee, rental or charge that is otherwise applicable under Part 2 of Schedule A is less than the minimum, if any, set out in Part 2 of Schedule A, then the rate, fee, rental or charge payable shall be that minimum.

Power use categories

15 (1) The categories of power use are as follows:

- (a) "**residential**" means a power use where the capacity and energy generated from a power development, which does not exceed an authorized capacity of 50 kW, is used to supply the household requirements of the licensee, including the requirements of any outbuildings, and may also be used in part to participate in the BC Hydro Net Metering Program;
- (b) "**commercial**" means a power use other than residential where the capacity and energy generated from a power development or developments owned by the licensee, or the entitlement to capacity and energy derived from water licences held by the licensee,
 - (i) is used by the licensee or may be sold by the licensee to immediate family members, employees or tenants of the licensee where the licensee's power development or developments does not exceed an authorized capacity of 499 kW,
 - (ii) is used for the extraction or processing of natural resources, or the manufacturing of products, in a primary industrial facility in which the licensee has an interest of more than 50%, or
 - (iii) is used in a facility that is adjacent to and integrated with a primary industrial facility in which the licensee has an interest of more than 50%, but only to the extent that the capacity and energy used in the adjacent and integrated facility is for the production of output consumed in or for the use of the industrial processes of the licensee;
- (c) "**general**" means
 - (i) a power use where the capacity and energy generated is from a power development or developments owned by a public utility regulated by the British Columbia Utilities Commission under Part 3 of the *Utilities Commission Act*,
 - (ii) a power use where the capacity and energy generated from a power development or developments exceeds that necessary to supply the licensee's capacity and energy requirements as defined by the commercial use category, or
 - (iii) any power use which is not residential or commercial.

(2) For the purposes of subsection (1) (b) (iii), the licensee must be exempt under section 22 or 88 of the *Utilities Commission Act* for the disposition of capacity and energy to the adjacent and integrated facility.

[en. B.C. Reg. 154/94, s. 2; am. B.C. Reg. 195/2009, s. (a).]

Determination of fees, rentals and charges

16 (1) The application fee for a licence for power purpose shall be based on:

- (a) the intended capacity, if the applicant intends to install generating equipment;
 - (b) the anticipated additional output produced in a single normal year at all sites where the water is to be used, if the applicant does not intend to install generating equipment.
- (2) The comptroller may determine the fees, rentals and charges using
- (a) records of operation submitted by the licensee of the power development,
 - (a.1) power sales records of the licensee and power consumption and output records of adjacent and integrated facilities, necessary to determine that all or any part of the capacity and output of a power development or developments should be charged under the commercial power use category described in section 15 (1) (b) (iii),
 - (b) information obtained by an inspection pursuant to section 22 of the Act, and
 - (c) other relevant evidence.
- (3) Annual rentals shall be determined at the appropriate rates according to the categories of power use.
- (4) For the commercial and general categories, there shall be separate rental charges at the rates for the calendar year when the determination is made, with the charge or charges being based on
- (a) the licensee's construction capacity, if any,
 - (b) the balance of the authorized capacity other than construction capacity, and
 - (c) subject to subsection (5), the total of the output from all power developments owned or operated by a single licensee during the preceding calendar year.
- (4.1) The comptroller must use the amount of capacity and output assessed to a licensee at the commercial power use rate as the base from which the capacity and output charges under the general power use rate will be determined under subsection (4).
- (5) Where output transfers in accordance with sections 19 and 23 have taken place during the calendar year immediately preceding the calendar year of a determination under subsection (4), the total of the output referred to in subsection (4) (c) shall be adjusted to reflect the requirements of sections 19 and 23.

[am. B.C. Reg. 154/94, s. 3.]

First annual rental — when due

- 17** The first annual rental is payable on issue of the licence or upon commencement of construction of the works authorized under the licence, whichever occurs first.

Rate adjustments in certain circumstances

- 18** (1) When the licensee of a power development intends to remove a unit of the powerplant from service for replacement of a substantial portion thereof in order to improve the unit's efficiency,
- (a) he shall notify the comptroller of his intention,
 - (b) during the period of replacement, rentals payable on the said unit shall be charged at the rate for construction capacity, and
 - (c) if the replacement unit is of a greater capacity than the previous one, but uses no more water, the authorized capacity on which rentals shall be charged shall change on the day that the unit recommences operation.
- (2) Subsection (1) does not apply to the removal or replacement of a unit as part of routine maintenance.
- (3) When construction capacity becomes operational, the rental rate to be charged shall change, with effect from the day on which the capacity becomes operational.

(4) Where all or part of the authorized capacity is not electrical in nature, the electrical equivalents for capacity and output may be determined, for rental purposes, by assuming that one kilowatt is equal to 1.341286 horsepower.

Additional fees in respect of certain downstream benefits

- 19** (1) In this section "**downstream owner**" means an owner, part owner or operator of a downstream plant outside the Province.
- (2) Subject to subsection (8), where the holder of a licence for storage purposes
- (a) operates the storage facilities for the purpose of enabling a downstream hydro-electric plant outside the Province to generate greater amounts of electricity than the level it could generate if the storage facilities were not so operated, and
 - (b) receives a benefit for doing so from a downstream owner,
- then, in addition to any fees, rentals or charges payable by the licensee for storage purpose under any other section of this regulation, he shall pay the fees determined under this section.
- (3) The additional fee referred to in subsection (2) shall be determined at the appropriate rate for annual rentals upon output.
- (4) The rate for output shall be the higher of
- (a) the rate applicable to the licensee in calculating the other annual rentals upon output payable by him under this regulation, or
 - (b) the rate that would apply to the downstream plant if it were in the Province.
- (5) Where the licensee is also the downstream owner, the additional fee referred to in subsection (2) shall be based on the amount by which the hydro-electrical energy available at the downstream plant increases due to the operation of the upstream storage facilities.
- (6) Where, in return for operating the upstream storage facilities, a licensee who is not a downstream owner receives hydro-electrical energy from a downstream owner, the additional fee referred to in subsection (2) shall be based on the amount of hydro-electrical energy so received.
- (7) Where, in return for operating the upstream storage facilities, a licensee who is not a downstream owner receives benefits other than hydro-electrical energy from a downstream owner, the additional fee referred to in subsection (2) shall be the fee that the licensee would be required to pay under this section if he were a licensee described in subsection (5) and receiving 1/2 of the amount by which the hydro-electrical energy generated by the downstream plant is increased due to the operation of the upstream storage facilities.
- (8) Fees determined under this section shall be payable in the calendar year following that in which the licensee incurs the fee, but for the purpose of any fee calculation under this section the rate for output shall be the rate for output for the calendar year in which the fee is payable, notwithstanding that the licensee incurred the fee during the preceding calendar year.
- (9) This section does not apply to those portions of the downstream power benefits described in the Columbia River Treaty that were sold within the United States of America under the terms of the Sales Agreement of 1964.

