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Our File No.: 1010-003

August 9, 2012

ELECTRONIC FILING

Ms. Erica Hamilton
Commission Secretary
British Columbia Utilities Commission
6th Floor- 900 Howe Street
Vancouver, B.C. V6Z2N3

Dear Ms. Hamilton:

Re: Project No. 3698640
British Columbia Utilities Commission (BCUC)
British Columbia Hydro and Power Authority (BC Hydro)
BC Hydro CPCN-Dawson Creek/Chetwynd Area Transmission Project (DCAT)

Please find attached the Book of Authorities of the West Moberly First Nations in relation to WMFN's Final Written Submissions in this matter.

We thank you for your assistance throughout this proceeding.

Sincerely,
RANA LAW

Julie Tannahill

Encl.

Book of Authorities

Statutes

Constitution Act, 1982."u057"

Hydro and Power Authority Act."TUDE"3; ; 8."e"434"

Utilities Commission Act."TUDE"3; ; 8."e"695"

Cases

Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)."4233"DEUE"488."4233"Ectuy gmDE"662"

Brown v. Sunshine Coast Forest District (District Manager), 422: "DEUE"3864."422: "Ectuy gmDE"47: 9"

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)."4232"UEE"65."4232"Ectuy gmDE"4: 89"

Gitksan Houses v. British Columbia (Minister of Forests)."4224"DEUE"3923."4224"Ectuy gmDE"4; 4: "

Haida Nation v. British Columbia, 4226"UEE"95."4226"Ectuy gmDE"4878"

Halfway River First Nation v. British Columbia (Ministry of Forests),"3; ; ; "DEEC"692"."3; ; ; "Ectuy gmDE"3: 43"

Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)."4227"DEUE"8; 9."4227"Ectuy gmDE"3343"

Husby Forest Products v. British Columbia (Minister of Forests), 4226"DEUE"364."4226"Ectuy gmDE"422"

In the Matter of British Columbia Transmission Corporation Reconsideration of the Interior to Lower Mainland Transmission Project."Hgdwtct {"5."4233"

In the Matter of British Columbia Hydro and Power Authority Certificate of Public Convenience and Necessity for the Ruskin Dam and Powerhouse Upgrade Project."O ctej "52."4234"

Kwikwetlem First Nation v. British Columbia Transmission Corp."422; "DEEC"8: ."422; "Ectuy gmDE"563"

Marshall v. Canada."5"UE0F0678."3; ; ; "Ectuy gmP U"

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage). 4227"UEE"8; ."4227"Ectuy gmP cv"5978"

R. v. Badger."3"UE0F0993."3; ; ; 8"Ectuy gmCnc"7: 9"

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 FC 1110, 422 F.T.R. 96, 2004 FC 1110, 422 F.T.R. 96.

Wii'litswx v. British Columbia (Minister of Forests), 2004 FC 1110, 422 F.T.R. 96.

West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2004 FC 1110, 422 F.T.R. 96.

West Moberly First Nations v. British Columbia (Chief Inspector of Mines), 2004 FC 1110, 422 F.T.R. 96.

Xeni Gwet'in First Nations v. British Columbia, 2004 FC 1110, 422 F.T.R. 96.

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2011 CarswellBC 440, 2011 BCSC 266, [2011] 2 C.N.L.R. 1, [2011] B.C.W.L.D. 5366, [2011] B.C.W.L.D. 5360, [2011] B.C.W.L.D. 5359, [2011] B.C.W.L.D. 5353, [2011] B.C.W.L.D. 5357, [2011] B.C.W.L.D. 5355, [2011] B.C.W.L.D. 5354, [2011] B.C.W.L.D. 5358, 20 B.C.L.R. (5th) 356

2011 CarswellBC 440, 2011 BCSC 266, [2011] 2 C.N.L.R. 1, [2011] B.C.W.L.D. 5366, [2011] B.C.W.L.D. 5360, [2011] B.C.W.L.D. 5359, [2011] B.C.W.L.D. 5353, [2011] B.C.W.L.D. 5357, [2011] B.C.W.L.D. 5355, [2011] B.C.W.L.D. 5354, [2011] B.C.W.L.D. 5358, 20 B.C.L.R. (5th) 356

Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)

Adams Lake Indian Band (Petitioner) and Lieutenant Governor in Council, The Thompson-Nicola Regional District and Sun Peaks Mountain Resort Municipality (Respondents)

British Columbia Supreme Court

Bruce J.

Heard: January 24-28, 2011

Judgment: March 4, 2011

Docket: Vancouver S105040

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Counsel: R.J.M. Janes, J.D. Shockey, V. Mathers for Petitioner

P.G. Foy, Q.C., E.K. Christie for Respondent, Lieutenant Governor in Council

G. Tucker, J.L. Williams for Respondent, Sun Peaks Mountain Resort Municipality

Subject: Public; Civil Practice and Procedure; Constitutional; Property

Aboriginal law --- Practice and procedure — Parties — Miscellaneous

Band was one of three bands that formed membership of Division of S aboriginal people — S Nation claimed, as part of their traditional territory, controlled recreation area — S Nation claimed aboriginal rights and title to lands encompassing controlled recreation area and had made its claims known to federal and provincial governments since 1860 — In 1993, provincial government entered into master development agreement (MDA) with company — MDA permitted purchase of Crown lands within traditional areas claimed by Division and Band in particular — MDA brought about rapid and extensive expansion of ski resort — Increased conflict with Division bands resulted — In midst of this climate, residents of controlled recreations area sought to attain status as incorporated municipality — Incorporated status was granted by issuance of Letters Patent and controlled recreation area became municipality — Band applied for declaration that Lieutenant Governor in Council breached its duty to consult with respect to decision to incorporate municipality and order setting aside order in council and letters patent — Application granted in part — Band had complied with ss. 15 and 16 of Judicial Review Procedure Act by naming Lieutenant Governor in Council as party and by providing Attorney General with no-

2011 CarswellBC 440, 2011 BCSC 266, [2011] 2 C.N.L.R. 1, [2011] B.C.W.L.D. 5366, [2011] B.C.W.L.D. 5360, [2011] B.C.W.L.D. 5359, [2011] B.C.W.L.D. 5353, [2011] B.C.W.L.D. 5357, [2011] B.C.W.L.D. 5355, [2011] B.C.W.L.D. 5354, [2011] B.C.W.L.D. 5358, 20 B.C.L.R. (5th) 356

tice of proceeding — There was no rule, statutory provision or practice at common law that required Band to also name Attorney General as party.

Aboriginal law --- Practice and procedure — Evidence — Miscellaneous

Band was one of three bands that formed membership of Division of S aboriginal people — S Nation claimed, as part of their traditional territory, controlled recreation area — S Nation claimed aboriginal rights and title to lands encompassing controlled recreation area and had made its claims known to federal and provincial governments since 1860 — In 1993, provincial government entered into master development agreement (MDA) with company — MDA permitted purchase of Crown lands within traditional areas claimed by Division and Band in particular — MDA brought about rapid and extensive expansion of ski resort — Increased conflict with Division bands resulted — In midst of this climate, residents of controlled recreations area sought to attain status as incorporated municipality — Incorporated status was granted by issuance of letters patent and controlled recreation area became municipality — Band applied for declaration that Lieutenant Governor in Council breached its duty to consult with respect to decision to incorporate municipality and order setting aside order in council and letters patent — Application granted in part — In order to determine strength of Band's prima facie claim on preliminary and general basis, and for purpose of defining content of duty to consult, it was appropriate to accept at face value oral histories and recollections of Band members — In addition, evidence led by Band was admissible to establish Crown's knowledge of rights and title asserted by Band and was admissible as part of background to dispute — Province's assessment of strength of claim subsequent to conclusion of consultation process and evidence relied upon was admissible for purpose of inquiry — There was no reason to disregard Band's evidence.

Aboriginal law --- Practice and procedure — Jurisdiction — Miscellaneous

Band was one of three bands that formed membership of Division of S aboriginal people — S Nation claimed, as part of their traditional territory, controlled recreation area — S Nation claimed aboriginal rights and title to lands encompassing controlled recreation area and had made its claims known to federal and provincial governments since 1860 — In 1993, provincial government entered into master development agreement (MDA) with company — MDA permitted purchase of Crown lands within traditional areas claimed by Division and Band in particular — MDA brought about rapid and extensive expansion of ski resort — Increased conflict with Division bands resulted — Incorporated status was granted by issuance of letters patent and controlled recreation area became municipality — Band applied for declaration that Lieutenant Governor in Council breached its duty to consult with respect to decision to incorporate municipality and order setting aside order in council and letters patent — Application granted in part — Band had authority to seek declaration that Crown failed to adequately consult with it concerning decision to grant incorporated status to municipality insofar as that decision affected rights and title asserted by Division in area — Aboriginal rights were recognized to be communally shared by all members of group by reason of their membership in that group — Facts supported conclusion that duty to consult was owed to each band individually.

Administrative law --- Standard of review — General principles

Band was one of three bands that formed membership of Division of S aboriginal people — S Nation claimed, as part of their traditional territory, controlled recreation area — S Nation claimed aboriginal rights and title to lands encompassing controlled recreation area and had made its claims known to federal and provincial governments since 1860 — In 1993, provincial government entered into master development agreement (MDA) with

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company — MDA permitted purchase of Crown lands within traditional areas claimed by Division and Band in particular — MDA brought about rapid and extensive expansion of ski resort — Increased conflict with Division bands resulted — In midst of this climate, residents of controlled recreations area sought to attain status as incorporated municipality — Incorporated status was granted by issuance of letters patent and controlled recreation area became municipality — Band applied for declaration that Lieutenant Governor in Council breached its duty to consult with respect to decision to incorporate municipality and order setting aside order in council and letters patent — Application granted in part — Existence of legal duty, such as duty to consult, was question of law judged on standard of correctness — Process of carrying out that legal duty fell to be reviewed on reasonableness standard.

Aboriginal law --- Constitutional issues — Constitution Act, 1982

Band was one of three bands that formed membership of Division of S aboriginal people — S Nation claimed, as part of their traditional territory, controlled recreation area (area) — S Nation claimed aboriginal rights and title to lands encompassing area and had made its claims known to federal and provincial governments since 1860 — In 1993, provincial government entered into master development agreement (MDA) with company — MDA permitted purchase of Crown lands within traditional areas claimed by Division and Band in particular — MDA brought about rapid and extensive expansion of ski resort — Increased conflict with Division bands resulted — Residents of area sought to attain status as incorporated municipality — Incorporated status was granted by issuance of letters patent and area became municipality — Band applied for declaration that Lieutenant Governor in Council breached its duty to consult with respect to decision to incorporate municipality and order setting aside order in council and letters patent — Application granted in part — Provincial government has duty to consult with aboriginal peoples and, where possible, to accommodate their interests to uphold honour of Crown — Steps leading up to order in council were not legislative in character — Duty to consult could not be ousted on basis that exercise of statutory power became law by issuance of order in council — All steps leading to decision to issue letters patent appropriately engaged honour of Crown — Discretion exercised by Lieutenant Governor in Council pursuant to s. 11 of Local Government Act was statutory power of decision reviewable pursuant to s. 5 of Judicial Review Procedure Act — There was no justification for insulating order in council from duty to consult simply because it had legislative character — Lieutenant Governor in Council, when exercising statutory power of decision, must act within constitutional limits, including those imposed by s. 35 of Constitution Act, 1982.

Aboriginal law --- Constitutional issues — Fiduciary duty of Crown

Band was one of three bands that formed membership of Division of S aboriginal people — S Nation claimed, as part of their traditional territory, controlled recreation area (area) — S Nation claimed aboriginal rights and title to lands encompassing area and had made its claims known to federal and provincial governments since 1860 — In 1993, provincial government entered into master development agreement (MDA) with company — MDA brought about rapid and extensive expansion of ski resort — Increased conflict with Division bands resulted — Incorporated status was granted by issuance of letters patent and area became municipality — Band applied for declaration that Lieutenant Governor in Council breached its duty to consult with respect to decision to incorporate municipality and order setting aside order in council and letters patent — Application granted in part — Province did not conduct preliminary assessment of strength of claim for aboriginal rights and title advanced by Band for purpose of its consultation about incorporation of municipality — Province did not make inquiries of Band in regard to scope and nature of aboriginal rights and title they were advancing as part of S Nation — Province failed to adequately fulfill first stage of consultation process — It was appropriate to declare that

2011 CarswellBC 440, 2011 BCSC 266, [2011] 2 C.N.L.R. 1, [2011] B.C.W.L.D. 5366, [2011] B.C.W.L.D. 5360, [2011] B.C.W.L.D. 5359, [2011] B.C.W.L.D. 5353, [2011] B.C.W.L.D. 5357, [2011] B.C.W.L.D. 5355, [2011] B.C.W.L.D. 5354, [2011] B.C.W.L.D. 5358, 20 B.C.L.R. (5th) 356

province did not fulfill its constitutional duty to consult with Band with respect to incorporation of municipality prior to issuance of order in council — It was also appropriate to order province to include consultation about incorporation of municipality in its ongoing consultation process with band regarding MDA and transfer of timber administration — It was not appropriate to order that order in council be quashed — Failure to quash order in council would not result in irrevocable harm to aboriginal rights and title claimed by Band in respect of area.

Aboriginal law --- Constitutional issues — Miscellaneous

Band was one of three bands that formed membership of Division of S aboriginal people — S Nation claimed, as part of their traditional territory, controlled recreation area (area) — S Nation claimed aboriginal rights and title to lands encompassing area and had made its claims known to federal and provincial governments since 1860 — In 1993, provincial government entered into master development agreement (MDA) with company — MDA brought about rapid and extensive expansion of ski resort — Increased conflict with Division bands resulted — Incorporated status was granted by issuance of letters patent and area became municipality — Band applied for declaration that Lieutenant Governor in Council breached its duty to consult with respect to decision to incorporate municipality and order setting aside order in council and letters patent — Application granted in part — Band's claim to aboriginal rights and title was neither extinguished nor reduced by change in local government — As consequence of changes in jurisdiction, municipality acquired significant powers and authority over local governance that was beyond supervision or control of province or regional district — Band's ability to protect its aboriginal rights and title to area was weakened by transfer of local jurisdiction to municipality — In practical terms, division of responsibility created number of additional hurdles for Band — Province misconceived significant potential impact change in local government may have on aboriginal interests claimed by Band — There was nothing in conduct of Band that frustrated consultation process — Province clearly failed to uphold honour of Crown in its dealings with Band during incorporation consultation — Accommodation by province was not within range of reasonable outcomes.

Aboriginal law --- Aboriginal rights to natural resources — Hunting offences — Miscellaneous

Band was one of three bands that formed membership of Division of S aboriginal people — S Nation claimed, as part of their traditional territory, controlled recreation area (area) — S Nation claimed aboriginal rights and title to lands encompassing controlled recreation area and had made its claims known to federal and provincial governments since 1860 — In 1993, provincial government entered into master development agreement (MDA) with company — MDA permitted purchase of Crown lands within traditional areas claimed by Division and Band in particular — MDA brought about rapid and extensive expansion of ski resort — Increased conflict with Division bands resulted — Incorporated status was granted by issuance of letters patent and area became municipality — Band applied for declaration that Lieutenant Governor in Council breached its duty to consult with respect to decision to incorporate municipality and order setting aside order in council and letters patent — Application granted in part — Based on evidence, on preliminary assessment Band had strong prima facie claim to aboriginal rights with respect to resource use such as hunting and gathering, and spiritual practices within area — Band had good prima facie claim to aboriginal title based on pattern of regular occupation throughout various seasons for hunting and gathering as well as spiritual practices within area — Existence of strong claim and highly significant potential adverse impact attracted duty of "deep consultation" — Province clearly failed to uphold honour of Crown in its dealings with Band during incorporation consultation.

Cases considered by *Bruce J.*:

2011 CarswellBC 440, 2011 BCSC 266, [2011] 2 C.N.L.R. 1, [2011] B.C.W.L.D. 5366, [2011] B.C.W.L.D. 5360, [2011] B.C.W.L.D. 5359, [2011] B.C.W.L.D. 5353, [2011] B.C.W.L.D. 5357, [2011] B.C.W.L.D. 5355, [2011] B.C.W.L.D. 5354, [2011] B.C.W.L.D. 5358, 20 B.C.L.R. (5th) 356

Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans) (2008), 2008 CAF 212, 2008 CarswellNat 2961, 37 C.E.L.R. (3d) 89, 2008 FCA 212, 2008 CarswellNat 1935, [2008] 3 C.N.L.R. 67, 379 N.R. 297, 297 D.L.R. (4th) 722, 85 Admin. L.R. (4th) 187 (F.C.A.) — referred to

Brokenhead Ojibway Nation v. Canada (Attorney General) (2009), 44 C.E.L.R. (3d) 1, [2009] 3 C.N.L.R. 36, 2009 CarswellNat 4884, 2009 CF 484, 345 F.T.R. 119 (Eng.), 2009 CarswellNat 1339, 2009 FC 484 (F.C.) — referred to

Brown v. Sunshine Coast Forest District (District Manager) (2008), (sub nom. *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*) [2009] 1 C.N.L.R. 110, 2008 BCSC 1642, 2008 CarswellBC 2587 (B.C. S.C.) — considered

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (2010), 325 D.L.R. (4th) 1, 406 N.R. 333, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council*) [2010] 4 C.N.L.R. 250, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council*) [2010] 2 S.C.R. 650, 2010 CarswellBC 2867, 2010 CarswellBC 2868, 2010 SCC 43, 11 Admin. L.R. (5th) 246, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 9 B.C.L.R. (5th) 205, 54 C.E.L.R. (3d) 1, 293 B.C.A.C. 175, 496 W.A.C. 175 (S.C.C.) — considered

Carrier-Sekani Tribal Council v. Canada (Minister of the Environment) (1992), 8 C.E.L.R. (N.S.) 157, [1992] 3 F.C. 316, 141 N.R. 125, 93 D.L.R. (4th) 198, 5 Admin. L.R. (2d) 38, 1992 CarswellNat 603, 1992 CarswellNat 8 (Fed. C.A.) — referred to

Carrier-Sekani Tribal Council v. Canada (Minister of the Environment) (1993), 9 Admin. L.R. (2d) 98 (note), 150 N.R. 80 (note), 149 N.R. 239 (note), 97 D.L.R. (4th) vii (note) (S.C.C.) — referred to

Cook v. British Columbia (Minister of Aboriginal Relations & Reconciliation) (2007), 80 B.C.L.R. (4th) 138, 72 Admin. L.R. (4th) 192, [2008] 7 W.W.R. 672, [2008] 1 C.N.L.R. 1, 2007 CarswellBC 2858, 2007 BCSC 1722 (B.C. S.C.) — considered

Dene Tha' First Nation v. Canada (Minister of Environment) (2006), 2006 CarswellNat 4508, 2006 CF 1354, 25 C.E.L.R. (3d) 247, 303 F.T.R. 106 (Eng.), 2006 FC 1354, 2006 CarswellNat 3642, [2007] 1 C.N.L.R. 1 (F.C.) — considered

Gardner v. Williams Lake (City) (2006), 2006 BCCA 307, 2006 CarswellBC 1521, 54 B.C.L.R. (4th) 225, 376 W.A.C. 120, 228 B.C.A.C. 120, 21 M.P.L.R. (4th) 191 (B.C. C.A.) — considered

Gitksan Houses v. British Columbia (Minister of Forests) (2002), 2002 BCSC 1701, 10 B.C.L.R. (4th) 126, 2002 CarswellBC 2928, 48 Admin. L.R. (3d) 225, (sub nom. *Gitksan First Nation v. British Columbia (Minister of Forests)*) [2003] 2 C.N.L.R. 142 (B.C. S.C.) — considered

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — considered

Hupacasath First Nation v. British Columbia (Minister of Forests) (2008), 2008 BCSC 1505, 2008 CarswellBC 2330, [2009] 1 C.N.L.R. 30 (B.C. S.C.) — considered

2011 CarswellBC 440, 2011 BCSC 266, [2011] 2 C.N.L.R. 1, [2011] B.C.W.L.D. 5366, [2011] B.C.W.L.D. 5360, [2011] B.C.W.L.D. 5359, [2011] B.C.W.L.D. 5353, [2011] B.C.W.L.D. 5357, [2011] B.C.W.L.D. 5355, [2011] B.C.W.L.D. 5354, [2011] B.C.W.L.D. 5358, 20 B.C.L.R. (5th) 356

Husby Forest Products Ltd. v. British Columbia (Minister of Forests) (2004), 2004 BCSC 142, 2004 CarswellBC 200, 12 Admin. L.R. (4th) 264, [2004] 5 W.W.R. 662, 25 B.C.L.R. (4th) 289 (B.C. S.C.) — considered

Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests) (2005), 2005 BCSC 697, 2005 Carswell-BC 1121, [2005] 3 C.N.L.R. 74, 33 Admin. L.R. (4th) 123 (B.C. S.C.) — considered

Klahoose First Nation v. British Columbia (Minister of Forests) (1995), 13 B.C.L.R. (3d) 59, [1996] 1 W.W.R. 757, 1995 CarswellBC 935 (B.C. S.C.) — referred to

Klahoose First Nation v. British Columbia (Minister of Forests) (1996), 18 B.C.L.R. (3d) 194, [1996] 6 W.W.R. 759, 1996 CarswellBC 586 (B.C. C.A.) — referred to

Klahoose First Nation v. British Columbia (Minister of Forests) (1996), (sub nom. *Noble v. British Columbia (Minister of Forests)*) 206 N.R. 79 (note), 85 B.C.A.C. 239 (note), 138 W.A.C. 239 (note), 24 B.C.L.R. (3d) xxxvi, [1996] 10 W.W.R. lix (S.C.C.) — referred to

Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources) (2010), 10 Admin. L.R. (5th) 163, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman*) 501 W.A.C. 1, (sub nom. *Beckman v. Little Salmon/Carmacks*) [2010] 3 S.C.R. 103, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman*) 295 B.C.A.C. 1, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman*) 408 N.R. 281, 55 C.E.L.R. (3d) 1, 2010 SCC 53, 2010 CarswellYukon 140, 2010 CarswellYukon 141, 97 R.P.R. (4th) 1, 326 D.L.R. (4th) 385, (sub nom. *Beckman v. Little Salmon/Carmacks First Nation*) [2011] 1 C.N.L.R. 12 (S.C.C.) — considered

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) — considered

Mitchell v. Minister of National Revenue (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.*) 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.*) 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.*) [2001] 3 C.N.L.R. 122, 206 F.T.R. 160 (note), (sub nom. *Mitchell v. M.N.R.*) [2001] 1 S.C.R. 911, [2002] 3 C.T.C. 359 (S.C.C.) — considered

Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management) (2005), 28 R.P.R. (4th) 165, 37 B.C.L.R. (4th) 309, 209 B.C.A.C. 219, 345 W.A.C. 219, 2005 BCCA 128, 2005 CarswellBC 472, [2005] 6 W.W.R. 429, [2005] 2 C.N.L.R. 212, 251 D.L.R. (4th) 717 (B.C. C.A.) — considered

Nemaiah Valley Indian Band v. Riverside Forest Products Ltd. (1999), 1999 CarswellBC 2438, 37 C.P.C. (4th) 101 (B.C. S.C.) — distinguished

R. v. Badger (1996), [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, 1996 CarswellAlta 365F, 1996 CarswellAlta 587 (S.C.C.) — considered

R. v. Lefthand (2007), 2007 CarswellAlta 850, 2007 ABCA 206, [2007] 4 C.N.L.R. 281, 222 C.C.C. (3d) 129, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203 (Alta. C.A.) — considered

2011 CarswellBC 440, 2011 BCSC 266, [2011] 2 C.N.L.R. 1, [2011] B.C.W.L.D. 5366, [2011] B.C.W.L.D. 5360, [2011] B.C.W.L.D. 5359, [2011] B.C.W.L.D. 5353, [2011] B.C.W.L.D. 5357, [2011] B.C.W.L.D. 5355, [2011] B.C.W.L.D. 5354, [2011] B.C.W.L.D. 5358, 20 B.C.L.R. (5th) 356

R. v. Lefthand (2008), 2008 CarswellAlta 195, 2008 CarswellAlta 196, (sub nom. *R. v. Eagle Child*) 454 A.R. 176 (note), (sub nom. *R. v. Eagle Child*) 385 N.R. 392 (note) (S.C.C.) — referred to

R. v. Marshall (2005), 15 C.E.L.R. (3d) 163, 235 N.S.R. (2d) 151, 747 A.P.R. 151, [2005] 2 S.C.R. 220, (sub nom. *R. v. Bernard*) 255 D.L.R. (4th) 1, [2005] 3 C.N.L.R. 214, (sub nom. *R. v. Bernard*) 198 C.C.C. (3d) 29, 287 N.B.R. (2d) 206, 750 A.P.R. 206, 2005 CarswellNS 317, 2005 CarswellNS 318, 2005 SCC 43, 336 N.R. 22 (S.C.C.) — followed

R. v. Sappier (2006), 355 N.R. 1, 274 D.L.R. (4th) 75, 2006 SCC 54, 2006 CarswellNB 676, 2006 CarswellNB 677, [2006] 2 S.C.R. 686, 50 R.P.R. (4th) 1, [2007] 1 C.N.L.R. 359, 799 A.P.R. 199, 214 C.C.C. (3d) 161, 309 N.B.R. (2d) 199 (S.C.C.) — followed

R. v. Vanderpeet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — followed

Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867 (1985), 1985 CarswellMan 183, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385, 19 D.L.R. (4th) 1, 59 N.R. 321, 35 Man. R. (2d) 83, 1985 CarswellMan 450 (S.C.C.) — considered

Sinclair c. Québec (Procureur général) (1992), [1992] 1 S.C.R. 579, (sub nom. *Sinclair v. Quebec (Attorney General)*) 89 D.L.R. (4th) 500, 134 N.R. 39, 10 M.P.L.R. (2d) 92, (sub nom. *Sinclair v. Quebec (Attorney General)*) 47 Q.A.C. 59, [1991] 3 S.C.R. 134, 1992 CarswellQue 48, 1992 CarswellQue 133 (S.C.C.) — considered

Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management) (2004), 2004 BCSC 1320, 2004 CarswellBC 2379, 34 B.C.L.R. (4th) 280, [2005] 1 C.N.L.R. 347 (B.C. S.C.) — referred to

Tsui T'ina Nation v. Alberta (Minister of Environment) (2010), 490 W.A.C. 198, 482 A.R. 198, 2010 CarswellAlta 804, 2010 ABCA 137, [2010] 10 W.W.R. 627, [2010] 2 C.N.L.R. 316, 50 C.E.L.R. (3d) 38, 23 Alta. L.R. (5th) 1 (Alta. C.A.) — considered

Vancouver Island Peace Society v. Canada (1993), 11 C.E.L.R. (N.S.) 1, 19 Admin. L.R. (2d) 91, [1994] 1 F.C. 102, (sub nom. *Vancouver Island Peace Society v. Canada (Minister of National Defence)*) 64 F.T.R. 127, 1993 CarswellNat 822, 1993 CarswellNat 1340 (Fed. T.D.) — considered

Vancouver Island Peace Society v. Canada (1995), 16 C.E.L.R. (N.S.) 24, (sub nom. *Vancouver Island Peace Society v. Canada (Minister of National Defence)*) 179 N.R. 106, (sub nom. *Vancouver Island Peace Society v. Canada (Minister of National Defence)*) 89 F.T.R. 136 (note), 1995 CarswellNat 4 (Fed. C.A.) — referred to

Vancouver Island Peace Society v. Canada (1995), 17 C.E.L.R. (N.S.) 298 (note), (sub nom. *Vancouver Island Peace Society v. Canada (Minister of National Defence)*) 192 N.R. 80 (note) (S.C.C.) — referred to

Wii'litswx v. British Columbia (Minister of Forests) (2008), 80 Admin. L.R. (4th) 217, 2008 BCSC 1139,

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2008 CarswellBC 1764, 38 C.E.L.R. (3d) 189, [2008] 4 C.N.L.R. 315 (B.C. S.C.) — considered

Wii'litswx v. British Columbia (Minister of Forests) (2008), 2008 BCSC 1620, [2009] 1 C.N.L.R. 359, 88 Admin. L.R. (4th) 109, 2008 CarswellBC 2530 (B.C. S.C.) — referred to

Statutes considered:

Attorney General Act, R.S.B.C. 1996, c. 22

s. 2(i) — considered

Community Charter, S.B.C. 2003, c. 26

s. 108 — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 133 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

s. 35(1) — considered

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

s. 23 — referred to

s. 23(1) — referred to

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Generally — referred to

s. 1 "statutory power" — considered

s. 1 "statutory power of decision" — considered

s. 1 "statutory power of decision" (a) — considered

s. 1 "statutory power of decision" (b) — considered

s. 1 "tribunal" — considered

s. 5 — referred to

s. 5(1) — considered

s. 8 — referred to

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s. 15 — considered

s. 16 — considered

Local Government Act, R.S.B.C. 1996, c. 323

s. 6 — considered

s. 8 — considered

s. 11 — considered

s. 11(1) — considered

s. 11(3.1) [en. 2007, c. 6, s. 16] — considered

s. 11(3.2) [en. 2007, c. 6, s. 16] — considered

s. 879 — referred to

Resort Timber Administration Act, S.B.C. 2006, c. 30

Generally — referred to

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009

R. 11-7(6) — referred to

APPLICATION by Band for declaration that Lieutenant Governor in Council breached its duty to consult with respect to decision to incorporate municipality and order setting aside order in council and letters patent.

Bruce J.:

Introduction

1 The Adams Lake Indian Band (the "Band") is one of three bands that form the membership of the Lakes Division of the Secwepemc aboriginal people. The Secwepemc Nation claims as part of their traditional territory a large area of the Province located in the south central interior plateau. Their claim extends to an area covering close to 180,000 square kilometres. The traditional territory of the Lakes Division bands is located in the southern portion of the lands claimed by the Secwepemc Nation and includes a 4,139 hectare parcel of land known as the Sun Peaks Controlled Recreation Area ("Sun Peaks"). Sun Peaks is 40 kilometres northeast of Kamloops. The Secwepemc Nation claims aboriginal rights and title to the lands encompassing Sun Peaks and has made its claims known to the federal and provincial governments since 1860 when James Douglas was Governor of the colony of British Columbia.

2 Sun Peaks is a mountain resort that includes both the developed areas at the base of the resort lands and the recreational ski areas located at the higher altitudes. Until the 1990s, Sun Peaks was a small ski hill operated under the name of Tod Mountain. In 1993, the Provincial government entered into a master development agree-

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ment ("MDA") with Tod Mountain Development Ltd. (now Sun Peaks Resort Corporation) that contemplated a phased expansion of the ski hill by the development of resort facilities and recreational improvements. To facilitate this expansion, the MDA permitted the purchase of Crown lands within the traditional areas claimed by the Lakes Division and the Band in particular. The MDA was to be in place until 2044 unless terminated earlier pursuant to its provisions.

3 The MDA brought about a rapid and extensive expansion of the ski resort that included the construction of several new ski lifts, a golf course, hotels, a snow making reservoir, cottages, condominiums, a community centre, trails, access roads, a conference centre, and many retail outlets. Large tracts of land were cleared and new roads opened up to service the growing community of full time and part time residents. An increasing number of tourists visited Sun Peaks as it became known as a year round mountain resort.

4 With the expansion of the ski resort came increased conflict with the Lakes Division bands who claimed that the MDA was inconsistent with their title to the land and with their traditional use and occupation of Sun Peaks. The complete absence of consultation with the surrounding aboriginal bands in regard to the expansion of the ski resort inflamed the already tenuous relationship between the Lakes Division bands and the Provincial government. Efforts to negotiate directly with the Sun Peaks Resort Corporation were also met with little success. This situation led to several legal and "self-help" actions by the Secwepemc Nation, including the Band, to protect their claim to the lands within Sun Peaks. The protests and blockades by the aboriginal people led to injunctions and criminal prosecutions by the provincial Crown. These incidents were widely publicized by the Canadian and international media.

5 In the midst of this climate of mistrust and acrimony, the residents of Sun Peaks sought to attain status as an incorporated municipality. The process towards incorporation began in 2005 when a committee of volunteers, who were residents of Sun Peaks, formed the Sun Peaks Incorporation Study Committee (the "Governance Committee") to investigate the feasibility of incorporation as a mountain resort municipality. Incorporated status was granted to Sun Peaks by the issuance of Letters Patent pursuant to Order in Council No. 158/2010 on March 25, 2010. From June 28, 2010 onward, Sun Peaks became Sun Peaks Mountain Resort Municipality (the "Municipality").

6 There is no dispute that pursuant to the Provincial government's recent policy objective to restore relationships with aboriginal people in B.C., efforts were made to consult with the Band in regard to the incorporation of Sun Peaks as a municipality. However, the Band's petition challenges the decision of the Lieutenant Governor in Council to grant incorporated status to Sun Peaks pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*Judicial Review Procedure Act*] on the ground that incomplete and inadequate consultation with the Band preceded the decision. The Band maintains that the Provincial government failed to comply with s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c. 11* [*Constitution Act*] which mandates a course of conduct to maintain the honour of the Crown with respect to its dealings with aboriginal people and the rights claimed by aboriginal people. An integral part of the honour of the Crown is the duty to consult. The Provincial government maintains that there was adequate consultation and accommodation of the concerns identified by the Band through the consultation process. The Municipality argues the duty to consult, if one existed, was minimal and thus any efforts by the Provincial government would satisfy the duty. The Regional District does not take any position and did not attend the hearing of this petition.

7 The parties filed lengthy written submissions addressing the facts and the law in support of their arguments and the court obtained a transcript of the proceedings to ensure that all of the issues raised by the parties

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could be fairly considered. I have not referred to every argument raised by the parties in my judgment; however, I have considered all of the arguments raised by the parties in respect of the issues addressed in my reasons for judgment.

Relevant Legislation

8 The *Judicial Review Procedure Act* governs the Band's application. Pursuant to s. 5(1) of this Act, the court's jurisdiction regarding the exercise, refusal to exercise, or purported exercise of a "statutory power of decision" is as follows:

... the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of the matter to which the application relates.

9 Section 1 of the *Judicial Review Procedure Act* defines "statutory power of decision" as, "a power or right conferred by an enactment to make a decision deciding or prescribing (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or (b) the eligibility of a person to receive, or continue to receive a benefit ...". Section 1 of the *Judicial Review Procedure Act* defines "statutory power" as including the power to make a regulation, rule, bylaw or order and to exercise a statutory power of decision. Lastly, s. 1 of the *Judicial Review Procedure Act* defines tribunal as "one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred."

10 Section 35(1) of the *Constitution Act* provides that, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

11 The procedure for establishing a mountain resort municipality is found in s. 11 of the *Local Government Act*, R.S.B.C. 1996, c. 323 [*Local Government Act*]:

11 (1) If a vote under section 8 is in favour of incorporation, the minister may recommend to the Lieutenant Governor in Council incorporation of a municipality as a mountain resort municipality.

(1.1) The minister may not recommend incorporation of a mountain resort municipality under subsection (1) unless the minister is satisfied that

(a) alpine ski lift operations, year-round recreational facilities and commercial overnight accommodation are offered within the area of the proposed municipality, or

(b) a person has entered into an agreement with the government with respect to developing alpine ski lift operations, year-round recreational facilities and commercial overnight accommodation within the area of the proposed municipality.

(2) Despite section 8, in the case of an area that is a mountain resort improvement district, the minister may recommend incorporation of a new mountain resort municipality to the Lieutenant Governor in Council, in accordance with the letters patent of the improvement district.

(2.1) Despite section 8, in the case of an area that is not a mountain resort improvement district, the minister may recommend to the Lieutenant Governor in Council incorporation of the residents of the area into a new mountain resort municipality if the minister is satisfied that a person has entered

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into an agreement with the government with respect to developing alpine ski lift operations, year-round recreational facilities and commercial overnight accommodation within the area.

(3) On the recommendation of the minister under subsection (1), (2) or (2.1), the Lieutenant Governor in Council may, by letters patent, incorporate the residents of an area into a mountain resort municipality.

(3.1) Letters patent under subsection (3) that, on the recommendation of the minister under subsection (2.1), incorporate a mountain resort municipality may do one or more of the following:

- (a) include exceptions from statutory provisions;
- (b) specify the effective period or time for an exception;
- (c) provide for restriction, modification or cancellation by the Lieutenant Governor in Council of an exception or its effective period;
- (d) appoint or provide for the appointment of one or more individuals to be the members of the municipal council of the municipality.

(3.2) For a mountain resort municipality incorporated under subsection (3) on the recommendation of the minister under subsection (2.1), the Lieutenant Governor in Council may, on the recommendation of the minister and by letters patent, provide for further exceptions, conditions and appointments.

(3.3) Appointments may be made under subsection (3.1) (d) or (3.2) until the general voting day for the first election of members to the municipal council.

(4) [Repealed 2008-42-37.]

(5) Section 17 applies with respect to the incorporation of a mountain resort municipality under this section.

Preliminary Issues

A. Proper Parties

12 The Ministry of the Attorney General of British Columbia ("Attorney General") received notice of the Band's petition and is the appropriate representative of the Lieutenant Governor in Council. In this capacity, the Attorney General has a right to be heard. However, the Attorney General argues that it is also a necessary party to any proceeding in which the validity of an Order in Council is challenged, and therefore, the proceedings are defective for failure to properly name the Attorney General. In support of this position, the Attorney General relies upon s. 16 of the *Judicial Review Procedure Act*; Brown and Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (consulted on July 2010), (Toronto: Canvasback Publishing, 2009), at para. 4:4300; *Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)* (1992), 93 D.L.R. (4th) 198, 5 Admin. L.R. (2d) 38 (Fed. C.A.) at paras. 28-29, leave to appeal to SCC refused, (1993), [1992] S.C.C.A. No. 360 (S.C.C.); and *Vancouver Island Peace Society v. Canada* (1993), [1994] 1 F.C. 102 (Fed. T.D.) [*Vancouver Is-*

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land Peace Society], aff'd (1995), 89 F.T.R. 136 (note) (Fed. C.A.), leave to appeal to SCC refused, [1995] S.C.C.A. No. 103 (S.C.C.).

13 The Band argues that while it must give notice to the Attorney General, it is only the Lieutenant Governor in Council that is a party to the petition. Section 15 of the *Judicial Review Procedure Act* provides that the decision maker is a party to the petition at their option. The Band maintains the Lieutenant Governor in Council exercised his statutory authority under s. 11 of the *Local Government Act* to issue letters patent to create a mountain resort municipality. The Band argues that the role of the Attorney General is to represent a ministry of the government in proceedings and this role is identified in s. 2(i) of the *Attorney General Act*, R.S.B.C. 1996, c. 22 [*Attorney General Act*]. Lastly, the Band argues that the authorities cited by the Attorney General involve proceedings against the Federal government where s. 23 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 [*Crown Proceedings Act*] permits proceedings against the Crown to be in the name of the Attorney General.

14 There is no statute or rule in force in B.C. that requires the Attorney General to be named as a party to any proceeding that questions a decision of the Crown made by the Lieutenant Governor in Council. Section 2(i) of the *Attorney General Act* reposes in the Attorney General the duty and power over, "regulation and conduct of all litigation for or against the government or a ministry in respect of any subjects within the authority or jurisdiction of the legislature." This provision does not require the Attorney General to be named as a party in all proceedings against the government. Section 16 of the *Judicial Review Procedure Act* requires that all applications for judicial review, regardless of the parties, must be served on the Attorney General and the Attorney General is entitled to be heard in the proceeding. However, s. 15 of the *Judicial Review Procedure Act* accords the right of party status only to the decision maker "in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power...". It is acknowledged that the Lieutenant Governor in Council had the authority to exercise the statutory power in s. 11 of the *Local Government Act* to grant incorporated status to a mountain resort municipality. It is this exercise of statutory power that is questioned in this proceeding. The fact that the exercise of statutory power took the form of an order in council does not alter the identity of the decision maker. Nor does it require the petitioner to name the Attorney General as a party to the proceedings.

15 The authorities cited by the Attorney General reflect a practice in the federal jurisdiction when proceedings are taken against the Federal Crown and this practice appears to be based upon s. 23(1) of the *Crown Proceedings Act*. Moreover, the practice in regard to the parties named in actions against the Federal Crown varies depending on the court in which the action is commenced: *Vancouver Island Peace Society* at para. 34. Thus these authorities are not persuasive with regard to the party status of the Attorney General in this Province.

16 The Attorney General agrees that it is the appropriate representative of the Lieutenant Governor in Council and, in this capacity, is accorded an opportunity to be heard in this proceeding. There is no suggestion that the Attorney General, if named as a party, would bring a different perspective or a different argument on the issues in dispute than it has presented as the representative of the Lieutenant Governor in Council. In addition to the lack of prejudice to the Attorney General, no remedy has been argued other than a determination that the proceedings are defective.

17 In my view, the Band has complied with ss. 15 and 16 of the *Judicial Review Procedure Act* by naming the Lieutenant Governor in Council as a party and by providing the Attorney General with notice of the proceeding. There is no rule, statutory provision or practice at common law that requires the Band to also name the Attorney General as a party.

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B. Triable Issues

18 The Attorney General argues that a petition is not an appropriate proceeding in which to resolve complicated and disputed questions of fact. In particular, the Attorney General argues that a judicial review petition is not the proper forum for resolving substantive claims of aboriginal rights and title. The Attorney General acknowledges that the Crown has knowledge of the Band's claims to aboriginal title and rights in and about the lands situated within Sun Peaks for the purpose of the duty to consult. Further, the Attorney General does not dispute that there was a duty reposed in the Crown to consult with respect to the incorporation of the Municipality. However, the Attorney General argues that, if it is necessary to rely upon the affidavit evidence filed by the Band for the truth of their assertions to aboriginal title and rights concerning Sun Peaks, the proceeding should be converted to an action and placed on the trial list.

19 The Attorney General also argues the affidavit evidence filed by the Band that suggests all of the Secwepemc people oppose development of Sun Peaks is in dispute. As a consequence, the Attorney General argues it should be disregarded by the court.

20 The Municipality argues that if the court is unable to decide whether the Provincial Crown satisfied its duty to consult without determining the strength of the claims asserted by the Band, the court should permit cross-examination on the affidavits filed or, alternatively, the proceeding should be converted to a trial.

21 The Band agrees that a summary proceeding is not the appropriate forum for determining aboriginal title and rights and it is not its intention to seek a declaration that such title or rights exist in regard to Sun Peaks. However, the Band argues that the affidavit evidence is relevant to the court's assessment of whether the Crown conducted itself properly in the course of the consultation. The Band argues that evidence proving what the Crown had knowledge of, either real or constructive, is relevant to the question of when the duty to consult arises: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.) [*Haida*] at para. 35.

22 The Band argues that the Attorney General has mischaracterized its evidence in regard to the Secwepemc protest over the development of Sun Peaks. The Band argues the evidence does not purport to establish that every member of the Secwepemc Nation opposes Sun Peaks' development and expansion. However, evidence that there have been protests over its expansion is properly before the court to explain the context in which this dispute arose.

23 Lastly, the Band argues that its evidence of traditional use and occupation in regard to Sun Peaks was in reply to the affidavit evidence filed by the Municipality, which suggests that historically the Band has not had a presence in the disputed area. This evidence is relevant to show what could have been considered by the Crown had it properly carried out the duty to consult. On the other hand, if this evidence is disregarded, the Band says that all evidence of this nature should be disregarded because it was not part of the material considered by the Crown during the consultation process.

24 This preliminary issue raises complicated questions of mixed fact and law. The authorities relied upon by all parties clearly hold that the strength of the claim to aboriginal title and rights asserted by the aboriginal claimant is an important factor to consider when determining the content of the duty to consult. A weak *prima facie* case may lead to a conclusion that the duty to consult is at the low end and, conversely, a strong *prima facie* case may require a duty to consult at the upper end of the spectrum. As a consequence, evidence that tends to establish the strength of the claim asserted is potentially relevant to the issues in dispute in this case. In a summary proceeding, the court is very reluctant to assess the credibility of conflicting evidence based solely on

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affidavit material.

25 The Attorney General has acknowledged a duty to consult and makes no submission concerning the strength of the claim asserted by the Band. The Crown has also recognized that Sun Peaks is within the traditional territory of the Band and the other Lakes Division bands. In a letter dated February 19, 2010, a representative of the Ministry of Tourism, Culture and Arts acknowledged that as a result of the location of Sun Peaks within the Band's traditional territory, "complete and meaningful consultation needs to take place in regard to the Sun Peaks Master Plan ...". The Attorney General's argument is that it fulfilled the duty to consult by any standard because the adverse consequences of the decision to incorporate the Municipality in terms of the asserted aboriginal claims were non-existent. However, the Attorney General also argues that even if it erred in assessing the content of the duty to consult on the facts of this case, the court must go on to evaluate the circumstances to determine if an appropriate level of consultation occurred in any event: *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53 (S.C.C.) [*Beckman*] at para. 39. This inquiry would inevitably lead to a consideration of the merits of the Band's claim to aboriginal title and rights even if it is only a preliminary assessment as described by Grauer J. in *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 (B.C. S.C.) [*Klahoose*] at para. 36.

26 The Municipality's argument also draws the court into a substantive assessment of the strength of the claim. Several affidavits filed by the Municipality address the absence of any presence of the Band in and about Sun Peaks or its members' use of land for hunting, fishing and herb gathering. The Municipality maintains this evidence supports a conclusion that the Band has only a weak claim to aboriginal title and rights in regard to the lands within its newly created boundaries. The Municipality asks the court to find that either no consultation or minimal consultation was warranted based on this evidence.

27 While the Band submits that the Province fundamentally erred in its approach to the consultation due to the failure to make a preliminary strength of claim assessment, their argument assumes the court will go on to examine what actually occurred to determine if the duty to consult was adequately fulfilled.

28 From this brief overview of the positions of the parties, it is apparent that the court may be required to make a preliminary assessment of the strength of the claim asserted by the Band if the Province is found to have misapprehended the potential adverse impact of the incorporation decision on the rights claimed by the Band.

29 For this purpose, I find the court is not in a position to make anything more than a preliminary, general assessment of the strength of the *prima facie* claim. The strength of claim evidence led by the Band includes oral histories and recollections about the use and occupation of Sun Peaks. The affidavit evidence filed by the Municipality disputes the accuracy of the Band members' recollections and oral histories. While it is generally inappropriate, without the benefit of *viva voce* evidence, to make critical findings of admissibility and credibility in respect of disputed facts, there is precedent for treating aboriginal oral history evidence at face value for the purpose of determining the strength of a *prima facie* claim: *Gitksan Houses v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 (B.C. S.C.) [*Gitksan*] at para. 70. It is not my task to make a final determination regarding the Band's claim for aboriginal title and rights.

30 Some flexibility must be accorded to the admissibility and weighing of evidence in support of aboriginal claims due to the inherent difficulty associated with its proof. This principle was recognized by the Supreme Court of Canada in *Mitchell v. Minister of National Revenue*, 2001 SCC 33 (S.C.C.) at paras. 29 and 30:

Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as

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much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet, supra*, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw, supra*).

The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

31 In my view, these principles are even more important to keep in mind when assessing in a preliminary fashion whether there is a *prima facie* aboriginal right or title at stake. As I will discuss below, the duty to consult in regard to unproven aboriginal rights and title is designed to preserve those rights, to the extent possible, pending a final determination. In this context, and from a policy perspective, it is advisable to adopt a more expansive view of admissible evidence to ensure preservation of the rights claimed.

32 Accordingly, to determine the strength of the Band's *prima facie* claim on a preliminary and general basis, and for the purpose of defining the content of the duty to consult, I find it is appropriate to accept at face value the oral histories and recollections of Band members. In addition, the evidence led by the Band is admissible to establish the Crown's knowledge of the rights and title asserted by the Band. This evidence is also admissible as part of the background to the dispute. Lastly, the Province's assessment of the strength of claim subsequent to the conclusion of the consultation process and the evidence relied upon is admissible for the purpose of this inquiry.

33 Turning to the Attorney General's submission with regard to the background evidence filed by the Band, I am not satisfied that it suggests that every member of the Secwepemc Nation opposes the development of Sun Peaks. Indeed, the affidavit evidence suggests that many members of the Secwepemc Nation seek to share in the economic benefits of the Sun Peaks development and to have a greater role in the decision making process surrounding its expansion. What is most prominent in the message articulated within the Band's affidavit evidence is a desire for an acknowledgement of the lack of consultation in the past and meaningful consultation and accommodation of its aboriginal rights in Crown decisions that relate to Sun Peaks going forward. Moreover, the affidavit evidence filed by the Attorney General clearly identifies a wide range of responses to development among the aboriginal groups that have an interest in Sun Peaks. Thus I see no reason to disregard the Band's evidence. I consider it is properly before me as part of the historical context of the Band's application for judicial review.

C. Limited Authority of the Band

34 The Attorney General argues the Band has no authority to seek a declaration on behalf of the Lakes Divi-

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sion that there has been inadequate consultation in respect of the incorporation decision. According to the affidavit of Chief Leon, Adams Lake Band, he is only authorized by the members of the Band to bring this petition. The Attorney General points to the fact that the Little Shuswap nation, also a member of the Lakes Division, signed a consultation agreement with the Crown and the Neskonlith nation, another member of the Lakes Division, is not a party to the proceeding.

35 The Band argues that until there is a recognized body within the Lakes Division with whom the Crown acknowledges it must consult in regard to decisions affecting their traditional territory, each member of the Lakes Division has the capacity to represent the interests of the Lakes Division. The Band says the Crown recognized an obligation to consult separately with each of the three bands that make up the Lakes Division during the consultation process and carried out separate meetings in many instances. However, the underlying basis for their claims and the corresponding duty to consult is based upon the rights acquired by the Secwepemc Nation and, in particular, its Lakes Division. In support of its argument, the Band relies upon *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.* [1999 CarswellBC 2438 (B.C. S.C.)] (11 November 1999), Victoria 90/0913 [*Nemaiah Valley*] at paras. 10-14.

36 The Band also argues the fact that one of the Lakes Division members accepted the consultation process as sufficient does not determine the sufficiency of the consultation for all members: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 (B.C. S.C.) [*Huu-Ay-Aht-First Nation*] at para. 128.

37 The declaration sought by the Band is described at p. 2 of its petition as follows: "this Court declare there has been inadequate consultation with the Adams Lake First Nation and the Lakes Division of the Secwepemc Nation before the approval of Order-in-Council 158/2010." At p. 3 of the petition, the Band states that Chief Leon has been authorized by the members of the Band to bring this proceeding by a resolution of the Band's council.

38 In my view, the Band has authority to seek a declaration that the Crown failed to adequately consult with it concerning the decision to grant incorporated status to the Municipality insofar as that decision affected the rights and title asserted by the Lakes Division in Sun Peaks.

39 As Vickers J. describes in *Nemaiah Valley*, aboriginal rights are recognized to be communally shared by all members of the group by reason of their membership in that group: at para. 12. All three band members of the Lakes Division claim overlapping and communally recognized rights and title to the disputed lands. Further, just as a favourable determination of aboriginal title would benefit all members of the group in *Nemaiah Valley*, the relief sought in this petition would support the rights claimed by all members of the Lakes Division in regard to Sun Peaks insofar as any accommodation that resulted from an enhanced consultation process would protect communal rights. Moreover, Chief Leon is a member of the Lakes Division and has the same interest as any other member of the Lakes Division in adequate consultation and accommodation by the Crown in regard to the decision to incorporate the Municipality.

40 However, what distinguishes this case from *Nemaiah Valley* is the nature of the claim sought by the petitioner. This is not an action to determine aboriginal title and rights with respect to lands that are the subject of an assertion by the Lakes Division or the Secwepemc Nation. Instead, this is a petition for a declaration that the Crown failed to adequately consult with respect to the impact of a decision to grant incorporated status to the Municipality based on asserted aboriginal rights and title. Throughout the consultation that occurred, each of the three Lakes Division bands maintained the Crown was required to consult individually with each band to satisfy

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its duty. While there were joint meetings, the concerns of each band were sought and recorded separately. Each band took different positions with respect to the adequacy of the consultation framework. At least one band, Little Shuswap, decided to accept the consultation process as framed by the Crown. Although a decision by one band does not determine the sufficiency of the consultation or the accommodation offered by the Crown, as reflected in the reasons of Dillon J. in *Huu-Ay-Aht-First Nation*, it illustrates that the consultation had a discreet and distinct impact on each of the three member bands.

41 The issue of authority to bring an action is a question of mixed fact and law best determined by the trial judge: *Nemaiah Valley* at para. 13. The facts in this case support a conclusion that, while the aboriginal rights to be protected and fostered are communally shared among all members of the Lakes Division, the duty to consult was owed to each band individually. Thus the Band has authority to seek a declaration that the Crown has failed to fulfill its duty to consult with the Band in regard to aboriginal title and rights that are communally shared with all of the members of the Lakes Division.

D. Admissibility of Evidence

42 The Band seeks to file an affidavit attaching a letter received by the Band on January 13, 2011, after it filed this petition. The letter is from the Ministry of Natural Resources and concerns an application by the Sun Peaks Development Corporation for a licence to cut timber in Sun Peaks. The letter contains a preliminary strength of claim analysis prepared by the Crown and an outline of the consultation process contemplated. The Attorney General argues this evidence is not admissible because it is concerned with a separate and distinct consultation unrelated to the incorporation decision. In my view, this evidence is relevant to the petition because it describes the Crown's assessment of the strength of the Band's claim in regard to the same lands in dispute in this case. Consequently, the strength of the claim remains the same regardless of the decision being contemplated by the government.

43 The Municipality seeks to adduce additional affidavit evidence that purports to respond to strength of claim evidence led by the Band in reply to the Municipality's initial affidavit evidence addressing the strength of claim. In addition, the Municipality seeks to adduce affidavit evidence addressing the passing of a firearms by-law that was included in the Band's legislation brief. The Band objects to this evidence because it has had no notice of it and on the basis that it could have been presented to the court as part of the Municipality's original reply submission. This is not new or unforeseen evidence that has come to light after the petition was filed.

44 The Municipality may adduce affidavit evidence concerning the firearms by-law as this evidence was included in the materials presented to the court after the filing of its affidavits. The strength of claim evidence contained in the late filed affidavits is admissible for the limited purposes described above. It contains evidence of the same nature as the original reply affidavits filed by the Municipality and would not therefore have unduly prejudiced the Band. The only affidavit that must be excluded from the record in fairness to the Band is the affidavit of Bill Rublee dated January 18, 2011. This evidence purports to be an expert opinion addressing the impact of Sun Peaks' development on the environment. The Band did not receive proper notice of this expert opinion and it is not filed in reply to an expert opinion led by the Band in its case. I decline to exercise my discretion to admit the evidence pursuant to Rule 11-7(6) for these reasons.

Standard of Review

45 The Band argues that the standard of review in regard to whether the consultation was adequately carried out is correctness. If the Crown has appropriately measured and carried out the duty to consult, its subsequent

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actions or decisions are evaluated by a standard of reasonableness. In this regard, the court asks whether the decision was within the constitutionally acceptable range of outcomes. In support of its argument, the Band relies upon *Beckman* at para. 48.

46 The Attorney General argues that *Beckman* did not establish a standard of correctness in respect of the efforts made by the Crown to carry out the duty to consult. While the existence of a duty to consult is a question of law and the decision maker must be correct, this determination also involves questions of fact, of which the court owes a degree of deference to the decision maker: *Haida* at paras. 61-63; *Klahoose* at para. 34; *Huu-Ay-Aht-First Nation* at para. 95, *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2008 FCA 212 (F.C.A.); *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 (B.C. S.C.) [*Ke-Kin-Is-Uqs*]; and *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 (F.C.) [*Dene Tha'*] at paras. 93-94. Thus where the question of pure law and facts are intertwined, the standard is reasonableness. The Attorney General argues that the process of consultation should be assessed against a standard of reasonableness.

47 The Attorney General agrees that the standard of correctness applies to the determination of whether the duty to consult is triggered as well as to the scope and extent of the duty in regard to legal and constitutional limits. In other words, the standard of correctness applies to the decision maker's conclusion as to the level of consultation required to meet the duty and whether that level was reached prior to the decision; however, the standard of reasonableness applies to the conduct of Crown officials during the consultation process.

48 The standard of review in cases involving the duty to consult, whether viewed from a constitutional or an administrative law perspective is in part based on a standard of correctness and in other respects is based on a standard of reasonableness. Generally speaking, questions of law are judged by the standard of correctness and questions of fact by the standard of reasonableness. However, because the duty to consult and accommodate depends on the particular circumstances, questions of law are often intertwined with questions of fact. The statement of Chief Justice McLachlin in *Haida* at para. 39 illustrates why it is far simpler to articulate the standard of review than to apply it:

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.

49 The existence of the duty to consult is a legal question judged by the correctness standard; however, this determination may involve an assessment of facts to which a degree of deference may be owed to the decision maker: *Haida* at para. 61. While the manner in which the government carries out its consultation, and what it does to accommodate aboriginal rights and interests is examined based on a standard of reasonableness, the standard of correctness applies to the government's assessment of the seriousness of the claim and the impact of the infringement on such rights and interests. These two concepts are described in the following passage from *Haida* at para. 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 unreason-

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able. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

50 Chief Justice McLachlin's comments about the standard of review in *Haida* were not intended to be definitive on the subject; the discussion of the general principles of administrative law reflected only "suggest" applications: *Haida* at para. 60. However, subsequent judgments in this jurisdiction have interpreted the standard of review articulated in *Haida* as positioning the government's efforts to consult within the purview of the reasonableness standard. As most succinctly described by Madam Justice L. Smith in *Ke-Kin-Is-Uqs* at para. 180:

The authorities are clear that the Crown's efforts at consultation and accommodation are to be measured against a standard of reasonableness, unless the Crown has misconceived the seriousness of the claim or the impact of the infringement. In that event, it would likely be a question of law assessed by the standard of correctness. The focus is on the process of consultation and accommodation, not the outcome.

51 In *Beckman*, Binnie J. addressed the appropriate standard of review at para. 48 of the judgment as follows:

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

52 In my view, this passage from *Beckman* should not be interpreted as modifying the legal principles articulated in *Haida*. Binnie J. does not address the intermediate steps within each legal question that may or may not involve issues of fact to which deference may be owed to the decision maker. Nor does Binnie J. articulate the distinction between the Crown's assessment of the content of the duty and its efforts to carry out the required level of consultation. Instead, I find this passage articulates the standard of review in a general fashion and in a manner that was deemed by the Court to be sufficient to decide the issues in dispute in the case before them.

53 Thus for the purpose of this case, I find the Attorney General's description of the standard of review to be correct. The existence or extent of a legal duty (i.e. the duty to consult) is a question of law, judged on a standard of correctness, whereas the process of carrying out that legal duty falls to be reviewed on a reasonableness standard.

Local Governance Prior to the Municipality

54 Before the Municipality was incorporated, there were three primary local government bodies at Sun Peaks: Sun Peaks Resort Improvement District ("Improvement District"); Thompson Nicola Regional District ("Regional District"); and the Provincial government.

55 The Improvement District had jurisdiction over the smaller developed area of Sun Peaks but not over the far larger area where the upper ski hills are located. The Improvement District is governed by a seven member

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unpaid board of directors that includes four elected members, two members appointed by the Province (one to represent the Sun Peaks Resort Corporation and a staff representative), and a member appointed by the Regional District. The Improvement District was created in 1995 and it is authorized to provide fire, water, sewer, drainage, street lights, snow removal, and parks and recreation services for Sun Peaks. To date, however, it has provided only street lighting and fire protection.

56 The Regional District governs ten municipalities and ten unincorporated areas, including Sun Peaks. Sun Peaks is part of the larger P electoral area and area P has one out of 24 elected representatives on the governing board. The Regional District governs a broad range of activities within the controlled areas such as regional planning, land use, by-laws, building standards, search and rescue, waste management, and parks. The Regional District has no community plan for Sun Peaks; however, it does have a zoning by-law in place. The Regional District cannot pass a land use by-law or a community plan for Sun Peaks without the approval of the Province.

57 The Province governs highways and road maintenance, education, social services, health care, tax collection and financial policies. A provincial staff member acts as the Approving Officer for subdivisions. The Province also provides police services through the RCMP.

58 After incorporation, the Improvement District was dissolved and the Municipality took over its responsibilities. The Municipality acquired its own member on the board of the Regional District and thus continued to participate in the Regional District's shared, area wide services and functions. In addition, the Municipality took over all of the local services and functions previously performed by the Regional District. The Municipality also took over some of the Provincial responsibilities for road maintenance, tax collection and subdivision approval.

Chronology of Events

59 In November 2005, a group of volunteers residing in Sun Peaks formed the Governance Committee to investigate the feasibility of incorporating as a mountain resort municipality. However, it was not until June 2006 that the Governance Committee had any significant contact with the Ministry of Community and Rural Development. In December 2006, the Province provided the Governance Committee with a grant to cover the cost of a study into the merits of incorporation and the costs of conducting public meetings on the subject. The incorporation study, referred to as the Technical Report, was completed in early 2007. Neither the Band nor any of the other Lakes Division bands were consulted during the preparation of the Technical Report or its update in 2009. The Governance Committee also conducted a community survey in May 2007 to solicit public input with regard to incorporation. The survey asked whether the municipality should be required to consult with business groups and others such as First Nations; however, the Lakes Division bands were not asked to contribute their views about the survey or its results.

60 On January 22, 2007, the Shuswap Nation Tribal Council wrote to the Regional District and to the Sun Peaks Resort Corporation expressing opposition to the incorporation of Sun Peaks and asking for a meeting to discuss "meaningful participation in the ongoing land use planning and development within our traditional territory." The Governance Committee sent this letter to the Ministry of Community and Rural Development and the Ministry in reply sent the Governance Committee a list of First Nations bands that should be provided with information about the incorporation process.

61 On February 2, 2007, the Governance Committee sent a letter to all the potentially affected aboriginal groups, including the Band, to notify them of the upcoming public meetings in February and April for discussion of the proposed incorporation. The first meeting had already been held in January 2007. The letter also con-

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tained a brief overview of the process for achieving incorporation status and indicated the Technical Report would be available at the end of April 2007.

62 On March 2, 2007, Chief Leon sent a letter to the Regional District and the Sun Peaks Resort Corporation expressing opposition to the incorporation of Sun Peaks because the process failed to take into account their aboriginal title and rights in the lands and provided no accommodation for these interests. In reply, the Governance Committee wrote to Chief Leon to advise that the Band's concerns were going to be forwarded to the Provincial government for review.

63 On April 4, 2007, the Band and the Neskonlith band sent a joint letter to the Premier expressing opposition to the incorporation of Sun Peaks. This letter said, in part:

Adequate consultation has not occurred in regard to the Sun Peaks development from the outset of the project; in spite of tremendous negative impact the development has on our traditional territory and the ability of our members to exercise our Aboriginal rights and title on the land. ...as well, the lands were set aside as reserve lands for our three communities - the subject of a specific claim. ...

Recently the Adams Lake and Neskonlith Band learned about an upcoming decision for municipal incorporation by Sun Peaks. By this letter, we put your government on notice that meaningful consultation about the decision for municipal incorporation must occur- the decision itself constitutes an interference but further, consultation about this decision provides an opportunity to engage in meaningful accommodation about the Sun Peaks project itself.

These steps were not taken for the Sun Peaks project in general, and about this decision in particular. Recently the bands received a letter ... from the Sun Peaks Incorporation Study Committee, which did not provide sufficient time to respond or attend the February 10th, 2007 public meeting regarding the municipal incorporation study. This is not adequate consultation. Not only is the process, including timing, problematic, we note that the Courts have clearly stated that First Nations consultation is not the same as public consultation processes.

...

If Sun Peaks becomes a municipality, our interests are directly affected - Sun Peaks will become empowered with a local government framework for "core areas of authority, including broad powers; taxation; financial management; procedures; and bylaw enforcement, municipal -provincial relations, with principles, consultation requirements and dispute resolution processes." ... Sun Peaks' interests are opposed to our own, and Sun Peaks' new authorities and powers will impact our Aboriginal title and rights and the outcomes possible for the Neskonlith Douglas Reserve claim ... resubmitted March 20th, 1997.

64 Chief Leon and Chief Wilson of the Neskonlith band attended the last public meeting held by the Governance Committee. During this meeting the Technical Report was presented. The minutes of the meeting indicated that Chief Wilson and Chief Leon expressed anger and frustration about the failure to consult with them about the incorporation as well as the development of Sun Peaks generally. They both expressed the opinion that public consultation was not meaningful or adequate consultation. The Governance Committee responded that they did not have a mandate to consult with the bands affected by the proposed incorporation or to address their aboriginal claims. It was the Governance Committee's expectation that the Province would soon step in and begin a consultation process.

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65 On April 5, 2007, the Governance Committee formally asked the Province to assume responsibility for consulting with the affected aboriginal groups. On May 14, 2007, Ida Chong, Minister for Community Services, advised the Governance Committee and the affected aboriginal bands that the Ministry would be consulting with them before any decision was made about incorporation. While there were two other issues to be clarified by the Province (responsibility for local roads and financial assistance available to an incorporated municipality), it is apparent that the Governance Committee put their investigation on hold until the Province had completed its consultation with the affected aboriginal groups. This decision was supported by Ida Chong.

66 It was not until July 2007 that the Band was provided with an internet link to the 2007 Technical Report coincident with Cathy Wilson's first telephone contact with the Lakes Division bands in regard to the consultation process. Ms. Wilson was the Director of the Ministry of Community and Rural Development's Government-First Nations Relations Branch. She became one of two primary contacts for the Band with respect to the consultation process.

67 The first consultation meetings were held on July 18 and 19, 2007. The Ministry's representatives met with each band separately. During this meeting Ms. Wilson explained the process and implications of incorporation and advised the Band that the Ministry wanted to engage in consultation with the affected bands to identify any potential impacts on aboriginal rights or title. Ms. Wilson's notes indicate that Chief Leon discussed the traditional uses of Sun Peaks by the Band members and the historical grievances the Band had with the development of Sun Peaks and the lack of accommodation and consultation to date. He also raised concerns about the incorporation decision such as the inadequate consultation to date; the need to jointly define the consultation framework, which should be resourced by the government; and the fact that the incorporation would create a new government body with jurisdiction over lands where their aboriginal title and rights are not known or adequately assessed.

68 In separate meetings, all of the Lakes Division bands expressed concern about the failure to consult during the development of the MDA with Sun Peaks Resort Corporation; the unsuccessful attempts made to consult with the Sun Peaks Resort Corporation pursuant to a protocol negotiated in 1997; and the lack of financial capacity to fully engage in the consultation process. The Lakes Division bands all requested copies of the MDA and any environmental assessments prepared prior to the MDA. In addition, Chief Wilson asked for the Ministry's consultation policy and its guide to municipal incorporation. Internet links for the latter documents were provided to the Lakes Division bands on July 25, 2007. On August 3, 2007, Psyche Brown emailed a copy of the MDA to the Lakes Division bands and advised them that no environmental studies could be located. Ms. Brown was the Manager of the Major Projects - Resort Development sector of the Ministry of Tourism, Culture and the Arts (the "Ministry of Tourism"). Ms. Brown became another primary contact for the affected aboriginal groups during the consultation process with the government.

69 In September 2007, the government decided that the Ministry of Tourism would lead the consultation process with the Lakes Division bands because it believed that most of the bands' concerns related to the development of Sun Peaks generally rather than to incorporation specifically. The proposed consultation process would cover issues concerning the Sun Peaks development, proposed amendments to the MDA, and implementation of the Resource Timber Administration Act, which contemplated a transfer of authority over timber resources within Sun Peaks. While consultation about the incorporation of Sun Peaks would be included in this process, these discussions were to be jointly led by the Ministry of Community and Rural Development and the Ministry of Tourism. Specifically, the consultations would be led by Ms. Brown and Ms. Watson. The Lakes Division bands had also expressed a desire to address all of the issues in dispute together in a single consultation

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process and were thus content with the government's proposal for consultation.

70 On December 6, 2007, Ms. Brown wrote to the bands and invited them to participate in a consultation process about Sun Peaks resort generally. The terms of reference drafted by Ms. Brown included the following topics:

1. Historical and traditional First Nations use.
2. Current First Nations use.
3. With acknowledgment of current commitments under the MDA, assessment of the impacts of proposed changes to the MDA, timber administration and governance [incorporation] on aboriginal interests.

71 Ms. Brown advised the bands that she expected consultations to complete within six to twelve months and anticipated they would meet once per month. Between January and May 2008, Ms. Brown attempted to arrange meetings with the bands. While she was unsuccessful, it should be noted that the Lakes Division bands were also involved in a lengthy consultation process with the Ministry of Forests during the spring of 2008.

72 In April 2008, the Deputy Minister of Community and Rural Development, Dale Wall, wrote to the Governance Committee and advised them that the incorporation decision was going to be part of the consultation process addressing the other decisions affecting Sun Peaks generally, including amendments to the MDA and the timber administration question. Mr. Wall indicated that the consultation process would likely complete by November 2008, including ratification by the First Nations and the Province.

73 On May 5, 2008, Ms. Brown met separately with representatives of the Lakes Division bands. It does not appear that there was any discussion of substantive issues during this meeting. Immediately after this meeting, the Band wrote to the Minister of Community and Rural Development expressing concern about Mr. Wall's description of the consultation that had already occurred in regard to incorporation in his letter to the Governance Committee as described above.

74 In a letter from Chief Wilson, on behalf of the Neskonlith band, dated May 6, 2008, concerns were expressed on behalf of the Lakes Division bands. (I note that Chief Leon sent an identical letter to the Minister on May 12, 2008.) Chief Wilson said that during the July 2007 meetings the bands advised the government that they were not yet prepared for consultations on the incorporation and merely listing the bands' concerns was not adequate consultation. Chief Wilson also stated that the first step was to agree on a process for consultation and secure adequate funding to permit meaningful participation by the bands in the process. While these concerns were brought to the government's attention in July 2007, no framework agreement had been negotiated to date. Chief Wilson specifically addressed the impact of incorporation on the claimed aboriginal title and interests as follows:

... When the Master Development Plan was approved in 1997, the Province took the position, since rejected by the Supreme Court of Canada, that it had no legal obligation to consult with us or accommodate our interests. Municipal incorporation could further entrench Sun Peaks' rights under the Master Plan. Indeed, the Summary of the Technical Report states that the letters patent of the municipality might enshrine special governance provisions to "preserve and respect" the Corporation's rights.

75 Chief Wilson advised the Minister that the sacred circle discussions currently underway within the Lakes

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Division bands should also be included in a framework for consultation because the lands affected by the Ministry of Forests' plans included one-third of Sun Peaks. Lastly, she emphasized that a global framework for all of the consultations had to be a priority before consultations could begin.

76 On May 28, 2008, likely in response to Chief Wilson's May 6, 2008 letter, Ms. Brown emailed the Lakes Division bands a draft consultation framework. The action plan forming part of the draft consultation framework included the signing of a consultation agreement describing the scope of discussions, a meeting schedule, funding, and responsibilities of the parties as the first step in the process. Next, there would be a gathering of information on traditional, environmental and socio-economic impacts to First Nations based on the agreed upon scope of consultation by the First Nations, the government, and other agencies. During this process, gaps in the information would be identified and further information would be sought by accessing outside sources and expertise. Once the information gathering process was complete, the parties would identify the impacts and benefits of the resort development on aboriginal interests and the potential future impacts based on the MDA. Next, the parties would investigate financial authority for compensation and negotiate accommodation agreements as appropriate. The timeframe for completion was October 2008.

77 Mr. Wall also responded to the bands' May 2008 correspondence. Mr. Wall's undated letter indicates agreement with the bands concerning the key steps in the consultation process, namely: identifying the participants; jointly developing a framework for meaningful consultation; undertaking a process of information gathering and exchange that ensures First Nations have the information necessary to assess the impact of the proposed decision on their interests; and identifying options to mitigate or compensate for the specific impacts identified. Mr. Wall also confirmed that the government intended to address all of the issues surrounding Sun Peaks, including the sacred circle areas, in a single consultation process.

78 Ms. Brown resumed her attempts to schedule a meeting with the Lakes Division bands to settle the terms of a consultation framework agreement. She advised the bands that the Governance Committee was hoping to schedule a public vote on the incorporation in the fall of 2008 and thus they were running out of time. A meeting was finally arranged for July 31, 2008. Chief Wilson and Chief Leon attended this meeting together and the attendees discussed options for a consultation framework agreement and their expectations for the consultation process. The Chiefs provided Ms. Brown with an accommodation agreement developed for an unrelated consultation and another meeting was scheduled for August 8, 2008. On August 6, 2008, Ms. Brown emailed the bands a draft consultation agreement that she advised was based on the accommodation agreement the Chiefs had given to her at the earlier meeting. Of particular importance, the draft provided as follows:

This Agreement is to enable the Parties sufficient time, information and resources to fully engage in the Negotiations of an Accommodation Agreement to reach their respective general objectives on the following terms and conditions:

1. Purpose: The purpose of this Agreement is to establish a reliable framework for government -to- government consultation and negotiation and to provide funding to the Bands to engage in meaningful dialogue and Negotiations to reach an appropriate Accommodation Agreement between the parties in respect to the Resort.

79 The draft defines Accommodation Agreement as "a long term definitive agreement after "efficient and good faith negotiation." By the terms of the Agreement, the Province acknowledged "the Bands' asserted interests in the Crown land included in the Resort Master Plan, as well as its asserted aboriginal rights, aboriginal

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title, employment and economic opportunities, protection of cultural and heritage resources, and environmental quality and stewardship."

80 At the August 8, 2008 meeting, the consultation framework agreement was discussed briefly but primarily Chief Leon and Chief Wilson requested more information about the impact of incorporation on their interests. There were no substantive issues discussed. Ms. Brown agreed to schedule a meeting in September 2008 that would involve a comprehensive discussion of the process of incorporation, the changes it would bring in terms of local government, and any impact on the bands' interests. A representative from the Ministry of Community and Rural Development (Ms. Watson) was to attend to discuss mountain resort municipalities and Ms. Brown hired a lawyer, Michael Vaughan, who specializes in municipal law, to attend the meeting.

81 This information meeting occurred on September 8, 2008. Chief Leon did not attend but he sent two representatives for the Band. Ms. Watson provided information regarding regional districts and the difference between a regional district and a municipality. She also advised the bands that the existing MDA would have to be respected by the municipality. Ms. Watson answered questions from the bands concerning municipal boundary extensions, the process of incorporation, funding for the study of incorporation available to the bands (none existed), First Nations' voting rights in a municipality, impact on trap lines, and the inability to share tax revenues. In addition, Ms. Watson explained the powers of the Province to require a mountain resort municipality to form advisory committees, including First Nations representation.

82 During the meeting, the bands expressed concern that the larger issues of aboriginal title had to be determined before incorporation could go ahead and Ms. Watson expressed the view that a municipality could not address federal or provincial issues such as aboriginal title. The bands said they required funding to investigate the impact of incorporation on their interests and that incorporation should not go ahead until the MDA and other Sun Peaks issues had been addressed in the consultation. Ms. Watson informed the bands that incorporation was not tied to these other issues even though they were included in a single consultation. Although Ms. Watson asked for a detailed summary of the bands' concerns and their funding requirements, she never received this information.

83 Ms. Brown followed up the September 8, 2008 meeting with a summary of the matters discussed and provided the bands with contact numbers for Mr. Vaughn, Ms. Watson and the other government representatives who attended the meeting if they wanted more information about the impact of incorporation. In October 2008, Ms. Brown sent additional information to the bands about road construction jurisdiction within a municipality. On October 14, 2008, Ms. Brown met with the chiefs of the Lakes Division bands and she was given a draft agreement to negotiate an accommodation that was essentially the same as her draft; however, the funding estimate included in the draft was \$250,000 for all three bands that had to be specifically accounted for as expended from trust. At this meeting, the Little Shuswap band indicated a desire to break away from any joint consultation with the other bands due to the slow progress to date.

84 On November 3, 2008, Ms. Brown and Ms. Watson met with the chiefs of the Lakes Division bands and provided them with a revised draft consultation agreement which was in an entirely new format. The agreement contemplated a consultation with respect to three proposed decisions: (1) the proposed MDA amendments to extend the term by ten years and to permit Sun Peaks Corporation to authorize recreational activities without government permission; and (2) the proposal to transfer the authority to administer timber resources on Crown lands within Sun Peaks to the Ministry for Community and Rural Development. Although the incorporation process was not included as a proposed decision, the purposes of the agreement included consultation on this matter. The

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consultation with respect to incorporation was scheduled to complete by March 31, 2009. The consultation about the proposed decisions was to complete by July 31, 2009. \$10,000 in funding was offered by the government to cover the costs of the consultation; however, Ms. Brown advised that additional funding could be made available. The bands felt the funding was inadequate but agreed to work with the proposed form of agreement. The bands were particularly concerned that there was no government funding available for the review of the consultation framework agreement. Funding would only be provided after they signed the agreement.

85 During the November 3, 2008 meeting, the bands expressed a concern that the timeline in the draft agreement could not be met and proposed that the Minister delay the question of incorporation until the consultation had concluded. In response, Ms. Brown's notes indicate she said:

... it is important for us to all move forward with the consultation on incorporation as quickly as possible - this part of the consultation is more an exchange of information and further exploration of potential impacts to the Bands, which we would then carry forward. Then we will move on to consultation on the MDA / RTAA decisions, followed by any accommodation (mitigation or compensation).

86 On November 20, 2008, the Little Shuswap band signed a consultation agreement that was identical to the government's draft except that incorporation was included as a "proposed decision".

87 On December 19, 2008, Ms. Brown forwarded a budget to the bands for consideration. The draft contemplated that each band would receive up to \$28,300 in funding for the consultation process. Ms. Watson and Ms. Brown met with Chiefs Leon and Wilson on January 5, 2009. During this meeting, Ms. Brown provided the chiefs with another copy of the MDA and maps of the proposed incorporation areas based on the larger Sun Peaks controlled recreation area and the smaller Sun Peaks Improvement District boundaries. The chiefs indicated a desire for co-management with the municipal council; input into environmental issues, particularly mining and fishing; and accommodation for past infringements. While Chief Leon preferred a veto right, he was also interested in an advisory role. His primary concern was receiving some benefit for the rights acquired by the municipality over their traditional territory and to share in the economic benefits generated in the area. Subsequent to this meeting, Ms. Brown provided the chiefs with a summary of the proposed changes to the MDA.

88 Ms. Brown was scheduled to be away on vacation from February 2009 until April 6, 2009. As a consequence, she attempted to have the remaining bands sign the consultation agreement before she left and to schedule another meeting. Neither of these events transpired. While she was on vacation, another staff member attempted to accomplish these objectives; however, he was not successful. The deadline for consultation on the incorporation process was changed to June 30, 2009.

89 On March 4, 2009, Ms. Watson responded to Chief Wilson's request for additional information about the services that a Sun Peaks municipality would take on after incorporation. Ms. Watson forwarded to Chief Wilson a list of all the services, which included roads, tax collection, subdivision approval, and formulation of an official community plan that was consistent with the MDA. She also offered to extend the completion date for the consultation.

90 On May 15, 2009, Mr. Furey, Assistant Deputy Minister for the Ministry of Community and Rural Development wrote to Chief Leon and Chief Wilson outlining the consultation with respect to incorporation that he believed had occurred to date, the information provided to the bands during the consultation, the offer of funding, the failed attempts to negotiate a consultation framework agreement, and the potential concerns raised by the bands. The three concerns included by this letter are: (1) potential impacts on claimed aboriginal rights and

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title; (2) impacts on traditional use and sacred sites; and (3) the provisions of the 1993 MDA. On the question of aboriginal rights and title, Mr. Furey stated:

The Province has a legal duty to consult with First Nations and, where appropriate, accommodate impacts on Aboriginal rights and title. To fulfill this obligation, MTCA and MCD have provided to the Neskonlith Indian Band extensive information on the incorporation process and worked to develop a Consultation Agreement ...

During this consultation process the Neskonlith Indian Band raised concerns about the Crown land that is proposed to be included within a possible Sun Peaks resort municipality. The current study process is considering two boundaries ... The Neskonlith Indian Band has expressed a preference for the area outside of the SPMRID boundary to remain rural. This preference will reviewed by MCD as part of the next steps in the study process.

Other concerns raised by the Neskonlith Indian Band regarding potential impacts of the MDA on Aboriginal rights and title may be better addressed in consultations with MTCA related to proposed amendments to the MDA.

91 Addressing the MDA, Mr. Furey indicated that its provisions were outside the scope of the incorporation study process because if Sun Peaks became a municipality it would be required to comply with the terms of the MDA.

92 On June 10, 2009, Ms. Brown met with Chief Wilson and her two consultants. Chief Wilson represented her band and Chief Leon. During this meeting the participants discussed the bands' view that the draft consultation agreement was too narrow in focus; that the incorporation decision should be delayed until all the consultation issues were concluded; that funding of \$50,000 would be required; and that the bands wanted a copy of the updated Technical Report. The participants also discussed the issue of road access within Sun Peaks; the Sacred Circle area; socio-economic studies; accommodations such as revenue sharing; acquisition of Crown land by the bands; and outstanding concerns about incorporation. Ms. Brown advised the bands that in her view incorporation did not change ownership of the land and that the municipality would only be taking over the role now played by the Regional District. The agenda for the next meeting included a discussion of options within incorporation; such as partnerships.

93 Chief Wilson requested a meeting with the Minister of Tourism, Kevin Krueger, to discuss the incorporation study. This meeting was held on July 2, 2009. Chief Leon did not attend. Mr. Krueger advised Chief Wilson that the government believed the consultation process with regard to the incorporation decision was complete but that the consultation concerning the MDA would be ongoing and if incorporation issues arose in that consultation the government would address them. The Minister did not suggest that either the referendum vote or the decision to grant incorporation would be delayed pending the MDA consultations. Chief Wilson objected to the Minister's characterization of the process; she said the bands had not yet set up the framework for consultation and had not yet received the requested record of the consultation process to date. The bands believed that the MDA consultation would clarify the impact of incorporation on their interests and that they would support incorporation, "once it is determined how we got to this point." Somewhat inconsistently, Ms. Brown and Ms. Watson commented that the incorporation decision had not been made and that the parties had until December 2009 to engage in further consultation.

94 While Chief Wilson questioned whether the economic impact of incorporation had been addressed, Ms.

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Watson reiterated that incorporation would not have an impact on federal or provincial jurisdiction over aboriginal claims. Nor would it result in a change of ownership in Crown lands. Ms. Brown indicated that the government to government discussions about the MDA would remain the same if Sun Peaks was incorporated and in that consultation the government was prepared to consider revenue sharing options. Chief Wilson responded that their concerns included who was going to control the municipality with an influx of people due to the expansion of the resort and the issue of non-resident voters. Their interests would be better served by having an "individual more discreetly involved in the process." Chief Wilson's concerns about the environmental impact of the resort expansion were deferred by Ms. Watson to the MDA consultation.

95 Chief Wilson expressed a need to seek legal advice as to whether the duty to consult had been satisfied and, further, that the bands needed to review the material disclosed by the government to determine if more work was required. She committed to working on the framework process and the budget. The meeting ended with Ms. Watson advising that the updated incorporation study would be ready by the end of August 2009 and the referendum vote would be held in the fall.

96 Although Ms. Brown contacted the Lakes Division bands on July 10, 2009 to organize consultation meetings in regard to the amendments to the MDA and the transfer of the timber administration, she did not attempt to set up meetings to discuss the incorporation after the July 2, 2009 meeting with Mr. Krueger. Moreover, due to the government's insistence that there would be no funding for the negotiation of a consultation agreement, the Band's view that the funds offered for the consultation process were inadequate to resource the information gathering studies necessary to properly understand the impact of the proposed decisions on their rights, the limited scope of the framework agreement proposed by the government and its deadlines for completion of the consultation, and the limited accommodations offered to date, the Band did not believe further meetings would be fruitful.

97 On November 2, 2009, Mr. Furey again wrote to the Lakes Division bands to advise them of the November 27 and 28, 2009 public meetings scheduled to discuss the updated Technical Report. He also outlined the contents of the update. In addition, Mr. Furey described the accommodation the government was prepared to make with regard to incorporation as a result of its consultation with the Lakes Division bands as follows:

In response to comments received during consultation with you, the Province proposes the creation of an advisory committee that would include First Nations representatives to provide advice to the new municipal council on land matters. In addition, the new municipality will need to consider consultation with First Nations in the development and amendments to the municipality's Official Community Plan, which will require the approval of the Minister of Community and Rural Development. ...

The [MDA] will not be affected by a change in local governance. Should the Sun Peaks community incorporate as a mountain resort municipality, the Official Community Plan will need to be consistent with the MDA.

98 In late November 2009, the bands were quoted in the local newspapers as saying the consultation process about incorporation was not yet complete. Ms. Brown attempted to discuss these comments with the chiefs but was not successful. She eventually forwarded an internet link to the updated Technical Report to the bands and questioned whether they would be attending the public meetings scheduled prior to the referendum vote. Chief Wilson and Chief Leon attended a public meeting and were given five minutes each to express their views on incorporation. In December 2009, Ms. Brown continued her attempts to arrange consultation meetings with the

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bands about the MDA amendments.

99 On December 4, 2009, the Minister of Community and Rural Development ordered a referendum vote be held with respect to the incorporation decision and it was held on January 30, 2010. A majority of voters affirmed a desire to incorporate.

100 On January 4, 2010, Chief Wilson wrote to Mr. Krueger and expressed her view that the incorporation consultation had not been adequate. It was her belief that without more complete information and an examination of all the issues surrounding the Sun Peaks development, the bands could not properly assess whether incorporation, the MDA amendments, or any other proposed government action would adversely affect their rights. The lack of any consultation record and environmental studies were highlighted as problems. She reiterated a concern that the \$10,000 funding offer was inadequate to cover the cost of studying the issues. Chief Wilson also expressed a concern that the "real decision makers" had not been involved in the consultation until now. This is a reference to Mr. Krueger's decision to hold a discussion meeting on January 6, 2010.

101 On January 7, 2010, Mr. Nordquist, a Band representative, requested that Ms. Brown provide a copy of the MDA, a consultation record and the strength of claim analysis that the government was producing. Ms. Brown responded, saying there was no consultation record or strength of claim analysis. The latter was in the process of being prepared.

102 On January 29, 2010, Mr. Krueger conducted a telephone conference with representatives of Lakes Division bands, including Chief Leon. At this meeting Chief Leon and Chief Wilson distributed a joint statement. While the joint statement says that incorporation should not proceed until their aboriginal rights issues are resolved, the minutes of the meeting indicate that the bands anticipated the consultation process would continue and to this end discussed more comprehensive consultation framework agreements. The joint statement indicated the bands were opposed to incorporation because it was aimed at further "third-party alienation of our lands." To that end, the statement called upon the government to act as follows:

We therefore request that the province not attempt to make any unilateral decisions regarding the Sun Peaks Master Plan, municipal incorporation, tenure transfers, and by-law amendments, in the absence of the Aboriginal Title issue being addressed. Any meaningful dialogue has to involve federal representatives and decision-makers who can address Aboriginal Title issues and has to respect the indigenous prior informed consent requirement. All relevant information has to be provided and sufficient funds and time has to be allotted to study the potential impact of any proposed developments or changes on our Aboriginal Rights and Title. In conclusion:

There should be no new municipalities created in Secwepemc territory without the agreement of the Secwepemc people and until there is recognition of our Aboriginal Title.

103 On February 11, 2010, Chief Leon again wrote to the various Ministers about the proposed incorporation of Sun Peaks. In this letter, Chief Leon asked to be provided with a list of the documents the government was considering in preparation of an analysis of their aboriginal rights and title to the disputed lands. He also referred to the government's promise to provide the Band with a strength of claim analysis and the failure to fulfill this promise. In addition to his concern that insufficient information had been provided in regard to the impact of incorporation on aboriginal rights, Chief Leon described the problems the Band had identified:

1. The municipality will exercise land use powers that were previously reposed in the Province. Muni-

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icipalities do not have a clear obligation in law to consult with First Nations when it proposes a by-law that affects aboriginal rights.

2. The 2009 Technical Report update indicates that the Province will be able to impose special governance provisions on the municipality that preserves Sun Peaks Resort Corporation's contractual interests and further erodes aboriginal interests. It is not suggested in the report that aboriginal rights can be preserved in the same fashion.

3. An advisory committee to the municipality does not reflect the constitutionally protected rights of the Band. It is a derogation of aboriginal rights to equate First Nations with stakeholders such as business and non-resident owners.

104 Chief Leon also reiterated his desire to have all of the issues relevant to the Sun Peaks development addressed in the same consultation process and underlined the need for research to be carried out in regard to the strength of their claims and the potential impact of the Sun Peaks development on their aboriginal rights. He ended the letter with a request for a meeting to formulate a comprehensive consultation framework and asked that no decisions be made with respect to Sun Peaks until the consultation process was complete.

105 On February 24, 2010, Chief Leon wrote to the Premier requesting that all decisions surrounding Sun Peaks be postponed until their aboriginal rights in regard to the lands were determined. He also articulated an additional governance concern as follows:

The management of Sun Peaks and Resort Association have not set up true participatory processes... A "local government" would just further enshrine this oligarchy whose sole goal is to seek the further third party alienation of Secwepemc jurisdiction. Sun Peaks as a local government would actively seek to undermine Secwepemc lands for real estate speculation. The track record of Sun Peaks so far in dealing with Aboriginal Title issues has been dismal, with the management of Sun Peaks openly adversarial to Aboriginal Peoples who assert their Aboriginal Title and rights. To make Sun Peaks into a municipality would further remove checks and balances on developments in the area. Sun Peaks already has an extensive file with the Minister of Environment for violations of environmental regulations. ... Environmental, social and cultural costs are routinely externalized. To make Sun Peaks into a municipality would be to have the fox guard the henhouse.

106 On March 5, 2010, the Assistant Deputy Minister of Tourism wrote to Chief Leon in response to his letter of February 11, 2010. Mr. Walters reiterated the government's position that the incorporation consultation was completed in July 2009 and that it had been adequate. The questions posed by the bands had been answered and the issues raised by the bands had been accommodated by the creation of a First Nations advisory committee and a requirement for the Provincial government to approve the municipality's land use plan and by-laws. He assured Chief Leon that the municipality had to respect constitutionally protected aboriginal rights and that the incorporation consultation could not address aboriginal title claims. He underlined the Band's primary concern was the development of the Sun Peaks resort and that this would be addressed in the ongoing consultation process with respect to the MDA. Lastly, he promised to provide a copy of the government's strength of claim assessment within two weeks.

107 On March 10, 2010, Ms. Brown emailed the Lakes Division bands a document entitled, "Sun Peaks Resort: A Review of the Historical and Ethnographic Sources Relating to Aboriginal Use and Occupation." She advised the bands that this document will "inform the assessment of strength of claim" for the Sun Peaks area. She also asked for comments on the document. It was her understanding that any legal opinion secured by the gov-

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ernment with regard to a strength of claim analysis would not be shared with the bands due to solicitor client privilege. This information was not included in her email to the chiefs.

108 The Order in Council establishing the Municipality and the Letters Patent were prepared on March 9, 2010 and granted by the Lieutenant Governor in Council on March 25, 2010. By letter dated March 31, 2010, Mr. Furey advised Chief Leon of this decision. Chief Leon deposed that he did not receive notice of the incorporation decision until May 20, 2010 when another ministry communicated with the Band about a proposed road access linking Sun Peaks to the McGillvray Forest Service Road.

109 On May 26, 2010, the Band's legal counsel wrote to the Minister of Community and Rural Development setting out the Band's position that the consultation with regard to incorporation could not have been adequate in advance of any assessment of the strength of the aboriginal rights claim. A request for such an assessment was reiterated in the letter. In response, the government asserted solicitor client privilege over their strength of claims assessment.

110 On June 12, 2010, the first Mayor and counsellors were elected for the Municipality. Mr. Raine was elected Mayor along with three counsellors who were on the board of directors for the Sun Peaks Improvement District. Mr. Raine wrote to Chief Leon on July 28, 2010, inviting him to nominate a representative on the First Nations Advisory Committee. It was Mr. Raine's intention to be the municipal representative on the committee. He also commented on the Municipality's authority over First Nations issues, "As you know, the authority of the council on matters concerning First Nations is extremely limited, however, there are bound to be issues such as zoning and land use where the concerns of the First Nations can be considered by the municipality." The Band did not respond to this invitation.

111 On September 20, 2010, the Municipality passed a by-law prohibiting the discharge of a firearm or a bow and arrow or a crossbow within the limits of the Municipality. The by-law was passed without consultation with the Lakes Division bands and without notice to the bands. It is apparent that the by-law interferes with the aboriginal right to hunt in the area within the Municipality's boundaries that is claimed by members of the Lakes Division bands. Mr. Raine deposed that he learned after the fact that the by-law may affect aboriginal hunting and he met with Chief Leon to discuss exemption of band members from the by-law.

112 On January 13, 2011, the Province wrote to Chief Leon giving notice that it had received an application from Sun Peaks Resort Corporation for a licence to cut timber within the boundaries of the Municipality. In this letter, the Province outlined the research material it considered to assess the aboriginal rights of the Band in the area affected by the licence, which included the affidavits filed in this action. A preliminary strength of claim assessment was also provided, as follows:

The Adams Lake Indian Band has a strong prima facie claim to aboriginal rights to hunt and gather plants for both food and medicinal purposes within the proposed licence to cut areas. Adams Lake Indian Band may also have a prima facie aboriginal rights claim to use certain areas for cultural purposes. The TUS identifies an area of spiritual importance that overlaps with some of the forest management treatment units, but it is uncertain what cultural practices this may relate to. There is a weak prima facie claim to aboriginal title in the proposed licence to cut areas, as these areas are in locations that were likely only occupied for brief periods while hunting or gathering.

The Letters Patent

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113 On March 25, 2010, the Lieutenant Governor in Council passed Order in Council 158/2010, which issued letters patent to the Municipality, amended the letters patent for the Thompson Nicola Regional District to reflect the transfer of jurisdiction to the Municipality, revoked the letters patent issued to the Sun Peaks Resort Improvement District and transferred its powers and authority to the Municipality, and provided that the Improvement District's by-laws continued in force until the Municipality amended or replaced them. The letters patent establishing the Municipality did not come into force until June 28, 2010.

114 The Municipality was incorporated under s. 11 of the *Local Government Act*, which applies exclusively to mountain resort municipalities. The boundary of the Municipality is the Sun Peaks Controlled Recreation area. The letters patent mandate the establishment of three advisory committees: business, non-resident owners, and first nations. The advisory committees cannot be dissolved before December 31, 2014 and the purpose of the committees is to advise the municipal council on matters within its authority that relate to business, non-resident owners, and first nations. The letters patent require the Municipality to prepare an official community plan before June 28, 2012, and it must be approved by the Minister. In addition, any by-law addressing land use passed before the official community plan is approved must also be approved by the Minister. Lastly, the Minister may appoint one counsellor to the Municipal council. This provision is to ensure that there is a representative of the Sun Peaks Resort Corporation on the municipal council.

Discussion

A. *The Duty to Consult and Accommodate — Existence of the Duty*

115 The Provincial government, through its various ministries, has a duty to consult with aboriginal people and, where possible, to accommodate their interests to uphold the honour of the Crown. In *Haida*, the Supreme Court of Canada held that the honour of the Crown is always at stake when the government deals with aboriginal people. In all its dealings with aboriginal people the Crown must act honourably. The honour of the Crown is not just a platitude; it has concrete application to the relationship between the Crown and aboriginal people. As described by Sopinka J. in *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.) at para. 41:

At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. ... [T]he honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. ... [A]ny ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.

116 The honour of the Crown must be interpreted generously to reflect the purposes underlying the entrenchment of aboriginal rights in s. 35 of the *Constitution Act*. That purpose is succinctly described in the following passage from *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.) [*Van der Peet*] at paras. 30-31:

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.

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More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

[Emphasis in original.]

117 While the honour of the Crown requires that aboriginal rights be determined, it is recognized that this process may take years, if not decades, to complete. While the process of honourable negotiations to resolve these questions continues, the Crown may be obliged to consult and accommodate aboriginal interests that are asserted but not yet proven: *Haida* at paras. 31-34.

118 The duty to consult with respect to unresolved aboriginal claims arises in an extremely broad range of circumstances. As McLachlin C.J.C. says in *Haida* 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.

119 In this case, the Municipality argues that Order in Council 158/2010 is a legislative act and as such it is not subject to the duty to consult. In addition, the Municipality argues that the court has no jurisdiction to grant an order quashing the Order in Council because it is a legislative act. The Attorney General agrees there is a duty to consult, but supports the Municipality's position that the court has no jurisdiction to quash the Order in Council. The Band argues the Order in Council is not legislative in character and, in any event, it is the exercise of a statutory power of decision that is being reviewed pursuant to s. 5 of the *Judicial Review Procedure Act*. Further, the Band argues that the court has jurisdiction to quash the Order in Council where it is preceded by inadequate consultation regardless of its legislative character.

120 The arguments of the parties raise three issues:

- (1) Whether the decision in this case is a legislative act;
- (2) If the decision is a legislative act, is it beyond the scope of the duty to consult?
- (3) If the duty to consult applies to a legislative act, what remedies are available in the event of a breach of this duty?

121 Addressing the first issue, in *Sinclair c. Québec (Procureur général)*, [1992] 1 S.C.R. 579 (S.C.C.) [*Sinclair*], the Supreme Court of Canada concluded that an Order in Council that issued letters patent for the amalgamated cities of Rouyn and Noranda constituted a legislative act for the purpose of s. 133 of the *Constitution Act*. Relying upon their judgment in *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 (S.C.C.), the Court held that since the purpose of s. 133 was to facilitate equal access to the legislatures, laws, and courts for both English and French speaking Canadians, this

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provision must apply to statutes in the strict sense and to all other instruments of a legislative character. In particular, the Court concluded in the reference that certain types of orders in council may have a legislative character. Additional indicia of legislative character were enumerated in *Sinclair* at 587 as follows:

1. The instrument embodies a rule of conduct;
2. The instrument has the force of law; and
3. The instrument applies to an undetermined number of persons.

122 Having regard to the purposes of s. 133 of the *Constitution Act*, the Court in *Sinclair* held that the order in council and the letters patent constituted the exercise of a statutory discretionary power that was legislative in character: at 589 and 593.

123 In my view, *Sinclair* goes no further than establishing that an order in council issuing letters patent to a municipality may be an instrument that has a legislative character. Certainly, Order in Council 158/2010 is not a statute in the strict sense. It was not an Act passed by the Legislature. Moreover, the steps leading to Order in Council 158/2010 were not legislative in character. Section 8 of the *Local Government Act* mandates that a public referendum in favour of incorporation be secured before the Minister may consider recommending incorporation to the Lieutenant Governor in Council. However, neither the Minister's discretion to make such a recommendation or the Lieutenant Governor in Council's discretion to grant incorporated status requires a legislative act or process. At its core, the Lieutenant Governor in Council is exercising a statutory power of decision and that decision was imbued with the force of law by a quasi-legislative instrument.

124 It is in this context that I turn to the second issue; that is, whether the duty to consult arises with respect to the Order in Council or to any of the steps leading to it. In my view, the duty to consult cannot be ousted on the basis that the exercise of a statutory power became law by the issuance of an order in council. This was clearly the conclusion in *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137 (Alta. C.A.) [*Tsuu T'ina*]. In that case the provincial government argued there was no duty to consult with regard to a water management plan put in place by an order in council because of the legislative character of the order in council. The Alberta Court of Appeal held that the fact that the plan was adopted by an order in council did not insulate the development of the plan from the duty to consult: *Tsuu T'ina* at para. 57. Moreover, O'Brien J.A.'s comments at paras. 52 and 55 of *Tsuu T'ina* suggest that it is only the passing of the legislation or the pronouncement of the order in council that may not be caught by the duty to consult:

In my view, the argument raised by the Crown does not go beyond consideration of whether or not the quashing of the Order in Council is a proper remedy. An inability to quash legislation, if that be the case, does not mean that consultation is not required when drafting plans for development of natural resources, nor does it preclude the availability of declaratory relief in appropriate circumstances.

...

Accordingly, even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions. ...

125 The Municipality relies on *R. v. Lefthand*, 2007 ABCA 206 (Alta. C.A.) [*Lefthand*], leave to appeal to

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SCC refused, (2008), [2007] S.C.C.A. No. 468 (S.C.C.) as an authority for the proposition that the duty does not apply to the passing of an order in council. In particular, the Municipality refers to para. 38 of *Lefthand*. Bearing in mind the statements by the Court of Appeal are obiter because there was no proven infringement of an aboriginal right, Slatter J.A. also concluded that the processes leading up to the passing of legislation could attract the duty to accommodate: *Lefthand* at para. 39.

126 The Municipality's submission on this issue is not supported by *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43 (S.C.C.) [*Rio Tinto Alcan*]. In that case the Supreme Court of Canada raised the issue of whether government conduct attracting a duty to consult included legislative action but declined to confirm or reject the views of the Alberta Court of Appeal in *Lefthand*. Nor is the Municipality's argument supported by *Cook v. British Columbia (Minister of Aboriginal Relations & Reconciliation)*, 2007 BC-SC 1722 (B.C. S.C.) [*Cook*]. In that case, Garson J. (as she then was) held that when the Minister engaged in negotiations leading to the signing of the final agreement with the Tsawwassen First Nation Band, he was not exercising a statutory power of decision but a prerogative power or a natural person power: *Cook* at para. 68. As a consequence, the Minister's actions could not be reviewed pursuant to the *Judicial Review Procedure Act*.

127 The Municipality also argues that the duty to consult will only arise when the Crown's actions involve an alienation of Crown lands or the use and extraction of resources from land. In light of the very broad parameters of the duty to consult articulated in *Haida*, the fact that many of the authorities cited by the parties involve the sale of land or the loss of resources on lands claimed by aboriginal groups does not lead to an inference that the duty to consult is limited to these types of situations. Moreover, a change in governance necessarily has an impact on the lands claimed by the Band because it is the Municipality that will now exercise jurisdiction over Sun Peaks in a manner that may or may not adversely affect the aboriginal rights and title claimed by the Band.

128 In my view, the decision of the British Columbia Court of Appeal in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 (B.C. C.A.) [*Musqueam Indian Band*], to suspend an order in council approving the sale of UBC endowment lands to permit consultation with the Musqueam band, and the reasoning in *Tsuu T'ina* described above, clearly support the Band's position that there is a duty to consult in the circumstances of this case. All of the steps leading to the decision to issue the letters patent appropriately engage the honour of the Crown *vis-à-vis* its dealings with the Band. The discretion exercised by the Lieutenant Governor in Council pursuant to s. 11 of the *Local Government Act* is a statutory power of decision reviewable pursuant to s. 5 of the *Judicial Review Procedure Act* and I find there is no justification for insulating Order in Council 158/2010 from the duty to consult simply because it has a legislative character. The Lieutenant Governor in Council, when exercising a statutory power of decision, must act within constitutional limits, including those imposed by s. 35 of the *Constitution Act*.

129 The final issue is whether the legislative character of Order in Council 158/2010 limits the nature of the remedies available to the Band. I intend to address this issue after I have decided the substantive questions raised by the Band's application for judicial review.

B. The Strength of Claim Analysis

130 In this case, the Attorney General acknowledges that the Province had an obligation to consult with the Band about the potential impact of the incorporation of Sun Peaks on its aboriginal rights and title to these lands. This acknowledgement, in my view, presumes a belief that the Band's claims with respect to Sun Peaks were

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credible. The Attorney General does not deny that the Province had knowledge of the claims asserted by the Band and, based on the historical relationship between the parties, there can be no question that the Province was aware that the Band had asserted aboriginal claims in regard to Sun Peaks. The dispute between the parties is the scope and content of the duty to consult on the facts of this case and the Crown's obligation to make a preliminary assessment of the strength of the claims asserted in order to have a properly informed view of the scope of consultation.

131 On my review of the authorities, it is well established that where the Crown has notice of a claim asserted by an aboriginal group and the duty to consult has been triggered, the Crown is obliged to make a preliminary assessment of the strength of the claim and the potential impact of the proposed decision on the asserted rights. The Crown's obligations also extend to providing the affected aboriginal group with an opportunity to comment on these preliminary assessments. This is necessarily a key step in the consultation process because the scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.": *Haida* at para. 39.

132 I disagree with the Attorney General's argument that it is sufficient if the Crown determines the level of impact on the rights asserted as a means of defining the extent and scope of the duty to consult. This characterization of the Crown's obligation to consult leaves out half of the equation. As McLachlin C.J.C. confirmed in *Haida*, "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.": at para. 36. The Attorney General's position is also inconsistent with several passages in *Haida* where McLachlin C.J.C. confirms that the stronger the rights claimed, the more stringent the duty to consult: *Haida* at paras. 37, 39 and 43. The importance of an assessment of the strength of claim, as informing the content of the duty to consult, is also affirmed in *Rio Tinto Alcan* at para. 36.

133 In *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 (B.C. S.C.) [*Wii'litswx*], Neilson J. (as she then was) concluded that the Ministry of Forests had failed to reasonably assess the scope of the duty to consult and accommodate because of its misconceived view of the strength of the claims asserted by the Gitanyow to the forest lands affected by the Ministry's decision to replace forest licences in this area. At para. 147 of the judgment, Neilson J. held that the Crown was obliged to make a preliminary assessment of the strength of the claim and the potential impact of the proposed government decision on aboriginal interests at the outset of the consultation:

The Crown's preliminary assessment of the strength of the claim and the potential adverse effect of government action on aboriginal interests must be made at the outset of the proposed consultation, if it is to inform the scope and extent of that process. In this case, there is nothing to indicate that the Crown made such an assessment before embarking on the consultation with Gitanyow with respect to the FL replacements.

134 The failure to conduct a preliminary assessment of the strength of the claim and a minimization of the potential adverse impact on aboriginal interests led to a conclusion that the Crown underestimated the extent of the duty to consult. As Neilson J. says in *Wii'litswx* at para. 245:

... First, the Crown failed to make a proper preliminary assessment of the scope and extent of its duty to consult and accommodate. There is nothing to indicate that it attempted to make that assessment at the outset of the consultation, so that it could inform the process. Further, Mr. Warner's assessment at the end of the process unreasonably minimized both the strength of Gitanyow's claim and the potential adverse impact

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of the FL replacement decision on its interests. The inevitable conclusion is that this led the Crown to underestimate its obligation to understand and address Gitanyow's concerns in the course of the consultation about the FL replacement decision.

135 Grauer J. in *Klahoose* followed *Wii'litswx* and held at para. 18 that the Crown was obliged to make a preliminary assessment of the scope of the duty to consult in the particular circumstances. Further, in light of Dillon J.'s reliance on the discussion of the content of the duty to consult in *Haida*, I am unable to accept that "or" is used in a disjunctive sense at para. 126 of *Huu-Ay-Aht-First Nation* wherein it was noted: "[t]o fail to consider at all the strength of claim *or* degree of infringement represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation." Indeed, Dillon J., in the same passage, relies on the judgment in *Musqueam* at para. 91, and says, "...a practical interim compromise failed to meet the tests enunciated by the Supreme Court of Canada when it was not informed or conditioned by the strength of claim and degree of intervention analysis." The strength of claim analysis is central to the duty of consultation owed in the particular circumstances.

136 In *Husby Forest Products Ltd. v. British Columbia (Minister of Forests)*, 2004 BCSC 142 (B.C. S.C.) [*Husby Forest*], Garson J. (as she then was) described the stages of consultation. The identification of the aboriginal rights and the strength of the claim is to be carried out by the government at the outset of the consultation process. In this regard, Garson J. says at para. 81 of *Husby Forest*:

In summary, it was incumbent on the District Manager to consult with the aboriginal people in order to identify the scope of the aboriginal right that the Haida alleged would be infringed by the cutting permit, if granted. The content of that consultation at the first stage would then be to define the scope of the right claimed. The decision maker must then consider the strength of the claim in the area in question and whether or not the impugned activity would infringe on the aboriginal right claimed and identified. If he determined that the activity did so infringe then the decision-maker must consider the four questions in *Sparrow* in order to determine if the Crown has justified the infringement. Overlying these three stages is the duty to consult and seek workable accommodations.

137 The authorities relied upon by the Attorney General wherein the Crown was not faulted for failing to make a preliminary assessment of the strength of the claims asserted by the aboriginal groups are situations in which the rights had already been well established. In *Beckman*, the Supreme Court of Canada was concerned with aboriginal rights already recognized in a treaty with the Federal government. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (S.C.C.) [*Mikisew*], the strength of the claim was known because the affected lands had been surrendered in a treaty and the right to use the lands for hunting and fishing was expressly subject to a "taking up" limitation for other non-aboriginal uses. Moreover, at para. 63 of *Mikisew*, Binnie J. acknowledged both the strength of the claim and the impact of the infringement on aboriginal rights as important contextual factors informing the level of consultation required.

138 On the evidence before me, the Province did not conduct a preliminary assessment of the strength of the claim for aboriginal rights and title advanced by the Band for the purpose of its consultation about the incorporation of the Municipality. Nor did the Province provide the Band with an opportunity to comment on its preliminary assessment of the strength of its claims regarding Sun Peaks. Further, the Province did not make inquiries of the Band in regard to the nature and scope of the aboriginal rights and title they were advancing as part of the Secwepemc Nation. Accordingly, I find the Province failed to adequately fulfill the first stage of the consultation process.

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C. The Impact of Incorporation on the Band's Aboriginal Rights and Title to Sun Peaks

139 The seriousness of the potential adverse impact of the decision to incorporate the Municipality on the aboriginal rights and title to Sun Peaks advanced by the Band is the other primary factor that defines the content of the duty to consult and accommodate: *Haida* at para. 39. The Province must be correct in its assessment of the potential adverse impact on the rights and title claimed by the Band: *Haida* at para. 63.

140 The Attorney General argues that there was no impact on the interests of the Band in regard to Sun Peaks stemming from the decision to incorporate the Municipality. Whatever wrongs were committed in the past in connection with the development of Sun Peaks cannot now support a claim of adverse impact: *Rio Tinto Alcan* at para. 49. The Attorney General argues that while there was a change in local government, there was no change in regard to the rights of the Band and the interests it claimed in Sun Peaks. The Municipality must comply with the MDA and its land use by-laws and its official community plan must be approved by the Province. The incorporation of the Municipality does not interfere with the Province's ability to consult with the Band in regard to the development of Sun Peaks. Although the Municipality has no independent legal obligation to consult, the Municipality, like the Regional District, must consider whether consultation with First Nations is required when it establishes or amends its official community plan. The Province will oversee any consultation to ensure the honour of the Crown is upheld: *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484 (F.C.) at para. 25. The Municipality supports the position of the Attorney General on this point.

141 The Band argues that on the facts of this case the Province did not come to a conclusion that the incorporation decision would have no impact on its aboriginal rights and interests in Sun Peaks. Instead, the Band says the Province maintained the Municipality would respect aboriginal rights because it was constitutionally mandated and, further, their land claims are better addressed in other processes.

142 In addition, the Band argues the incorporation of the Municipality is a structural or strategic high level decision that has both a potential for immediate and future adverse impacts on its aboriginal title and claim to Sun Peaks. The level of consultation is not determined solely by the changes brought about by the incorporation but it is also governed by the potential for future changes that may affect aboriginal rights. Because the Municipality will now have a distinct influence and authority over the nature of the development at Sun Peaks, and the process by which decisions about development will be made and implemented, the Band argues incorporation may have a serious impact on their aboriginal rights. The Band argues that the court cannot look at the incorporation decision in isolation from the historical context of the MDA, the development of Sun Peaks, and the importance of the Municipality to the resort. The Band also argues that the incorporation has an impact on its ability to consult with government about proposed decisions that affect its interests because the Municipality will now have jurisdiction over a broad range of matters, only one of which is land use. In this regard, the Band points to the fact that a municipality has no constitutional duty to consult.

143 Fundamentally, the Band argues, the court is not concerned with what has changed in terms of the local government but what impact the incorporation has or may have on the unresolved claims to aboriginal title and rights it is asserting. A change in the identity of the decision maker has just as much of an impact on the rights claimed as any substantive change in the nature of the authority exercised: *Gitxsan* at para. 82.

144 The first question is precisely what adverse impacts are relevant to this inquiry. In *Rio Tinto Alcan*, the Supreme Court of Canada confirmed that the duty to consult is not confined to decisions or conduct that have an immediate impact on land or resources that are the subject of an aboriginal claim. A potential for future harm is

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sufficient: *Rio Tinto Alcan* at paras. 44 and 46.

145 The duty to consult also extends to "strategic, higher level decisions" that may impact how and to what extent aboriginal rights may be exercised: *Rio Tinto Alcan* at para. 44. For example, the duty to consult arises in regard to the creation of a mechanism for determining future actions that may adversely impact aboriginal rights. In *Dene Tha'*, the Dene Tha' claimed the government breached its duty to consult because they were excluded from discussions that led to a plan for an environmental review process that would apply to the construction of the Mackenzie Gas Pipeline. Although the plan conferred no rights, it was characterized as a form of strategic planning that set up the means by which the environmental review process was to be managed for the entire project: *Dene Tha'* at para. 108. By depriving the Dene Tha' of an opportunity to have input into the terms of reference for the review process, the plan had a potential to adversely affect their aboriginal interests with respect to the pipeline project: *Dene Tha'* para. 114.

146 *Rio Tinto Alcan* makes it clear, however, that past wrongs do not give rise to a current duty to consult unless the current decision has a "novel" adverse impact on a present claim or existing right: *Rio Tinto Alcan* at paras. 45 and 49. Within these parameters, there must be a purposive approach to the determination of the potential adverse impacts of a government decision on aboriginal claims. As McLachlin C. J. says in *Rio Tinto Alcan* at paras. 46 and 47:

Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must be an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

[Emphasis in original.]

147 Having defined the nature of the adverse impacts within the purview of the court's inquiry, I turn to the government's assessment of the potential adverse effects of incorporation on the aboriginal rights and title claimed by the Band. As noted above, the Province never carried out a strength of claim assessment nor identified the scope of the rights and title claimed by the Band. Thus it is difficult to understand how it could conclude there was no adverse impact. In any event, the Province embarked on a consultation process with the Band that

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included a discussion of the incorporation of Sun Peaks as a municipality. There was no suggestion in the Province's correspondence with the Band at the beginning of the process that the consultation would be a mere formality because there was no potential adverse impact on their aboriginal claims to Sun Peaks. Moreover, the fact the Province required the Municipality to create a First Nations advisory committee as an accommodation of the Band's interests suggests at least some adverse impact was contemplated in the exercise of the Municipality's jurisdiction. The later correspondence from the Ministry of Community and Rural Development, indicating they believed the incorporation consultation was complete, claimed that the Band's concerns had been heard and would be accommodated in the letters patent issued to the Municipality. Thus while it may be implied from the extent of the consultation and the accommodation offered by the Province that they believed the impact of the incorporation was minimal, I am unable to conclude the government assessed the impact as non-existent.

148 I agree with the Attorney General that the change in local government from a regional district/improvement district form of governance to an incorporated municipality on its face placed the Band in no worse position that it was before incorporation. The Band's claim to aboriginal rights and title with respect to Sun Peaks was neither extinguished nor reduced by the change in local government. Incorporation did not involve the alienation of Crown lands or private property within Sun Peaks. Moreover, the Band's ability to protect its claims through involvement in local government decisions was actually improved by the creation of an advisory committee. The Band had no similar representation on the Regional District or the Improvement District.

149 This superficial analysis, however, is not a sufficient inquiry into the issue of adverse impact. A close examination of the facts, even under this "before and after" comparison approach, reveals that from a practical perspective there were significant alterations in the spheres of influence and the balance of power, as between the Band and the Sun Peaks Development Corporation, with a corresponding reduction in Provincial government influence over the acts of the local government due to the independence gained through incorporated status.

150 When the Municipality was incorporated, the Improvement District was dissolved and its authority and jurisdiction was inherited by the Municipality. The Improvement District had authority to provide fire, water, sewer, drainage, street lights, snow removal, and parks and recreation services. However, the actual services provided were fire protection and street lights. The Municipality also inherited parts of the authority and jurisdiction of the Regional District with respect to planning and zoning, economic development, building standards, electoral area administration, tax collection and the setting of tax rates, and the power to pass a wide variety of regulations governing use of firearms, parking, animal control, noise, building permits, etc. The *Community Charter* grants to a municipality considerable powers and independence to carry out its purposes, including: (1) providing for good government of its community; (2) providing services, laws and other matters for community benefit; (3) providing for stewardship of the public assets of the community; and (4) fostering the economic, social and environmental well-being of its community: 2009 Update Technical Report at p. 33. Lastly, the Municipality inherited the Province's responsibility to appoint an Approving Officer for sub-division approval, to set public road standards and provide maintenance and repair services, and to establish drainage standards, policies and works beyond roadways.

151 As a consequence of these changes in jurisdiction, the Municipality acquired significant powers and authority over local governance that is beyond the supervision or control of the Province or the Regional District. The powers exercised by the Regional District prior to the incorporation of the Municipality, were monitored directly by the Province through the legislative requirement to obtain approval for land use by-laws. In addition, Sun Peaks, as an unincorporated rural area, had only nominal input into many other decisions made by the Regional District because its sole representative on the board of directors was the Electoral District P director who

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is elected to represent a large area, of which Sun Peaks is only a small part. Any by-law that affected only Sun Peaks could not be adopted without the approval of the Regional District's board of directors. The more limited powers of the Improvement District were monitored by the directors appointed to the board of trustees by the Province and by the legislative requirement to obtain the approval of the Province for numerous decisions, as well as a requirement to use provincially set financial policies: 2009 Update Technical Report at p. 14.

152 The Municipality is not subject to the supervision of the Province except in regard to land use by-laws and the establishment of an official community plan. Thus the Municipality may potentially pass by-laws, make regulations, and establish financial policies that adversely impact the aboriginal rights and title claimed by the Band absent the supervision or control exercised by the Province and the Regional District prior to incorporation. An example of such a by-law is the Firearms By-law passed by the newly elected Municipal Council in the fall of 2010. This by-law had a direct and immediate impact on the Band's aboriginal right to hunt within Sun Peaks. The Municipality did not consult with the Band prior to the passing of this by-law. Nor were First Nations interests considered in the municipal council's discussion of the by-law during the meetings preceding the adoption of the by-law.

153 In addition, it is apparent that the incorporation of the Municipality pursuant to s. 11 of the *Local Government Act* significantly enhanced the ability of the Sun Peaks Resort Corporation to influence and control municipal policies and actions beyond the supervision of the Province. Prior to incorporation, the Province appointed one representative from the Sun Peaks Resort Corporation to the board of trustees governing the Improvement District. The Province has reserved to itself the authority to appoint a counsellor on the Municipal Council pursuant to the letters patent. The Province has appointed a representative of Sun Peaks Resort Corporation as its nominee on the council and passed Order in Council 157/2010 exempting this representative from the conflict of interest provisions in s. 108 of the *Community Charter* in respect to any remuneration he or she may receive from Sun Peaks Resort Corporation. In my view, this change has greatly enhanced the corporation's ability to control development within Sun Peaks. The corporation's representative has gone from being one of seven trustees, with very limited jurisdiction over a limited geographical area, to one of four council members and a mayor, with a considerably broader jurisdiction over the entire controlled recreation area of Sun Peaks.

154 The appointment of a representative of the Sun Peaks Resort Corporation to the municipal council also potentially increases the corporation's ability to influence decisions made by the Regional District in a manner that favours development at Sun Peaks. Because the Municipality has the right to appoint a municipal representative to the Regional District's board of directors, it may choose to nominate the Sun Peaks Resort Corporation appointee for this position.

155 Conversely, the Band's ability to protect its aboriginal rights and title to Sun Peaks is weakened by the transfer of local jurisdiction from the Regional District to the Municipality. Prior to incorporation, members of the Band who lived outside of Sun Peaks but within the Regional District could vote for the Electoral Area P representative on the board of directors. The Electoral P representative had a say in any local decision that affected Sun Peaks and was within the Regional District's jurisdiction. While after incorporation the Band members living outside of Sun Peaks retain the right to vote for the Electoral P representative, the Regional District no longer has jurisdiction with respect to local issues affecting only Sun Peaks.

156 The significance of this change in the ability of Sun Peaks Resort Corporation to influence and control the policies of the Municipality cannot be underestimated due to the dependence of the Municipality on the resort for its continued existence and success. Section 11 of the *Local Government Act* only permits incorporation

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of a mountain resort municipality where there is a ski resort within the proposed municipality or there is an agreement to establish one. The importance of Sun Peaks Resort Corporation to the proposed municipality was recognized by the Governance Committee as reflected in the following passage from the 2009 Update Technical Report:

The resort's success is due mainly due to the Corporation's vision. The company's development plan is not complete and could extend another 20 years or more. Three factors suggest that consideration should be given as to how the Corporation might secure a role as an active participant in the local government that would manage the community:

- The Corporation has a comprehensive, long term vision for the resort that should be acknowledged. What would help protect this vision?
- It has assured development rights under the Master Development Agreement with the Province no matter what form of local government is in place. What could keep these rights a core feature of community planning discussions?
- A municipal government could be charged with developing and administering community policies that include the management of land use development. What would help harmonize the local government's policies and the Corporation's vision?

In short, the rights of a locally elected municipal council need to be balanced against the resort company's right to fulfill its master plan.

Under new legislation, the Province could appoint a person to municipal council. This could be a Resort Corporation representative ... This would help ensure the company's interests are represented at the decision table during discussions about community policies...

157 Moreover, the justification for considering incorporation was grounded in the desire to realize the full potential of Sun Peaks as a major mountain resort. At p. 78, the 2009 Update Technical Report underlines this objective:

Why consider municipal status?

Resorts have unique requirements. They provide a high quality of services and a broad array of amenities ... This requires the power to arrange and coordinate diverse aspects of the community, such as land use regulations, tourism promotion, infrastructure planning and financing, and regulatory functions like bylaw enforcement. The current local governance system does not provide this flexibility to the degree that might be needed to optimally help the community reach its full potential as a major resort.

158 I also agree with the Band's submission that the increased independence of the new local government, particularly with regard to sub-division and zoning approval authority, enhances the ability of the Municipality to make decisions that favour its smaller electorate whose interests are generally aligned with the Sun Peaks resort. The advantages of independence were recognized by the 2009 Update Technical Report at p. 87:

The increased autonomy would flow from the independent powers given to municipalities under the Community Charter and the Local Government Act. The main decision-makers - the municipal council - would be accountable to local electors. There would be less reliance on remote bodies like the Province and the

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TNRD [Regional District], where the decision makers are not elected by the Sun Peaks voters.

159 As the Attorney General has identified in its submission, it is the development of Sun Peaks by the Sun Peaks Resort Corporation that is the focus of the Band's concerns with respect to the protection of the aboriginal rights and title it asserts over Sun Peaks. The Band maintains the continued expansion and development of the resort interferes with its traditional use and enjoyment of the lands and is inconsistent with its claim to aboriginal title over the lands. Thus to enhance the power of the corporation to control and direct the policies of the Municipality to suit its vision of the future for resort development clearly has a potential to create an adverse impact on the interests claimed by the Band. This change is clearly a new and "novel" impact in regard to the past failures to consult about the development at Sun Peaks.

160 In *Gitxsan*, Tysoe J. (as he then was) recognized that a change in the decision maker or the character of the decision maker may potentially lead to adverse consequences with respect to claimed aboriginal rights. In *Gitxsan*, the issue was a change in control of Skeena Cellulose Inc. who held the forest licence in dispute. The Province argued there was no adverse impact resulting from the change in ownership and thus there was no duty to consult. Tysoe J. rejected the Province's submission and held at para. 82 of *Gitxsan*:

I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly. ...

161 In this case, the change in the decision maker has already demonstrated a difference in philosophy about their relationship with the Band. The newly elected municipal council took the position in this proceeding that there was no duty to consult with respect to the incorporation decision and, in any event, the Band's claim to aboriginal rights and title to Sun Peaks was "sparse, doubtful and equivocal". This position is clearly out of line with the Province's assessment that there was a duty to consult in the circumstances and its subsequent preliminary assessment of the Band's aboriginal claim to Sun Peaks, which is described in the January 13, 2011 correspondence to the Band from the Ministry of Natural Resources and Operations.

162 I am also satisfied that there is a broader perspective to consider with respect to the potential impact on the Band's aboriginal rights in the future. The ability to protect and preserve its claim for aboriginal rights and title to Sun Peaks is the underlying purpose of the duty to consult. Where a change in local government interferes with the Band's ability to demand consultation occurs before decisions that potentially affect its rights are made, then that change triggers the duty to consult. From this broader perspective, the incorporation of the Municipality created a new mechanism for making decisions that could potentially impact the ability of the Band to engage in a meaningful consultation about their affected rights and interests.

163 Section 879 of the *Local Government Act* requires the Municipality to consider whether consultation with First Nations is required when developing its official community plan. Pursuant to the letters patent, the Municipality's official community plan and interim land use by-laws must also be approved by the Province. However, there is no requirement to consider whether it is necessary to consult directly with aboriginal groups on issues other than land use and the municipality has no independent constitutional duty to consult with the Band. In *Gardner v. Williams Lake (City)*, 2006 BCCA 307 (B.C. C.A.) [*Gardner*], the British Columbia Court

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of Appeal addressed the scope of s. 879 of the *Local Government Act* and, specifically, whether it conferred on the municipal council a constitutional duty to consult with First Nations groups. At para. 24 of *Gardner*, Saunders J.A. held that the honour of the Crown is not engaged by local governments:

Local governments, however, are the creatures of the provincial legislature, bound by their provincial enabling legislation. This case, therefore, does not engage the honour of the Crown or the heightened responsibility that comes with that principle in cases engaging Aboriginal questions. Rather it concerns the content of the requirement to consult that is found in s. 879 of the *Local Government Act*. The case simply requires consideration of the language of the section in its context.

164 Moreover, whether the Municipality complied with s. 879 of the *Local Government Act* is judged by the patently unreasonable standard: *Gardner* at para. 27. A local government is not subject to the more stringent correctness standard imposed with regard to the Crown's assessment of the scope of the constitutional duty to consult in any given case.

165 The Attorney General argues the change in local government does not interfere with the Province's obligation to consult with the Band and it will also have a duty to assess the Municipality's consultations with the Band to ensure they meet the standards set by the Province. However, in practical terms this division of responsibility creates a number of additional hurdles for the Band. First, as outlined above, the Municipality now exercises control over many aspects of local government that are not subject to a duty to consult with First Nations and that are beyond any supervisory jurisdiction exercised by the Province. Second, if the Municipality decides to consult with First Nations in regard to its official community plan, the Band will be required to expend its own resources to carry out the consultation because the Municipality has no authority to provide funding to aboriginal groups for this purpose. Third, if the Band is dissatisfied with the consultation afforded by the Municipality, it would then be required to compel the Province to commence consultations pursuant to its constitutional duty. This two tiered system of consultation creates obvious impediments to the exercise of the Band's right to consult. In addition to the increased time and delay, there is the cost of engaging in two consultation processes. As occurred in this case, a significant and often unresolved issue in the consultation process is the provision of adequate funding to permit meaningful participation by the Band in the consultation process.

166 For these reasons, I find the Province misconceived the significant potential impact a change in local government may have on the aboriginal interests claimed by the Band. Both types of potential impact described above explain the Band's concern that all of the outstanding issues regarding the Sun Peaks resort be the subject of consultation simultaneously. Incorporation of the Municipality had a direct and significant impact on the Band's ability to effectively consult with the Province about proposed municipal decisions and the enhanced influence and control of Sun Peaks Resort Corporation on Municipal policies changed the character of the decision maker to their detriment.

Adequacy of the Consultation

167 It is apparent from the authorities cited by the parties that the court is required to make an independent assessment of the consultation that actually occurred, notwithstanding a conclusion that the Province misconceived either the strength of the claim or the impact of the proposed decision. Underlying this assessment is the court's determination of the precise scope of the duty to consult. Having concluded that the proposed change in local government potentially gave rise to serious adverse consequences in respect to the Band's aboriginal interests, I must turn to the strength of their claims.

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168 The tests for aboriginal title are described in *R. v. Marshall*, 2005 SCC 43 (S.C.C.), at paras. 52-58 and for aboriginal rights the evidentiary requirements are articulated in *Van der Peet* at paras. 45-75 and in *R. v. Sappier*, 2006 SCC 54 (S.C.C.) at paras. 45-49.

169 It is appropriate to start with a presumption that the strength of the Band's claim is no less than that assessed by the Province in its proposed consultation with the Band about timber cutting rights within Sun Peaks. As outlined earlier, this assessment pertains to claims by the same aboriginal band in regard to the same lands in dispute in this case. The Province's preliminary assessment of the strength of claim is that the Band has a "strong *prima facie* claim to aboriginal rights to hunt and gather plants for both food and medicinal purposes." In addition, the Band may also have a "*prima facie* aboriginal right[s] to use certain areas for cultural purposes." The Province concluded the Band had a "weak *prima facie* claim to aboriginal title" to Sun Peaks.

170 The Ethnographic Background Report dated January 20, 2010 (the "Report"), was created by the Ministry of the Attorney General to inform the Crown of the historical use and occupation of Sun Peaks by aboriginal peoples. This Report recognizes the traditional territory of the Secwepemc Nation as including Sun Peaks and the areas immediately surrounding the resort. According to this study, each division of the Secwepemc Nation was identified with a particular territory depending on its habitual harvesting of resources; however, all of the territories belonged to the entire Secwepemc Nation. The Report notes that many of the Secwepemc winter villages were in or near Sun Peaks along the South Thompson River, Shuswap Lake, and the mouth of Adams Lake: Report at p. 3.

171 Sun Peaks was an area traditionally used for hunting and gathering. There is also historical evidence of trails in and about the mountains included within Sun Peaks. As the author of the Report says at p. 3:

Sun Peaks Resort Area includes Mount Tod... and is the highest of three peaks which make up the Sun Peaks Resort. ... Neskonlith elders from the Kamloops and Chase areas identified Mount Tod as an important gathering area. In 1888, Dawson recorded in his geological survey field notebook that he ascended Mount Tod by way of a trail which was used by Indians while berry picking and accessing the adjacent valley.

... Recent studies have shown that the Montane Parkland environment, the third level of altitude, was a significant component in the seasonal round of subsistence activities. When salmon runs were unproductive a greater dependence was placed upon the deer, roots, and berries found in the mountains. Furthermore, archaeologists Muir et al note that ethnographic accounts mention daytime use of the Alpine zone, the highest levels of altitude, accessed from Parkland base camps for purposes consisting primarily of plant gathering and hunting. ...

In total, the ethno botanist Gary Palmer documented over 135 plants species known to have been used for medicine, food or construction in the Kamloops Division territory to the south of Alkali Lake. Of particular interest,... Tod Mountain, currently the location of Sun Peaks, was specifically visited in order to gather Snake Root.

172 The Report also noted that while all parts of the Secwepemc territory were open to the constituent bands, they had established rules about trespass and control over hunting grounds. Thus if a member of some other tribe hunted in the Secwepemc territory, the owner of the hunting ground had a right to expect a share of the meat: Report at p. 19. Territory could also be sold or inherited within families: Report at p. 20.

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173 Because the Secwepemc people followed a yearly seasonal schedule of resource harvesting, they occupied different elevations and areas depending on the season. In the early spring the families moved to the highland areas to fish for lake trout. In April and May they gathered shoots, roots and edible bulbs and in the fall they harvested berries in a variety of locations and elevations: Report at p. 23. Hunting was also an important part of the seasonal round from August to October. The families travelled to base camps near the Montane parklands and the men hunted for elk, deer and caribou at the higher elevations. The tribes returned to winter villages in the late fall and subsisted on dried and preserved food: Report at p. 26.

174 The claims of the Band are also supported by the existence of reserves in close proximity to Sun Peaks. In 1877, the Adams Lake Band was awarded seven reserves, five of which are near Sun Peaks: Report at p. 39.

175 Sun Peaks was included within the reserve marked by Chief Neskonlith as the area he claimed for the Lakes Division bands. Although the claim that this land was designated reserve lands by Governor Douglas was rejected by the Federal Indian Claims Commission, it concluded that based on evidence from Neskonlith elders the "Shuswap people had a long history of using the territory demarcated by Chief Neskonlith": Commission Decision at p. 7. The Commission elaborated upon its findings at p. 47 of the Commission Decision as follows:

It is apparent from the oral history testimony that the Shuswap tribe made use of the lands demarcated by Chief Neskonlith's boundaries and also lands outside of those boundaries. In some cases, primarily near the southern boundary, there is ample evidence regarding settlements, gardens, fields, and spiritual areas, although the location of grazing lands and the size of the Bands' herds remains unclear. Also, the oral history and the documentary record do not present a clear picture of how frequently the remote northern area of the reserve claimed by Chief Neskonlith was used, but the Elders did speak of hunting and trapping northwest of Adams Lake, and no doubt their ancestors travelled throughout the whole territory.

176 The Province also considered a Traditional Use Study prepared by the Band and the Neskonlith Indian Band in 1998 in formulating its assessment of the strength of the claims involving Sun Peaks. The following passages from p. 7 of this Study are instructive of the nature of the Secwepemc connection to Sun Peaks:

The Adams Lake and Neskonlith people have lived in Shuswap country in the south central interior of British Columbia for thousands of years, and archaeologists have succeeded at connecting the contemporary Secwepemc to people living in the region at least 7,000 years ago. The Secwepemc lived by hunting, fishing, root digging, berry picking and trading. They occupied lands where three separate and distinct ecoregions merge, offering them plentiful resource alternatives and opportunities for economic diversification. The region was thoroughly interconnected with trails and travel routes and many of these routes have been incorporated in contemporary roads and highways.

In summer, the Neskonlith and Adams Lake people dispersed throughout their traditional territory to take advantage of resources found in each ecoregion. While travelling in summer, the people lived in tents, but in winter they returned to their village sites along the South Thompson River and Adams Lake and Shuswap Lake. In winter, many, but not all people, lived in a village of "kekulis" or pit houses, which are the most obvious and impressive reminders of their long tradition of occupation in the region. In the lower Adams River watershed alone there are at least 80 recorded occupation sites.

177 The affidavit evidence filed by the Band also indicates that even in modern times its members have continued to frequent Sun Peaks for traditional purposes such as hunting and gathering. It is apparent that development within Sun Peaks has necessarily curtailed their use of the lands and the availability of herbs and game.

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The reduction in use of the land for such traditional purposes may reasonably explain why the non-aboriginal residents who filed affidavit evidence on behalf of the Municipality have not witnessed aboriginal hunting or herb and berry gathering over this period. The evidence led by the Municipality in this regard must be accorded some weight; however, in my view, the Band's evidence is more consistent with the findings contained in the Ethnographic Background Report and the preliminary assessment by the Province as to the strength of the claim.

178 Based on the evidence before me, I am satisfied that, on a preliminary assessment, the Band has a strong *prima facie* claim to aboriginal rights with respect to resource use such as hunting and gathering, and spiritual practices within Sun Peaks. The Band has a good *prima facie* claim to aboriginal title based on a pattern of regular occupation throughout the various seasons for hunting and gathering, as well as spiritual practices within Sun Peaks.

179 Having determined the primary governing factors, I turn to the content of the duty to consult in the particular circumstances of this case. First, in every consultation and at all stages there must be good faith on both sides. The government must commit to a meaningful process of consultation where their intention must be to substantially address aboriginal concerns: *Haida* at para. 42. Consultation is not simply an exchange of information; it may oblige the Province to change its proposed action based on information received during the consultation process: *Haida* at para. 46. The Province must demonstrate that, in balancing the competing interests at stake in the incorporation decision, it listened to the Band's concerns with an open mind and in good faith made an effort to understand them and address them, with a view to minimizing the adverse impact of the decision while providing reasonable accommodation.

180 Second, the existence of a strong claim and highly significant potential adverse impact attracts a duty of "deep consultation", which is described in *Haida* at para. 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.

181 In my view, this passage appropriately describes the nature of the consultation process that was required on the facts of this case. This is the type of complete and meaningful consultation recognized by the Province as necessary when addressing amendments to the MDA. The incorporation of the Municipality was an integral part of the expansion and development of the resort and, in particular, the influence of the Sun Peaks Resort Corporation over the policies of the municipal council. It is apparent from the record of consultation that the Province misunderstood the concerns expressed by the Band as to the connection between the incorporation decision, the impact on its rights in regard to future development at Sun Peaks, and the ongoing discussions about amendments to the MDA.

182 While significant and valuable information about the incorporation process was shared with the Band during consultation meetings, from the outset the Province narrowly focused on the superficial maintenance of the status quo *vis-à-vis* the Band's aboriginal rights in the transfer of responsibilities as between the Regional

2011 CarswellBC 440, 2011 BCSC 266, [2011] 2 C.N.L.R. 1, [2011] B.C.W.L.D. 5366, [2011] B.C.W.L.D. 5360, [2011] B.C.W.L.D. 5359, [2011] B.C.W.L.D. 5353, [2011] B.C.W.L.D. 5357, [2011] B.C.W.L.D. 5355, [2011] B.C.W.L.D. 5354, [2011] B.C.W.L.D. 5358, 20 B.C.L.R. (5th) 356

District, the Improvement District and the Municipality. The Province emphasized that the incorporation would not interfere with the Band's aboriginal rights because Municipal land use and planning decisions would require Ministry approval. However, the Province ignored the loss of provincial and regional regulation of and supervision over many other areas of responsibility exercised by the Municipality (as described earlier) and the fact that the incorporation of the Municipality would give Sun Peaks Resort Corporation more say in a far broader range of decisions. Indeed, at no point during the consultation process did the Province inform the bands that they would use the special governance powers in s. 11 of the *Local Government Act* to appoint a representative of Sun Peaks Resort Corporation to the municipal council. Nor was the possibility that this could happen directly addressed by the Province during the consultation meetings. The Province also spent very little time during the consultation discussing the pros and cons of the two proposed municipal boundaries. This is particularly significant given the greater sphere of influence accorded to the Sun Peaks Resort Corporation when the larger controlled recreation area was chosen for the municipal boundaries.

183 The failure to recognize a need to establish a strength of claims assessment at the outset of the consultation led the Province to ignore what the Band, as well as the other Lakes Division bands, said in support of their aboriginal rights and title to Sun Peaks. The first meetings with the Province occurred on July 18 and 19, 2007. The Province met separately with each of the Lakes Division bands and during each meeting the bands described the traditional aboriginal uses of Sun Peaks, which included fishing, hunting, berry picking, gathering plants for medicinal uses, and sacred ceremonies. Chief Wilson indicated the Traditional Use Study that included Sun Peaks was obsolete and required updating. At subsequent meetings the bands also attempted to define the rights claimed in respect of Sun Peaks. While it is apparent the government representatives listened to what the bands had to say, and made notes of their comments in the minutes, they took no steps to gather data concerning the traditional aboriginal uses of the lands within the proposed municipal boundaries for the purpose of making an assessment of the strength of the Band's claims and did not seek from the Band comments on its assessment. In my view, the government representatives misunderstood the reason why the bands continued to raise the issue of their unresolved aboriginal claims to Sun Peaks during the consultations meetings. This is apparent in the later meetings when the government representatives advised the Band that this consultation was not the proper forum for resolving aboriginal rights claims.

184 It is because the Province misconceived the relationship between the proposed incorporation and the Sun Peaks development that its representatives insisted the incorporation consultation be separate from the ongoing discussions concerning the MDA. While all of the issues appear to have been discussed during the early meetings, as the government's deadline for the incorporation referendum vote approached, and when it was apparent the consultation process was moving very slowly, the Province encouraged the bands to get on with discussions about the MDA and expressed their belief that the incorporation consultation had concluded. For the same reason, the Province ignored the entreaties of the bands that to properly assess the impact of continued development at Sun Peaks, they required background reports and studies addressing the environment, traditional aboriginal uses, and loss of economic benefits. The Province believed these issues were irrelevant to the incorporation decision because it had no impact on the MDA. As a consequence of this misconception, the bands became frustrated with the consultation process; they were justifiably of the view that the government was ignoring their concerns.

185 It was also very important for the bands that a framework be established to define the scope of consultation and the resources to be provided by the government to ensure the bands could participate in the discussions in a meaningful way. The negotiation of a framework agreement was the topic of discussion in the first meeting held in July 2007, and this agreement continued to be the primary focus of almost every meeting until December

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2008. Until in or about October 2008, the bands, along with Ms. Brown and Ms. Watson, discussed the terms of a framework agreement that would cover all of the proposed decisions related to the Sun Peaks development, including incorporation. The government representatives worked on a draft agreement that was provided by the bands. This draft agreement contemplated consultations on a wide range of topics, including mitigation measures for potential impacts on the bands' interests; education and training; environmental protection; land-use management options for the lands within or near the resort; financial considerations, including land acquisition by the bands; protection and use of indigenous knowledge; social and cultural protection; and dispute resolution. It also contemplated additional research where there were gaps in the government's knowledge relevant to the discussion topics.

186 In October 2008, the government unilaterally proposed an altogether different type of framework agreement that did not identify the topics of discussion outlined above and set out separate timelines for the completion of the incorporation consultation. By the terms of this agreement, the Province agreed to provide any "available" information that might help the bands determine the impact of the proposed decisions on their aboriginal rights and to meet in person to discuss the identified impacts. Thereafter, the only promise made by the Province was to "undertake a full and fair consideration of any views presented by the Band". Conspicuously absent from the draft agreement was any commitment to fund research into the topics included within the consultation, to prepare a strength of claims analysis, and to accommodate the interests of the bands where possible. In my view, this framework agreement clearly contemplated consultation at the low end of the spectrum. The agreement defined the consultation process in terms that are very similar to the treaty language considered in *Beckman*. At paras. 74-75, the Supreme Court of Canada in *Beckman* found that an obligation to "make a full and fair consideration" of aboriginal views, without any requirement on the government to "understand the effect" of the proposed decision coupled with an attempt to then "try and minimize it" relegated the agreed standard to the low end of the consultation spectrum.

187 Only the Shuswap band agreed to the framework agreement proposed by the Province. The other bands refused to sign the framework agreement primarily because they were dissatisfied with the level of funding the government was willing to commit to the process and the lack of any funding for the negotiation of the framework agreement. However, the bands also continued to raise concerns at meetings as late as June 2009 that the framework agreement was too narrow in scope and that it failed to provide for studies into the impact of the resort on cultural heritage, archaeology, land acquisition, infrastructure and the environment. It was shortly after this date, on July 2, 2009, that the Minister of Tourism, Mr. Krueger, advised the bands that the government believed the incorporation consultation was over.

188 In my view, after July 2009 the Province was only going through the motions to complete the incorporation consultation and get the work of the Governance Committee back on track. Indeed, after this date Ms. Brown sought only to resume consultations with regard to the MDA and the transfer of the timber administration. Moreover, the bands legitimately lost interest in attending more meetings as a result of what Mr. Krueger had said and because the government continually failed to realize the real and substantial connection between the incorporation decision and the Sun Peaks development in general. Up to this point it is apparent that the Province had failed to direct their minds to the real concerns of the bands in respect of the development and the potential impact a change in local government could have on the expansion of the Sun Peaks resort and the influence of the Sun Peaks Resort Corporation on the Municipality. I find nothing in the conduct of the Band that frustrated the consultation process. The Band did not put improper barriers in the way of appropriate accommodations being reached. A careful examination of the evidence indicates the Band did not oppose incorporation altogether; instead, they opposed a decision on the incorporation before the other issues involving Sun Peaks were

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resolved.

189 As McLachlin C.J.C. says in *Haida* at para. 63, when reviewing the sufficiency of the consultation efforts by the government, the court must look at the process adopted and not simply the outcome of the consultation sessions. In this regard, I find the Province clearly failed to uphold the honour of the Crown in its dealings with the Band during the incorporation consultation. While the government continued to engage the bands in a consultation process with regard to the MDA and the transfer of the timber administration, it announced that the incorporation consultation was complete and ignored the bands' concerns that the incorporation would further entrench the power and influence of the Sun Peaks Resort Corporation over the new local government and was thus intimately connected with these other issues. In my view, this was not a reasonable consultation process.

190 Lastly, I need to address the accommodations that were made by the Province. Even if the consultation process was flawed, if the accommodations substantially addressed the interests of the Band, the court should not ultimately conclude that the consultation failed to uphold the honour of the Crown. The Crown is not under a duty to reach an agreement during the consultation process; however, where there is a strong aboriginal claim, meaningful consultation may require the Crown to modify its course of action "to avoid or minimize infringement of aboriginal interests pending their final resolution": *Wii'litswx* at para. 178. An assessment of whether the consultation was meaningful leads to a consideration of the accommodations actually made by the government. The question is whether the accommodations were within the range of reasonable available outcomes.

191 The sole accommodation by the Province in response to the concerns raised by the Band was a requirement that the Municipality establish a First Nations Advisory Committee and that it not dissolve such a committee until December 31, 2014. While the Province also purported to reserve to the Minister of Community and Rural Development a supervisory role in regard to the Municipality's official community plan, it is apparent that this was necessary to ensure the municipal council respected the terms of the MDA. It was not a restriction on the Municipality's authority that was intended to satisfy concerns raised by the bands regarding land use and property development within Sun Peaks.

192 I am not satisfied that the creation of a First Nations advisory committee reasonably met the concerns of the Band. First, the Municipality is not required to consult with the First Nations Advisory Committee and the Municipality has no independent constitutional obligation to do so as discussed above. Lacking in s. 8 of the letters patent is the mandatory language of s. 6 of the letters patent, which requires the Municipality to consult with a resort advisory committee, if the Minister does not appoint a councillor pursuant to s. 11(1) of the letters patent. The terms of reference for the First Nations Advisory Committee are also vague and appear to suggest that it is only issues that the municipal council view as relevant to "First Nations" that could be the subject of discussions. Significantly, there is no stipulation in the letters patent with regard to what the Municipality must do with the advice they receive from the First Nations Advisory Committee. In addition, the First Nations Advisory Committee can be dissolved after December 31, 2014, and the letters patent do not contemplate what would replace the committee after this date.

193 Second, the First Nations Advisory Committee does little to redress the balance of power and influence as between the bands and the Sun Peaks Resort Corporation. The appointment of a municipal councillor as a representative of the corporation ensures that the corporation will have a say in and a direct influence over decisions that go well beyond the scope of the MDA.

194 Lastly, the First Nations Advisory Committee does not address the Band's concern that the further en-

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trenchment of the corporation's interests through incorporation of the Municipality would lead to an expansion of the resort, greater interference with their traditional use of Sun Peaks, and an increased loss of resources and economic opportunities for their members. In my view, it would have been impossible for the Province to adequately address this concern due to the separation of the incorporation consultation from the ongoing discussions with the bands about the MDA. By insisting that the issues surrounding the MDA and the incorporation were distinct and unrelated, the Province rendered a range of possible accommodations designed to minimize the potential impact of incorporation on development at Sun Peaks a moot issue. As a consequence, the concerns of the Band were not addressed prior to incorporation and will not be addressed in the ongoing consultations concerning the MDA.

195 The broad powers granted to the Lieutenant Governor pursuant to s. 11 of the *Local Government Act* made available to the Province several accommodation options to preserve and protect the aboriginal rights and title claimed by the Band pending their final determination. Section 11(3.1) of the *Local Government Act* empowers the Lieutenant Governor in Council to exempt a mountain resort municipality from statutory provisions and to appoint *one or more* individuals to the municipal council. Section 11(3.2) of the *Local Government Act* grants the Lieutenant Governor in Council a discretion, on the recommendation of the Minister, to provide for "further exceptions, conditions and appointments" in the letters patent. In my view, the broad discretion accorded to the Province with respect to the structuring of a mountain resort municipality amply illustrates the limited nature of the actual accommodation adopted as a means of addressing the Band's interests in Sun Peaks. In addition, the inadequate nature of the accommodation provided by the Province may well prove to be substantially greater upon an in-depth analysis of the strength of claim by the government, which will be addressed below as part of the remedies ordered.

196 For these reasons, I find the accommodation by the Province was not within the range of reasonable outcomes.

197 The Band raises issues in regard to the refusal of the Province to share the results of its strength of claim assessment. In my view, the argument of the Band raises important issues about the consultation process and how these intersect with solicitor client privilege. However, it is not necessary for me to address whether the Province breached the honour of the Crown by its refusal to disclose this document. The strength of claim assessment prepared by the Crown, regardless of what this assessment consisted of, was not created for the purpose of the incorporation consultation. The Province created this assessment after determining that its consultation regarding the incorporation decision was complete and well after the Minister had drafted the letters patent for the proposed municipality. Thus while it is evidence of the Province's preliminary assessment of the strength of claim, whether any part of the assessment should be protected by solicitor client privilege is not an issue that needs to be determined in this proceeding.

Remedies

198 The Band seeks a declaration that the Lieutenant Governor in Council breached its duty to consult with respect to the decision to incorporate the Municipality and an order setting aside Order in Council 158/2010 and the letters patent. Alternatively, the Band seeks an order suspending Order in Council 158/2010. In the further alternative, the Band seeks to adjourn its application for an order quashing Order in Council 158/2010 and asks the court to give directions with regard to the consultation that must take place in the interim period.

199 The Attorney General argues that the alternative relief cannot be granted because it was not included in

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the petition, and that the only relief available in the circumstances is a declaration that the consultation was inadequate. In particular, the Attorney General argues the court has no jurisdiction to set aside Order in Council 158/2010 and further, that the delay in filing the petition should result in no such relief in the circumstances.

200 The Municipality argues the court has no jurisdiction to quash an order in council because it is a legislative act. The Municipality also argues the court must consider the prejudice caused to it by any remedy ordered by the court. In particular, the Municipality points to the uncertainty that would be created by a decision to quash Order in Council 158/2010. Lastly, the Municipality argues the court should decline to grant the relief sought based on the delay in the petitioner's application for judicial review until after the incorporation decision was made.

201 I have concluded the Province failed to adequately consult with the Band prior to the issuance of Order in Council 158/2010 by the Lieutenant Governor in Council and that the accommodation arising from the consultation was not within the range of reasonable outcomes. Thus it is appropriate to declare that the Province did not fulfill its constitutional duty to consult with the Band with respect to the incorporation of the Municipality prior to the issuance of Order in Council 158/2010 by the Lieutenant Governor in Council. I am also satisfied that the court has jurisdiction to order the Province to engage in a consultation process with regard to the incorporation of the Municipality to uphold the honour of the Crown and in a manner that reflects the strength of the claims and the serious impact on the Band's interests identified by the court in this judgment. Nothing short of deep consultation and accommodation where possible is appropriate in all of the circumstances. It is also appropriate to order the Province to include consultation about the incorporation of the Municipality in its ongoing consultation process with the Band concerning the MDA and the transfer of the timber administration.

202 There is ample authority for this type of relief. In *Musqueam Indian Band*, the Crown was ordered to consult with the band concerning the proposed sale of UBC endowment lands. The order in council transferring the lands was suspended for two years to permit meaningful consultation: *Musqueam Indian Band* at para. 101 per Hall J.A. In *Klahoose*, Grauer J. stayed all further operations under the disputed Forest Stewardship Plan pending deep consultation and the negotiation of an interim solution that would preserve the Klahoose aboriginal claims: *Klahoose* at para. 150. Upon a finding that the Crown breached its duty to consult with regard to the granting of rights to third parties over lands claimed by the Squamish Indian band, Koenigsberg J. ordered that consultation occur as if the decisions had not yet been made: *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 (B.C. S.C.) at para. 95.

203 This form of relief is also consistent with the underlying purpose of the duty to consult which is to maintain the honour of the Crown and to promote reconciliation between aboriginal and non-aboriginal peoples in a mutually respectful long term relationship: *Haida* at para. 45 and *Beckman* at para. 10. A positive duty imposed on the Province to fulfill its constitutional obligations accords respect to both the aboriginal rights claimed by the Band and the rule of law.

204 Lastly, while this precise form of relief was not included in the Band's petition, I have jurisdiction to craft relief orders to ensure they conform to the reasons for judgment: *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1620 (B.C. S.C.) at para. 5.

205 The Band asks the court to go further and issue an order quashing Order in Council 158/2010. There is clearly authority for the proposition that the court lacks jurisdiction to quash a legislative act. The Alberta Court of Appeal judgments in *Lefthand* and *Tsuu T'ina* limit the available relief after legislation is passed to a declara-

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tion that the Crown has failed to fulfill its duty to consult during the processes preceding the legislative act. While the Alberta Court of Appeal recognizes a duty to consult in regard to proposed decisions that will become law by an order in council, it has concluded there is no duty to consult prior to the passing of legislation, including regulations and orders in council: *Lefthand* at para. 38. Whether this line of authority will be upheld by the Supreme Court of Canada is an open question. The existence of a duty to consult with respect to legislative action was left undecided by the Supreme Court of Canada: *Rio Tinto Alcan* at para. 44.

206 The Band's position, however, is supported by the British Columbia Court of Appeal's decision in *Musqueam Indian Band*. As noted previously, the court in *Musqueam Indian Band* suspended the operation of an order in council that affirmed the transfer of UBC endowment lands pending adequate consultation and reserved jurisdiction to hear applications for additional relief at the end of the suspension period: per Hall J.A. at para. 101. Madam Justice Southin, in separate concurring reasons, held that the Minister should be restrained from exercising the powers granted pursuant to the order in council pending negotiations with the Musqueam Indian Band: at para. 71.

207 Whether or not the court has jurisdiction to quash Order in Council 158/2010, I am not satisfied that it is appropriate to do so in the circumstances of this case. The court has a discretion with respect to the remedies granted pursuant to s. 8 of the *Judicial Review Procedure Act*. In this case there are opposing interests that must be balanced in crafting the appropriate remedy.

208 I agree with the Municipality that it is a third party whose rights have intervened since the enactment of Order in Council 158/2010. The municipal council has been functioning since June 28, 2010, and a decision to quash Order in Council 158/2010 would invite chaos. The status of any by-law passed by the council would be in doubt and the election of the Mayor and counsellors would be a nullity. The Municipality has expended public monies, engaged staff, and leased premises. All of these actions would be in jeopardy if the incorporation was declared a nullity. In my view, the Municipality is clearly a third party that has relied on Order in Council 158/2010 in good faith. Thus I must balance the potential prejudice to the Municipality against the prejudice to the Band if Order in Council 158/2010 is not quashed: *Klahoose First Nation v. British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 59 (B.C. S.C.) at para. 17, aff'd (1996), 18 B.C.L.R. (3d) 194 (B.C. C.A.), leave to appeal to SCC refused, [1996] S.C.C.A. No. 263 (S.C.C.).

209 Turning to the prejudice to the Band, I am not satisfied that a failure to quash Order in Council 158/2010 will result in irrevocable harm to the aboriginal rights and title claimed by the Band in respect of Sun Peaks. The Province is in the process of consulting with the Band in regard to the MDA and the transfer of the timber administration. In the context of these discussions, the Province is capable of considering accommodation options that may involve amendments to the letters patent granted to the Municipality that more adequately reflect the adverse impact of the incorporation decision on the Band and the strength of their claims. This is not a case where the government has completed its consultation regarding the development at Sun Peaks rendering any further consultation concerning the incorporation of the Municipality moot. I note in this regard that the Band was not opposed to incorporation *per se*. Instead, the Band wanted all of the outstanding issues involving development at Sun Peaks to be addressed before any decision was made in regard to incorporation to ensure the Province made the appropriate accommodations to preserve its aboriginal claims pending a final determination.

210 I am mindful that the Band cannot be faulted for waiting until the Municipality was incorporated before bringing this application for judicial review. Obtaining injunctive relief, even on an interlocutory basis, would likely not have succeeded: *Haida* at para. 14. Nevertheless, the fact that the Municipality came into existence

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and has carried on business since June 2010 cannot be ignored.

211 For these reasons, I find it is not appropriate to quash Order in Council 158/2010 or suspend its operation until the parties have concluded an adequate consultation process.

212 The Band asks the court to adjourn its application to quash Order in Council 158/2010 and give directions in regard to the nature of the consultation expected in the circumstances. The Attorney General argues against this form of relief on the ground that it goes beyond the permissible scope of declaratory orders and because the court should not dictate the nature of the accommodations that must be considered by the Crown. The Municipality supports the arguments of the Attorney General.

213 In my view, for the same reasons as the court has declined to quash the order in council, I find it is not appropriate to adjourn the Band's application to quash. The orders that I have made provide appropriate relief to the Band for the Crown's failure to adequately consult in regard to the incorporation decision. In addition, I agree with the Attorney General's submission that the court should not dictate the terms of reference for the consultation beyond what is expressly or implicitly part of the reasons for judgment. The court should also not confine the parties to any particular description of the available accommodations. As Hall J.A. says in *Musqueam Indian Band* at para. 97:

The core of accommodation is the balancing of interests and the reaching of a compromise until such time as claimed rights to property are finally resolved. ... This is a developing area of the law and it is too early to be at all categorical about the ambit of appropriate accommodative solutions that have to work not only for First Nations people but for all of the populace having a broad regard to the public interest.

214 Accordingly, while I shall retain jurisdiction to resolve issues that arise out of the application of these reasons for judgment during the course of the parties' consultation process, no further directions are necessary in the circumstances.

Costs

215 The Band asks that it be awarded costs in regard to this application. As the successful party, costs in favour of the Band appear to be appropriate. However, neither the Municipality nor the Attorney General addressed the matter of costs. Thus I will retain jurisdiction to address this issue and make an order for costs if the matter cannot be resolved informally by the parties.

Application granted in part.

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2008 CarswellBC 2587, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110, [2009] B.C.W.L.D. 2474, [2009] B.C.W.L.D. 2475, [2009] B.C.W.L.D. 2627

2008 CarswellBC 2587, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110, [2009] B.C.W.L.D. 2474, [2009] B.C.W.L.D. 2475, [2009] B.C.W.L.D. 2627

Brown v. Sunshine Coast Forest District (District Manager)

Chief Ken Brown, on his own behalf and on behalf of members of the Klahoose First Nation (Petitioner) and Brian Hawrys, in his capacity as District Manager — Sunshine Coast Forest District and Hayes Forest Services Limited (Respondents)

British Columbia Supreme Court

Grauer J.