Calculating biennial installment rentals

- 20** (1) This section applies only to licensees who are required to pay annual rentals in 2 installments due by March 31 and September 30 respectively.
- (2) The amount of first installment rentals upon output shall be based upon half of the output during the latest 12 month period for which data are available.
- (3) First installment rentals other than those upon output shall be half of the rentals for the full

calendar year.

(4) The second installment rentals shall be the balance due after deduction of amounts paid in accordance with subsections (2) and (3).

Indexing factor for years after 1994

- 21** (1) If a fee, rental or charge is indicated as being indexed, the amount due for the current calendar year must, commencing in the calendar year 1995 and for each subsequent year, be computed using the rates shown in item 11.1 of Part 3 of Schedule A, multiplied by the indexing factor determined in accordance with the procedures set out in Schedule B, with the result rounded off to the nearest one tenth of a cent.
- (2) The comptroller must publish annual updates of the calculation of the indexing factor and the resulting rentals for "Power Purpose" as calculated using Schedules A and B of this regulation.

[en. B.C. Reg. 154/94, s. 4; am. B.C. Reg. 146/2006.]

Exception to annual rental requirement

- 22** A licensee is not required to pay annual rentals in respect of hydro-electrical energy that the licensee is obliged at law to deliver free of charge to an owner or operator of a downstream hydro-electric plant outside the Province as compensation for losses of hydro-electrical capacity, energy or both at that plant suffered as a result of
- (a) the licensee's operation of the upstream storage or power facilities that are the subject of his licence, or
 - (b) filling the licensee's reservoir for the first time.

Consignment agreements

- 23** (1) In this section "**consignment agreement**" means an agreement between 2 licensees of hydro-electric projects under which the consignor delivers electrical energy to the consignee for the latter's immediate use and the consignee establishes an energy account in favour of the consignor, in accordance with standard utility practice.
- (2) Where a licensee of a hydro-electric project has reason to believe that
- (a) the amount of water available for generating electrical energy is likely to exceed the amount required to meet the demand for electrical energy from his project, and
 - (b) due to insufficient storage capacity, unavoidable spilling of water from his reservoir could occur,
- he may, with the object of making more effective use of the available water, enter into a consignment agreement.
- (3) The licensee who is the consignor shall forthwith notify the comptroller of the consignment agreement.
- (4) Disposition of all or part of an energy account established under a consignment agreement may be accomplished or occasioned by one or more of the following:
- (a) delivery of energy to the consignor by the consignee;
 - (b) sale of the energy account itself to the consignee by the consignor;
 - (c) unavoidable spilling of water from the consignee's reservoir.

(5) Where a consignment agreement has been established, water rentals shall be paid on the following basis:

- (a) on delivery of energy to the consignee, he shall be liable for the rentals on it at the rate he would have paid if he had produced it himself;

(b) on disposition of all or part of an energy account in the manner described in subsection (4) (a) or (b), the consignor shall be liable for rentals on the equivalent amount of energy at the same rate he pays for energy produced by him that is not delivered to a consignee under a consignment agreement.

Remission of annual rentals payable for orders under section 88 of the Act

- 23.1** (1) In this section and in section 23.2, "**power development**" includes storage recognized in a licence for storage purpose as supporting storage for that power development.
- (2) Authorization is given for remission of a part of the annual rentals payable in respect of a power development on the following conditions:
- (a) the comptroller is conducting a review of the licences in respect of the power development and of the operation of the power development;
 - (b) during the preceding calendar year the diversion, rate of diversion, storage, carriage, distribution and use of water by the licensee has been regulated by an order under section 88 of the Act, and
 - (i) the effect of the order has been to reduce the power benefits to the licensee in favour of other benefits, which may include benefits for fish, fish habitat, flood protection, recreation or otherwise, and
 - (ii) the comptroller is satisfied that the licensee has operated the power development in accordance with the order;
 - (c) the licensee has begun to prepare a water use plan for the power development in accordance with water use plan guidelines published by the government;
 - (d) the licensee has provided information on the operation of the power development during the preceding calendar year as required by the comptroller.
- (3) The authorization for remission under subsection (2) ceases to have effect when the amount that is to be remitted under this section for the calendar year in which the order referred to in subsection (2) (b) is rescinded has been remitted to the licensee.
- (4) The amount to be remitted under subsection (2) in a calendar year must be
- (a) subject to subsection (5), based on an estimate of the long-term cost to replace the foregone power benefits as agreed by the licensee and the comptroller or, failing agreement, as may be otherwise established by the comptroller, and
 - (b) deducted from the total annual rentals payable by the licensee.
- (5) The total amount of remissions authorized under this section in each calendar year must not exceed \$3.6 million.
- (6) If the annual rentals payable are payable in 2 installments in a calendar year, an estimate of one half of that calendar year's remission must be deducted from the first installment and the balance of that calendar year's remission must be deducted from the second installment.

[en. B.C. Reg. 347/2004; am. B.C. Reg. 195/2009, s. (b).]

Remission of annual rentals payable for water use plans

- 23.2** (1) In this section, "**increased costs**" includes increased costs to a licensee resulting from a condition of an order, new licence or amended licence referred to in subsection (2) (c) that requires a licensee to collect, analyze or report specified information to the comptroller.
- (2) Authorization is given for remission of a part of the annual rentals payable in respect of a power development on the following conditions:
- (a) the comptroller has completed a review of the licences in respect of the power

development and made any changes to the licences that are necessary to

- (i) provide a clear description of the rights granted and obligations imposed in respect of the power development, and
- (ii) provide a basis for monitoring compliance with and enforcement of the licences and the terms and conditions of the licences;

(b) the licensee has

- (i) completed a water use plan in respect of the power development in accordance with water use plan guidelines published by the government, and
- (ii) submitted the water use plan to the comptroller for review;

(c) the comptroller has ordered or authorized the licensee to operate the power development as contemplated by the water use plan as submitted or as modified by the comptroller, including by or as a condition of

- (i) an order made under section 88 of the Act,
- (ii) a new licence issued under section 12 of the Act, or
- (iii) a licence amended under section 18 of the Act;

(d) the order, new licence or amended licence referred to in paragraph (c) was in effect during the preceding calendar year;

(e) compliance with the order, new licence or amended licence referred to in paragraph (c) has caused

- (i) a net loss of revenue to the licensee from power production, or
- (ii) increased costs to the licensee

at the power development that is the subject of the order, new licence or amended licence, in favour of benefits other than power benefits, which may include benefits for fish, fish habitat, flood protection, recreation or otherwise;

(f) the licensee has provided information as required by the comptroller on

- (i) the operation of the power development, or
- (ii) any other aspect of the power development

during the preceding calendar year;

(g) the comptroller is satisfied that the licensee has, during the preceding calendar year, substantially complied with the order, new licence or amended licence referred to in paragraph (c);

(h) the total amount of the remission over the period of the remission schedule, as determined under subsection (3),

- (i) in respect of the Peace River Water Use Plan,
 - (A) is approved by the Lieutenant Governor in Council, or
 - (B) is varied by, and approved as varied, by the Lieutenant Governor in Council, or
- (ii) in respect of all other water use plans, is approved by the chair of Treasury Board.