Heard: June 16-18, 2008

Judgment: November 28, 2008

Docket: Vancouver S082076

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Counsel: T. Howard, B. Stadfeld for Petitioner

E.K. Christie, J. Oliphant for Respondent, Hawrys, British Columbia (Attorney General)

C.F. Willms, K. Grist for Respondent, Hayes Forest Services Limited

Subject: Public; Constitutional; Property; Natural Resources

Aboriginal law --- Constitutional issues — General principles

Forestry company acquired tree farm licence for area covering First Nation's traditional territory — Logging had ceased in watershed portion of area, due to First Nation's refusal to permit road through reserve at mouth of river — Company submitted forest stewardship plan relating to unit within area — Crown approved plan — First Nation applied for judicial review of approval — Application granted — Crown did not assess strength of First Nation's claim, as precursor to determining extent of duty to consult — First Nation established strong prima facie case for Aboriginal rights in and reasonable prima facie case for Aboriginal rights to areas covered by plan — Potential adverse effect of approval on First Nation's Aboriginal interests was serious, as step towards exercising timber rights — Extent of Crown's duty to consult and accommodate fell towards higher end of spectrum — Neither process of consultation nor resulting accommodation were adequate — Crown failed to provide meaningful information to First Nation — Crown did not provide revised drafts of forest stewardship plan to First Nation — Crown did not include First Nation in discussions with company on suggested accommodations — First Nation did not attempt to frustrate consultation process — First Nation's position insisting on information relating to entire licence area and on operational information for impact assessment was not unreasonable — Crown failed to fulfill duty to engage in appropriately deep consultation and accommodation — Plan ap-

2008 CarswellBC 2587, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110, [2009] B.C.W.L.D. 2474, [2009] B.C.W.L.D. 2475, [2009] B.C.W.L.D. 2627

approval was stayed and Crown ordered to consider application to amend plan by expansion to entire licence area as new application.

Aboriginal law --- Reserves and real property — Rights and title — Non-reserve land

Forestry company acquired tree farm licence for area covering First Nation's traditional territory — Logging had ceased in watershed portion of area, due to First Nation's refusal to permit road through reserve at mouth of river — Company submitted forest stewardship plan relating to unit within area — Crown approved plan — First Nation applied for judicial review of approval — Application granted — Crown did not assess strength of First Nation's claim, as precursor to determining extent of duty to consult — First Nation established strong prima facie case for Aboriginal rights in and reasonable prima facie case for Aboriginal rights to areas covered by plan — Potential adverse effect of approval on First Nation's Aboriginal interests was serious, as step towards exercising timber rights — Extent of Crown's duty to consult and accommodate fell towards higher end of spectrum — Neither process of consultation nor resulting accommodation were adequate — Crown failed to provide meaningful information to First Nation — Crown did not provide revised drafts of forest stewardship plan to First Nation — Crown did not include First Nation in discussions with company on suggested accommodations — First Nation did not attempt to frustrate consultation process — First Nation's position insisting on information relating to entire licence area and on operational information for impact assessment was not unreasonable — Crown failed to fulfill duty to engage in appropriately deep consultation and accommodation — Plan approval was stayed and Crown ordered to consider application to amend plan by expansion to entire licence area as new application.

Natural resources --- Timber — Timber licences — Miscellaneous

Forestry company acquired tree farm licence for area covering First Nation's traditional territory — Logging had ceased in watershed portion of area, due to First Nation's refusal to permit road through reserve at mouth of river — Company submitted forest stewardship plan relating to unit within area — Crown approved plan — First Nation applied for judicial review of approval — Application granted — Crown did not assess strength of First Nation's claim, as precursor to determining extent of duty to consult — First Nation established strong prima facie case for Aboriginal rights in and reasonable prima facie case for Aboriginal rights to areas covered by plan — Potential adverse effect of approval on First Nation's Aboriginal interests was serious, as step towards exercising timber rights — Extent of Crown's duty to consult and accommodate fell towards higher end of spectrum — Neither process of consultation nor resulting accommodation were adequate — Crown failed to provide meaningful information to First Nation — Crown did not provide revised drafts of forest stewardship plan to First Nation — Crown did not include First Nation in discussions with company on suggested accommodations — First Nation did not attempt to frustrate consultation process — First Nation's position insisting on information relating to entire licence area and on operational information for impact assessment was not unreasonable — Crown failed to fulfill duty to engage in appropriately deep consultation and accommodation — Plan approval was stayed and Crown ordered to consider application to amend plan by expansion to entire licence area as new application.

Cases considered by *Grauer J.*:

Delgamuukw v. British Columbia (1997), 220 N.R. 161, 153 D.L.R. (4th) 193, [1997] 3 S.C.R. 1010, 99 B.C.A.C. 161, 162 W.A.C. 161, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered

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Metlakatla Indian Band v. Canada (Minister of Transport) (2006), 2006 FC 1129, 2006 CarswellNat 2900, 2006 CF 1129, 2006 CarswellNat 4538, (sub nom. *Leighton v. Canada (Minister of Transport)*) [2007] 1 C.N.L.R. 195, 57 Admin. L.R. (4th) 120 (F.C.) — referred to

Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management) (2005), 28 R.P.R. (4th) 165, 37 B.C.L.R. (4th) 309, 209 B.C.A.C. 219, 345 W.A.C. 219, 2005 BCCA 128, 2005 CarswellBC 472, [2005] 6 W.W.R. 429, [2005] 2 C.N.L.R. 212, 251 D.L.R. (4th) 717 (B.C. C.A.) — referred to

R. v. Bernard (2005), 15 C.E.L.R. (3d) 163, (sub nom. *R. v. Marshall*) 235 N.S.R. (2d) 151, (sub nom. *R. v. Marshall*) 747 A.P.R. 151, (sub nom. *R. v. Marshall*) [2005] 2 S.C.R. 220, 255 D.L.R. (4th) 1, [2005] 3 C.N.L.R. 214, 198 C.C.C. (3d) 29, (sub nom. *R. v. Marshall*) 287 N.B.R. (2d) 206, (sub nom. *R. v. Marshall*) 750 A.P.R. 206, 2005 CarswellINS 317, 2005 CarswellINS 318, 2005 SCC 43, 336 N.R. 22 (S.C.C.) — considered

R. v. Vanderpeet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — referred to

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Xeni Gwet'in First Nations v. British Columbia (2007), (sub nom. *Tsilhqot'in Nation v. British Columbia*) [2008] 1 C.N.L.R. 112, 65 R.P.R. (4th) 1, 2007 BCSC 1700, 2007 CarswellBC 2741 (B.C. S.C.) — referred to

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Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35(1) — referred to

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

Generally — referred to

s. 8 — referred to

s. 12 — referred to

Forest and Range Practices Act, S.B.C. 2002, c. 69

Generally — referred to

s. 3 — referred to

s. 3(1) — considered

s. 5 — referred to

s. 16 — referred to

s. 16(1) — referred to

s. 16(1.01) — referred to

s. 77.1(1) [en. 2003, c. 55, s. 36] — considered

Heritage Conservation Act, R.S.B.C. 1996, c. 187

Generally — referred to

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

Generally — referred to

s. 2(1) "Indian band" — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

App. B, s. 2(2)(c) — referred to

Regulations considered:

Forest and Range Practices Act, S.B.C. 2002, c. 69

Forest Planning and Practices Regulation, B.C. Reg. 14/2004

2008 CarswellBC 2587, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110, [2009] B.C.W.L.D. 2474, [2009] B.C.W.L.D. 2475, [2009] B.C.W.L.D. 2627

Generally — referred to

ss. 5-9.2 — referred to

Government Actions Regulation, B.C. Reg. 582/2004

Generally — referred to

APPLICATION for judicial review of Crown's approval of forest stewardship plan for land claimed by First Nation.

Grauer J.:

A. Introduction

1 "A culture," said W. H. Auden, "is no better than its woods."^[FN1] This petition concerns the woods of the Toba River watershed in the traditional territory of the Klahoose First Nation.

2 The petitioner Ken Brown is the Chief Councillor of the Klahoose First Nation ("Klahoose"). He brings this petition on behalf of all members of Klahoose for judicial review of the decision of the respondent Brian Hawrys, district manager of the Sunshine Coast Forest District (the "district manager"), approving a Forest Stewardship Plan ("FSP") submitted by the respondent Hayes Forest Services Limited ("Hayes"). This impugned decision was made on February 15, 2008.

3 The FSP relates to a Forest Development Unit ("FDU") that constitutes a small portion of Tree Farm License 10 ("TFL 10"). TFL 10, including the area subject to the FSP, is within Klahoose traditional territory, to which area the Klahoose assert aboriginal title.

4 The petitioner takes the position that the district manager owed a constitutional and legal duty to consult with Klahoose in good faith, and to endeavour to seek accommodations, prior to approving the FSP for TFL 10, and further, that the district manager failed to comply with this duty. The petitioner seeks a declaration that the FSP approval decision was unlawful, and an order in the nature of *certiorari* quashing it and setting aside the FSP. Alternatively, the respondent seeks an order:

(i) directing the district manager to consult in good faith, and to endeavour to seek accommodation, in relation to the final FSP, subject to the supervision of this Court;

(ii) in the nature of an injunction restraining the district manager from issuing any further permits, authorizations or approvals to Hayes in relation to forestry operations pursuant to the final FSP, without the prior agreement of Klahoose or further order of this Court; and

(iii) in the nature of an injunction restraining Hayes from carrying out any forestry operations pursuant to the final FSP, without a prior agreement of Klahoose or further order of this Court.

5 For his part, the respondent district manager (to whom I shall henceforth refer as the "Crown") acknowledges that the Crown had a duty to consult with Klahoose and to seek to accommodate its asserted aboriginal rights in a manner that balanced societal and aboriginal interests with any Crown decision relating to the FSP submitted by Hayes. The district manager submits that the Crown discharged that duty in the circumstances of this case.

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6 The respondent Hayes, licensee of TFL 10, takes the position that the consultation conducted in relation to the approval of the FSP met the required tests as set out in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.), or if it did not, it is because Klahoose did not meet its own consultation obligations. Hayes further takes the position that as the relief sought is discretionary, it should be denied because the prejudice to Hayes arising from quashing the approval of the FSP far outweighs any prejudice to Klahoose if the FSP approval is not quashed, and moreover the conduct of Klahoose disentitles them to the discretionary relief sought.

7 The respondents, in short, take the position that they bent over backwards in attempts to consult and accommodate Klahoose, but received very little cooperation in return.

8 I will begin by reviewing the statutory and administrative framework applicable to the Tree Farm Licence and Forest Stewardship Plan at issue here. I will then review the law concerning the duty of the Crown to consult and accommodate, before turning to the facts of this case in order to apply the appropriate legal principles. For ease of reference, I attach at the end of this judgment a glossary of the acronyms and abbreviations used throughout.

B. The Legislative and Administrative Framework

9 A tree farm licence is a form of tenure agreement pursuant to s. 12 of the *Forest Act*, R.S.B.C. 1996, c. 157. It provides the holder rights to carry out forest management on a specific area of Crown land. The right is geographically specific, and amounts to an exclusive right to manage and harvest timber in the TFL area. The annual allowable cut for each TFL is determined by the Chief Forester every five to 10 years pursuant to s. 8 of the *Forest Act*.

10 TFL holders are required to fulfill certain operational planning and forest management obligations which include the requirement to prepare a forest stewardship plan (a type of operational plan) in accordance with sections 3 and 5 of the *Forest and Range Practices Act*, S.B.C. 2002, c. 69 (the "FRPA"). These FSPs are submitted for approval to the district manager pursuant to s. 16 of the FRPA. These sections provide in part as follows:

Forest stewardship plan required

3(1) Before the holder of

- (a) a major licence,
- (b) a timber sale licence that requires its holder to prepare a forest stewardship plan,
- (c) a community forest agreement,
- (c.1) a community salvage licence, or
- (d) a pulpwood agreement

harvests timber or constructs a road on land to which the agreement or licence applies, then, subject to section 4 (2), the holder must prepare, and obtain the minister's approval of, a forest stewardship plan that includes a forest development unit that entirely contains the area on which

- (e) the timber is to be harvested, and
- (f) the roads are to be constructed.

.....

Content of forest stewardship plan

5(1) A forest stewardship plan must

- (a) include a map that
 - (i) uses a scale and format satisfactory to the minister, and
 - (ii) shows the boundaries of all forest development units,
- (b) specify intended results or strategies, each in relation to
 - (i) objectives set by government, and
 - (ii) other objectives that are established under this Act or the regulations and that pertain to all or part of the area subject to the plan, and
- (c) conform to prescribed requirements.

(1.1) The results and strategies referred to in subsection (1)(b) must be consistent to the prescribed extent with objectives set by government and with the other objectives referred to in section 5(1)(b).

(2) A forest stewardship plan must be consistent with timber harvesting rights granted by the government for any of the following to which the plan applies:

- (a) the timber supply area;
- (b) the community forest agreement area;
- (c) the tree farm licence area;
- (d) the pulpwood area.

(3) A forest stewardship plan or an amendment to a forest stewardship plan must be signed by the person required to prepare the plan, if an individual or, if a corporation, by an individual or the individuals authorized to sign on behalf of the corporation.

.....

Approval of forest stewardship plan, woodlot licence plan or amendment

16(1) The minister must approve a forest stewardship plan or an amendment to a forest stewardship plan if it conforms to section 5.

(1.01) A forest stewardship plan or an amendment to a forest stewardship plan conforms to section 5 if

- (a) a person with prescribed qualifications certifies that it conforms to section 5 in relation to prescribed subject matter, and

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(b) the minister is satisfied that it conforms to section 5 in relation to subject matter not prescribed for the purpose of paragraph (a).

11 An FSP is a landscape-level planning document which outlines the strategies and results by which the licensee (here Hayes) proposes to conduct its operations within a specified area in order to achieve government objectives. The specified area is the Forest Development Unit, or FDU. The FSP must be consistent with the objectives of local land-use plans or other objectives such as those set by the Ministry of Environment for species at risk. Where land-use plans are not yet in place, there are legally binding objectives for high-priority biodiversity values such as old-growth, management of streamside areas, maximum cut block size, retention of coarse woody debris and wildlife trees. These objectives are set out in the *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004, ("FPPR") as well as additional regulations such as the *General Government Actions Regulation*, B.C. Reg. 582/2004.

12 Where an FSP incorporates the default result or strategy stated in the FPPR for the relevant values, then approval of those results or strategies is not required by the district manager. Where no default result or strategy is prescribed by the regulations, then approval is necessary.

13 Approval of an FSP is an initial step in the legislative process leading to timber harvesting in an FDU within a TFL, although it does not itself provide the licensee with authority to harvest timber. The position of the Crown is that approval of an FSP in and of itself has little on-the-ground impact on the exercise of aboriginal rights.

14 Notwithstanding that position, s. 77.1(1) of the FRPA provides as follows:

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77.1(1) If an operational plan [which includes an FSP] for an area is approved and the minister subsequently concludes, on the basis of information that was not known to the person who granted the approval, that carrying out a forest practice or range practice under the plan will continue or result in a potential unjustifiable infringement of an aboriginal right or title in respect of the area, the minister

(a) must notify the holder of the plan of the previously unavailable information, and

(b) by order given to the holder of the plan, may vary or suspend to the extent the minister considers necessary one or more of the following:

- (i) the operational plan;
- (ii) a forest practice or range practice;
- (iii) a cutting permit;
- (iv) a road permit.

15 Once a license holder has an approved FSP in place, it may submit applications for cutting permits or road permits to the Minister of Forests and Range. The authorization of these permits is regulated under the *Forest Act* in conjunction with the terms of the TFL itself. A cutting permit or road permit authorized by the district manager is required before commencing to harvest the timber in the FDU covered by the FSP. Hayes is in the process of seeking cutting permits to allow it to commence harvesting timber in the FSP by the spring of 2009.

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16 It is important to understand that the right to harvest timber comes from the TFL itself. The FSP is part of the process required for the licence holder to move from having that right to exercising that right. The final step is the cutting permit.

C. The Duty to Consult and Accommodate

17 As noted, the respondents do not contest that the Crown had a duty to consult with Klahoose and to seek to accommodate its asserted aboriginal rights in a manner that balanced societal and aboriginal interests with any Crown decision relating to the FSP submitted by Hayes. What is at issue is the scope of that duty in the particular circumstances of this case.

18 I observe that, as will be discussed in more detail below, there is no evidence in the record before me as to what assessment, if any, the Crown made concerning the scope of its duty to consult in this case, other than acknowledging that it had such a duty. Yet, as pointed out by Neilson J., as she then was, in *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 (B.C. S.C.), the Crown is obliged to make such an assessment.

19 The Crown's duty to consult with Klahoose in this case arises from two sources. The first is the Constitution. The second is an Interim Agreement on Forest and Range Opportunities ("FRO") between Klahoose and the province, negotiated through much of 2007, and signed on behalf of the Government of British Columbia on January 23, 2008. Under the FRO, the province provides interim economic accommodation to Klahoose related to provincially authorized forestry operations in Klahoose traditional territory. It also contains an interim consultation protocol.

20 I will review the constitutional duty to consult first, and then I will set out the relevant parts of the FRO. The FRO will have to be considered again in the context of the steps actually taken among the parties to consult in this particular case.

1. The Constitutional Duty to Consult

21 The applicable principles begin with s. 35 of the *Constitution Act, 1982*, which provides as follows:

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

22 The historical foundation for the duty to consult and accommodate was described by McLachlin C.J.C. in the *Haida* case, *supra* at paras. 25-27:

[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.

[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?

[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.

23 The Chief Justice next considered the scope and content of the duty to consult and accommodate, explaining 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. [para. 39]

24 McLachlin C.J.C. then made the following observations:

[42] At all stages, good faith on both sides is required. A common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised, 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. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

[43] Against this background, I turned to the kind of duties that may arise in different situations. In this respect, the concept of the spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in personal 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....

[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 a 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.

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25 In paras. 47-48, the Chief Justice went on to discuss the stage of accommodation:

[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 consequence 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 a final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 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 of veto over what can be done with land pending final proof of the claim.... Rather, what is required is a process of balancing interests, of give and take.

26 To determine the extent of the Crown's constitutional duty to consult, then, I must first carry out a preliminary assessment of the strength of the case supporting the existence of the right or title asserted by Klahoose. I must also assess the seriousness of the potentially adverse effect of the FSP on the right or title claimed by Klahoose. On the basis of these assessments, I must determine where on the spectrum of strength of case and adversity of effect this case lies, and come to a conclusion concerning to what depth of consultation Klahoose was entitled in relation to the decision to approve the FSP. In this regard I note that while the scope of the duty to consult will vary with the circumstances, it "always requires meaningful, good-faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.": *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (S.C.C.).

2. The Consultation Protocol

27 The *Interim Agreement on Forest Opportunities* between the Klahoose First Nation and Her Majesty the Queen and Right of the Province of British Columbia begins with the following recitals:

WHEREAS:

A. British Columbia and the First Nations Leadership Council, representing the Assembly of First Nations-BC Region, First Nations Summit, and the Union of BC Indian Chiefs ("Leadership Council") have entered into a New Relationship in which they are committed to reconciliation of Aboriginal and Crown titles and jurisdiction, and have agreed to implement a government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights.

B. This Agreement is in the spirit and vision of the "New Relationship".

C. Work is underway regarding the implementation of the New Relationship and that this Agreement may need to be amended in the future to reflect the outcomes of that work.

D. The Klahoose First Nation has a relationship to the land that is important to its culture and the maintenance of its community, governance and economy.

E. The Klahoose First Nation has Aboriginal Interests within its Traditional Territory.

The Parties wish to enter into an interim measures agreement in relation to forest resource development within the Traditional Territory.

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F. British Columbia intends to consult and to seek an Interim Accommodation with the Klahoose First Nation on forest resource development activities proposed within the Klahoose First Nation Traditional Territory that may lead to an infringement of the Klahoose First Nation's Aboriginal Interests.

G. The Klahoose First Nation intends to participate in any consultation with British Columbia or a licensee, in relation to forest resource development activities proposed within the Klahoose First Nation's Traditional Territory that may lead to an infringement of the Klahoose First Nation's Aboriginal Interests.

H. British Columbia and the Klahoose First Nation wish to resolve issues relating to forest resource development where possible through negotiation as opposed to litigation.

28 Of interest, the agreement defines "Operational Plan" as including a Forest Stewardship Plan that has a potential effect in the Klahoose First Nation's Traditional Territory, and "Operational Decision" as meaning "a decision that is made by a person with respect to the statutory approval of an Operational Plan that has potential effect in the Klahoose First Nation's Traditional Territory"

29 "Aboriginal Interests" are defined to mean "aboriginal rights and/or aboriginal title", while "Traditional Territory" is defined to mean the traditional territory as asserted by the Klahoose First Nation, which includes the entirety of the Toba River watershed, and all of TFL 10.

30 Article 4 of the agreement provides, in part, as follows:

4.0 Consultation and Accommodation Regarding Operational and Administrative Decisions and Plans

4.1 The Klahoose First Nation is entitled to full consultation with respect to all potential infringements of their Aboriginal Interests arising from any Operational or Administrative Decisions or Plans affecting the Klahoose First Nation's Aboriginal Interests, regardless of benefits provided under this agreement

4.2 During the term of this Agreement, subject to the terms and the intent of this Agreement being met and adhered to by British Columbia, the Klahoose First Nation agrees that British Columbia will have provided an Interim Accommodation with respect to the economic component of potential infringements of the Klahoose First Nation's Aboriginal Interests as an interim measure as a result of forest and range activities occurring within their Traditional Territory

[Klahoose agrees that the government has met its duty to provide interim accommodation with respect to the economic component.]

.....

4.5 Nothing in this Agreement restricts the ability of Klahoose First Nation to seek additional accommodation for impact on its Aboriginal Interests from forest resources development within its Traditional Territory.

4.6 The Parties agree to develop consultation processes to address both Operational and Administrative Decisions and Operational Plans, which may affect the Klahoose First Nation's Aboriginal Interests within their Traditional Territory. Appendix B contains an interim consultation process that will apply until the parties have developed the consultation processes noted above, or in the event that they are unable to otherwise agree on any other such process(es).

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4.7 In developing such consultation processes, the Parties further agree to address consultation on Administrative Decisions, Operational Decisions and Operational Plans through participation of the Klahoose First Nation in strategic level planning and policy development processes.

31 By its terms, the FRO took effect on January 23, 2008, for a term of five years. The Interim Consultation Protocol (the "Protocol") is set out in Appendix B to the agreement, and provides as follows:

1. Scope and Purpose

1.1 The government of British Columbia agrees to consult with the Klahoose First Nation on those Operational Decisions, Operational Plans and Administrative Decisions (Decisions) which may affect the Aboriginal Interests of the Klahoose First Nation in accordance with the process set out in this consultation protocol, except for the Economic component of those interests which the parties agree are addressed to the extent set out in section 3.0 of the Forest and Range Opportunities Agreement.

1.2 This Protocol fulfills section 4.6 of the Interim Agreement on Forest and Range Opportunities (FRO) and will apply to all Operational and Administrative Decisions made by the Ministry of Forests and Range (MFR) which may affect the Klahoose First Nation's Aboriginal Interests within their Traditional Territory.

1.3 This Protocol applies to the provincial Crown lands in the Traditional Territory as defined in the FRO, including any Administrative Decisions that would result in private lands being deleted from a Tree Farm License.

2. Definitions

2.1 The definitions set out in section 1 of the FRO apply where those defined terms are used in this Protocol, and for greater certainty, will continue to apply in this Protocol after the expiry or termination of the FRO unless the Parties to this Protocol otherwise agree;

2.2 "Response Period" means a period of up to 60 days from the initiation of the process set out in section 3.2 of this Protocol, where the initiation date is the date on which Klahoose First Nation receives information regarding the proposed Administrative Decision or Timber Supply Review process, or a copy of the Operational Plan for review. Where an emergency operation arises and/or expedited salvage has to occur, MFR will communicate the nature of the emergency to the Klahoose and, if required, a shortened initial Response Period, that is consistent with The *Forest and Range Practices Act* (FRPA) emergency public review requirements.

2.3 A reference to the "Ministry of Forests and Range" or "MFR" in this Protocol includes, as appropriate, a reference to a Minister, Deputy Minister, Regional Executive Director, Timber Sales Manager, District Manager or any of their designates.

3. Consultation Process

3.1 General

The parties acknowledge that the scope of the duty to consult and, where appropriate, accommodate, will respect and meet the standards set out in the SCC *Haida* Decision and acknowledge that the duty exists on a spectrum and is proportionate to a preliminary assessment of the strength of the Aboriginal Interest(s) and to the seriousness of the potential effect.

3.1.1 Notification of initiation of consultation with appropriate information will be sent to: Chief Councillor Ken Brown. Any replies to MFR consultation by the Klahoose First Nation will be sent to Allan Shaw unless otherwise agreed by the Parties.

3.1.2 During the term of the FRO, Klahoose First Nation agrees to fully participate in the consultation process as set out in this consultation protocol, and thereafter as the Parties may agree.

3.1.3 MFR agrees that Klahoose may request further information and/or meetings with MFR, the licensee or another Provincial agency with relevant information or expertise, as part of the consultation process under this protocol. Klahoose agrees that, in the event it does require further information or meeting, it will make best efforts to ensure that such request does not unreasonably delay the consultation process.

3.1.4 MFR agrees to initiate the consultation process at the earliest practical opportunity to provide the Klahoose First Nation with a reasonable opportunity to engage in the consultation process before a decision is made concerning the forestry activity;

3.1.5 Klahoose agrees to provide a response to a notification pursuant to clause 3.1.1 within the Response Period. In that response Klahoose will indicate whether it has sufficient information to provide Klahoose's input regard the subject matter of the consultation, or whether additional information and/or meetings with MFR, other Provincial agencies and/or the licensee are required. If so the parties will agree on a further time period in which to conduct consultation.

3.1.6 Where no response is received within the Response Period, MFR may conclude that Klahoose First Nation does not intend to respond or participate in the consultation process and a decision by MFR will proceed.

3.1.7 This Protocol and its processes are not intended to constrain MFR or Licensee's relationship with Klahoose First Nation and other opportunities may be taken to enhance the relationship.

3.1.8 The Parties acknowledge that FDP/FSP will be consistent with approved land use plans when higher-level plan objectives have been established.

3.2 Information Sharing

The parties agree that information sharing constitutes the beginning of the consultation process.

3.2.1 MFR or the Licensee will

3.2.1.1 Send a notification letter advising Klahoose First Nation of the proposed Decision required and the relevant response period.

3.2.1.2 Provide maps and other information relevant to the proposed Decision to Klahoose First Nation.

3.2.1.3 Offer to meet with Klahoose First Nation to discuss information regarding the proposed decision, Aboriginal Interests and cultural heritage resources, and how these interests may be affected by the proposed Decision and to discuss practical means for addressing the interest and concerns raised.

3.2.1.4 For operational plans, provide to Klahoose First Nation a copy of the plan submitted to the District Manager for a Decision, a description of how the Aboriginal Interests and cultural heritage resources have been considered,

and will provide an opportunity for Klahoose First Nation to provide further comments.

3.2.1.5 For Administrative Decisions, meeting at mutually agreed to times throughout the year to provide an opportunity for Klahoose First Nation to make known to representatives of the government of British Columbia their concerns and comments relative to the effects of the Administrative Decision(s) within the Traditional Territory.

3.2.1.6 The Klahoose First Nation may develop suggested information sharing practices that may be adopted by licensees when reviewing Forest Stewardship Plans with Klahoose First Nation.

3.2.2 Klahoose First Nation or their designate will

3.2.2.1 Agree to participate in the consultation process initiated by MFR or the Licensee;

3.2.2.2. Be responsible for conducting their own internal review of the information provided by MFR or the Licensee as part of the information sharing as outlined in section 3.2.1;

3.2.2.3 Provide information to MFR or Licensee regarding the scope and nature of Aboriginal Interests or cultural heritage resources and how these Interests or resources may be impacted by the proposed decision through written submission or meeting with MFR or as mutually agreed to under section 3.1.5.

3.3 Further Consultation and Accommodation As Appropriate

3.3.1 Where appropriate, further consultation meetings may occur to discuss First Nation issues identified in section 3.2.2.3 and potential measures to address those concerns, as appropriate

3.4 Decision

3.4.1 Where Klahoose First Nation requests additional relevant information, the decision maker will make reasonable efforts to provide available information from the Licensee or through MFR, recognizing that the decision maker may not have access to certain licensee information. MFR will nonetheless encourage and recommend that the Licensee provide information that is requested by Klahoose where it is practical for the Licensee to do so.

3.4.2 Decision maker will make the Decision considering all the relevant information provided by Klahoose First Nation during the consultation process

3.4.2.1 For Aboriginal Interests raised during the review of Administrative Decisions that cannot be addressed at the Administrative Decision stage the decision maker will provide the Aboriginal Interest information to the appropriate decision maker for consideration in further operational decisions.

3.4.2.2 Prior to issuing a road permit, cutting permit or proposed timber sale, the decision maker will consider any existing or new information regarding Aboriginal Interests and impacts on Aboriginal Interest that is provided by Klahoose First Nation, and will ensure that consultation process has been adequate.

3.4.2.3 MFR will communicate the results of the decision to Klahoose First Nation in writing after the decision is made.

32 It will be observed that the Consultation Protocol incorporates the standards set out in the *Haida* case, *supra*. Counsel for Klahoose submitted that the Protocol goes further by setting out what is, in effect, a minimum level of consultation required of the Crown. I agree, but would add that the Protocol sets minimum standards for both parties. It does

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not change the analysis one must go through in assessing the scope of the constitutional duty to consult, as discussed above, but it does provide a useful yardstick.

D. The Standard of Review

33 As Madam Justice Neilson observed in *Wii'litswx*, *supra* at paras. 11-13, the subject of judicial review in a case such as this is not really the district manager's decision to approve the FSP. Rather, what must be reviewed is the conduct of the Crown with respect to the fulfillment of its duty to consult Klahoose and to accommodate Klahoose's interests in the course of making that decision.

34 As mandated in the *Haida* case, *supra*, the *extent* of the duty to consult or accommodate is a question of law to be judged on the standard of correctness, although it is capable of becoming an issue of mixed law and fact to the extent that the appropriate standard becomes that of reasonableness. The *adequacy* of the consultation process is governed by a standard of reasonableness. With respect to this second aspect, I propose to follow the lead of Neilson J. (see *Wii'litswx*, *supra* at paras. 16-17) and address first the adequacy of the process of consultation, and secondly, the adequacy of any resulting accommodations.

E. Strength of Claim: The Klahoose in the Toba River Watershed

35 Where title to lands formerly occupied by a First Nation has not been surrendered, as is the case here with the Klahoose traditional territory, a claim for aboriginal title to the land may be made under the common law. Aboriginal peoples used the land in many ways at the time of sovereignty. Some uses, like hunting and fishing, have given rise to the right to continue those practices in today's world. Aboriginal title, which is based on occupancy of the land at the time of British sovereignty, is one of these various aboriginal rights: see *R. v. Bernard*, [2005] 2 S.C.R. 220 (S.C.C.) ("*Marshall-Bernard*"); *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.).

36 It is, of course, not for me in this proceeding to decide the validity of Klahoose's claim to aboriginal title and rights over its traditional territory. I must simply do my best on the evidence to assess, on a preliminary basis, the apparent strength of the case supporting the existence of Klahoose's asserted right or title.

37 In doing so, I bear in mind the test for the establishment of title set out in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), which requires claimants to prove exclusive pre-sovereignty occupation of the land by their forebears: *Marshall-Bernard*, *supra* at para. 55. As noted by the Chief Justice in *Marshall-Bernard*, *supra* at para. 58:

It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, *the season over, they left, and the land could be traversed and used by anyone*. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights. [Emphasis added.]

38 With these principles in mind, my review of the evidence discloses the following.

39 The Klahoose are a Coast Salish people who constitute an "Indian Band" under the *Indian Act*, R.S.C. 1985, c. I-

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5, with approximately 300 members. Their traditional territory covers lands and waters in the northern Gulf Islands area of the coast of British Columbia. It includes a portion of Quadra Island, Cortes Island, the Redonda Islands, and the Desolation Sound area. Its main village is on Klahoose Indian Reserve #7 ("IR #7"), at Squirrel Cove on Quadra Island.

40 This territory was outlined in a map attached to the territorial claim (Statement of Intent) submitted by Klahoose on August 29, 1994, to the treaty negotiation process administered by the B.C. Treaty Commission.

41 The backbone of the territory, its central axis, is formed by the Toba Inlet and the Toba River Valley. The Toba River watershed constitutes and indeed defines a substantial portion of Klahoose traditional territory.

42 The territory's largest Indian Reserve, Klahoose IR #1, is located at the mouth of the Toba River where it enters Toba Inlet, and extends approximately 7 km up the Toba River Valley. It is not presently occupied.

43 Kathy Francis is the Chief Treaty Negotiator and a Band Councillor for the Klahoose First Nation. She has previously served as Chief Councillor. As Chief Treaty Negotiator, she has had to learn and understand Klahoose oral history, and has personally studied the oral history as passed on by Klahoose elders for that purpose. These elders include Joe Mitchell, Sue Pielle and Rose Barnes.

44 According to Ms. Francis, the Toba River watershed has always been an area of central importance to the Klahoose. Historically, the nation's primary village site was located near the mouth of the Toba River. The village, Tl'ém'tl'ems ("many houses") forms part of the area established as Klahoose IR #1, and was last occupied in the 1950s.

45 In addition to this main village site, the Klahoose maintained smaller villages and housing sites all along the Toba River upstream (east) of IR #1 and along the north shore of Toba Inlet near the Tahumming River, west of IR #1. There have been no permanent residents in the watershed since 1979. There are a number of burial sites and pictographs in the area.

46 Ms. Francis deposes that the Klahoose have always relied on the lands, waters and resources of the Toba River watershed to support themselves culturally, economically and spiritually. They harvested and managed the resources of the watershed for domestic and trading purposes, including harvesting cedar and spruce for dwellings, canoes, weapons, household items, clothing, etc.; hunting and trapping deer, mountain goats, bears, squirrels, lynx, raccoons and other animals; fishing for salmon, groundfish, prawns, eulachons, trout and other species at various locations throughout the watershed and the shoreline of Toba Inlet; gathering shellfish and other marine resources such as kelp; maintaining defensive positions against raiding parties; and creating food caches and places to store other harvested resources. The watershed and Toba Inlet were also the main traveling routes for trading with neighbouring nations and for traveling to other places within Klahoose territory.

47 According to Klahoose oral history, there are battle sites within the Toba River watershed where the Klahoose defended their territory from incursions by other nations, including the Tsilhqot'in people who attacked from the Interior through the mountains at the headwaters of the watershed, and the Kwakiutl and Haida people who would raid by canoe up Toba Inlet.

48 Ms. Francis deposed that while the location of Klahoose villages changed over time, members continued to hunt, fish, trap and harvest forest resources from the watershed throughout the 20th century. During the time when Klahoose children were being sent to residential schools, Klahoose members would leave Squirrel Cove with their children, and go to the Toba River watershed to hide them away.

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49 Ms. Francis noted that there has never been a comprehensive survey or study to locate all the Klahoose cultural and archaeological sites in the Toba River watershed. Counsel for the petitioner advised me that there was "rock solid" evidence to come, presumably in the treaty negotiation process. It was not available to me.

50 In addition to the oral history related by Ms. Francis, there was available to me a report dated February 27, 2007, prepared by Tracy Bulman of the Aboriginal Research Division, Legal Services Branch, Ministry of the Attorney General, for the Ministry's Aboriginal Law Group, entitled *Klahoose First Nation*, and subtitled *Research in support of a preliminary assessment of strength of claim for the Klahoose First Nation* (the "research report"). This report corroborated much of what Ms. Francis related by way of oral history, although according to Ms. Francis, its author did not conduct any interviews with Klahoose elders or members, or otherwise seek any input from the Klahoose.

51 With respect to the traditional use of land and resources, the research report notes that fishing was an integral part of Klahoose culture and livelihood, with salmon by far the most important fish in this respect. Pacific herring was also important. There was evidence that shellfish were gathered by the Klahoose year-round, and that deer were the most frequently hunted land mammals. Socially, economically and ritually, the most prestigious animals hunted on the mainland were mountain goats, which required a highly specialized skill. The ranking family of the Klahoose were great goat hunters who enjoyed a special prerogative to use the mountain goat head mask during winter ceremonials. Mountain goat hunting, of course, took place in the upland areas of the mountainous Toba River watershed.

52 The research report also noted evidence that plant gathering was another important source of nourishment, and that specific gathering sites "belonged" to certain families with possession of these rights passing to the eldest son.

53 Red cedar was used extensively to make everything from canoes to house planks, barbecuing sticks, salmon spreaders, drying racks, fish traps and bowls.

54 There were different kinds of housing built by the Klahoose, depending on the season and on a family's wealth. Shed housing was built by the wealthy at their summer campgrounds, while poorer families used this sort of housing year-round. Generally, wealthier families used cedar planks in the walls and poorer families used bark slabs. Winter housing was constructed in different formats, with only the framework being permanent. Family crests were carved on the winter houses and 40 foot high totem poles were erected in front in commemoration of the dead. Underground houses were made with pits approximately 10 feet deep, where protection was thought necessary.

55 Social organization consisted of groups of extended families which came together to form winter villages. One of the defining features of Klahoose social, political and economic organization was the exclusive control over particular hunting and gathering sites within their territory. Title to hunting and gathering sites was usually retained within a given family, and was passed from headman to headman (usually from father to son). Permission to hunt and gather in traditional family-owned sites was sought by others who wished to use those areas. Access to, and use of, particular sites could be gained through marriage, but ownership was inherited. Family ownership and control of summer resorts and hunting and gathering sites was a foundation of Klahoose society.

56 The research report quotes ethnographic sources as indicating that at the time of contact, the Klahoose lived primarily in the protected waters in and around Toba Inlet. Sources identify 17 former Klahoose village sites located in the area of Toba Inlet and the Toba River Valley. These include Náath'úwem, approximately 10 miles upstream from the mouth of the Toba River, which contained plank houses built partially underground due to fear of Tsilhqot'in raiding parties, Xwéthéyin, on the mouth of the Little Toba River, where spring salmon spawned, and Nísh7uuthin on the east side of the Toba River, where cranberries were gathered. The report goes on to note the following:

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Although the ethnographic sources do not reveal evidence of specific upland sites traditionally used by the Klahoose, it is very likely that intensive aboriginal use occurred in these areas. The variety of animals, plants and foods that were hunted and gathered by the Klahoose speaks to the fact that they regularly utilized upland areas. There are very likely many traditional sites that were simply not recorded because white men did not travel to those areas to observe the Klahoose there. The material culture recorded by Barnett suffices as evidence that the Klahoose did indeed utilize upland locations. There is a high probability these areas fell within [Klahoose traditional territory].

57 Interestingly, it appears that it was not until the coming of the Europeans brought an end to raids into Klahoose territory from the Tsilhqot'in and the Kwakiutl that the Klahoose expanded their territory out of the Toba River and Inlet into the Strait of Georgia. A permanent settlement at Squirrel Cove on Cortes Island was not established until the mid to late 1800s.

58 On the basis of the evidence before me, I find that Klahoose has established on a balance of probability the following:

- a strong *prima facie* case for aboriginal rights, and an arguable case for aboriginal title, throughout the entirety of the Toba River watershed, including all of TFL 10;
- a strong *prima facie* case for aboriginal title to the shores of the upper reaches of Toba Inlet, and to the floor of the Toba River Valley;
- a reasonable *prima facie* case for aboriginal title to the upland areas immediately surrounding the Toba River Valley and the valleys of Toba River tributaries, including those portions that make up the FDU covered by the FSP.

59 In this regard I note that it is exactly those upland areas on either side of the floor of the Toba River Valley, through which flow the tributaries that feed the river, and which include the mountain goats' winter range, where the evidence suggests that the Klahoose had exclusive use and occupation of the kind discussed in the *Marshall-Bernard* case, as opposed to seasonal use that left the land open to all comers in the off-season.

F. Potential Adverse Effect: Klahoose Territory and TFL 10

60 TFL 10 covers almost the entirety of the Toba River watershed. The FDU covered by the FSP in question is, of course, within TFL 10. It covers a much smaller area from the headwaters of Toba Inlet, south of IR #1, and thence east beyond IR #1 another 12 km or so up the Toba River Valley to the junction of the Toba and Little Toba Rivers. This is the very heart of Klahoose traditional territory.

61 TFL 10 was originally issued by the provincial Crown to Timberland Development Co. in 1951. Its original boundaries included not only the entire Toba River watershed, but also areas located on the north and south sides of Toba Inlet. It was subsequently partitioned so that those parts outside of the Toba River watershed were severed from the licence area.

62 In 1982, TFL 10 was acquired by Weldwood of Canada. At that time, Weldwood held a permit, issued under the *Indian Act*, to use a road that runs through Klahoose IR #1. Logging in the Toba River watershed was accessed through a series of logging roads all of which led down to this main road passing through IR #1. All logging in the watershed area had to pass through IR #1 in order to get to water that was deep enough to permit the offloading of logs into booms in Toba Inlet. Without access through IR #1, logging in the watershed was impracticable.

63 Weldwood's road use permit expired in 1988. Klahoose advised Weldwood that they would not issue a long-term

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permit renewal for access through IR #1. Instead, Klahoose offered a permit for a one-year term subject to Weldwood assisting Klahoose in paying for an environmental impact assessment of Weldwood's forestry activities in the watershed. Weldwood refused that offer, and their permit was not renewed. As a result, there have been no commercial forestry operations in the Toba River watershed since 1988, a period of 20 years.

64 Klahoose proceeded with a study of the watershed that looked at the cumulative impact of Weldwood's logging, as well as other existing or proposed uses of the watershed, such as big game hunting and proposed bulk water exports. As a result of this study, Klahoose concluded that the forest in the watershed had been harvested at an unsustainably high rate, and needed time to regenerate. In the meantime, the roads and bridges that constituted the logging road network in the watershed began to deteriorate as they were no longer maintained by Weldwood.

65 In 1994, Weldwood transferred its interest in TFL 10 to International Forest Products Ltd. ("Interfor"). Interfor was able to carry on with logging on those parts of TFL 10 that were outside of the Toba watershed and which were severed. Like Weldwood, however, Interfor was unable to carry out forestry activities within the watershed area because of the lack of any access through IR #1.

66 Both Weldwood and Interfor offered substantial annual payments for the right to use the road through IR #1. Klahoose declined these offers in the absence of agreements that provided for co-management with Klahoose, which agreements were not forthcoming.

67 In June of 2006, the respondent Hayes purchased the watershed portion of TFL 10 from Interfor for a nominal sum. It did so with full knowledge of the problem arising from the lack of access through IR #1. Indeed Hayes had been involved in the area for some time, acting as the contractor responsible for providing forestry services to both Weldwood and Interfor in relation to TFL 10. The situation nevertheless has remained the same: the Toba River watershed has remained free of commercial forestry operations for 20 years.

68 In these circumstances, I have no hesitation in concluding that the potential adverse effect upon the aboriginal interests of the Klahoose of approving a Forest Stewardship Plan for a Forest Development Unit that is set in the heartland of Klahoose traditional territory is serious indeed. It matters not that the FSP is but one step in the process of moving from obtaining the right to harvest timber granted by the TFL, to exercising it. Any step in that process carries the potential of adversely affecting Klahoose aboriginal interests to a serious degree. This is clearly contemplated by the scheme set out in the FRO and Protocol.

G. Conclusion on the Scope of the Duty to Consult

69 It follows from my findings concerning the strength of Klahoose's claim and the seriousness of the potential adverse effect of the FSP on Klahoose's aboriginal interests that the extent of the Crown's duty to consult and accommodate falls towards the higher end of the spectrum described by the Chief Justice of Canada in *Haida*.

70 Bearing in mind the need for flexibility and individuality in determining what the expected level of consultation required of the Crown in this particular case, I will now review in some detail the history of dealings among the parties in relation to this FSP.

H. Klahoose Interaction with Hayes and the Crown

71 As contractor responsible for providing forestry services to both Weldwood and Interfor in relation to TFL 10, Hayes had been involved in meetings with representatives of the Klahoose since 2001, by which time two things were

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apparent: first, the system of roads and bridges within the Toba watershed had deteriorated and would have to be replaced before any further harvesting could take place there; and second, there was by this time a viable volume of timber available within the watershed that had not yet been accessed.

72 As a leading independent forest services provider in British Columbia, Hayes values its relationship with First Nations, whom it regards as potential customers for its forest services, and potential joint venture partners in forest resource development and harvest. In 2001, Hayes had a number of meetings with representatives of Klahoose to discuss opportunities in the Toba watershed to be leveraged from negotiation of a renewed access agreement. Klahoose made it clear that its aim was to develop a long-term vision for the future, based on a balance between social, cultural and economic needs based on the resources that lie within its territories.

73 Nothing came of these discussions, and they were not meaningfully renewed until Hayes had reached agreement in principle with Interfor to purchase TFL 10. According to Hayes, it formed the view that the best way to advance forestry operations within the Toba watershed was to include Klahoose directly in some kind of joint venture. This was raised with Klahoose on June 16, 2006, and was discussed at meetings between Hayes and Klahoose on October 5 (Duncan) and November 2, 2006 (Squirrel Cove).

74 At that time, Klahoose was engaged in negotiations with Plutonic Power Corporation regarding the construction and operation of a run-of-the-river independent power project at Montrose Creek and East Toba River, further up the Toba River Valley to the northeast of where the FDU is now situated. Part of the Hayes proposal in 2006 noted the opportunity to take advantage of the fact that Plutonic needed to build roads to access the proposed facilities, which could also be used for logging if they were built to the appropriate standards.

75 Klahoose then concentrated on its negotiations with Plutonic. These negotiations, which included Klahoose's involvement in the review, design and assessment stages of the project, were concluded in early 2007. In April of 2007, the petitioner Ken Brown was elected Chief Councillor.

76 On May 15, 2007, Chief Brown wrote to the Minister of Forests and Range protesting the lack of consultation and accommodation in relation to the transfer of TFL 10 from Interfor to Hayes. Among the points made by Chief Brown were the following:

The area of TFL #10 is located entirely within the Klahoose traditional territory to which the Klahoose claim aboriginal rights and title.

The Klahoose First Nation has not and will not permit Hayes or any other company access to the Toba Valley through our reserve for the purpose of logging TFL #10.

The TFL has been inactive for the last 20 years due to Klahoose closing access to it through our reserve. It is the intent of the Klahoose First Nation to secure the TFL in order to conduct a sustainable logging operation that will benefit our people in perpetuity.

77 Unaware of this correspondence, Hayes met with Klahoose in Campbell River on May 17, 2007, expecting a continuation of discussions regarding joint venturing opportunities with respect to forestry operations in the Toba River watershed. Chief Brown opened the meeting, however, by advising that Klahoose was not prepared to negotiate with Hayes regarding forestry operations in TFL 10. He expressed the view that Klahoose had their own internal capacity to operate TFL 10, and as it formed part of their traditional territory, it was their intention to conduct any and all future forestry operations within it. To that end, Klahoose was interested in acquiring TFL 10 from Hayes, but had no interest in discus-

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sions concerning access for Hayes, or pursuit of a business relationship with Hayes. With respect to access, Klahoose maintained the same position as they had with Interfor and Weldwood.

78 Thereafter, a stalemate developed. In essence, Klahoose maintained the position that nobody but the Klahoose First Nation would harvest timber in their traditional territory under TFL 10, that it would oppose any efforts by Hayes to harvest timber in the Toba River Valley, that it would continue to deny access through IR #1, that TFL 10 was therefore of no commercial value to Hayes, and that the purchase of TFL 10 by Klahoose was the only viable option.

79 Hayes maintained that it was open to any reasonable offer for TFL 10, but that any such offer would have to take into account both Hayes' ownership, and its contract to provide forestry services for the TFL. In the absence of a reasonable offer, Hayes intended to work diligently to develop the commercial value of TFL 10, and to pursue other access options.

80 I sense that the parties had rather different views as to the appropriate value of TFL 10.

81 I pause to observe that, while Klahoose's expressed desire to have exclusive control of the harvesting of timber in the Toba River watershed is both understandable and commendable, Klahoose has no legal right or entitlement to such control (pending the conclusion of a treaty) in the absence of acquiring the rights under TFL 10 from Hayes. On the other hand, Klahoose is entirely within its rights to deny access to the watershed through IR #1 to Hayes or anyone else.

82 In the meantime, beginning in May of 2007, Klahoose began negotiating the terms of its FRO with the Ministry of Forests and Range.

83 Then on July 3, 2007, Hayes submitted its forest stewardship plan (the "draft FSP") for TFL 10 to the ministry. By letter dated July 5, 2007, Hayes provided a copy of the draft FSP submission to Chief Brown, noting:

In our June 15 letter, we advised that we intended to proceed with exploring our options and working to build the commercial value of the TFL. We further committed to both keeping you informed on our progress, and to remaining prepared to carefully review and consider any offer in respect of the TFL from Klahoose. We remain open to your suggestion as to a reasonable time for you to prepare an offer to purchase the TFL.

In the interim period, we have decided to submit a limited area forest stewardship plan (FSP) for the TFL. We have enclosed a copy of our submission for your convenience. The public review and comment period for this FSP will be July 9, 2007 to September 6, 2007 inclusive. As you are likely aware, the FSP may be changed as a result of written comments received during the review and comment period.

We would be pleased to meet with you to discuss the FSP and invite you to contact us at your convenience.

For greater certainty, notwithstanding that we are submitting an FSP for approval, we remain committed to working with you to pursue a sale and purchase of the TFL.

84 On July 17, 2007, the Ministry through Chuck Anderson of the Sunshine Coast Forest District ("SCFD") wrote to Chief Brown concerning Hayes' FSP, and it is here that we come to the start of the "record" (the information) that was before the Crown when it came to make the impugned decision approving the FSP. The letter included the following reference:

Under Section 21 of the Forest Planning and Practices Regulation, FSP proponents must make reasonable efforts to meet with First Nations groups that may be affected by the plan to discuss the plan.

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As with Forest Development Plans, government has an obligation to consult with First Nations that may be affected by a FSP. It is our expectation that for First Nations that are signatory to an agreement that stipulates a consultation timeframe based on submission of operational plans to them [i.e. an FRO], the consultation period will commence upon receipt of the FSP from the plan proponent. For First Nations that do not have such agreements, consultation will be deemed to begin with notice of a FSP provided by the plan proponent.

We would like to meet with you to discuss the FSP and any potential affect the FSP may have on your aboriginal interests. We are willing to participate in meetings between yourselves and the licensee and/or will meet with you separately. We are also willing to meet with you to further explain the FSP process.

85 In September and October of 2007, there were meetings between Klahoose and the Ministry concerning the negotiation of the FRO. The draft FSP was not discussed. Meanwhile, exchanges between Klahoose and Hayes included entering into a confidentiality agreement regarding the receipt of information concerning TFL 10, and Klahoose's expression of dismay that Hayes would be actively working to ramp up operations in an area that Klahoose wished to protect against the threat of unsustainable logging, accompanied by a further warning that no access would be permitted through IR #1.

86 On October 9, 2007, Klahoose wrote to the Ministry to the attention of Jim Gowriluk, Regional Executive Director, Coast Regional Office, raising concerns about, among other things, the draft FSP. Klahoose expressed the position that consultation was not possible as there was "inadequate information available upon which meaningful consultation could occur", and further raised the concern that the planning and inventory information upon which the draft FSP was based was significantly out of date and not representative of current conditions within TFL 10 (there having been no logging for 20 years). The letter, which was copied to Hayes, went on to state:

This problem is compounded by the fact that the FSP is proposed to apply to only a small portion of Toba Valley. The Toba Valley watershed is, and always has been, of central importance to Klahoose. It lies at the heart of Klahoose territory, and has been protected by Klahoose from development for several decades. The proposed initiation of industrial logging in the watershed must be addressed in a manner that permits Klahoose to evaluate the implications of the operations for our title, rights and interests throughout the watershed, an approach that is directly frustrated by the compartmentalized approach to FSP planning taken by Hayes.

.....

In conclusion, after decades of conflict with MOF and the various licensees of TFL 10, Klahoose is actively trying to acquire this tenure and, in doing so, resolve conflicts and pursue economically and environmentally sustainable forestry. From our perspective this will create a real forward-looking solution that results in a win-win for all. In the interim, we are expecting that the Crown meet its lawful obligations to us before purporting to take steps to operationalize this long inactive tenure without adequate consultation.

87 On October 15, 2007, Hayes faxed a letter to Chief Brown requesting a meeting to discuss the Klahoose letter to the Ministry of October 9. In anticipation of the meeting, Hayes requested advice as to what additional information Klahoose required, the precise area to which Klahoose claimed title, and what Klahoose meant by "sustainable forest management".

88 By letter dated November 1, 2007, Chuck Anderson of the SCFD wrote to Chief Brown requesting a meeting to discuss the FSP and any potential effects it may have upon Klahoose's aboriginal interests. There was no reference to Chief Brown's letter of October 9, which Mr. Anderson presumably had not seen.

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89 The Ministry responded by letter dated November 27, 2007, from Mr. Gowriluk of the Coast Forest Region, who indicated that the Ministry intended to consult with the Klahoose First Nation on the proposed FSP for TFL 10, and that the Sunshine Coast Forest District had initiated such consultation through its July 17, 2007 letter. Mr. Gowriluk advised that the SCFD remained open to meet with Klahoose representatives to discuss the FSP and any potential effect it may have on their aboriginal interests. Mr. Gowriluk also thought it would be appropriate to meet to discuss the ways in which the Ministry and the licensee may be able to provide further information about the proposed operations under the FSP over time, and asked Chief Brown to contact Al Shaw, tenures officer, SCFD, to arrange a meeting.

90 Klahoose responded by letter of December 6, 2007, to Mr. Shaw of the SCFD, enclosing a copy of the earlier correspondence to Mr. Gowriluk. Chief Brown wrote:

As the enclosed correspondence indicates, the proposed FSP relates to an area of central importance to the Klahoose First Nation. We have serious reservations about sufficiency and accuracy of the information contained in, or relied on in preparing, the FSP. As well, we are concerned that the FSP indicates a "piecemeal" approach to resource planning in our territory. Any decision to restart industrial forestry in TFL 10 must be made on the basis of reliable and sufficient information, that enables us to assess and understand what is proposed, as well as evaluate the implications of Hayes' activities for our aboriginal title and rights. These conditions are not presently in place.

We are prepared to meet with you and other MOF representatives to discuss our concerns. We wish to be clear that this meeting will be a first step in the consultation process, and that we expect MOF to honour its obligations to meaningfully consult with and accommodate Klahoose prior to making a decision on the draft FSP.

91 In the meantime, on November 28, 2007, Hayes had submitted a revised draft of the FSP to the Ministry for approval. Neither it nor any subsequent redraft was copied to Klahoose before the final approval.

92 On December 13, 2007, Klahoose and the Ministry reached a final agreement on the FRO, including the interim consultation protocol. Chief Brown signed the FRO on behalf of Klahoose on December 14, 2007, and it became effective when signed by the Minister on January 23, 2008.

93 On December 17, 2007, a meeting took place between Klahoose and Hayes. The Ministry was not involved, and both sides were accompanied by legal counsel. The main subject was the desire of Klahoose to acquire TFL 10 from Hayes, and Klahoose proposed a 90 day "cooling off" period, during which Hayes would not carry out any activities in TFL 10, and Klahoose could obtain the appropriate information it needed to present an offer. Hayes declined this proposal, but said that it would carefully consider any reasonable offer. Klahoose was upset that Hayes was continuing to operationalize the area in view of Klahoose's concerns, and also took exception to a suggestion from Hayes that it would look into using barge access up the Toba River in lieu of road access. The meeting ended with the parties remaining at stalemate.

94 On December 18, 2007, Klahoose met with Al Shaw and Chuck Anderson of the SCFD. Klahoose takes the position that this meeting was, in essence, the start of the consultation process. Klahoose expressed a number of concerns about the draft FSP (they had not seen the latest draft). These concerns were based on three principal objections: the piecemeal approach (the FSP covered only a small part of TFL 10 consisting, as noted, of the heart of Klahoose traditional territory), the lack of up-to-date information, and the lack of on-the-ground specifics. In their mind, these deficiencies prevented them from understanding adequately how the whole TFL, across which Klahoose had obvious interests, would be affected, and how Hayes' plans would impact such matters as the salmon fishery habitat in the watershed, the wildlife habitats and old growth, and the protection of Klahoose cultural heritage resources.

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95 Mr. Shaw and Mr. Anderson noted in response that under the legislation and regulations, the draft FSP did not have to set out much of the information Klahoose sought, and was not required to cover the entire TFL. They pointed out that there would be other steps before harvesting could commence where further consultation would take place.

96 At the conclusion of the meeting, it was agreed that Klahoose would provide a written statement of its concerns, and information about Klahoose traditional use in the watershed, by early January, 2008. Immediately following the meeting, counsel for Klahoose wrote to the Ministry (Mr. Shaw) to request clarification on certain points, including the Minister's ability "to meaningfully consider and act on information provided by Klahoose in relation to various aspects of the draft FSP, [given that] the scheme requires the Minister to approve the FSP where an RPF [Registered Professional Forester] employed by Hayes has certified its contents." Information concerning the treatment of cultural resources was also requested.

97 The Ministry (Chuck Anderson) e-mailed Klahoose later on December 18, 2007, to provide some of the information that Klahoose had sought, and Mr. Shaw also wrote on December 21, 2007. In his letter, Mr. Shaw confirmed that although cultural heritage resources were one of the elements that had to be the subject of a result or strategy in the proposed FSP, and therefore required district manager review and approval, the FPPR excluded from this process those cultural heritage resources that were regulated under the *Heritage Conversation Act*. Mr. Shaw went on to say:

When making a determination of whether or not the result or strategy for cultural heritage resources is consistent with the objective for cultural heritage resources, the decision-maker will consider any cultural heritage resource information provided by the First Nations. The decision could be that the result or strategy is consistent or it could provide further direction to the plan holder or it could be decided that it is not consistent with the objective and not approved as such.

98 The written statement promised by Klahoose at the meeting of December 18, 2007, was provided in the form of an eight-page letter dated and faxed January 9, 2008, from Klahoose's legal counsel, Mr. Howard, to Mr. Shaw of the SCFD. It was not copied to Hayes.

99 In his letter, Mr. Howard took the position that the Ministry should not approve the draft FSP, based on three arguments. The first was that the Ministry lacked the authority to approve the draft FSP because Klahoose has aboriginal title and rights to the lands, waters and resources contained within TFL 10, thus British Columbia lacked jurisdiction. This was based upon comments made by Vickers J. in *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700 (B.C. S.C.). Mr. Howard then described Klahoose use and occupation in the area of the proposed FSP.

100 The second argument was that the FSP review and approval process breached the honour of the Crown by failing to meet the Crown's duty to consult, which Mr. Howard put at the high end of the *Haida* spectrum (as do I). This argument was based upon two propositions: that the legislative scheme set out in the FRPA and the FPPR contained inherent barriers that precluded meaningful consultation, and that there had been insufficient information provided to Klahoose to enable meaningful consultation. The alleged barriers in the legislative scheme consisted of a lack of power on the part of the district manager to make changes to the draft FSP where the default result or strategy set out in the FPPR had been adopted for particular values, and the statutory objective set out in sections 5 through 9.2 of the FPPR that gave priority to supply of timber over non-commercial forest values and attributes that would support the continued exercise of Klahoose title and rights. In short, Mr. Howard maintained that the scheme did not permit sufficient flexibility to make consultation meaningful.

101 With respect to the need for information, Mr. Howard stated that the province had consistently failed to answer Klahoose's requests for information regarding Hayes' proposed operations, in the absence of which it was not feasible for

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Klahoose to assess whether the management strategies and results stated in the FSP would protect or minimally impair Klahoose's title and rights. In addition, Klahoose wanted further information regarding the reliability of the inventory data for the FSP area which Klahoose understood was several decades old and therefore unreliable, and further information regarding the relationship between the draft FSP and Hayes' annual allowable cut ("AAC") for TFL 10.

102 The third argument was that the content of the draft FSP was deficient, in that it failed to meaningfully address and accommodate impacts to Klahoose, and failed to achieve the objectives set by government. Mr. Howard was particularly critical of the proposed strategies relating to Cultural Heritage Resources, Wildlife, Wildlife and Biodiversity Landscape and Stand Level, and Access Management.

103 Mr. Howard concluded as follows:

The approval of the draft FSP as it presently stands cannot be reconciled with MOF's constitutional duties and powers. Accordingly, the draft FSP should be rejected.

MOF should advise Hayes that it is not prepared to entertain a substantially similar FSP application, until the underlying problem with Hayes' approach to the management of TFL 10 are addressed. In particular:

- The problem of out-of-date forest inventory and habitat data must be addressed.
- Hayes must present a plan that applies to all of TFL 10, which is the management unit that has applied since the TFL was first created.
- Hayes must demonstrate that it can access the TFL and remove the timber it will harvest.

In the event that MOF nonetheless continues its review of this draft FSP, Klahoose expects MOF to comply with the letter and the spirit of the Forest and Range Opportunities Agreement ("FRO") agreed to between Klahoose and the Ministry of forests ("MOF"), and provide further information requested below in preparation for further meetings with Klahoose, as provided in Appendix B to the FRO:

- The inventory and habitat data relied on by Hayes and MOF in preparing and reviewing the draft FSP.
- How the AAC for TFL 10 will be harvested in light of the limited area proposed for the FSP.
- Hayes' plan for accessing the FDU area.
- An explanation of the stream classification system used by Hayes and information identifying the Stream class of each of the streams within the FDU.
- An explanation of how Hayes calculated the identified wildlife habitat and adopted the proportional target for the FDU area.

104 Mr. Shaw deposed that upon receipt of this letter, he reviewed it with the district manager, the respondent Brian Hawrys. He then proceeded with a more detailed review of the letter and spent several weeks researching the issues, including reading the research report concerning the Klahoose First Nation strength of claim (referred to in paragraph 50, *supra*). On the basis of his research, Mr. Shaw determined the locations of former Klahoose village sites in the Toba River Valley, and noted that they appeared to be within the area included in the FSP, and reported this to Mr. Hawrys.

105 I pause to point out that the research report was prepared "*in support of* a preliminary assessment of strength of

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claim for the Klahoose First Nation" [emphasis added], and consists of a survey of such "historical, ethno-historical and archaeological data as is readily available and potentially useful...". The report does not in fact purport to make any preliminary assessment of the strength of claim.

106 Further, Mr. Shaw had discussions with Chuck Anderson, as a result of which between January 14 and 16, 2008, Mr. Anderson on behalf of the Ministry contacted Hayes to request certain changes to the "cultural heritage resources" strategies of the FSP. Hayes revised the FSP again, as a result of those discussions, and submitted the further revised FSP for approval on January 18, 2008. That January 18 draft was subsequently approved by the district manager on, as we have seen, February 15, 2008. Neither the nature of the changes requested by the Ministry, nor the actual revisions, were discussed with Klahoose beforehand.

107 Clause 3.6.1 of the FSP, relating to Cultural Heritage Resources had originally read in part as follows:

The Licensee carrying out timber harvesting and road construction subject to this FSP adopts as a result or strategy the following:

1. Timber harvesting and road construction will not cause a Cultural Heritage Resource that is, in the context of a traditional use by an aboriginal people, based on input from an aboriginal people and, in consultation with the aboriginal people determined to be:

- a) important;
- b) valuable;
- c) scarce; *and*
- d) of continued and/or historical importance

to become unavailable for its continuing extent of use by an aboriginal people... [emphasis added].

108 In the final draft, the conjunction "and" in 1(c) was changed to "or". Changes were also made to the old growth management strategy and the wildlife strategy.

109 On February 1 and 5, 2008, Mr. Shaw and other representatives of the Ministry met with legal counsel for the Ministry of the Attorney General to discuss the issues raised by Mr. Howard in his January 9 letter, and the strength of claim research report. As a result of those meetings, the Ministry concluded that it would be prudent to raise with Hayes the possibility of setting aside an area within the FDU encompassing the likely village sites within the Toba River Valley floor. On February 11, 2008, Mr. Hawrys sent an e-mail to Mr. Anderson "for the file" stating that:

Over the last couple of weeks I have had a number of conversations with Donald Hayes. I have advised there is a strength of claim analysis that identifies one or possibly two village sites within the FDU. Donald was previously unaware of such sites but quickly described such sites as "no go zones" and wants to incorporate such information into future planning. As my previous e-mail indicated Hayes will meet as often as necessary with Klahoose as Hayes develop more specific plans.

110 My own review of the research report suggests that four village sites had been identified within the FDU.

111 Mr. Shaw and his colleagues met with Hayes to discuss this on February 12, 2008, as a result of which meeting,

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Hayes wrote to Mr. Hawrys on February 14, 2008 (the day before Mr. Hawrys approved the FSP), stating as follows:

We are writing to you further to our FSP application for TFL 10. Since the time we submitted the FSP, we have been advised of a possible Klahoose village site or sites within a part of or adjacent to the FDU.

In accordance with section 3.6.1 on page 10 of our FSP, we have concluded that Hayes should make accommodation with respect to potential harvesting and road construction within the sites in the immediately adjacent area (the "Sites") until such time that the Sites can be more fully explored in the context of a traditional use of the Klahoose and their importance, value, scarcity or continued and/or historical importance.

Accordingly, attached please find a map which indicates an "accommodation" area (the "Area"). The boundaries of the Area have been set to capture the majority of the valley floor within the FDU. The Toba River in itself is excluded from the Area as is any private land within the boundaries of the area. A minor portion of the North Valley floor has been excluded from the Area because of existing licenses of occupation and development activities related to the Plutonic project.

Hayes will not harvest timber or carry out road construction within the Area until this matter is more fully explored. Operations in these areas shall be limited to incidental use including use of existing roads and infrastructure or roads and infrastructure built subsequently by others (if any).

112 The "Temporary Accommodation Area" thus designated covers the narrow floor of the Toba River Valley essentially from the eastern edge of IR #1 to a little east of the river's confluence with the Little Toba River. No attempt was made to review this with Klahoose either in concept or in final form prior to the approval of the FSP.

113 In the meantime, Mr. Howard had written to Mr. Hawrys on February 12, noting that his letter of January 9 to Mr. Shaw remained unanswered. He emphasized the Klahoose sought a meaningful consultation regarding Hayes' proposed operations in the TFL as a whole, and again raised concerns about the lack of attention to the access that was available to Hayes.

114 Klahoose learned of the Temporary Accommodation Area from Mr. Shaw who wrote to Mr. Howard on February 15, 2008, to respond to Mr. Howard's letter of January 9, and to advise of the approval of the FSP.

115 Mr. Shaw noted that Mr. Howard had outlined a number of aboriginal rights that Klahoose practised adjacent to and within the proposed FSP area, and announced that in light of that information, the FSP holder had agreed to the Temporary Accommodation Area, a map of which was attached. Mr. Shaw pointed out that the FSP included an information sharing process whereby Klahoose would have an opportunity to review site-specific information regarding proposed harvesting and road building activities, in response to which it could provide detailed information with respect to potential impacts on asserted aboriginal rights.

116 Mr. Shaw disagreed with Mr. Howard's point that the legislation contained barriers to consultation, stating:

The Forest Planning and Practices Regulation (FPPR) does obligate a plan proponent to make efforts to meet with First Nations to discuss the plan. MoFR still has the duty to consult and in fact has undertaken a process to consult with Klahoose regarding this plan, and as a result of consultation and consideration of the possible strength of claims of Klahoose in the FDU area has worked with the licensee to effect a commitment to forgo harvesting in the valley bottom area as an accommodation while the nature of that claim is more fully considered over time.

117 This, of course, was news to Klahoose. After responding to a number of other matters raised by Mr. Howard,

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Mr. Shaw concluded as follows:

In conclusion, although there are elements of the plan that are defaults and therefore would be deemed to meet the approval test, this does not preclude the requirement for First Nation consultation and determining if there needs to be any mitigated action taken on a site-specific basis to avoid or minimize potential infringement of an aboriginal interest. Given the nature of required FSP content and your concern that there isn't enough detailed information, this will be best accomplished at the operational level when more detailed information will be available and prior to the issuance of cutting permits.

118 On February 15, 2008, Hayes wrote to Chief Brown to advise that the FSP had been approved, stating:

We want to take this opportunity to assure you that we will comply with the terms of the FSP which we believe addresses the concerns you have expressed to us. We'll continue to consult you in respect of the TFL and are available to meet with you to discuss our operations at any reasonable time you may request.

We take this opportunity to once again reach out to you and ask you if you might reconsider our proposal to work cooperatively in the TFL and create a business venture together. We continue to be open to considering any reasonable proposal in this respect.

119 Nowhere in the materials is there any indication of to what conclusion Mr. Shaw, Mr. Hawrys or anyone else within the Ministry came concerning the strength of the case supporting the existence of Klahoose's right or title, or the seriousness of the potentially adverse effect upon it. As noted in *Haida, supra* at para. 39, such an analysis would be necessary to establish the scope of the Crown's duty to consult. There is no evidence of the analysis having been undertaken here, although I infer that the Ministry paid at least some attention to the concept when it concluded that it would be prudent for some alterations to be made to the FSP, and for the Temporary Accommodation Area to be put in place.

120 Since then, Klahoose gave notice to the Ministry and Hayes of its intention to bring these proceedings, while Hayes gave notice of its intention to apply for a cutting permit, and of its application to the Integrated Land Management Bureau for authority to build and operate a "barge grid" (a barge docking and loading facility) on the Toba River. Klahoose takes the position that this was the type information it sought in vain from Hayes and the Ministry in order to be able to assess the implications of Hayes' operations for its aboriginal title and rights. Klahoose further takes the position that such a development would pose a risk of serious harm to the river and the fisheries upon which Klahoose relies. Hayes then advised Klahoose that it would be submitting an FSP amendment, essentially expanding the boundaries of the FSP from the original FDU to the entire area of TFL 10. As far as I am aware, all of these matters remain pending.

I. Adequacy of Consultation

121 For the reasons articulated above, I have concluded that the scope of the Crown's duty to consult with and accommodate Klahoose in this case lay at the high end of the spectrum described by the Chief Justice of Canada in the *Haida* case. Whether the representatives of the Ministry of Forests and Range who dealt with this matter came to the same conclusion is unknown to me. If they did not, they were in my respectful view incorrect.

122 Regardless, the issue now becomes whether the consultation process that in fact took place, as outlined in the previous section, was adequate in view of the scope of the duty. This involves considering, first, the adequacy of the process of consultation, and secondly, the adequacy of any resulting accommodations. I reiterate the words of McLachlin CJC in *Haida, supra* at para. 44, where the Chief Justice noted that at the high end of the spectrum, "deep consultation, aimed at finding a satisfactory interim solution, may be required". Such consultation could include such matters as form-

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al participation in the decision-making process.

123 I have come to the conclusion that neither the process of consultation, nor the resulting accommodation, was adequate in this case.

124 With respect to the process, I find it difficult even to describe it as "consultation". While some information was indeed supplied by the Ministry in response to requests from Klahoose, much meaningful information was not. Indeed, Mr. Howard's letter of January 9 received no response at all until the approval had in fact taken place. In the meantime, Klahoose was not provided with revised drafts of the FSP as they were submitted to the Ministry, was not shown any operational information despite repeated requests, was given no information concerning access plans and plans for the remainder of the tree farm licence, and was not permitted to participate in any of the discussions between the Ministry and Hayes concerning suggested accommodations.

125 Hayes has criticized what it describes as the "minimal information provided by the Klahoose in this case" to support its claim for aboriginal rights, and has argued that Klahoose cannot now assert that the consultation was based on an incorrect assessment of the strength of its claim, and was therefore inadequate, when it did not provide information that would allow such an assessment during the time that the FSP was under consideration.

126 I reject that submission. It is true that the evidence provided by Klahoose was not as extensive as that which appears to have been provided in cases such as *Haida* and *Metlakatla Indian Band v. Canada (Minister of Transport)*, 2006 FC 1129 (F.C.). No doubt the information will continue to be developed. But the information concerning the basis for Klahoose's assertion of aboriginal rights and title that was summarized in Mr. Howard's letter to the Ministry of January 9, 2008, was surely not intended to be the final word. It will be recalled that the Ministry's reaction to that letter was to carry out research, none of which was shared with Klahoose, including a review of the research report. It is as though the Ministry had not given any thought to the issue of strength of claim before this. But instead of consulting with Klahoose about the results of that research, the Ministry dealt hastily with Hayes to make revisions to the FSP of which Klahoose was unaware, and then swiftly approved it. The Ministry never did articulate an assessment of Klahoose's strength of claim. It certainly never discussed it with Klahoose.

127 In these circumstances, I find that Klahoose is entitled to rely on the evidence introduced at this hearing (which is essentially an expansion of what was summarized by Mr. Howard in his letter of January 9), together with the province's research report, in asserting that the consultation was inadequate in view of the strength of its claim.

128 In many other instances, the Ministry's response to Klahoose's requests for information consisted of advice that the licensee was not required to provide such information when submitting an FSP for approval, or that the more appropriate time for deal with such requests would be in the context of operational decisions such as applications for cutting permits, when opportunities for further consultation would arise.

129 I do not consider that to be an adequate response. The relationship of an FSP to the harvesting of timber or construction of a road (the two acts which have the potential for negative impact on the landscape) is made clear by s. 3(1) of the FRPA. Where the duty to consult is deep, it is not an answer to say that there will be further opportunities for consultation when the process that may lead to harm is further advanced, or that the information sought, while important, is not part of the process at this stage.

130 This is implicit in both s. 77.1(1) of the FRPA, which provides wide powers of intervention by the Ministry after an FSP is approved, and the consultation protocol in the FRO. Moreover, it is consistent with the approach taken by the Supreme Court of Canada in the *Haida* case where the failure of the province to consult in relation to the replacement of

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a TFL was considered a breach of the Crown's duty, notwithstanding that the Crown had consulted and continued to consult before authorizing any cutting permits or other operational plans. The Court noted that, "Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title" (*supra* at para. 76).

131 Finally, it is consistent with the observations of the Court of Appeal for British Columbia that the constitutional duty to consult and accommodate is "upstream" of the statutes under which the ministerial power has been exercised, so that the district manager is not able to follow a statute, regulation or policy in such a way as to offend the Constitution: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 D.L.R. (4th) 666 (B.C. C.A.) at para. 177, and *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 (B.C. C.A.) at para. 19.

132 As I noted earlier in these reasons, the respondents have taken the position that the actions of Klahoose over the course of the FSP approval process indicated a failure on the First Nation's part to fulfill its reciprocal obligation to carry out its end of the consultation. Both the *Haida* case and the FRO Interim Consultation Protocol make it clear that the obligation is indeed reciprocal. Hayes points to requests made of Klahoose to clarify what information it required, and Hayes' expressions of an ongoing willingness to respond.

133 I am unable to agree with this characterization of Klahoose's behaviour. Klahoose and Hayes were involved not only in the process of approving the FSP, but also in negotiations for the purchase of the TFL. Those negotiations were hard-nosed. Each side attempted to build a position of strength: Klahoose through its continued denial of access to the watershed through IR #1, and Hayes through its avowed intent to build the value of the TFL by bringing it into commercial operation. They were both entitled to those positions.

134 I find no evidence in the record, however, that Klahoose attempted to frustrate the consultation process by refusing to meet or participate in meetings, or by imposing unreasonable conditions; see *Halfway River First Nation, supra* at para. 161. While making it clear it did not want Hayes or anyone else to log the area, Klahoose never took the position that it would not participate in any consultation process which would have that result. What Klahoose insisted on was information that related to the whole of the TFL, as opposed to a piecemeal approach, and operational information that would permit it adequately to assess the impact. I do not consider that to be unreasonable; see *Tzeachten First Nation v. Canada (Attorney General)*, 2008 FC 928 (F.C.) at para. 64-69.

135 That is not to say that Hayes was in any way unreasonable. Indeed, some of the information requested by Klahoose in Mr. Howard's letter to the Ministry of January 9 was provided by Hayes in a letter to Mr. Shaw of the SCFD dated January 18, 2008. The record does not indicate, however, any transmission of that information from Mr. Shaw to Klahoose before the approval occurred. It must be remembered, of course, that the duty to consult and accommodate belongs to the Crown. It is not Hayes' duty.

136 Turning to the Temporary Accommodation Area that was agreed to between the Ministry and Hayes, setting aside a temporary no-go zone on the Toba River valley floor, I am satisfied that it was a genuine attempt by both the Ministry and Hayes to respond to concerns raised by Klahoose, and to accommodate them. It demonstrates the sort of step that can be taken in this process of attempting to find a satisfactory interim solution. The problem is that Klahoose was not involved in the process. Nobody asked Klahoose whether it was satisfactory. Klahoose had no input into it at all.

137 In these circumstances, I am unable to accept the respondents' submission that the accommodations made in this case were adequate

138 It follows that I find that the Crown, through the Ministry of Forests and Range, failed to fulfill its duty to en-

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gage in appropriately deep consultation with Klahoose, and to accommodate Klahoose's interests adequately, in the course of reviewing and approving Hayes' FSP.

J. Remedy

139 I described the remedies sought by the petitioner in paragraph 4 of these reasons. In essence, Klahoose seeks an order quashing the FSP approval in order to ensure that a meaningful process of consultation and accommodation takes place, beginning anew from a proper starting point.

140 The Crown submits that if I should find, as I have, that the Ministry, through the district manager, did not meet its duty of consultation and accommodation concerning the FSP decision, then the appropriate remedy would be a declaration to that effect, with liberty to the parties to apply with respect to any question relating to the duty. In the Crown's submission, an order quashing the FSP would, at the very least, create substantial uncertainty regarding the rights of tenure holders under the *Forest Act* and would, potentially, prejudice their abilities to initiate and/or continue timber harvesting operations. The Crown argues that setting aside the FSP at this stage would do little to advance the goal of effecting reconciliation of the interests of the Crown and Klahoose. Hayes supports that position, noting that it has already invested considerable resources in moving the TFL towards commercial operation, as it is entitled to do.

141 Those concerns were considered by MacKenzie J., as he then was, in *Klahoose First Nation v. British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 59 (B.C. S.C.), but that case concerned a very different situation, and was decided almost a decade before *Haida*.

142 In the circumstances before me, it is difficult to see how the district manager's decision approving the FSP can stand given that it was taken without meeting what I have found to have been the Crown's constitutional duties. Because of that failure, there was inadequate accommodation, and the decision therefore did not appropriately balance societal and aboriginal interests.

143 Nevertheless, I am cognizant of my obligation to be flexible and to approach this case individually: *Haida*, *supra* at para. 45. In that context, I note the following relevant factors.

144 First, Hayes is the lawful holder of TFL 10 until such time as it comes up for renewal, or Hayes transfers the licence to another party. This tree farm license gives it the right to harvest timber in the Toba River watershed, which right is not in issue in this proceeding. It does not give Hayes any right to access through IR #1.

145 Second, Klahoose is not entitled to a veto in relation to the granting of an FSP to Hayes.

146 Third, one of the objections of Klahoose to the FSP was the piecemeal approach taken by Hayes by focusing on an FDU that covered only a small part of TFL 10, whereas Klahoose's interests run throughout the entire watershed that TFL covers. On February 29, 2008, Hayes submitted an application to amend its FSP by expanding the proposed FDU over the entirety of TFL 10. This would, among other things, enable the AAC to be harvested over a larger area, and would go some distance to meeting Klahoose's piecemeal approach objection.

147 Fourth, since the FSP was approved on February 15, 2008 (if not before as maintained by Klahoose), Hayes has developed a good deal of the operational information that Klahoose had sought, including access plans and maps showing detailed cutblock layouts.

148 Fifth, I anticipate that both Klahoose and Hayes may have developed further archaeological and ethno-historical data in recent months.

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149 Sixth, the world has changed significantly since the hearing of this petition in June of 2008.