(3) Subject to subsections (2) (h) (i) and (4), the amount to be remitted under subsection (2) in a calendar year must be

(a) equal to

$$\text{net loss of revenue} + (\text{increased costs} - \text{net gain in revenue}),$$

(b) determined by applying a methodology as agreed by the licensee and the comptroller or, failing agreement, as may be otherwise established by the comptroller, for

- (i) calculating the net loss of and net gain in revenue to the licensee from power production and the increased costs to the licensee at the power development that have resulted from compliance with an order, new licence or amended licence referred to in subsection (2) (c) in respect of the power development, and
 - (ii) a schedule for remission to the licensee, covering a period not longer than 20 years, of annual rentals payable by the licensee in respect of a power development as calculated in accordance with subparagraph (i), commencing in the calendar year following the calendar year in which the order, new licence or amended licence referred to in subsection (2) (c) is made or issued, and
- (c) deducted from the total annual rentals payable by a licensee in respect of a power development.
- (4) The total amount of remissions authorized under this section in each calendar year must not exceed \$50 million.
- (5) If the annual rentals payable are payable in 2 installments in a calendar year, an estimate of one half of that calendar year's remission must be deducted from the first installment and the balance of that calendar year's remission must be deducted from the second installment.

[en. B.C. Reg. 347/2004; am. B.C. Reg. 195/2009, s. (c).]

Part 5 — Expropriation of Land by Licensees

Interpretation

24 In this Part:

"court" means the Supreme Court;

"land" includes an estate or interest in or easement over land.

[am. B.C. Reg. 147/2006, s. (a).]

Consent under section 27 (4) of the Act, respecting dams

25 Where the holder of a licence that authorizes the construction of a dam intends to expropriate land that would be flooded if the dam were constructed and utilized, he may, by means of a petition to the Lieutenant Governor in Council, seek the consent that is required under section 27 (4) of the Act for such an expropriation.

Commencement of expropriation proceedings

26 Where any licensee, including the holder of a licence referred to in section 25, has a right under section 27 of the Act to expropriate land, intends to exercise that right and is unable to reach agreement with the owners of the affected land as to

- (a) what land is reasonably required,
- (b) the amount of compensation, or
- (c) the terms of the required conveyance or other instrument,

the licensee may commence expropriation proceedings by filing with the comptroller and the registrar, and by serving on each owner of the affected land, the following documents:

- (d) notice of intent to acquire the land;
- (e) a plan showing the area the licensee wishes to acquire;
- (f) a draft of the instrument in the form of a conveyance or other instrument considered necessary to vest in the licensee the title to or right over that land in which

- (i) the land affected shall be legally described,
 - (ii) the land benefiting from the easement shall be legally described, and
 - (iii) the character of the works to be constructed and maintained within the easement shall be stated;
- (g) a statement of the amount of compensation offered.

Substitute service

27 Where the comptroller is satisfied that an expropriating licensee has been unable, after reasonable efforts, to effect service on an owner pursuant to section 26, the comptroller may direct substituted service of the documents referred to in section 26 (d) to (g).

Amendment of documents after commencement

28 (1) At any time before an application is made under section 30, the expropriating licensee may amend the documents referred to in section 26 (d) to (g).

(2) Where he makes an amendment under subsection (1), the expropriating licensee shall refile and serve the amended documents in accordance with section 26.

Owner may refuse or accept offer of compensation

29 Each owner of affected land may, within 30 days after service on him under section 26, notify the expropriating licensee and the comptroller whether or not that owner will accept the compensation offered and execute the instrument described in section 26 (f).

Applications to Supreme Court

30 After expiration of the 30 day period referred to in section 29, the expropriating licensee or an owner of the affected land may commence an action in the court for a determination of the following matters:

- (a) the amount of compensation to be paid for the affected land;
- (b) the nature and terms of the conveyance or instrument required to give effect to the expropriating licensee's right under section 27 of the Act to expropriate the land reasonably required in accordance with that section.

[am. B.C. Reg. 147/2006, s. (b).]

Procedures on application, and method and basis of compensation

31 (1) Sections 26 (1) (d), 27, 31 to 44 and 50 of the *Expropriation Act* apply in respect of a determination under section 30 (a), except that, for the purposes of this regulation,

- (a) "**date of expropriation**" in any of those provisions means the date notice of intent referred to in section 26 (d) of this regulation, is filed with the registrar,
- (b) the references to "**the expropriation notice under section 6 (1) (a) or order under section 5 (4) (a)**" in sections 33 (c), 35 (2) and 38 (1) (b) of that Act shall be read as references to the notice of intent referred to in section 26 (d) of this regulation, and
- (c) a reference to the "**expropriating authority**" in any of those provisions shall be read as a reference to an expropriating licensee under the *Water Act*.

- (2) It is the duty of the court to determine the matters referred to in section 30 (b) of this regulation, and the court has the powers necessary to determine those matters.
- (3) Without limiting the generality of this section, the powers of the court under the *Expropriation Act* apply in respect of the determination of an application under section 30.

[am. B.C. Reg. 147/2006, ss. (c) and (d).]

Costs of expropriation proceedings

- 32** (1) Where the court makes a determination under section 26 (1) (c) or (d) of the *Expropriation Act* as adopted by section 31, it shall also determine the reasonable costs of the expropriation proceedings as necessary for the purposes of subsections (2) to (7).
- (2) Where the compensation awarded to an owner is greater than 115% of the amount of compensation offered to the owner, as set out in the statement referred to in section 26 (g), the court shall award the owner his costs and include the costs in the award of compensation.
- (3) Where the compensation awarded to an owner is 115% or less of the amount of compensation offered to the owner, as set out in the statement referred to in section 26 (g), the court has a discretion to award the owner all or part of his costs and the court shall, if it awards any costs to the owner, include the amount of the costs in the award of compensation.
- (4) Where the compensation awarded to an owner is 100% or less of the amount of compensation offered to the owner, as set out in the statement referred to in section 26 (g), the court may, in its discretion,
- (a) award costs to the owner and include the costs in the award of compensation, or
 - (b) award costs to the licensee.
- (5) On a claim under section 41 (3) of the *Expropriation Act* as adopted by section 31, the court may award, in its discretion, costs to the owner or the licensee.
- (6) Where the court awards costs to the licensee under subsection (4) or (5), it shall deduct the amount of costs from the award of compensation.
- (7) Section 45 (3), (7) to (9) and (10) (b) (i) and (c) of the *Expropriation Act* applies for the purposes of this section.

[am. B.C. Reg. 147/2006, ss. (c) and (e).]

Repealed

- 33** Repealed. [B.C. Reg. 147/2006, s. (f).]

Repealed

- 34** Repealed. [B.C. Reg. 456/2003, s. 4.]

Part 6 — Water Districts

Water districts

- 35** The Province is divided into the 26 water districts described in Schedule C.