150 In these circumstances, I conclude that rather than setting aside the impugned FSP, the appropriate remedy would be to order a stay of all further activity and operations occurring under it, with the exception of the amendment application to extend the FDU to the entirety of TFL 10. That application, in my mind, should now be considered by the district manager as a new FSP (which is how I understand the application for such an amendment is approached in any event), in accordance with what I have found to be the Crown's duty of deep consultation, aimed at finding a satisfactory interim solution.

151 Such a solution would, one hopes, permit appropriate harvesting of timber resources while adequately protecting the economic, cultural, spiritual and social interests of Klahoose in the Toba River watershed. Klahoose's interest, after all, has not been to eliminate forestry operations in the watershed, but rather to ensure that they are sustainable, environmentally sound and consistent with a long-term vision for the future. Klahoose's desire to have complete control of forestry operations in TFL 10 is not an outcome that can be forced through this process. Although it is an attractive solution, it must be achieved, if at all, through other means.

152 The consideration of the application to amend the FSP would, I expect, involve an appropriate sharing of information, including information that may not be statutorily required in relation to an FSP, such as operational and access information. It would also involve Klahoose directly in the decision-making process concerning any accommodation of Klahoose's rights.

153 I invite the parties to prepare a form of Order setting out the appropriate declaratory and injunctive relief in accordance with these reasons. If the parties believe that further submissions are necessary, they may arrange a date with the registry.

154 I am inclined to award costs to the petitioner and to the respondent Hayes against the respondent Crown, on scale C, but the parties are at liberty to speak to costs if there are factors presently unknown to me that ought to be taken into account.

Application granted.

APPENDIX — Glossary

AAC	Allowable Annual Cut
FDU	Forestry Development Unit
FPPR	Forest Planning and Practices Regulation
FRO	Forest and Range Opportunities Agreement
FRPA	Forest and Range Practices Act
FSP	Forest Stewardship Plan
Hayes	Hayes Forest Services Limited
IR	(Klahoose) Indian Reserve
Klahoose	Klahoose First Nation
Ministry—)	

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MOF—) Ministry of Forests and Range

MoFR—)

Research report *Klahoose First Nation: Research in support of a preliminary assessment of strength of claim for the Klahoose First Nation* (February 27, 2007)

RPF Registered Professional Forester

SCFD Sunshine Coast Forest District

TFL Tree Farm Licence

[FNI](#) As quoted in Ronald Wright: *A Short History of Progress* (Toronto, 2004)

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Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)

Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority (Appellants) and Carrier Sekani Tribal Council (Respondent) and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, British Columbia Utilities Commission, Mikisew Cree First Nation, Moosomin First Nation, Nunavut Tunngavik Incorporated, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, Upper Nicola Indian Band, Lakes Division of the Secwepemc Nation, Assembly of First Nations, Standing Buffalo Dakota First Nation, First Nations Summit, Duncan's First Nation, Horse Lake First Nation, Independent Power Producers Association of British Columbia, Enbridge Pipelines Inc. and TransCanada Keystone Pipeline GP Ltd. (Interveners)

Supreme Court of Canada

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

Heard: May 21, 2010

Judgment: October 28, 2010

Docket: 33132

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Proceedings: reversing *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* (2009), [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228, 76 R.P.R. (4th) 159, 89 B.C.L.R. (4th) 298, [2009] 4 W.W.R. 381, 2009 CarswellBC 340, 2009 BCCA 67 (B.C. C.A.)

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2010 CarswellBC 2867, 2010 SCC 43, J.E. 2010-1926, [2010] B.C.W.L.D. 8040, [2010] B.C.W.L.D. 8185, [2010] B.C.W.L.D. 8184, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, [2010] 4 C.N.L.R. 250, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, [2010] 2 S.C.R. 650, 225 C.R.R. (2d) 75

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Arthur C. Pape, Richard B. Salter for Intervener, First Nations Summit

Jay Nelson for Interveners, Duncan's First Nation, Horse Lake First Nation

Roy W. Millen for Intervener, Independent Power Producers Association of British Columbia

Harry C. Underwood (written) for Intervener, Enbridge Pipelines Inc.

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Subject: Public; Constitutional; Property

Aboriginal law --- Constitutional issues — Miscellaneous

Major dam project was constructed in 1950s to produce power for aluminium smelting, without consultation with First Nations represented by tribal council, whose historic use of river was affected by altered water flows — Excess power from project was sold to Crown corporation — R Inc. entered into energy purchase agreement with Crown corporation committing to such excess power sales until 2034, which agreement was subject to review by provincial Utilities Commission — After Commission's initial scoping order, tribal council obtained intervener status and unsuccessfully applied for reconsideration of scoping to include consideration of adequacy of Crown consultation — Commission approved agreement — Tribal council's appeals of reconsideration decision and approval of agreement were allowed — R Inc. and Crown corporation appealed — Appeal allowed — Commission correctly accepted it had jurisdiction to consider adequacy of Crown's consultation — Crown had knowledge of potential aboriginal claims and agreement was clearly proposed Crown conduct — Commission was correct in concluding that duty to consult was not triggered by underlying infringement from failure to consult on initial project, as question was whether there was claim or right that could be adversely impacted by current government conduct of agreement — Commission considered organizational implications of agreement and any possible physical changes it might bring about — It was not unreasonable for Commission to find that agreement did not have potential to adversely impact claims or rights of tribal council's First Nations.

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Public law --- Public authorities — Provincial boards and commissions — Miscellaneous

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Public law --- Public utilities — Regulatory boards — Practice and procedure — Miscellaneous

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Droit autochtone --- Questions d'ordre constitutionnel — Divers

Dans les années 50, un important projet de barrage a été exécuté en vue de la production d'électricité destinée à l'alimentation d'une aluminerie, sans consultation avec le conseil tribal représentant les Premières nations, ce qui a gêné celles-ci dans leur utilisation ancestrale d'une rivière en raison des dérivations subies par les courants d'eau — Surplus d'électricité produits par le barrage ont été vendus à une société d'État — R inc. a signé un contrat d'achat d'électricité avec la société d'État suivant lequel elle s'engageait à vendre l'électricité excédentaire jusqu'en 2034, lequel contrat était assujéti à l'approbation de la commission de services publics provinciale — Après que la commission ait rendu une première ordonnance portant sur le cadre de l'audience, le conseil tribal a été constitué partie intervenante et a échoué dans sa tentative de demande de révision de l'ordonnance

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définissant le cadre de l'audience afin que le caractère adéquat de la consultation faite par la Couronne soit examiné — Commission a ratifié le contrat — Appels interjetés par le conseil tribal à l'encontre de la décision portant sur le réexamen et celle ayant ratifié le contrat ont été accueillis — R inc. et la société d'État ont formé un pourvoi — Pourvoi accueilli — Commission a eu raison de conclure qu'elle avait compétence pour examiner le caractère adéquat de la consultation faite par la Couronne — Couronne avait connaissance de l'existence possible des revendications autochtones et la participation au contrat proposé était clairement une mesure projetée par la Couronne — Commission a eu raison de conclure que l'obligation de consulter n'était pas déclenchée du fait d'une atteinte sous-jacente découlant de l'omission de consulter au sujet du projet initial, étant donné que la question était de savoir s'il y avait une revendication ou un droit qui risquerait de subir des effets préjudiciables découlant de la mesure du gouvernement en question, soit le contrat — Commission a considéré les répercussions organisationnelles du contrat et les changements physiques qui pouvaient en résulter — Conclusion de la commission à l'effet que le contrat ne risquait pas de compromettre les revendications ou les droits des Premières nations représentées par le conseil tribal n'était pas déraisonnable.

Droit public --- Pouvoirs publics — Commissions et offices provinciaux — Divers

Dans les années 50, un important projet de barrage a été exécuté en vue de la production d'électricité destinée à l'alimentation d'une aluminerie, sans consultation avec le conseil tribal représentant les Premières nations, ce qui a gêné celles-ci dans leur utilisation ancestrale d'une rivière en raison des dérivations subies par les courants d'eau — Surplus d'électricité produits par le barrage ont été vendus à une société d'État — R inc. a signé un contrat d'achat d'électricité avec la société d'État suivant lequel elle s'engageait à vendre l'électricité excédentaire jusqu'en 2034, lequel contrat était assujéti à l'approbation de la commission de services publics provinciale — Après que la commission ait rendu une première ordonnance portant sur le cadre de l'audience, le conseil tribal a été constitué partie intervenante et a échoué dans sa tentative de demande de révision de l'ordonnance définissant le cadre de l'audience afin que le caractère adéquat de la consultation faite par la Couronne soit examiné — Commission a ratifié le contrat — Appels interjetés par le conseil tribal à l'encontre de la décision portant sur le réexamen et celle ayant ratifié le contrat ont été accueillis — R inc. et la société d'État ont formé un pourvoi — Pourvoi accueilli — Commission a eu raison de conclure qu'elle avait compétence pour examiner le caractère adéquat de la consultation faite par la Couronne — Couronne avait connaissance de l'existence possible des revendications autochtones et la participation au contrat proposé était clairement une mesure projetée par la Couronne — Commission a eu raison de conclure que l'obligation de consulter n'était pas déclenchée du fait d'une atteinte sous-jacente découlant de l'omission de consulter au sujet du projet initial, étant donné que la question était de savoir s'il y avait une revendication ou un droit qui risquerait de subir des effets préjudiciables découlant de la mesure du gouvernement en question, soit le contrat — Commission a considéré les répercussions organisationnelles du contrat et les changements physiques qui pouvaient en résulter — Conclusion de la commission à l'effet que le contrat ne risquait pas de compromettre les revendications ou les droits des Premières nations représentées par le conseil tribal n'était pas déraisonnable.

Droit public --- Services publics — Organismes de réglementation — Procédure — Divers

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Après que la commission ait rendu une première ordonnance portant sur le cadre de l'audience, le conseil tribal a été constitué partie intervenante et a échoué dans sa tentative de demande de révision de l'ordonnance définissant le cadre de l'audience afin que le caractère adéquat de la consultation faite par la Couronne soit examiné — Commission a ratifié le contrat — Appels interjetés par le conseil tribal à l'encontre de la décision portant sur le réexamen et celle ayant ratifié le contrat ont été accueillis — R inc. et la société d'État ont formé un pourvoi — Pourvoi accueilli — Commission a eu raison de conclure qu'elle avait compétence pour examiner le caractère adéquat de la consultation faite par la Couronne — Couronne avait connaissance de l'existence possible des revendications autochtones et la participation au contrat proposé était clairement une mesure projetée par la Couronne — Commission a eu raison de conclure que l'obligation de consulter n'était pas déclenchée du fait d'une atteinte sous-jacente découlant de l'omission de consulter au sujet du projet initial, étant donné que la question était de savoir s'il y avait une revendication ou un droit qui risquerait de subir des effets préjudiciables découlant de la mesure du gouvernement en question, soit le contrat — Commission a considéré les répercussions organisationnelles du contrat et les changements physiques qui pouvaient en résulter — Conclusion de la commission à l'effet que le contrat ne risquait pas de compromettre les revendications ou les droits des Premières nations représentées par le conseil tribal n'était pas déraisonnable.

In the 1950s, A Inc. constructed a major dam project to produce hydro power for aluminium smelting, which altered the water flows to a river used by First Nations represented by the tribal council since time immemorial. No consultation occurred with those First Nations prior to provincial approval of the project. Excess power from the project was sold to a Crown corporation for local and regional use.

In 2007, R Inc., the successor to A Inc., entered into an energy purchase agreement with the Crown corporation committing to such excess power sales until 2034. The provincial Utilities Commission issued an order as to the scope of its hearing to review the agreement. The tribal council obtained intervener status and unsuccessfully applied for reconsideration of the scoping order to include consideration of the adequacy of Crown consultation. The Commission took the view that the agreement could have no potential adverse impact on aboriginal claims or rights so no duty to consult with the First Nations was triggered. The Commission approved the agreement as in the public interest, as required by s. 71 of the Utilities Commission Act.

The tribal council's appeals of the reconsideration decision and the approval of the agreement were allowed. R Inc. and the Crown corporation appealed.

Held: The appeal was allowed.

McLachlin C.J.C. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell JJ. concurring): The Commission correctly accepted that it had the jurisdiction to consider the adequacy of the Crown's consultation, given the breadth of factors it had to consider under s. 71 of the Act and its power to decide questions of law, which implicitly included constitutional issues such as aboriginal consultation.

The Crown had knowledge of the potential aboriginal claims, as the First Nations were lodged in the provincial claims resolution process, and the proposed agreement was clearly proposed Crown conduct given the involvement of a Crown corporation. The third necessary element for triggering the Crown's duty to consult was whether the proposed Crown conduct could have an adverse impact on the aboriginal claims or rights. The Commission was correct in concluding that an underlying infringement from the failure to consult on the initial project did not constitute an adverse impact giving rise to a duty to consult. The question was whether there was an aboriginal claim or right that could be adversely impacted by the current government conduct or decision, which

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here was the agreement. Consultation required the parties to meet in good faith to accommodate the conflicting interests involved in state-authorized development that might have adverse impacts on aboriginal interests. This was impossible where the resource had long since been altered and the present government conduct did not have any further impact on the resource.

The Commission correctly identified that the main issue was whether the agreement had potential to adversely affect claims and rights of First Nations. The Commission considered the organizational implications of the agreement and any possible physical changes it might bring about. The Commission reasonably found that the agreement did not have the potential to adversely impact the claims or rights of the First Nations and so did not err in rejecting the tribal council's application to consider the issue of Crown consultation. As that was the only basis for attacking the Commission's approval of the agreement, such approval was not unreasonable.

Dans les années 50, A inc. a exécuté un important projet de barrage en vue de la production d'électricité destinée à l'alimentation d'une aluminerie, ce qui a modifié les débits d'eau dans une rivière utilisée depuis des temps immémoriaux par les Premières nations représentées par un conseil tribal. Ces Premières nations n'ont pas été consultées avant que le projet ne soit ratifié par la province. Les surplus d'électricité produits par le barrage ont été vendus à une société d'État pour usage local et régional.

En 2007, R inc., la société ayant succédé à A inc., a signé un contrat d'achat d'électricité avec la société d'État suivant lequel elle s'engageait à vendre l'électricité excédentaire jusqu'en 2034. La commission de services publics de la province a émis une ordonnance définissant le cadre de l'audience devant se tenir devant elle concernant le contrat. Le conseil tribal a été constitué partie intervenante et a échoué dans sa tentative de demande de révision de l'ordonnance définissant le cadre de l'audience afin que le caractère adéquat de la consultation faite par la Couronne soit examiné. Selon la commission, le contrat n'aurait aucun effet préjudiciable sur les revendications ou les droits des Premières nations, de sorte qu'il n'y avait aucune obligation de consultation avec les Premières nations. La commission a ratifié le contrat, le jugeant dans l'intérêt public, conformément à l'art. 71 de la Utilities Commission Act (la « Loi »).

Les appels interjetés par le conseil tribal à l'encontre de la décision portant sur le réexamen et celle ayant ratifié le contrat ont été accueillis. R inc. et la société d'État ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

McLachlin, J.C.C. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell, JJ., souscrivant à son opinion) : La commission a eu raison de conclure qu'elle avait compétence pour examiner le caractère adéquat de la consultation faite par la Couronne, compte tenu de la diversité des facteurs qu'elle devait prendre en considération en vertu de l'art. 71 de la Loi et de son pouvoir de trancher des questions de droit, y compris, de façon implicite, des questions d'ordre constitutionnel tel que le devoir de consulter les Premières nations.

La Couronne avait connaissance de l'existence possible des revendications autochtones, puisque celles-ci étaient formulées dans le cadre du processus mis sur pied par la province pour le règlement des revendications autochtones et que la participation au contrat proposé était clairement une mesure projetée par la Couronne, compte tenu de la présence d'une société d'État. Le troisième élément requis pour que soit déclenché l'obligation de la Couronne de consulter était la question de savoir si la mesure projetée par celle-ci aurait un effet préjudiciable sur les revendications ou les droits des Premières nations. La commission a eu raison de conclure qu'une atteinte sous-jacente découlant de l'omission de consulter au sujet du projet initial ne constituait pas un effet préjudiciable déclenchant l'obligation de consulter. La question était de savoir s'il y avait une revendication

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ou un droit des Premières nations qui risquerait de subir des effets préjudiciables découlant de la mesure ou de la décision du gouvernement en question, soit, en l'espèce, le contrat. Il était nécessaire, dans le cadre de la consultation, que les parties se rencontrent de bonne foi dans une optique de conciliation des intérêts divergents en jeu dans le projet autorisé par l'État pouvant avoir des effets préjudiciables sur les intérêts des Premières nations. Ceci était impossible lorsque la ressource avait été transformée depuis longtemps et que la mesure ou la décision actuelle du gouvernement n'a plus aucune incidence sur elle.

La commission a bien cerné la question principale, à savoir si le contrat pouvait avoir un effet préjudiciable sur les revendications et les droits des Premières nations. La commission a considéré les répercussions organisationnelles du contrat et les changements physiques qui pouvaient en résulter. La conclusion de la commission à l'effet que le contrat ne risquait pas de compromettre les revendications ou les droits des Premières nations était raisonnable et, ainsi, elle n'a pas erré en rejetant la demande du conseil tribal d'examiner la question de la consultation de la Couronne. Comme cela constituait le seul moyen de contestation de la décision de la commission de procéder à la ratification, cette ratification n'était pas déraisonnable.

Cases considered:

An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re (2009), 2009 CarswellBC 3637 (B.C. Utilities Comm.) — referred to

British Columbia Hydro & Power Authority, Re (2008), 2008 CarswellBC 1232 (B.C. Utilities Comm.) — referred to

Brown v. Sunshine Coast Forest District (District Manager) (2008), (sub nom. *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*) [2009] 1 C.N.L.R. 110, 2008 BCSC 1642, 2008 CarswellBC 2587 (B.C. S.C.) — referred to

Dene Tha' First Nation v. Canada (Minister of Environment) (2006), 2006 CarswellNat 4508, 2006 CF 1354, 25 C.E.L.R. (3d) 247, 303 F.T.R. 106 (Eng.), 2006 FC 1354, 2006 CarswellNat 3642, [2007] 1 C.N.L.R. 1 (F.C.) — referred to

Dene Tha' First Nation v. Canada (Minister of Environment) (2008), 2008 CarswellNat 687, 378 N.R. 251, 2008 FCA 20, 35 C.E.L.R. (3d) 1, 2008 CAF 20, 2008 CarswellNat 2391 (F.C.A.) — referred to

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — followed

Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests) (2005), 2005 BCSC 697, 2005 Carswell-BC 1121, [2005] 3 C.N.L.R. 74, 33 Admin. L.R. (4th) 123 (B.C. S.C.) — referred to

Khosa v. Canada (Minister of Citizenship & Immigration) (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, (sub nom. *Canada (Citizenship & Immigration) v. Khosa*) [2009] 1 S.C.R. 339 (S.C.C.) — considered

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21

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C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) — considered

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 95 L.C.R. 65 (S.C.C.) — followed

Paul v. British Columbia (Forest Appeals Commission) (2003), 2003 CarswellBC 2432, 2003 CarswellBC 2433, 2003 SCC 55, 5 Admin. L.R. (4th) 161, 111 C.R.R. (2d) 292, 18 B.C.L.R. (4th) 207, [2003] 2 S.C.R. 585, 231 D.L.R. (4th) 449, [2003] 11 W.W.R. 1, [2003] 4 C.N.L.R. 25, 3 C.E.L.R. (3d) 161 (S.C.C.) — followed

R. v. Conway (2010), 320 D.L.R. (4th) 25, 75 C.R. (6th) 201, 255 C.C.C. (3d) 506, [2010] 1 S.C.R. 765, 1 Admin. L.R. (5th) 163, 263 O.A.C. 61, 402 N.R. 255, 2010 CarswellOnt 3847, 2010 CarswellOnt 3848, 2010 SCC 22 (S.C.C.) — followed

R. v. Douglas (2007), 400 W.A.C. 164, 242 B.C.A.C. 164, 2007 BCCA 265, 2007 CarswellBC 930, 278 D.L.R. (4th) 653, 219 C.C.C. (3d) 115, [2007] 3 C.N.L.R. 277, 155 C.R.R. (2d) 235 (B.C. C.A.) — considered

R. v. Kapp (2008), 2008 SCC 41, [2008] 8 W.W.R. 1, 79 B.C.L.R. (4th) 201, 37 C.E.L.R. (3d) 1, 256 B.C.A.C. 75, 431 W.A.C. 75, 175 C.R.R. (2d) 185, 376 N.R. 1, 58 C.R. (6th) 1, 232 C.C.C. (3d) 349, [2008] 3 C.N.L.R. 346, 294 D.L.R. (4th) 1, [2008] 2 S.C.R. 483, 2008 CarswellBC 1312, 2008 CarswellBC 1313 (S.C.C.) — considered

R. v. Lefthand (2007), 2007 CarswellAlta 850, 2007 ABCA 206, [2007] 4 C.N.L.R. 281, 222 C.C.C. (3d) 129, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203 (Alta. C.A.) — referred to

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) — considered

Wii'litswx v. British Columbia (Minister of Forests) (2008), 80 Admin. L.R. (4th) 217, 2008 BCSC 1139, 2008 CarswellBC 1764, 38 C.E.L.R. (3d) 189, [2008] 4 C.N.L.R. 315 (B.C. S.C.) — referred to

Statutes considered:

Administrative Tribunals Act, S.B.C. 2004, c. 45

Generally — referred to

s. 1 "constitutional question" — considered

2010 CarswellBC 2867, 2010 SCC 43, J.E. 2010-1926, [2010] B.C.W.L.D. 8040, [2010] B.C.W.L.D. 8185, [2010] B.C.W.L.D. 8184, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, [2010] 4 C.N.L.R. 250, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, [2010] 2 S.C.R. 650, 225 C.R.R. (2d) 75

s. 1 "privative clause" — referred to

s. 44(1) — considered

s. 58 — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 24 — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 12 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

s. 52 — referred to

Constitutional Question Act, R.S.B.C. 1996, c. 68

Generally — referred to

s. 8 — considered

s. 8(1) — considered

s. 8(2) — considered

Utilities Commission Act, R.S.B.C. 1996, c. 473

Generally — referred to

s. 2(4) — considered

s. 71 — referred to

s. 71(1)(b) — referred to

s. 71(2) — referred to

s. 71(2)(a)-71(2)(e) — referred to

s. 71(2)(e) — referred to

s. 71(2.1)(a) [en. 2008, c. 13, s. 14] — referred to

s. 71(2.1)(b) [en. 2008, c. 13, s. 14] — referred to

2010 CarswellBC 2867, 2010 SCC 43, J.E. 2010-1926, [2010] B.C.W.L.D. 8040, [2010] B.C.W.L.D. 8185, [2010] B.C.W.L.D. 8184, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, [2010] 4 C.N.L.R. 250, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, [2010] 2 S.C.R. 650, 225 C.R.R. (2d) 75

s. 71(2.1)(d) [en. 2008, c. 13, s. 14] — referred to

s. 71(2.4) [en. 2008, c. 13, s. 14] — referred to

s. 71(3) — referred to

s. 79 — considered

s. 101(1) — referred to

s. 105 — considered

APPEAL by R Inc. and Crown corporation from judgment reported at *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* (2009), [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228, 76 R.P.R. (4th) 159, 89 B.C.L.R. (4th) 298, [2009] 4 W.W.R. 381, 2009 CarswellBC 340, 2009 BCCA 67 (B.C. C.A.), allowing appeals by tribal council of First Nations from decisions of provincial Utilities Commission.

POURVOI de R inc. et d'une société d'État à l'encontre d'une décision publiée à *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* (2009), [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228, 76 R.P.R. (4th) 159, 89 B.C.L.R. (4th) 298, [2009] 4 W.W.R. 381, 2009 CarswellBC 340, 2009 BCCA 67 (B.C. C.A.), ayant accueilli les appels interjetés par le conseil tribal des Premières nations à l'encontre de décisions de la commission de services publics de la province.

McLachlin C.J.C.:

1 In the 1950s, the government of British Columbia authorized the building of the Kenney Dam in Northwest British Columbia for the production of hydro power for the smelting of aluminum. The dam and reservoir altered the water flows to the Nechako River, which the Carrier Sekani Tribal Council ("CSTC") First Nations have since time immemorial used for fishing and sustenance. This was done without consulting with the CSTC First Nations. Now, the government of British Columbia seeks approval of a contract for the sale of excess power from the dam to British Columbia Hydro and Power Authority ("BC Hydro"), a Crown corporation. The question is whether the British Columbia Utilities Commission ("the Commission") is required to consider the issue of consultation with the CSTC First Nations in determining whether the sale is in the public interest.

2 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), this Court affirmed that governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. In the intervening years, government-Aboriginal consultation has become an important part of the resource development process in British Columbia especially; much of the land and resources there are subject to land claims negotiations. This case raises the issues of what triggers a duty to consult, and the place of government tribunals in consultation and the review of consultation. I would allow the appeal, while affirming the duty of BC Hydro to consult the CSTC First Nations on future developments that may adversely affect their claims and rights.

I. Background

A. The Facts

3 In the 1950s, Alcan (now Rio Tinto Alcan) dammed the Nechako River in northwestern British Columbia

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for the purposes of power development in connection with aluminum production. The project was one of huge magnitude. It diverted water from the Nechako River into the Nechako Reservoir, where a powerhouse was installed for the production of electricity. After passing through the turbines of the powerhouse, the water flowed to the Kemano River and on to the Pacific Ocean to the west. The dam affected the amount and timing of water flows into the Nechako River to the east, impacting fisheries on lands now claimed by the CSTC First Nations. Alcan effected these water diversions under Final Water Licence No. 102324 which gives Alcan use of the water on a permanent basis.

4 Alcan, the Province of British Columbia, and Canada entered into a Settlement Agreement in 1987 on the release of waters in order to protect fish stocks. Canada was involved because fisheries, whether seacoast-based or inland, fall within federal jurisdiction under s. 91(12) of the *Constitution Act, 1867*. The 1987 agreement directs the release of additional flows in July and August to protect migrating salmon. In addition, a protocol has been entered into between the Haisla Nation and Alcan which regulates water flows to protect eulachon spawning grounds.

5 The electricity generated by the project has been used over the years primarily for aluminum smelting. Since 1961, however, Alcan has sold its excess power to BC Hydro, a Crown Corporation, for use in the local area and later for transmission to neighbouring communities. The Energy Purchase Agreement ("EPA") entered into in 2007, which is the subject of this appeal is the latest in a series of power sales from Alcan to BC Hydro. It commits Alcan to supplying and BC Hydro to purchasing excess electricity from the Kemano site until 2034. The 2007 EPA establishes a Joint Operating Committee to advise the parties on the administration of the EPA and the operation of the reservoir.

6 The CSTC First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River. As was the practice at the time, they were not consulted about the diversion of the river effected by the 1950s dam project. They assert, however, that the 2007 EPA for the power generated by the project should be subject to consultation. This, they say, is their constitutional right under s. 35 of the *Constitution Act, 1982*, as defined in *Haida Nation*.

B. The Commission Proceedings

7 The 2007 EPA was subject to review before the Commission. It was charged with determining whether the sale of electricity was in the public interest under s. 71 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473. The Commission had the power to declare a contract for the sale of electricity unenforceable if it found that it was not in the public interest having regard to the quantity of energy to be supplied, the availability of supplies, the price and availability of any other form of energy, the price of the energy supplied to a public utility company, and "any other factor that the commission considers relevant to the public interest".

8 The Commission began its work by holding two procedural conferences to determine, among other things, the "scope" of its hearing. "Scoping" is the process by which the Commission determines what "information it considers necessary to determine whether the contract is in the public interest" pursuant to s. 71(1)(b) of the *Utilities Commission Act*. The question of the role of First Nations in the proceedings arose at this stage. The CSTC was not party to the proceedings but the Haisla Nation was. The Haisla people submitted that the Province and BC Hydro "had failed to act on their legal obligation" to them, but "refrained from asking the Commission to assess the adequacy [of consultation] and accommodation afforded ... on the 2007 EPA": *Re: British Columbia Hydro & Power Authority Filing of Electricity Purchase Agreement with Alcan Inc. as an En-*

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ergy Supply Contract Pursuant to Section 71, British Columbia Utilities Commission, Oct. 10, 2007 (the "Scoping Order"). The Commission's Scoping Order therefore addressed the consultation issue as follows:

Evidence relevant to First Nations consultation may be relevant for the same purpose that the Commission often considers evidence of consultation with other stakeholders. Generally, insufficient evidence of consultation, including with First Nations is not determinative of matters before the Commission.

9 On October 29, 2007, the CSTC requested late intervener status on the issue of consultation on the basis that the Commission's decision might negatively impact Aboriginal rights and title which were the subject of its ongoing land claims. At the opening of the oral hearing on November 19, 2007, the CSTC applied for reconsideration of the Scoping Order and, in written submissions of November 20, 2007, it asked the Commission to include in the hearing's scope the issues of whether the duty to consult had been met, whether the proposed power sale under the 2007 EPA could constitute an infringement of Aboriginal rights and title in and of itself, and the related issue of the environmental impact of the 2007 EPA on the rights of the CSTC First Nations.

10 The Commission established a two-stage process to consider the CSTC's application for reconsideration of the Scoping Order: an initial screening phase to determine whether there was a reasonable evidentiary basis for reconsideration, and a second phase to receive arguments on whether the rescoping application should be granted. At the first stage, the CSTC filed evidence, called witnesses and cross-examined the witnesses of BC Hydro and Alcan. The Commission confined the proceedings to the question of whether the 2007 EPA would adversely affect potential CSTC First Nations' interests by causing changes in water flows into the Nechako River or changes in water levels of the Nechako Reservoir.

11 On November 29, 2007, the Commission issued a preliminary decision on the Phase I process called "Impacts on Water Flows". It concluded that the "responsibility for operation of the Nechako Reservoir remains with Alcan under the 2007 EPA", and that the EPA would not affect water levels in the Nechako River stating, "the 2007 EPA sets the priority of generation produced but does not set the priority for water". With or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation".

12 As to fisheries, the Commission stated that "the priority of releases from the Nechako Reservoir [under the 1987 Settlement Agreement] is first to fish flows and second to power service". While the timing of water releases from the Nechako Reservoir for power generation purposes may change as a result of the 2007 EPA, that change "will have no impact on the releases into the Nechako river system". This is because water releases for power generation flow not into the Nechako River system to the east, with which the CSTC First Nations are concerned, but into the Kemano River to the west. Nor, the Commission found, would the 2007 EPA bring about a change in control over water flows and water levels, or alter the management structure of the reservoir.

13 The Commission then embarked on Phase II of the rescoping hearing and invited the parties to make written submissions on the reconsideration application — specifically, on whether it would be a jurisdictional error not to revise the Scoping Order to encompass consultation issues on these facts. The parties did so.

14 On December 17, 2007, the Commission dismissed the CSTC's application for reconsideration of the scoping order on grounds that the 2007 EPA would not introduce new adverse effects to the interests of the First Nations: *British Columbia Hydro & Power Authority, Re*, 2008 CarswellBC 1232 (B.C. Utilities Comm.) (the "Reconsideration Decision"). For the purposes of the motion, the Commission assumed the historic infringement of Aboriginal rights, Aboriginal title, and a failure by the government to consult. Referring to *Haida Nation*, it concluded that "more than just an underlying infringement" was required. The CSTC had to demonstrate that the

2010 CarswellBC 2867, 2010 SCC 43, J.E. 2010-1926, [2010] B.C.W.L.D. 8040, [2010] B.C.W.L.D. 8185, [2010] B.C.W.L.D. 8184, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 54 C.E.L.R. (3d) 1, 9 B.C.L.R. (5th) 205, [2010] 4 C.N.L.R. 250, 406 N.R. 333, 325 D.L.R. (4th) 1, 11 Admin. L.R. (5th) 246, 293 B.C.A.C. 175, 496 W.A.C. 175, [2010] 2 S.C.R. 650, 225 C.R.R. (2d) 75

2007 EPA would "adversely affect" the Aboriginal interests of its member First Nations. Applying this test to its findings of fact, it stated that "a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing [without consultation] would not be a jurisdictional error". The Commission therefore concluded that its decision on the 2007 EPA would have no adverse effects on the CSTC First Nations' interests. The duty to consult was therefore not triggered, and no jurisdictional error was committed in failing to include consultation with the First Nations in the Scoping Order beyond the general consultation extended to all stakeholders.

15 The Commission went on to conclude that the 2007 EPA was in the public interest and should be accepted. It stated:

In the circumstances of this review, evidence regarding consultation with respect to the historical, continuing infringement can reasonably be expected to be of no assistance for the same reasons there is no jurisdictional error, that is, the limited scope of the section 71 review, and there are no new physical impacts.

16 In essence, the Commission took the view that the 2007 EPA would have no physical impact on the existing water levels in the Nechako River and hence it would not change the current management of its fishery. The Commission further found that its decision would not involve any transfer or change in the project's licences or operations. Consequently, the Commission concluded that its decision would have no adverse impact on the pending claims or rights of the CSTC First Nations such that there was no need to rescope the hearing to permit further argument on the duty to consult.

C. The Judgment of the Court of Appeal, 2009 BCCA 67, 89 B. C.L.R. (4th) 298 (B.C. C.A.) (Donald, Huddart and Bauman JJ.A.)

17 The CSTC appealed the Reconsideration Decision and the approval of the 2007 EPA to the British Columbia Court of Appeal. The Court, *per* Donald J.A., reversed the Commission's orders and remitted the case back to the Commission for "evidence and argument on whether a duty to consult and, if necessary, accommodate the [CSTC First Nations] exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA" (para. 69).

18 The Court of Appeal found that the Commission had jurisdiction to consider the issue of consultation. The Commission had the power to decide questions of law, and hence constitutional issues relating to the duty to consult.

19 The Court of Appeal went on to hold that the Commission acted prematurely by rejecting the application for reconsideration. Donald J.A., writing for the Court, stated:

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

I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. [paras. 61-62]

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20 The Court of Appeal held that the honour of the Crown obliged the Commission to decide the consultation issue, and that "the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation" (para. 53). Unlike the Commission, the Court of Appeal did not consider whether the 2007 EPA was capable of having an adverse impact on a pending claim or right of the CSTC First Nations. The Court of Appeal did not criticize the Commission's adverse impacts finding. Rather, it appears to have concluded that despite these findings, the Commission was obliged to consider whether consultation could be "useful". In finding that the Commission should have considered the consultation issue, the Court of Appeal appears to have taken a broader view than did the Commission as to when a duty to consult may arise.

21 The Court of Appeal suggested that a failure to consider consultation risked the approval of a contract in breach of the Crown's constitutional duty. Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry" (para. 42).

22 Alcan and BC Hydro appeal to this Court. They argue that the Court of Appeal took too wide a view of the Crown's duty to consult and of the role of tribunals in deciding consultation issues. In view of the Commission's task under its constituent statute and the evidence before it, Alcan and BC Hydro submit that the Commission correctly concluded that it had no duty to consider the consultation issue raised by the CSTC, since, however much participation was accorded, there was no possibility of finding a duty to consult with respect to the 2007 EPA.

23 The CSTC argues that the Court of Appeal correctly held that the Commission erred in refusing to re-scope its proceeding to allow submissions on the consultation issue. It does not pursue earlier procedural arguments in this Court.

II. The Legislative Framework

A. Legislation Regarding the Public Interest Determination

24 The 2007 EPA was subject to review before the Commission under the authority of s. 71 of the *Utilities Commission Act* to determine whether it was in the public interest. Prior to May 2008, this determination was to be based on the quantity of energy to be supplied; the availability of supplies; the price and availability of any other form of energy; the price of the energy supplied to a public utility company; and "any other factor that the commission considers relevant to the public interest": *Utilities Commission Act*, s. 71(2)(a-e). Effective May 2008, these considerations were expanded to include "the government's energy objectives" and its long-term resource plans: s. 71(2.1)(a-b). The public interest clause, however, was narrowed to considerations of the interests of potential British Columbia public utility customers: s. 71(2.1)(d).

B. Legislation on the Commission's Remedial Powers

25 Based on the above considerations, the Commission may issue an order approving the proposed contract under s. 71(2.4) of the *Utilities Commission Act* if it is found to be in the public interest. If it is not found to be in the public interest, the Commission can issue an order declaring the contract unenforceable, either wholly or in part, or "make any other order it considers advisable in the circumstances": s. 71(2), (3).

C. Legislation on the Commission's Jurisdiction and Appeals

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26 Section 79, of the *Utilities Commission Act* states that all findings of fact made by the Commission within its jurisdiction are "binding and conclusive". This is supplemented by s. 105 which grants the Commission "exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act". An appeal, however, lies from a decision or order of the Commission to the Court of Appeal with leave: s. 101(1).

27 Together, ss. 79 and 105 of the *Utilities Commission Act* constitute a "privative clause" as defined in s. 1 of the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Under s. 58 of the *Administrative Tribunals Act*, this privative clause attracts a "patently unreasonable" standard of judicial review to "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause"; a standard of correctness is to be applied in the review of "all other matters".

28 The jurisdiction of the commission is also arguably affected by s. 44(1) of the *Administrative Tribunals Act* which applies to the Commission by virtue of s. 2(4) of the *Utilities Commission Act*. Section 44(1) of the *Administrative Tribunals Act* states that "[t]he tribunal does not have jurisdiction over constitutional questions". A "constitutional question" is defined in s. 1 of the *Administrative Tribunals Act* by s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Section 8(2) says:

(2) If in a cause, matter or other proceeding

(a) the constitutional validity or constitutional applicability of any law is challenged, or

(b) an application is made for a constitutional remedy,

the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

A "constitutional remedy" is defined as "a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion": *Constitutional Question Act*, s. 8(1).

D. Section 35 of the Constitution Act, 1982

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

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

III. The Issues

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30 The main issues that must be resolved are: (1) whether the Commission had jurisdiction to consider consultation; and (2) if so, whether the Commission's refusal to rescope the inquiry to consider consultation should be set aside. In order to resolve these issues, it is necessary to consider when a duty to consult arises and the role of tribunals in relation to the duty to consult. These reasons will therefore consider:

1. When a duty to consult arises;
2. The role of tribunals in consultation;
3. The Commission's jurisdiction to consider consultation;
4. The Commission's Reconsideration Decision;
5. The Commission's conclusion that approval of the 2007 EPA was in the public interest.

IV. Analysis

A. *When Does the Duty to Consult Arise?*

31 The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.

32 The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation: *Haida Nation*, at para. 20. As stated in *Haida Nation*, at para. 25:

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

33 The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective. Moreover, with a few exceptions, many Aboriginal groups have limited success in obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.

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34 Grounded in the honour of the Crown, the duty has both a legal and a constitutional character: *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.), at para. 6. The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.

35 *Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-35. The duty is *prospective*, fastening on rights yet to be proven.

36 The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.), at para. 32.

37 The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

38 The duty to consult embodies what Brian Slattery has described as a "generative" constitutional order which sees "section 35 as serving a dynamic and not simply static function" ("Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at p. 440). This dynamicism was articulated in *Haida Nation* as follows, at para. 32:

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

As the post-*Haida Nation* case law confirms, consultation is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations": D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21.

39 Against this background, I now turn to the three elements that give rise to a duty to consult.

(1) *Knowledge by the Crown of a Potential Claim or Right*

40 To trigger the duty to consult, the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), para. 34. Constructive knowledge

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arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice. As stated in *Haida Nation*, at para. 37:

Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.

41 The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27, 33.

(2) Crown Conduct or Decision

42 Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

43 This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74 (B.C. S.C.), at paras. 94, 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315 (B.C. S.C.), at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

44 Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41, emphasis omitted). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110 (B.C. S.C.)); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1 (F.C.), aff'd, 2008 FCA 20, 35 C.E.L.R. (3d) 1 (F.C.A.)); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C. Utilities Comm.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203 (Alta. C.A.), at paras. 37-40.

(3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right

45 The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previ-

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ous breaches of the duty to consult, do not suffice.

46 Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27, 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653 (B.C. C.A.), at para. 44, there must be an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

47 Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

48 An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

49 The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.

50 Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process

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an advantage over the other.

(4) An Alternative Theory of Consultation

51 As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

52 The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.

53 I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

54 The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree — an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

B. The Role of Tribunals in Consultation

55 The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.). It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.

56 The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.

57 Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its

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duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.

58 Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

59 The decisions below and the arguments before us at times appear to merge the different duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation.

60 This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

61 A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

62 The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

63 As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of

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dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

64 Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:

The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate... Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness...

65 It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.). It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

C. The Commission's Jurisdiction to Consider Consultation

66 Having considered the law governing when a duty to consult arises and the role of tribunals in relation to the duty to consult, I return to the questions at issue on appeal.

67 The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.

68 As discussed above, issues of consultation between the Crown and Aboriginal groups arise from s. 35 of the *Constitution Act, 1982*. They therefore have a constitutional dimension. The question is whether the Commission possessed the power to consider such an issue. As discussed, above, tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the constitution.

69 It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 (S.C.C.), at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.

70 Beyond its general power to consider questions of law, the factors the Commission is required to con-

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sider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the Commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?"

71 This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over constitutional matters. Section 2(4) of the *Utilities Commission Act* makes certain sections of the *Administrative Tribunals Act* applicable to the Commission. This includes s. 44(1) which provides that "[t]he tribunal does not have jurisdiction over constitutional questions". However, "constitutional question" is defined narrowly in s. 1 of the *Administrative Tribunals Act* as "any question that requires notice to be given under section 8 of the *Constitutional Question Act*". Notice is required only for challenges to the constitutional validity or constitutional applicability of any law, or are application for a constitutional remedy.

72 The application to the Commission by the CSTC for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982*. In broad terms, consultation under s. 35 of the *Constitution Act, 1982* is a constitutional question: *Paul*, para. 38. However, the provisions of the *Administrative Tribunals Act* and the *Constitutional Question Act* do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, in applying the test articulated in *Paul* and *Conway*, the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.

73 For these reasons, I conclude that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place.

74 While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place, its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

75 As the Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the Legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

D. The Commission's Reconsideration Decision

76 The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups. The reason it decided it would not consider this issue was not for want of power, but because

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it concluded that the consultation issue could not arise, given its finding that the 2007 EPA would not adversely affect any Aboriginal interest.

77 As reviewed earlier in these reasons, the Commission held a hearing into the issue of whether the main hearing should be rescoped to permit exploration of the consultation issue. The evidence at this hearing was directed to the issue of whether approval of the 2007 EPA would have any adverse impact on the interests of the CSTC First Nations. The Commission considered both the impact of the 2007 EPA on river levels (physical impact) and on the management and control of the resource. The Commission concluded that the 2007 EPA would not have any adverse physical impact on the Nechako River and its fishery. It also concluded that the 2007 EPA did not "transfer or change control of licenses or authorizations", negating adverse impacts from management or control changes. The Commission held that an underlying infringement (i.e. failure to consult on the initial project) was not sufficient to trigger a duty to consult. It therefore dismissed the application for reconsideration and declined to rescope the hearing to include consultation issues.

78 The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statutes, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative Tribunals Act*. Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness" as set out in *Haida Nation* and *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

79 A duty to consult arises, as set out above, when there is: (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right, (b) contemplated Crown conduct, and (c) the potential that the contemplated conduct may adversely affect the Aboriginal claim or right. If, in applying the test set out in *Haida Nation*, it is arguable that a duty to consult could arise, the Commission would have been wrong to dismiss the rescoping order.

80 The first element of the duty to consult — Crown knowledge of a potential Aboriginal claim or right — need not detain us. The CSTC First Nations' claims were well-known to the Crown; indeed, it was lodged in the Province's formal claims resolution process.

81 Nor need the second element — proposed Crown conduct or decision — detain us. BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia.

82 The third element — adverse impact on an Aboriginal claim or right caused by the Crown conduct — presents greater difficulty. The Commission, referring to *Haida Nation*, took the view that to meet the adverse impact requirement, "more than just an underlying infringement" was required. In other words, it must be shown that the 2007 EPA could "adversely affect" a current Aboriginal interest. The Court of Appeal rejected, or must be taken to have rejected, the Commission's view of the matter.

83 In my view, the Commission was correct in concluding that an underlying infringement in and of itself

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would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past. The Commission applied the correct legal test.

84 It was argued that the Crown breached the rights of the CSTC when it allowed the Kenney Dam and electricity production powerhouse with their attendant impacts on the Nechako River to be built in the 1950s and that this breach is ongoing and shows no sign of ceasing in the foreseeable future. But the issue before the Commission was whether a fresh duty to consult could arise *with respect to the Crown decision before the Commission*. The question was whether the 2007 EPA could *adversely* impact the claim or rights advanced by the CSTC First Nations in the ongoing claims process. The issue of ongoing and continuing breach was not before the Commission, given its limited mandate, and is therefore not before this Court.

85 What then is the potential impact of the 2007 EPA on the claims of the CSTC First Nations? The Commission held there could be none. The question is whether this conclusion was reasonable based on the evidence before the Commission on the rescoping inquiry.

86 The Commission considered two types of potential impacts. The first type of impact was the physical impact of the 2007 EPA on the Nechako River and thus on the fishery. The Commission conducted a detailed review of the evidence on the impact the 2007 EPA could have on the river's water levels and concluded it would have none. This was because the levels of water on the river were entirely governed by the water licence and the 1987 agreement between the Province, Canada, and Alcan. The Commission rejected the argument that not approving the 2007 EPA could potentially raise water levels in the Nechako River, to the benefit of the fishery, on the basis of uncontradicted evidence that if Alcan could not sell its excess electricity to BC Hydro it would sell it elsewhere. The Commission concluded that with or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation". Finally, the Commission concluded that changes in the timing of water releases for power generation have no effect on water levels in the Nechako River because water releases for power generation flow into the Kemano River to the west, rather than the Nechako River to the east.

87 The Commission also considered whether the 2007 EPA might bring about organizational, policy, or managerial changes that might adversely affect the claims or rights of the CSTC First Nations. As discussed above, a duty to consult may arise not only with respect to specific physical impacts, but with respect to high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants. It noted that a "section 71 review does not approve, transfer or change control of licenses or authorization". Approval of the 2007 EPA would not effect management changes, ruling out any attendant adverse impact. This, plus the absence of physical impact, led the Commission to conclude that the 2007 EPA had no potential to adversely impact on Aboriginal interests.

88 It is necessary, however, to delve further. The 2007 EPA calls for the creation of a Joint Operating Committee, with representatives of Alcan and BC Hydro (s. 4.13). The duties of the committee are to provide advice to the parties regarding the administration of the 2007 EPA and to perform other functions that may be specified

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or that the parties may direct (s. 4.14). The 2007 EPA also provides that the parties will jointly develop, maintain, and update a reservoir operating model based on Alcan's existing operating model and "using input data acceptable to both Parties, acting reasonably" (s. 4.17).

89 The question is whether these clauses amount to an authorization of organizational changes that have the potential to adversely impact on Aboriginal interests. Clearly the Commission did not think so. But our task is to examine that conclusion and ask whether this view of the Commission was reasonable, bearing in mind the generous approach that should be taken to the duty to consult, grounded in the honour of the Crown.

90 Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be viewed as organizational changes effected by the 2007 EPA, the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive.

91 By contrast, in this case, the Crown remains present on the Joint Operating Committee and as a participant in the reservoir operating model. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The CSTC First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require BC Hydro to give the CSTC First Nations notice of any decisions under the 2007 EPA that have the potential to adversely affect their claims or rights.

92 This ongoing right to consultation on future changes capable of adversely impacting Aboriginal rights does not undermine the validity of the Commission's decision on the narrow issue before it: whether approval of the 2007 EPA could have an adverse impact on claims or rights of the CSTC First Nations. The Commission correctly answered that question in the negative. The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA is approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it, as is their entitlement under Final Water Licence No. 102324 and the 1987 Agreement on waterflows. Moreover, although the Commission did not advert to it, BC Hydro, as a participant on the Joint Operating Committee and the reservoir management team, must in the future consult with the CSTC First Nations on any decisions that may adversely impact their claims or rights. On this evidence, it was not unreasonable for the Commission to conclude that the 2007 EPA will not adversely affect the claims and rights currently under negotiation of the CSTC First Nations.

93 I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the organizational implications of the 2007 EPA and at the

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physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

E. The Commission's Decision that Approval of the 2007 EPA was in the Public Interest

94 The attack on the Commission's decision to approve the 2007 EPA was confined to the Commission's failure to consider the issue of adequate consultation over the affected interests of the CSTC First Nations. The conclusion that the Commission did not err in rejecting the application to consider this matter removes this objection. It follows that the argument that the Commission acted unreasonably in approving the 2007 EPA fails.

V. Disposition

95 I would allow the appeal and confirm the decision of the British Columbia Utilities Commission approving the 2007 EPA. Each party will bear their costs.

Appeal allowed.

Pourvoi accueilli.

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2002 CarswellBC 2928, 2002 BCSC 1701, [2003] B.C.W.L.D. 161, 10 B.C.L.R. (4th) 126, 48 Admin. L.R. (3d) 225, [2003] 2 C.N.L.R. 142

Gitxsan Houses v. British Columbia (Minister of Forests)

Yal also known as Aubrey Jackson, Djogaslee also known as Ted Mowatt, Lelt also known as Lloyd Ryan, Geel also known as Walter Harris, Wii Eelast also known as Jim Angus, Tsabux also known as Wilmer Johnson, Tenimgyet also known as Art Mathews Jr., and Sakxum Higookw also known as Vernon Smith, on behalf of themselves and in their capacity as Gitxsan House Chiefs and on behalf of all members of the Gitxsan Houses having their principal Office at P.O. Box 229, 1650 Omineca Street, Hazelton B.C. V0J 2N0, Petitioners and Minister of Forests of the Province of British Columbia and Skeena Cellulose Inc., Respondents

The Lax Kw'alaams Indian Band, by Chief Councillor Garry Reece on his own behalf and on behalf of the members of the Lax Kw'alaams Indian Band, and the Metlakatla Indian Band, by Chief Councillor Harold Leighton, on his own behalf and on behalf of the members of the Metlakatla Indian Band, and the Allied Tsimshian Tribes Association, Petitioners and 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, and Skeena Cellulose Inc. and NWBC Timber & Pulp Ltd., Respondents

Gwasslam also known as George Phillip Daniels, Gwinuu also known as Godfrey Good, Gamlaxyeltxw also known as Edger Good, Sindihl also known as Robert Good, Widaxhayetsxw also known as Agatha Bright, Wiilitsque also known as Morris Derrick, Malii also known as Gordon Johnson, on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all members of the Gitanyow First Nation having their principal office at P.O. Box 148, Kitwanga, British Columbia, V0J 2A0, Petitioners and the Minister of Forests for the Province of British Columbia, Skeena Cellulose Inc. and NWBC Timber & Pulp Ltd., Respondents

British Columbia Supreme Court

Tysoe J.

Heard: September 23-27, October 21-23, 2002

Judgment: December 10, 2002

Docket: Smithers 12437, Vancouver L021279, L021243

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Peter R.A. Grant and David Kalmakoff, for petitioners (in Action Vancouver L021243)

2002 CarswellBC 2928, 2002 BCSC 1701, [2003] B.C.W.L.D. 161, 10 B.C.L.R. (4th) 126, 48 Admin. L.R. (3d) 225, [2003] 2 C.N.L.R. 142

Paul J. Pearlman, Q.C., and Paul Yearwood, for respondent Minister of Forests (in all Actions) and for respondent Attorney General of the province of British Columbia (in Action Vancouver L021279)

Charles F. Willms, for respondent Skeena Cellulose Inc. (in Action Smithers 12437)

Charles F. Willms, for respondents Skeena Cellulose Inc. and NWBC Timber & Pulp Ltd. (in Action Vancouver L021279)

Charles F. Willms and Kevin G. O'Callaghan, for respondent Skeena Cellulose Inc. (in Action Vancouver L021243)

Subject: Public; Insolvency; Property; Natural Resources

Native law --- Reserves and real property — Rights and title — Non-reserve land

Minister of Forests consented to transfer of control of S Inc., which held tree farm and forest licences, from Crown to timber company — Under s. 54 of British Columbia Forest Act, Minister has duty to consult and accommodate First Nation bands with aboriginal claims to land covered by licences before consenting to transfer — First Nation bands were involved in treaty negotiations — First Nation bands and individuals brought petitions challenging Minister's consent — Petitions granted in part — Issues were questions of law, and standard of review was correctness — Evidence supported claims that aboriginal rights of hunting and fishing extended to some lands subject to tree farm and forest licences — Each petitioning First Nation had good prima facie claim of aboriginal title and strong prima facie claim of aboriginal rights to part of lands in question — Change of control of holder of tree farm and forest licences constitutes prima facie infringement of aboriginal title and rights — Meetings held between ministry officials and band representatives had been brief and were called on short notice — Minister did not adequately fulfil duty to consult and accommodate — Because Minister's consent did not affect treaty negotiations, Minister did not breach duty to negotiate in good faith — Share transfer of S Inc. could not be reversed — Declaration was issued that Minister had legally enforceable duty to consult and accommodate First Nations and that he was required to provide petitioners with all relevant information requested by them.

Administrative law --- Prerequisites to judicial review — Nature of tribunal under review — Crown — Ministers of Crown

Minister of Forests consented to transfer of control of S Inc., which held tree farm and forest licences, from Crown to timber company — Under s. 54 of British Columbia Forest Act, Minister has duty to consult and accommodate First Nation bands with aboriginal claims to land covered by licences before consenting to transfer — First Nation bands were involved in treaty negotiations — First Nation bands and individuals brought petitions challenging minister's consent — Petitions granted in part — Issues were questions of law, and standard of review was correctness — Evidence supported claims that aboriginal rights of hunting and fishing extended to some lands subject to tree farm and forest licences — Each petitioning First Nation had good prima facie claim of aboriginal title and strong prima facie claim of aboriginal rights to part of lands in question — Change of control of holder of tree farm and forest licences constitutes prima facie infringement of aboriginal title and rights — Meetings held between ministry officials and band representatives had been brief and were called on short notice — Minister did not adequately fulfil duty to consult and accommodate — Because Minister's consent did

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not affect treaty negotiations, Minister did not breach duty to negotiate in good faith — Share transfer of S Inc. could not be reversed — Declaration was issued that Minister had legally enforceable duty to consult and accommodate First Nations and that he was required to provide petitioners with all relevant information requested by them.

Timber --- Timber licences — General

Minister of Forests consented to transfer of control of S Inc., which held tree farm and forest licences, from Crown to timber company — Under s. 54 of British Columbia Forest Act, Minister has duty to consult and accommodate First Nation bands with aboriginal claims to land covered by licences before consenting to transfer — First Nation bands were involved in treaty negotiations — First Nation bands and individuals brought petitions challenging Minister's consent — Petitions granted in part — Issues were questions of law, and standard of review was correctness — Evidence supported claims that aboriginal rights of hunting and fishing extended to some lands subject to tree farm and forest licences — Each petitioning First Nation had good prima facie claim of aboriginal title and strong prima facie claim of aboriginal rights to part of lands in question — Change of control of holder of tree farm and forest licences constitutes prima facie infringement of aboriginal title and rights — Meetings held between ministry officials and band representatives had been brief and were called on short notice — Minister did not adequately fulfil duty to consult and accommodate — Because Minister's consent did not affect treaty negotiations, Minister did not breach duty to negotiate in good faith — Share transfer of S Inc. could not be reversed — Declaration was issued that Minister had legally enforceable duty to consult and accommodate First Nations and that he was required to provide petitioners with all relevant information requested by them.

Cases considered by *Tysoe J.*:

Delgamuukw v. British Columbia, 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered

Gitanyow First Nation v. Canada, 1999 CarswellBC 581, [1999] 3 C.N.L.R. 89, 66 B.C.L.R. (3d) 165 (B.C. S.C. [In Chambers]) — followed

Haida Nation v. British Columbia (Minister of Forests), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.) — followed

Haida Nation v. British Columbia (Minister of Forests), 2002 BCCA 462, 2002 CarswellBC 2067, 216 D.L.R. (4th) 1, 5 B.C.L.R. (4th) 33, [2002] 10 W.W.R. 587, [2002] 4 C.N.L.R. 117 (B.C. C.A.) — considered

Halfway River First Nation v. British Columbia (Ministry of Forests), 1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 129 B.C.A.C. 32, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 210 W.A.C. 32 (B.C. C.A.) — considered

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture), 2002 SCC 31, 2002 CarswellBC 617, 2002 CarswellBC 618, 210 D.L.R. (4th) 577, [2002] 2 C.N.L.R. 143, (sub nom. *Kitkatla*

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Indian Band v. British Columbia (Minister of Small Business, Tourism & Culture) 286 N.R. 131, [2002] 6 W.W.R. 1, 1 B.C.L.R. (4th) 1, 165 B.C.A.C. 1, 270 W.A.C. 1 (S.C.C.) — considered

Klahoose First Nation v. British Columbia (Minister of Forests), 13 B.C.L.R. (3d) 59, [1996] 1 W.W.R. 757, 1995 CarswellBC 935 (B.C. S.C.) — distinguished

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2001 FCT 1426, 2001 CarswellNat 2902, [2002] 1 C.N.L.R. 169, 214 F.T.R. 214 (Fed. T.D.) — considered

Mitchell v. Minister of National Revenue, 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.*) 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.*) 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.*) [2001] 3 C.N.L.R. 122, (sub nom. *Mitchell v. M.N.R.*) [2001] 1 S.C.R. 911, 206 F.T.R. 160 (note), [2002] 3 C.T.C. 359 (S.C.C.) — referred to

R. v. Nikal, [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013, (sub nom. *Canada v. Nikal*) 35 C.R.R. (2d) 189, [1996] 3 C.N.L.R. 178, 1996 CarswellBC 950, 1996 CarswellBC 950F (S.C.C.) — considered

R. v. Noel, [1995] 4 C.N.L.R. 78, [1996] N.W.T.R. 68, 1995 CarswellNWT 38 (N.W.T. Terr. Ct.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — considered

Skeena Cellulose Inc., Re, 2002 BCSC 597, 2002 CarswellBC 1021, 34 C.B.R. (4th) 298 (B.C. S.C. [In Chambers]) — considered

Skeena Cellulose Inc., Re, 2002 BCCA 403, 2002 CarswellBC 1691, 36 C.B.R. (4th) 101 (B.C. C.A. [In Chambers]) — referred to

Suresh v. Canada (Minister of Citizenship & Immigration), 2002 CarswellNat 7, 2002 CarswellNat 8, 2002 SCC 1, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159 (S.C.C.) — considered

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 211 D.L.R. (4th) 89, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 163 B.C.A.C. 164, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.) — considered

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2002 CarswellBC 2740, 2002 CarswellBC 2741 (S.C.C.) — referred to

Statutes considered:

2002 CarswellBC 2928, 2002 BCSC 1701, [2003] B.C.W.L.D. 161, 10 B.C.L.R. (4th) 126, 48 Admin. L.R. (3d) 225, [2003] 2 C.N.L.R. 142

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Environmental Assessment Act, R.S.B.C. 1996, c. 119

Generally — referred to

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

Generally — referred to

s. 36 — considered

s. 54 — considered

s. 55 — referred to

Heritage Conservation Act, R.S.B.C. 1996, c. 187

Generally — referred to

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

Generally — referred to

Tariffs considered:

Rules of Court, 1990, B.C. Reg. 221/90

App. B, s. 2(2)(d) — referred to

PETITIONS by First Nations challenging decision of Minister of Forests to consent to change of control of corporation holding tree farm and forest licences over lands subject to aboriginal treaty claims.

Tysoe J.:

Introduction

1 In each of these three proceedings, the Petitioners challenge the decision of the Minister of Forests (the "Minister") to consent to the change of control of Skeena Cellulose Inc. ("Skeena") by which NWBC Timber & Pulp Ltd. ("NWBC") became the owner of all of the shares in the capital of Skeena. The Gitanyow First Nation also challenges other actions related to Skeena and makes additional requests for relief.

2 The Petitioners in each proceeding are aboriginal people who assert aboriginal title and rights in respect of lands covered by a tree farm licence and several forest licences issued to Skeena and its subsidiaries pursuant to the *Forest Act*, R.S.B.C. 1996, c. 157 (the "Act"). Section 54 of the Act provides that, among other things, the Minister must consent before a licence issued under the Act is transferred or before there is a change of control of the holder of such a licence. The Petitioners assert that, in giving his consent to the change of control of Skeena, the Minister failed to fulfil his duty of consultation and accommodation as articulated by the Supreme

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Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) ("*Delgamuukw*"), and as elaborated upon by, among others, the B.C. Court of Appeal in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 (B.C. C.A.), *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2002 BCCA 59 (B.C. C.A.), leave to appeal to S.C.C. granted [2002] S.C.C.A. No. 148 (S.C.C.) ("*Taku River*"), *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 147 (B.C. C.A.) ("*Haida No. 1*"), and *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 462 (B.C. C.A.) ("*Haida No. 2*") (together "*Haida*"), leave to appeal to S.C.C. requested.

3 Despite the fact that there are different facts in each proceeding, I have decided that it is appropriate to issue a single set of Reasons for Judgment in respect of all three proceedings. None of the factual differences or additional challenges affect my reasoning or overall conclusions. It will still be necessary for counsel to draw up separate Orders in each of the proceedings to reflect the declarations and orders flowing from these Reasons. Although I am issuing a single set of Reasons for Judgment, I have only relied on the evidence in each proceeding to reach my conclusions with respect to the issues involved in that proceeding.

Facts

Recent History of Skeena

4 Skeena has been involved in the forestry industry in northwestern British Columbia for many years. It has a pulp mill in Prince Rupert and, either directly or indirectly through subsidiaries, it operates several saw mills. Skeena holds several licences issued under the Act in connection with its operations.

5 The main licence held by Skeena is a tree farm licence, which gives it the exclusive right to harvest timber in three areas covered by it to the extent of the annual allowable cut attached to the licence in the approximate amount of 600,000 cubic metres of timber. Parts of the areas covered by the tree farm licence are among the lands claimed by each of the petitioning First Nations. As with all other tree farm licences issued under the Act, Skeena's tree farm licence has a term of 25 years. Section 36 of the Act sets out a procedure for the replacement of a tree farm licence every five years. Each replacement licence has a term of 25 years so that the practical effect of a replacement is to extend the term by five years. If a licence is not replaced at the end of the five-year period, the licence continues in existence for the remaining 20 years of its term and it then expires with no right of replacement.

6 Skeena also holds at least six forest licences and a seventh forest licence is held by Buffalo Head Forest Products Ltd. ("*Buffalo Head*"), a company which was owned by Skeena until the transaction in question. Forest licences give the holder the right to harvest an annual volume of timber within timber supply areas. Unlike a tree farm licence, a forest licence does not give its holder the exclusive right to harvest timber within a timber supply area. The chief forester determines the allowable annual cut for a particular timber supply area and the volume is then apportioned among the holders of licences. A holder of a forest licence harvests timber in particular areas within the timber supply area in accordance with cutting permits issued by the Ministry of Forests. Forest licences held by Skeena (and the forest licence held by Buffalo Head) relate to timber supply areas within the territories claimed by the petitioning First Nations.

7 Skeena has been encountering financial difficulties for the past decade. It sought the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"), in the mid-1990s and its two principal creditors, the Crown and The Toronto-Dominion Bank, became its shareholders through a numbered holding company (with an agreement to give shares to Skeena's employees in consideration of a 10% wage cut over

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7 years). When there was a change in the provincial government in May 2001, the Ministry holding Skeena's shares was given the mandate of returning Skeena to private sector ownership.

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

9 On February 20, 2002, the Crown executed a purchase agreement with NWBC for the sale of its shares in Skeena to NWBC. Based on the purchase agreement, a restructuring plan was formulated to give a limited recovery to Skeena's creditors (\$6 million for the secured creditors and \$2 million, or 10 cents on the dollar, for the unsecured creditors). Skeena's creditors approved the restructuring plan at creditor meetings on April 2. The plan was sanctioned by Brenner C.J.S.C. on April 4.

10 The closing of the share transaction and the implementation of Skeena's restructuring plan were scheduled for April 29. The latest extension of the stay in the CCAA proceedings was set to expire on April 30 and, if the restructuring was not completed by April 30, Skeena was to be assigned into bankruptcy. These deadlines were capable of further extension but it is not known whether Brenner C.J.S.C. or NWBC would have been prepared to grant an extension of any significant length.

11 One of the conditions of the purchase agreement was that the Minister consent to the change of control of Skeena. As the transaction was scheduled to complete by April 29, the Minister was required to make his decision by this date.

Communications between the Ministry and the Petitioners

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

13 I will now outline the events from the perspective of each of the four First Nations which are Petitioners in these proceedings. There was some affidavit evidence regarding the conversations which took place at the meetings but, for the most part, I have relied on minutes of the meetings prepared by a consultant hired by the Ministry of Forests who attended all but one of the meetings, together with minutes prepared by another government representative in respect of the meeting not attended by the consultant.

(a) Gitksan

14 Representatives of the Ministry of Forests met with representatives of the Gitksan (also spelled Gitksan) First Nation on April 12 and 19. The April 12 meeting was public and it was attended by non-Gitksan persons as well as Gitksan representatives. It is unclear whether the meeting was expressed as a consultation on aboriginal rights and title. A Gitksan representative asked to see a copy of the agreement between the Crown and NWBC, and was told that it was confidential. One of the Gitksan speakers expressed the view that there was nothing

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upon which the Gitksan could make a decision to approve or disapprove of the transaction. Another Gitksan speaker stated that some of the Gitksan Houses opposed the transfer because they were not consulted on activities occurring within their territories. Employment concerns were also raised by the Gitksan. At the conclusion of the meeting, the Gitksan stated that there had to be a thorough consultation process and that "mere consultation" was not sufficient.

15 On April 15, the Chair of the Gitksan Treaty Society wrote to the Minister about the April 12 meeting and future meetings. The letter stated that there must be a discussion of the process for consultation and accommodation. The letter listed a number of issues in respect of which the Gitksan wished to be consulted. It requested seven items of information. The letter concluded by expressing the view that the Gitksan needed to be fully informed of the implications of the transaction before they could be properly consulted. The Gitksan First Nation have never received a reply to this letter.

16 The April 19 meeting lasted approximately 1 $\frac{1}{2}$ hours. A number of Gitksan speakers expressed concerns about such matters as unemployment, the lack of any offers of partnership and the removal of resources from their territories. The meeting concluded with a Gitksan speaker stating that the Gitksan did not view the meeting as a consultation meeting and that they were prepared to enter into proper consultation when they had full information. One of the Ministry's representatives responded that the concerns expressed by the Gitksan at the meeting would be forwarded to the Minister.

(b) Lax Kw'alaams

17 No meetings occurred between representatives of the Ministry and the Lax Kw'alaams First Nation. A meeting was scheduled for April 16 but it was postponed by the First Nation after a letter dated April 9 was written to the Minister by the Chief Councillor of the Lax Kw'alaams Indian Band and the President of the Allied Tsimshian Tribes Association (the "Association"). The letter requested that the Minister withhold his consent to the transfer of control of the forest tenures until he had completed a full and appropriate consultation process with the Lax Kw'alaams Indian Band. It expressed the view that a proper consultation would (i) involve a distinct and separate process, (ii) involve a full discussion of the proper allocation of forest resources in the aboriginal title lands of the Lax Kw'alaams and (iii) involve discussion of compensation for past and future infringements of their aboriginal rights and title. No response to this correspondence was received until May 8, when the Minister sent a letter in which he stated, among other things, that he had consented to the proposed change of control after reviewing all of the information provided to him.

18 On April 23, legal counsel for the Lax Kw'alaams and the Association wrote to the lawyer with the Ministry of Attorney General who was involved in the meetings with the other First Nations. The lack of response to the April 9 letter was noted and a request was made for a consultation meeting with the Minister or his representative. No meeting took place. The Lax Kw'alaams band manager was told by a Ministry official on April 24 that there was no point in holding a meeting and that nothing could be done in view of the timetable for the transaction.

(c) Metlakatla

19 One meeting was held on April 15 between representatives of the Metlakatla Indian Band and Ministry officials. The meeting lasted for approximately one hour.

20 At the outset of the meeting, a Metlakatla representative stated that it was a highly flawed consultation

process with inadequate time frames and that the Metlakatla could not support the transaction or the process without proper and meaningful consultation. The representative stated that he considered the meeting to be an information sharing meeting.

21 When one of the Metlakatla asked if the meeting was a result of the *Haida* case consultation ruling (*Haida No. 1* had been issued less than two months earlier), the lawyer from the Ministry of Attorney General responded that it was and she concurred that the process was less than adequate as far as consultation was concerned. She also stated that the government officials were not at the meeting to request approval of either the transaction or the process.

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

(d) Gitanyow

23 Although the communications between the Ministry of Forests and the other First Nations commenced with the Ministry's March 27 letter, the Gitanyow's legal counsel had written an earlier letter to the Minister. By letter dated March 19, the Gitanyow's counsel wrote to the Minister making reference to media reports of a sale of Skeena to NWBC and requesting confirmation that the forest tenures held by Skeena would not be transferred until the completion of "legally required consultation with a view of accommodating the Aboriginal rights and title of the Gitanyow." As with the April 9 letter written to the Minister by the Lax Kw'alaams, there was no response to this letter until May 8, when the Minister wrote a letter stating that he had consented to the change of control of Skeena.

24 On April 5, the chief treaty negotiator for the Gitanyow wrote to the Attorney General enclosing a copy of the March 19 letter and requesting that he arrange a timely response from the government with respect to its constitutional obligation to consult with the Gitanyow. The Attorney General responded by letter dated April 8. He acknowledged the concern around adequate consultation and stated that he appreciated the significance of the recent decisions of the B.C. Court of Appeal (which were presumably the *Taku River* and *Haida No. 1* decisions). The Attorney General recorded his understanding that a meeting between representatives of the Gitanyow and the Ministry of Forests was scheduled for April 12 and stated that he looked forward to the results of the meeting.

25 On April 9, the Gitanyow tabled a draft of a framework agreement for consultation and accommodation with the B.C. treaty negotiators (a copy was also given to NWBC). The purpose of this draft agreement was to set out a process for consultation and accommodation with respect to forestry operations and the granting or transferring of forest tenures affecting the territory claimed by the Gitanyow. No comments on the form of the agreement have been made by the Crown (although a letter written by the Deputy Minister of Forests on the business day immediately preceding the hearing of the Gitanyow's Petition on October 21 has indicated a willingness to hold a workshop to discuss the draft agreement).

26 The April 12 meeting lasted approximately 2 $\frac{1}{2}$ hours. The meeting began with a statement on behalf of the Gitanyow that they did not view the meeting as a consultation. It is alleged in an affidavit filed in these proceedings that the President of NWBC, who was in attendance at the meeting, agreed that the meeting was not a consultation, although the minutes of the meeting taken by the consultant hired by the Ministry do not reflect a

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statement to this effect.

27 There were further discussions throughout the meeting about the topic of consultation. A Gitanyow representative made reference to the decisions in *Taku River* and *Haida No. 1*, and stated that the Ministry had an obligation to consider their cultural and economic interest. A Ministry representative responded that the Ministry of Attorney General was working on an analysis of those decisions and would be developing guidelines for consulting, which would then be incorporated into the Ministry's own policies. The Ministry representative acknowledged that the Crown was still looking into how it would approach consultation. He subsequently stated that the Ministry needed to ensure that it had a meaningful consultative process and time would be required to work on it as a result of cutbacks having the effect of reducing capacity within the Ministry.

28 During the meeting, the Gitanyow expressed concerns about the environment, unemployment of their people, a dwindling of resources and the effect of logging on fishing and game. A Gitanyow speaker raised the topic of NWBC's business plan and was told that NWBC was not prepared to discuss its business plan in detail until the transaction closed. An issue was also raised about the fact that the Buffalo Head tenure was being excluded from the transaction and NWBC's President replied that it was expedient to exclude it.

29 On April 21, the chief treaty negotiator for the Gitanyow wrote to the Minister requesting certain information with respect to the proposed change of control of Skeena. The letter stated that the April 12 meeting did not constitute even a beginning of consultation and that the requested information was needed to start the consultation process. The only response to this letter was the Minister's May 8 letter stating that he had consented to the change of control of Skeena.

The Injunction Application

30 As mentioned above, the closing of the sale and the implementation of Skeena's restructuring plan were scheduled for April 29. On April 23, the Gitanyow proceeding was commenced, and the Lax Kw'alaams proceeding was initiated on April 25. An application was then brought by the Gitanyow and Lax Kw'alaams First Nations in their proceedings and Skeena's CCAA proceedings for an interlocutory injunction to restrain the Minister from giving his consent to the change of control of Skeena. The application was heard by Brenner C.J.S.C., who dismissed it on April 30 (cited as *Re Skeena Cellulose Inc.*, 2002 BCSC 597 (B.C. S.C. [In Chambers])), leave to appeal granted but stayed until the determination of these proceedings, 2002 BCCA 403 (B.C. C.A. [In Chambers])). I gather that the closing of the sale and implementation of the restructuring plan were postponed for one day in order to give Brenner C.J.S.C. an opportunity to give a considered decision.

31 In dismissing the injunction application, Brenner C.J.S.C. applied the well-known three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) ("*RJR-MacDonald*"), for the granting of interim relief. It was conceded by opposing counsel that the first part of the test was satisfied in view of the serious question to be tried. In dealing with the second part of the test, Brenner C.J.S.C. held that the applicants had failed to demonstrate any significant prejudice or irreparable harm but, as there was some prejudice, he went on to consider the final leg of the test. In considering the balance of convenience, Brenner C.J.S.C. said the following:

The potential prejudice to [Skeena], to NWBC, to the creditors, employees and contractors dependent upon [Skeena], and indeed to many members of the public of British Columbia should the sale not close, in my view, considerably outweighs any prejudice that the petitioners might suffer as a consequence of the Minister giving his final consent to the change in control. (para. 23)

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Brenner C.J.S.C. concluded that the balance of convenience did not favour the granting of the injunction and that the Minister should not be restrained from giving his consent to the change in control.

Consent of the Minister

32 The Minister's consent to the change of control of Skeena was required pursuant to s. 54 of the Act. In addition to stipulating that the Minister must consent to a disposition of a licence issued pursuant to the Act, s. 54 requires his prior consent to be obtained for an amalgamation of a licence holder with another company and for a change of control of a licence holder.

33 As previously mentioned, a consultant retained by the Ministry of Forests attended all of the meetings with the First Nation groups (with the exception of the meeting with the Metlakatla Band, which was attended by another government representative who took notes of the meeting). The consultant prepared a report to the Minister for his consideration in deciding whether to consent to the change in control. The body of the report was 10 pages long and the minutes of the various meetings were attached as an appendix to the report. It summarized the concerns expressed by the First Nation groups at the meetings (including the concern about the lack of proper consultation).

34 The Minister gave his approval in principle to Skeena's change of control on April 24 and he gave his final consent on April 30. The Minister's consent was given subject to three conditions, the terms of which were contained in the Minister's April 24 letter, as amended by responding correspondence from Skeena/NWBC. The conditions, as amended, were as follows:

[Skeena] and NWBC must:

1. acknowledge that [Skeena's] licences issued under the *Forest Act* and their ancillary permits may be affected by land use planning decisions, aboriginal interests, and treaty negotiations with First Nations;
2. acknowledge that the change of control of [Skeena] will be without prejudice to any aboriginal rights or title that may exist in or over the land supporting the licences. For the purposes of clarity, this is not an acknowledgement that there are aboriginal rights or title in or over any of the affected land. Rather, this is an acknowledgement that the proposed change of control is neutral with respect to any aboriginal right or title; and
3. agree in writing to provide, within 60 days of the change in control of [Skeena] becoming effective, copies of a business plan for [Skeena] to the Regional Manager, Prince Rupert Forest Region, and to a representative of each First Nation asserting aboriginal or treaty rights within the operating area of [Skeena].

The consent letter, as amended, also contained the following paragraph immediately following the three conditions:

The rights and responsibilities described in this letter are for the sole benefit of, and binding on [Skeena], NWBC and the Ministry of Forests, and are subject to enforcement by them solely and may not be used or relied upon by third parties for any purpose, except aboriginals in respect of their existing aboriginal rights or title.

After the Minister gave his consent, the sale transaction completed and all of the shares in the capital of Skeena

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were acquired by NWBC. The business plan described in the third condition was not delivered within the 60-day time limit but it was subsequently provided within a 30-day extension granted by the Minister.

Aboriginal Claims of the Petitioners

35 Each of the Petitioners assert aboriginal title and aboriginal rights in the areas covered by Skeena's tree farm licence and forest licences. Before summarizing each of their claims, I will deal briefly with the status of their treaty negotiations.

36 In 1992, Canada, British Columbia and representatives of the First Nations Summit entered into the British Columbia Treaty Commission Agreement. This Agreement incorporated the following six-stage treaty process:

Stage 1: Submission of Statement of Intent to negotiate a treaty

Stage 2: Preparation for negotiations

Stage 3: Negotiation of Framework Agreement

Stage 4: Negotiation of Agreement in Principle

Stage 5: Negotiation to finalize a treaty

Stage 6: Implementation of the treaty

Each of the petitioning First Nations is currently at Stage 4 of the treaty process.

37 The chief treaty negotiator of the Gitanyow had deposed that the Crown's chief negotiator has stated that the Gitanyow treaty negotiations are one of the most advanced treaty negotiations in British Columbia. One of the claims made by the Gitanyow in the present proceedings is for a declaration that the Crown has breached its duty to conduct treaty negotiations in good faith. None of the other petitioning First Nation groups seek this form of relief, although it was evident from the materials and submissions of counsel that at least the Gitksan First Nation is quite frustrated with the negotiations.

38 In the *Taku River* decision, the chambers judge pointed out that the federal government had agreed to negotiate land claims with the Tlingit First Nation in 1984 on the basis of a preliminary determination that it had aboriginal rights in the territory claimed by it. The chief treaty negotiator under the B.C. treaty process has deposed that any information submitted by a First Nation in which they assert the existence of aboriginal rights and title is used by the Province for the purpose of identifying the interests or areas which the First Nation wishes to negotiate, and is not for the purpose of evaluating or assessing whether the information is sufficient to meet the legal criteria for the proof of aboriginal rights and title.

39 The Gitanyow say that they are in the same position as the Tlingit First Nation. The Gitanyow submitted a claim to the federal government in 1977 with respect to their rights in and to the territory claimed by them. The claim was accepted for negotiation by the federal government in 1981. The policy of the federal government at the time was that comprehensive claims would be denied or accepted for settlement after they were analyzed in terms of both their historical accuracy and legal merit by the Office of Native Claims and the Department of

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Justice.

40 I will now summarize the evidence in support of aboriginal title and rights as proffered by each of the petitioning First Nations.

(a) Gitxsan Claims

41 The Gitxsan Houses were one set of the plaintiffs in *Delgamuukw*, where the duty of consultation and accommodation was discussed by the Supreme Court of Canada. Hence, it is instructive to briefly review the decisions in that case at each of the three levels of court. At trial, the Hereditary Chiefs of 71 Gitxsan and Wet'suwet'en Houses claimed separate portions of 58,000 square kilometres of British Columbia. The trial judge did not accept the evidence of oral histories of the plaintiffs showing attachment to the claimed lands. He dismissed the claims for ownership, jurisdiction and aboriginal rights on the basis that the Crown had extinguished aboriginal rights to all lands in the colony.

42 On appeal, the individual claims by each of the Houses were amalgamated into two claims, one by the Gitxsan and one by the Wet'suwet'en. In addition, the claims for ownership and jurisdiction were replaced with claims for aboriginal title and self-government. The appeal to the B.C. Court of Appeal was dismissed by a majority of the Court.

43 The Supreme Court of Canada ordered a new trial on two bases. The first basis was the fact that there had been no amendment to the pleadings to reflect the changed claims being pursued on appeal. The second basis was that the trial judge had incorrectly refused to give any independent weight to the oral histories recited by the plaintiffs. In the course of its decision, the Court held that aboriginal rights had not been extinguished by the Crown.

44 In this proceeding, the affidavit evidence recounted that the Gitxsan First Nation consists of four clans, which are known as the frog, wolf, eagle and fireweed clans or phraties. Each clan has a number of wilps, which are extended family or house groups. There are a total of 65 Gitxsan Houses (53 of which participated in the *Delgamuukw* litigation).

45 Affidavits of members of the Gitxsan Houses were filed in support of the claims for aboriginal title and rights. The affidavits describe oral histories of the Gitxsan, such as the adaawk and family recollections (adaawk are described as ancient oral histories recounting origins and migrations since the ice ages). Based on the oral histories, the Gitxsan say that since time immemorial they have exercised aboriginal rights and title over approximately 30,471 square kilometres of territories located mainly in the Upper Skeena and Upper Nass watersheds. They say that they have occupied these territories exclusively and according to their laws. Attached to one of the affidavits were excerpts from the transcript of the *Delgamuukw* trial where the aboriginal rights of hunting and fishing were discussed. Attached to another of the affidavits was an affidavit filed in the *Delgamuukw* trial setting out the territory claimed by one of the Gitxsan Houses on the basis of instructions given to the deponent by persons who are now deceased. One of the deponents prepared a map showing the relationship between the territories claimed by the Gitxsan Houses and Skeena's tree farm and forest licences.

(b) Lax Kw'alaams and Metlakatla Claims

46 The affidavit evidence describes the relationship between the Lax Kw'alaams band and the Metlakatla band. They are two modern *Indian Act* bands which substantially represent the membership of nine Tsimshian

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tribes. The nine Tsimshian tribes formed the Association, one of the Petitioners in these proceedings, to be their representative. The Association is governed by the current Hereditary Chiefs of the original nine tribes.

47 The affidavits allege that the nine tribes have used and occupied certain territories shown on a map attached to the affidavits. The affidavits state that the deponents were told about their territories and rights at feasts and meetings or by their grandparents. The deponents say that before contact with the European people, the tribes occupied their territories and possessed the natural resources located in the territories to the exclusion of other people unless permission was granted to allow others to use the territories.

48 One of the affidavits was sworn by a professor who specializes in Tsimshian culture and language. Attached to her affidavit was a report dealing with the use and occupation of the lands covered by Skeena's tree farm licence by the Lax Kw'alaams and Metlakatla Indian Bands. Based on research done by the professor, the report concludes that some areas covered by Skeena's tree farm licence fall within the territory claimed to be owned by Tsimshian tribes and the territory claimed to be the hunting and berry grounds of one or more Tsimshian tribes.

(c) Gitanyow Claims

49 Several affidavits were sworn by Gitanyow persons. Similar to the Gitksan, the Gitanyow have two clans comprised of eight Houses. They also have oral histories called adaawks.

50 The chief treaty negotiator for the Gitanyow (who is a Hereditary Chief of one of the Houses) swore an affidavit to which he has attached three publications, (i) *Totem Poles of the Gitksan, Upper Skeena, British Columbia*, (ii) *Histories, Territories and Laws of the Kitwancool* and (iii) *Tribal Boundaries in the Nass Watershed*. The first of these works was prepared in 1929 by Marius Barbeau and published as Bulletin No. 61 of the National Museum of Canada. The second work was published in 1959 by Wilson Duff under the auspices of the Department of Education of the B.C. Provincial Museum. The third work was a report issued in 1995 for the Gitanyow Treaty Office. It was prepared by five persons (including counsel for the Gitanyow in these proceedings). The co-ordinator, researcher and principal writer of the report is a Gitksan person who swore two affidavits describing the process by which the report was prepared. In the affidavit of the chief treaty negotiator, it is deposed that these three works, the adaawk taught to him and the testimony in *Delgamuukw* all uphold that the Gitanyow have occupied the territory claimed by them prior to the arrival of the first white man and that the Gitanyow have continued to occupy the territory since 1846 (the year in which it was determined in *Delgamuukw* that British sovereignty over British Columbia was conclusively established).

51 Two other Hereditary Chiefs of Gitanyow Houses also swore affidavits. They say that they were taught various things by deceased relatives and a former chief. These teachings included the whereabouts of the boundaries of the territories of their respective Houses, the utilization and occupation of the territories and the Gitanyow laws.

Subsequent Events Affecting the Gitanyow

52 As mentioned in the introduction of these Reasons for Judgment, the Gitanyow First Nation challenges actions of the Crown in addition to the Minister's decision to consent to the change of control of Skeena. The Amended Petition of the Gitanyow requests a declaration that the failure of the Minister to ensure meaningful consultation with respect to forestry development which may affect the Gitanyow's aboriginal rights and title constitutes a breach of the Minister's constitutional and fiduciary duties towards the Gitanyow.

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53 This additional claim relates to two proposed actions affecting Skeena's forest licences. The first involves an application by one of Skeena's subsidiaries for a major amendment to the forest licence held by the subsidiary. The second involves a proposed 2002-2011 forest development plan for a small business forest enterprise program in which Skeena (or one of its subsidiaries) would participate. The Gitanyow First Nation alleges a failure of the Crown to ensure proper consultation with respect to these two proposed actions.

Issues

54 The common issues raised at the hearings of each of the three Petitions are as follows:

- (a) What is the appropriate standard of review to be applied by the Court in respect of the Minister's decision to consent to the change of control of Skeena?
- (b) Have each of the Petitioners established a *prima facie* claim of aboriginal title or rights in respect of lands covered by Skeena's licences?
- (c) Have each of the Petitioners established a *prima facie* infringement of the aboriginal title or rights which they claim?
- (d) If a duty of consultation and accommodation was owed to each of the Petitioners by the Minister before he made his decision whether to consent to the change of control of Skeena, did he fulfil his duty?
- (e) If the Minister had such a duty and failed to fulfil it, what are the appropriate remedies?

55 The Amended Petition of the Gitanyow First Nation raises two additional issues. The first relates to the request for a declaration that the Minister has failed to ensure meaningful consultation with respect to the proposed actions involving a major amendment to the forest licence of one of Skeena's subsidiaries and a proposed 2002-2011 forest development plan for a small business forest enterprise program. The second additional issue is whether the decision of the Minister to give his consent to the change of control of Skeena constituted a breach of the Crown's duty to conduct treaty negotiations with the Gitanyow in good faith.

56 Counsel for the Crown did not argue that the Minister does not owe a duty of consultation until the aboriginal title or rights are established by a treaty or a court determination, presumably because the decisions of the B.C. Court of Appeal in *Taku River* and *Haida* are binding on me with respect to this point. The Crown has been granted leave to appeal *Taku River* to the Supreme Court of Canada and I understand that the Crown is seeking leave to appeal *Haida* as well. I do not take the Crown's silence to represent a concession on the merits of the issue. There are other issues that were not conceded by counsel for the Minister and Skeena/NWBC in respect of which I also consider these decisions to be binding upon me.

Discussion

57 Before I address the specific issues raised by these proceedings, it is useful, in my view, to review the leading authorities in this area. The duty of consultation was first discussed by the Supreme Court of Canada in *Delgamuukw*. Although the Court ordered a new trial, it undertook an extensive discussion of aboriginal title and rights. The Court stated that aboriginal rights, including aboriginal title, are not absolute and they may be infringed by the federal and provincial governments if the infringements satisfy a test of justification. The test of justification has two parts, the first of which is the requirement that the infringement must be in furtherance of a

legislative objective that is compelling and substantial. The second part of the test involves an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples.

58 In discussing the topic of justification of an infringement of aboriginal title, Lamer C.J.C. said the following:

. . . 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 in determining whether the infringement of aboriginal title is justified . . . 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. (para. 168)

59 In *Halfway River*, a cutting permit was issued in respect of lands adjacent to a reserve established by a treaty. The First Nation was concerned that logging under the permit would infringe its treaty right to hunt moose. The B.C. Court of Appeal upheld the decision of the chambers judge to quash the cutting permit on the basis that the infringement of the treaty rights was not justified because the Ministry of Forests had failed in its fiduciary duty to engage in adequate consultation with the First Nation.

60 The next decision on the topic by the B.C. Court of Appeal was *Taku River*. A mining company wished to reopen a mine and to build an access road which would cross a portion of the territory claimed by the First Nation. The Court of Appeal upheld the decision of the chambers judge to quash the granting of a project approval certificate to the mining company by the responsible Ministers pursuant to the *Environmental Assessment Act*. The Court agreed with the chambers judge that the Crown owed the First Nation a constitutional or fiduciary duty of consultation despite the fact that the aboriginal rights or title had not yet been established in court proceedings.

61 The two most recent decisions of the B.C. Court of Appeal on the topic of consultation, *Haida No. 1* and *Haida No. 2*, arise from the same case. Similar to the case at bar, *Haida* involved the transfer of a tree farm licence and its replacement under s. 36 of the Act. The chambers judge had dismissed the petition on the basis that questions of infringement and justification could not be decided until the claims of aboriginal title and rights had been determined conclusively by legal proceedings. This was contrary to the subsequent holding of the Court of Appeal in *Taku River*, which was released one week before the *Haida* appeal was set for hearing. In *Haida No. 1*, Lambert J.A., on behalf of the Court, held that the decision in *Taku River* was binding and determinative of the outcome of the appeal. However, he went on at some length discussing the duty to consult and the appropriate remedy for that case. The Court did not rule the actions of the Minister of Forests to be invalid at that stage and declared that the Crown and the recipient of the licence, Weyerhaeuser Company Limited, had a duty to consult with the Haida people and to endeavour to seek workable accommodations.

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62 *Haida No. 2* was decided as a result of the objection of Weyerhaeuser to being included in the declaration of consultation/accommodation. The majority of the Court of Appeal confirmed the inclusion of Weyerhaeuser in the declaration. In the course of the reasons of the two judges comprising the majority, there was additional discussion about the duty of consultation/accommodation.

63 I now turn to the specific issues raised in the course of these proceedings.

Standard of Review

64 Counsel for the Crown made submissions with respect to the standard of review to be applied by the Court in reviewing the Minister's decision. He argued that the Court should give the highest standard of deference and should only interfere with the Minister's decision if it was patently unreasonable. Counsel says that the Minister was required to balance competing interests in a limited time frame and that his decision was reasonable in all of the circumstances. At the hearing of the Gitanyow Petition, counsel cited *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1 (S.C.C.) ("*Suresh*"), in support of the proposition that the patently unreasonable standard of review applies to decisions made by ministers even if they involve constitutional considerations.

65 In my view, these submissions confuse the standard of review to be applied when considering a decision made by a minister and the fulfilment of a constitutional duty which must be satisfied before a minister makes a decision. This case deals with the fulfilment of the constitutional duty. The issue is whether the constitutional prerequisite to the decision was satisfied and it is not a question of applying a standard of review to the decision. In *Suresh*, the standard of review was being applied to the Minister's decision, which was required to conform with the Constitution, and it did not involve a separate and distinct constitutional duty.

66 In any event, even if it is a question of the standard of review to be applied to a consideration of the Minister's decision, the Court of Appeal decided in *Halfway River* that the issues of the nature before me are questions of law and that the test to be applied to the decision is that of correctness. Finch J.A. (as he then was) held, at para. 86, that if the government official was afforded the deference entailed in the patently unreasonable standard of review, he would be the judge in his own cause. The circumstances of *Halfway River* are much closer to the present situation than the *Suresh* circumstances, and I consider *Halfway River* to be binding on me in this regard. I also note that while the applicability of a standard of review was not discussed in *Taku River* or *Haida*, no deference was afforded to the government official in either of those cases.

Prima Facie Claims

67 Counsel for the Crown disputes that the Petitioners have established strong or good *prima facie* claims of aboriginal title or rights in respect of all of the areas claimed by them. Counsel for Skeena/NWBC did not expressly take a position on this issue but made submissions which were generally supportive of the Crown's position. In particular, counsel for Skeena/NWBC challenges the admissibility of portions of affidavits sworn in support of the claim of aboriginal title and rights (counsel for the Crown joined in support of most of these challenges).

68 Counsel for the Crown makes a distinction between a *prima facie* case *simpliciter* and a strong or good *prima facie* case. I agree that there is a distinction based on the following paragraph from *Haida No. 1*:

The strength of the Haida case gives content to the obligation to consult and the obligation to seek an ac-

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accommodation. I am not saying that if there is something less than a good *prima facie* case then there is no obligation to consult. I do not have to deal with such a case on this appeal. But certainly the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights. (para. 51)

Lambert J.A. made these comments after quoting from the chambers judge, who spoke of certain claims having degrees of success ranging from "reasonable possibility" to "reasonable probability" to "substantial probability."

69 In making submissions with respect to the nature of the *prima facie* case required to be established by the Petitioners, counsel for the Crown made comparisons to the criteria applied on interim stay applications (which are, in turn, similar to interlocutory injunction applications). He made reference to *RJR-MacDonald*, where the Court stated that in considering whether there is a serious case to be tried, the motions judge should not undertake a prolonged examination of the merits. It is necessary, however, to make an evaluation of the strength of the First Nation's *prima facie* claim for the purpose of assessing the adequacy of the Crown's efforts to consult and accommodate. I agree with the submission of counsel for the Crown that the Court is not in a position to do anything more than make a preliminary, general assessment of the strength of the *prima facie* claim.

70 Similarly, it is also my view that the Court should not make detailed rulings on evidentiary matters unless it is essential to do so for the purpose of making the decision on the existence of a *prima facie* claim and the strength of it. For example, in *Delgamuukw*, the Supreme Court of Canada held that the trial judge erred because he refused to give independent weight to oral histories. As with the evidence before me, the oral histories consisted of the adaawk of the Gitksan, personal recollections of deceased members of the First Nations and territorial affidavits. Lamer C.J.C. observed, at para. 107, that the findings of facts might have been very different if the oral histories had been assessed correctly. An informative discussion of evidentiary difficulties in cases involving aboriginal rights is also found in *Mitchell v. Minister of National Revenue*, 2001 SCC 33 (S.C.C.). In my opinion, it would be inappropriate for me, on the basis of affidavits only and without the benefit of *viva voce* evidence, to make critical findings of admissibility and to assess the weight to be given to oral histories. This should be left to a trial judge, who will have the task of making the final determinations on the claims of aboriginal title and rights, without being encumbered by any opinions expressed by me on the basis of affidavit evidence. I will treat the oral histories at face value for the purpose of determining whether the Petitioners have *prima facie* claims of aboriginal title and rights.

71 I agree with the submissions of counsel for Skeena/NWBC that many statements in the affidavits are irrelevant or are inadmissible hearsay, opinion or argument, and I have disregarded these statements. In reaching my conclusions on the existence and strength of the Petitioners' *prima facie* claims of aboriginal title and rights, I have relied only on direct evidence and the oral histories contained within the affidavits. It has not been necessary for me to rely on expert opinion evidence in this regard and I express no view on its admissibility.

72 On the basis of the direct evidence and oral histories, I am satisfied that each of the petitioning First Nations has a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights with respect to at least part of the areas claimed by them and that these parts are included within the lands covered by Skeena's tree farm and forest licences. The claims for aboriginal rights are stronger than the claims for aboriginal title because they do not require an element of exclusivity, but each claim qualifies for a classification as a good or strong *prima facie* claim. In reaching my conclusion in this regard, I have not found it necessary to rely on the fact that the claim of the Gitanyow was accepted for treaty negotiation by the federal government (which is not a party to these proceedings) or the fact that the claims of each of the petitioning First Nations have been

the subject of treaty negotiations with the provincial government (which entered into the negotiations without assessing the validity of the claims).

73 Counsel for the Crown argued that the Petitioners do not have strong or good *prima facie* claims of aboriginal title or rights in respect of all of the territories claimed by them for two principal reasons, the second of which only applies to the Gitksan proceeding. First, counsel points to the fact that there are two types of overlapping claims with respect to the territories claimed by the First Nation groups. There are internal overlapping claims in the sense that within the overall area claimed by the Gitksan, some portions of the territory are claimed by two or more Gitksan Houses. There are external overlapping claims in the sense that parts of the territories claimed by the each of the petitioning First Nations are also claimed by other First Nation groups. The second reason asserted by counsel for the Crown is that the findings of the trial judge in *Delgamuukw* undermine the assertion of the Gitksan First Nation of a strong *prima facie* claim of aboriginal title to the whole of the territory claimed by them.

74 There is no requirement that a First Nation group establish a good *prima facie* claim of aboriginal title or rights with respect to all of the area claimed by it. The overlapping claims certainly preclude each competing group from being successful in proving aboriginal title to the areas which are the subject matter of the overlapping claims because, as stated, at para. 155 of *Delgamuukw*, it would be absurd for two or more groups to have the right of exclusive use and occupation to the same area. However, as pointed out, at para. 156 of *Delgamuukw*, the common law principle of exclusivity should be imported into the concept of aboriginal title with caution and the presence of other aboriginal groups does not necessarily preclude a finding of exclusivity. One group may be successful over another group in proving exclusivity to establish aboriginal title. In addition, in the event that the overlapping claims result in a finding that aboriginal title to a disputed area has not been established, it is still possible for the Court to conclude that the competing groups have each established aboriginal rights in respect of the area.

75 In *Haida*, for instance, the Haida Nation claimed title to all of the Queen Charlotte Islands. The chambers judge concluded that there was a reasonable probability that the Haida would be able to establish aboriginal title to some parts of the Islands and that there was a reasonable possibility that they would be able to establish aboriginal title to other parts of the Islands. He also concluded that there was a substantial probability that the Haida would be able to establish the aboriginal right to harvest red cedar trees in areas covered by the tree farm licence in question. Roughly speaking, I would equate (i) the term "reasonable possibility" to a *prima facie* case, (ii) the term "reasonable probability" to a good *prima facie* case and (iii) the term "substantial probability" to a strong *prima facie* case. The fact that the Haida Nation did not have a good *prima facie* claim of aboriginal title in respect of all of the territory claimed by it was of no consequence because they had established good or strong *prima facie* claims of aboriginal title and rights in respect of some of the lands covered by the tree farm licence. The same situation exists in this case.

76 With respect to the other arm of the argument, it would not be appropriate, in my view, to rely on the findings of the trial judge in *Delgamuukw* to conclude that the Gitksan First Nation does not have a good *prima facie* claim of aboriginal title or rights. One of the reasons for ordering a new trial was the conclusion of the Supreme Court of Canada that the trial judge erred in refusing to give independent weight to the oral histories. As mentioned above, Lamer C.J.C. stated, at para. 107, that the trial judge's conclusions on the issues of occupation and use of the disputed territory might have been very different if he had assessed the oral histories correctly.

Prima Facie Infringement

77 Counsel for the Minister and counsel for Skeena/NWBC each argues that the Petitioners have not established that the Minister's decision constituted a *prima facie* case of infringement. They say that the present circumstances are different from the *Haida* situation because there was no replacement of any forest tenure and there was no transfer of forest tenure from one party to another. They maintain that, as stated in the letter giving the Minister's consent, the change of control was neutral with respect to aboriginal title and rights. Counsel say that if there was no *prima facie* infringement, there was no requirement for the Minister to consult the petitioning First Nations before consenting to the change of control of Skeena. Counsel further submit that there has been ongoing consultation regarding operation issues and that there will be an opportunity for consultation in connection with the pending decision of the Minister to replace Skeena's tree farm licence pursuant to s. 36 of the Act.

78 In my view, the *Haida* decisions are binding upon me with respect to this issue. At the trial level, the Haida Nation had alleged numerous instances of infringement but on appeal it confined its claim to two actions (see para. 48 of *Haida No. 1*). Those two actions were a s. 36 replacement of a tree farm licence in 1999 and the transfer of the tree farm licence in 2000 from MacMillan Bloedel Limited to Weyerhaeuser Company Limited. In each of the *Haida* decisions and especially in *Haida No. 2*, it is clear that the Court of Appeal considered both of these actions to constitute a *prima facie* infringement of aboriginal title and rights. There is no practical distinction between a transfer of a tree farm licence from one party to another (as occurred in *Haida*) and a change of control of the holder of tree farm and forest licences such that the holder becomes a wholly owned subsidiary of another corporation (as occurred in this case). In each situation, a different party will, either directly or indirectly, have the ability to make decisions with respect to forest tenure licences. This is why the Legislature included a change of control of the licence holder, as well as a transfer of the licence itself, in s. 54 as a circumstance requiring the consent of the Minister. If a change of control was not included in s. 54, parties could circumvent the requirement for the Minister's consent to a transfer of the licence by maintaining the licence in a shell company and transferring the shares in the shell company rather than the licence itself.

79 However, it is my view that the *Haida* decisions go further than holding that a transfer of a forest tenure licence (or the equivalent change of control of the licence holder) is a *prima facie* infringement of aboriginal title or rights. Although the Haida Nation confined their claim on appeal to the 1999 and 2000 actions of the Minister, the Court of Appeal took a broader view of the infringement. At para. 84 of *Haida No. 2*, Lambert J.A. stated that the potential infringements extended to the passing of the Act and the issuance of the tree farm licence. He said the following, at para. 91:

The provincial Crown may infringe on the aboriginal title and aboriginal rights of the Haida people if it can justify the infringement. The infringement would consist in establishing a legislative and administrative scheme under the Forest Act, granting Weyerhaeuser an exclusive right to harvest timber in the area covered by T.F.L. 39, renewing the issuance of T.F.L. 39, transferring T.F.L. 39 to Weyerhaeuser, approving management plans, and issuing cutting permits, all in furtherance of the same legislative scheme, and all in violation of the aboriginal title and aboriginal rights of the Haida people. The provincial Crown may justify its actions by meeting the tests for justification. Among the tests is a requirement that the Haida people be consulted before the infringement actions are taken. In this case, the Crown provincial did not consult the Haida people in any effective way at any stage of the furtherance of the legislative and administrative scheme, and so is in breach of its obligation of consultation at every stage where a justification test would require effective consultation.

And, at para. 64, Lambert J.A. observed that the Crown's fiduciary duty is a continuing and ever present duty

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which continues unimpaired until the next time it must be observed.

80 Finch C.J.B.C. expressed a similar view at para. 123 of *Haida No. 2*. He said that the circumstances giving rise to a duty to consult on the part of Weyerhaeuser included the issuance by the Minister of a tree farm licence in breach of the Crown's duty to consult (and the receipt by Weyerhaeuser of a licence which suffered a legal defect).

81 Each of Finch C.J.B.C. and Lambert J.A. made reference to the issuance of the tree farm licence being a *prima facie* infringement of aboriginal title or rights. Lambert J.A. stated that the fiduciary duty continues until the next time it must be observed. There is no suggestion in the present case that the Crown previously consulted the petitioning First Nations when the forest tenure licences were initially issued to Skeena or previously replaced under s. 36 of the Act. If a forest tenure licence has been issued in breach of the Crown's duty to consult, the duty continues and the Crown is obliged to honour its duty each time it has a dealing with the licence. This includes each occasion when the Minister's consent is required under s. 54. There is an obligation on the Minister to ensure that the Crown's continuing duty has been fulfilled before the infringement is perpetuated by a further transaction involving the licence. The Minister cannot simply ignore the previous breaches of the duty to consult and give his consent to a transaction under s. 54 without giving the aboriginal people an opportunity to provide their views with respect to the infringement.

82 I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly. Second, Skeena was on the brink of bankruptcy and it may have gone into bankruptcy if the Minister had not given his consent by April 30. If Skeena had gone into bankruptcy, it would no longer have been able to utilize the licences. It is possible that the trustee in bankruptcy or Skeena's secured creditors would have been able to sell the licences but any sale would have required the Minister's consent and there can be no doubt that he would have been required to consult the Petitioners before giving his consent to any sale of the licences. There was also a possibility that the tree farm licence would not be sold, in which case the Petitioners would have had the opportunity of pursuing their own ventures for logging some or all of the lands covered by the licence.

83 The sale transaction had an added impact on the Gitanyow. The transaction specifically excluded Skeena's subsidiary, Buffalo Head. Skeena transferred the shares in Buffalo Head to a numbered company owned by the Crown. There are issues with respect to the silviculture obligations in relation to the areas harvested by Buffalo Head pursuant to its forest licence and it has not been clarified as to whether the Crown will assume those obligations. The affected areas fall within the territory claimed by the Gitanyow.

84 Counsel for each of the Crown and Skeena/NWBC relied on the decision of the Supreme Court of Canada in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 (S.C.C.). Counsel for Skeena/NWBC relied on it in making his submission that the change of control was neutral by referring to the passage at para. 71, stating that the *Heritage Conservation Act* was tailored so that it did not affect the established rights of aboriginal peoples. As I have stated, I disagree with the submission that the change of control was neutral.

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85 Counsel for the Crown relied on the *Kitkatla* decision in making a comparison to the balancing of interests recognized by the Court in that decision to the balancing of interests undertaken by the Minister in this case. He also relied on *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.), for the proposition that the government is ultimately entitled to balance competing rights. Counsel went on to submit that the Minister's decision to consent to the change of control struck a reasonable balance of the competing interests. I agree that the Minister is required to balance competing interests but he is first required to fulfil his duty of consultation and accommodation. It is no answer to say that consultation was not required because the Minister considered the competing interests. One of the principal purposes of consultation is to enable the Minister to gain a proper understanding of the aboriginal interests and to seek ways to accommodate those interests.

86 I hold that each of the petitioning First Nations has established a *prima facie* infringement of aboriginal title or rights giving rise to a duty on the Minister to consult them prior to consenting to the change of control of Skeena. The fact that there may be a duty of consultation on him prior to a replacement of the tree farm licence under s. 36 does not diminish from the requirement that he was required to fulfil his duty of consultation prior to deciding whether to consent to Skeena's change in control. It is a continuing duty which must be observed each time the Crown has a dealing with the licence. Similarly, the consultation on operating issues in the past did not fulfil the Minister's duty of consultation in connection with the change in control.

Adequacy of Consultation and Accommodation

87 In my view, there was no meaningful consultation by the Crown of the petitioning First Nations with respect to the Minister's decision and there was no attempt whatsoever to accommodate their concerns.

88 It was stated in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2001 FCT 1426 (Fed. T.D.) ("*Mikisew*"), that consultation must be undertaken with the genuine intention of substantially addressing First Nation concerns (para. 154) and that it is not sufficient for the communication to be the same as the communication with other interested stakeholders (para. 141). In *Halfway River*, the B.C. Court of Appeal said that the duty to consult imposes on the Crown the obligation to reasonably ensure that the aboriginal peoples are provided with all necessary information in a timely way and to ensure that their representations are seriously considered and, where possible, integrated into the proposed course of action (para. 160). I find as follows in these regards:

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

89 There was no consultation of any sort with the Lax Kw'alaams. It was not unreasonable for the Lax

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Kw'alaams to decline to meet until they had received a response to their April 9 letter (although I am not suggesting that the Crown was required to accept the positions expressed by the Lax Kw'alaams in the letter). Their request for a consultation meeting by way of the letter dated April 23 from their legal counsel was essentially ignored.

90 At the meeting with the Metlakatlas on April 15, legal counsel for the Crown effectively conceded that the meeting did not constitute consultation as required by *Haida No. 1*. I agree with this concession, and it is my view that there was no significant difference between this meeting and the meetings held with the Gitksan and the Gitanyow, where objections about the sufficiency of the meetings for the purposes of the duty of consultation were also expressed.

91 In his submissions, counsel for the Crown made reference to the time constraints facing the Minister in view of the April 29 deadline and he argued that the Minister acted reasonably in striking a balance between the concerns of the First Nations and the interests of creditors, employees and contractors of Skeena. On a factual basis, I observe that the Crown did not initiate any communication with the First Nation groups until over a month after it entered into the sale agreement with NWBC. The sale agreement was signed on February 20 and the first letter to the First Nations was sent on March 27 (which was more than half way to the April 29 deadline). Hence, the Crown itself contributed to the short length of the time constraints. On a legal basis, the shortness of time and economic interests are not sufficient to obviate the duty of consultation: see *R. v. Noel*, [1995] 4 C.N.L.R. 78 (N.W.T. Terr. Ct.), at p. 95, *Mikisew*, at para. 132 and *Haida No. 1*, at para. 55.

92 I find that the Minister did not satisfy his duty of consultation and accommodation as it relates to the petitioning First Nations before he made his decision to consent to the change of control of Skeena.

Other Proposed Actions

93 The Gitanyow First Nation seeks a declaration that the Minister has failed to ensure meaningful consultation with respect to the proposed actions involving a major amendment to the forest licence of one of Skeena's subsidiaries and a proposed 2002-2011 forest development plan for a small business forest enterprise program.

94 I set out the facts related to these proposed actions very briefly and it is not necessary to provide any further details because it is my view that the claim is premature and may become academic. It is premature because no decisions have been made on the proposed actions (at least as they affect the territory claimed by the Gitanyow). In addition, there have been revisions to each of the proposed actions which convert or classify the cutblocks within the territory claimed by the Gitanyow as "information" blocks only. This means that no harvesting can occur in these cutblocks unless a new forest development plan or major amendment is put forward and approved. Any such new plan or amendment would be subject to consultation with the Gitanyow.

95 As a result, the facts do not support a finding that the Crown has failed to ensure meaningful consultation with respect to any decision made by the Crown. No decision has been made on the proposed actions and they have both been revised to effectively exclude the territory claimed by the Gitanyow First Nation. Accordingly, I refuse to make the requested declaration.

Duty To Negotiate in Good Faith

96 Relying on, among others, the decision in *Gitanyow First Nation v. Canada*, [1999] 3 C.N.L.R. 89 (B.C.

S.C. [In Chambers]), and the cases referred to therein, the Gitanyow First Nation alleges that the Crown has breached its obligation to negotiate a treaty with it in good faith on the basis that the Minister's consent to the change of control of Skeena now prevents the Crown from agreeing to give things to the Gitanyow First Nation as part of their treaty negotiations. In his oral submissions, counsel for the Gitanyow asserted that the Crown had unilaterally taken issues "off the negotiating table." In his reply submissions, counsel for the Gitanyow argued that during treaty negotiations the Crown has an obligation to maintain the status quo and cannot change the status quo by granting new rights to new actors.

97 There are two answers to this allegation. First, the Gitanyow have not presented evidence of any matter being negotiated with the Crown in the treaty negotiations which has been affected by the change in control of Skeena. Indeed, it is difficult to envisage how any matter under negotiation could have been affected. Although I disagree with the argument of the Crown that the Minister's decision to consent to the change in control was neutral with respect to aboriginal rights or title, it is my view that the change in control was neutral to the treaty negotiations. The Crown was in no better position before the change in control to make a concession to the Gitanyow in respect of any matter affected by the tree farm or forest licences. The change in control did not affect any of the rights under the licences. The Minister's consent simply allowed a change of control of Skeena to take place and it did not give any new rights under the licences to Skeena or NWBC. Although a refusal by the Minister to give his consent to the change of control may potentially have resulted in the Crown being in a better position to make concessions to the Gitanyow in the treaty negotiations, the duty to negotiate in good faith does not require the Crown to effectively expropriate rights from third parties without compensation so that they may be given to aboriginal people.

98 Second, the conditions attached to the Minister's giving of consent put the Crown in a better, not a worse, negotiating position. The first condition required Skeena and NWBC to acknowledge that the licences could be affected by, among other things, treaty negotiations with First Nations. This acknowledgment potentially gives the Crown the ability to make concessions in the treaty negotiations with the Gitanyow which it would not have been able to make prior to the change in control.

99 I conclude that it has not been demonstrated that the Crown has breached its duty to negotiate a treaty in good faith with the Gitanyow.

Remedies

100 As I have held that the Minister had a duty to consult and accommodate the petitioning First Nations prior to deciding whether to consent to the change of control of Skeena and that he did not fulfil his duty, it is necessary to consider the appropriate remedies in the circumstances. In addition to requesting a declaration that the Minister did not fulfil his duty of consultation and accommodation, the principal remedy sought by each of the Petitioners is a setting aside or quashing of the decision of the Minister to consent to the change in control. In his reply submissions, counsel for the Gitksan First Nation requested that he be given the opportunity to make further submissions on alternate remedies if I did not quash the "tenure transfer." I interject to comment that I have no jurisdiction to invalidate or reverse the transfer of Skeena's shares to NWBC. At most, I can set aside the Minister's decision to give his consent to the change in control.

101 On the other hand, each of counsel for the Minister and Skeena/NWBC submit that I should exercise my discretion to decline to grant any relief and that I should dismiss the Petitions. In this regard, counsel for the Crown relies on the decision in *Klahoose First Nation v. British Columbia (Minister of Forests)* (1995), 13

B.C.L.R. (3d) 59 (B.C. S.C.) ("*Klahoose*"), as well as two other factors. Counsel for Skeena/NWBC takes the same position and submits that a setting aside of the Minister's consent will render Skeena bankrupt and will result in massive economic damage to the employees of Skeena, its customers and to the northwest part of the Province.

102 In the *Haida* case, the Court of Appeal declined to set aside the transfer of the tree farm licence at that stage of the proceeding and limited the relief granted by it to an interim declaration that the Crown and Weyerhaeuser had a duty to consult with the Haida people and to seek workable accommodations. In *Haida No. 1*, the Court of Appeal declined to make a determination of whether the replacement of the tree farm licence or its transfer to Weyerhaeuser were either invalid or void on the basis that the issue was not sufficiently argued on the appeal. Lambert J.A. also commented that the issue could more readily be argued after the extent of any infringement of aboriginal title and rights had been determined by a court of competent jurisdiction. He went on to say that it seemed to him that the proper time to determine the question of validity would be at the same time as the determination of aboriginal title and rights.

103 In *Haida No. 2*, when Weyerhaeuser challenged its inclusion in the duty to consult declaration, Lambert J.A. described the reasoning somewhat differently. He said the Court had been concerned by Weyerhaeuser's principal submission during the initial appeal hearing that the Court should exercise its discretion against granting a declaration that the tree farm licence was invalid. He then said the following:

It seemed reasonable to think that once it had been established that the duty of consultation arose, in the circumstances of this case, before aboriginal title had been proven in court, a declaration to that effect, on an interim basis, would be sufficient to require the establishment of a procedure for future consultation and would serve to produce a framework for dealing with and protecting the Haida claim to aboriginal title and aboriginal rights over the period until the title and rights had been established by treaty or by a court of competent jurisdiction, while at the same time protecting Weyerhaeuser's interests in T.F.L. 39 and the Crown's interest in safeguarding the public forests. (para. 13)

Lambert J.A. then stated that the declaration which had been granted seemed to be the most minimal remedy and that if proper consultation and accommodation did not occur, the Haida people could renew the request for a declaration that the tree farm licence be declared invalid.

104 I have concluded that I should exercise my discretion in the same fashion as occurred in *Haida No. 1*. In my opinion, the setting aside of the Minister's decision to give his consent to the change in control would be too potentially drastic at this stage. I do not accept that Skeena would necessarily be thrust into bankruptcy if I did set aside the Minister's decision but the consequences could be far-reaching and the public interest could be detrimentally affected.

105 In contrast, the setting aside of the Minister's decision could possibly have no consequences. Unlike the *Haida* case, Skeena's tree farm licence was not replaced or transferred. In the *Haida* situation, if the Minister's decision to replace the licence or consent to its transfer was set aside, it could be more forcibly argued that the licence should be cancelled or transferred back to MacMillan Bloedel. In the present case, Skeena has continued to hold the licence at all material times. The share transfer has occurred and neither this Court nor the Minister has the jurisdiction to reverse it. It may be that the Minister would have the ability to cancel Skeena's licences under s. 55 of the Act if his consent to the change in control is rendered nugatory but no submissions were made to me to the effect that this Court has the power to force him to exercise such an ability.

106 In light of the uncertainty of the consequences flowing from the setting aside the Minister's decision to give his consent to the transaction, it is my view that it is preferable to first make a declaration with respect to the duty of consultation on an interim basis and to then allow the parties to undertake a proper process of consultation and accommodation. If the process does not succeed, the matter can be brought back before the Court for further directions or further declarations. For example, if the Minister fails to properly consult with the Petitioners following the issuance of these Reasons for Judgment, it will be open to the Petitioners to renew their request that the Minister's decision be set aside.

107 In addition to the uncertainty aspect, there is another principal reason why I have decided to exercise my discretion to make a declaration with respect to the duty of consultation on an interim basis without at the same time setting aside the Minister's decision. I have held that the Ministry's attempt at consultation was insufficient. Part of the reason for the insufficiency was the time constraints involved in the Skeena's CCAA proceedings and the sale transaction. These time constraints do not relieve the Minister of his obligation to consult the petitioning First Nations, but they make his breach of the duty more understandable. The remedy which I am granting will allow the parties to engage in the consultation/accommodation process within a more adequate time frame without first causing potentially drastic consequences.

108 In submitting that I should exercise my discretion to dismiss the Petitions, counsel for the Crown and Skeena/NWBC cited the *Klahoose* decision. In that case, Mackenzie J. dismissed a petition seeking judicial review of the Minister's decision to consent to a transfer of a tree farm licence by balancing the potential prejudice to the parties. However, there is a significant distinguishing factor between *Klahoose* and the case at bar. The main factor relied upon by Mackenzie J. was the reliance in good faith by the purchaser of the licence on the consent given by the Minister. It was not contemplated by the purchaser in that case that the Minister's consent would be potentially invalid. In the present case, NWBC was aware that the Petitioners were challenging the Minister's decision to consent to Skeena's change in control prior to the completion of the sale. In addition, a term of the Minister granting consent was the acknowledgment by Skeena and NWBC that the change in control was without prejudice to aboriginal rights or title. In contrast to *Klahoose*, it cannot be said that NWBC relied in good faith on the Minister's consent as it relates to aboriginal issues.

109 In addition to the *Klahoose* decision, counsel for the Crown pointed to two other factors favouring the exercise of my discretion against the Petitioners. One was a "flood gates" type argument (i.e., it would invite judicial review of every decision by the Minister affecting major licences) and the other was the fact that the consent to the change in control was given without prejudice to aboriginal rights and title, coupled with the existence of continuing opportunities to consult. It is not clear to me whether counsel was relying on these factors to argue that I should dismiss the Petitions or to submit that I should not quash the Minister's decision. I have decided for other reasons that I should not set aside the Minister's decision at this stage. Suffice it to say that these two factors do not persuade me that I should exercise my discretion to dismiss the Petitions.

110 As I mentioned above, counsel for the Gitksan requested in his reply that he be given the opportunity to make further submissions on alternate remedies if I did not, in effect, set aside the Minister's consent to the change of control of Skeena. I believe that I have heard sufficient submissions from all counsel to deal with the relief sought in the three Petitions and I do not think that anything would be gained by hearing further arguments at this stage.

111 One of the forms of relief sought by the Lax Kw'alaams and Metlakatla First Nations is a declaration that Skeena, as well as the Minister, had a duty of consultation in respect of the change in control. This claim is

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based on the *Haida* case, where the Court of Appeal held, in *Haida No. 2*, after hearing further submissions, that Weyerhaeuser had such a duty in that case. Lambert J.A. based his conclusion in this regard on the concept of "knowing receipt" in situations dealing with breach of fiduciary duty. Finch C.J.B.C. relied on the fact that Weyerhaeuser possessed a licence with a fundamental legal defect which could only be remedied by a declaration of invalidity or participation by Weyerhaeuser in the consultation process.

112 The focus of these proceedings has been the change of control of Skeena by which it became a wholly owned subsidiary of NWBC. Skeena did not knowingly receive a new licence or any other forest tenure rights as a result of the change in control. Although the issuance of the licences represented a *prima facie* infringement of aboriginal title or rights giving rise to an ongoing duty of consultation, there is no evidence in these proceedings that Skeena initially received the licences with knowledge of a breach of fiduciary duty. It may be that Skeena possesses licences having a legal defect but I do not consider it necessary at this stage to impose a formal obligation on Skeena to participate in the process of consultation/accommodation between the petitioning First Nations and the Crown. If the licences do have a legal defect, Skeena will be practically motivated to participate in the process in order to facilitate the removal of the defect. In view of these factors and the nature of these judicial review proceedings, I exercise my discretion against the inclusion of Skeena in the declaration of the duty of consultation/ accommodation.

113 One of the forms of relief sought by the Gitksan and Gitanyow First Nations is an order requiring the Minister to provide information, including specified documents, prior to the consultation with them. As noted above, the B.C. Court of Appeal stated in *Halfway River* that the duty to consult included an obligation on the Crown to reasonably ensure that the aboriginal peoples are provided with necessary information. I am prepared to make a general declaration that the Minister is required to provide the Petitioners with all relevant information reasonably requested by them. However, it is my view that the exact type and extent of information to be provided by the Crown to the First Nations should be discussed between them before the Court makes determinations as to whether specific documents should be provided. The Gitanyow have tabled a draft of a framework agreement for consultation and accommodation, and the Deputy Minister of Forests has indicated a willingness to hold a workshop to discuss the draft agreement. In their letter dated April 15, 2002, to the Minister, the Gitksan stated that there must be a discussion of the process of consultation and accommodation. I agree that the first step of the consultation process is to discuss the process itself, and the discussion in that regard would logically include the provision of relevant information. If an impasse is reached on whether specific documents should be provided, there will be liberty to reapply for a determination of the issue.

114 Finally, on the aspect of the relief claimed in the Petitions, some of the requested relief has become academic or is not being pursued, and each of the Gitksan and the Gitanyow seek other declarations which I do not feel are necessary or appropriate. For instance, each of them requested a declaration that they have a good *prima facie* case to aboriginal rights and title to their territory and that a significant part or portion of their territory is covered by the forest tenures held by Skeena. Although it was necessary for me to determine whether they had made out good *prima facie* cases, no purpose is served in making the requested declaration. The second part of the requested declaration requires a finding that the territory claimed by them is their territory, which would involve a definitive ruling on aboriginal title. I am not in a position to make such a definitive ruling.

Conclusion

115 The following orders and declarations are made:

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

(b) I declare that that the Minister is required to provide the Petitioners with all relevant information reasonably requested by them;

(c) I order that the parties have liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation, including the production of documents and other provision of information;

(d) I order that the relief in the Petitions seeking to quash or set aside the decision of the Minister to consent to the change of control of Skeena is adjourned generally, with liberty to reapply in the event that any of the Petitioners do not believe that the Minister is fulfilling the duty which I have declared in clause (a);

(e) I order that the Petitioners are entitled to their party and party costs of their respective proceedings up to the date hereof; and

(f) I order that the balance of the relief sought in the Petitions, including the request by the Gitanyow for a declaration that the Minister breached a duty to negotiate a treaty in good faith and the claim of the Gitanyow relating to the major amendment of the forest licence of one of Skeena's subsidiaries and the plan for the small business forest enterprise program, is dismissed.

116 No submissions were made with respect to the scale at which costs of these proceedings should be granted. Without the benefit of submissions, my inclination is to grant the costs at scale 4 of Appendix B of the *Rules of Court*. If counsel cannot agree, there is liberty to apply to fix the appropriate scale of the costs.

Order accordingly.

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2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

Haida Nation v. British Columbia (Minister of Forests)

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)

Weyerhaeuser Company Limited (Appellant) v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation (Respondents) and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General for Saskatchewan, Attorney General of Alberta, Squamish Indian Band and Lax-kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association and Village of Port Clements (Intervenors)

Supreme Court of Canada

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

Heard: March 24, 2004

Judgment: November 18, 2004

Docket: 29419

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Proceedings: reversing in part *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.); additional reasons at *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 462, 2002 CarswellBC 2067, 216 D.L.R. (4th) 1, 5 B.C.L.R. (4th) 33, [2002] 10 W.W.R. 587, [2002] 4 C.N.L.R. 117, 172 B.C.A.C. 75, 282 W.A.C. 75 (B.C. C.A.); reversing *Haida Nation v. British Columbia (Minister of Forests)* (2000), 2000 BCSC 1280, 2000 CarswellBC 2434, 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83 (B.C. S.C.)

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2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

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Subject: Natural Resources; Public; Property; Civil Practice and Procedure; Environmental; Constitutional

Timber --- Timber licences — Judicial review

Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted.

Crown --- Crown property — Grants of Crown lands — General

Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted.

Aboriginal law --- Reserves and real property — Transfer or disposition — General principles

Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted.

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ility of aboriginal title has been asserted.

Injunctions --- Injunctions involving Crown — Miscellaneous injunctions

Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted — Band not required to seek injunction in order to exercise remedy.

Bois d'oeuvre --- Permis de coupe de bois — Contrôle judiciaire

Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication.

Couronne --- Propriété de la Couronne — Concession des terres de la Couronne — En général

Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication.

Droit autochtone --- Réserves et biens-fonds — Transfert ou disposition — Principes généraux

Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication.

Injonctions --- Injonctions impliquant la Couronne — Injonctions diverses

Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication — Bandes ne sont pas obligées de demander une injonction pour exercer leur recours.

An aboriginal band lived on an island in British Columbia, where it had harvested cedar timber for many generations. The band claimed title to the island, but the claim had not been recognized at the time of the proceedings. The Province issued a tree farm licence and replaced the licence on three occasions.

The band's application to set aside the licence and replacements was dismissed. The trial judge found that no legal duty existed to negotiate with the band, although a moral duty existed.

The band's appeal was allowed. The appellate court found that the Government and the logging company had a legal duty to negotiate with the band regarding the timber licence.

The Government and the logging company appealed.

Held: The Government's appeal was dismissed and the logging company's appeal was allowed.

The honour of the Crown requires that the Government consult on relevant issues with Indian bands when their assertion of aboriginal rights is sufficiently strong. In appropriate circumstances, a duty to accommodate may also arise. The fact that the rights claimed had not yet been proven did not negate the duty to consult. Knowledge of a credible but unproven claim is sufficient to trigger the duty to consult and possibly accommodate. The scope of the duty is proportionate to a preliminary assessment of the strength of the band's case, and the potentially adverse effects of the impugned activity on the aboriginal title. The duty does not rest exclusively with the federal Government but extends to the provincial Government as well.

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In the case at bar, the Province failed in its duty to consult the native band. The Province had knowledge of potential aboriginal title. Red cedar was integral to the Indian band's culture, and the logging licence covered a large amount of the island.

The logging company did not have a duty to consult or accommodate. The honour of the Crown cannot be delegated to a third party. The doctrine of "knowing receipt" was not applicable. The fact that a third party is not required to consult or accommodate native interests does not preclude findings of liability.

The band was not required to seek an interlocutory injunction rather than bring the current proceedings. The current proceedings did not prevent an application for an injunction.

Une bande indienne vivait sur une île de la Colombie-Britannique et elle coupait depuis plusieurs générations le cèdre qui y poussait. La bande a revendiqué le titre de l'île, mais sa revendication n'avait toujours pas été reconvenue au moment des procédures. La province a délivré un permis, appelé concession de ferme forestière, et l'a remplacé à trois reprises.

La demande de la bande en annulation du permis et des remplacements a été rejetée. Le premier juge a conclu que seule une obligation morale, et non légale, existait de négocier avec la bande.

Le pourvoi de la bande a été accueilli. La Cour d'appel a conclu que le gouvernement et la compagnie d'exploitation du bois avaient une obligation légale de négocier avec la bande indienne relativement au permis d'exploitation du bois.

Le gouvernement et la compagnie ont interjeté appel.

Arrêt: Le pourvoi du gouvernement a été rejeté et le pourvoi de la compagnie a été accueilli.

L'honneur de l'État exige que le gouvernement consulte les bandes indiennes au sujet des questions pertinentes lorsque leurs revendications de titres ancestraux sont assez solides. Une obligation d'accommodement peut également naître dans des circonstances appropriées. Le fait que les droits revendiqués n'avaient pas encore été prouvés n'enlevait pas l'obligation de consulter. La connaissance d'une revendication crédible mais non prouvée suffit pour donner naissance à l'obligation de consulter et aussi, possiblement, à celle de trouver un accommodement. L'étendue de l'obligation est proportionnelle à l'évaluation préliminaire de la force de la preuve de la bande et de l'impact potentiellement négatif de l'activité contestée sur le titre ancestral. L'obligation n'appartient pas exclusivement au gouvernement fédéral; elle s'applique également au gouvernement provincial.

En l'espèce, la province a manqué à son obligation de consulter la bande indienne. La province connaissait l'existence possible d'un titre ancestral. Le cèdre rouge faisait partie intégrante de la culture de la bande indienne, et le permis de couper du bois couvrait une large partie de l'île.

La compagnie n'avait aucune obligation de consulter ou de trouver un accommodement. L'honneur de l'État ne peut être délégué à un tiers. La doctrine de la « réception en connaissance de cause » ne trouvait pas application ici. Le fait qu'un tiers n'était pas obligé de consulter les autochtones vis-à-vis leurs intérêts ou de trouver un accommodement pour ceux-ci n'empêchait cependant pas de tirer une conclusion de responsabilité.

La bande n'était pas obligée de demander une injonction au lieu des procédures actuelles. Celles-ci n'empêchaient par ailleurs pas une demande d'injonction.

Cases considered by *McLachlin C.J.C.*:

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — considered

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — considered

Cardinal v. Kent Institution (1985), [1985] 2 S.C.R. 643, [1986] 1 W.W.R. 577, 24 D.L.R. (4th) 44, 63 N.R. 353, 69 B.C.L.R. 255, 16 Admin. L.R. 233, 23 C.C.C. (3d) 118, 49 C.R. (3d) 35, 1985 CarswellBC 402, 1985 CarswellBC 817 (S.C.C.) — considered

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — followed

Guerin v. R. (1984), [1984] 6 W.W.R. 481, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, (sub nom. *Guerin v. Canada*) 55 N.R. 161, [1985] 1 C.N.L.R. 120, 20 E.T.R. 6, 36 R.P.R. 1, 59 B.C.L.R. 301, 1984 CarswellNat 813, 1984 CarswellNat 693 (S.C.C.) — followed

Halfway River First Nation v. British Columbia (Ministry of Forests) (1997), 1997 CarswellBC 1745, 39 B.C.L.R. (3d) 227, [1997] 4 C.N.L.R. 45, [1998] 4 W.W.R. 283 (B.C. S.C.) — referred to

Halfway River First Nation v. British Columbia (Ministry of Forests) (1999), 1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 129 B.C.A.C. 32, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 210 W.A.C. 32 (B.C. C.A.) — referred to

Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management) (2003), 19 B.C.L.R. (4th) 107, 4 C.E.L.R. (3d) 214, 2003 BCSC 1422, 2003 CarswellBC 2294 (B.C. S.C.) — referred to

Marshall v. Canada (1999), (sub nom. *R. v. Marshall*) [1999] 3 S.C.R. 456, 1999 CarswellINS 262, 1999 CarswellINS 282, (sub nom. *R. v. Marshall*) 177 D.L.R. (4th) 513, (sub nom. *R. v. Marshall*) 246 N.R. 83, (sub nom. *R. v. Marshall*) 138 C.C.C. (3d) 97, (sub nom. *R. v. Marshall*) [1999] 4 C.N.L.R. 161, (sub nom. *R. v. Marshall*) 178 N.S.R. (2d) 201, (sub nom. *R. v. Marshall*) 549 A.P.R. 201 (S.C.C.) — considered

Marshall v. Canada (1999), (sub nom. *R. v. Marshall*) [1999] 3 S.C.R. 533, 1999 CarswellINS 349, 1999 CarswellINS 350, (sub nom. *R. v. Marshall*) [1999] 4 C.N.L.R. 301, (sub nom. *R. v. Marshall*) 247 N.R. 306, (sub nom. *R. v. Marshall*) 179 D.L.R. (4th) 193, (sub nom. *R. v. Marshall*) 139 C.C.C. (3d) 391, (sub nom. *R. v. Marshall*) 179 N.S.R. (2d) 1, (sub nom. *R. v. Marshall*) 553 A.P.R. 1 (S.C.C.) — considered

Mitchell v. Minister of National Revenue (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.*) 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.*) 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.*) [2001] 3 C.N.L.R. 122, (sub nom. *Mitchell v. M.N.R.*) [2001] 1 S.C.R. 911, 206 F.T.R. 160 (note), [2002] 3 C.T.C. 359 (S.C.C.) — considered

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

Paul v. British Columbia (Forest Appeals Commission) (2003), 18 B.C.L.R. (4th) 207, [2003] 11 W.W.R. 1, [2003] 4 C.N.L.R. 25, 3 C.E.L.R. (3d) 161, 231 D.L.R. (4th) 449, 5 Admin. L.R. (4th) 161, 111 C.R.R. (2d) 292, [2003] 2 S.C.R. 585, 2003 SCC 55, 2003 CarswellBC 2432, 2003 CarswellBC 2433 (S.C.C.) — considered

R. c. Adams (1996), 202 N.R. 89, [1996] 3 S.C.R. 101, 110 C.C.C. (3d) 97, 138 D.L.R. (4th) 657, [1996] 4 C.N.L.R. 1, 1996 CarswellQue 912, 1996 CarswellQue 913 (S.C.C.) — considered

R. v. Badger (1996), [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, 1996 CarswellAlta 365F, 1996 CarswellAlta 587 (S.C.C.) — considered

R. c. Côté (1996), 110 C.C.C. (3d) 122, 202 N.R. 161, 138 D.L.R. (4th) 385, [1996] 3 S.C.R. 139, [1996] 4 C.N.L.R. 26, 1996 CarswellQue 1039, 1996 CarswellQue 1040 (S.C.C.) — considered

R. v. Gladstone (1996), [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65, 1996 CarswellBC 2305, 1996 CarswellBC 2306 (S.C.C.) — considered

R. v. Nikal (1996), [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013, (sub nom. *Canada v. Nikal*) 35 C.R.R. (2d) 189, [1996] 3 C.N.L.R. 178, 1996 CarswellBC 950, 1996 CarswellBC 950F (S.C.C.) — considered

R. v. Sparrow (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — considered

R. v. Vanderpeet (1996), 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — followed

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120, (sub nom. *RJR-Macdonald Inc. c. Canada (Procureur général)*) 171 N.R. 402 (note) (S.C.C.) — followed

Roberts v. R. (2002), (sub nom. *Wewaykum Indian Band v. Canada*) [2002] 4 S.C.R. 245, (sub nom. *Wewaykum Indian Band v. Canada*) 2002 SCC 79, 2002 CarswellNat 3438, 2002 CarswellNat 3439, (sub nom. *Wewaykum Indian Band v. Canada*) 220 D.L.R. (4th) 1, (sub nom. *Wewayakum Indian Band v. Canada*) 297 N.R. 1, (sub nom. *Wewaykum Indian Band v. Canada*) [2003] 1 C.N.L.R. 341, (sub nom. *Wewayakum Indian Band v. Canada*) 236 F.T.R. 147 (note) (S.C.C.) — followed

Ryan v. Law Society (New Brunswick) (2003), (sub nom. *Law Society of New Brunswick v. Ryan*) [2003] 1

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S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — considered

Sioui v. Quebec (Attorney General) (1990), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427, 109 N.R. 22, (sub nom. *R. c. Sioui*) 30 Q.A.C. 280, 56 C.C.C. (3d) 225, [1990] 3 C.N.L.R. 127, 1990 CarswellQue 103, 1990 CarswellQue 103F (S.C.C.) — considered

St. Catharines Milling & Lumber Co. v. R. (1888), 1888 CarswellNat 20, (1889) L.R. 14 App. Cas. 46, 4 Cart. B.N.A. 107, 58 L.J.P.C. 54, 6 L.T. 197, C.R. [10] A.C. 13 (Canada P.C.) — considered

TransCanada Pipelines Ltd. v. Beardmore (Township) (2000), 2000 CarswellOnt 1072, 186 D.L.R. (4th) 403, (sub nom. *Ontario (Minister of Municipal Affairs & Housing) v. TransCanada Pipelines Ltd.*) [2000] 3 C.N.L.R. 153, 137 O.A.C. 201 (Ont. C.A.) — referred to

Statutes considered:

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 109 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

s. 35(1) — referred to

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

Generally — referred to

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

Generally — referred to

APPEAL by Government and logging company from judgment reported at *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.), allowing Indian band's appeal from dismissal of application to set aside timber licence.

POURVOI du gouvernement et de la compagnie d'exploitation du bois à l'encontre de l'arrêt publié à *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.), qui a accueilli le pourvoi de la bande indienne à l'encontre du rejet de sa demande d'annulation du permis de coupe de bois.

McLachlin C.J.C.:

I. Introduction

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

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 spoiled.

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

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Haida people: (2000), [2001] 2 C.N.L.R. 83, 2000 BCSC 1280 (B.C. S.C.). 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 (B.C. C.A.), with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462 (B.C. C.A.).

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 (S.C.C.), 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. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), 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 re-

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quire 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 (S.C.C.), at para. 41; *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.). 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 *Vanderpeet*, *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: *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), 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 *Roberts*, 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 inter-

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pretation 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 (S.C.C.), 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 (S.C.C.), 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 (S.C.C.), 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

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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. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), at p. 653; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), 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 (Ont. C.A.), 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.

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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. Minister of National Revenue*, [2001] 1 S.C.R. 911, 2001 SCC 33 (S.C.C.), 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

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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.

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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* (1998) provides insight:

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 ... (at s. 2.0 of Executive Summary)

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

- gathering information to test policy proposals
- putting forward proposals that are not yet finalized
- 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

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- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process. (at s. 2.2 of Deciding)

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 *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.), 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": *The 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 *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.), 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 *R. c. Côté*, [1996] 3 S.C.R. 139 (S.C.C.), 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. c. Adams*, [1996] 3 S.C.R. 101 (S.C.C.), 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.

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

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 *Roberts* 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. R.*, [1984] 2 S.C.R. 335 (S.C.C.), 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 (B.C. C.A.), at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

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". 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. Catharines Milling & Lumber Co. v. R.* (1888), (1889) L.R. 14 App. Cas. 46 (Canada 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. Catharines Milling & Lumber Co.*, *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 (S.C.C.). 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: *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.); *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:

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

Canada (Director of Investigation & Research) v. Southam Inc., [1997] 1 S.C.R. 748 (S.C.C.).

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.

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

(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 (c)). 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(b)). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

2004 CarswellBC 2656, 2004 SCC 73, 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, REJB 2004-80383, J.E. 2004-2156

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 (T.F.L.), 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.

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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.

Order accordingly.

Ordonnance en conséquence.

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1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Halfway River First Nation v. British Columbia (Ministry of Forests)

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

British Columbia Court of Appeal

Southin, Finch, Huddart J.J.A.

Heard: January 19-22, 1999

Judgment: August 12, 1999

Docket: Vancouver CA023526, CA023539

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Proceedings: affirming (1997), 39 B.C.L.R. (3d) 227, [1997] 4 C.N.L.R. 45, [1998] 4 W.W.R. 283 (B.C.S.C.)

Counsel: *M.W.W. Frey* and *H.M. Groberman, Q.C.*, for Appellants District Manager and Ministry of Forests.

S.B. Armstrong and *J.M. Marks*, for Appellant Canadian Forest Products Ltd.

C. Allan Donovan, for Respondents Chief Bernie Metecheah and Halfway River First Nation.

Subject: Public

Native law --- Hunting and fishing — Native rights — Hunting

District manager allowed logging in area adjacent to native reserve — Decision was quashed on judicial review, on basis that band was not consulted and decision unreasonably denied band its preferred means of exercising its rights — Appeal dismissed — Failure to consult was breach of procedural fairness — Interference with right to hunt was prima facie infringement of treaty, but district manager's finding that decision would have minimal impact on wildlife was sufficient to meet tests for minimal impairment or infringement.

Administrative law --- Requirements of natural justice — Right to hearing — Duty of fairness

District manager allowed logging in area adjacent to native reserve — Decision was quashed on judicial review, on basis that band was not consulted and district manager unlawfully fettered discretion — Appeal dismissed —

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Failure to consult was breach of procedural fairness.

The district manager granted a permit allowing a company to log a non-reserve area adjacent to a native reserve occupied by the band. The band's predecessors had surrendered all title to the non-reserve area under a treaty. The Crown allowed the band to continue traditional activities throughout the area. The decision of the district manager was quashed on judicial review. The district manager was found to have unlawfully fettered his discretion and violated the principles of procedural fairness, as the decision unreasonably denied the band its preferred means of exercising its rights. The Crown was found to have failed to meet its fiduciary duty to adequately consult and inform the band prior to decision. The company, district manager and Minister of Forests appealed.

Held: The appeal was dismissed.

Per Finch J.A.: It was unreasonable to infer that the district manager denied the band procedural fairness. While the district manager may have held a mistaken view of the law, this did not necessarily demonstrate a failure to keep an open mind or an unwillingness to decide the issues on merits. The chambers judge erred in holding that the district manager's conduct gave rise to a reasonable apprehension of bias and that adequate notice of the decision had not been given to the band. There was no requirement for the district manager to hold a formal hearing, but the failure to consult and ascertain the band's position was correctly found to be a breach of procedural fairness.

The chambers judge did not err in holding that interference with the right to hunt was a prima facie infringement of the treaty. Although the chambers judge did not address the issue of whether such an infringement was a minimal impairment of the right to hunt, the district manager's finding that the company's activities would have minimal impact on wildlife was sufficient to meet the tests for minimal impairment or infringement. The benefits ensuring to the company would outweigh any detriment to the band's rights.

Per Huddart J.A. (concurring): The district manager's failure to consult was a deficiency in the decision-making process that made Finch J.A.'s analysis of procedural fairness premature. The district manager is required to initiate a process of adequate and meaningful consultation with the band to ascertain the nature and scope of the treaty right. Once this is done, a determination as to whether the proposed use is compatible with the treaty right is made. If it is found compatible, the district manager must seek to accommodate the uses to each other. It is the accommodation that is subject to judicial review. The chambers judge was therefore acting outside of his jurisdiction when he found that any interference with the right to hunt was an infringement of the treaty.

Per Southin J.A. (dissenting): To require administrators to consult to ascertain the nature and scope of a treaty right is to impose a burden that civil servants should not have to bear. A district manager is not qualified to decide a legal issue arising under the treaty. The burden also affects the people of the province who must pay for any wrongs committed by the Crown. Companies who find themselves in a similar position to the company in this case may not be able to afford the costs of litigation.

Cases considered by *Finch J.A.*:

Berg v. University of British Columbia, 13 Admin. L.R. (2d) 141, 79 B.C.L.R. (2d) 273, (sub nom. *University of British Columbia v. Berg*) 152 N.R. 99, (sub nom. *University of British Columbia v. Berg*) [1993] 2 S.C.R. 353, (sub nom. *University of British Columbia v. Berg*) 26 B.C.A.C. 241, (sub nom. *University of British Columbia v. Berg*) 44 W.A.C. 241, (sub nom. *University of British Columbia v. Berg*) 102 D.L.R. (4th) 665, (sub nom. *University of British Columbia v. Berg*) 18 C.H.R.R. D/310 (S.C.C.) — referred to

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Calder v. British Columbia (Attorney General), [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 (S.C.C.) — referred to

Canada (Attorney General) v. Mossop, 93 C.L.L.C. 17,006, 13 Admin. L.R. (2d) 1, 46 C.C.E.L. 1, 149 N.R. 1, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658, 17 C.H.R.R. D/349 (S.C.C.) — referred to

Chetwynd Environmental Society v. Dawson Creek Forest District (District Manager) (1995), 13 B.C.L.R. (3d) 338 (B.C. S.C. [In Chambers]) — referred to

Clare v. Thomson (1993), 25 B.C.A.C. 146, 43 W.A.C. 146, 83 B.C.L.R. (2d) 263 (B.C. C.A.) — referred to

Colliers MacCauley Nicolls Inc. v. Clarke (September 29, 1989), Doc. Vancouver CA009621 (B.C. C.A.) — referred to

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.) — referred to

Daniels v. White, [1968] S.C.R. 517, 4 C.R.N.S. 176, 64 W.W.R. 385, [1969] 1 C.C.C. 299, 2 D.L.R. (3d) 1 (S.C.C.) — referred to

Davison v. Maple Ridge (District) (1991), 60 B.C.L.R. (2d) 24, 6 M.P.L.R. (2d) 221, 4 B.C.A.C. 233, 9 W.A.C. 233 (B.C. C.A.) — referred to

Doe d. Jacobs v. Phillips (1845), 115 E.R. 835, 8 Q.B. 158 (Eng. Q.B.) — referred to

Eastmain Band v. Robinson (1992), 9 C.E.L.R. (N.S.) 257, (sub nom. *Eastmain Band v. Canada (Federal Administrator)*) [1993] 3 C.N.L.R. 55, (sub nom. *Eastmain Band v. James Bay & Northern Quebec Agreement (Administrator)*) 99 D.L.R. (4th) 16, (sub nom. *Eastmain Indian Band v. Robinson*) 145 N.R. 270, (sub nom. *Eastmain Band v. Canada (Federal Administrator)*) [1993] 1 F.C. 501, (sub nom. *Eastmain Indian Band v. Robinson*) 58 F.T.R. 240 (note) (Fed. C.A.) — referred to

Emcon Services Inc. v. British Columbia (Council of Human Rights) (1991), 49 Admin. L.R. 220, 20 C.H.R.R. D/193 (B.C. S.C.) — referred to

International Forest Products v. British Columbia (March 19, 1997), Doc. Appeal 96/02(b) (B.C. Forest Appeals Comm.) — referred to

International Forest Products Ltd. v. British Columbia (1998), (sub nom. *International Forest Products Ltd. v. British Columbia (Forest Appeals Commission)*) 12 Admin. L.R. (3d) 45 (B.C. S.C.) — referred to

Koopman v. Ostergaard (1995), 12 B.C.L.R. (3d) 154, 34 Admin. L.R. (2d) 144 (B.C. S.C. [In Chambers]) — referred to

Maple Lodge Farms Ltd. v. Canada, [1982] 2 S.C.R. 2, 44 N.R. 354, 137 D.L.R. (3d) 558 (S.C.C.) — applied

Mitchell v. Sandy Bay Indian Band, (sub nom. *Mitchell v. Peguis Indian Band*) [1990] 5 W.W.R. 97, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, 3 T.C.T. 5219, 67 Man. R. (2d) 81, 110 N.R. 241, [1990] 3 C.N.L.R. 46 (S.C.C.) — referred to

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 134 N.R. 241, [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289, 4 Admin. L.R. (2d) 121, 95 Nfld. & P.E.I.R. 271, 301 A.P.R. 271 (S.C.C.) — referred to

Nowegijick v. R., (sub nom. *Nowegijick v. Canada*) [1983] 1 S.C.R. 29, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193 (S.C.C.) — referred to

Orangeville Raceway Ltd. v. Wood Gundy Inc. (1995), 6 B.C.L.R. (3d) 391, 40 C.P.C. (3d) 226, 59 B.C.A.C. 241, 98 W.A.C. 241 (B.C. C.A.) — referred to

Pezim v. British Columbia (Superintendent of Brokers), 4 C.C.L.S. 117, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385, (sub nom. *Pezim v. British Columbia (Securities Commission)*) 168 N.R. 321, [1994] 7 W.W.R. 1, 92 B.C.L.R. (2d) 145, 22 Admin. L.R. (2d) 1, 14 B.L.R. (2d) 217, (sub nom. *Pezim v. British Columbia (Securities Commission)*) 46 B.C.A.C. 1, (sub nom. *Pezim v. British Columbia (Securities Commission)*) 75 W.A.C. 1 (S.C.C.) — referred to

Placer Development Ltd. v. Skyline Explorations Ltd. (1985), 67 B.C.L.R. 366 (B.C. C.A.) — referred to

R. v. Badger, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321 (S.C.C.) — applied

R. v. Bartleman, 55 B.C.L.R. 78, [1984] 3 C.N.L.R. 114, 13 C.C.C. (3d) 488, 12 D.L.R. (4th) 73 (B.C. C.A.) — referred to

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R. v. Jack (1995), 16 B.C.L.R. (3d) 201, 103 C.C.C. (3d) 385, 131 D.L.R. (4th) 165, [1996] 5 W.W.R. 45, 67 B.C.A.C. 161, 111 W.A.C. 161, [1996] 2 C.N.L.R. 113 (B.C. C.A.) — referred to

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R. v. Noel, [1995] 4 C.N.L.R. 78, [1996] N.W.T.R. 68 (N.W.T. Terr. Ct.) — considered

R. v. Sampson (1995), 16 B.C.L.R. (3d) 226, 103 C.C.C. (3d) 411, 131 D.L.R. (4th) 192, [1996] 5 W.W.R. 18, 67 B.C.A.C. 180, 111 W.A.C. 180, [1996] 2 C.N.L.R. 184 (B.C. C.A.) — referred to

R. v. Sikyea, [1964] S.C.R. 642, 44 C.R. 266, 49 W.W.R. 306, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80 (S.C.C.) — referred to

R. v. Simon, [1985] 2 S.C.R. 387, 62 N.R. 366, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 23 C.C.C. (3d) 238, 171 A.P.R. 15 (S.C.C.) — referred to

R. v. Sparrow, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — applied

R. v. Sundown, 132 C.C.C. (3d) 353, 236 N.R. 251, 170 D.L.R. (4th) 385, [1999] 2 C.N.L.R. 289, [1999] 6

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

W.W.R. 278, 177 Sask. R. 1, 199 W.A.C. 1, [1999] 1 S.C.R. 393 (S.C.C.) — applied

R. v. Sutherland, [1980] 2 S.C.R. 451, 53 C.C.C. (2d) 289, [1980] 5 W.W.R. 456, 7 Man. R. (2d) 359, 35 N.R. 361, 113 D.L.R. (3d) 374, [1980] 3 C.N.L.R. 71 (S.C.C.) — referred to

R. v. Taylor, [1981] 3 C.N.L.R. 114, 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (Ont. C.A.) — referred to

Rootman Estate v. British Columbia (Public Trustee) (1998), 115 B.C.A.C. 281, 189 W.A.C. 281, 24 E.T.R. (2d) 287, 60 B.C.L.R. (3d) 187 (B.C. C.A.) — referred to

Ryan v. Fort St. James Forest District (District Manager) (January 25, 1994), Doc. Smithers 7855, 7856 (B.C. S.C.) — referred to

Ryan v. Fort St. James Forest District (District Manager) (1994), 40 B.C.A.C. 91, 65 W.A.C. 91 (B.C. C.A.) — referred to

Saanichton Marina Ltd. v. Claxton, 36 B.C.L.R. (2d) 79, (sub nom. *Marina Ltd. v. Tsawout Indian Band*) 57 D.L.R. (4th) 161, [1989] 5 W.W.R. 82, [1989] 3 C.N.L.R. 46 (B.C. C.A.) — applied

Semiahmoo Indian Band v. Canada (1997), 148 D.L.R. (4th) 523, 215 N.R. 241, 131 F.T.R. 319 (note), [1998] 1 F.C. 3, [1998] 1 C.N.L.R. 250 (Fed. C.A.) — referred to

Sioui v. Quebec (Attorney General), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427, 109 N.R. 22, (sub nom. *R. c. Sioui*) 30 Q.A.C. 280, 56 C.C.C. (3d) 225, [1990] 3 C.N.L.R. 127 (S.C.C.) — applied

T. (C.) v. Langley School District No. 35 (1985), 65 B.C.L.R. 197 (B.C. C.A.) — referred to

Thompson v. Bennett (1872), 22 U.C.C.P. 393 (Ont. C.P.) — referred to

U.S.W.A., Local 4589 v. Bombardier - M.L.W. Ltée, 32 N.R. 426, [1980] 1 S.C.R. 905, 80 C.L.L.C. 14,057, 112 D.L.R. (3d) 61 (S.C.C.) — referred to

Zurich Insurance Co. v. Ontario (Human Rights Commission), 39 M.V.R. (2d) 1, (sub nom. *Ontario (Human Rights Commission) v. Zurich Insurance Co.*) [1992] I.L.R. 1-2848, (sub nom. *Ontario (Human Rights Commission) v. Zurich Insurance Co.*) 138 N.R. 1, 93 D.L.R. (4th) 346, [1992] 2 S.C.R. 321, 16 C.H.R.R. D/255, 12 C.C.L.I. (2d) 206, (sub nom. *Ontario (Human Rights Commission) v. Zurich Insurance Co.*) 55 O.A.C. 81, 9 O.R. (3d) 224 (note) (S.C.C.) — referred to

Cases considered by *Huddart J.A.* (concurring):

Cheslatta Carrier Nation v. British Columbia (Project Assessment Director), 26 C.E.L.R. (N.S.) 37, 4 Admin. L.R. (3d) 22, (sub nom. *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director)*) [1998] 3 C.N.L.R. 1, 53 B.C.L.R. (3d) 1 (B.C. S.C.) — referred to

Delgamuukw v. British Columbia, 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14 (S.C.C.) — referred to

R. v. Badger, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R.

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

(4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321 (S.C.C.) — considered

R. v. Gladstone, [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65 (S.C.C.) — considered

R. v. Mousseau, [1980] 2 S.C.R. 89, [1980] 4 W.W.R. 24, 31 N.R. 620, 3 Man. R. (2d) 338, 111 D.L.R. (3d) 443, 52 C.C.C. (2d) 140, [1980] 3 C.N.L.R. 63 (S.C.C.) — considered

R. v. Smith, [1935] 2 W.W.R. 433, 64 C.C.C. 131, [1935] 3 D.L.R. 703 (Sask. C.A.) — considered

R. v. Sparrow, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — considered

R. v. Sundown, 132 C.C.C. (3d) 353, 236 N.R. 251, 170 D.L.R. (4th) 385, [1999] 2 C.N.L.R. 289, [1999] 6 W.W.R. 278, 177 Sask. R. 1, 199 W.A.C. 1, [1999] 1 S.C.R. 393 (S.C.C.) — considered

Ryan v. Fort St. James Forest District (District Manager) (January 25, 1994), Doc. Smithers 7855, 7856 (B.C. S.C.) — referred to

Ryan v. Fort St. James Forest District (District Manager) (1994), 40 B.C.A.C. 91, 65 W.A.C. 91 (B.C. C.A.) — referred to

Sioui v. Quebec (Attorney General), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427, 109 N.R. 22, (sub nom. *R. c. Sioui*) 30 Q.A.C. 280, 56 C.C.C. (3d) 225, [1990] 3 C.N.L.R. 127 (S.C.C.) — considered

Cases considered by *Southin J.A.* (dissenting):

British Columbia (Attorney General) v. Mount Currie Indian Band, 54 B.C.L.R. (2d) 156, (sub nom. *British Columbia (Attorney General) v. Andrew*) [1991] 4 C.N.L.R. 3 (B.C. C.A.) — considered

R. v. Sparrow, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — considered

Saanichton Marina Ltd. v. Claxton (1987), 18 B.C.L.R. (2d) 217, [1988] 1 W.W.R. 540, [1987] 4 C.N.L.R. 48, 43 D.L.R. (4th) 481 (B.C. S.C.) — considered

Saanichton Marina Ltd. v. Claxton, 36 B.C.L.R. (2d) 79, (sub nom. *Marina Ltd. v. Tsawout Indian Band*) 57 D.L.R. (4th) 161, [1989] 5 W.W.R. 82, [1989] 3 C.N.L.R. 46 (B.C. C.A.) — referred to

Statutes considered by *Finch J.A.*:

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 — referred to

s. 91¶24 — referred to

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

s. 92 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

s. 35 — considered

s. 35(1) — referred to

Constitution Act, 1930 (U.K.), 20 & 21 Geo. 5, c. 26, reprinted R.S.C. 1985, App. II, No. 26

Generally — referred to

Sched. — considered

Sched., (3) — referred to

Sched., (3)¶12 — referred to

Sched., (4) — considered

Fisheries Act, R.S.C. 1970, c. F-14

Generally — referred to

Forest Act, R.S.B.C. 1979, c. 140

Generally — considered

s. 9 — referred to

s. 10 [am. 1980, c. 14, s. 4] — considered

s. 10 [am. 1980, c. 14, s. 4; am. 1994, c. 41, s. 247] — considered

s. 10(a) — considered

s. 10(b) — considered

s. 10(c) — considered

s. 10(d) — considered

s. 12 — referred to

s. 12(f) — considered

s. 158(2) [am. 1980, c. 14, s. 47] — referred to

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

s. 158(2)(d.1) [en. 1980, c. 14, s. 47(a)] — considered

Forest Amendment Act, 1980, S.B.C. 1980, c. 14

Generally — referred to

Forest Practices Code of British Columbia, S.B.C. 1994, c. 41

Generally — considered

Preamble — considered

Pt. 3 — referred to

Pt. 3, Div. 3 — referred to

s. 10 — referred to

s. 11 — referred to

s. 12 — referred to

s. 13 — referred to

s. 14 — referred to

ss. 15-16 — referred to

ss. 17-19 — referred to

ss. 20-21 — referred to

ss. 22-23 — referred to

s. 24 — referred to

s. 25 — referred to

ss. 26-27 — referred to

s. 238 — referred to

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Generally — referred to

s. 2(a) — referred to

Migratory Birds Convention Act, R.S.C. 1952, c. 179

Generally — referred to

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Ministry of Forests Act, R.S.B.C. 1979, c. 272

Generally — referred to

s. 2(1) [am. 1980, c. 14, s. 50] — referred to

s. 2(1)(d) [rep. & sub. 1980, c. 14, s. 50(a)] — considered

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

Generally — referred to

Railway Belt Re-transfer Agreement Act, S.B.C. 1930, c. 60

Generally — referred to

Range Act, R.S.B.C. 1979, c. 355

Generally — referred to

Statutes considered by Huddart J.A. (concurring):

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Forest Act, R.S.B.C. 1979, c. 140

Generally — referred to

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

Generally — referred to

Offence Act, R.S.B.C. 1996, c. 338

Generally — referred to

Statutes considered by Southin J.A. (dissenting):

British Columbia Boundaries Act, 1863 (26 & 27 Vict.), c. 83

Generally — referred to

s. 3 — referred to

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

British Columbia Terms of Union (U.K.), May 16, 1871, reprinted R.S.C. 1985, App. II, No. 10, Sched., Term 11

s. 13 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

s. 35(1) — considered

Forest Act, R.S.B.C. 1979, c. 140

Generally — referred to

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

Generally — referred to

Land Act, R.S.B.C. 1979, c. 214

Generally — referred to

Land Act, R.S.B.C. 1996, c. 245

Generally — referred to

Mineral Tenure Act, S.B.C. 1988, c. 5

Generally — referred to

Mineral Tenure Act, R.S.B.C. 1996, c. 292

Generally — referred to

Petroleum and Natural Gas Act, R.S.B.C. 1979, c. 323

Generally — referred to

Petroleum and Natural Gas Act, R.S.B.C. 1996, c. 361

Generally — referred to

Railway Belt Re-transfer Agreement Act, S.B.C. 1930, c. 60

Generally — referred to

Wildlife Act, R.S.B.C. 1996, c. 488

Generally — considered

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Treaties considered by *Finch J.A.*:

Treaty No. 6, 1876 (Between Her Majesty the Queen and the Plains and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River)

Generally — referred to

Article 9 — considered

Treaty No. 8, 1899

Generally — considered

Treaties considered by *Huddart J.A.* (concurring):

Treaty No. 8, 1899

Generally — considered

Treaties considered by *Southin J.A.* (dissenting):

Treaty No. 8, 1899

Generally — considered

Rules considered by *Finch J.A.*:

Rules of Court, 1990, B.C. Reg. 221/90

R. 52(11)(d) — considered

Regulations considered by *Finch J.A.*:

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

Operational Planning Regulation, B.C. Reg. 174/95

Generally

s. 2

s. 4(1)

s. 4(4)

s. 4(5)

ss. 5-8

s. 6(1)(a)

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

s. 11(1)

s. 11(2)(b)

APPEAL from judgment reported at (1997), 39 B.C.L.R. (3d) 227, [1997] 4 C.N.L.R. 45, [1998] 4 W.W.R. 283 (B.C. S.C.), allowing application for judicial review from decision of district manager granting permit to log non-reserve land adjacent to native reserve.