Part 7 — Changes in and about a Stream

Definitions

- 36** In this Part:

"acid generating rock" means rock that when ground to paste has a paste pH of less than 4.5;

"changes in and about a stream" means changes in and about a stream defined in section 1 of the *Water Act*;

"clear span bridge" means a single span structure without piers which spans a stream channel

from top of bank to top of bank with the bridge abutments outside the stream channel;

"culvert" means one or more pipes, pipe arches, or structures covered with soil and lying below the road surface, used to carry water, but does not include log structures;

"embankment" means a structure of earth, gravel or similar material raised above the surrounding land surface;

"engineer" means an engineer defined in section 1 of the *Water Act*;

"erosion" means the wearing away, by water, of the banks or bed of a stream or of the materials used in any works;

"fish bearing waters" means a stream having a fish population present at some time during the year;

"habitat" means the areas in and about a stream including

- (a) the quantity and quality of water on which fish or wildlife depend directly or indirectly in order to carry out their life processes, and
- (b) spawning grounds and the nursery, rearing, food supply and migration areas;

"habitat officer" means a public service employee designated in writing by the regional director for the regional office of the Ministry of Water, Land and Air Protection where the public service employee is employed;

"municipality" means a municipality or regional district incorporated under the *Municipal Act* or the City of Vancouver;

"natural state" means as close as possible to the state that existed before the change in and about the stream began;

"public utility" means a public utility defined in section 1 of the *Utilities Commission Act* or a federally regulated public utility;

"professional engineer" means a member in good standing of the Association of Professional Engineers and Geoscientists of British Columbia;

"scour" means to scour the stream bed by water action;

"stream" means a stream defined in section 1 of the *Water Act*;

"stream channel" means a stream channel defined in section 1 of the *Water Act*;

"works" means works defined in section 1 of the *Water Act*;

"worksite" means the area required for the construction of works in and about a stream.

[en. B.C. Reg. 241/95; am. B.C. Reg. 109/2002, s. 1.]

Authority to make a change in and about a stream

37 (1) A change in and about a stream must not proceed unless it is

- (a) authorized by an approval, licence or order, or
- (b) made in compliance with this regulation.

(2) If a change in and about a stream is authorized by an approval, licence or order, this regulation, except subsection (3), does not apply to the change in and about the stream.

(3) If the engineer is of the opinion that a proposed change in and about a stream may have a significant detrimental impact on the nature of the stream or stream channel, the engineer may require that an application for an approval or a licence be made in connection with the proposed change in and about a stream.

- (4) The fact that a change in and about a stream meets the requirements of subsection (1) does not relieve the person carrying out the change in and about the stream from
- (a) the requirement to comply with all applicable federal, provincial or municipal enactments, and
 - (b) if the change in and about a stream will occur on Crown land or land owned by another person, from the requirement to obtain the approval of the owner before proceeding.
- [en. B.C. Reg. 241/95.]

Limits on the authority to make a change in and about a stream

- 38** (1) A person must not make a change in and about a stream unless that person
- (a) provides, on request, information that the engineer, officer or habitat officer requires to assess the impact on the nature of the stream or stream channel, and
 - (b) once commenced, completes the change without delay except if a delay is necessary to preserve the nature of the stream or stream channel.
- (2) A change in and about a stream must be designed, constructed and maintained in such a manner that the change does not pose a significant danger to life, property or the environment.

[en. B.C. Reg. 241/95.]

Failure to comply with this regulation when making a change in and about a stream

- 39** In addition to other remedies or penalties that may be imposed on a person who makes a change in and about a stream that does not comply with this regulation, the person must
- (a) within 72 hours report the non-compliance to the closest regional office of the Ministry of Environment, Lands and Parks, and
 - (b) to remedy the non-compliance,
 - (i) take the measures the engineer specifies, and
 - (ii) comply with the terms and conditions described in section 42 that a habitat officer specifies.

[en. B.C. Reg. 241/95.]

Notification

- 40** (1) A person must not make a change in and about a stream unless that person
- (a) notifies a habitat officer of the region of the Ministry of Environment, Lands and Parks in which the change in and about a stream will be located, by providing the information specified in the notification form available from the ministry, of the particulars of the proposed change at least 45 days prior to commencing to make the change, and
 - (b) obtains from a habitat officer the terms and conditions described in section 42 on which the change can proceed prior to commencing to make the change.
- (2) Despite subsection (1), if a habitat officer has not contacted the person giving notice under subsection (1) (a) within 45 days of the receipt of the notice by a habitat officer, the person may proceed to make the change.
- (3) A person who makes a change in and about a stream under section 44 (1) (o) to (s) or (2) does not have to comply with subsection (1).
- (4) A person who makes a change in and about a stream under section 44 (1) (o) or (p) must
- (a) within 72 hours report the change to a habitat officer, and
 - (b) take the measures the engineer specifies and comply with the terms and conditions

described in section 42 that a habitat officer specifies respecting the change.

[en. B.C. Reg. 241/95; am. B.C. Reg. 134/98, s. 1.]

Protection of water quality

41 A person making a change in and about a stream must ensure that

- (a) no substance, sediment, debris or material that could adversely impact the stream is
 - (i) allowed or permitted to enter or leach or seep into the stream from an activity, construction, worksite, machinery or from components used in the construction of any works, or
 - (ii) placed, used or stored within the stream channel,
- (b) no standards or objectives published under section 2 (e) of the *Environment Management Act* by the Ministry of Environment, Lands and Parks for the protection of ambient water quality are exceeded or not attained now or in the future due to the change,
- (c) there is no disturbance or removal of stable natural materials and vegetation in and about a stream that contribute to stream channel stability except as authorized under this regulation and in accordance with the terms and conditions specified by the habitat officer,
- (d) temporary material, fill, bridge, culvert, pump, pipe, conduit, ditch or other structure used to assist in the construction of any works are constructed and maintained only during the period of construction, and are removed on completion of the works,
- (e) all cast-in-place concrete and grouting is completely separated from fish bearing waters for a minimum of 48 hours,
- (f) rock from acid-generating rock formations is not used for construction, and
- (g) the stream is restored to its natural state on completion of the change in and about a stream.

[en. B.C. Reg. 241/95.]

Protection of habitat

42 (1) To protect habitat, a person making a change in and about a stream under this regulation, other than under section 44 (1) (o) to (s) or (2), must make that change in accordance with terms and conditions specified by the habitat officer with respect to

- (a) the timing window or the period or periods of time in the year during which the change can proceed without causing harm to fish, wildlife or habitat,
- (b) the minimum instream flow or the minimum flow of water that must remain in the stream while the change is being made,
- (c) the removal of material from the stream or stream channel in connection with the change,
- (d) the addition of substance, sediment, debris or material to the stream or stream channel in connection with the change,
- (e) the salvage or protection of fish or wildlife while the change is being made or after the change has been made,
- (f) the protection of natural materials and vegetation that contribute to habitat or stream channel stability,
- (g) the restoration of the work site after the change has been made, and
- (h) the requirement to obtain an approval from the federal Department of Fisheries and Oceans in connection with the change.

- (2) In addition to other remedies or penalties that may be imposed on a person who makes a change in and about a stream that damages habitat, the person must
- within 72 hours report the damage to a habitat officer, and
 - restore and repair the habitat to its natural state or as directed by the habitat officer.
- [en. B.C. Reg. 241/95; am. B.C. Reg. 134/98, s. 2.]