Finch J.A.:

I Introduction

1 The Ministry of Forests ("the Ministry"), its District Manager at Fort St. John, David Lawson, ("the District Manager") and Canadian Forest Products Limited ("Canfor") appeal the order of the Supreme Court of British Columbia pronounced 24 June, 1997, which quashed the decision of the District Manager on 13 September, 1996, approving Canfor's application for Cutting Permit 212. Canfor holds the timber harvesting licence for the wilderness area in which C.P.212 would permit logging. It is Crown land, adjacent to the reserve land granted to the Halfway River First Nation. The Halfway Nation are descendants of the Beaver People who were signatories to Treaty 8 in 1900.

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

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

(my emphasis)

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

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

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

6 On this appeal, the appellants say the learned chambers judge erred on all counts. They say that, properly construed, the plaintiffs' right under Treaty 8 to hunt is subject to the Crown's right to "require", or "take up"

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

lands from time to time for, among other purposes, "lumbering"; and that the issuance of C.P.212 therefore did not breach or infringe the petitioners' treaty rights to hunt. Alternatively, the petitioners say that if the treaty right to hunt was breached, that breach was justified within the test laid down in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410 (S.C.C.).

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

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

II Background

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

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

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

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

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

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

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

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

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

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

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

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

20 There are now said to be 184 men, women and children in the Halfway River Nation. They are a poor people, economically, and have in general not adapted themselves to the agricultural lifestyle contemplated in those parts of Treaty 8 granting each family of five one square mile of land, or each individual 160 acres of land, as well as livestock, farm implements and machinery, and such seed as was suited to the locality of the Band.

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

They have instead pursued their traditional means of support and sustenance, of which moose hunting is an important element. 75% of the members of the Halfway River Nation live on social assistance.

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

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

III The Legislative Scheme

23 The authority of the District Manager to issue a cutting a permit derives from the *Forest Act*, R.S.B.C. 1979, c. 140, as am. S.B.C. 1980, c. 14 (the *Act*), the *Forest Practices Code of British Columbia Act*, S.B.C. 1994, c. 41 (the *Code*, now R.S.B.C. 1996, c. 159) and subsequent regulations, and the *Ministry of Forests Act*, R.S.B.C. 1979, c. 272, as am. S.B.C. 1980, c. 14. That latter statute amended various aspects of the *Forest Act*, the *Ministry of Forests Act*, and the *Range Act*, R.S.B.C. 1979, c. 355. The 1980 amendment to s. 158(2) of the *Forest Act* provides:

158 (2) Without limiting ss. (1), the Lieutenant Governor in Council may make regulations respecting ...

(d.1) the establishment of an area of the Province as a forest district, the abolition and variation in boundaries and name of a forest district and the consolidation of 2 or more forest districts; ...

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

2 (1) The following persons may be appointed under the ***Public Service Act***: ...

(d) a district manager for a forest district established under the ***Forest Act*** and the part of a range district established under the ***Range Act*** that covers the same area as the forest district; ...

24 That section, in combination with the *Public Service Act*, R.S.B.C. 1979, c. 343, authorized the Lieutenant Governor in Council to appoint district managers for forest districts established under the *Forest Act*. Section 9 of the 1979 *Forest Act* (now section 11) specified that no rights to harvest Crown timber could be granted on behalf of the government except in accordance with the *Act*. Section 10 (now section 12) specified that a District Manager, a regional manager or the minister may enter into agreements granting rights to harvest timber in the form of licenses and/or permits subject to the provisions of the *Act* and the *Regulations*. In 1994, section 247 of

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

the *Code* amended section 10 of the *Forest Act*, subjecting the District Manager's authority to enter into agreements granting rights to harvest timber to the requirements of the *Code*. Section 238 of the *Code* states that every cutting permit in existence at the time the *Code* came into force remains in existence, but ceases to have effect two years after the date the section came into force unless the District Manager determines that the operational planning requirements of the cutting permit are consistent with the requirements of the *Code*. With the exception of a few sections, the *Code* came into effect pursuant to Reg. 165/95 on June 15, 1995.

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

10. Subject to this *Act* and the *Regulations*, a district manager, a regional manager or the minister, on behalf of the Crown, may enter into an agreement granting rights to harvest Crown timber in the form of a

- (a) forest licence;
- (b) timber sale licence;
- (c) timber licence;
- (d) tree farm licence; ...

12. A forest licence ...

(f) shall provide for cutting permits to be issued by the Crown to authorize the allowable annual cut to be harvested, within the limits provided in the licence, from specific areas of land in the public sustained yield unit or timber supply area described in the licence;

.....

26 The enactment of the *Forest Practices Code* further amended these provisions, so as to render the formation of agreements under section 10 of the *Act* subject to the provisions of the *Code* (s. 247 of the *Code*).

27 In addition, the preamble to the *Code* provides a broad set of principles to guide the actions of forestry officials, and by which the statute is to be interpreted.

28 The preamble to the *Forest Practices Code* is as follows:

WHEREAS British Columbians desire sustainable use of the forests they hold in trust for future generations;

AND WHEREAS sustainable use includes

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- (a) managing forests to meet present needs without compromising the needs of future generations,
- (b) providing stewardship of forests based on an ethic of respect for the land,
- (c) balancing productive, spiritual, ecological and recreational values of forests to meet the economic and cultural needs of peoples and communities, including First Nations,
- (d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources, and
- (e) restoring damaged ecologies;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

29 The *Code* is to be interpreted so as to achieve the principles set out in the preamble: see *Koopman v. Ostergaard* (1995), 12 B.C.L.R. (3d) 154 (B.C. S.C. [In Chambers]); *Chetwynd Environmental Society v. Dawson Creek Forest District (District Manager)* (1995), 13 B.C.L.R. (3d) 338 (B.C. S.C. [In Chambers]). The preamble of the *Code*, therefore, is to receive a broad and liberal construction so as to best ensure the attainment of the *Code's* goals: *International Forest Products v. British Columbia* (unreported (March 19, 1997), Doc. Appeal 96/02(b) (B.C. Forest Appeals Comm.) (Vigod, Chair)) [affirmed by Bauman J., without comment on this issue, at (1998), 12 Admin. L.R. (3d) 45].

30 In addition to receiving guidance from the preamble's principles, the District Manager's authority to grant cutting permits is subject to certain specific operational planning requirements under the *Code*. These generally take the form of requiring the permit holder to demonstrate that the plans for harvesting conform to certain environmental standards. The operational planning requirements are set out in Part 3 of the *Code*, directing that the holder of an agreement under the *Forest Act* must carry out certain impact assessments of the proposed harvest area and integrate the findings of such an assessment into forest development plans (ss. 10, 17-19), logging plans (s. 11, 20-21), silviculture prescriptions and plans (s. 12, 14, 22-23, 25), and access management, stand management, and range use plans (ss. 13, 15-16, 24, 26-27). There are numerous provisions that allow for the holder of an agreement under the *Forest Act* to apply for exemptions from these requirements (Part 3, Division 3).

31 Finally, the District Manager's authority to grant cutting permits pursuant to forest licence agreements entered into under the *Act* is limited by many of the regulations enacted pursuant to the *Code*. Specifically, the *Operational Planning Regulations* [B.C. Reg. 174/95] identify areas where the District Manager must satisfy himself of the nature of the various kinds of public consultations that have occurred and need to occur. According to sections 5-8 of the *Operational Planning Regulations* the proponent of an operational plan or forest development plan is required to ensure that the best information available is used and that the District Manager approves of it.

32 Under the *Regulations*, before a person submits, or a District Manager puts into effect, a forest development plan, they must publish notice of the plan to the public (s.2). The District Manager must provide an opportunity for review and comment to an interested or affected person (s.4(4)), and must consider all comments received (s.4(5)).

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

33 Section 4(4) of the *Regulations* provides:

An opportunity for review and comment provided to an interested or affected person under s-s.(1) will only be adequate for the purposes of that subsection if, in the opinion of the district manager, the opportunity is commensurate with the nature and extent of that person's interest in the area under the plan and any right that person may have to use the area under the plan.

34 Finally, under s.6(1)(a) of the *Regulations* the District Manager has a discretion to require that operational plans be referred to any other resource agency, person, or other agency he may specify. I observe in passing that the District Manager's discretion to determine the adequacy of the opportunity to "review and comment" does not extend to that consultation required by the jurisprudence concerning the Crown's obligation to justify infringement of aboriginal or treaty rights.

35 The proponent of a plan is under an obligation to use the best information available (s.11(1)) and to use all information known to the person (s.11(2)(b)). These provisions confer a very broad discretion. It would appear, however, to be the sort of discretion calling for expertise beyond that of a professional forester. Whether a set plan of logging is acceptable to those members of the public who have a stake in it appears to be a question of judgment that any properly informed person would be as well able to answer as a forester.

36 *In summary then*, the District Manager's powers to issue cutting permits are found in s.10 of the 1979 *Forest Act* as amended by s.247 of the *Code* in 1994, and those powers are subject to the requirements of the *Code*. The preamble to the *Code* states the guiding principles for forest management which include meeting "the economic and cultural needs of First Nations". Section 4(4) to the *Regulations* gives the District Manager a discretion to determine the adequacy of consultation with interested parties, as specified in s.4(1).

IV The Decision of the District Manager

37 After investigation, reviews and discussion, the District Manager finally decided to issue C.P.212 on 13 September, 1996. His reasons for doing so are set out in a letter he wrote to Chief Metecheah on 3 October, 1996. In summary, the District Manager held:

1. Canfor's application for C.P.212 was consistent with Canfor's approved five year forest development plan;
2. C.P.212 was in substantial compliance with the requirements of the *Forest Practices Code*;
3. Canfor's harvesting operations would have minimal impacts on wildlife habitat suitability and capability for ungulates (moose and deer) and black bear in the area;
4. There would be minimal to no impact on fish habitat or fishing activities;
5. It was not the policy of the Provincial government to halt resource development pending resolution of a Treaty Land Entitlement Claim (TLEC) advanced by the petitioners against the federal Crown;
6. Canfor would be required to perform an Archeological Impact Assessment (AIA) in block 4 of C.P.212 where an old First Nations pack trail was located;
7. The proposed harvesting plan included sufficient measures to mitigate any concerns as to the trapping of

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

fur bearing animals in the area;

8. Canfor's plan would deactivate all roads seasonally, to make them impassable, and on completion of harvesting, would deactivate the roads permanently.

8. Canfor's plan would deactivate all roads seasonally, to make them impassable, and on completion of harvesting, would deactivate the roads permanently.

9. Canfor's proposed harvesting activities would not infringe the petitioners' Treaty 8 rights of hunting, fishing and trapping.

38 There does not appear to be any statutory requirement for the giving of such reasons, either oral or written. The reasons are useful, however, because they record the factors the District Manager took into account in reaching his decision, and they lend an air of openness to the process he followed. On the other hand, the giving of reasons may suggest a more judicial or quasi-judicial process than is required by the legislative scheme.

V The Decision of the Chambers Judge

39 The Halfway River First Nation brought an application for judicial review, seeking to quash the decision of the District Manager to issue C.P.212. That application was brought pursuant to the *Judicial Review Procedure Act*, which provides remedies for administrative actions in excess of statutory powers. Whether this was the proper form of proceedings to bring is considered more fully below. On that application, Madam Justice Dorgan granted *certiorari* and quashed the decision of the District Manager, citing reasons related to the various issues involved, which are outlined below.

A. Fettering:

40 The learned chambers judge held that the District Manager had fettered his discretion. She said at para.35:

[35] Notwithstanding these references which indicate a notion of weighing various interests, on the whole of the record I am satisfied that Lawson fettered his discretion by treating the government policy of not halting development as a given and by simply following the direction of the Minister of Forests not to halt development. This is particularly evident from p.4 of his Reasons for Decision which reads:

... in December 1995 the Minister of Forests advised both ourselves and the Halfway band that it is not the policy of the provincial government to halt resource development pending resolution of the Treaty Land Entitlement (TLE) claim and that we must honour legal obligations to both the Forest Industry as well as First Nations. This fact was again reiterated by Janna Kumi, Assistant Deputy Minister, Operations, upon her meeting with the Halfway Band in January 1996.

B. Bias

41 The learned chambers judge held that there was no actual bias in the District Manager's decision, but that there was a reasonable apprehension of bias. She said at paras.48-9:

[48] However, a further statement by Lawson is of concern. In his letter to Chief Metecheah dated August

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

29, 1996 Lawson states:

I must inform you that if the application is in order and abides by all ministry regulations and the *Forest Practices Code* I have no compelling reasons not to approve their application.

This statement strongly suggests that Lawson had already concluded that there was no infringement of Treaty or Aboriginal Rights. His only remaining concerns about the application were with respect to compliance with MOF and *Code* requirements. He requests information on Aboriginal and Treaty Rights with respect to future Canfor activities but makes no reference to such rights vis-a-vis CP212. The only conclusion to be drawn from this letter is that Lawson had already decided that there was no infringement of Halfway's rights.

[49] As well, it should be noted that at paragraph 18 of the affidavit of David Menzies, he states:

Approval to proceed with harvesting in Blocks 1, 2, 4, 5, 17 and 19 was granted by the District Manager on September 13, 1996 (attached as Exhibit 8). The formal application letter was only sent after the Ministry of Forests confirmed that the application would be granted, consistent with the approval already granted for the Development Plan.

[emphasis added]

This evidence indicates that once the Development Plan was approved, all applications for cutting permits within it will likely be approved as well and is evidence which supports a finding of a reasonable apprehension of bias.

42 She held that the petitioners had not waived their right to rely on the allegation of apprehended bias.

C. The District Manager's "Errors of Fact"

43 The learned chambers judge held that it was patently unreasonable for the District Manager to conclude that there was no infringement of the petitioner's hunting rights under Treaty 8. In reaching this conclusion, she said in part at paras. 63, 66 and 68:

[63] In the present case, it cannot be said that there was no evidence supporting Lawson's finding that Aboriginal and Treaty Rights would not be infringed. Lawson had the CHOA report and information provided by BCE staff regarding the impact of harvesting on the traditional activities of hunting, trapping and fishing.

.....

[66] Given the limited evidence available to Lawson, the factual conclusions which he reached as to infringement of Treaty 8 or Aboriginal Rights is unreasonable. There was some evidence supporting his findings, however, Lawson had no information from Halfway. How can one reach any reasonable conclusion as to the impact on Halfway's rights without obtaining information from Halfway on their uses of the area in question? This problem was recognized in the CHOA report, which stated, at 33-34:

In summary, the Cultural Heritage (Ethnographic) Overview presented here provides a useful starting point for assessing the extent of the Halfway River First Nation's use of the Tuszah study area. It demonstrates the area was, and continues to be, utilized for hunting, fishing, trapping and plant collect-

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

ing, and provides a ranking of the use potential for each of these activities. However, these data alone are not sufficient to understanding the issues surrounding infringement of Treaty and/or Aboriginal rights of the Halfway River Peoples. It is my opinion that additional cultural and ecological studies of the Tuzdzah study area are required before this issue can be adequately addressed.

.....

However, as discussed above, there are numerous shortcomings with a study of this nature, from both a cultural and ecological perspective. In fact, I suggest that until more detailed information is obtained in both these areas, studies such as this will fail to adequately address the concerns and management needs of forest managers and First Nations.

.....

[68] Given the importance attached to Treaty and Aboriginal Rights, in the absence of significant information and in the face of assertions by Halfway as to their uses of CP212, it was patently unreasonable for Lawson to conclude that there was no infringement.

D. Notice

44 The learned chambers judge held that the highest standard of fairness should apply in the circumstances of this case, and although the petitioners had some notice of Canfor's application for C.P.212, that notice was inadequate because the petitioners did not see Canfor's application in final form until after the Cutting Permit had been approved by the District Manager, and the petitioners had no specific notice that the District Manager would make his decision on 13 September, 1996 or on any other date. The history of the notice given to the petitioners is set out in para.73 of her reasons.

E. Infringement of Treaty 8 Right to Hunt

45 The learned chambers judge held that there was a *prima facie* infringement of the petitioners Treaty 8 right to hunt, as recognized and affirmed by s.35(1) of the *Constitution Act, 1982* which provides:

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

46 She held that infringement was to be determined in accordance with the test laid down in *R. v. Sparrow*, *supra*. She said in part at paras.91-93:

[91] Pursuant to Treaty 8 the Beaver First Nation (of which Halfway is a member) agreed to surrender "all their rights, titles and privileges whatsoever" to the Tuzdzuha area. Treaty 8 appears to have extinguished any non-Treaty Aboriginal Rights Halfway may have had prior to entering into the Treaty.

See for example *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570 at 575, 83 D.L.R. (4th) 381.

[92] In return for the surrender of land, the government agreed that the Natives would have the "right to pur-

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

sue their usual vocations of hunting, trapping and fishing throughout the tract surrendered." In *R. v. Noel*, [1995] 4 C.N.L.R. 78 at 88 (N.W.T. Terr. Ct.), Halifax J. stated:

There is no doubt that Treaty No. 8 provided a right to fish, hunt and trap to persons covered under that Treaty.

[93] According to the Treaty, these rights were subject to "such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

47 She held, citing *R. v. Badger*, *supra* (at para.101):

... that any interference with the right to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights.

48 She considered the availability to Canfor of other areas in which to log at para.108:

[108] While the onus is on the petitioners to establish infringement, it is worth noting that there is no persuasive evidence to suggest that other areas do not exist which Canfor could log in place of CP212 to avoid interfering with aboriginal rights.

She said at para.114:

[114] The MOF and Canfor argue that Halfway has the rest of the Tusdzu area in which to enjoy the preferred means of exercising its rights. This again ignores the holistic perspective of Halfway. Their preferred means are to exercise their rights to hunt, trap and fish in an unspoiled wilderness in close proximity to their reserve lands. In that sense, the approval of CP 212 denies Halfway the preferred means of exercising its rights.

F. Justification of Infringement

49 The learned chambers judge held that the Crown's infringement of the petitioners' Treaty 8 right to hunt was not justified because it had failed in its fiduciary duty to engage in adequate, reasonable consultation with the petitioners. She said, in part at paras. 140-142 and 158-159:

[140] In summary, then, the following meaningful opportunities to consult were provided:

- (a) Fourteen letters from the MOF to Halfway during 1995 and 1996 requesting information and/or a meeting or offering consultation.
- (b) Three meetings between Lawson and Halfway: on November 27/28, 1995; and February 2 and May 13, 1996.
- (c) Five telephone calls between the MOF and Halfway in 1995 and 1996.
- (d) An opportunity to provide feedback on the CHOA.

[141] The following reasonable opportunities to consult were denied to Halfway:

- (a) Halfway was not invited to attend the meeting between MOF and Canfor employees at which the cutting permit was approved.
- (b) The report "Potential Impacts to Fish & Wildlife Resources" was not provided to Halfway until August 26, 1996, despite that a draft copy was available January 4, 1996.
- (c) There was no real opportunity to participate in the CHOA.
- (d) Canfor's actual application for CP212 was not provided to Halfway until after the decision was made.

[142] While the MOF did make some efforts to inform itself, by requesting information from and meetings with Halfway, I have concluded these measures were inadequate. Briefing notes prepared by the MOF indicate that there was inadequate information with respect to potential infringement of treaty and aboriginal rights.

.....

[158] Finally, the present case is categorically different from *Ryan* in that in the present case the MOF failed to make all reasonable efforts to consult. In *Ryan* Macdonald J. stated, at 10, "I accept the submission that the M.O.F. more than satisfied any duty to consult which is upon it." While Halfway may not have been entirely reasonable, the fact remains that the MOF did not meet its fiduciary obligations.

[159] (1) Halfway has a treaty right to hunt, fish and trap in the Tusdzuh area. There is some evidence to suggest that the harvesting in CP212 will infringe upon this right, and in my view this evidence establishes *prima facie* infringement. The MOF has failed to justify this infringement under the second stage of the *Sparrow* test. Of particular significance is the fact that the MOF did not adequately consult with Halfway prior to approving Canfor's CP212 application.

(2) The MOF owes a fiduciary duty to Halfway. As part of this duty, the MOF must consult with the Band prior to making decisions which may affect treaty or aboriginal rights. The MOF failed to make all reasonable efforts to consult with Halfway, and in particular failed to fully inform itself respecting aboriginal and treaty rights in the Tusdzuh region and the impact the approval of CP212 would have on these rights. The MOF also failed to provide Halfway with information relevant to CP212 approval.

VI Issues

50 The following issues are raised by this appeal:

1. Whether judicial review of the District Manager's decision to issue a cutting permit is a proper proceeding in which to consider the alleged infringement of treaty rights;
2. The standard of review to be applied by this Court in reviewing the chambers judge's decisions as to fettering, reasonable apprehension of bias, adequacy of notice, and opportunity to be heard;
3. Whether the chambers judge erred in deciding that the District Manager had fettered his discretion, that there was a reasonable apprehension of bias, or that there was inadequate notice, or opportunity to be heard;

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4. Whether the chambers judge applied the correct standard of review to the District Manager's decision that treaty rights had not been infringed, and that the cutting permit should issue;
5. What is the true interpretation of Treaty 8, and the effect of s.35 of the *Constitution Act, 1982*, and then, whether the petitioner's right to hunt under the Treaty has been infringed; and
6. If there is an infringement of treaty rights, whether that infringement is justified.

VII Form of Proceedings

51 Madam Justice Southin takes the position that this Court should not decide the question of treaty rights or infringement on an application for judicial review, and that an action properly constituted is necessary for that purpose. With respect I take a different view of that matter.

52 Review of administrative decisions is traditionally challenged by way of judicial review: *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s.2(a). The Halfway River First Nation was a party in the consultation process contemplated under the *Forest Practices Code* and by Ministerial policy guidelines. It brought a petition for *certiorari*, seeking to quash the District Manager's decision. Such proceedings are usually decided on affidavit evidence.

53 Where the issues raised on such an application are sufficiently complex, and are closely tied to questions of fact, a chambers judge has a discretion to order a trial of the proceedings. Under Supreme Court Rule 52(11)(d), "the court may order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application." The court's powers under this Rule can be invoked on the court's own motion or on an application of a party.

54 Here we are told by counsel for the Minister that he took the position in the court below that the issue of Treaty rights and their breach had not been properly raised in the petition, and could not properly be decided on affidavit evidence, and without pleadings. The chambers judge does not mention these matters in her reasons, and it is impossible to tell how strenuously the point was argued. In any event, counsel for the Minister does not appear to have moved under Rule 52(11)(d) to have the proceedings converted into a trial.

55 In considering whether to issue C.P.212, the District Manager must be taken to have been aware of his fiduciary duty to the petitioners, as an agent of the Crown, of the right the petitioners asserted under Treaty 8, and of the possibility that issuance of the permit might constitute an infringement of that right. Of necessity his decision included a ruling on legal and constitutional rights. On these matters his decision is owed no deference by the courts, and is to be judged on the standard of correctness.

56 Those matters are nonetheless capable of disposition on affidavit evidence on an application for judicial review. And the District Manager and the forest industry would be in an impossible situation if, before deciding to issue a cutting permit, the applicant was required to commence an action by writ for resolution of any dispute over treaty rights, and the District Manager was bound to wait for the disposition of such an action (and the appeals) before deciding to issue a permit.

57 The learned chambers judge had a discretion under Rule 52(11)(d) whether to have the proceedings converted into a trial, and I am not at all persuaded that she erred in the exercise of that discretion by proceeding as

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she did. Counsel for the minister did not make a motion under the Rule, and it would be unfair to all concerned to refuse now to decide the treaty issues dealt with by the chambers judge, and which the District Manager could not avoid confronting.

VIII Standard of Review to be Applied to the Decision of the Chambers Judge Concerning Fettering, Bias, Notice and Hearing

58 The learned chambers judge held that the process followed by the District Manager offended the rules of procedural fairness in four respects: he fettered his decision by applying government policy; he pre-judged the merits of issuance of the cutting permit before hearing from the petitioners; he failed to give the petitioners adequate notice of his intention to decide whether to issue C.P.212; and he failed to provide an opportunity to be heard. These are all matters of procedural fairness, and do not go to the substance or merits of the District Manager's decision. There is, therefore, no element of curial deference owed to that decision by either the chambers judge or by this Court.

59 The chambers judge's decisions on fettering, apprehension of bias, inadequacy of notice and opportunity to be heard are all questions of mixed law and fact. To the extent that her decision involves questions of fact decided on affidavit and other documentary evidence, this Court would intervene only if the decision was clearly wrong, that is to say not reasonably supported by the evidence: see *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (B.C. C.A.) at 389; *Colliers MaCaulay Nicolls Inc. v. Clarke* (September 29, 1989), Doc. Vancouver CA009621 (B.C. C.A.); *Orangeville Raceway Ltd. v. Wood Gundy Inc.* (1995), 6 B.C.L.R. (3d) 391 (B.C. C.A.) at 400; and *Rootman Estate v. British Columbia (Public Trustee)* (1998), 115 B.C.A.C. 281 (B.C. C.A.).

60 To the extent that her decision involves questions of law this Court would, of course, intervene if it were shown that the judge misapprehended the law or applied the appropriate legal principles incorrectly.

IX Whether the Chambers Judge Erred in Deciding Those Issues

A. Fettering

61 The learned chambers judge held (para.35) that the District Manager fettered his discretion concerning issuance of the cutting permit by "treating the government policy of not halting development as a *given* and by simply following the direction of the Minister of Forests not to halt development."

62 The general rule concerning fettering is set out in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.), which holds that decision makers cannot limit the exercise of the discretion imposed upon them by adopting a policy, and then refusing to consider other factors that are legally relevant. Other cases to the same effect are *Davison v. Maple Ridge (District)* (1991), 60 B.C.L.R. (2d) 24 (B.C. C.A.) and *T. (C.) v. Langley School District No. 35* (1985), 65 B.C.L.R. 197 (B.C. C.A.). Government agencies and administrative bodies must, of necessity, adopt policies to guide their operations. And valid guidelines and policies can be considered in the exercise of a discretion, provided that the decision maker puts his or her mind to the specific circumstances of the case rather than blindly following the policy: see *Maple Lodge Farm, supra* at pages 6-8 and *Clare v. Thomson* (1993), 83 B.C.L.R. (2d) 263 (B.C. C.A.). It appears to me, with respect, that the learned chambers judge applied correct legal principles in her consideration of whether the District Manager fettered his discretion.

63 The question then is whether she applied those principles correctly in the circumstances of this case. In

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my respectful view she did not. Government policy, as expressed by the District Manager, was to not halt resource development pending resolution of the TLECs. In other words, such claims would not be treated as an automatic bar to the issuance of cutting permits. Even though such a claim was pending in respect of a potential logging area, the policy was to consider the application for a cutting permit in accordance with the requirements of the regulations, *Act* and *Code*.

64 A TLEC does not, on its face, require the cessation of all logging in the subject area. Such a claim does not impose any obligation on the District Manager, or on the Ministry generally. The claim is simply one factor for the District Manager to consider with respect to the land's significance as a traditional hunting area, and to potential land use.

65 The government policy in respect of TLECs does not preclude a District Manager from considering aboriginal hunting rights, and the effect that logging might have upon them. It is apparent in this case that the District Manager gave a full consideration to the information before him concerning those hunting rights. Cognisance by him of the government policy on TLECs did not give rise to the automatic issuance of a cutting permit without further consideration of other matters relevant to that decision.

66 I am therefore of the view that the learned chambers judge erred in applying the legal principles concerning fettering to the facts of this case. While the existence of TLEC was a factor for the District Manager to consider, the government policy of not halting resource development while such a claim was pending did not limit or impair the District Manager's discretion, or its exercise. Misapplication of the appropriate legal principle is an error of law that this Court can and should correct.

B. Reasonable Apprehension of Bias

67 The basic legal test on this issue is whether reasonable right-minded persons informed of the relevant facts, and looking at the matter realistically and practically, would consider that the District Manager had prejudged the question of whether to issue C.P.212: see *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at 394-95, and *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.).

68 The matter is a little more complex in this case where the District Manager's role includes both an investigative and an adjudicative function. The expression of a tentative or preliminary opinion on what the evidence shows in the investigative stage does not necessarily amount to a reasonable apprehension of bias: see *Emcon Services Inc. v. British Columbia (Council of Human Rights)* (1991), 49 Admin. L.R. 220 (B.C. S.C.) and *U.S.W.A., Local 4589 v. Bombardier - M.L.W. Ltée*, [1980] 1 S.C.R. 905 (S.C.C.).

69 In a case such as this the District Manager has a continuing and progressive role to play in making the numerous enquiries required of him by the *Regulations*, *Act* and *Code*, and in communicating with the applicant and others who have a stake in his decision. It is to be expected that his conclusions would develop over time as more information was obtained, and as interested parties made their positions known. His "decision letter" was written to Chief Metcheah on 3 October, 1996, but it is clear that the components of that decision were the result of previous investigations and deliberations.

70 In these circumstances I think one should be very cautious about inferring prejudice or the appearance of bias to the District Manager.

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

71 The learned chambers judge's conclusion that there was a reasonable apprehension of bias is based primarily on the statement the District Manager made in his letter of 29 August, 1996 to Chief Metecheah, that if the appellants' application complied with the Ministry's regulations and the *Code* he had "no compelling reasons" not to approve their application.

72 Applying the legal test set out above, and having regard to the nature of the District Manager's investigative and adjudicative roles, it would, in my view, be unreasonable to infer from that letter that the District Manager had closed his mind to anything further the petitioners might wish to put forward. A fair reading of his statement is that he had formed a tentative view on the information then available that the permit should issue, but that the final decision had not been made, and he was prepared to refuse issuance of the permit if there was a good reason to do so.

73 Nor in my view does the statement from David Menzies' affidavit, quoted at para.49 of the chambers judge's reasons, support an inference of bias reasonably apprehended. Administrative procedures followed by the District Manager in confirming approval of the appellants' application, before the formal application was received, are consistent with the continuing nature of the District Manager's contact and dialogue with the applicants.

74 It may be that the District Manager held a mistaken view of the law concerning the Crown's duty to satisfy itself that there was no infringement of the aboriginal right to hunt, and that the onus did not lie upon the petitioners to assert and prove that right or infringement. But in my view a misapprehension of the law by an administrative officer does not necessarily demonstrate a failure by him to keep an open mind, or an unwillingness to decide the issues on the merits as he saw them. Even the most open minds may sometimes fall into legal error.

75 In my respectful view, the learned chambers judge erred in holding that the District Manager's conduct gave rise to a reasonable apprehension of bias.

C. Adequacy of Notice

76 The learned chambers judge held that the petitioners did not have adequate notice that the District Manager would make his decision on 13 September, 1996 (para.78 of her reasons). With respect, I think the learned chambers judge more closely equated the decision making process in this case with a purely adjudicative process than is warranted by the legislative scheme.

77 As indicated above, this is not a case where a formal hearing on a fixed date was held or required. The District Manager's job required him to develop information over time, and it was properly within his role as an administrator to make tentative decisions as he went along, up to the time when he was finally satisfied that a cutting permit should or should not issue in accordance with the requirements of the *Regulations, Act* and *Code*.

78 In para.73 of her reasons the learned chambers judge set out in detail the means by which the petitioners were made aware of Canfor's logging plans for the area covered by C.P.212. The first notice, on the chambers judge's findings of fact, occurred in 1991. On 8 November, 1995 the District Manager sent the petitioner a copy of Canfor's application for C.P.212, and on 5 March, 1996 the District Manager wrote to the petitioners' lawyer to advise that "a decision regarding C.P.212 would be made within the next couple of weeks". In fact, the decision was not made for another six months.

79 On 13 May, 1996 the District Manager provided the petitioners with a map of Canfor's proposed harvest-

ing activities, including blocks in C.P.212. The map was colour-coded and clearly identified the cut blocks under consideration by the District Manager. The learned chambers judge described the meeting at which this map was presented to the petitioners as "the only true advance notice" of Canfor's plans, but she held it to be defective as notice because it did not give the date on which his decision would be made.

80 In my respectful view the learned chambers judge was plainly wrong to conclude that adequate notice had not been given in this case. Only if it could be said that notice of a fixed date for decision was required by law could her conclusion be justified. For the reasons expressed above, notice of such a fixed date was not required either by the statute, or by the requirements of procedural fairness. Imposing a requirement for such a fixed date would be inconsistent with the administrative regime under which the District Manager operated, and would unnecessarily restrict the flexibility that such a regime contemplates. The petitioners were well aware of Canfor's plans to log in the area covered by C.P.212 and had time to submit evidence and to make representations. The notice was adequate in the context of the legislative scheme, and the nature of the District Manager's duties.

D. The Right to be Heard

81 The learned chambers judge dealt with this issue at paras. 69-72. She held that the District Manager had not met the high standards of fairness in ensuring that the petitioners had an effective opportunity to be heard. She said the right to be heard was very similar to the consultation requirement encompassed by the Ministry's fiduciary duty to the petitioners.

82 Under the legislative scheme described above, there is no requirement for the District Manager to hold a formal "hearing", and in fact none was. However, the legislation and the *Regulations* do require consideration of First Nations' economic and cultural needs, and imply a positive duty on the District Manager to consult and ascertain the petitioners' position, as part of an administrative process that is procedurally fair. As the District Manager did not do this it is my view that the learned chambers judge was correct in holding there to have been a breach of the duty of procedural fairness.

E. Conclusion on Administrative Law Issues

83 In my respectful view, there was a failure to provide the petitioners an adequate opportunity to be heard. Otherwise, there was no lack of procedural fairness on any of the other grounds asserted by the petitioners, and found by the learned chambers judge.

X The Standard of Review Applicable to the District Manager's Decision

84 The learned chambers judge treated the District Manager's decision as to treaty rights, and breach of same, as a question of fact (see para.37 above, quoting the chambers judge's reasons at paras. 63, 66 and 68). She appears to have concluded, or assumed, that it was within the statutory powers of the District Manager to decide such matters, and she therefore asked whether his decisions on those matters were patently unreasonable. She concluded that the District Manager's decisions on those matters were patently unreasonable (see her conclusion No. 5 at para.158), and she therefore held that she was justified in substituting her view on those matters for those of the District Manager.

85 With respect, interpreting the treaty, deciding on the scope and interplay of the rights granted by it to both the petitioners and the Crown, and determining whether the petitioners' rights under the treaty were in-

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fringed, are all questions of law, although the last question may be one of mixed fact and law. Even though he has a fiduciary duty, the District Manager had no special expertise in deciding any of these issues, and as I understand the legislation, he has no authority to decide questions of general law such as these. To the extent that his decisions involve legal components, in the absence of any preclusive clause, they are reviewable on the standard of correctness: see *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) at para.63; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 (S.C.C.); *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.); and *Berg v. University of British Columbia*, [1993] 2 S.C.R. 353 (S.C.C.).

86 Moreover, as an agent of the Crown, bound by a fiduciary duty to the petitioners arising from the treaty in issue, the District Manager could not be seen as an impartial arbitrator in resolving issues arising under that treaty. To accord his decision on such questions the deference afforded by the "patently unreasonable" standard would, in effect, allow him to be the judge in his own cause.

87 As I consider these issues, characterized in the chambers judge's reasons as aboriginal issues, to be questions of law, the test applied to the District Manager's decision is that of correctness. Similarly, of course, the standard of correctness applies to her conclusions. In other words, the question for us is whether she erred in law.

XI Treaty 8

A. Principles of Treaty Interpretation

88 The principles applicable in the interpretation of treaties between the Crown and First Nations have been discussed and expounded in a number of cases: see *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 (S.C.C.) at p.404; *R. v. Sutherland*, [1980] 2 S.C.R. 451 (S.C.C.); *R. v. Taylor* (1981), 34 O.R. (2d) 360 (Ont. C.A.); *R. v. Bartleman* (1984), 55 B.C.L.R. 78 (B.C. C.A.); *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.); *R. v. Simon*, [1985] 2 S.C.R. 387 (S.C.C.); *R. v. Horse, supra Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79 (B.C. C.A.); *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.); *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.); *R. v. Sparrow, supra*; and *R. v. Badger, supra*.

89 In *Saanichton v. Tsawout, supra*, Mr. Justice Hinkson conveniently summarized the then principles of interpretation at pp. 84-85:

(b) Interpretation of Indian treaties - general principles

In approaching the interpretation of Indian treaties the courts in Canada have developed certain principles which have been enunciated as follows:

- (a) The treaty should be given a fair, large and liberal construction in favour of the Indians;
- (b) Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
- (c) As the Honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
- (d) Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted

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to the prejudice of the Indians if another construction is reasonably possible;

(e) Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.

90 Paragraph (d) in that list should now be modified to include the statement of Mr. Justice Cory in *R. v. Badger, supra* at 794:

Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.

91 And to para.(e) one might add the following, from *Sioui v. Quebec (Attorney General), supra*, at 1035, per Lamer, J. (as he then was):

In particular, [Courts] must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration. ...

92 Those are the principles which I consider applicable in the circumstances of this case.

B. The Parties' Positions

1. The Appellants' Position

93 The positions of the Ministry of Forests and of Canfor are very similar, if not identical, and I consider them together.

94 Both the Minister and Canfor say that the Indian right to hunt preserved in paragraph 9 of Treaty 8 (quoted above at para.2 of these reasons) is expressly made subject to two independent rights of the Crown which are of equal status to the Indian's rights. Those two Crown rights are the government power to regulate hunting etc. and the government right to "require" or "take up" parts of the Treaty lands for, *inter alia*, "lumbering". The appellants say that the Crown's right to require or take up lands for one of the listed purposes limits or qualifies the petitioners' right to hunt. The appellants say the Crown's right to acquire or take up land is clearly expressed, and is not ambiguous.

95 The appellants say that no extrinsic evidence is necessary or admissible to alter the terms of the treaty by adding to or subtracting from its express terms.

96 The appellants say the granting of C.P.212 was an exercise by the Crown of its express right to require or take up land, and there is therefore no infringement of the petitioners' treaty right to hunt.

97 The appellants say that the learned chambers judge erred when she held that *any interference* with the petitioners' right to hunt was a breach of Treaty 8, and say further that she erred in basing her decision on the petitioners' "holistic perspective" and in holding that they had the right to exercise their "preferred means" of hunting in an "unspoiled wilderness". The Minister says such conclusions are embarrassing as they do not reflect the historical realities of what had occurred in the Tusdzuh (mining and oil and gas exploration) before the granting of C.P.212.

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98 The appellants say that s.35 of the *Constitution Act, 1982* gives the petitioners no better position than they held before 1982, because their right to hunt in the treaty lands was, and remains, a defeasible right subject to derogation by the Crown's exercise of its rights. The power to require and take up lands remains unimpaired by s.35.

99 The appellants maintain that "taken up" includes designation of land by the Crown in a cutting permit, and that visible signs of occupation, or incompatible land use (see *R. v. Badger, supra*, at paragraphs 53, 54, and 66-68) are not necessary as indicia. The appellants say those considerations that are relevant where an Indian is charged with an offence as in *Badger*, are not relevant here where such an offence is not alleged, and the Crown is merely exercising its Treaty right.

100 So the appellants say that as a result of the "geographical limitation" in Treaty 8 the Crown is entitled to take up Treaty lands for "settlement, mining, lumbering, or other purposes" without violating any promise made by the Crown to the Indians. As there has been no infringement of Indian treaty rights, no "justification" analysis is required.

2. The Petitioners' Position

101 The petitioners say that the Crown's (and Canfor's) approach to Treaty 8 would give the Crown "the unlimited and unfettered right to take up any land or all lands as it sees fit and does not have to justify its decision in any way". It says this approach would allow the Crown to ignore the impact of such conduct on the rights of aboriginal signatories and would render meaningless the 1982 constitutionalization of Treaty rights. The Crown's approach, say the petitioners, is therefore unreasonable and manifestly wrong. To give the Treaty such an interpretation would not uphold the honour and integrity of the Crown.

102 The petitioners say that the government power to require or take up land is not a separate right in itself. It is rather a limitation on the petitioners' right to hunt, etc. The petitioners say s.35 guaranteed the aboriginal rights to hunt and fish. The Crown's right of defeasance is not mentioned in s.35, and is therefore not subject to a similar guarantee.

103 Prior to 1982, before the right to hunt was guaranteed by s.35, the Crown could have exercised its right of defeasance, and so overridden or limited the right to hunt. But since the enactment of s.35 the Crown's right is not so unlimited. Now the Crown can only exercise its right after consultation with the Indians. The Treaty creates competing, or conflicting rights - the Indian right to hunt on the one hand, and the Crown's right to take up such hunting grounds for the listed purposes on the other. Such competing rights cannot be exercised in disregard of one another. If exercise of the Crown right will impair or infringe the aboriginal right, then such infringement must be justified on the analysis set out in *Sparrow, supra* (a non-Treaty case).

104 The petitioners say the meaning of the Treaty proviso allowing the Crown to require or take up lands is ambiguous and can be read in more than one way. It should therefore be read in the context of the Crown's oral promises at the time of Treaty negotiations. Extrinsic evidence, including the representations made by the Crown's negotiators to the signatories in 1899, as well as in 1900, is admissible for the purposes of construing the Treaty. The petitioners say the Treaty should be read in a broad, open fashion, and construed in a liberal way in favour of the Indians. All subsequent adhesions refer back to the Treaty made at Lesser Slave Lake with the Cree people in 1899, and the oral promises made there are essential to a true understanding of the Treaty made with the petitioners' forebears.

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

C. The Admissibility of Extrinsic Evidence

105 In support of its argument against the admissibility of extrinsic evidence, The Ministry of Forests relies on *R. v. Horse, supra*, where Mr. Justice Estey, writing for the court, said at S.C.R. 201:

I have some reservations about the use of this material as an aid to interpreting the terms of Treaty No. 6. In my view the terms are not ambiguous. The normal rule with respect to interpretation of contractual documents is that extrinsic evidence is not to be used in the absence of ambiguity; nor can it be invoked where the result would be to alter the terms of a document by adding to or subtracting from the written agreement.

And further at p.203:

In my opinion there is no ambiguity which would bring in extraneous interpretative material. Nevertheless I am prepared to consider the Morris text, proffered by the appellants, as a useful guide to the interpretation of Treaty No. 6. At the very least, the text as a whole enables one to view the treaty at issue here in its overall historical context.

106 Those comments were made in a case involving Treaty 6, which has an identical "geographical limitation" to that contained in Treaty 8. Further, *Horse* was concerned with the interpretation of s.12 of the Saskatchewan Natural Resources Transfer Agreement, which required interpretation of the words "unoccupied Crown land" and "right of access", language not at issue in this case. Counsel for the Ministry also referred us to *Sioui v. Quebec (Attorney General), supra* and *R. v. Badger, supra*. In my respectful view, the conventional statement of the rule governing admissibility of extrinsic evidence enunciated in *R. v. Horse* has been somewhat relaxed by subsequent decisions. In *Sioui v. Quebec (Attorney General), supra*, after referring to *R. v. Horse* at p.1049, Mr. Justice Lamer (as he then was) said at p.1068:

The historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it. As MacKinnon J.A. said in *Taylor and Williams, supra*, at p.232:

Cases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and the surrounding circumstances at the time of the treaty, relied on by both parties, in determining the treaty's effect.

107 And in *R. v. Badger, supra*, Mr. Justice Cory for the majority held at pp.798-9:

Third, the applicable interpretative principles must be borne in mind. Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (1880), at pp.338-42; *Sioui, supra*, at p.1068; Report of the Aboriginal Justice Inquiry of Manitoba (1991); Jean Fiesen, Grant me Wherewith to Make my Living (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is un-

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

likely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted. See *Nowegijick*, *supra*, at p.36; *Sioui*, *supra*, at pp. 1035-36 and 1044; *Sparrow*, *supra*, at p.1107; and *Mitchell*, *supra*, where La Forest J. noted the significant difference that exists between the interpretation of treaties and statutes which pertain to Indians.

108 I observe in passing that *R. v. Badger*, like *R. v. Horse* also involved interpretation of s.12 of the Natural Resources Transfer Agreement, 1930. But I understand the ruling concerning the admissibility of extrinsic evidence to be equally applicable in a case such as this one, where that agreement is not in issue.

109 In this case, the learned chambers judge held that extrinsic evidence was admissible to explain the "context" in which the Treaty was signed (at paras. 96-98 of her reasons). In my respectful view in so doing she did not err in principle. The passage quoted above from the judgment of Mr. Justice Cory in *Badger* at pp.798-9 is particularly apt in this case. The Treaty, written in English, purports to reflect the mutual understanding of the Crown and all aboriginal signatories. The understanding of the aboriginal peoples cannot be deduced from the language of the Treaty alone, because its meaning to the aboriginal signatories could only have been expressed to them orally by interpretation into their languages, and by whatever oral explanations were necessary to ensure their understanding.

D. What Extrinsic Evidence is Admissible

110 The Crown says, without admitting any ambiguity in the Treaty, that even if extrinsic evidence is admissible for the purpose of giving historical context, evidence of the Commissioner's Report on negotiations in 1899 is not admissible in this case, because there is no evidence that what was said by the government negotiators at Lesser Slave Lake, and elsewhere in 1899, was also said at Fort St. John in 1900, when the Beaver people signed. In particular, the Crown says that the passage of the Commissioner's Report referred to by Mr. Justice Cory in *Badger*, and by the learned chambers judge in this case, is not evidence of what was said to the Beaver people at Fort St. John. In the Crown's submission, only the report of the Commissioners made in 1900 is admissible.

111 What the Commissioners report of 1889 said, as quoted in part by the learned chambers judge at para.98 of her reasons, is this:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges, ... We pointed out ... that the same means of earning a livelihood would continue after the treaty as existed before it ...

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

would be as free to hunt and fish after the treaty as they would be if they never entered into it.

112 In my respectful view, the position of the Crown on this issue is not tenable. The adhesion signed by the representatives of the Beaver people at Fort St. John in 1900 contains this:

The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said Treaty, and agree to adhere to the terms thereof in consideration of the undertakings made therein.

(my emphasis)

113 The terms of the Treaty signed by the Indians at Lesser Slave Lake had been explained to them orally, as indicated in the Commissioner's report in 1899, and it is therefore, in my view, a reasonable inference from the terms of the Beavers' adhesion in 1900 that the terms of the Treaty were explained to them in similar, if not identical, terms.

114 Moreover, it would not be consistent with the honour and integrity of the Crown to accept that the Treaty was interpreted and explained to the Indians at Lesser Slave Lake in one way, but interpreted and explained to the Beaver at Fort St. John in another less favourable and more limited way. To accept the proposition put forward by the Ministry would be to acknowledge that the same Treaty language is to be given different meanings in respect of different signatories. Only the clearest evidence could persuade me to such a conclusion, and such evidence is not present in this case.

115 The Ministry of Forests further objects to the admission of the affidavit evidence of Father Gabriel Breynat, an interpreter present at the signing of Treaty 8 in 1899 at Fort Chippewan, and Fond du Lac. This affidavit was sworn in 1937 at Ottawa, Ontario. The Ministry says the document is irrelevant, and in addition has not been properly proven as an ancient document.

116 The objection as to relevance is similar to the Crown's objection to the Commissioner's Report of 1899, as relating to events at a different time and place, and with a different Indian people. I would not give effect to the objection based on relevance for the reasons expressed above.

117 Turning to the question of proof, the general rule in Canada governing the admissibility of ancient documents (a document more than thirty years old) is that any document "which is produced from proper custody, is presumed in the absence of circumstances of suspicion, to have been duly signed, sealed, attested, delivered, or published according to its purport": Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworths, 1992) at 955. If there are suspicious circumstances surrounding the origins of the document, the court will either require proof of the execution of it as being in a similar manner as the execution of a similar document of a more recent date. Further, documents are considered to have been in "proper custody" when they have been kept by someone in a place where the documents might reasonably and naturally be expected to be found: Sopinka et al, *supra* at 956, citing *Doe d. Jacobs v. Phillips* (1845), 8 Q.B. 158, 115 E.R. 835 (Eng. Q.B.), and *Thompson v. Bennett* (1872), 22 U.C.C.P. 393 (Ont. C.P.).

118 The affidavit of Father Breynat appears on its face to have been executed in a manner consistent with

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

the execution of modern affidavits. The copy produced is not entitled in any particular cause or matter, and one cannot tell from the document itself the purpose for which it was sworn. I would not say that this gives rise to suspicions concerning its origins, but rather that there is an unanswered question as to why it was sworn.

119 The affidavit of Father Breynat was adduced in these proceedings as an exhibit to the affidavit of Michael Pflueger. He is Alberta counsel representing the Halfway River First Nation in its Treaty Land Entitlement Claim. His affidavit does not disclose in whose custody Father Breynat's affidavit has been kept. There is a notation at the top of page 1 of Father Breynat's affidavit, clearly not part of the original, which says "Anthropology UA", which I take to be a reference to the Anthropology Department at the University of Alberta. However, there is nothing to indicate whether the University was the custodian of the document. Mr. Pflueger deposes that the affidavit of Father Breynat is part of "the standard treaty package that is submitted with Treaty Land Entitlement Claims".

120 On the evidence as it stands, I do not think there is any indication of suspicious circumstances surrounding the document's origins. However, I think the evidence falls short of proving that the document was produced from "proper custody". Wigmore, *Evidence in Trials at Common Law* vol. 7 (Boston: Middlebound & Company, 1978) explains why evidence as to custody of such a document is important:

A forger usually cannot secure the placing of a document in such custody; and hence the naturalness of its custody, being relevant circumstantially, is required in combination with the document's age.

I think therefore that Father Breynat's affidavit is inadmissible as not having been properly proven. The learned chambers judge did not refer to this affidavit, so she cannot be said to have made any error on that account.

E. R. v. Sparrow and its Application

121 In *R. v. Sparrow, supra*, the Supreme Court of Canada considered the effect of s.35(1) of the *Constitution Act, 1982* on the status of aboriginal rights, and set out a framework for deciding whether aboriginal rights had been interfered with, and if so, whether such interference could be justified. In *Sparrow* a native fisher was charged with an offence under the *Fisheries Act*, R.S.C. 1970, c. F-14. In his defence, he admitted the constituent elements of the charge, but argued that he was exercising an existing aboriginal right to fish, and that the statutory and regulatory restrictions imposed were inconsistent with s.35.

122 The court held that the words in s.35 "existing aboriginal rights" must be interpreted flexibly, so as to permit their evolution over time, and that "an approach to the constitutional guarantee embodied in s.35(1) that would incorporate 'frozen rights' must be rejected." It held that the Crown had failed to discharge the onus of proving that the aboriginal right to fish had been extinguished, and it held that the scope of the right to fish for food was not confined to mere subsistence, but included as well fishing for social and ceremonial purposes.

123 The court also considered the meaning of the words "recognized and affirmed" in s.35. It held that a generous, liberal interpretation of those words was required. It held the relationship between government and aboriginal peoples was trustlike, rather than adversarial, and that the words "recognized and affirmed" incorporated a fiduciary relationship, and so imported some restraint on the exercise of sovereign power. Federal legislative powers continue to exist, but those powers "must be reconciled with the federal duty", and that reconciliation could best be achieved by requiring "justification" of any government regulation that infringed or denied aboriginal rights. Section 35 was therefore "a strong check on legislative power". The court emphasized the importance of "context" and the "case by case approach to s.35(1)".

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

124 The court then set out the test for *prima facie* interference with an existing aboriginal right. First, does the impugned legislation have the effect of interfering with an existing aboriginal right, having regard for the character or incidence of the right in issue? Infringement may be found where the statutory limitations on the right are unreasonable, impose undue hardship, or deny the aboriginal the preferred means of exercising the right. The question is whether either the purpose or effect of the statutory regulation unnecessarily infringes the aboriginal interest.

125 The court then considered the question, if a *prima facie* infringement be found, of how the Crown could show that the infringement was justified. The justification analysis involved asking whether there is a valid legislative objective. In the context of *Sparrow*, conservation and resource management were considered to be valid legislative objectives. The Crown has a heavy burden on the justification issue because its honour is at stake. Justification also requires considering whether the aboriginal interest at stake has been infringed, "as little as possible", whether in cases of expropriation fair compensation is available, and whether the aboriginal group has been consulted with respect to conservation, or at least informed of the proposed regulatory scheme. This list of factors was said not to be exhaustive.

126 There are several features in the present case that differ from *Sparrow*, and the extent to which those differences may qualify or limit *Sparrow's* application to this case will have to be considered. First, there is the fact that the right to hunt in this case is based on Treaty 8. There was no treaty in *Sparrow*. Second, *Sparrow* is another case involving the allegation of an offence against a native person, in answer to which charge he has relied upon his aboriginal right. In this case there is no offence alleged. It is the provincial Crown which asserts a positive right under Treaty 8 to require or to take up land as the basis for its legislative scheme in respect of forestry. Third, in *Sparrow* the attack was made on the constitutional validity of federal legislation, the *Fisheries Act*. In this case the petitioners do not allege that any legislation is unconstitutional. The amended petition alleges that the decision of the District Manager in issuing C.P.212 was in breach of constitutional or administrative law duties. The attack is therefore on executive or administrative conduct rather than on any legislative enactment. Fourth, and finally, it is provincial legislation that authorizes the impugned conduct. In *Sparrow*, the attack was on federal legislation.

127 The fact that a treaty underlies the aboriginal right to hunt in this case does not, to my mind, render inapplicable the s.35(1) analysis engaged in by the court in *Sparrow*. Section 35(1) gives constitutional status to both aboriginal and treaty rights. As indicated above, treaties with aboriginal peoples have always engaged the honour and integrity of the Crown. The fiduciary duties of the Crown are, if anything, more obvious where it has reduced its solemn promises to writing.

128 As noted above in discussing some of the other cases, there is in this case no allegation of an offence by an aboriginal person. The Crown asserts its positive rights under the Treaty as the basis for its forestry program. In *Sparrow*, the federal Crown relied on its enumerated powers in s.91 of the *Constitution Act, 1867* (the *BNA Act*) as the basis for its legislative and regulatory scheme in respect of fisheries. Here, even if one accepts that the Crown's right to require or take up land under Treaty 8 has achieved constitutional status under s.35(1) (a position which the petitioners stoutly reject), its authority to act could be no higher than the constitutional powers the federal Crown sought to exercise in *Sparrow*.

129 In my view the fact that the Crown asserts its rights under Treaty 8 can place it in no better position vis-a-vis a competing or conflicting aboriginal treaty right than the position the Crown enjoys in exercising the powers granted in either s.91 or 92 of the *Constitution Act, 1867*.

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130 There is also a distinction between the alleged unconstitutionality of legislation in *Sparrow*, and the attack here on the conduct of a government official; and the fact that the conduct was authorized under provincial legislation, whereas in *Sparrow* a federal statute was impugned. Here the petitioners do not challenge the validity of the provincial legislation concerning forestry. They seek to prohibit any activity in connection with C.P. 212 until the Ministry has fulfilled its "fiduciary and constitutional" duty to consult with the petitioners.

F. Interpretation of Treaty 8 and Infringement of the Right to Hunt

131 The appellants say the learned chambers judge erred in holding, at para.101, that: "... That any interference with the right to hunt, fish or trap constitutes a *prima facie* infringement of Treaty 8 rights" and further erred in holding (at para.114) that the issue was to be considered from the petitioners' "holistic perspective", and that the approval of C.P.212 denied the petitioners "their preferred means ... to hunt ... in an unspoiled wilderness in close proximity to their reserve lands." The appellants assert the Crown's independent right under the Treaty to require or take up lands as described above in these reasons.

132 I begin by observing that earlier cases involving the interpretation of the proviso in Treaty 8 (e.g. *R. v. Badger, supra*) or similar language in other treaties (e.g. *R. v. Horse, supra*) are of limited assistance for two reasons. First, they are cases involving a charge against an Indian for breach of a provincial statute, in answer to which the accused relied upon the treaty right to hunt. Second, they are cases involving the interpretation of s.12 of the Natural Resources Transfer Agreement, in addition to the language of the treaty granting the right to hunt. The only case we were cited involving the interpretation of Treaty 8, and in which the Natural Resources Transfer Agreement was not a factor, is *R. v. Noel*, [1995] 4 C.N.L.R. 78 (N.W.T. Terr. Ct.), a decision of the Northwest Territories Territorial Court. As with the other cases, *Noel* was a charge against a native for breach of legislation in answer to which he relied on his Treaty 8 right to hunt.

133 A second observation I would make is that prior to the enactment of s.35 of the *Constitution Act, 1982*, parliamentary sovereignty was not limited or restricted by treaties with aboriginal peoples, and the federal government had the power to vary or repeal treaty rights by act of parliament: see *R. v. Sikyea*, [1964] S.C.R. 642 (S.C.C.), and *Daniels v. White*, [1968] S.C.R. 517 (S.C.C.) where the *Migratory Birds Convention Act* was held to supersede Indian treaty rights.

134 The third observation I would make is that the Indians' right to hunt granted to the signatories of Treaty 8, and the Crown's right to regulate, and to require or take up lands, cannot be given meaning without reference to one another. They are competing, or conflicting rights as has been recently affirmed in *R. v. Sundown* (1999), 132 C.C.C. (3d) 353 (S.C.C.). The Indians' right to hunt is subject to the "geographical limitation", and the Crown's right to take up land cannot be read as absolute or unrestricted, for to do so (as even the Crown concedes) would render the right to hunt meaningless. Such a position cannot be asserted in conformity with the Crown's honour and integrity. So even before the enactment of s.35 in 1982, a balancing of the competing rights of the parties to the Treaty was necessary.

135 Fourth, the enactment of s.35 in 1982 has improved the position of the petitioners. Their right to hunt, and other treaty rights, now have constitutional status. They are therefore protected by the supreme law of Canada, and those rights cannot be infringed or restricted other than in conformity with constitutional norms.

136 I am therefore of the view that it is unrealistic to regard the Crown's right to take up land as a separate or independent right, rather than as a limitation or restriction on the Indians' right to hunt. In either case, however, the Crown's right qualifies the Indians' rights and cannot therefore be exercised without affecting those

rights.

137 The effect of the decision to issue C.P.212, and the reasonableness of the District Manager's decision, must be viewed in the context of the competing rights created by Treaty 8, namely the Indians' right to hunt, and the government's right to take up land for lumbering. The petitioners' interest in the logging activity proposed in the Tusdzuw was known from the outset, and it was recognized by both appellants. In his letter of 3 October, 1996, the District Manager recognized the petitioners' assertion of a Treaty Land Entitlement Claim (TLEC) in the area where C.P.212 was located, as well as the effect logging might have on wildlife habitat and hunting activities. His view was that Canfor's proposed logging plan would have "minimal impact" on those matters, and that the plan included elements that would "mitigate" the impact of logging.

138 In my view the District Manager effectively acknowledged that C.P.212 would affect the petitioners' hunting rights in some way. Given the fiduciary nature of the relationship between government and Indians, and the constitutional protection afforded by s.35 over the treaty right to hunt, it seems to me that the interference contemplated by C.P.212 amounts to an infringement of the petitioners' right to hunt. The granting of C.P.212 was the *de facto* assertion of the government's right to take up land, a right that by its very nature limited or interfered with the right to hunt.

139 I do not think the learned chambers judge erred in holding that any interference with the right to hunt was a *prima facie* infringement of the petitioners' Treaty 8 right to hunt.

140 In my respectful view, the learned chambers judge overstated the petitioners' position in holding that they were entitled to exercise their "preferred means of hunting" by doing so in an "unspoiled wilderness". The Tusdzuw was not unspoiled wilderness in 1996 when the District Manager approved C.P.212, nor was it unspoiled wilderness in 1982 when treaty rights received constitutional protection. This was a wilderness criss-crossed with seismic lines, where oil and gas exploration and mining had taken place.

141 Nor do I think "preferred means" should be taken to refer to an area, or the nature of the area, where hunting or fishing rights might be exercised. Those words more correctly refer to the methods or modes of hunting or fishing employed.

142 But despite these disagreements with the reasons of the learned chambers judge, I do not think she erred in concluding that approval of C.P.212 constituted a *prima facie* infringement of the Treaty 8 right to hunt because the proposed activity would limit or impair in some degree the exercise of that right.

143 The appellants contend that in reaching that conclusion the learned chambers judge substituted her finding of fact for that of the District Manager. But the interpretation of Treaty rights, and a decision as to whether they have been breached, are not within any jurisdiction conferred on the District Manager by the *Forest Act*, *Forest Practices Code* or relevant regulations. They are questions of law and even the District Manager acknowledges that the proposed harvesting would have some effect on hunting. He said (at p.3 of the letter of 3 October, 1996) that:

... the proposed harvest areas would have minimal impacts on wildlife habitat suitability and capability for ungulates and black bear...

144 I respectfully agree with the learned chambers judge that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s.35 of the *Constitution Act, 1982*.

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XII Justification

145 The analysis required in deciding whether infringement of a treaty right is justified is referred to above briefly in paragraph 83. Although *Sparrow* was not a treaty case, in my view the same approach is warranted here as in cases of aboriginal rights, as both treaty and aboriginal rights have constitutional protection under s.35(1) of the *Constitution Act, 1982*.

146 Justification requires consideration of the following questions (said in *Sparrow* not to be an exhaustive or exclusive list):

1. Whether the legislative or administrative objective is of sufficient importance to warrant infringement;
2. Whether the legislative or administrative conduct infringes the treaty right as little as possible;
3. Whether the effects of infringement outweigh the benefits derived from the government action; and
4. Whether adequate meaningful consultation has taken place.

147 Overriding all these issues is whether the honour and integrity of the Crown has been upheld in its treatment of the petitioners' rights.

148 I will consider those issues in turn.

A. Importance of the Legislative Objective

149 The learned chambers judge does not appear to have addressed this question, nor does the petitioner appear to have led any evidence to suggest that the objectives of the *Forest Act* and *Code* are not of sufficient importance to warrant infringement of the petitioners right to hunt.

150 It would, in my view, be unduly limited, and therefore wrong, to consider the objective in issuing a cutting permit only from the perspective of Canfor's presumed goal to have a productive forest business with attendant economic benefits, or from the perspective of the Provincial Government to have a viable forest industry and a vibrant Provincial economy. The objectives of the forestry legislation go far beyond economics. The preamble to the *Code* (see para.28 above) refers to British Columbians' desire for sustainable use of the forests they hold in trust for future generations, and to the varied and sometimes competing objectives encompassed within the words "sustainable use".

151 In *Sparrow* the legislative objective was found to be conservation of the fishery, and the Court held that to be a sufficiently important objective to warrant infringement of the aboriginal right to fish for food. Viewing the legislative scheme in respect of forestry as a whole, and by a parity of reasoning with *Sparrow*, in my view the legislative objectives of the *Forest Act* and *Code* are sufficiently important to warrant infringement of the petitioners' treaty right to hunt in the affected area. Those objectives include conservation, and the economic and cultural needs of all peoples and communities in the Province.

B. Minimal Impairment

152 As with the first issue, the learned chambers judge does not appear to have addressed directly the question of minimal infringement. When dealing with the issue of infringement of the right to hunt, she did say (at

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

para.108) that" there is no persuasive evidence to suggest that other areas do not exist which Canfor could log in place of C.P.212 to avoid interfering with aboriginal rights".

153 But the learned chambers judge stopped short of saying that minimal interference means no interference, and correctly so, for the law does not impose such a stringent standard. In *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.) at 1065, the Court held that "[s]o long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test".

154 The onus for showing minimal impairment rests on the Crown. See *Semiahmoo Indian Band v. Canada* (1997), 148 D.L.R. (4th) 523, [1998] 1 C.N.L.R. 250 (Fed. C.A.) at 268.

155 In this context, the findings of the District Manager are significant. He found (see para. 37 above) that Canfor's proposed operations would have minimal impacts on wildlife habitat suitability and capability for moose, deer and bear, that there would be minimal to no impact on fish habitat or fishing activities, and that the proposed harvesting plan included sufficient measures to mitigate any concerns as to the trapping of fur bearing animals in the area.

156 In my respectful view, these findings, which are within the scope of the District Manager's authority to make, are sufficient to meet the tests for minimal impairment or infringement of the right to hunt.

C. Whether the Effects of Infringement Outweigh the Benefits to be Derived from the Government Action

157 Again, this issue was not addressed by the chambers judge. Given the minimal effects on hunting that the proposed logging would have, as found by the District Manager, and in the absence of any evidence to the contrary, it is in my view a fair inference that the benefits to be derived from implementation of the legislative scheme, and the issuance of cutting permits in accordance with its requirements, would outweigh any detriment to the petitioners caused by the infringement of the right to hunt.

D. Adequate Meaningful Consultation

158 The learned chambers judge found that there had been inadequate consultation with the petitioners, and it is upon this ground that she found the Crown had failed in its attempts to justify the infringement of the petitioners' right to hunt.

159 It is perhaps worth mentioning here the difference between adequate notice as a requirement of procedural fairness (considered above at paras.76-80) and adequate consultation, which is a substantive requirement under the test for justification. The fact that adequate notice of an intended decision may have been given, does not mean that the requirement for adequate consultation has also been met.

160 The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action: see *R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 (B.C. C.A.) at 251; *R. v. Noel*, [1995] 4 C.N.L.R. 78 (N.W.T. Terr. Ct.) at 94-95; *R. v. Jack* (1995), 16 B.C.L.R. (3d) 201 (B.C. C.A.) at 222-223; *Eastmain Band v. Robinson* (1992), 99 D.L.R. (4th) 16 (Fed. C.A.) at 27; and *R. v. Nikal*, *supra*.

161 There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

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 v. Fort St. James Forest District (District Manager)* (January 25, 1994), Doc. Smithers 7855, 7856 (B.C. S.C.); affirmed (1994), 40 B.C.A.C. 91 (B.C. C.A.).

162 The chambers judge's findings as to what steps were taken by way of consultation are matters of fact that cannot be impugned unless there is no evidence to support them. In my view there is such evidence and we must accept the facts as found by her.

163 It remains to consider the adequacy or inadequacy of the Crown's efforts in that behalf.

164 The learned chambers judge found (at para.141) that:

The following reasonable opportunities to consult were denied to Halfway:

- (a) Halfway was not invited to attend the meeting between MOF and Canfor employees at which the cutting permit was approved.
- (b) The report "Potential Impacts to Fish & Wildlife Resources" was not provided to Halfway until August 26, 1996, despite that a draft copy was available January 4, 1996.
- (c) There was no real opportunity to participate in the CHOA.
- (d) Canfor's actual application for CP212 was not provided to Halfway until after the decision was made.

165 These findings, particularly (b) and (c) support the conclusion that the Crown did not meet the first and second parts of the consultation test referred to, namely to provide in a timely way information the aboriginal group would need in order to inform itself on the effects of the proposed action, and to ensure that the aboriginal group had an opportunity to express their interests and concerns.

166 I respectfully agree with the learned chambers judge that given the positive duty to inform resting on the Crown, it is no answer for it to say that the petitioners did not take affirmative steps in their own interests to be informed, conduct that the learned chambers judge described as possibly "not ... entirely reasonable".

167 As laid down in the cases on justification, the Crown must satisfy all aspects of the test if it is to succeed. Thus, even though there was a sufficiently important legislative objective, the petitioners rights were infringed as little as possible, and the effects of the infringement are outweighed by the benefits to be derived from the government's conduct, justification of the infringement has not been established because the Crown failed in its duty to consult. It would be inconsistent with the honour and integrity of the Crown to find justification where the Crown has not met that duty.

XIII Remedy

168 The learned chambers judge granted "an order quashing the decision made September 13, 1996 which approved the application for CP.212".

169 I would dismiss the appeal from that order for the reasons given above.

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Huddart J.A. (concurring):

170 My approach to the issues on this appeal varies somewhat from those of my colleagues, whose reasons I have had the opportunity to read in draft. While I agree entirely with Mr. Justice Finch with regard to the administrative law issues, like Madam Justice Southin I part company with him on his application of the principles from *Sparrow*, *supra*, to the circumstances of this case.

171 The larger question may be whether the province's forest management scheme permits the accommodation of treaty and aboriginal rights with the perceived rights of licensees. However, the constitutionality of the legislative scheme governing the management of the province's forests is not in issue on this appeal. So we must accept, for the purposes of our analysis in this case, that the legislature and executive have provided an acceptable method of "recognizing and affirming" treaty and aboriginal rights of first nations in making the decisions required by that management scheme. The scheme obviously contemplates situations where shared use would be made of the territory in question. Shared use was also envisaged by the treaty makers on both sides of Treaty 8. That is evident from the evidence in this case and from the discussion in *Badger*, *supra*, about the same Treaty 8. Thus accepting the adequacy of the legislative scheme to accommodate treaty and aboriginal rights is not necessarily offensive to the interests of the Halfway River First Nation.

172 I agree with Mr. Justice Finch that the District Manager's decision must be reviewed "in the context of the competing rights created by Treaty 8". On the facts as the District Manager found them, however, this is not a case of "visible incompatible uses" such as would give rise to the "geographical limitation" on the right to hunt as Cory J. discussed it in *Badger*, *supra*.

173 I do not think the District Manager for a moment thought he was "taking up" or "requiring" any part of the Halfway traditional hunting grounds so as to exclude Halfway's right to hunt or to extinguish the hunting right over a particular area, whatever the Crown may now assert in support of his decision to issue a cutting permit. At most the Crown can be seen as allowing the temporary use of some land for a specific purpose, compatible with the continued long-term use of the land for Halfway's traditional hunting activities. The Crown was asserting a shared use, not a taking up of land for an incompatible use. There was evidence before the District Manager to support a finding that the treaty right to hunt and Canfor's tree harvesting were compatible uses. That finding must underpin his conclusion that CP212 would not infringe the treaty right to hunt.

174 Nor do I agree with Canfor's argument that the test formulated by Cory J. in *Badger* is not applicable to a lumbering use. Justice Cory is clear that, "whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis" i.e. whether a proposed use is incompatible with the treaty right is a question of fact. The same can be said of "required or taken up ... for the purpose of ... lumbering", although I would compare lumbering more with the wilderness park use in *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.) and *R. v. Sundown* (1999), 132 C.C.C. (3d) 353 (S.C.C.), than with settlement, or the use for a game preserve in *R. v. Smith*, [1935] 2 W.W.R. 433 (Sask. C.A.) or a public road corridor in *R. v. Mousseau*, [1980] 2 S.C.R. 89 (S.C.C.).

175 The District Manager's task was to allocate the use of the land in the Timber Supply Area among competing, perhaps conflicting, but ultimately compatible uses among which the land could be shared; not unlike the sharing of herring spawn in *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.).

176 Nevertheless, a shared use decision may be scrutinized to ensure compliance with the various obligations on the District Manager, including his obligation to "act constitutionally", as I recall Crown counsel put-

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

ting it in oral argument. Counsel agreed *Sparrow* provided the guidelines for that scrutinization on judicial review if a treaty right was engaged and I will expand further on that analysis below.

177 Just as the impact of a statute or regulation may be scrutinized to ensure recognition and affirmation of treaty rights of aboriginal peoples, so may the impact of a decision made under such a statute or regulation by an employee of the Crown. The District Manager can no more follow a provision of a statute, regulation, or policy of the Ministry of Forestry in such a way as to offend the Constitution than he could to offend the *Criminal Code* or the *Offence Act*.

178 I share Mr. Justice Finch's view that the District Manager was under a positive obligation to the Halfway River First Nation to recognize and affirm its treaty right to hunt in determining whether to grant Cutting Permit 212 to Canfor. This constitutional obligation required him to interpret the *Forest Act* and the *Forest Practices Code* so that he might apply government forest policy with respect for Halfway's rights. Moreover, the District Manager was also required to determine the nature and extent of the treaty right to hunt so as to honour the Crown's fiduciary obligation to the first nation: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) at 1112-1113 per Lamer C.J.C.; and see the discussion by Williams C.J.S.C. in *Cheslatta Carrier Nation v. British Columbia (Project Assessment Director)* (1998), 53 B.C.L.R. (3d) 1 (B.C. S.C.) at 14-15.

179 Mr. Justice Finch points out that the District Manager's failure to consult adequately precluded justification under the second stage of the *Sparrow* analysis of the infringement of the Halfway treaty right to hunt he considered was constituted by CP212. In my view this deficiency in the decision-making process is a breach of the Crown's fiduciary responsibilities that makes this Court's application of the *Sparrow* analysis premature.

180 Because only the first nation will have information about the scope of their use of the land, and of the importance of the use of the land to their culture and identity, if the *Sparrow* guidelines are to organize the review of an administrative decision it makes good sense to require the first nation to establish the scope of the right at the first opportunity, to the decision-maker himself during the consultation he is required to undertake, so that he might satisfy his obligation to act constitutionally. It is only upon ascertaining the full scope of the right that an administrative decision maker can weigh that right against the interests of the various proposed users and determine whether the proposed uses are compatible. This characterization is crucial to an assessment of whether a particular treaty or aboriginal right has been, or will be infringed. Thus, particularly in the context of a judicial review where the Court relies heavily upon the findings of the decision maker, a consideration of whether consultation has been adequate must precede any infringement/justification analysis using the *Sparrow* guidelines.

181 It is implicit in Halfway's submission that the proposed lumbering use is incompatible with its rights or at least would be found to be so if the District Manager had full information and properly considered the scope of its treaty right to hunt and of its aboriginal right to use the particular tract in question for religious and spiritual purposes.

182 The requirement that a decision-maker under the *Forest Act* and the *Forest Practices Code* consult with a first nation that may be affected by his decision does not mean the first nation is absolved of any responsibility. Once the District Manager has set up an adequate opportunity to consult, the first nation is required to cooperate fully with that process and to offer the relevant information to aid in determining the exact nature of the right in question. The first nation must take advantage of this opportunity as it arises. It cannot unreasonably refuse to participate as the first nation was found to have done in *Ryan v. Fort St. James Forest District (District*

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Manager) (January 25, 1994), Doc. Smithers 7855, 7856 (B.C. S.C.); affirmed (1994), 40 B.C.A.C. 91 (B.C. C.A.). In my view, a first nation should not be permitted to provide evidence on judicial review it has had an appropriate opportunity to provide to the decision-maker, to support a petition asserting a failure to respect a treaty right.

183 The District Manager's failure to consult adequately means that we cannot know what additional information might have been available to him regarding the nature and extent of the Treaty 8 right to hunt or of other aboriginal rights not surrendered by the treaty. Nor can we know how he might have weighed that information with information he might have sought regarding other possible cutting areas to meet Canfor's needs while minimizing the effects on the Halfway River First Nation's treaty right to hunt. Counsel adverted in argument to Canfor having obtained permits to cut in other areas to replace CP212 after the chambers judge made her order. Finally, any weighing of benefits is limited by the evidence, in this case almost entirely put forward by Canfor. Only when adequate consultation has taken place and both parties have fulfilled their respective consultation duties will the District Manager be in a position to determine whether the uses are compatible or a geographical limitation is being asserted, and the consequences in either event to the application for a cutting permit.

184 Halfway did not receive an appropriate opportunity to establish the scope of its right. Thus, the District Manager's decision must be set aside because it was made without the information about Halfway's rights he should have made reasonable efforts to obtain. The most that can be decided definitively on judicial review in such circumstances is whether the legislative objective was sufficiently important to warrant infringement. About that there has never been a question in this case.

185 This conclusion does not signify agreement with Canfor's submission that the interference by CP212 with Halfway's treaty right to hunt *could* not be elevated to an infringement of a constitutional right. There was evidence of a diminution of the treaty right in this case for the valid purpose of lumbering, a purpose recognized by the treaty itself as a reason for government encroachment on the treaty right to hunt. There was evidence the proposed lumbering activity would preclude hunting in an area considerably larger than the particular cutting blocks during active logging for two years. While mitigating steps were to be taken, there was also evidence of the detrimental effect of road construction on the long-term use of the area by native hunters. Common sense suggests these effects might be sufficiently meaningful, particularly when they are felt in an area near the first nation's reserve, to require justification by the government of its action, depending on the nature of the hunting right. Had the District Manager understood the extent of his obligation to consult, he might have concluded the activities of Canfor authorized by CP212 would result in a meaningful diminution of the Treaty 8 right to hunt, just as he might have seen to the mitigation of such effects or to compensation for them as part of his analysis of how the proposed use and the treaty right could be accommodated to each other.

186 My difference with the reasoning of Mr. Justice Finch flows from my view that the chambers judge was wrong when she found that "any interference" with the right to hunt constituted an "infringement" of the treaty right requiring justification. I cannot read either *Sparrow* or *Badger* to support that view. As my colleague notes at para. 124, in *Sparrow* the court stated the question as "whether either the purpose or effect of the statutory regulation *unnecessarily* infringes the aboriginal interest." In *Badger*, at 818, in his discussion as to whether conservation regulations infringed the treaty right to hunt, Cory J. indicated the impugned provisions might not be permissible "if they erode *an important aspect* of the Indian hunting rights." In *Gladstone, supra*, Lamer C.J.C. indicated that a "meaningful diminution" of an aboriginal right would be required to constitute an infringement. Each of these expressions of the test for an "infringement" imports a judgment as to the degree and significance of the interference. To make that judgment requires information from which the scope of the exist-

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

ing treaty or aboriginal right can be determined, as well as information about the precise nature of the interference.

187 Incidentally, as an aside, given the significance of particular land to aboriginal culture and identity, I would not preclude "preferred means" from being extended to include a preferred tract of land. Proof may be available that use of a particular tract of land is fundamental to a first nation's collective identity, as it is to many indigenous cultures. While it may be that "preferred area" for hunting is not relevant, "preferred area" for religious and spiritual purposes is likely to be. Such rights do not appear to have been included in the treaty-making one way or the other.

188 If, after the requisite consultation has occurred, the District Manager confirms the nature of his decision is one involving compatible shared uses, modification of the *Sparrow* guidelines for review of his allocation of the resources is likely to be necessary. I find support for such modification in the following statement from *Sparrow*, at 1111 (*per* Dickson C.J.C. and La Forest J.):

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

189 As is apparent from the discussion in *Gladstone*, *supra*, it will be impossible to determine how the contours of the justificatory standard should be modified without an understanding of the existing treaty and aboriginal rights and the precise nature of the competing use or uses proposed. Lamer C.J.C. emphasized the distinction between a right with an internal limit such as the right to fish for social, ceremonial and food purposes in *Sparrow* and a right with an external, market-driven limit such as the right to sell herring spawn commercially at issue in *Gladstone*. As he noted, the scope of the aboriginal right can determine whether or not exclusive exercise of that right is warranted or how the doctrine of priority will be applied in a government decision on resource allocation. In the circumstances of the case at hand the scope of the Halfway nation's hunting right is yet to be fully determined. Thus it is impossible to reach a conclusion as to what justificatory standard would be applied to the issuance of the cutting permit.

190 Where the decision maker has determined the proposed uses are compatible with the aboriginal right, the question becomes one of accommodation as opposed to one of exclusive exercise of either the aboriginal right in question or the Crown's proposed use. In *Quebec (Attorney General)*, *supra*, the Court held it was up to the Crown "to prove that its occupancy of the territory cannot be accommodated to reasonable exercise of the Hurons' rights," if the Crown wanted to assert its occupancy of the land in question was incompatible with the Hurons' religious customs or rites. It may be that guidance can be found in this concept for the review of an administrative decision on the allocation of resources among compatible uses.

191 In summary, so as to fulfill the Crown's fiduciary and constitutional duties to Halfway, the District Manager is required to initiate a process of adequate and meaningful consultation with Halfway to ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. It will be that accommodation the court reviews within the contours of a justificatory standard yet to be determined.

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192 If the District Manager determines the proposed use is incompatible with the treaty right, he will be asserting a geographical limitation on the treaty right. In that event, I agree with Mr. Justice Finch that his decision may be reviewed under the *Sparrow* analysis.

193 It follows from these reasons that I too would affirm the order of Dorgan J. setting aside the decision of the District Forest Manager to grant CP212.

Southin J.A. (dissenting):

194 This is an appeal by the respondents below from this judgment pronounced 24 June 1997:

THIS COURT ORDERS that

- the decision of the District Manager made September 13, 1996, approving the application for Cutting Permit 212 be quashed; and
- costs be awarded to the Petitioner.

195 What led to this judgment was a petition for judicial review brought in late 1996 for an order:

1. [Reviewing and setting aside the decision of the Ministry of Forests to allow forestry] activities within Cutting Permit 212;
2. Declaring that the Ministry of Forests has a fiduciary and constitutional duty to adequately consult with the Halfway River First Nation and declaring that the level of consultation to date is insufficient;
3. Compelling the Ministry of Forests to consult with the Halfway River First Nation with respect to the full scope, nature and extent of the impact of proposed forestry activities on the exercise of the Treaty and Aboriginal rights of the Halfway River First Nation in accordance with the reasons and directions of this Honourable Court, and compelling the Ministry of Forests to provide funding to the Halfway River First Nation to support this consultation process;

[There is no "4." in the amended petition.]

5. Remitting the matter to the Respondent Ministry of Forests to complete the consultation process and then reconsider and determine whether to consent to the proposed cutting activities, and to determine appropriate conditions and requirements to be imposed upon any such cutting activities;
6. Prohibiting the Ministry of Forests from making any decision with respect to forestry activity within Cutting Permit 212 until completing the consultation process ordered by this Honourable Court.
7. Retaining jurisdiction over matters dealt within this application such that any party may return to the Court, by motion, for determination of any issue relating to the consultation or the implementation of this Order.
8. Such other relief as this Honourable Court may deem meet; and

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9. Costs on a solicitor client basis.

196 The central point was an assertion by the respondents in this Court that rights preserved to them under s. 35 of the *Constitution Act, 1982* were infringed by that act of the District Manager.

197 The learned judge below had before her not only this petition for judicial review but also an application by the respondent below, here the appellant, Canadian Forest Products Ltd., more familiarly known in this Province as Canfor, for an interlocutory injunction restraining the Chief and Halfway River First Nation from interfering with the implementation of the cutting permit.

198 The petition recites that in support of it will be read the affidavits of Chief Bernie Metecheah, Chief George Desjarlais, Stewart Cameron, Peter Havlik, Judy Maas, and Michael Pflueger. These affidavits and their exhibits comprise nearly 1,000 pages in the appeal book.

199 As both proceedings came on together, the learned judge below had affidavits from both sides in both proceedings. In its action, Canfor filed the affidavits of James Stephenson, Jill Marks and J. David Menzies, totalling 330 pages of the appeal book. The Crown in this proceeding filed, among others, two affidavits of Mr. Lawson, the District Manager, bearing date the 20th December, 1996, and amounting to 432 pages. There were some further shorter affidavits from both sides. Thus, the appeal book, excluding the reasons for judgment, judgment and notice of appeal, is 2,376 pages.

200 These proceedings engaged the chambers judge in eight days of hearing.

201 As I shall explain, I would allow the appeal on the simple footing that the central issue in this case concerning the existence or non-existence of rights in the Halfway River First Nation under s. 35 of the *Constitution Act, 1982*, ought to have been dealt with by action. For a precedent of an action on a treaty, see *Saanichton Marina Ltd. v. Claxton* (1987), 18 B.C.L.R. (2d) 217 (B.C. S.C.), aff'd. (1989), 36 B.C.L.R. (2d) 79 (B.C. C.A.), in which the learned trial judge, Mr. Justice Meredith, most usefully included in his reasons for judgment the Tsawout Indian Band statement of claim.

202 In revising these reasons, I have had the benefit of the draft reasons of my colleagues.

203 If this were not the first case on the implications for British Columbia of Treaty 8 and if these implications did not go far beyond whether Canfor can or cannot log these cut blocks, I would agree with Mr. Justice Finch that, as the parties did not object to the mode of proceeding, it must be taken to be satisfactory. But, in my opinion, the courts do have an obligation to ensure that a case the implications of which extend beyond the parties and the implications of this case may extend not only to all the inhabitants of the Peace River but also, because the Peace River country is not poor in resources, to all the inhabitants of British Columbia is fully explored on proper evidence. Furthermore, to my mind, the so-called administrative law issues in this case are nothing but distractions from the issues arising on the Treaty.

204 By s. 35(1), of the *Constitution Act, 1982*:

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

205 Because Treaty No. 8 is central to this case and to all other cases which may arise in the Peace River

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between First Nations, on the one hand, and the Crown and the non-aboriginal inhabitants on the other, I set it out in full:

Treaty No. 8

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part:

—

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendent General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for ever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say: —

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore

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northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

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

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a proviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as She may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and is prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, DO HEREBY SOLEMNLY PROMISE and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

[Emphasis mine.]

206 The Beaver Indians, from whom the present respondents are descended, adhered to the Treaty in 1900:

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

The Beaver Indians of the Upper Peace River and the country thereabouts, having met at Fort St. John, on this thirtieth day of May, in this present year 1900, Her Majesty's Commissioner, James Ansdell Macrae, Esquire, and having had explained to them the terms of the treaty unto which the Chief and Headmen of the Indians of Lesser Slave Lake and adjacent country set their hands on the twenty-first day of June, in the year 1899, do join in the cession made by the said treaty, and agree to adhere to the terms thereof, in consideration of the undertakings made therein.

In witness whereof, Her Majesty's said Commissioner, and the following of the said Beaver Indians, have hereunto set their hands, at Fort St. John, on this the thirtieth day of May, in the year herein first above written.

[Here followed the signatures.]

207 Canfor holds under the Crown a forest licence A18154 dated 28th June, 1993, which covers a very substantial area of northeastern British Columbia between the Rocky Mountains and 120° west longitude, being there the boundary between this Province and Alberta. Under such a licence the District Manager from time to time issues cutting permits. The issuance of such permits is governed not only by the terms of the licence but also by the terms of the *Forest Act*.

208 For the purposes of these reasons for judgment I accept:

1. The Halfway River First Nation, which has its reserve on the Halfway River, claims under Treaty 8 the right to hunt, fish and trap, particularly to hunt moose, in the area covered by the cutting permit, the logging of which may impede their hunting for moose.
2. The holder of a forest licence does not, under its licence, acquire any exclusive right of occupation of the lands encompassed in a cutting permit.
3. Neither the *Wildlife Act*, R.S.B.C. 1996, c. 488, nor any other statute of this Province forbids hunting on lands upon which logging is being carried on but it does prohibit the dangerous discharge of firearms. It would be dangerous to discharge firearms where logging is being carried on and I do not think for one moment that any member of the Halfway River First Nation would do such a thing even if there were no statutory prohibition.

209 The respondents assert a breach of the Treaty in two ways:

1. When the reserve for the Halfway people was set up, which was said not to have happened until 1914, that is, some fourteen years after the Beaver had adhered to the Treaty, they received less than their entitlement under the Treaty. In its claim to the Federal Government, submitted in 1995 under the Federal Land Claims Process, the Halfway River First Nation calculated the shortfall thus:

15.1 The following is a summary of the key population figures indicating a shortfall at date of first survey. Detailed information concerning individual members of the Halfway River Band, absentees/arrears and late adherents is contained in the Genealogical Appendices.

Halfway River Band on Hudson Hope Band Paylist - Date of First Survey - 1914 77

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Deduct Double Counts 0

Base Paylist 77

Absentees/Arrears 13

Late Adherents 4

Adjusted Date of First Survey Population 94

Calculation of Shortfall 94×128 acres - 9823 acres = Treaty Land Entitlement Shortfall of 2,139 acres

I do not pretend to have grasped the full import of this claim, nor the relationship to it, if any, of Section 13 of the British Columbia Terms of Union and the various events arising from that section, as to which see my judgment in *British Columbia (Attorney General) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 (B.C. C.A.) at 176, where the whole sorry history of reserves in other parts of the Province is recounted and in which, in my opinion, the right clearly belonged to the Mount Currie Indian Band. If the Halfway River First Nation is right and the claim is not settled but must be pursued in an action, an interesting question of law will fall to be determined: Is British Columbia bound to provide further lands and, if so, who is to choose those lands, or is Canada bound to pay compensation and, in either event, to what ancillary remedies, if any, is the Halfway River First Nation entitled? At this stage, no authority with the power to resolve the claim as made in 1995 has made any findings of fact or law relating thereto.

2. Development in the area has deleteriously affected the hunting. Chief Metecheah deposes:

3. The Halfway River First Nation community is very poor. More than 75% of our members rely on social assistance and hunting to feed their families. Because we are so poor, the members of our community rely very much on hunting to feed their children.

4. All of the land within Cutting Permit 212 ("C.P. 212") is very good for hunting and is the land that is used the most by our people to feed their children. The C.P. 212 area is next to our reserve. Our members don't need to spend much money to get there to get food for their families.

5. All through C.P. 212, there is proof of this use. Our members' permanent camp sites, corrals and meat drying racks are everywhere in the area.

6. We have many religious, cultural and historical sites in C.P. 212.

7. I am told by one of our members that some of the cut blocks are right where important spiritual ceremonies are held.

8. We have told the Ministry of Forests ("Ministry") that we are willing to gather this information but we need money and help to do this.

9. I have hunted throughout the Treaty 8 territory all my life and I have seen the effects of forestry activities on wildlife and hunting. The land is not as good for hunting once the trees have been cut. Non-Native hunters use the roads left by the forestry people to hunt in our traditional territory and there

is less game left to feed our families.

10. If the hunting in C.P. 212 is affected, children in our community will go hungry.

11. C.P. 212 is right next to our Reserve. Because of all of the things that the government has done to our traditional territory by allowing logging companies and oil and gas companies to cut trees and pollute the land without consulting us or respecting our rights, our people must go farther and farther from our Reserve to get to land where we can hunt and gather berries and medicine. We use the land in C.P. 212 for teaching our children about our spiritual beliefs and our way of life. If the trees in C.P. 212 are cut down and the animals are driven away we will not be able to teach our children how to hunt and how our ancestors lived.

210 The appellants do not accept that the development of the area has adversely affected the animal population or, more particularly, that cutting pursuant to this cutting permit will do so. There is some evidence that logging, because it results in fresh growth, ultimately produces good browse for ungulates, including moose.

211 The assertions by the Chief in paragraphs 9-11 are sweeping and I am sure he is profoundly convinced of their truth. But, in my opinion, assertions, even if contained in an affidavit, which are sweeping in scope but which the deponent does not support, to use Lord Blackburn's words in another context, by condescending to particulars, should be given little weight in a proceeding seeking a final, in contra-distinction to an interlocutory, order.

212 As I understand Mr. Justice Finch's reasons, his central premise is set forth in this paragraph:

[144] I respectfully agree with the learned chambers judge that any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s.35 of the *Constitution Act, 1982*.

213 That premise leads inexorably to the application of the doctrine of *R. v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1 (S.C.C.).

214 It is upon that premise that my colleague and I part company.

215 I accept that the doctrine of the honour of the Crown applies to the interpretation of treaties which are within s. 35(1) of the *Constitution Act*. But I do not accept that the central words of the Treaty bear the construction put upon them by my colleague. To my mind, the words which, in the court below, ought to have been but were not addressed, except perhaps by a side wind, are "as may be required or taken up". Do the words empower the Crown, to whom all the lands covered by the Treaty were surrendered, to convey those lands away to others in fee simple? Such a conveyance would, of course, give exclusive possession to the grantee.

216 In the case at bar, the issuance of a cutting permit did not give exclusive possession to the appellant Canfor. It did not exclude the respondents from hunting. But if the Crown did grant all the lands away, it might be argued with some force that it had made the reservation nugatory. One might apply the common law doctrine of derogation from a grant, by analogy, to such a state of affairs.

217 In order that the significance of the principal issue to this Province may be understood, I must set out some history.

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

218 By the British Columbia *Boundaries Act*, 26 & 27 Vict., c. 83 (1863), Parliament at Westminster established the boundaries of then Colony of British Columbia thus:

3. *British Columbia* shall for the Purposes of the said Act, and for all other Purposes, be held to comprise all such Territories within the Dominions of Her Majesty as are bounded to the South by the Territories of the United States of *America*, to the West by the *Pacific Ocean* and the Frontier of the *Russian Territories* in *North America*, to the North by the Sixtieth Parallel of North Latitude, and to the East, from the Boundary of the United States Northwards, by the *Rocky Mountains* and the One hundred and twentieth Meridian of West Longitude, and shall include *Queen Charlotte's Island* and all other Islands adjacent to the said Territories, except *Vancouver's Island* and the Islands adjacent thereto.

219 When the Colony of British Columbia, which by then encompassed Vancouver Island as well, became part of Canada in 1871, it did so pursuant to the Terms of Union and the order in council of 16 May 1871. By the Terms of Union a substantial part of British Columbia known as the Railway Block was conveyed to the Dominion government. By subsequent statutes, other lands known as the Peace River Block were granted by the Province to Canada. These statutes are recited in the *Railway Belt Retransfer Agreement Act*, S.B.C. 1930, c. 60.

220 From the time that the Beaver adhered to this treaty in 1900 until after the Second World War, there was very little settlement in what British Columbians call the Peace River which, more sensibly, ought to have been part of Alberta, lying as it does east of the Rocky Mountains.

221 The introduction by Gordon E. Bowes to *Peace River Chronicles* (Prescott Publishing Co., 1963) gives a sufficient overview [p. 13 *et seq*]:

The Hudson's Bay Company remained in undisturbed possession of its huge fur preserve until the gold rush to the Peace and the Finlay in 1862. Many of the gold-seekers turned to the fur trade themselves, and so ended the Company's monopoly. There was another gold rush in the years 1870-73, this time to the Omineca country. Klondikers passed through in 1898-99, and a few returned later as traders. In 1908-09, there was a smaller gold rush to McConnell Creek on the Ingenika River.

Ignoring difficulties and hardships, the miners and the independent traders and trappers opened up the country and made it known to the outside world. They were soon followed by missionaries, travellers, and railway and geological survey parties. Their favourable reports drew attention to the agricultural advantages of the eastern part of the region.

Land surveyors and settlers entered the Peace River region of British Columbia only a few years prior to the First World War. Until that time, the area from the Rockies east to the Alberta boundary had been kept under a provincial government reserve which prohibited homesteading. The purpose of this reserve was to permit the federal government to select 3,500,000 acres of unalienated arable land (the Peace River Block) in return for aid given earlier by Ottawa for railway construction elsewhere in the province. The long-delayed choice of the block was announced in 1907, and Ottawa threw open some of the lands for homesteading in 1912.

Lack of transportation has been the great obstacle to development of the region. Some settlers came in on the mere rumour of a railway. In 1913 there were 40 settlers near Hudson Hope, 30 along the Peace down to

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

Fort St. John, and about 400 in the Pouce Coupe prairie. Even Finlay Forks had two general stores in 1913, and hopes were high. The First World War pricked the bubble, leaving deserted cabins everywhere.

The building of what is now the Northern Alberta Railways line in 1916 from Edmonton to Grande Prairie on the Alberta side facilitated some further settlement of the eastern half of the region. Following the war, the Soldier Settlement Board helped to establish veterans on the land. Another influx of land-hungry settlers occurred in 1928 and 1929, with the result that there were almost 7,000 persons in the eastern part of the region by 1931.

The completion of the Northern Alberta Railways line to Dawson Creek in January 1931 marked the beginning of a new era. At long last the railway had arrived, if only just within the area's eastern boundary! During the depression years discouraged wheat farmers from the parched districts of southern Alberta and Saskatchewan swelled the migratory waves. The trek into the Promised Land with livestock and farm equipment sometimes took as long as three or four months.

The arrival of bush pilots and the establishment of air lines in the thirties heralded the coming of further improvements in transportation. The Second World War, with its building of airports and the Alaska Highway and its forced economic expansion, played a sudden and spectacular part in the region's growth. Dawson Creek was given a highway to the Yukon and Alaska a full decade before it obtained one to the rest of the province! In the immediate post-war years, settlement continued in substantial volume. A major land boom occurred in 1948-49. Dawson Creek established itself in the front rank in all of Western Canada for grain shipments. The eastern part of the region is still the fastest-growing section of British Columbia.

The initial exploitation of the oil and gas fields, the completion of the John Hart Highway from Prince George in 1952, the building in 1957 of Canada's first major natural gas pipeline, Westcoast Transmission Company's line from Taylor south to the American border, the long-delayed and eagerly-awaited extension of the Pacific Great Eastern Railway to Fort St. John and Dawson Creek in 1958, the completion of the Western Pacific Products and Crude Oil pipeline to Kamloops in 1961, and the construction, now under way, of the great hydro-electric power project near Hudson Hope, all represent other significant steps in the region's development in recent years.

The present prosperity and the growing commercial importance of Dawson Creek, Fort St. John, Hudson Hope, Taylor, and Chetwynd contrast sharply with conditions two decades ago. Isolated no longer, and provided with air lines, highways, railways, and gas and oil pipelines, the region has overcome its transportation problems. Nature's lavish endowment of this corner of British Columbia is becoming evident to all. Not only one of the world's greatest power sites but also the untold wealth of natural gas, oil, coal, base metals, gold, timber, and millions of fertile acres for agriculture are beginning to make the pioneers' wildest dreams come true.

222 Thus, I think it fair to infer that from the time they adhered to the Treaty in 1900 until after the Second World War, the Beaver people, including the present respondents, were left with their hunting ranges largely free of the "taking up" for any purpose by the Crown of lands ceded to it and from intrusion by non-natives upon those lands for such purposes as hunting, fishing, exploring for minerals, and so forth. Thus, until then, no issue could have arisen of breach by the Crown.

223 Since the early 1960's, there has been in the Peace River further extensive taking up of land by the Crown, although to what extent that taking up has excluded the Beaver people from their traditional hunting

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

ranges by the granting of exclusive possession to others, does not appear with any clarity in the evidence in this case.

224 In my opinion the issue is not whether there is an infringement and justification within the *Sparrow* test, but whether the Crown has so conducted itself since 1900 as to be in breach of the Treaty. The proper parties to a proceeding to determine that issue are in my opinion the Halfway River First Nation and the Attorney General for British Columbia, or, if monetary compensation is sought, Her Majesty the Queen in right of British Columbia, and the proper means of proceeding is an action.

225 The question in such an action would be whether what the Crown has done throughout the Halfway River First Nation's traditional lands by taking up land for oil and gas production, forestry, and other activities has so affected the population of game animals as to make the right of hunting illusory. "To make the right of hunting illusory" may be the wrong test. Perhaps the right test is "to impair substantially the right of hunting" or some other formulation of words.

226 Whatever is the correct formulation, it cannot be applied without addressing all that has been done by the Crown since the lands were ceded to it. The Beaver Indians have the right to hunt but that right is burdened or cut down by the right of the Crown to take up lands. There are many issues of fact to be addressed on proper evidence to answer the question in whatever terms one puts it.

227 My colleague, Madam Justice Huddart, approaches this case differently from Mr. Justice Finch. The culmination of her reasons is in this paragraph:

[191] In summary, so as to fulfill the Crown's fiduciary and constitutional duties to Halfway, the District Manager is required to initiate a process of adequate and meaningful consultation with Halfway to ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. It will be that accommodation the court reviews within the contours of a justificatory standard yet to be determined.

228 Essentially, therefore, she accedes to the respondent's prayer for relief contained in the petition for judicial review.

229 With respect, to create a system in which those appointed to administrative positions under the *Forest Act* or any other statute of British Columbia regulating Crown land in the Peace River are expected to consult "to ascertain the nature and scope of the treaty right at issue" and to determine "whether the proposed use is compatible with the treaty right" is to place on our civil servants a burden they should not have to bear - a patchwork quilt of decision making by persons appointed not for their skill in legal questions but for their skill in forestry, mining, oil and gas, and agriculture.

230 A District Manager under the *Forest Act* is no more qualified to decide a legal issue arising under this treaty than my colleagues and I are qualified to decide how much timber Canfor should be permitted or required to cut in any one year in order to conform to the terms of its tenure.

231 Not only is this burden on the civil servants unfair to them, but also it ladens the people of British Columbia with burdens heavy to be borne, burdens which no other province's people have to bear, even though

1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, 129 B.C.A.C. 32, 210 W.A.C. 32, [1999] B.C.J. No. 1880, 4 C.N.L.R. 1

the other provinces, except Newfoundland, also have First Nations.

232 If my colleagues are right, British Columbia, which was once described as the spoilt child of Confederation, is about to become the downtrodden stepchild of Confederation.

233 This case has serious economic implications. To decide the issues arising on the evidence here adduced, which, as the parties chose to proceed, was not focused on that question only, is a course fraught with danger, especially to third parties. Those third parties include, as well as those who have rights acquired under the *Forest Act*, R.S.B.C. 1996, c. 157, and predecessor statutes, those who have rights acquired under the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361, and predecessor statutes, the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292, and predecessor statutes, and the *Land Act*, R.S.B.C. 1996, c. 245, and predecessor statutes.

234 If the Crown has so conducted itself that it has committed a breach of its obligations under the Treaty to the respondents, and, perhaps, other First Nations who are also Beaver Indians, then it is right that the Crown should answer for that wrong and pay up. The paying up will be done by all the taxpayers of British Columbia. But it is not right that Canfor and all others, who in accordance with the Statutes of British Columbia have obtained from the Crown rights to lands in the Peace River and conducted their affairs in the not unreasonable belief that they were exercising legal rights, should find themselves under attack in a proceeding such as this.

235 Canfor, a substantial corporation, presumably can afford this litigation. But others whose rights may be imperilled may not have Canfor's bank account.

236 I would allow the appeal and set aside the judgment below.

Appeal dismissed.

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2005 CarswellBC 1121, 2005 BCSC 697, [2005] B.C.W.L.D. 4168, [2005] 3 C.N.L.R. 74, 33 Admin. L.R. (4th) 123

Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)

Huu-Ay-Aht First Nation by Chief Councillor Robert Dennis on his own behalf and on behalf of the members of the Huu-ay-aht First Nation (Petitioners) And The Minister of Forests and Her Majesty The Queen In Right of the Province of British Columbia (Respondents)

British Columbia Supreme Court

Dillon J.

Heard: January 24 - 27, 2005; February 10, 11, 2005

Judgment: May 10, 2005

Docket: Vancouver L042292

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Counsel: G. McDade, Q.C., J. Tate for Petitioners

G.R. Thompson, K.J. Chapman for Respondents

Subject: Public; Constitutional; Property; Natural Resources

Aboriginal law --- Constitutional issues — Land claims agreements — Duty of Crown to negotiate

Government wished to conduct logging operation on forest — Aboriginal band claimed rights in land — Government and aboriginal groups entered into negotiations regarding accommodation of native interests — Band and Crown entered into interim agreements for management of resources — After agreements concluded, Crown entered into ad hoc discussions regarding management — Government was prepared to accommodate Indian band with financial offer based on population of band, not amount of timber harvested — Band brought petition for declaration that Crown had legally enforceable duty to negotiate in good faith and seek reasonable accommodation, and that population-based assessment of accommodation was inappropriate — Petition granted — Declaratory relief was available — Negotiations took place under aegis of Forestry Revitalization Act and Forest Act — Crown had ongoing duty to consult and accommodate native interests — Duty arises as soon as infringement contemplated — Crown had knowledge of claim for significant period — Crown had high duty to negotiate — Band and Crown were nearing end of treaty negotiations and had agreement in principle — Band showed strong prima facie claim to forestry rights — Overlapping claims by certain other bands did not weaken claim — Process following expiry of interim agreements did not meet standard — Crown's position was not merely hard bargaining — Crown failed to consider strength of title claim.

Cases considered by Dillon J.:

Auton (Guardian ad litem of) v. British Columbia (Minister of Health) (1999), 1999 CarswellBC 692, 12 Admin. L.R. (3d) 261, 32 C.P.C. (4th) 305 (B.C. S.C.) — considered

Benias v. Vancouver (City) (1983), 23 M.P.L.R. 269, 3 D.L.R. (4th) 511, 1983 CarswellBC 642 (B.C. S.C.) — distinguished

C.U.P.E., Local 4027 v. Iberia Airlines of Spain (1990), 80 di 165, (sub nom. *Iberia Airlines of Spain v. C.U.P.E. (Airline Division), Local 4027*) 13 C.L.R.B.R. (2d) 224, 1990 CarswellNat 981, 1990 CarswellNat 980 (Can. L.R.B.) — considered

Gitanyow First Nation v. British Columbia (Minister of Forests) (2004), 2004 BCSC 1734, 2004 Carswell-BC 3064, 38 B.C.L.R. (4th) 57 (B.C. S.C.) — considered

Gitxsan Houses v. British Columbia (Minister of Forests) (2002), 2002 BCSC 1701, 2002 CarswellBC 2928, 10 B.C.L.R. (4th) 126, 48 Admin. L.R. (3d) 225, (sub nom. *Gitxsan First Nation v. British Columbia (Minister of Forests)*) [2003] 2 C.N.L.R. 142 (B.C. S.C.) — considered

Glacier View Lodge Society v. British Columbia (Minister of Health) (2000), 2000 BCCA 242, 2000 CarswellBC 723, 75 B.C.L.R. (3d) 373, 136 B.C.A.C. 198, 222 W.A.C. 198 (B.C. C.A.) — referred to

Glacier View Lodge Society v. British Columbia (Ministry of Health) (1998), 1998 CarswellBC 815 (B.C. S.C.) — considered

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Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 15 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

s. 32(2) — referred to

s. 35 — referred to

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Generally — referred to

s. 15 — referred to

s. 36 — referred to

s. 43.51 [en. 2004, c. 36, s. 23] — referred to

s. 47.3 [en. 2002, c. 44, s. 9] — considered

s. 48(1)(g)(i) — referred to

s. 80.1 [en. 2003, c. 30, s. 14] — considered

Forest and Range Practices Act, S.B.C. 2002, c. 69

Generally — referred to

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

Generally — referred to

Health Authorities Act, R.S.B.C. 1996, c. 180

Generally — referred to

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

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Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Generally — referred to

Land Act, R.S.B.C. 1996, c. 245

Generally — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

Generally — referred to

App. B, s. 2(2)(d) — referred to

PETITION by aboriginal band for declaratory relief regarding land subject to treaty negotiations.

Dillon J.:

I. Nature of Application

1 This is an application by the petitioners, the Huu-ay-aht First Nation (the "HFN"), for:

(a) a declaration that the Crown as represented by the Ministry of Forests (the "MOF") has a legally enforceable duty to the HFN to exercise its discretion pursuant to the *Forestry Revitalization Act*, S.B.C. 2003, c. 17 and section 47.3 of the *Forest Act*, R.S.B.C. 1996, c. 157, as amended by the *Forestry (First Nations Development) Amendment Act*, S.B.C. 2002, c. 44, in a manner consistent with the Crown's duty to consult in good faith and to endeavour to seek workable economic accommodation between aboriginal rights and title interests of the HFN, on the one hand, and the short-term and longterm objectives of the Crown to manage forestry permits and approvals in HFN traditional territory in accordance with the public interest, both aboriginal and non-aboriginal;

(b) a declaration that in its application of the Forest and Range Agreement ("FRA") program pursuant to the *Forestry Revitalization Act* and the *Forest Act*, the MOF as an agent of the Crown in right of British Columbia has an administrative duty to endeavour in good faith to reach accommodation agreements with the HFN that are responsive to the degree of infringement of the HFN aboriginal rights and title represented by forestry operations in HFN traditional territory;

(c) a declaration that application of a population-based formula to determine accommodation pursuant to the FRA programme does not constitute good faith consultation and accommodation in respect of the HFN aboriginal rights and title interests;

(d) a declaration that application of a population-based formula to determine accommodation arrangements pursuant to the FRA programme does not fulfill the administrative obligations of the Crown to provide accommodation for the aboriginal rights and title interests of the HFN;

(e) a declaration that application of a population-based formula to determine accommodation agreements for the HFN pursuant to the FRA programme has no rational connection with the legislative objectives of the FRA programme, including but not limited to, the objective of promoting economic development by addressing asserted aboriginal rights and title; and

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

(g) costs; and

(h) such further relief as this honourable court may seem just.

2 The HFN are not seeking injunctive relief.

3 In response to the formal relief sought by the petitioners, the respondents, the MOF and the province of British Columbia, oppose the relief by submitting that:

(a) the relief sought is premature and is not appropriate for judicial review as set out in the *Judicial Re-*

view Procedure Act, R.S.B.C. 1996, c. 241 ("JRPA");

(b) the Crown's legally enforceable duty to consult and accommodate aboriginal interests is not triggered by the Crown's general management of forestry permits and approvals. Rather, the Crown's duty is triggered by specific decisions that have the potential to infringe on s. 35 rights;

(c) the Crown does not owe a duty here because aboriginal rights and title have only been asserted, rather than defined or proven;

(d) the FRA initiative is only one component of the MOF's exercise of any constitutional and administrative law duties that arise with respect to protection of aboriginal rights. Thus, the petitioner's relief should be denied on the basis that it is inappropriate for the court to assess only one aspect of negotiations, rather than the overall process which has not yet been completed. In any event, the Crown submits that it has met any obligations it may have with respect to consultation with the HFN to date;

(e) the FRA initiative is an entirely voluntary interim measure, the Province engaged in good faith efforts to reach an agreement with the HFN, and has deposed to the fact that it intends to continue to fulfill its obligations with respect to consultation and accommodation should the HFN decide that they do not wish to enter a FRA;

(f) the petitioners seek a declaration that the application of a population-based formula to determine accommodation pursuant to the FRA initiative has no rational connection with the legislative objectives of the FRA initiative. The respondents submit that this relief should be denied on the basis that the FRA initiative is a policy initiative not directly authorized by statute and no such declaration can issue; and

(g) they are prepared to consult with the HFN on a decision by decision basis should the HFN wish to avail themselves of the accommodation offered under the FRA initiative. The respondents submit that it would be inappropriate to order the Crown to consult with the HFN with respect to forest operations within the HFN territory generally, as such a general claim is not sufficient to trigger the duty to consult. Rather, the duty is triggered by specific decisions or activities which have the potential to infringe aboriginal interests.

II. Facts

a) The Huu-ay-aht First Nation Claim of Aboriginal Title and Rights and the Alleged Infringement of Aboriginal Title

4 Prior to the assertion of British sovereignty, the HFN claim that "they occupied a traditional territory (the "Hahoothlee") located on the western coast of Vancouver Island in and near Barclay Sound, Pachena Bay, and southern portions of Alberni inlet, including the watersheds of the Sarita River, Pachena River, Klanawa River and Coleman Creek."

5 The HFN are asserting that most of their traditional territory falls within a tree farm licence held by Weyerhaeuser ("TFL 44"). The Province has issued TFL 44, granted subsequent replacements of the licence pursuant to provincial forestry legislation, and directly authorized harvesting within the territory covered by TFL 44. The HFN are claiming that their aboriginal title and rights are being infringed by the logging taking place within their traditional territory pursuant to TFL 44. The HFN claim that their rights and title were infringed from

"March 2004 to January 18, 2005, when logging operations continued within HFN territory despite the fact that the Province has not consulted with the HFN about the level of forestry operations within the Hahoothlee and despite the fact that HFN title and rights interests have not been accommodated." The HFN claim that such an infringement warrants economic accommodation and they "seek a forest tenure to take a fair allocation for the development of their lands, and revenue sharing until a treaty is determined."

6 The HFN consists of the members of the Huu-ay-aht Indian Band. The Huu-ay-aht Indian Band is the designated representative of its members pursuant to the *Indian Act*, R.S.C. 1985, c. I-5. The HFN consists of aboriginal peoples of Canada pursuant to section 32(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*], and has approximately 570 members and thirteen reserves under the *Indian Act*.

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

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

9 The land component of the AIP includes up to 20,900 hectares of provincial Crown land and 2,105 hectares of existing Indian reserve land, which will include the existing HFN Indian reserve land and up to 6,500 hectares of additional lands. According to the Crown, the capital transfer provided by Canada is \$62.5 million. The AIP outlines major components of a treaty, including rights to resources such as wildlife, fish and timber, culture and related self-government provisions.

10 The Ditidaht and Tseshaht First Nations have asserted claims to territories which overlap with the territory claimed by the HFN. Nonetheless, the HFN claim that "since time immemorial they have had a special connection with forest resources in the Hahoothlee." In the "Traditional Use Study, Final Report of the HFN" which was prepared for the HFN and the Ministry of Forests (with their approval) by a private company called Shoreline Archaeological Services, Inc., there is clear evidence of traditional use of forest resources within the

Hahoothlee. The study found that forestry is the activity with the "seventh highest frequency" and reflects "the traditional independence the HFN had on natural resources." The study found that the HFN have traditionally used forest resources "for the source of much of the material required for clothing, canoes, house building material, household implements and more." Many of the HFN still use the forest resources for traditional activities. The study found that "the forestry activity frequency represents 5.6% of all activities and is included as an activity for 8% of the 905 archaeological sites studied." However, the study noted that "it is estimated that only about 5% of the inland areas of the traditional territory of the HFN have been systematically surveyed for archaeological resources."

11 The HFN assert that approximately 95% of the HFN traditional territory is within the boundaries of TFL 44. A TFL is a large area based tenure granting the rights to manage the forest lands and to apply for cutting permits to harvest timber. MOF is responsible for the administration of TFLs and for dealing with all TFL licenses. The present licensee of TFL 44 is Weyerhaeuser whose current forest development plan contemplates a further 5.4 million cubic metres of timber ("m3") out of the Hahoothlee territory within the next 5 years. The estimated stumpage payable to the Province in relation to the anticipated volume of harvest of 5.4 million m3 over the next 5 years is in the range of \$143 million. The Province will receive additional revenues from income, property and sales tax. The HFN claim, and the respondents have not disputed, that between 1940 and 1996, approximately 35,000,000 m3 has been harvested from the Hahoothlee. Over 56% of old growth forests within the Hahoothlee were harvested from 1940 to 1996.

12 The HFN has submitted that the rate of harvest proposed for the HFN territory far exceeds the geographic proportion of the annual allowable cut ("AAC") for the entire TFL. The HFN maintain that a sustainable AAC in their territory would be limited to 225,000 m3 per year, whereas Weyerhaeuser plans to harvest approximately 1,000,000 m3 per year out of the Hahoothlee in each of the next 5 years. The HFN is claiming that much of this future harvesting will take place within areas of significant cultural importance to the HFN and that the removal of this economically valuable timber represents a serious, ongoing, and unaccommodated infringement of HFN's aboriginal title and forestry rights.

b) Previous Accommodation Agreements

13 As part of the effort to participate in the forestry processes within the Hahoothlee, in 1998 the HFN signed an Interim Measures Agreement ("IMA") with the MOF. The term of the IMA was for 3 years, and provided, *inter alia*, for: (a) an inter-governmental working relationship between the HFN and the MOF; (b) the establishment of a joint forest council to resolve issues of forest management, cultural heritage and economic development; (c) joint planning in relation to forestry activities in the HFN territory; (d) protection of cultural heritage resources; (e) the creation of economic development opportunities; and (f) dispute resolution processes. The IMA arose out of a conflict regarding harvest levels in TFL 44 and the HFN request for accommodation. It addressed economic development issues through direct funding from MOF and by engaging Forestry Renewal BC multi-year funding for forest restoration and enhancement. The IMA also established at section 11 that "the agreement does not define or limit the aboriginal rights, title and interests of the HFN" and that the map of the Hahoothlee which is used for the purposes of the IMA agreement is to "define the territorial scope of the application of this agreement only."

14 On March 5, 2001, the parties renewed the IMA through the Interim Measures Extension Agreement ("IMEA"), and included the Uchucklesaht First Nation as an additional party. Section 11 of the IMEA mirrored section 11 in the IMA. However, the IMEA included an agreement regarding a direct tenure award, which was

not part of the original IMA. Recent amendments to the *Forest Act* had allowed MOF to enter into a direct tenure award agreement. In accordance with the direct tenure award agreement included in the IMEA and s. 47.3 of the *Forest Act*, the MOF invited the HFN and the Uchucklesaht to jointly apply for a timber sale licence for a volume of up to 265,000 m³. This licence agreement was dated January 28, 2003.

15 On March 5, 2004, the IMEA expired. In the fall of 2003, the HFN attempted to negotiate a renewal of the IMA and IMEA. The HFN claim that the Province refused to enter into a renewal unless the HFN entered into a FRA. The MOF, on the other hand, claims that it was impossible for it to renew the IMEA in its current form due to significant changes in the mandate and structure of MOF during the period between 2002 and 2004. As of April 24, 2004, MOF was no longer involved in strategic planning, inventory, or restoration and enhancement priority setting and funding. The Ministry of Sustainable Resource Management is now responsible for economic sustainable development of Crown land. Further, new legislation, namely the *Forest and Range Practices Act*, S.B.C. 2002, c. 69, changed the operations planning and approvals process within the MOF. As a result of these changes, the MOF claims that the referral process under the IMEA did not reflect the provisions of the *Forest and Range Practices Act*.

16 It is important to note that during the time in which the IMA and IMEA were in force, the HFN were satisfied with the terms and did not challenge any provincial decisions.

c) The Forest and Range Agreement Policy

17 In March 2003, the MOF announced its forest revitalization plan. Part of that plan included the enactment of the *Forestry Revitalization Act* to take back 20% of the annual allowable cut from major replaceable forest licences and tree farm licences throughout the Province. This decision was made, in part, in order to provide volume for direct awards of forest tenures to First Nations. The 20% take-back is to be re-allocated and divided so that 10% is sold through a market-based system, the British Columbia Timber Sales Program. Approximately 8% is to be used for First Nation tenure opportunities to address accommodation of potential aboriginal interests, and the remaining amount is to be used for small tenures. At the same time, the Province appropriated a total of \$95 million for forestry revenue sharing with First Nations throughout British Columbia over the period of 2003-2005. The Ministry claims that these initiatives have provided it with the means to provide significant interim economic accommodation to those First Nations that choose to negotiate forestry agreements with the Province.

18 The FRA initiative was a component of the forest revitalization plan and was called the First Nations Forest Strategy ("FNFS"). The FNFS was enabled by the following events:

- Direct invitation tenures — In Spring 2002, the Province amended the *Forest Act* (creating s. 47.3) to allow the Minister of Forests to directly invite tenure applications from First Nations, without competition;
- Revenue sharing — In February 2003, the Province announced that it would begin to share forest revenues with First Nations; and
- Timber reallocation — In March 2003, the Province passed the *Forestry Revitalization Act* that resulted in major reallocation of AAC for major licences in the Province. This reallocated timber included volume for the FNFS as well as other initiatives associated with revitalizing British Columbia's forest economy.

19 Between 2002 and 2003, the MOF developed and began implementing the FRA programme which was a

strategic policy approach to fulfilling the Province's duty to consult with aboriginal peoples with respect to possible infringements of potential aboriginal or treaty rights in the face of uncertainty surrounding First Nations' claims yet to be proven.

20 The FRA programme is in fact a "fast-track" program in which the MOF and First Nations sign an agreement which gives the First Nation economic accommodation for forestry infringements within its territory. The FRA programme is a "fast-track" program because a First Nation is not required to prove the strength of their claim to an asserted territory. The FRA programme is based on an assumption that there is a potential that exists somewhere in the asserted traditional territory of each First Nation for a *prima facie* claim for title. The FRA programme is based on an offer of forest revenue sharing and tenure allocation in an amount calculated on the registered population of the Indian Band to whom the offer is made. The calculation is based on population alone and has no relation to the strength of a First Nation's claim of aboriginal title and rights, the amount of timber or timber harvesting in the First Nation's territory, or the seriousness of the potential infringement of title and rights. The MOF claims that they extensively reviewed a number of complex distribution models, including those considering values and amounts of timber harvested from specific areas, as well as regional approaches. The MOF claims that it ultimately chose the population-based approach because it had the fewest variations and disparities for an equitable distribution across the province.

21 The MOF's "Strategic Policy on their Approaches to Accommodation", dated July 31, 2003, sets out the MOF's policy on the FRA initiative. Section 2 of the policy reads:

In consideration of the provincial objective to create certainty on Crown lands and promote economic development by addressing asserted aboriginal rights and title, it is the policy of the Ministry of Forests to provide access to timber and revenue sharing through a negotiated agreement with a First Nation.

22 Section 3 of the policy recognizes that aboriginal title, where it exists, has been determined by the courts to have an economic component:

Recent legal decisions (Haida, Skeena) have determined that an obligation of the Crown exists to seek to accommodate potential First Nation aboriginal rights and title interests when making forest management decisions.

23 Section 4 of the policy reads:

Court decisions have increased the requirements for the Ministry of Forests to consult with First Nations on a wide-range of forest and range management decisions. The Courts have indicated that if First Nations have a reasonable probability of aboriginal title, then the Province is obligated to seek to accommodate the First Nation for unjustifiable infringements of that title.

Further, if there is the potential that somewhere in the asserted traditional territory the First Nation has a *prima facie* ("on the face of it") aboriginal title claim, and forestry and range activities/approvals cover significant areas within that territory so as to make it likely that they may unjustifiably infringe on as yet unproven aboriginal title, there may be a need to provide accommodation in respect to that possible infringement, even though the areas where that aboriginal title is a real probability have not been ascertained.

.....

The policy approach to implementing the accommodation strategy is to offer access to economic benefits (revenue sharing and access to timber) through negotiated agreements with individual First Nations. In exchange for the economic benefits, agreements will contain provisions that promote a stable operating environment for the forest and range section, including consultation procedures and terms indicating that the Province is providing workable accommodation of the First Nation's economic interests arising from forest and range decisions.

24 The eligibility requirements are produced at section 5:

The Province has introduced this initiative to respond to calls by the courts to seek to accommodate First Nations' interests in areas where First Nations have a reasonable probability of title. BC also wants to improve the provincial economy by enhancing operational stability. As such, there are two primary filters to determine eligibility for the initiative:

- (a) the First Nation must have bona fide claims of unresolved aboriginal rights and title; and
- (b) forestry and range activities (including timber harvesting, tenure transfers, AAC determinations and operational planning) must be likely to impact potential aboriginal rights and title in the First Nation's asserted traditional territory. If there is no appreciable forestry or range activity in the area (i.e. in urban areas) then aboriginal title is not likely being infringed by the forestry and range activity.

25 At section 6, the FRA policy states that access to the revenue and timber volumes will be through a negotiated interim measures agreement between the MOF and the First Nation. The main components of this agreement are revenue sharing, tenure invitation (which will be non-replaceable and non-transferable), and volume. As defined in section 80.1 of the *Forest Act*, a "non-replaceable licence" means a licence that provides that a replacement for it must not be offered, and a "replaceable licence" means a licence for which a replacement licence must be offered under section 15 or 36.

26 Within section 6, the provincial policy on revenue sharing states that:

The government has allocated funding in the Ministry of Forests' budget as follows: \$15 million in 2003/04; \$30 million in 2004/05; and, \$50 million in 2005/06... In 2005/06, the government will have allocated the full amount available for forestry revenue sharing with First Nations in the pre-treaty environment. As a result, it is the policy of the Ministry of Forests that, should all First Nations participate in the initiative, each First Nation in the Province will receive an equitable share of the budgeted forestry revenue. The amount available for an individual First Nation will be set though a mandate provided by the Deputy Minister of Forests.

27 Also within section 6, the provincial policy on volume states that "the Ministry of Forests is setting a target of 8% (about 5.6 million m3) of the provincial AAC to be held by First Nations."

28 Further, under section 6, the provincial policy states that:

The FRA will contain clauses that indicate the government is providing economic benefits to accommodate the economic aspect of the First Nation's potential aboriginal title interests that may be infringed by the issuance of tenures and administrative or operational decisions made by statutory decision makers. As a res-

ult, the Ministry of Forests will, on an annual basis provide a list to the First Nation of the following administrative decisions that may affect the First Nations aboriginal interests during the term of the FRA:

- a) decisions that set or vary AAC for a timber supply area or a forest tenure;
- b) the issuance, consolidation, subdivision or amendment of a forest tenure;
- c) the replacement of forest tenures;
- d) the disposition of timber volumes arising from licence undercuts;
- e) AAC apportionment and reallocation decisions;
- f) timber sale licence conversion to other forms of tenure and timber licence term extensions;
- g) the reallocation of harvesting;
- h) the issuance of special use permits; and
- i) establishment of interpretive forest sites, recreation sites and recreation trails.

29 The HFN submit that in order to obtain interim economic accommodation in relation to infringements of HFN title and rights, the Province is forcing the HFN to agree that its duty to consult has been met in relation to a long list of administrative decisions, each of which authorize the infringements of HFN title and rights. Therefore, after entering into a FRA, the Ministry will make administrative decisions that affect the title and rights of the First Nation without consulting the First Nation.

30 Under the FRA initiative, any First Nation which takes the view that the FRA would not provide a fair return may choose not to enter into the FRA and may continue to consult with the MOF to address accommodation for forestry activities in the asserted territory. Section 7 of the policy states:

In situations where an agreement cannot be reached, Ministry staff should continue to consult with First Nations in a manner consistent with the Ministry of Forests' Protection of Aboriginal Rights Policy. Any offer made to a First Nation, even if it ends up ultimately being rejected, will be made on a "with prejudice" basis. This means that if faced with litigation, the province will provide information to the court that an accommodation offer was made, and will inform the court of the terms of that offer. It is important that Ministry staff inform the First Nation of this fact.

31 The Province has no program available to offer tenure or revenue sharing other than the FRA programme. Moreover, according to the FRA policy, the entire tenure volume and budget for revenue sharing available for First Nations through the forest revitalization legislation has been reserved to the FRA programme.

d) The FRA Drafts

32 The first draft of the FRA which the parties drew up for discussion is dated November 4, 2003. It states that "the parties wish to enter into an interim measures agreement in relation to forest resource development and related economic benefits arising from this development within the Traditional Territory;" and, that "the parties have an interest in seeking interim workable accommodation of HUU-ay-aht's and Uchucklesaht's Aboriginal In-

terests where forest development activities are proposed with the Traditional Territory that may lead to the potential infringement of Huu-ay-aht's and Uchucklesaht's Aboriginal Interests." At section 1.7, "Interim Workable Accommodation means accommodation of the potential infringement of Huu-ay-aht's and Uchucklesaht's Aboriginal Interests arising from or a result of forest and/or range development, prior to the full reconciliation of these interests through a land claim settlement."

33 The significant sections of the first draft of the FRA are:

- Section 3.1 invites the HFN to apply for a 265,000 m³ TSL as per the IMEA regarding a direct award tenure. The TSL is non-transferable, non-replaceable, and for a 5 year-term in TFL 44.
- Section 3.2 states that during the term of the FRA, the Government of British Columbia would share revenue with the HFN, being approximately \$280,000 annually.
- The timber and revenue sharing distribution is decided on a population-based, per capita approach. This approach is based on the population of rural, First Nation individuals.
- Section 4.2 states that "during the term of this Agreement, the Huu-ay-aht and Uchucklesaht agree that the Government of British Columbia has filled its duties to consult and seek interim workable accommodation with respect to the economic component of potential infringements of Huu-ay-aht's and Uchucklesaht's Aboriginal Interests or proven aboriginal rights in the context of Operational Plan decisions that the Government of British Columbia will make." The same statement is at section 5.8 in reference to administrative decisions.
- The FRA is to terminate on the occurrence of the earliest of "five years from the date this Agreement is executed; or the coming into effect of a treaty; or the mutual agreement of the parties; or the Government of British Columbia cancels economic benefits under this Agreement pursuant to Section 9.0."

34 The terms of this draft have remained relatively unchanged. For instance, after the first draft FRA was proposed by the Ministry, the HFN requested that an agreement in the form of an IMEA be substituted for the FRA. Thereafter, the Ministry simply changed the title, but not the substance of the second draft of the FRA to reflect the HFN's request. The Ministry changed the title of the draft FRA to "Interim Measures (Extension) Agreement", but simply renumbered the paragraphs rather than changing the substance of the agreement. Therefore, any changes that the government made were essentially window dressings.

35 One change which is important to note is that the Ministry inserted section 16.9 into draft 5 of the FRA, which states:

The parties differ on the question of the existence or extent of any duty or duties of consultation and/or accommodation owed by the forest licensees to the Huu-ay-aht First Nation. Nothing in this Agreement, or the fact that the parties have entered into this Agreement, is intended to limit or prejudice the position that either Party may take in litigation or other negotiations on the existence or extent of any duty or duties of consultation and/or accommodation owed by forest licensees or other third parties to the Huu-ay-aht First Nation.

36 The court will consider section 16.9 after discussing the negotiations which have taken place up to this litigation.

37 The only term which actually changed in substance was with regard to forest tenure. Section 3.1 of the FRA changed on June 22, 2004, when MOF increased the tenure award offer from 30 m³ per person to an amount of 54 m³ per person. This would result in an annual award of 30,500 m³ annually for the 5 year term of the FRA agreement. However, the offer of 54 m³ per person was within the MOF's target according to the FNFS proposal. At paragraph 59 of Ministry official, Sharon Hadway's affidavit, she outlines the FNFS proposal:

59. The amount of available timber was intended to be fixed: in fact, under the FNFS proposal, both the targets of allocated timber and the quantum of funds available as revenue sharing were intended to be fixed. For the FRA Initiative MOF had available to it:

(a) timber volume to be dedicated to First Nation direct awards in the amount of 3 million m³, that is 30 m³/person from the reallocation process with an upper target of 54 m³/person if volume from other sources is available to 'top up' the tenure opportunity from sources such as undercut.

38 This target rate is reiterated in several internal MOF e-mails. For instance, in an internal e-mail sent from Ministry worker, Darrell Robb, on June 17, 2004, he states that "[m]y interest here is an outcome which is defensible to numerous parties. A defensible allocation of the undercut would meet the policy for FN tenure (i.e. 8% population, thus 54 m³ per capita), and is distributed in geographical areas."

39 Although the specific target rate of 54 m³/person is not listed in the FRA policy, nor mentioned in any other government documents, there is a reference in the FRA policy to "setting a target of 8% (about 5.6 million m³) of the provincial AAC to be held by First Nations". This per-capita, population-based approach is expressly stated under "Revenue Sharing" in the FRA policy and is repeated under "Current Tenures held by the First Nation". This target is further outlined in a MOF memorandum titled "Opening up new partnerships with First Nations", dated March 26, 2003, where forest tenure was linked to the per-capita, population-based criteria: "[the] Government is proposing to allocate up to eight per cent, or about 5.5 million cubic metres, of the province's total allowable annual cut to First Nations. This would be roughly equivalent to the proportion of First Nations people in the rural population."

e) Negotiation of Accommodation Agreements

40 As set out above, the parties initially met on November 4, 2003 to discuss a timber and revenue sharing agreement. The HFN sought to renew the existing IMEA, while the MOF proposed a FRA. At the November 4 meeting, the MOF presented a formal offer and first draft FRA which offered \$280,000 in revenue sharing annually for the term of the FRA and requested recognition of the existing 265,000 m³ Direct Award Agreement as a component of the FRA. The FRA offer was based upon the HFN membership number of 565 as taken from January 2003 information. As well, MOF offered to commit to the provision of an annual list of all proposed administrative decisions anticipated within that year and to continue to consult with HFN in regard to operational planning decisions in respect of existing forest tenures. The MOF sought agreement from the HFN that, in consideration of the economic benefits and consultation processes set out in the draft FRA, the Government of British Columbia has fulfilled its duties to seek interim workable accommodation with respect to the economic component of potential infringements of HFN's potential aboriginal interests resulting from administrative decisions made by statutory decisions makers from time to time during the FRA. This FRA was intended to replace the existing IMEA that expired March 5, 2004.

41 In a letter dated November 19, 2003, the Assistant Deputy Minister of Tenure and Revenue at MOF, Bob

Friesen, wrote to Chief Counsellor Robert Dennis and Chief Counsellor Charlie Cootes Sr. to convey MOF's offer as articulated at the November 4 meeting. Through this offer, MOF sought to achieve a "pragmatic interim solution" to HFN's economic interests.

42 On December 1, 2003, Chief Dennis wrote to the Assistant Deputy Minister advising that HFN wished to extend the IMEA rather than enter a FRA.

43 On December 17, 2003, the HFN met with the provincial Treaty Negotiation Office ("TNO") as a member of the Maa-nulth Treaty Group. At the TNO meeting, the HFN requested the extension of the IMEA arrangement for forestry, including a revenue sharing and tenure component, as an alternative to the FRA offer. The HFN also asked for an accommodation of aboriginal title and rights interests that would be connected to the volume and value of ongoing logging within the Hahoothlee. However, the provincial policy provides that their agents, including the TNO, may not negotiate IMAs that commit to tenure or revenue sharing in excess of the FRA policy.

44 On January 14, 2004, the HFN met with Premier Gordon Campbell in order to discuss the extension of the IMEA. HFN presented Premier Campbell with a briefing document titled "Investing in Certainty" which included a request to renew the IMEA which was set to expire on March 4, 2004. The HFN was unwilling to sacrifice the structures established under the IMEA and informed the premier that the FRA was not reasonably connected to the extent of forestry operations in HFN territory.

45 By e-mail dated January 26, 2004, Tom Happynook of HFN responded to the FRA offer tabled by MOF. Mr. Happynook stated his appreciation for the extension of the offer of the FRA, but turned down the offer on that basis that "the FRA has the potential to create economic and political problems for our leadership and ultimately our Nation." He then itemized HFN's reasons for requesting an extension of the IMEA and offered to negotiate.

46 In an internal MOF e-mail sent by MOF aboriginal affairs officer, Rhonda Morris, on January 27, 2004, the MOF confirmed its position that "we are not looking to renew IMAs except in the form of FRAs" and confirmed the per capita target range of 30 to 50 m³ per person:

MOF can not offer any more volume without creating a large discrepancy with regards to the amount of volume other neighbouring FNs are being offered. H/U [HFN], with their present direct award of 262,000 m³ over 5 years, is already at 45 m³/person target which is well within the volume target range we are working within — 30-50 m³/person.

47 The MOF was prepared to review options suggested by HFN with respect to meeting with provincial officials, but only within the context of the resource constraints faced by MOF. There were insufficient resources available to the MOF to continue the IMEA processes as a result of MOF district staff being stretched in terms of resources and thus no longer being able to commit to monthly joint forest council meetings.

48 On February 5, 2004, Cindy Stern, the District Manager of the South Island Forest District, wrote to Chief Dennis and other chiefs and councils whose asserted traditional territories were within the South Island Forest District. Ms. Stern was writing to clarify the process undertaken by MOF in seeking to consult with First Nations who might have an interest in respect of forest development decisions and approvals. Ms. Stern indicated that the Maa-nulth First Nations had expressed a concern that the MOF, in seeking to consult with the Tse-shaht First Nation on proposed forest development activities located within an expanded traditional territory,

was in some way acknowledging or verifying the validity of territorial claims which might be disputed by other First Nations. Ms. Stern clarified that the MOF process was intended to be inclusive of First Nations who asserted some aboriginal interest in respect of areas where forest development decisions were contemplated. Ms. Stern further clarified that the discussions with respect to forest development proposals with First Nations were "not predicated in any way upon an acknowledgment, recognition or verification by the MOF that asserted claims necessarily had legal or factual validity".

49 On February 5, 2004, MOF staff met with representatives of the HFN to discuss the FRA initiative.

50 On February 25, 2004, the MOF and HFN discussed the expiring IMEA and the proposed FRA via a conference call. As agreed during the call, the parties would meet on March 12, 2004 to review the effectiveness of the IMEA and to identify the essential components of the expiring IMEA and the proposed FRA with the mind to incorporate the components into one, new agreement respecting forest resource activities within the asserted traditional territories.

51 On March 5, 2004, Assistant Deputy Minister Friesen wrote to Chief Dennis of the HFN and to Chief Cootes of the Uchucklesaht as a follow-up to the February 25, 2004 conference call.

52 On March 12, 2004, the HFN met with Assistant Deputy Minister Friesen to discuss the extension of the IMEA. At this meeting, the Assistant Deputy advised that he had no authority to negotiate and was bound by the provincial FRA policy. MOF confirmed at this meeting that both the offer of revenue sharing and tenure under the FRA offer were based on a fixed per-capita formula derived from provincial targets, and were non-negotiable. The HFN again requested accommodation of aboriginal title and rights interests that would be connected to the volume and value of ongoing logging within the Hahoothlee.

53 Chief Dennis sent a letter to the MOF dated March 19, 2004, stating that the Province was not taking a good faith approach to accommodation because the strictly limited pre-set population-based funding formula ignored the strength of the HFN claim, the high stage at which the HFN was in their treaty negotiations, and the quantity and value of timber proposed to be logged from HFN territory:

Further, we have now been advised by your Ministry officials that their ability to negotiate proper economic accommodations for loss of forests in our territory is strictly limited by a pre-set population-based funding formula, without regard to our particular circumstances, the strength of our title claim, our AIP Treaty status, or disproportionate quantity and value of timber proposed to be logged from our territory.

54 Chief Dennis then advised that the HFN intended to prohibit any logging activity within their claimed territory if a renewed IMEA could not be negotiated prior to April 30, 2004.

55 Chief Dennis sent a letter to Ms. Stern dated March 19, 2004, stating that until the IMEA is renewed, the HFN:

...will not be authorizing any new logging approvals in our territory without requiring that you undertake a full consultation and accommodation process...at present, there is no agreement in place with the Ministry of Forests that provides proper economic or cultural accommodation for on-going logging, or that provides appropriate process for reaching such accommodations...we must ask that you put all current Cutting Permits and other logging approval applications on hold until we have adequate time together to put a proper consultation and accommodation processes and economic mechanisms into place.

56 On March 23, 2004, the HFN had a meeting with the Minister, the last such meeting provided for under the IMEA. The HFN used the meeting to reiterate the points made in the March 19, 2004 letter. The Minister indicated that the revenue available for distribution was fixed under the FRA initiative.

57 In late March 2004, both MOF and TNO, through internal e-mails, were engaged in review of tenure opportunities and were assessing take back volumes as one potential source of volume to use for tenure at the final agreement stage of the treaty process. MOF and TNO were seeking replaceable tenure opportunities and, in some cases, area based tenures; however, HFN were neither advised nor included in such discussions.

58 On April 7, 2004, the Minister responded by letter to the HFN and stated that the Ministry was constrained from offering the HFN a greater proportion than the amounts fixed under the FRA policy. The Minister, when requested to discuss an alternative revenue sharing or tenure initiative refused:

...I am constrained within a fixed treasury board budget under the Forest Revitalization Plan. Giving the HFN a greater proportion of this fixed amount would mean giving other First Nations less, which I am not prepared to do.

59 The Minister set out the factors that he had to consider regarding timber distribution and acknowledged that he was prepared to authorize discussions towards a revised, 5 year tenure opportunity. The Minister advised that "any timber volume for a new tenure opportunity would be acquired through the timber allocation process" and that "[a]s the timber reallocation process [was] ongoing, any invitation for a new tenure could not be extended until January 2006". The Minister confirmed that this time frame corresponded "with the anticipated completion of the harvesting of the initial 265,000 m³ tenure held by the HFN and Uchucklesaht." The Minister advised that, "[g]iven the constraints outlined above on the timber supply on southern Vancouver Island, [he] anticipated that any new tenure using volume from the reallocation process would be approximately 16,900 m³ annually for HFN." This process indicates that the HFN would have to apply for tenure like any other First Nation and still be within the constraints of the population-based criteria.

60 On April 16, 2004, Sharon Hadway assumed the role of lead negotiator for MOF with respect to the negotiations with HFN. On April 19, 2004, Ms. Hadway sent an e-mail to Chief Dennis in order to set the agenda for an April 21, 2004 meeting. The purpose of the meeting was "to provide a forum for frank and open disclosure to set the stage for a new agreement." The parties were to explore ways to continue with workable aspects of the IMEA.

61 On April 21, 2004, the HFN met with Ms. Morris from the MOF. At the meeting, the HFN again requested that any annual award should be based on the amount of harvesting from its territory. The MOF confirmed the population-based formula for revenue and tenure amounts under the FRA. Further, the MOF informed the HFN that any FRA could not be retroactive to the expiry of the IMEA, and that it would only come into effect in the quarter that the agreement was signed. This meant that the HFN were not covered by any agreement during the time that negotiations continued, and that forestry operations continued in the Hahoothlee, and continue presently with no accommodation of HFN title or rights.

62 The HFN further requested that tenure offered as accommodation should also be replaceable, particularly given the fact that the TFL is a replaceable tenure. The HFN noted that under the stated objectives of the forestry revitalization reallocation process, 8% of AAC was to be re-allocated to First Nations, and 8% if applied to the approximately 1,000,000 m³ per year coming out of HFN territory would require an award in the range of 80,000 m³. The HFN proposed trying to reach agreement with the Province on harvesting activity within the Ha-

hoothlee; however, the MOF was not prepared to discuss an award based upon the amount being logged. Further, the HFN proposed that a draft FRA should explicitly state that it represented only partial accommodation of its interests. The MOF would not agree to "partial accommodation". The MOF proposed that the FRA would explicitly represent an interim accommodation on the basis that all FRAs are a response to the uncertainties regarding the strength of a First Nation's claim. There was no strength of claim analysis under the FRA process.

63 On April 26, 2004, Ms. Hadway sent an e-mail to Greg McDade, counsel for the HFN. Ms. Hadway advised Mr. McDade that the MOF had reviewed HFN's position that the benefits offered to the HFN in the negotiation process represented only partial or limited accommodation. Ms. Hadway advised that, although the MOF agreed that this agreement was a bit different because it was to be negotiated as a continuation of an IMEA, the Ministry would still be seeking acknowledgement that the benefits provided (revenue sharing and an additional tenure opportunity) would constitute interim workable accommodation for the term of the agreement. She also advised that MOF would be seeking to "include the provisions regarding cancellation and suspension of the benefits if litigation regarding the adequacy of the consultation process and benefits was pursued." She stated that the Minister had "already made significant commitments beyond a standard FRA" for the benefit of the HFN and advised that if the HFN chose to pursue a replaceable tenure opportunity through the treaty process, MOF would support any discussions with TNO.

64 On May 13, 2004, Ms. Hadway, Chief Dennis, Mr. McDade, and Len Mannix of MOF in Nanaimo, met to discuss the next draft FRA. MOF stated that the proposed FRA was intended by MOF to provide interim workable accommodation and that MOF could not extend the IMEA. HFN once again stated that accommodation must have a connection to the amount of harvesting in traditional territory and the extent of the infringement. MOF said that it would not enter into an agreement based on the amount of logging in the territory.

65 On May 27, 2004, Mr. McDade sent an e-mail to Ms. Hadway with an attached draft of an agreement and notes with respect to possible suggested language to be substituted, further to the May 13, 2004 discussions. Mr. McDade advised that the language proposed attempted to respect the Province's view that it had promised what money it currently had, and the HFN view that it not be necessarily required to accept that this was an acceptable amount.

66 Another meeting was held on June 10, 2004, to further negotiate with respect to the draft FRA. On June 11, 2004, Ms. Hadway sent an e-mail to Mr. McDade and Chief Dennis attaching a further amended proposal, being draft 4, for a FRA. In the e-mail, Ms. Hadway stated that:

The benefits are not based on an objective analysis of the value of the accommodation owing...MOF is also not prepared to accept language in the agreement that states or implies that these benefits only provide partial accommodation, and that further benefits would be negotiated through the consultation process. The benefits that are offered through the Agreement are all of the economic accommodation that the Province has available to put on the table.

67 Regardless of the above stated position, the MOF has argued before this court that they retain the ability under the legislative scheme to address any alleged infringement of First Nation interests outside of the FRA initiative pursuant to ss. 43.51 and 47.3 of the *Forest Act*. These sections enable the MOF to invite, without competition, an application from a First Nation for a direct award, forest licence, woodlot licence, or timber sale licence in order to implement or further an agreement between the First Nation and the Province. The FRA initiative does not preclude First Nations from also participating in the competitive process for these opportunities. In

addition, a First Nation may be issued, without competition, a timber sale licence for less than 2,000 m³ through s. 48(1)(g)(i) of the *Forest Act* or a small volume free use permit for traditional and cultural activities. However, according to the FRA policy, "[i]nvitations to First Nations under Section 43.51 and 47.3 of the *Forest Act* may only be made to implement or further a treaty-related measures, interim measures, or economic measures agreement". Thus, a First Nation must have entered into an agreement with the Province in order to take advantage of these sections. Further, these sections of the *Forest Act* appear to be the reference to which the FNFS proposal was referring to as "top up tenure from other sources". Therefore, if a First Nation has already reached the Province's upper "top up" rate of 54 m³/person, then these sections of the *Forest Act* would not apply. Thus, the MOF has never offered the HFN anything outside of its target rate.

68 On June 22, 2004, MOF increased the tenure award offer from 30 m³ per person to an amount of 54 m³ per person due to an additional source of volume in undercut volume (the difference between the AAC under the licences and the annual amount which was actually cut) in TFL 44 that was uncommitted and could be used to increase the size of the tenure opportunity for First Nations negotiating FRAs in TFL 44. This additional volume allowed MOF to increase the tenure award to its upper target rate of 54 m³/person. This was possible in the case of the HFN as well as several other First Nations in TFL 44, including the Tshshaht and Ditidaht. This amount still remains within the MOF's FNFS policy.

69 On June 24, 2004, Ms. Hadway wrote a letter to Chief Dennis setting out the MOF's commitment regarding the forest tenure opportunity and a response to the two main options for concluding an agreement as presented by the HFN:

(a) MOF offered an increased tenure opportunity which it intended to locate within the Sarita River Valley;

(b) HFN wanted the agreement to explicitly represent "partial accommodation" of their claim. MOF was prepared to expressly commit to recognition that the FRA was an interim measure and that it was not intended to address full reconciliation of the HFN's claim and to agree that nothing in the FRA, including the fact that the parties had entered into the FRA, would be used to limit or prejudice the position that either party might take in litigation or negotiations as to the existence of any duty of consultation or accommodation owed by forest licensees or other third parties to the HFN; and

(c) MOF committed to contacting Weyerhaeuser with respect to the HFN proposal for a management approach that involved the HFN in the Sarita River Valley.

70 Chief Dennis responded by a letter dated June 24, 2004, stating that the population-based economic accommodation offered did not relate to the strength of title and rights claim and was not sufficient to address the infringement of aboriginal rights and title that resulted from forest development activities. Chief Dennis indicated that the HFN might consider the offer if it were a replaceable licence with a volume of 50,000 m³ annually.

71 On July 5, 2004, Ms. Hadway sent an e-mail to Mr. McDade and Chief Dennis, in response to their June 24, 2004 letter, advising that the MOF could not meet this tenure request as it had already put forward its best offer of 152,500 m³ over 5 years in a non-replaceable tenure. She added that the HFN might be able to acquire a replaceable tenure in a final treaty through negotiation in the treaty process.

72 On July 5, 2004, Chief Dennis responded to Ms. Hadway's July 5, 2004 e-mail, stating that the HFN viewed the MOF proposal as a "take it or leave it response" and that he found it unacceptable that the forestry

negotiations could only be achieved by licensee approval. Chief Dennis also said that he found it very "disturbing that government and industry benefit from ongoing forestry activity in our asserted territory and neither party provides any accommodation to HUU-ay-aht."

73 On July 5, 2004, Chief Dennis also sent an email to Premier Campbell providing notice "that our Interim Measure Extension Agreement/Forest Range Agreement negotiations are not producing positive results to enable both parties to achieve an agreement." Chief Dennis then requested a meeting with the Premier and the MOF "to iron out the wrinkles."

74 On July 12, 2004, Chief Dennis sent a letter to Ferd Hamre, Acting District Manager, South Island Forest District, MOF, advising that "[f]orestry operations within our territory involve a huge amount of annual extraction of timber resources, an infringement which is currently happening without any accommodation." Further, Chief Dennis stated:

The current Crown position precludes any possibility that we can recommend the approval of harvesting in cutblock 961420 to our membership, or agree to harvesting of any cutblock within our territory. The Crown is not meeting its legal duty of accommodation. On cutblock 961420 we need the information we have requested in our previous correspondence to embark upon any assessment of the impact of harvesting. We wish to make it clear through this letter that in addition to the need for this information, we will object to any approvals being issued on any cutblock, until such a time as MOF negotiates a fair agreement which provides for acceptable economic accommodation.

75 On July 19, 2004, Ms. Hadway sent an e-mail to Mr. McDade and Chief Dennis advising that MOF's offer had not changed since its proposal of June 24, 2004. MOF was still prepared to offer revenue sharing of \$281,000 annually and the tenure opportunity of 54 m³ per person (152,500 m³ over 5 years) with an operating area situated in the Sarita River Valley. Ms. Hadway stated that the MOF "had proposed alternative language regarding clauses dealing with accommodation in an attempt to address the HFN concerns about those clauses." She also stated that "[a]s requested by HFN, MOF is having some further discussions with Weyerhaeuser regarding [Chief Dennis'] proposal of increasing the HFN role in the management of the Sarita River Valley through a partnership with Weyerhaeuser."

76 On July 19, 2004, Chief Dennis responded to Ms. Hadway's e-mail, advising that he would ask Mr. McDade to review the alternative language issue and that he felt that he had responded to MOF's June 24, 2004 proposal. Chief Dennis advised that he felt that the HFN's counter-proposal had been rejected and that the HFN had requested the Premier's intervention on the FRA negotiations to assist with a resolution. Chief Dennis said that further negotiations would depend on the Sarita River Valley proposal.

77 On July 27, 2004, Chief Dennis requested an update with respect to the HFN proposal for an area-focused tenure in the Sarita Valley. Ms. Hadway responded to Chief Dennis' e-mail, advising that she had provided an updated FRA proposal in her e-mail dated July 19, 2004, and that she was waiting for the HFN to respond to the proposed language. She stated that the MOF had discussions with Tom Holmes of Weyerhaeuser with respect to partnerships in the Sarita River Valley and had scheduled a second meeting for later in August.

78 On August 24, 2004, at a further meeting with MOF, the HFN was advised that there continued to be no room to negotiate any change in the revenue or tenure formulas. The HFN were provided with the Province's fifth draft of the FRA, which the HFN did not accept. The HFN indicated that based on the draft, they had no choice but to pursue litigation. A draft writ was tabled and the meeting ended.

79 HFN served the petition with respect to this matter on September 20, 2004. Further negotiations ceased.

80 From the time the IMEA expired in March 2004 until January 18, 2005, logging operations have continued within HFN territory. Cutting permits have been granted in at least 9 cutblocks and road permits have been granted in at least a further 11 cutblocks within the Hahoothlee during this period, representing a total volume of approximately 600,000 m³ of harvest.

81 In the "consultation process" which took place between the MOF and the HFN from November 2003 to the present, no other options besides the FRA were presented to the HFN. For instance, in Ms. Hadway's June 11, 2004 email addressed to Greg McDade and Chief Dennis, she stated that:

The benefits that are offered through the Agreement [FRA] are all of the economic accommodation that the Province has available to put on the table...MOF is not prepared to approach the negotiation of the Agreement predicated on the assumption that the consultation process should be open-ended...

82 Furthermore, at no time did the Ministry ever indicate that a more formal process was available, nor did they provide information as to how the HFN could enter into a more formal consultation process. In addition, considering section 16.9 of the fifth draft of the FRA, the Ministry is not limited by the agreement, i.e., they can still negotiate while litigation is taking place. The Ministry maintains that it has always been willing and able to enter into a formal consultation process with the HFN, yet to date they have taken no steps to do so.

83 The Ministry has also argued that the formal consultation process is too long and that the HFN will have already entered into a treaty with the Government of British Columbia by the time that any formal consultation would ever be concluded. Yet, such an assertion has no substance because the MOF and the British Columbia Treaty Office have failed to communicate with each other in this regard.

84 The Ministry put forward its FRA policy as the only form of economic accommodation available to a First Nation until a treaty is reached. In the FRA policy dated July 31, 2003, the Province recognizes that the FRA policy is in response to *Haida*. Section 3 of the policy states:

The courts have held that First Nations' aboriginal title and rights in respect of land and resource use are recognized and affirmed under Section 35 of the *Constitution Act, 1982*. Aboriginal title, where it exists, has been determined by the courts to have an economic aspect. Recent legal decisions (*Haida*, *Skeena*) have determined that an obligation of the Crown exists to seek to accommodate potential First Nation aboriginal rights and title interests when making forest management decisions.

...In response, the government of British Columbia has developed a framework to ensure the appropriate, consistent, and fair application of accommodation measures...

85 At section 4, the policy further states that:

Court decisions have increased the requirements of the Ministry of Forests to consult with First Nations on a wide-range of forest and range management decisions.

.....

The policy approach to implementing the accommodation strategy is to offer access to economic benefits

(revenue sharing and access to timber) through negotiated agreements with individual First Nations. In exchange for the economic benefits, agreements will contain provisions that promote a stable operating environment for the forest and range section, including consultation procedures and terms indicating that the Province is providing workable accommodation of the First Nation's economic interests arising from forest and range decisions.

86 The language in the FRA policy, i.e. that in response to *Haida* and other court decisions, the Province has developed the FRA process, leads to the logical conclusion that the FRA process is the consultation process regarding the economic aspects of aboriginal title and rights.

(F) Does the FRA Policy Follow the Government's Formal Consultation Policy?

87 There are two formal consultation policies for consultation with First Nations. The first is the "Provincial Policy for Consultation with First Nations", dated October 2002 ("Provincial Policy"); the second is the "Ministry [Ministry of Forests] Policy", dated May 14, 2003.

88 The purpose of the Provincial Policy is to "describe the Provincial approach to consultation with First Nations on aboriginal rights and/or title that have been asserted but have not been proven through a Court process". According to this policy, the Province must follow the following steps:

(1) Pre-consultation assessment: an initial assessment should evaluate whether a particular decision or activity will require consultation.

(2) Stage 1: initiate consultation. Stage 1(a) requires decision makers to consider aboriginal interests identified or raised by potentially affected First Nations. The scope and depth of consultation required is proportional to the soundness of the aboriginal interests that are at issue. According to stage 1(b), more indepth consultation is required when a number of the following criteria are met: title to the land had been continuously held in the name of the Crown; land near or adjacent to a reserve or formal settlement or village sites; land in areas of traditional use or archaeological sites; land used for aboriginal activities; notice of an aboriginal interest/aboriginal rights and/or title from a First Nation, even where made to another Ministry or agency of the Crown; and land subject to a specific claim.

(3) Stage 2: consider the impact of the decision on aboriginal interests. If the Province determines that there appears to be a likelihood that the decision may result in an infringement of those interests should they be proven subsequently to be existing aboriginal rights and/or title, the Province must go to stage 3.

(4) Stage 3: consider whether any likely infringement of aboriginal interests could be justified in the event that those interests were proven subsequently to be existing aboriginal rights and/or title. The nature and scope of the duty to consult will vary with the nature of the right, the circumstances, and with the nature and extent of the infringing action. Aboriginal title embodies both cultural and economic aspects. Addressing both is part of the justification of infringement of aboriginal rights. If the Province finds that the likely infringement of aboriginal interests, should those interests be proven subsequently to be existing aboriginal rights and/or title, appears not to be justifiable, the Province must go to stage 4.

(5) Stage 4: look for opportunities to accommodate aboriginal interests and/or negotiate resolution bear-

ing in mind the potential for setting precedents that may impact other ministries or agencies. This step may involve the use of treaty related measures, interim measures, economic measures, programs, training, economic development opportunities, agreements or partnerships with industry or proponents, or other arrangements aimed at attempting to address and/or reach workable accommodations with respect to aboriginal interests, particularly where the scope of discretion to accommodate such interests under the statutory framework in question is limited. The range of activities that can be carried out in terms of coming to a negotiated resolution vary greatly from situation to situation, and according to agency statutory mandates, policies, programs, appropriations, and available statutory discretion.

89 The MOF has not applied stage 1 to the negotiations with the HFN. According to stage 1(a) of the Provincial Policy, the Province must consult in proportion to the soundness of the aboriginal interests that are at issue. According to stage 1(b), more in-depth consultation is required when a First Nation has met a number of criteria. The HFN has met all criteria listed, including having a specific claim on the land that does not overlap with other First Nations claims to parts of the Hahoothlee.

90 The MOF has not applied stage 3 which states again that "the nature and scope of the duty to consult will vary with the nature of the right, the circumstances, and with the nature and extent of the infringing action". Regardless of the HFNs continual request to enter negotiations on the basis of the strength of their claim and the nature of the infringement, the MOF have followed the FRA policy, and in particular, the per-capita, population-based criteria, in order to determine the extent of negotiations.

91 The second formal consultation policy is the Ministry Policy. According to the Ministry Policy, the consultation process is to "include considerations on the degree to which the forestry decision impacts the landbase, and the degree to which the First Nation likely has aboriginal interests within the area under decision." According to the Ministry Policy, the consultation process will:

- (1) identify First Nations potentially affected by proposed forest development decisions,
- (2) provide them with all relevant and reasonably available information regarding proposed forest development decisions,
- (3) request information from First Nations that will assist in the identification of, and provide the basis for claims of, aboriginal interests that may be impacted by proposed forest development decisions,
- (4) consider the degree to which the forestry decision impacts the landbase,
- (5) consider whether the aboriginal interests described by the First Nation will potentially be infringed by the proposed development activity or decision, and
- (6) consider the apparent strength of aboriginal interests in relation to forest development decisions, seeking to accommodate those interests where appropriate.

92 The Ministry has met the first requirement in the consultation process; however, the other requirements do not appear to have been followed.

III. Analysis

a) Can the Petitioner Proceed by Petition to Seek Declaratory Relief?

93 This matter was commenced by petition under the *JRPA*. The respondent has argued that negotiation under the FRA initiative is not the exercise of a statutory power and so not amenable to judicial review. Further, it was submitted that consultations under the FRA programme are advisory in nature so do not fall under the *JRPA*. Finally, the respondent said that the FRA initiative was a strategic policy to provide incentive to First Nations to participate in a voluntary initiative where options are available and so is not reviewable under the *JRPA*. The petitioner says that the FRA initiative was created by statute, namely, the *Forestry Revitalization Act* and the *Forest Act* which called upon the province to make specific agreements with First Nations and that the vehicle for those agreements is the FRA. It is not a voluntary policy when no options are available.

94 *Haida Nation v. British Columbia (Minister of Forests)* (2004), 245 D.L.R. (4th) 33, 2004 SCC 73 (S.C.C.) [*Haida*] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004), 245 D.L.R. (4th) 193, 2004 SCC 74 (S.C.C.) [*Taku*] established that the principle of the honour of the Crown requires the Crown to consult and, if necessary, accommodate Aboriginal peoples prior to proof of asserted Aboriginal rights and title. This is a corollary of s. 35 of the *Constitution Act, 1982*, in which reconciliation of Aboriginal and Crown sovereignty implies a continuing process of negotiation which is different from the administrative duty of fairness that is triggered by an administrative decision that affects rights, privileges, or interests (*Haida* at paras. 28-32). The obligation is a free standing enforceable legal and equitable duty (*Haida Nation v. British Columbia (Minister of Forests)* (2002), 99 B.C.L.R. (3d) 209 (B.C. C.A.) at para. 55, 2002 BCCA 147 (B.C. C.A.) [*Haida Nation* (2002)]; *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)* (2004), 34 B.C.L.R. (4th) 280, 2004 BCSC 1320 (B.C. S.C.) at para. 73 [*Squamish*]). The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution (*Haida* at para. 60). In its review, the court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process (*Taku* at para. 24). It is not a question, therefore, of review of a decision but whether a constitutional duty has been fulfilled (*Gitksan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (B.C. S.C.) at para. 65, 2002 BCSC 1701 (B.C. S.C.) [*Gitksan Houses*]).