Protection of other water users

- 43** (1) A person making a change in and about a stream, other than a change under section 44 (1) (o) to (s) or (2), must ensure that persons who are lawfully diverting or using water under the *Water Act* will not be adversely affected.
- (2) Despite subsection (1), if persons who are lawfully diverting or using water under the *Water Act* may be adversely affected, a person proposing to make a change in and about a stream, other than a change under section 44 (1) (o) to (s) or (2), must give 3 days notice to those persons prior to commencing to make the change and must provide an adequate supply of water to those persons, if required by those persons.

[en. B.C. Reg. 241/95; am. B.C. Reg. 134/98, s. 3.]

Authorization for changes in and about a stream

- 44** (1) For the purposes of section 9 (2) of the *Water Act*, the following changes in and about a stream may be made without obtaining an approval or licence for that change, provided that the change is made in accordance with this regulation and in accordance with the terms and conditions, described in section 42, specified by a habitat officer:
- the installation, maintenance or removal of a stream culvert for crossing a stream for the purposes of a road, trail or footpath, provided that
 - equipment used for site preparation, construction, maintenance or removal of the culvert is situated in a dry stream channel or operated from the top of the bank,
 - in fish bearing waters, the culvert allows fish in the stream to pass up or down stream under all flow conditions,
 - the culvert inlet and outlet incorporate measures to protect the structure and the stream channel against erosion and scour,
 - if debris cannot safely pass, provision is made to prevent the entrance of debris into the culvert,
 - the installation, maintenance or removal does not destabilize the stream channel,
 - the culvert and its approach roads do not produce a backwater effect or increase the head of the stream,
 - the culvert capacity is equivalent to the hydraulic capacity of the stream channel or is capable of passing the 1 in 200 year maximum daily flow without the water level at the culvert inlet exceeding the top of the culvert,
 - the culvert has a minimum equivalent diameter of 600 mm,
 - a culvert having an equivalent diameter of 2 metres or greater, or having a design capacity to pass a flow of more than 6 cubic metres a second, is designed by a professional engineer and constructed in conformance with that design,
 - the culvert is installed in a manner which will permit the removal of obstacles and debris within the culvert and at the culvert ends,
 - the stream channel, located outside the cleared width, is not altered,
 - embankment fill materials do not and will not encroach on culvert inlets and outlets,

- (xiii) the culvert has a depth of fill cover which is at least 300 mm or as required by the culvert manufacturer's specifications,
 - (xiv) the maximum fill heights above the top of the culvert do not exceed 2 m, and
 - (xv) the culvert material meets the standards of the Canadian Standards Association;
- (b) the construction, maintenance or removal of a clear span bridge, provided that
- (i) the bridge and its approach roads do not produce a back water effect or increase the head in the stream,
 - (ii) the equipment used for construction, including site preparation, maintenance or removal of the bridge, is situated in a dry stream channel or is operated from the top of the bank,
 - (iii) the hydraulic capacity of the bridge is equivalent to the hydraulic capacity of the stream channel, or is capable of passing the 1 in 200 year maximum daily flow, and the height of the underside of the bridge is also adequate to provide free passage of flood debris and ice flows, and
 - (iv) the bridge material meets the standards of the Canadian Standards Association, as applicable;
- (c) the construction or maintenance of a pipeline crossing, provided that
- (i) the pipeline and associated works are installed in a dry stream channel at a depth so that the top of the pipe is at least 1 metre below the lowest elevation of the bed of the stream, and
 - (ii) in the case of an aerial crossing, the crossing is constructed in accordance with the requirements prescribed in paragraph (b) for clear span bridges;
- (d) the construction, maintenance or removal of a pier or wharf in a stream, provided that the ebb and flow of water and movement of material under the influence of waves or currents is not obstructed and that the requirements under section 37 (4) are met;
- (e) the construction, maintenance or removal of a flow or water level measuring device in a stream by the Crown in right of either Canada or British Columbia, or their agents;
- (f) the construction or removal of a fish fence, screen or fish or game guard across a stream by the Crown in right of either Canada or British Columbia, or their agents, provided that it is designed, constructed, maintained or used so as not to obstruct the flow of water in the stream;
- (g) the restoration or maintenance of a stream channel by British Columbia or its agents;
- (h) the restoration or maintenance of a stream channel by a municipality;
- (i) the mechanical or manual cutting of annual vegetation within a stream channel;
- (j) the restoration or maintenance of fish habitat by the Crown in right of either Canada or British Columbia, or their agents;
- (k) the repair or maintenance of existing dikes or existing erosion protection works to their original state, provided that the dikes or works were functional during the previous year;
- (l) the construction or maintenance of storm sewer outfalls, provided that the storm sewer outfall is designed by a professional engineer, and constructed, maintained and used so as not to obstruct the flow of water in the stream or to cause erosion or scour in the stream;
- (m) the mechanical or manual control of Eurasian watermilfoil and other aquatic vegetation by a landowner, a municipality or a local authority;
- (n) the construction or maintenance of ice bridges, winter fords or snowfills, provided that
- (i) the materials used are removed from the stream channel before ice breakup and

that only clean ice and snow are used, and

(ii) in the case of ice bridges, any logs, timber and other structural materials used can be removed in a safe manner;

(o) the construction or placement of erosion protection works or flood protection works during a flood emergency, but not including restoration works, declared under the *Emergency Program Act*, under the direction of the Crown in right of British Columbia, or its agents, or by a municipality;

(p) the clearing of an obstruction from a bridge or culvert by the Crown in right of British Columbia, or its agents, or by a municipality during a flood event when there exists a potential danger to life or property;

(q) the installation or cleaning of drain tile outlets;

(r) the repair or maintenance of the superstructure of a bridge, excluding its foundation, made in accordance with this regulation, particularly the terms and conditions specified in this regulation for the protection of water quality, habitat and water users;

(s) the installation, repair, maintenance or removal of fences, provided that the fencing materials

(i) are not in the stream channel,

(ii) do not block debris in the stream channel, and

(iii) do not interfere with navigation of the stream;

(t) Repealed. [B.C. Reg. 134/98, s. 4.]

(u) the maintenance of a minor and routine nature by a public utility of its works;

(v) the removal of a beaver dam under section 9 of the *Wildlife Act*, provided that the removal is carried out in such a manner that downstream flooding and erosion do not occur;

(w) the construction of a temporary ford across a stream, provided that

(i) the construction occurs at a time in the year during which the construction can occur without causing harm to fish, wildlife or habitat,

(ii) the 1 in 10 year maximum daily flow over the ford is accommodated without the loss of the ford and without scouring the stream,

(iii) a stream culvert, if used, is designed and installed to pass the average low flow during the period of use,

(iv) the channel is protected against any anticipated erosion

(A) during the period of construction and use of the ford, and

(B) after the ford crossing is removed,

(v) sediment from approach ditches does not enter the stream,

(vi) the driveable running surface is erosion-free,

(vii) the stream remains in its channel and cannot be diverted down the road,

(viii) the ford will pass channel debris, and

(ix) the ford is removed at the end of the period of use at a time, before the next freshet, when the removal can proceed without causing harm to fish, wildlife or habitat;

(x) the construction of a temporary diversion around or through a worksite for the purposes of constructing or maintaining bridge abutments, constructing or maintaining piers other than bridge piers, or maintaining bridge piers or constructing works authorized under this section, provided that the worksite is no larger than the minimum area required, and

- (i) if pumps, pipes or conduits are used to divert water around or through the worksite,
 - (A) the pumps, pipes or conduits are sized to divert the 1 in 10 year maximum daily flow for the period of construction, and
 - (B) any pump or intake withdrawing water from fish bearing waters is screened in accordance with the Fish Screening Directive of the Department of Fisheries and Oceans (Canada),
 - (ii) if cofferdams are used to isolate successive parts of the construction at the worksite,
 - (A) the cofferdams are designed by a professional engineer and constructed in accordance with that design, and
 - (B) the natural channel remaining outside of the cofferdams is adequate to pass the 1 in 10 year maximum daily flow during the period of construction, or
 - (iii) if ditches are used to divert flow around the worksite,
 - (A) the flow of water diverted remains within the stream channel,
 - (B) the ditches are designed and constructed to divert the 1 in 10 year maximum daily flow around or through the worksite and are protected from any anticipated erosion during the period of construction and use of the ditch, and
 - (C) the ditches are completely backfilled and the area returned as closely as possible to the natural state on completion of the works.
- (2) For the purposes of section 9 (2) of the Act, a change may be made in and about a stream to which a standard or regulation under the *Forest and Range Practices Act* applies, without obtaining an approval or licence, if
- (a) the change is made by
 - (i) a municipality or other person who
 - (A) holds an agreement or road use permit under the *Forest Act*, an agreement under the *Range Act* or a special use permit under the *Forest Practices Code of British Columbia Act*, or
 - (B) is authorized to construct or modify a road under the *Coal Act*, the *Geothermal Resources Act*, the *Mines Act*, the *Mining Right of Way Act* or the *Petroleum and Natural Gas Act*, or
 - (ii) the Crown in right of British Columbia or a person under contract to the Crown in right of British Columbia, and
 - (b) the person making the change complies with the *Forest and Range Practices Act* and the regulations and standards established under it.
- (3) For the purposes of section 9 (2) of the Act, a change may be made in and about a stream by a person who holds a permit under section 10 of the *Mines Act*, without obtaining an approval or licence, if the person complies with
- (a) Part 11 of the Health, Safety and Reclamation Code for Mines in British Columbia, and
 - (b) all conditions in the permit respecting changes in and about the stream.
- (4) For the purposes of section 40, an application for a permit to carry out exploration activities under section 10 of the *Mines Act* constitutes notice of the change.

[en. B.C. Reg. 369/97; am. B.C. Reg. 134/98, s. 4; 235/2007.]

Schedule A

[en. B.C. Reg. 498/92; am. B.C. Regs. 154/94, s. 5; 40/96; 219/97; 45/2000, ss. 4 and 5;

**Tariff of Fees, Rentals and Charges Payable to the Crown
in Respect of Applications, Licences, Approvals and Other Proceedings
under the Water Act**

Part 1

Fees for Water Licence Applications and Permits To Occupy Crown Land

Item	Column 1	Column 2
	Purpose	Application Fee
Water Licence Applications		
1 IRRIGATION PURPOSE AND INDUSTRIAL PURPOSE ASSOCIATED WITH AGRICULTURAL USE		
(a) water conveyed by a local authority for irrigation		
all applications		\$400
(b) private irrigation		
irrigate less than 5 hectares		\$100
irrigate 5 hectares to less than 50 hectares		\$150
irrigate 50 hectares or more		\$400
(c) industrial purpose associated with agriculture		
crop suppression		
fish hatcheries		
flood harvesting		
frost protection		
game farms		
greenhouses		
kennels		
nurseries		
ponds		
stockwatering		
watering of golf courses, ornamental gardens, parks, or similar properties		
all applications		\$150
2 CONSERVATION AND LAND IMPROVEMENT PURPOSES		
all applications		\$150
3 DOMESTIC PURPOSE AND INDUSTRIAL PURPOSE ASSOCIATED WITH DOMESTIC USE		
(a) domestic household consumption		
all applications		\$100
(b) industrial purpose associated with domestic use		
camps		
churches and community halls		
exhibition grounds		
institutions		
public facilities		
residential lawn or garden watering (area exceeds 1 012 square metres)		
swimming pools		
work camps		
all applications		\$150
4 INDUSTRIAL PURPOSE AND MINERAL TRADING PURPOSE		

(a)	general — use for industrial purpose	
	amusement parks	
	bottling fresh water for sale, less than 200 cubic metres a day	
	brake cooling	
	cooling	
	dewatering	
	dust control	
	enterprise (which includes hotels, motels, trailer parks, stores, service stations, restaurants or similar commercial enterprises)	
	effluent dilution	
	film processing plant	
	fire prevention	
	fire protection	
	garbage dumps	
	heat exchangers	
	ice making	
	log fluming	
	mineral trading purpose (mineral baths or trading)	
	overburden disposal	
	processing (which includes food processing plants, manufacturing operations, sawmills, and washing sand or gravel)	
	road maintenance	
	sediment control	
	sewage disposal	
	shipyards	
	snowmaking	
	truck washing	
	tunnelling	
	washing intake screens	
	wharves	
	all applications	\$500
(b)	bottling fresh water for sale, 200 cubic metres or more a day —	
	use for	
	industrial purpose	\$2 000
(c)	pulp mill — use for industrial purpose	\$10 000
5	MINING PURPOSE AND INDUSTRIAL PURPOSE ASSOCIATED WITH MINING USE	
(a)	mining purpose	
	placer mining	
	all applications	\$500
(b)	use for industrial purpose associated with mining	
	mining equipment	
	oil field injection	
	pressure testing and flushing	
	all applications	\$500
(c)	other mining purposes	
	hydraulic mining	
	processing of ore	
	washing coal	
	all applications	\$5 000

6 POWER PURPOSE

(a) residential use (up to 50 kW, for one household)		
all applications		\$100
(b) commercial use		
all applications		\$5 000
(c) general use (for a power plant that produces up to 20 MW)		
all applications		\$5 000
(d) general use (for a power plant that produces over 20 MW)		
all applications		\$10 000

7 STORAGE PURPOSE

(a) less than 125 000 cubic metres stored		
all applications		\$150
(b) 125 000 to less than 1 250 000 cubic metres stored		
all applications		\$400
(c) 1 250 000 cubic metres or more stored		
all applications		\$2 000

8 WATERWORKS PURPOSE

(a) water conveyed by a local authority for waterworks purpose less than 100 000 cubic metres a year		
all applications		\$500
100 000 cubic metres a year to less than 5 000 000 cubic metres a year		
all applications		\$2 000
5 000 000 cubic metres or more a year		
all applications		\$10 000
(b) water conveyed for a waterworks purpose by a person other than a local authority		
all applications		\$500
(c) water delivery within British Columbia		
all applications		\$500

Permits To Occupy Crown Land

9 PERMITS TO OCCUPY CROWN LAND

(a) affecting less than 0.5 hectares		\$100
(b) affecting 0.5 hectares to less than 50 hectares		\$500
(c) affecting 50 hectares or more		\$2 000

Part 2

Annual rentals payable in respect of a licence for the following purposes and categories

Item	Column 1 Purpose	Column 2 Annual Rental Year 2006	Column 3 Annual Rental Year 2007	Column 4 Annual Rental Year 2008	Column 5 Annual Rental Year 2009
1	IRRIGATION PURPOSE AND INDUSTRIAL PURPOSE ASSOCIATED WITH AGRICULTURAL USE For all purposes under Item 1, the annual rental is the greater of \$25.00 or the annual rental calculated using the rental rate set out below for each 1 000 cubic metres.				
(a)	water conveyed by a local authority and used for irrigation purpose	\$0.48 per 1 000 cubic metres	\$0.50 per 1 000 cubic metres	\$0.55 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
(b)	private irrigation use	\$0.48 per	\$0.50 per	\$0.55 per	\$0.60 per

		1 000 cubic metres	1 000 cubic metres	1 000 cubic metres	1 000 cubic metres
(c)	industrial purpose associated with agriculture:				
	crop suppression	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	flood harvesting	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	frost protection	\$0.35 per 1 000 cubic metres	\$0.40 per 1 000 cubic metres	\$0.50 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	game farms	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	greenhouses	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	kennels	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	nurseries	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	ponds	\$25.00	\$25.00	\$25.00	\$25.00
	stockwatering	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	watering of golf courses, ornamental gardens, parks or similar properties	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
2	INDUSTRIAL PURPOSE ASSOCIATED WITH AQUACULTURE USE For all purposes under Item 2, the annual rental is the greater of \$100.00 or the annual rental calculated using the rental rate set out below for each 1 000 cubic metres.				
(a)	fish hatcheries	\$0.075 per 1 000 cubic metres	\$0.077 per 1 000 cubic metres	\$0.078 per 1 000 cubic metres	\$0.08 per 1 000 cubic metres
3	CONSERVATION AND LAND IMPROVEMENT PURPOSES For all purposes under Item 3, the annual rental is the greater of \$25.00 or the annual rental calculated using the rental rate set out below for each 1 000 cubic metres.				
(a)	conservation purpose:				
	storage of water	\$25.00	\$25.00	\$25.00	\$25.00
	use of water	\$0.006 per 1 000 cubic metres	\$0.007 per 1 000 cubic metres	\$0.008 per 1 000 cubic metres	\$0.01 per 1 000 cubic metres
	construction of works in and				

	about streams	\$25.00	\$25.00	\$25.00	\$25.00
(b)	land improvement	\$25.00	\$25.00	\$25.00	\$25.00
4	DOMESTIC PURPOSE AND INDUSTRIAL PURPOSE ASSOCIATED WITH DOMESTIC USE				
For all purposes under Item 4, the annual rental is the greater of \$25.00 or the annual rental calculated using the rental rate set out below for each 1 000 cubic metres.					
(a)	domestic purpose	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
(b)	industrial purpose associated with domestic use:				
	camps	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	churches and community halls	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	exhibition grounds	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	institutions	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	public facilities	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	residential lawn watering (area exceeds 1 012 square metres)	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
	swimming pools	\$25.00	\$25.00	\$25.00	\$25.00
	work camps	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres	\$0.60 per 1 000 cubic metres
5	INDUSTRIAL PURPOSE AND MINERAL TRADING PURPOSE				
For all purposes under Item 5, the annual rental is the greater of \$100.00 or the annual rental calculated using the rental rate set out below for each 1 000 cubic metres.					
(a)	general — use for industrial purpose:				
	amusement parks	\$0.85 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	bottling fresh water	\$0.85 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	brake cooling	\$0.85 per 1 000 cubic	\$0.85 per 1 000 cubic	\$0.85 per 1 000 cubic	\$0.85 per 1 000 cubic

		metres	metres	metres	metres
	cooling	\$0.55 per 1 000 cubic metres	\$0.65 per 1 000 cubic metres	\$0.75 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	dewatering	\$100.00	\$100.00	\$100.00	\$100.00
	dust control	\$0.35 per 1 000 cubic metres	\$0.45 per 1 000 cubic metres	\$0.65 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	enterprise (which includes hotels, motels, trailer parks, stores, service stations, restaurants or similar commercial enterprises)	\$0.85 per 1 000 cubic metres			
	effluent dilution	\$0.25 per 1 000 cubic metres	\$0.45 per 1 000 cubic metres	\$0.65 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	film processing plant	\$0.85 per 1 000 cubic metres			
	fire prevention	\$0.35 per 1 000 cubic metres	\$0.45 per 1 000 cubic metres	\$0.65 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	fire protection	\$100.00	\$100.00	\$100.00	\$100.00
	garbage dumps	\$0.85 per 1 000 cubic metres			
	heat exchangers	\$0.85 per 1 000 cubic metres			
	ice making	\$0.85 per 1 000 cubic metres			
	log fluming	\$0.85 per 1 000 cubic metres			
	mineral trading purpose (mineral baths or trading)	\$0.85 per 1 000 cubic metres			
	overburden disposal	\$100.00	\$100.00	\$100.00	\$100.00
	processing (which includes food processing plants, manufacturing operations, sawmills, and washing sand or gravel)	\$0.55 per 1 000 cubic metres	\$0.65 per 1 000 cubic metres	\$0.75 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	pulp mills	\$0.55 per 1 000 cubic metres	\$0.65 per 1 000 cubic metres	\$0.75 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres

	river improvement	\$100.00	\$100.00	\$100.00	\$100.00
	road maintenance	\$0.25 per 1 000 cubic metres	\$0.45 per 1 000 cubic metres	\$0.65 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	sediment control	\$100.00	\$100.00	\$100.00	\$100.00
	sewage disposal	\$0.85 per 1 000 cubic metres			
	shipyards	\$0.85 per 1 000 cubic metres			
	snowmaking	\$0.35 per 1 000 cubic metres	\$0.55 per 1 000 cubic metres	\$0.65 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	truck washing	\$0.85 per 1 000 cubic metres			
	tunnelling	\$0.85 per 1 000 cubic metres			
	washing intake screens	\$0.25 per 1 000 cubic metres	\$0.45 per 1 000 cubic metres	\$0.65 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres
	wharves	\$0.85 per 1 000 cubic metres			
6	MINING PURPOSE AND INDUSTRIAL PURPOSES ASSOCIATED WITH MINING USE For all purposes under Item 6, the annual rental is the greater of \$100.00 or the annual rental calculated using the rental rate set out below for each 1 000 cubic metres.				
(a)	mining purpose:				
	hydraulic mining	\$0.065 per 1 000 cubic metres			
	hydraulicking	\$0.065 per 1 000 cubic metres			
	placer mining	\$0.45 per 1 000 cubic metres			
	processing ore	\$1.10 per 1 000 cubic metres			
	washing coal	\$0.55 per 1 000 cubic metres	\$0.75 per 1 000 cubic metres	\$0.95 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres
(b)	industrial purpose associated				

	with mining:				
	mining equipment	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres
	oil field injection	\$0.65 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres	\$0.95 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres
	pressure testing and flushing	\$0.35 per 1 000 cubic metres	\$0.55 per 1 000 cubic metres	\$0.85 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres
7	STORAGE PURPOSE For all purposes under Item 7, the annual rental is the greater of \$25.00 or the annual rental calculated using the rental rate set out below for each 1 000 cubic metres.				
(a)	storage purpose	\$0.006 per 1 000 cubic metres	\$0.007 per 1 000 cubic metres	\$0.008 per 1 000 cubic metres	\$0.01 per 1 000 cubic metres
8	WATERWORKS For all purposes under Item 8, the annual rental is the greater of \$100.00 or the annual rental calculated using the rental rate set out below for each 1 000 cubic metres.				
(a)	water conveyed by a local authority and used for waterworks purpose	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres
(b)	water conveyed for waterworks purpose by a person other than a local authority	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres
(c)	water delivery	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres
(d)	bulk shipment of water by marine transport	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres	\$1.10 per 1 000 cubic metres
9	PERMITS TO OCCUPY CROWN LAND For Item 9 (a), the annual rental for Crown land occupied by a dam is the greater of \$50.00 or the annual rental calculated using the rental rate set out below per hectare. For Item 9 (b), the annual rental for Crown land flooded or occupied by other works is the greater of \$10.00 or the annual rental calculated using the rental rate set out below per hectare.				
(a)	occupied by a dam	\$120.00 per hectare	\$120.00 per hectare	\$120.00 per hectare	\$120.00 per hectare
(b)	flooded or occupied by other works	\$7.45 per hectare	\$7.50 per hectare	\$7.50 per hectare	\$7.50 per hectare

Part 3					
Annual rentals for power purpose in respect of power generation projects					
Item	Column 1 Purpose	Column 2 Annual Rental Year 2006	Column 3 Annual Rental Year 2007	Column 4 Annual Rental Year 2008	Column 5 Annual Rental Year 2009

11	POWER PURPOSE For Item 11 (a), the annual rental is the greater of \$100.00 or the annual rental calculated using the rental rate set out below for each 1 000 cubic metres.				
(a)	residential power use	\$0.003 per 1 000 cubic metres	\$0.005 per 1 000 cubic metres	\$0.008 per 1 000 cubic metres	\$0.01 per 1 000 cubic metres
	Column 1				Column 2
Item					\$
11.1	POWER PURPOSE				
	(a) Commercial power use:				
	construction capacity, for each kilowatt		0.276 indexed		
	authorized capacity, other than construction capacity, for each kilowatt		1.726 indexed		
	output, for each megawatt-hour		1.036 indexed		
	minimum annual rental, for each licence		100.00		
	(b) General power use:				
	construction capacity, for each kilowatt		0.345 indexed		
	authorized capacity, other than construction capacity, for each kilowatt		3.453 indexed		
	output, for each megawatt-hour a year, up to a total of 160 000 megawatt-hours from all power developments operated by the same licensee		1.036 indexed		
	output, for each additional megawatt-hour a year exceeding 160 000 megawatt-hours, up to a total of 3 000 000 megawatt-hours		4.835 indexed		
	output, for each additional megawatt-hour a year exceeding 3 000 000 megawatt-hours		5.815 indexed		
	minimum annual rental, for each licence		200.00		
12	Repealed. [B.C. Reg. 549/2004, s. 2 (c) (iii).]				

Part 4

Other fees and charges

Item	Column 1	Column 2
	Service	Fee
1	Approvals issued under section 8 or 9 of the <i>Water Act</i> :	
	(a) for short term use of water, the fee for the proposed use as set out in Part 1 of this tariff, plus the annual rental for the proposed use as set out in Part 2 or 3 of this tariff	
	(b) for changes in and about a stream	\$130
2	Request for amendment of a licence or approval under section 18 of the <i>Water Act</i> for the following purposes: industrial, mining, power, storage (1 250 000 cubic metres or more stored), and waterworks	\$500
3	Request for amendment of a licence or approval under section 18 of the <i>Water Act</i> for purposes not referred to in item 2	\$100
4	Transfer of appurtenancy of a licence for the following purposes: industrial, mining, power, storage (1 250 000 cubic metres or more stored), and waterworks (payable by each recipient of transferred rights)	\$500
5	Transfer of appurtenancy of a licence for all purposes not	

referred to in item 4 (payable by each recipient of transferred rights)	\$100
6 Apportionment of a licence for the following purposes: industrial, mining, power, storage (1 250 000 cubic metres or more stored), and waterworks (payable by each recipient of rights)	\$500
7 Apportionment of a licence for purposes not referred to in item 6 (payable by each recipient of rights)	\$100
8 Copy of any licence or other document, including computer print-outs, for each page (one-sided) produced, for requests greater than 20 pages (e.g. 21 pages is \$5.25)	\$0.25
9 Research and compilation of data	\$50 for each hour, with \$25 minimum charge
10 Map prints and copies	\$10 for each map
11 Certification of any licence or document; witness of a declaration	\$50

Schedule B

[en. B.C. Reg. 154/94, s. 6.]

(section 21)

Indexing Factor For Fees and Rentals Under "Power Purpose" in Schedule A

Calculation of the indexing factor, with respect to rentals indicated as being indexed under the heading "Power Purpose" in Schedule A, must be done in accordance with the following steps:

- (a) the indexing factor for the calendar year ending December 31, 1994 is 1;
- (b) for each subsequent year, the indexing factor will be equal to the result of multiplying the indexing factor for the previous year by $(1 + \text{the percentage of approved average general increases in the British Columbia Hydro and Power Authority Electric Tariff Rate Schedule made in the preceding calendar year, excepting any rate increases resulting from the application of this regulation and passed through to ratepayers pursuant to section 61 (4) of the Utilities Commission Act})$.

Schedule C

(section 35)

Water Districts

Alberni Water District

That part of Vancouver Island together with adjacent islands lying southwest of a line commencing at the northwest corner of Fractional Township 42, Rupert Land District, being a point on the natural boundary of Fisherman Bay; thence in a general southeasterly direction along the southwesterly boundaries of the watersheds of Dakota Creek, Laura Creek, Stranby River, Nahwitti River, Quatsie River, Keogh River, Cluxewe River and Nimpkish River to the southeasterly boundary of the watershed of Nimpkish River; thence in a general northeasterly direction along the southeasterly boundary of the watershed of Nimpkish River to the southerly boundary of the watershed of Salmon River; thence in a general easterly direction along the southerly boundary of the watershed of Salmon River to the southwesterly boundary thereof; thence in a general southeasterly direction along the southwesterly boundaries of the watersheds of Salmon River and Campbell River to the southerly boundary of the watershed of Campbell River; thence in a general easterly direction along the