95 The appropriate standards of review were discussed in *Haida* at paras. 60-63. Briefly stated, the existence or extent of the duty to consult or accommodate is a legal question requiring correctness. Government misconception of the seriousness of the claim or impact of the infringement is a question of law to be judged by correctness. When infused with an assessment of facts, the standard is reasonableness. The process itself is to be judged on the reasonableness standard with the essential question being whether the government action viewed as a whole accommodates the collective aboriginal right in question. The government's process must be reasonable. Hall J.A. admonished in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 (B.C. C.A.) at para. 96 [*Musqueam*] that there should be some deference when a court considers the adequacy of the government's efforts to consult with an aboriginal group, and that administrative law principles suggest a standard of reasonableness when the question is not purely a legal one.

96 In *Haida Nation v. British Columbia (Minister of Forests)* (2004), 35 B.C.L.R. (4th) 189, 2004 BCSC 1243 (B.C. S.C.), the decision regarding the duty to consult stemmed from the original breach of the Crown's duty in issuing the forestry licence. Mr. Justice Kelleher said at paras. 36 and 37 that there did not have to be a discrete decision to trigger the duty to consult and relied upon *Haida Nation* (2002), to conclude that the obligation is not linked to ongoing decisions or breaches of the Crown. In *Haida Nation* (2002), Lambert J.A. commented at para. 34 that it was unnecessary on the facts of that case to consider whether a statutory power was

being exercised when forests are managed and operations continue by third parties under a tree farm licence.

97 A similar argument had been made by the Crown in *Squamish Nation* where it was argued that an application was premature where an interim agreement to change a shareholder and expand a ski area had been made pursuant to policy under the *Land Act*, R.S.B.C. 1996, c. 245. The court (at para. 93) found that the duty to meaningfully consult arose in relation to the earliest decisions that affected whether the proposal would go ahead because the Crown knew of the First Nation assertion of claims.

98 In *Musqueam* at paras. 16-23, Madam Justice Southin considered that the *JRPA* was inapt to the claim in the nature of prohibition to quash a decision to proceed with the sale of certain lands and for declaratory relief with respect to the duty of consultation because there was no assertion that the transaction in issue was authorized by statute. The correct way to proceed was by action. Nonetheless, the learned justice allowed the matter to proceed as if by action. Neither of the two other justices appeared to have shared this view as neither commented on Madam Justice Southin's conclusions. Most of the cases on this subject have been commenced by petition (*Haida*, *Squamish Nation*, *Musqueam*, and *Gitanyow First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734 (B.C. S.C.) [*Gitanyow*]). In most of these cases, the 'decision' that led to the duty to consult was the original breach of Crown duty in issuance of the forestry licence in the first place.

99 It is apparent that the courts have not been pedantic or overly restrictive in the type of action which it regards as a 'decision' when it comes to declaratory relief following review of whether the Crown has discharged its obligation to consult with First Nations. This is consistent with the view expressed by the learned authors, DeSmith, Woold & Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995), at p.114:

In summary, it can be said that where an application is for an order of certiorari, logic may require that there be some "decision" or "determination" capable of being quashed. The court should not, however, be pedantic or overly restrictive in the type of action which it regards as a "decision". Further, where the only relief sought is a declaration there is no need, at least in challenges to primary legislation, for any "decision" to be identified other than the legislative instrument itself.

[Emphasis added]

100 The Crown had also argued in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001 (B.C. S.C. [In Chambers]) that advisory decisions do not fall within the jurisdiction of the *JRPA*, citing the same cases that were cited before this court, *Save Richmond Farmland Society Western Canada Wilderness Committee v. Richmond (Township)* (1988), 36 Admin. L.R. 45 (B.C. S.C.) [*Save Richmond*] and *Benias v. Vancouver (City)* (1983), 3 D.L.R. (4th) 511 (B.C. S.C.) [*Benias*]. Although the trial court refused to order declaratory relief because the Crown conduct was advisory in nature and so did not fall within the definition of the exercise of a statutory power, neither the Court of Appeal nor the Supreme Court of Canada followed the learned trial court justice on this point. Both *Save Richmond* and *Benias* are distinguishable as they discuss the issue of judicial review in light of decisions in the form of recommendations. The actions taken by the respondent in dealing with the HFN are not meant to be recommendations but are decisions regarding proposal for a formal contract regarding forestry operational and management decisions at present and into the future.

101 In *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), at 459, (1985), 18 D.L.R. (4th) 481 (S.C.C.) [*Operation Dismantle* cited to S.C.R.], the majority agreed that judicial review was available to scrutin-

ize policy decisions of government for compatibility with the Constitution. A preventative declaratory judgment is available if a legal interest or right has been placed in jeopardy or uncertainty. The court said at p. 480:

Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, suggests that declaratory relief in cases which are not susceptible of any other relief is distinctive in that:

...no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant...

102 There is authority that applications for declaratory relief under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 [*Charter*] may be taken by petition when the constitutional rights of an individual are called into question (*R. v. B. (S.)* (1982), 40 B.C.L.R. 273, 142 D.L.R. (3d) 339 (B.C. S.C.), rev'd on other grounds *R. v. B. (S.)* (1983), 43 B.C.L.R. 247, 146 D.L.R. (3d) 69 (B.C. C.A.)). Madam Justice Allan discussed whether an action or petition should be brought when a party seeks declaratory relief related to section 15 *Charter* rights in *Auton (Guardian ad litem of) v. British Columbia (Minister of Health)* (1999), 32 C.P.C. (4th) 305 (B.C. S.C.) at paras. 23-32 and concluded that such matters could proceed either by petition or action. A petition was more appropriate to clarify the nature and extent of public duties due to the summary nature of the proceedings and the ability of the court under the *Rules of Court*, B.C. Reg. 221/90 to order more generous pre-trial procedures if warranted.

103 In *Glacier View Lodge Society v. British Columbia (Ministry of Health)*, [1998] B.C.J. No. 852 (B.C. S.C.), aff'd (2000), 75 B.C.L.R. (3d) 373, 2000 BCCA 242 (B.C. C.A.), an issue arose as to whether the matter should proceed by action or judicial review when it concerned the exercise of statutory powers of amalgamation under the *Health Authorities Act*, R.S.B.C. 1996, c. 180. Shabbits J. held at paras. 22-24:

[22] Section 2 of the *Judicial Review Procedure Act* does provide that on an application for judicial review, the court may grant any relief that the applicant would be entitled to in any proceeding for a declaration or injunction or both in relation to the proposed exercise of a statutory power. That section is permissive. It does not require that declarations or injunctions relating to the proposed exercise of a statutory power be by way of a judicial review; it permits such relief in that kind of an application.

[23] It is my finding that this matter is governed by s. 13 of the *Judicial Review Procedure Act*, which provides that on an application of a party to a proceeding for a declaration or injunction, the court may direct that any issue about the proposed exercise of a statutory power be disposed of summarily, as if it were an application for judicial review. The Act provides that such direction may be made whether or not the proceeding includes a claim for other relief, as is the case with this proceeding.

[24] The matter then, is one entirely of discretion. In reaching this conclusion, I am mindful of the plaintiff's submission that it is not the manner in which the Minister may exercise a statutory power of decision that is in question, but rather the constitutionality of legislation. Notwithstanding that submission, it is the Minister's proposed exercise of a statutory power which has given rise to these proceedings, and that is a matter to which s. 13(1) of the *Judicial Review Procedure Act* relates.

104 In conclusion, declaratory relief has been granted by this court in several cases involving First Nations

disputes concerning the duty to consult. In regards to forestry decisions, declaratory relief stems from the initial decisions to issue timber licences. In this case, the FRA initiative is a creature of statute, the *Forestry Revitalization Act* and the *Forest Act*, which enable the province to make specific agreements with First Nations regarding forest tenure. The FRA is the vehicle that the Ministry chose to deliver those specific agreements. The concept of 'decision' should not be strictly applied when there is legislative enablement for a government initiative that directly affects the constitutional rights of First Nations. This approach has been approved by the Supreme Court of Canada in *Haida* when it spoke of review of governmental action affecting the duty to consult. The petitioners are entitled to seek the declaratory relief under the *JRPA* that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN.

B) Does the Duty to Consult and Accommodate the HFN Exist?

105 The duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida* at paras. 35 and 64). "Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate" (*Haida* at para. 37). It is clear that this duty arises before an infringement occurs and is continuing (*Haida Nation* (2002) at paras. 42-43). Once the government has knowledge of an asserted Aboriginal title or right, it must consult as to how exploitation of the land should proceed (*Haida* at para. 74). In *Taku*, the duty was engaged because the Crown was aware of the claim through the treaty negotiation process.

106 The Crown has had knowledge of the HFN claim since at least 1994 when it entered the treaty negotiation process as part of the Maa-nulth Treaty Group. The status of the HFN within the treaty negotiations is now at level 5 with a comprehensive agreement in principle that has been ratified by the HFN. Crown knowledge is obvious.

107 The nature of infringement or exploitation sufficient to trigger the duty was considered in *Haida* when, in general terms, McLaughlin C.J.C. said that the Crown may continue to manage a resource subject to consultation with Aboriginal groups, depending on the circumstances related to strength of claim. Unilateral exploitation is not honourable. In relation to tree farm licences, the court said at paras. 75-76:

[75] The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence (T.F.L.), 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 an-

nual 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.

[Emphasis added]

108 In *Taku*, the Crown knew that re-opening of a mine had the potential to adversely affect the First Nation claim so to trigger the duty to consult.

109 The Crown has argued here that McLaughlin C.J.C. meant that consultation should take place at the point of decision to grant or renew a licence and that there is no specific impugned conduct here that might adversely affect Aboriginal interest so that it is premature to consider any consultation. An allegation of general continuing forest operations is insufficient and too broad to trigger the duty according to the Crown. This cannot be so.

110 Tysoe J. considered the nature of the infringement in *Gitxsan Houses* after the Crown had there argued that the petitioners had not established a *prima facie* infringement. While that case and *Haida* involved replacement and transfer of tree farm licences, the court found that a broader view of potential infringement was contemplated within the duty. Lambert J.A. said in *Haida Nation v. British Columbia (Minister of Forests)* (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462 (B.C. C.A.) at para. 91:

The provincial Crown may infringe on the aboriginal title and aboriginal rights of the Haida people if it can justify the infringement. The infringement would consist in establishing a legislative and administrative scheme under the *Forest Act*, granting Weyerhaeuser an exclusive right to harvest timber in the area covered by T.F.L. 39, renewing the issuance of T.F.L. 39, transferring T.F.L. 39 to Weyerhaeuser, approving management plans, and issuing cutting permits, all in furtherance of the same legislative scheme, and all in violation of the aboriginal title and aboriginal rights of the Haida people. The provincial Crown may justify its actions by meeting the tests for justification. Among the tests is a requirement that the Haida people be consulted before the infringement actions are taken. In this case, the Crown provincial did not consult the Haida people in any effective way at any stage of the furtherance of the legislative and administrative scheme, and so is in breach of its obligation of consultation at every stage where a justification test would require effective consultation.

111 In *Gitxsan Houses* at para. 81, the court said that the Crown must ensure that its continuing duty is fulfilled before the infringement is perpetuated by a further transaction or dealing with the licence.

112 The FRA assumes HFN forbearance on a number of forestry decisions that would be made over the five year term of the agreement as listed in paragraph 28 above. In the meantime, absent agreement, these decisions are being made regularly and cutting continues on the land without meaningful consultation or a process for it. The question posed by the Crown is how specific the infringement has to be before the duty is triggered. With respect, that is not the question. The obligation arises upon knowledge of a claim and when infringement is contemplated. It is an ongoing obligation once the knowledge component is established. It is a process. How the Crown deals with the continuing obligation is another factor. In this case, the Crown attempted to deal with the requirement to consult with a five year plan for agreement based upon population. It was rejected by the HFN. The Crown's suggestion that a challenge should then be made on a cutblock by cutblock basis would render this process futile from the point of view of HFN and represents a practical take it or leave it attitude on the part on the Crown in the absence of continuing consultation. When a series of operational decisions is certainly contemplated, the duty to consult is triggered if accommodation has not been previously accepted.

113 The first step in the process is to discuss the process itself (*Gitanyow* at para. 8). The Crown is then obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made. While it is conceivable that a challenge could be made on a cutblock by cutblock basis, this is largely dependent on whether the Crown has fulfilled its duty in the meantime based on the content of the consultation that has or has not occurred.

c) What is the Scope of the Duty to Consult?

114 The scope of the duty to consult is distinguished from knowledge sufficient to trigger a duty to consult. McLachlin C.J.C. wrote at para. 37 of *Haida*:

[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.

115 What the honour of the Crown requires "varies with the circumstances" (*Taku* at para. 25). It must be understood generously (*Haida* at para. 17). The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Taku* at para. 29; *Haida* at para. 39). The duty is conditioned and informed by the nature and strength of First Nation claims (*Musqueam* at para. 92). This assessment will assist the Crown in determining the scope of the duty within the spectrum described by McLachlin C.J.C. at paras. 43-44 in *Haida*:

[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 adminis-

trative regimes with impartial decision-makers in complex or difficult cases.

116 To substantially address First Nation concerns, communication must be unique to the group addressed and not the same as with all stakeholders (*Gitksan Houses* at para. 88). The individual nature of the consultation is apparent from the requirement to consult and seek accommodation that is "proportional to the potential soundness of the claim for Aboriginal title and rights" (*Haida Nation* (2002) at para. 51). The requirement to approach each case individually is key here when the government has attempted to impose an overall policy upon all Aboriginal groups based upon population and seeks to justify this imposition by an assertion that this policy promotes equality and fairness to each Aboriginal person. This is not the criteria established by the courts and does not afford the individual consideration required to fulfill the duty as described by McLaughlin C.J.C. without more.

117 The duty to consult may lead to a duty to accommodate by changing government plans or policy in response to Aboriginal concerns (*Haida* at para. 46; *Taku* at para. 42). Meaningful, good faith consultation requires willingness on the Crown to make changes based upon information that emerges during the consultation process (*Taku* at para. 29). Good faith on the part of the Crown means exhibition throughout consultation of a willingness to substantially address Aboriginal concerns as they are raised (*Haida* at para. 42). Hard bargaining is one thing; sharp dealing is quite another. The former is not offensive, but the latter is. Accommodation begins when policy gives way to Aboriginal interests.

118 Evidence of acceptance into the treaty negotiation process is sufficient to establish a *prima facie* case in support of Aboriginal rights and title. In *Taku*, acceptance of the First Nation into the treaty negotiation process was sufficient to establish a strong *prima facie* case that placed the petitioners within the spectrum of the duty of consultation above minimum requirements of notice and disclosure of information and to a level of responsiveness to its concerns. In that case, traditional land usage by the First Nation was purposefully and expertly studied by the government as to the specific impact of a proposed mining road with many meetings, committees, hearings, preparation of written reports and extensions of time within the process provided by the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119 as rep. by S.B.C. 2002, c. 43, s. 58. The Supreme Court of Canada found this process adequate to satisfy the honour of the Crown.

119 In *Haida*, 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. Although there had been consultation on forest development plans and cutting permits, there had been no specific consultation with respect to replacement of the tree farm licence. The ongoing consultation on operational planning did not substitute for consultation on replacement of the tree farm licence. In that case, the court found that there had been no consultation at all.

120 In this case, the duty of consultation falls on the higher end of the spectrum. The HFN and the Crown are near the end of treaty negotiations with an agreement in principle that acknowledges rights related to forest resources and title to certain lands without legally recognizing HFN's rights or title. There have been two previous accommodation agreements (the IMA and IMEA) that, for six years, had provided a process for continuing consultation that had been honoured by both parties. On this basis alone, the HFN have shown a strong *prima facie* claim to title and rights related to forestry resources such that consultation with respect to ongoing operations is warranted. In addition, the Crown holds title to the land in question with the HFN claim based upon occupation of the lands before Crown sovereignty. Although there are overlapping claims over part of the Hahoothlee, a part is exclusively claimed by the HFN. The issue of exclusive possession is challenging but not insurmountable (see *Musqueam* at paras. 87-88). It certainly does not mean that no consultation should occur. The

level of potential infringement of rights to timber resources is severe given the harvest rate contemplated by third parties over the next five years.

D) Has the Crown Fulfilled Its Duty to Consult and Accommodate the HFN?

121 Any consultation must be meaningful, although there is no duty to reach agreement (*Haida* at para. 10). To be meaningful, consideration must be given to the strength of claim and to the degree of potential infringement. In the earlier case of *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.) at para. 110, (1996), 133 D.L.R. (4th) 658 (S.C.C.), Cory J. said that every reasonable effort must be made to inform and consult in relation to resources to which Aboriginal claim has been made. It is a question of law whether the government misconceived the seriousness of the claim or impact of the infringement. The government must, therefore, be correct on these matters and act on the appropriate standard (*Haida* at para. 63). The process itself is to be examined on the standard of reasonableness (*Haida* at para. 62).

122 A strong *prima facie* claim was said by Hall J.A. in *Musqueam* at para. 95 to give rise to deep consultation possibly entailing an opportunity to make submissions, formally participate in any decision making processes, and receive written submissions to demonstrate that Aboriginal concerns were addressed.

123 To drop the processes established in the IMA and IMEA without consultation or notice and engage in an ad hoc series of meetings and correspondence fails to accomplish the first step in a consultation process. This is so, regardless that the term of these agreements was set to expire. The Crown had an obligation to introduce a new consultation process before the agreements expired. To suggest to this court that it should have been apparent to the HFN that negotiation of the FRA was not a formal consultation, but some sort of preliminary business discussion, cannot withstand scrutiny in face of the Crown obligation for continuing, meaningful consultation. This is especially so when the Crown failed to follow its own process for consultation as set out in the Provincial Policy for Consultation with First Nations and the Ministry Policy, and when it was apparent early on that the HFN were not prepared to accept the business premise of the FRA. In my view, this was not reasonable. The Crown is obliged to establish a reasonable consultation process for future consultation with respect to economic accommodation for ongoing forest activity within the Hahoothlee. If this involves inclusion of other First Nations, so be it.

124 Was the Crown's position here just hard bargaining? Or did it infringe on the honour of the Crown's duty of good faith? A good idea of bargaining can be gleaned from labour relations cases where, although not analogous, there is discussion of good and bad faith bargaining. For example, in *C.U.P.E., Local 4027 v. Iberia Airlines of Spain* [1990 CarswellNat 981 (Can. L.R.B.)], CLRB Decision No. 796 (Can.Lab.Rel.Bd.), "surface bargaining" was distinguished from hard bargaining. The employer had engaged in surface bargaining when its position of active bargaining at first glance seemed above reproach. However, on closer examination as revealed by the fact that the employer had never actually assessed the employees' demands, an intransigent position through passive resistant negotiation was revealed. Of course, labour negotiations assume an obligation to agree which is not the case here. However, the nature of good faith bargaining is instructive to the consultation process in which the Crown and the HFN were supposed to be engaged.

125 This court considered the FRA initiative in *Gitanyow*. There, the ongoing degree of infringement of the claim of a right to timber resources was not significant (para. 21). Tysoe J. was clear that the scope of the duty to consult was proportionate to a preliminary assessment of the claim for Aboriginal rights or title and the seriousness of the potentially adverse effect upon the rights or title as claimed (paras. 45 and 50). He acknowledged

that it might be commercially expedient for the government to fulfill the duty to consult and accommodate through a five-year FRA rather than each time it had a dealing with the tree farm licence. He also said that both the government and the First Nation had a business decision to make as to whether the offer contained in the FRA was sufficient accommodation for a five-year period. He did not, however, decide whether the Crown had fulfilled its duty to consult in the offering of the FRA. While he observed that the Crown's approach in the FRA was not unreasonable because there was no attempt to force the FRA upon the First Nation, he agreed that economic compensation would more logically be based upon the volume of trees harvested in the claimed territory rather than a population base (para. 57). In the end, the learned justice said that the parties should resume negotiations in relation to the FRA based upon the guidance provided in *Haida* and *Taku*.

126 To fail to consider at all the strength of claim or degree of infringement represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation. While a population-based approach may be a quick and easy response to the duty to accommodate, it fails to take into account the individual nature of the HFN claim. In *Musqueam* at para. 91, a practical interim compromise failed to meet the tests enunciated by the Supreme Court of Canada when it was not informed or conditioned by the strength of claim and degree of intervention analysis. In this case, the government did not misconceive the seriousness of the claim or impact of the infringement. It failed to consider them at all. The government acted incorrectly and must begin anew a proper consultation process based upon consideration of appropriate criteria.

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

128 This is not to comment at all on the appropriateness or adequacy of the accommodation that might be achieved at the end of the consultation process. It may be that the substance of the offer of accommodation contained in the FRA may be sufficient accommodation. However, that would have to be determined not by a population based criteria, but by a strength of claim and degree of infringement assessment. That question is deferred until proper consultation has taken place. The fact that some First Nations have accepted the FRA offer indicates only that those groups made a business decision to accept the offer in a practical sense. It is not reflective of the sufficiency either of the consultation process or of the accommodation offered.

IV. Conclusion

129 The petitioners shall have declaratory relief as set out in the petition. The petitioners are entitled to costs on the scale of 4.

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Petition granted.

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2004 CarswellBC 200, 2004 BCSC 142, [2004] B.C.W.L.D. 422, 25 B.C.L.R. (4th) 289, [2004] 5 W.W.R. 662, 12 Admin. L.R. (4th) 264

Husby Forest Products Ltd. v. British Columbia (Minister of Forests)

Husby Forest Products Ltd., Petitioner and Minister of Forests, Minister of Sustainable Resource Management, Calvin Ross, District Manager, Queen Charlotte Islands Forest District and Council of the Haida Nation, Respondents

British Columbia Supreme Court

Garson J.

Heard: November 26-28, 2003, January 21, 2004[FN*]

Judgment: February 5, 2004

Docket: Vancouver L032472

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Counsel: C.F. Wilms and K.G. O'Callaghan for petitioner

P.J. Pearlman, Q.C., and P. Yearwood for respondents Minister of Forests, Minister of Sustainable Resource Management and Calvin Ross, District Manager, Queen Charlotte Islands Forest District

L. Mandell, Q.C., and B. Elwood for respondent Council of the Haida Nation

Subject: Public; Natural Resources; Constitutional; Property

Aboriginal law --- Aboriginal rights to natural resources — Aboriginal rights — Timber rights — Culturally modified trees

H Ltd. cut and sold timber from Queen Charlotte Islands — H Ltd. held forest licence dated December 17, 1998 — Council of Haida Nation represented interests of people of Haida ancestry — R was acting district manager of Queen Charlotte Islands Forests District — As acting district manager, R held statutory decision-making responsibilities, including responsibility for approving or disapproving applications for cutting permits — H Ltd. sought permit for cut blocks in areas that contained culturally modified trees — Culturally modified trees bear marks of past human intervention that occurred primarily as part of aboriginal use — On October 10, 2002, H Ltd. applied to Heritage Conservation Branch of Ministry of Sustainable Resource Management under s. 12 of British Columbia Heritage Conservation Act for site alteration permits to authorize alteration and removal of certain culturally modified trees — On October 18 and 28, 2002, Ministry notified Haida of H Ltd.'s applications for site alteration permits and requested Haida's comments — In spite of objections by Haida, on January

2004 CarswellBC 200, 2004 BCSC 142, [2004] B.C.W.L.D. 422, 25 B.C.L.R. (4th) 289, [2004] 5 W.W.R. 662, 12 Admin. L.R. (4th) 264

15, 2003, Heritage Conservation Branch issued site alteration permits to H Ltd. for cut blocks — On August 15, 2003, R refused H Ltd.'s applications for cutting permits on ground that cut blocks would infringe aboriginal rights asserted by Haida — H Ltd. applied for judicial review — Application allowed — Matter remitted to R for redetermination — Decisions under Heritage Conservation Act to issue site alteration permits do not embrace full range of considerations involved under British Columbia Forestry Act in issuing cutting permits — R's decision should not be set aside on ground that site alteration permits determined issue — Clause 8.08 of H Ltd.'s forest licence should not be interpreted as meaning that R was authorized to refuse cutting permit only if aboriginal right was proven and if R believed that permit would result in infringement of that aboriginal right — H Ltd. contended that, pursuant to its licence, R lacked authority to refuse cutting permit if he did not advise H Ltd. of that refusal within 45 days of application for cutting permit, but argument was rejected — Forty-five day period in licence was directory, not mandatory — R failed to fulfil his constitutional duties by not conducting three-stage analysis of asserted infringement of aboriginal rights after consulting with Haida.

Timber --- Timber licences — Judicial review

H Ltd. cut and sold timber from Queen Charlotte Islands — H Ltd. held forest licence dated December 17, 1998 — Council of Haida Nation represented interests of people of Haida ancestry — R was acting district manager of Queen Charlotte Islands Forests District — As acting district manager, R held statutory decision-making responsibilities, including responsibility for approving or disapproving applications for cutting permits — H Ltd. sought permit for cut blocks in areas that contained culturally modified trees — Culturally modified trees bear marks of past human intervention that occurred primarily as part of aboriginal use — On October 10, 2002, H Ltd. applied to Heritage Conservation Branch of Ministry of Sustainable Resource Management under s. 12 of British Columbia Heritage Conservation Act for site alteration permits to authorize alteration and removal of certain culturally modified trees — On October 18 and 28, 2002, Ministry notified Haida of H Ltd.'s applications for site alteration permits and requested Haida's comments — In spite of objections by Haida, on January 15, 2003, Heritage Conservation Branch issued site alteration permits to H Ltd. for cut blocks — On August 15, 2003, R refused H Ltd.'s applications for cutting permits on ground that cut blocks would infringe aboriginal rights asserted by Haida — H Ltd. applied for judicial review — Application allowed — Matter remitted to R for redetermination — Decisions under Heritage Conservation Act to issue site alteration permits do not embrace full range of considerations involved under British Columbia Forestry Act in issuing cutting permits — R's decision should not be set aside on ground that site alteration permits determined issue — Clause 8.08 of H Ltd.'s forest licence should not be interpreted as meaning that R was authorized to refuse cutting permit only if aboriginal right was proven and if R believed that permit would result in infringement of that aboriginal right — H Ltd. contended that, pursuant to its licence, R lacked authority to refuse cutting permit if he did not advise H Ltd. of that refusal within 45 days of application for cutting permit, but argument was rejected — Forty-five day period in licence was directory, not mandatory — R failed to fulfil his constitutional duties by not conducting three-stage analysis of asserted infringement of aboriginal rights after consulting with Haida.

Cases considered by *Garson J.*:

Alpenridge Wood Products Ltd. v. British Columbia, 42 C.C.E.L. 86, 5 Admin. L.R. (2d) 183, (sub nom. *Alpenridge Wood Products Ltd. v. R.*) 92 C.L.L.C. 14,045, 1992 CarswellBC 860 (B.C. S.C.) — considered

Cyanamid Canada Inc. v. Canada (Minister of Health & Welfare), 45 C.P.R. (3d) 390, (sub nom. *Cyanamid Canada Inc. v. Canada (Minister of National Health & Welfare)*) 148 N.R. 147, 9 Admin. L.R. (2d) 161, 1992 CarswellNat 216 (Fed. C.A.) — referred to

2004 CarswellBC 200, 2004 BCSC 142, [2004] B.C.W.L.D. 422, 25 B.C.L.R. (4th) 289, [2004] 5 W.W.R. 662, 12 Admin. L.R. (4th) 264

Delgamuukw v. British Columbia, 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered

Gitxsan Houses v. British Columbia (Minister of Forests), 2002 BCSC 1701, 2002 CarswellBC 2928, 10 B.C.L.R. (4th) 126, 48 Admin. L.R. (3d) 225, (sub nom. *Gitxsan First Nation v. British Columbia (Minister of Forests)*) [2003] 2 C.N.L.R. 142 (B.C. S.C.) — followed

Haida Nation v. British Columbia (Minister of Forests), 2000 BCSC 1280, 2000 CarswellBC 2434, 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83 (B.C. S.C.) — considered

Haida Nation v. British Columbia (Minister of Forests), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.) — considered

Haida Nation v. British Columbia (Minister of Forests), 2002 BCCA 462, 2002 CarswellBC 2067, 216 D.L.R. (4th) 1, 5 B.C.L.R. (4th) 33, [2002] 10 W.W.R. 587, [2002] 4 C.N.L.R. 117, 172 B.C.A.C. 75, 282 W.A.C. 75 (B.C. C.A.) — considered

Halfway River First Nation v. British Columbia (Ministry of Forests), 1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 129 B.C.A.C. 32, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 210 W.A.C. 32 (B.C. C.A.) — considered

Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management), 19 B.C.L.R. (4th) 107, 4 C.E.L.R. (3d) 214, 2003 BCSC 1422, 2003 CarswellBC 2294 (B.C. S.C.) — considered

Hyland Homes Ltd. v. Pickering, 2000 BCSC 524, 2000 CarswellBC 705 (B.C. S.C.) — considered

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture), 183 D.L.R. (4th) 103, 2000 BCCA 42, 2000 CarswellBC 87, 72 B.C.L.R. (3d) 247, [2000] 4 W.W.R. 431, (sub nom. *Kitkatla Indian Band v. British Columbia (Minister of Small Business, Tourism & Culture)*) 132 B.C.A.C. 191, (sub nom. *Kitkatla Indian Band v. British Columbia (Minister of Small Business, Tourism & Culture)*) 215 W.A.C. 191, [2000] 2 C.N.L.R. 36 (B.C. C.A.) — considered

Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture), 2002 SCC 31, 2002 CarswellBC 617, 2002 CarswellBC 618, 210 D.L.R. (4th) 577, [2002] 2 C.N.L.R. 143, (sub nom. *Kitkatla Indian Band v. British Columbia (Minister of Small Business, Tourism & Culture)*) 286 N.R. 131, [2002] 6 W.W.R. 1, 1 B.C.L.R. (4th) 1, 165 B.C.A.C. 1, 270 W.A.C. 1, [2002] 2 S.C.R. 146 (S.C.C.) — referred to

Large v. British Columbia (Director of Employment Standards), 66 B.C.L.R. 227, 1985 CarswellBC 272 (B.C. Co. Ct.) — considered

Lax Kw'Alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management), 2002 BCSC 1075, 2002 CarswellBC 1741, [2002] 9 W.W.R. 173, 4 B.C.L.R. (4th) 104 (B.C. S.C. [In Chambers]) — considered

Mitchell v. Minister of National Revenue, 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub

2004 CarswellBC 200, 2004 BCSC 142, [2004] B.C.W.L.D. 422, 25 B.C.L.R. (4th) 289, [2004] 5 W.W.R. 662, 12 Admin. L.R. (4th) 264

nom. *Mitchell v. M.N.R.*) 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.*) 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.*) [2001] 3 C.N.L.R. 122, (sub nom. *Mitchell v. M.N.R.*) [2001] 1 S.C.R. 911, 206 F.T.R. 160 (note), [2002] 3 C.T.C. 359 (S.C.C.) — considered

Montreal Street Railway v. Normandin, [1917] A.C. 170, 33 D.L.R. 195 (Quebec P.C.) — considered

R. v. Sparrow, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — considered

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 211 D.L.R. (4th) 89, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 163 B.C.A.C. 164, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.) — considered

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

Employment Standards Act, R.S.B.C. 1996, c. 113

s. 13 — referred to

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

Generally — referred to

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159

Generally — referred to

s. 41 — referred to

Heritage Conservation Act, R.S.B.C. 1996, c. 187

Generally — considered

s. 2 — considered

s. 12 — considered

s. 13 — considered

Residential Tenancy Act, R.S.B.C. 1996, c. 406

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Generally — referred to

Regulations considered:

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159

Operational Planning Regulation, B.C. Reg. 107/98

s. 37(1)(e)

APPLICATION by logging company for judicial review of decision of district forest manager refusing to issue cutting permit.

Garson J.:

Introduction

1 This is an application for judicial review of a decision of the District Forest Manager of the Queen Charlotte Islands to refuse to issue a cutting permit to a logging company on the grounds that it would infringe an aboriginal right asserted by the Haida Nation.

2 The parties, that is, the petitioner logging company and the respondents, the Crown and the Council of the Haida Nation, agree that the standard of review is correctness. However, the Haida also say that once the District Manager correctly interprets the forestry licence under which he makes his decision, and identifies the aboriginal right which, in his opinion, would be infringed - thereby grounding his jurisdiction - the balance of his decision is reviewed on a standard of patent unreasonableness. I agree with Tysoe J. where he stated in *Gitksan Houses v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 2761, 2002 BCSC 1701 (B.C. S.C.), at ¶ 65, that considering the question of the standard of review of a statutory decision maker "the issue is whether the constitutional prerequisite to the decision was satisfied and it is not a question of applying a standard of review to the decision." My task is to determine what the constitutional duty requires, and then to consider whether the duty has been satisfied.

3 Because I have decided that the District Manager should reconsider his decision on constitutional grounds it is unnecessary for me to decide if the balance of his decision (that portion which could be said to be an exercise of his discretion) should be reviewed on another standard, patent unreasonableness, as asserted by the Haida.

4 I have concluded that the District Manager failed to identify the nature and scope of the aboriginal right that he said could be infringed by the granting of the cutting permits applied for. This flaw in the decision-making process requires him to reconsider his decision and, in so doing, to consult with the Haida so that he may properly identify the allegedly infringed right as well as the scope of that right as it applies to the potentially conflicting use. Section 35 of the *Constitution Act, 1982* requires him to determine if the aboriginal right would be infringed by the granting of the cutting permits and, if so, whether there is justification for the infringement.

Chronology

5 There is no dispute about the facts that follow.

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6 The Petitioner, Husby Forest Products Ltd. ("Husby"), is a British Columbia company. Husby's business is the cutting and selling of timber from the Queen Charlotte Islands. The Queen Charlotte Islands are also commonly known as Haida Gwaii.

7 The Respondent Council of the Haida Nation ("Haida") represents the interests of people of Haida ancestry and was granted intervenor status to appear as a Respondent to this Petition.

8 The Respondent Minister of Forests is the minister of the Provincial Crown who is responsible for administering forest licences. The Respondent Calvin Ross was the Acting District Manager of the Queen Charlotte Islands Forests District in the Province of British Columbia. As acting District Manager he held statutory decision-making responsibilities, including the responsibility to approve or disapprove applications for cutting permits.

9 Husby is the holder of replaceable Forest Licence A16869, dated December 17, 1998. The forest licence is a volume based tenure by which, subject to the provisions of the licence, the *Forest Act* and the *Forest Practices Code* of British Columbia, Husby may harvest an allowable annual cut of 169,127 cubic metres of Crown timber each year during the term of the licence from areas of Crown land within the Queen Charlotte timber supply area specified in cutting permits and road permits. The Husby Forest Licence is located on the northern part of Graham Island, the northern most island in the Queen Charlotte Islands. Part of the Husby Forest Licence covers a chart area near Naden Harbour, which includes the areas that are in issue on the application.

10 Section 8.01 of Forest Licence A16869 provides:

Subject to paragraphs 8.02 and 8.03, the Licencee may submit an application to the District Manager for a cutting permit to authorize the Licencee to harvest one or more proximate areas of Crown land that are either:

(a) identified on a forest development plan as cut blocks for which the Licencee may, during the term of the forest development plan, apply for a cutting permit, or

(b) exempted under the *Forest Code of British Columbia Act* from the requirement for a forest development plan.

11 Husby's 2001-2005 forest development plan was approved by the District Manager pursuant to s. 41 of the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, on April 6, 2002.

12 Section 37(1)(e) of the *Operational and Site Planning Regulation*, B.C. Reg. 107/98, made pursuant to the *Forest Practices Code of British Columbia Act*, provides:

37.(1) Subject to subsections (4) and (5), a person preparing a silviculture prescription must carry out the following assessments and make available, upon request, to the district manager the following information:

.....

(e) an archaeological impact assessment that meets the requirements of the Minister responsible for the *Heritage Conservation Act*, if the district manager is satisfied that the assessment is necessary to adequately manage and conserve archaeological sites in the area.

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13 When the District Manager approved Husby's 2001-2005 forest development plan, he did so on terms requiring archaeological impact assessments for, *inter alia*, cut blocks Lignite 11 ("LIG 11"), Lignite 12 ("LIG 12"), Lignite 12A ("LIG 12A") and Peregrine 11 ("PER 11"), pursuant to s. 37(1)(e) of the *Operational and Site Planning Regulation*.

14 The reason Husby applied for these particular cut blocks was so that it could maintain year-round operations. These cut blocks are located in areas that are generally suitable for winter operations, whereas many of the other areas available for logging to Husby are inaccessible in winter conditions.

15 Cut blocks in areas PER 11 and LIG 11, 12 and 12A all contain culturally modified trees, sometimes called CMTs.

16 CMTs are trees which bear the marks of past human intervention occurring mostly as part of earlier aboriginal use. Husby engaged Base Line Archaeological Services Ltd. to provide the Archaeological Impact Assessment Reports for cut blocks in PER 11, LIG 11, LIG 12, LIG 12A and associated roads. According to Baseline the CMT features identified include rectangular bark-stripped cedar trees, taper bark-stripped cedar trees, logged undercut cedar trees, logged sections of trees, test holes in cedar trees, notched cedar trees and logged undercut cedar trees which exhibit a platform notch.

17 Baseline identified 56 CMTs in the cut block known as PER 11, 61 in the cut block known as LIG 11, and 57 in the cut block known as LIG 12 and 12A. Husby redesigned its proposed cut blocks in order to minimize the effects on CMTs. The effect of that redesign was that Husby would cut no CMTs in PER11, 22 of 61 recorded CMTs in LIG 11, and 24 of 57 recorded CMTs in LIG 12 and 12A.

18 CMTs are designated as sites under the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187. Because Husby sought to harvest timber within that part of cut block PER 11 previously designated as Archaeological Site F1Ud-5, and to harvest CMTs within cut blocks LIG 11 and LIG 12 and 12A, it required site alteration permits under s. 12 of the *Heritage Conservation Act*. Although Husby did not apply to log any CMTs in PER 11, it still required a site alteration permit because the whole area of the forest known as PER 11 was designated as an archaeological site (F1Ud-5) as opposed to the individual CMTs being designated as archaeological sites.

19 In order to alter a heritage site, or heritage property, Husby required site alteration permits from the minister, or his designate, under the *Heritage Conservation Act*. In order to harvest Crown timber within the cut blocks, including the CMTs, Husby also had to apply for and obtain cutting permits from the District Manager of the Queen Charlotte Forest District.

20 On October 10, 2002, Husby applied to the Heritage Conservation Branch of the Ministry of Sustainable Resource Management under s. 12 of the *Heritage Conservation Act* for site alteration permits to authorize the alteration and removal of certain CMTs from cut blocks LIG 11, LIG 12 and LIG 12A, and to authorize operations within archaeological site F1Ud-5 in PER 11.

21 On October 18 and 28, 2002, the Ministry of Sustainable Resource Management wrote to notify the Haida of the applications for site alteration permits and requesting the Haida's comments. On November 7, 2002, Guujaaw, President of the Council of Haida Nations, replied. He said, in part, regarding LIG 11, LIG 12 and LIG 12A, that:

These sites and features contain living archaeological and other cultural values that, throughout Haida

Gwaii, have already been compromised by logging. The cultural sites that remain are therefore that much more valuable to the understanding of our historical context in relationship to these lands and are held dear as cultural and spiritual sites.

22 On November 7, 2002, the Haida wrote to Calvin Ross, stating that the areas proposed for harvesting in the cut blocks had high Haida cultural values, and requesting a meeting with the District Manager prior to any further approvals in these areas. Although the site alteration permits under the *Heritage Conservation Act* had not then been granted, the Haida were anticipating applications for cutting permits going to the Ministry of Forests for the cutting permits.

23 Husby received a copy of the Haida correspondence and responded to it on November 14, 2002, by reiterating its standing invitation to meet with the Haida to discuss any concerns the Haida might have with the harvesting proposal and permit applications.

24 On November 19, 2002, Calvin Ross wrote to Captain Gold of the Haida forestry committee, with a copy to Husby, confirming that no decision would be made regarding the cutting permit applications for cut blocks PER 11, LIG 11, LIG 12 and LIG 12A before a consultation meeting that was then scheduled for December 4, 2002.

25 On November 26, 2002, Husby applied for cutting permit P104, which included cut block PER 11.

26 On January 15, 2003, more than 45 days after Husby had submitted its application for cutting permit 104 to the District Manager of Forests, the Heritage Conservation Branch issued to Husby site alteration permits for cut blocks PER 11, LIG 11, LIG 12 and LIG 12A despite the objection of the Haida. Mr. Kenny, who had authority to issue the site alteration permits, noted that in the application for cut block PER 11, no CMTs were to be cut. He also noted the Haida's reasons for opposing the site alteration permits included ". . . as the Haida view CMT sites as consisting of both individual CMT features and the adjacent forest, the entire forest must remain intact." Mr. Kenny stated that "the protection afforded CMTs under the [*Heritage Conservation Act*] does not extend to the entire forest"

27 In each of his decisions to issue the site alteration permits, Mr. Kenny emphasized that the decision with respect to authorizing timber harvesting resided with the Ministry of Forests.

28 On January 28, 2003, Husby wrote to Calvin Ross stating, *inter alia*, that it was anxious for the PER 11 Cutting Permit P104 to be approved. If the delay was related to consultation, in Husby's view, more than adequate consultation had occurred with the agencies and the Haida with respect to the PER 11 area. Husby concluded by requesting the District Manager's earliest consideration for the approval of the road permit for PER 11 and the subsequent approval of Cutting Permit 104.

29 On February 14, 2003, Calvin Ross approved cutting permit 104 in respect of all cut blocks in respect of which it was sought by Husby except PER. Mr. Ross informed Husby that the Ministry of Forests was undergoing consultation with the Haida regarding the cut block in PER 11.

30 On February 20 and March 5, 2003, representatives of the Ministry of Forests, the Haida and Husby participated in field reviews of cut block PER 11.

31 On February 24, 2003, Mr. Ross informed Bob Brash of Husby, by e-mail, that, "as mentioned previ-

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ously, the consultation process is taking longer than I had hoped for in this area." The District Manager also advised that he was in the process of finalizing an assessment of the Haida's "strength of claim," in accordance with the Ministry of Forests' consultation policy and with the assistance of the Ministry of the Attorney General, for use in his decision.

32 On June 10, 2003, Husby applied for Cutting Permit 106, pertaining to the cut blocks LIG 11, LIG 12, and LIG 12A.

33 On June 18, 2003, Mr. Ross wrote to Husby regarding the applications for cutting permits for cut blocks PER 11, LIG 11 and LIG 12 and 12A. He referred to the Ministry of Forests' obligation to consult with the Haida and to the high level of significance of these areas given their location and overlap with archaeological sites, and advised that the District was continuing to review this issue and that he hoped to have a decision shortly.

34 On August 15, 2003, Mr. Ross issued the cutting permit decision. He refused the applications. After describing the location and features of the cut blocks, the issuance of the site alteration permits under s. 12 of the *Heritage Conservation Act*, and the subsequent consultations by the District Office, Queen Charlotte Forest District, with the Haida, Mr. Ross continued:

The proposed cut blocks also lie within a zone to which the trial judge in the Supreme Court of [British Columbia \(2000 BCSC 1280\)](#) in the *Council of the Haida Nation and Guujaaw v. The Minister of Forests and the Attorney General of British Columbia on behalf of Her Majesty the Queen in right of British Columbia, and Weyerhaeuser Company Limited* ruled that "[47] . . . there is a reasonable probability that the Haida people will be able to establish aboriginal title to at least some parts of the coastal and inland areas of Haida Gwaii . . . Moreover, in my view, there is a substantial probability that the Haida will be able to establish the Aboriginal right to harvest red cedar trees from various old growth forest areas of Haida Gwaii, including both coastal and inland areas of Block 6, regardless of whether Aboriginal title to these forest areas is proven. [48] I am also of the opinion that a reasonable probability exists that the Haida would be able to show a prima facie case of infringement of this last mentioned right, by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply."

In my analysis of the information available to me, the conclusions of the trial judge apply equally to the parts of Naden Harbour area where you seek these road permits and cutting permits.

I have taken into consideration the state of Husby operations in making my decision on these permits. While it is apparent that these blocks and roads are important for Husby's winter operations, modifications are possible to the Lignite blocks that would both result in avoidance of the archaeological sites and still provide road construction and harvesting opportunities for Husby. Husby's proposed development and mitigation measures (disturbances of the site and cutting and removal of a large number of CMTs) are insufficient to address the values associated with this area.

Under section 8.08 of the Forest Licence document for FL A16869 it specifies that the District Manager may refuse to issue a cutting permit if, in the opinion of the District Manager, issuance of the cutting permit would result in an infringement of an aboriginal right. There are many factors to be considered when making a decision that could result in an infringement of a claimed aboriginal right. I am not convinced in this case that the potential infringement, necessary to achieve the desired objective of a productive forestry industry, is as small as reasonably possible.

Your applications for Peregrine 11 and Lignite 11, 12 and 12A are denied.

I have made this decision based on the factors related specifically to these blocks and roads and their location, however I am not advocating that this decision applies to other areas or circumstances. I will continue to review individual applications based on their own specific circumstances.

As discussed I would be willing to consider modifications to the above applications that result in the exclusion of the related archaeological sites from harvesting and/or development. If you have any questions or further concerns please contact me at (250) 559-6203.

35 I note that the District Manager did not quote the full text of ¶ 48 of the judgment of Halfyard J., in which he concluded the paragraph by saying:

I find myself unable to predict what likelihood there is that the Haida would be able to establish the infringement of other aspects of their rights in relation to lands and timber of Block 6.

Events following November 26-28, 2003, hearing

36 Not long after the argument of the Petition was heard, on November 26-28, 2003, the Haida learned that Husby had submitted new cutting permit applications to the District Forest Manager for the PER 11, LIG 12 and 12A areas. These new cutting permit applications were submitted by Husby on what Husby calls a "without prejudice" basis, by which I understand Husby to mean that it did not abandon its applications for cutting permits regarding which the decisions of Mr. Ross are the subject of this judicial review. Rather, Husby says that these applications were made as alternate applications in case the first applications are not successful. The new applications were pending at the time of the November 26-28 hearing and Husby did not inform either the Court or the Haida of the applications. The applications were submitted to the District Forest Manager and the Heritage Conservation Branch without being copied to the Haida.

37 At the request of the Haida, a further hearing before me was held on January 22, 2004, to consider the implications of the new applications for this judicial review. Ms Mandell argued that the Court should either dismiss or adjourn the Petition because it is now moot or premature. She said that the parties should await the results of the new applications for cutting permits, before proceeding with this application for judicial review. She also argued that the relief requested by the Petitioner is a discretionary remedy and ought not to be granted in the face of what she characterized as misrepresentations to the court and to the Haida and also because the new applications demonstrated, she said, that Husby "had not exhausted its options in terms of working with the District Manager before turning to the courts." She said that Husby should be penalized by an order for special costs because Husby misled the court, failed to disclose the relevant new applications, and misrepresented the urgency of the application for judicial review.

38 Mr. Pearlman, for the Crown, and Mr. Wilms, for Husby, said that I should, despite the new applications, determine the issues raised in the Petition because, as they both argued, there are still live legal issues as to the interpretation of the forest license (which I discuss below) and as to whether the District Manager was correct in his interpretation and application of the decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2000 BCSC 1280 (B.C. S.C.) (*Haida Nation* (S.C.)), to the applications before him. Mr. Willms said that Husby has not abandoned its Petition for review of Mr. Ross's August 15, 2003, decision. Husby still wishes to be permitted to cut timber in accordance with those cutting permit applications. Mr. Willms said the new applications are mitigative measures and are irrelevant to the central issues raised by the Petition.

39 I turn next to review the facts concerning the new applications.

40 The whole area, which includes PER 11, was previously designated an archaeological site F1Ud-5 and therefore Husby was required to apply for a site alteration permit even though Husby did not apply to log any CMTs in PER 11. On November 14, 2003, the Ministry of Sustainable Resources reclassified the CMTs within F1Ud-5 as 26 individual archaeological sites. Husby then needed one site alteration permit because Husby would need to operate within one of the archaeological sites and because one of the 26 CMTs in PER 11 would be impacted by logging under the new cutting permit application, which Husby then made. That discrete CMT site would be traversed by the road to be constructed to harvest timber in PER 11. The Minister of Sustainable Resource's decision to reclassify the site on the basis of individual CMTs and not the forest was made at the request of Husby or by Baseline Archaeological Services on behalf of Husby. The Haida were not consulted about the application to reclassify the CMTs in PER 11, nor were they notified about the decision of the Minister of Sustainable Resources until after the hearing before me, which concluded on November 28, 2003.

41 On November 10, 2003, Husby applied for a new site alteration permit to allow it to operate within the boundaries of the one CMT which would be traversed by the proposed logging road. After an exchange of correspondence and some conversations between Husby and the Minister of Sustainable Resources, Husby agreed on November 18, 2003, to the cancellation of the previous site alteration permit in order to mitigate its potential losses, and without prejudice to its application to quash the decision of the District Manager. The new site alteration permit cancelled the old site alteration permit upon which the District Forest Manager's August 15, 2003, decision on Husby's cutting permit application for PER 11 had been based. On January 14, 2004, on "a without prejudice basis," Husby submitted a new PER 11 cutting permit application based upon the new site alteration permit.

42 On November 28, 2003, Husby wrote to the District Forest Manager that "in order to mitigate its potential losses, and without prejudice to its application to quash the decision of the District Manger," it was submitting to the District Forest Manager new cutting permit applications for the LIG 12 and 12A areas. The new cutting permit applications reconfigured the cut blocks so that no CMTs would be cut and therefore a significantly lesser volume of timber would be cut. The applications were further revised on December 16, 2003.

43 The District Manager has not issued decisions on any of the new applications.

44 Husby says that, regardless of the District Manager's decision on the new applications, Husby has not abandoned its original cutting permit applications.

45 As already mentioned, the Haida argue that because of these new applications the Petition is either moot or premature. Ms Mandell says that the site alteration permit which is now cancelled was attached to the affidavit used in support of Husby's argument at the hearing before me. She also says that Husby took the District Manager up on his suggestion to redesign the cut blocks. She says that Husby had not exhausted its remedies before coming to the court to quash the District Manager's decision.

46 I agree with the Crown and Husby that the issues raised by the Petition are not moot. The first cutting permit applications have not been withdrawn. Husby is still entitled to challenge by judicial review the August 15, 2003, decision, despite the mitigative measures it has taken.

47 I agree with the Haida that Husby ought to have disclosed to the Haida and to the Court that different cutting permit applications had been made.

48 Ms Mandell argues that, owing to this failure on Husby's part, I should refuse to exercise my discretion to grant the requested remedy. It is my opinion, however, that the effect of Husby's lack of disclosure is better dealt with at the costs stage.

49 In further written submissions counsel informed me that the Haida have requested that the District Manager defer his decision on the new cutting permit applications until these Reasons for Judgment have been delivered.

50 Taking all these submissions into account I conclude I should consider the merits of Husby's Petition for judicial review now.

51 I will hear further submissions on the implications for costs of Husby's lack of disclosure after these Reasons for Judgment have been delivered.

Issues

52 The issues before me were put somewhat differently by each party but I have determined that the issues ought to be stated this way:

(a) Did the District Manager fail to give adequate consideration to the site alteration permits that were issued under the *Heritage Conservation Act* over the objections of the Haida? That is, were the site alteration permits determinative of the issue before him?

(b) Did the District Manager fail to interpret properly the language of para. 8:08 of the Forest Licence?

(c) Is the District Manager required to render a decision within 45 days? What is the result of his failure to do so?

(d) Did the District Manager fulfil his constitutional duties by conducting the three stages of the analysis of asserted infringement of an aboriginal right?

(e) What is the appropriate remedy?

(a) Did the District Manager fail to give adequate consideration to the site alteration permits that were issued under the Heritage Conservation Act over the objections of the Haida? That is, were the site alteration permits determinative of the issue before him?

53 Husby argued that the site alteration permits, issued under the *Heritage Conservation Act*, are determinative of the issue concerning the authorization to cut culturally modified trees. Husby argued that the District Manager exceeded his jurisdiction, or erred in law in the exercise of his jurisdiction, under the *Forest Act*, R.S.B.C. 1996, c. 157, by overruling, or refusing to properly take into account, the Minister of Sustainable Resources decisions made under the *Heritage Conservation Act*. Husby said further that the focus of the District Manager's analysis appears to be on the CMTs and the disturbance of the archaeological sites. These issues were considered, and their incumbent consultation with the Haida was undertaken, by the Minister of Sustainable Resources, after which the site alteration permits were issued. Husby argued that any further consultation required in the cutting permit process should have focused on issues other than those already dealt with in the site alteration permit process. I agree with Husby that two ministries of the same Crown should not make conflicting de-

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cisions on the same issue, but I disagree with Husby that the issue considered under ss. 12 and 13 of the *Heritage Conservation Act* is the same issue considered by the District Manager under para. 8:08 of the Forest Licence.

54 The purpose of the *Heritage Conservation Act* is described in s. 2:

The purpose of this Act is to encourage and facilitate the protection and conservation of heritage property in British Columbia.

55 The *Heritage Conservation Act* provides for a scheme to assess and preserve archaeological artefacts. Without a site alteration permit issued under s. 13 of the *Heritage Conservation Act*, a person may not remove or damage a heritage object. The Act is not concerned with the protection of aboriginal rights.

56 In *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2000 BCCA 42 (B.C. C.A.), affirmed 2002 SCC 31 (S.C.C.), the Court of Appeal held that the provisions of the *Heritage Conservation Act* enabled the province to strike a balance between the protection of native cultural interests and competing social goals when addressing the protection of heritage property. At ¶ 64 of *Kitkatla*, Braidwood J.A. said in the context of a discussion about the constitutionality of part of the *Heritage Conservation Act* on the grounds that the permits granted pursuant to the Act could affect the determination of an aboriginal right:

The granting of a licence to cut CMTs cannot affect the determination of an aboriginal right. The evidence of or the fact of the existence of the tree is preserved. The general intent of the statute appears to be to protect such objects as have significant historical value and balance this legislative value against other general interests of all of the occupants of the Province of British Columbia. This general object of the legislation is not intended in any way to diminish the appellants' rights as Indians and the Act retains its characterization as a provincial law concerning property and civil rights. In general the statute provides for enhanced protection of all heritage objects, whether aboriginal or non-aboriginal.

And, at ¶ 66, he continued:

The person making the decision is concerned with assessing the heritage value of particular heritage property.

And, at ¶ 101, in a concurring judgment, Hall J.A. said:

The legislation, as might be expected, is not framed in absolute preservationist terms. While it is desirable to preserve elements of the past, humanity is required to live in the present. This legislation, like most legislation of whatever type, sets out to endeavour to strike a balance between competing interests. The interests are preserving heritage objects and sites and also permitting proper utilization of provincial land and resources.

57 At the Supreme Court of Canada, LeBel J. said, in affirming the decision and concerning the purpose of the *Heritage Conservation Act*, at ¶ 64:

. . . In other words, the effect here is the striking of a balance between the need and desire to preserve aboriginal heritage with the need and desire to promote the exploitation of British Columbia's natural resources.

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58 In a subsequent decision of this court in *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2002 BCSC 1075 (B.C. S.C. [In Chambers]), Maczko J. was asked to consider if the Minister of Sustainable Resources and Management, under the *Heritage Conservation Act*, had a duty to consult with aboriginal groups and accommodate aboriginal interests in CMTs advanced by the Petitioners. In *Lax Kw'Alaams* the cutting permit had already been issued. Maczko J. noted that the *Kitkatla* case was decided before *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 98 B.C.L.R. (3d) 16 (B.C. C.A.), and Maczko J. therefore found that there was an obligation on the Minister acting under the *Heritage Conservation Act* to consult with the Petitioner Indian band. At ¶ 30, he said:

The obligation is imposed whenever the Crown infringes on aboriginal rights or title. That infringement may occur directly pursuant to the *Forest Act*, or it may occur coincidentally under the HCA [*Heritage Conservation Act*]." [Internal citations are omitted.]

At ¶ 32, Maczko J. held that "if an infringement will occur, it will have been as a result of the issuing of the cutting permit by the Minister of Forests." He continued, at ¶ 34:

The obligation to accommodate does not fall on any particular ministry or person or in any particular statute. The obligation to accommodate falls on the Crown wherever there has been an infringement as a result of a Crown action.

59 Counsel for the Haida say the District Manager considered the site alteration permits, but concluded correctly that they were not determinative of his discretion under the Forest Licence because the District Manager's decision to issue the cutting permits triggers the Crown's constitutional and fiduciary obligations to the Haida.

60 I conclude that the *Heritage Conservation Act* is not concerned with forestry issues, nor is it directly concerned with protecting aboriginal rights. The decision under the *Heritage Conservation Act* to issue a site alteration permit does not embrace the full range of considerations involved under the *Forestry Act* in issuing a cutting permit. The decisions to issue the site alteration permits reflected a consideration of the preservation of cultural artefacts or data concerning them. Mr. Kenny's January 15, 2003, decision was not concerned with infringement of asserted aboriginal rights except to the extent of preservation of an historical record. Consequently, I do not agree with Husby that the District Manager's decision should be set aside on the ground that the site alteration permits were determinative.

(b) Did the District Manager fail to interpret properly the language of para. 8:08 of the Forest Licence?

61 Husby argued that the proper interpretation of clause 8.08 of the Forest Licence permits the District Manager to refuse a cutting permit only if there is a *proven* aboriginal right and only if the District Manager is of the opinion that the cutting permit would result in an infringement of that aboriginal right. Husby says that the District Manager did not conclude that the Haida have *proven* aboriginal rights or title in the area of the cut blocks and did not conclude that there *would* be an infringement of any right that the Haida might have. Rather, he found that the proposed logging *could* result in an infringement of a claimed aboriginal right. Husby relies on the literal wording of the licence to assert the position that, in the absence of proven aboriginal rights and in the absence of a conclusion that the logging would infringe the proven right, the licence must be issued. The relevant provisions of the licence are the following:

8:08 The District Manager may refuse to issue a cutting permit if, in the opinion of the District Manager, issuance of the cutting permit *would* result in an infringement of an aboriginal right. [Emphasis added.]

.....

19:03 The laws of British Columbia will govern the interpretation of this Licence and the performance of the parties' obligations under this Licence.

62 Crown counsel noted that Forest Licence A16869 is dated December 17, 1998. The Forest Licence predates the decisions of the British Columbia Court of Appeal in the *Taku* and *Haida Nation* cases (*Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 147 (B.C. C.A.) (*Haida Nation* (B.C.C.A.) No. 1) and *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 462 (B.C. C.A.) (*Haida Nation* (B.C.C.A.) No. 2)). I agree with Crown counsel when he says that the interpretation of the Husby Forest Licence and the performance of the parties' obligations under the Licence is governed by the laws of British Columbia as is provided for in clause 19:03 of the Licence. Based on the Court of Appeal's decision in *Taku*, the Crown concedes that it has a constitutional or fiduciary obligation which exists prior to the proof of aboriginal rights or title in court; thus, the Crown has an obligation to consider unproven but asserted aboriginal interests in decision-making processes. (The Crown rests this concession on the basis of the present state of the law, without resiling from its stated intention to argue the contrary position on the *Taku* appeal to the Supreme Court of Canada.) As Rowles J.A. said in *Taku*, "It does not logically follow that until an aboriginal right has been established in court proceedings, the right does not exist."

63 Therefore, the licence cannot be interpreted to mean that the aboriginal right must be established. Rather, the District Manager should interpret the licence to mean that he must issue the cutting permit unless licensed activity *would* infringe on an aboriginal right that may be established. As is discussed below, the allegedly infringed right must first be identified through consultation. Then the District Manager must determine if the activity infringes the alleged right. If there is no infringement, then there seems to me no basis upon which he could refuse to issue the cutting permit. If there is an infringement, then he must follow the next steps as discussed below.

(c) Is the District Manager required to render a decision within 45 days? What is the result of his failure to do so?

64 Husby argued that the District Manager has no authority to refuse the cutting permit, if he does not advise the Licencee (Husby) of the refusal within 45 days of the application for the cutting permit.

65 The application for the PER 11 cutting permit was submitted to the District Manager on November 26, 2002. The application for the cutting permits for LIG 11, LIG 12 and LIG 12A were submitted on June 10, 2003. The District Manager issued his decision to refuse the cutting permits on August 15, 2003.

66 Paragraph 8.10 of the Licence provides as follows:

If the District Manager

- (a) determines that a cutting permit may not be issued because the requirements of paragraph 8.05 have not been met,
- (b) is carrying out consultations under paragraph 8.08 or 8.09,
- (c) refuses to issue a cutting permit under paragraph 8.08 or 8.09,

the District Manager will notify the Licencee within 45 days of the date on which the application for the cutting permit was received.

67 Paragraph 8.06 of the Licence provides that the District Manager may consult aboriginal people who may be affected.

68 More than 45 days elapsed from November 26, 2002, when Husby submitted its application for the PER 11 cutting permit, until the Heritage Conservation Branch issued the site alteration permit for PER 11 on January 15, 2003. The District Manager wrote to Husby to advise that he would be consulting with the Haida within the 45 days. In my view, the District Manager therefore complied with the licence by notifying Husby within 45 days that he was consulting with the Haida.

69 The Crown also submits that the District Manager was performing a public duty and that he must fulfil that duty in conformance with the Crown's constitutional and fiduciary obligations. The Crown further submits that any requirement that the District Manager notify the licencee within 45 days of the date when he received the cutting permit application of his decision to refuse that application ought to be construed as directory, rather than mandatory. The Crown relies on *Alpenridge Wood Products Ltd. v. British Columbia* (1992), 5 Admin. L.R. (2d) 183 (B.C. S.C.), where the requirements of s. 13 of the *Employment Standards Act* were found to be directory, in part because the section involved the performance of a public duty. In reviewing the law on this issue, the Court in *Alpenridge* referred to *Large v. British Columbia (Director of Employment Standards)* (1985), 66 B.C.L.R. 227 (B.C. Co. Ct.), where Mr. Justice Lander quoted *The Canadian Encyclopedic Digest (Western)*, 3rd ed., vol. 1, "Administrative Law," as follows, at ¶ 56:

[T]he courts are more likely to favour strict adherence to procedural provisions where private rights are being affected than where the requirements relate to the performance of a public duty, the invalidation of which would cause serious general inconvenience In the latter situations, the courts will usually hold such provisions to be directory only.

70 The Crown also relies on *Hyland Homes Ltd. v. Pickering*, 2000 BCSC 524 (B.C. S.C.), where a notice requirement in the *Residential Tenancy Act*, which provided that the Manufactured Home Park Dispute Resolution Committee "must" give notice within 30 days of a request for mediation was held to be directory. This finding was based on the following factors: the section involved a public duty, the Act imposed no penalty for non-compliance with the notice requirement, and an interpretation of the notice requirement as being mandatory would punish the tenants, who had no control over the Committee's performance of the notice requirement.

71 In arriving at this decision, Downs J. relied on *Montreal Street Railway v. Normandin* (1917), 33 D.L.R. 195 (Quebec P.C.) (also applied in *Cyanamid Canada Inc. v. Canada (Minister of Health & Welfare)* (1992), 9 Admin. L.R. (2d) 161 (Fed. C.A.)). In *Montreal Street Railway*, it was held that:

When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislation, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.

72 The Crown, on the strength of the interpretive principles set out in these cases, argues that, since the District Manager was performing a public duty, the 45-day time limit should be construed as directory rather than

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mandatory. I agree with this submission of the Crown. Given the important constitutional obligations owed by the Crown where aboriginal rights are potentially at stake, and the great inconvenience and injustice that could occur if the decision were to be deemed invalid due to a failure on the part of the Crown to observe the procedural requirements of ¶ 8:10 of the licence, the 45-day time limit must be construed as directory rather than mandatory.

73 In conclusion, I reject this submission made by Husby. The District Manager did comply with the 45-day notice requirement. Alternatively, I find that the provision is directory, not mandatory.

(d) Did the District Manager fulfil his constitutional duties by conducting the three stages of the analysis of asserted infringement of an aboriginal right?

74 A statutory decision maker such as the District Forest Manager, confronted with an asserted claim that government action may infringe an aboriginal right, must approach his task in three stages. The first stage requires him to identify the potentially infringed aboriginal right. The second stage requires him to determine the strength of the asserted right and if the government action infringes that asserted right. If it does, the third stage of the analysis requires him to determine if the government can justify the infringement. I will discuss these three stages in further detail and then examine the decision made by the District Manager to determine if he fulfilled his constitutional duties by examining the question in these three stages. Lastly, I will comment on the consultative rights and responsibilities.

The Stages of the Analysis

75 At ¶ 180 of *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 64 B.C.L.R. (3d) 206 (B.C. C.A.), Madam Justice Huddart said in her concurring judgment:

Because only the first nation will have information about the scope of their use of the land, and of the importance of the use of the land to their culture and identity, if the *Sparrow* guidelines are to organize the review of an administrative decision it makes good sense to require the first nation to establish the scope of the right at the first opportunity, to the decision maker himself during the consultation he is required to undertake, so that he might satisfy his obligation to act constitutionally. *It is only upon ascertaining the full scope of the right that an administrative decision maker can weigh that right against the interests of the various proposed users and determine whether the proposed uses are compatible.* (Emphasis added.)

76 At ¶ 182, Huddart J.A. described the responsibility of a first nation to co-operate fully in the consultation process and to:

. . . offer the relevant information to aid in determining the exact nature of the right in question. The first nation must take advantage of this opportunity as it arises. It cannot unreasonably refuse to participate [A] first nation should not be permitted to provide evidence on judicial review it has had an appropriate opportunity to provide to the decision-maker, to support a petition asserting a failure to respect a treaty right.

77 For the decision-maker to make a judgment about the infringement of an aboriginal right he must have before him information about the precise nature of the interference (*Halfway*, ¶ 186).

78 Once the scope of the aboriginal right is identified the question then becomes one of accommodation as opposed to one of exclusive exercise of either the aboriginal right in question or the Crown's proposed use (

Halfway, ¶ 190).

79 At ¶ 191 and ¶ 192 Huddart J.A. summarized the steps in the decision-maker's analysis. He must:

. . . ascertain the nature and scope of the treaty right at issue. Having done so, and having determined the effect of the proposed non-aboriginal use, he then makes a determination as to whether the proposed use is compatible with the treaty right. If it is he must seek to accommodate the uses to each other. . . .

If the District Manager determines the proposed use is incompatible with the treaty right, . . . [then] his decision may be reviewed under the *Sparrow* analysis.

80 The *Sparrow* analysis is described by Finch J.A. (as he then was) in *Halfway*. At ¶ 125, he described the framework for deciding whether an aboriginal right had been interfered with and, if, so whether such interference could be justified. At ¶ 146 he describes the four questions (which are not exhaustive) posed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), to determine if the Crown has justified the infringement.

- Importance of legislative objective - is the legislative objective sufficiently important to warrant the infringement?

- Minimal infringement - minimal interference does not mean no interference (i.e., no logging) - the law does not impose such a stringent standard - so long as the infringement was one which, in the context of the circumstances presented, could reasonably be considered to be as minimal as possible then it will meet the test (at ¶ 153).

- Whether the effect of infringement outweighs the benefits to be derived from the government action.

- Adequate consultation (¶ 160). There is a reciprocal duty on the aboriginal people to respond in the consultation process (¶ 161).

See also *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911 (S.C.C.), at ¶¶ 12, 14, and 15.

81 In summary, it was incumbent on the District Manager to consult with the aboriginal people in order to identify the scope of the aboriginal right that the Haida alleged would be infringed by the cutting permit, if granted. The content of that consultation at the first stage would then be to define the scope of the right claimed. The decision maker must then consider the strength of the claim in the area in question and whether or not the impugned activity would infringe on the aboriginal right claimed and identified. If he determined that the activity did so infringe, then the decision-maker must consider the four questions in *Sparrow* in order to determine if the Crown has justified the infringement. Overlying these three stages is the duty to consult and seek workable accommodations.

82 A Provincial Crown document titled "Provincial Policy for Consultation with First Nations (October 2002)," which formed part of the record of documents that were before the District Manager, describes a framework for assessing whether an action of government interferes with an aboriginal right and, if so, whether the interference is justifiable. The framework described in this document, which is, I am told intended as a guide for statutory decision-makers acting under provincial legislation, such as the District Manager, is based on the *Sparrow* decision and is consistent with the decision of Huddart J.A. in *Halfway*. With one qualification concerning step one, I find it a useful method to organize the review of the District Manager's decision. I quote from the Provincial Policy:

1. Is there an existing aboriginal right?
2. Does the proposed government activity interfere with an existing aboriginal right because it:
 - a. is unreasonable;
 - b. imposes undue hardship; or
 - c. prevents the holder of the right the preferred means of exercising it;
3. If the right is interfered with, is the interference justified because:
 - a. there is a valid legislative objective, such as conservation;
 - b. the particular regulation, after conservation measures are taken, gives priority to First Nations;
 - c. there is as little infringement as possible;
 - d. in the case of expropriation there is fair compensation; and
 - e. there has been appropriate consultation?

83 I would clarify step one to require the statutory decision maker to ask, not only what is the aboriginal claim, but also to ask what is the scope of the aboriginal claim as it applies to the statutory application for a potentially conflicting use. If the decision-maker can define the right in relation to the specific land in question, then he will be able to determine if the intended use infringes the claim.

Analysis of the Decision of the District Manager

First Stage - Did the District Manager identify an aboriginal claim and, if so, what is the nature and scope of that claim as it applies to the allegedly conflicting use (logging)?

84 Counsel for the Haida say the District Manager identified "two fold rights":

- (i) aboriginal title to the Naden Harbour area, which includes the right to choose to what uses the land can be put to; and
- (ii) the right to red cedar as an integral aspect of Haida culture, which includes the right to preserve CMTs for their cultural value.

85 The Haida also say in their submission that the aboriginal right in issue is the:

. . . right to red cedar, including the right to use large red cedar trees from old-growth forests for construction of canoes, houses, totem poles, masks, boxes and other items of art and ceremony for which the Haida are so well-known.

This right they also say includes the preservation of red cedar, which the Haida refer to as "the sacred workplaces of their ancestors," also known as Culturally Modified Trees.

86 In a somewhat different description of the aboriginal right in question, the Haida say that their position at consultation is that if there is to be harvesting, then the CMTs should be protected with an appropriate buffer zone and should not be cut.

87 In correspondence from the Haida to the Archaeology and Registry Services Branch of the provincial government concerning the Husby application for a site alteration permit, Guujaaw described the Haida claim. He wrote, in part:

Please be advised that Husby Forest Products has not engaged in any discussions with our people on this matter. These sites and features contain living archaeological and other cultural values that, throughout Haida Gwaii, have already been compromised by logging. The cultural sites that remain are therefore that much more valuable to the understanding of our historical context in relationship to these lands and are held dear as cultural and spiritual sites.

Council of the Haida Nation has served a Writ on the Governments of British Columbia and Canada to prove Haida Aboriginal Title. CMTs and adjacent forests will be used as evidence in the trial. It is not acceptable that this evidence be tampered with, disturbed or interfered with in any way.

88 Later, Guujaaw wrote on behalf of the Haida to the District Manager concerning the application for the cutting permits and the claim of the Haida. In part his letter of April 3, 2003, says:

Each of the few remaining intact sites represent the few remaining areas of old growth that still provides the living context of Haida forest utilization. We have lost many of our cultural sites already due to extensive logging and inadequate protection and buffering of industrial activities.

Each of these sites are unique showcases of Haida use, particularly in areas noted by high numbers of CMTs at all elevations such as in Peregrine 11 and the surrounding area. These features in combination with the fishing weirs and midden provide opportunities to learn of information not previously recorded.

Logging cannot be seen as compatible or acceptable in the few remaining areas of high cultural significance for short term profits to third party interests. Peregrine 11 and Lignite 11 and 12a have been identified as *archaeological forests*, deemed sacred to our people. These sites also represent important evidence in our lawsuit contesting the ownership of Haida Gwaii, which is currently before the courts.

To protect these forests, we ask for the co-operation of your office in establishing adequate buffers and necessary measures to ensure that no further degradation of these sites is to occur. [Emphasis added.]

89 At the hearing of this Petition, I understood counsel for the Haida to stop short of saying that the Haida claim the right to all the red cedar, but rather they claim the right to preserve all CMTs, and that seems to be the import of the last paragraph of this last-mentioned letter from Guujaaw.

90 The Crown identifies the aboriginal right in issue as the "right to *harvest* red cedar." [Emphasis added.]

91 Counsel for Husby says that the District Manager did not define the aboriginal right he said was infringed. Husby argues further that the District Manager could not identify or characterize the right in issue because there was no evidence permitting him to do so. Husby argues that there is no aboriginal right to preserve all the CMTs alive, forever. At the hearing of this Petition, counsel for Husby objected to the statement in the written brief of the Haida that the "aboriginal right in issue is the right to red cedar" on the grounds that it was

the first time the Haida had claimed that this was the aboriginal right in issue.

92 This case required the District Manager to identify and describe the aboriginal claim (*Mitchell*, at ¶¶ 12, 14, 15). The District Manager applied the conclusions of the trial judge in *Haida Nation* to the application before him. In *Haida Nation* the trial judge concluded that the Haida people had a reasonable probability of establishing aboriginal title to the area in question in that case and a substantial probability of establishing "the Aboriginal right to harvest red cedar trees [in] . . . Block 6." [Emphasis added.] The District Manager concluded that the area of Naden Harbour, which is the area of the cut blocks in question here, had the same aboriginal history as Block Six (the subject of the claim in *Haida Nation* (S.C.)).

93 Given that the areas of land to which the cutting permits applied is part of the Queen Charlotte Islands, and given the findings made in *Haida Nation* (S.C.), it was not unreasonable, in my view, for the District Manager to conclude that the Naden Harbour area had the same characteristics and similar history to the area in question in *Haida Nation* (S.C.) (Block 6). This conclusion of the District Manager is not challenged by Husby.

94 The District Manager appears to have assumed that the aboriginal right in question was the right to *harvest* red cedar. The District Manager did not differentiate between the aboriginal right to harvest the red cedar and a possibly more limited right claimed by the Haida at the hearing of this petition: the *preservation of all the CMTs*, or *the right to red cedar*. It was incumbent on the Haida, if they did object to the granting of the cutting permits, to clearly define the nature and scope of the aboriginal right they claimed was being infringed.

95 At the hearing of the petition and in the correspondence noted above, the Haida claim the cut blocks are within an "archaeological forest," which ought to be preserved. Their characterization of the forests as archaeological forest is not based on a designation by the MSRN but rather on the notion that a forest containing a significant density of CMTs should be preserved intact.

96 The Haida must delineate whether they claim the right to red cedar and specifically what that means in relation to these cutting permit application, or the right to harvest cedar, or the right to preserve CMTs, or the right to preserve what they call the archaeological forests or some other right not yet encompassed in the various claims mentioned. They must do so in a site-specific way.

97 The issue before Halfyard J. in *Haida Nation* (S.C.) was whether the asserted, but unproven, aboriginal claim to the lands which the tree farm licence pertained constituted a legal encumbrance on the timber of Block 6. In *Haida Nation* (S.C.), the Crown had transferred the licence without consultation with the Haida and the Court of Appeal held that there was a duty on the Crown and the holder of the licence (Weyerhaeuser) to consult with the Haida about accommodating the aboriginal rights and title that the Haida claimed (*Haida Nation* (B.C.C.A.) No. 1 and No. 2). The *Haida Nation* case was not concerned with defining the aboriginal right in question, as is the case here.

98 It is true that one of the findings in *Haida Nation* (S.C.) that was said by the District Manager to apply to the Naden Harbour area related to aboriginal title. However, I do not conclude from this that aboriginal title was identified by the District Manager as a right that could be infringed by the permits. Indeed, aboriginal title did not figure into the District Manager's analysis. Instead, the analysis focused on the Haida's desire to preserve the archaeological features of the forests in question. The District Manager did not discuss aboriginal title in his analysis, nor did he link the archaeological features to the concept of aboriginal title or the attendant right to determine land use. Moreover, while the Haida (in letters written as part of the consultation process) expressed concern that the harvesting of the trees might affect their aboriginal title litigation, they did not characterize their

claim to aboriginal title as being a right that would directly be infringed by the permits. Given these factors, I find that aboriginal title was not identified through the consultation process as being a right potentially affected by the permits.

99 At ¶¶ 12, 14, and 15 of *Mitchell*, the Court describes the test to identify an aboriginal right:

In the seminal cases of *R. v. Van der Peet*, [1996] 2 S.C.R. 507 and *Delgamuukw*, *supra*, this Court affirmed the foregoing principles and set out the test for establishing an aboriginal right. Since, s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to *Contact*.

.....

In *Van der Peet*, *supra*, at ¶ 53, the majority of this Court provided three factors that should guide a court's characterization of a claimed aboriginal right:

- (1) the nature of the action which the applicant is claiming was done pursuant to an aboriginal right;
- (2) the nature of the governmental legislation or action alleged to infringe the right, i.e. the conflict between the claim and the limitation; and
- (3) the ancestral traditions and practices relied upon to establish the right.

The right claimed must be characterized in context and not distorted to fit the desired result. It must be neither artificially broadened nor narrowed. An overly narrow characterization risks the dismissal of valid claims and an overly broad characterization risks distorting the right by neglecting the specific culture and history of the claimant's society.

100 In my view, the duty to consult, which *Haida Nation* (B.C.C.A.) No. 1 and other cases have clearly established, is meaningless unless the parties know precisely what aboriginal right or claim is alleged to be infringed and the scope of that claim.

101 In conclusion, there is nothing else in the District Manager's decision that could be taken to be a statement of what aboriginal right he had determined would or could be infringed. On the evidence before me there was no consultation between the Haida and Husby in order to delineate the aboriginal right that was of concern. I do not see how the District Manager can make a decision that a cutting permit applied for under a forest licence ought to be granted or denied without a clear delineation of the nature and scope of the aboriginal right asserted and I would remit the matter to the District Manager to reconsider the application in accordance with these reasons.

Second Stage - Infringement Analysis

102 I would remit the decision to the District Manager on other grounds as well. After the District Manager has identified through consultation with the Haida the aboriginal right in issue, he must then adhere to the analysis set out above.

103 The second stage of the analysis is whether the cutting permit interferes with the asserted aboriginal right because it is unreasonable, imposes undue hardship, or prevents the holder of the right the preferred means of exercising it. I should add that the focus of this second stage consultation and analysis differs from that contemplated by the *Heritage Conservation Act*, i.e., that the CMTs ought to be preserved for their heritage value. Neither should this inquiry be resolved on the basis that evidence needs to be preserved for the pending aboriginal title claim. If such preservation of evidence were necessary, that question is better determined by a claim for injunctive relief before the court which has jurisdiction to hear the claim to aboriginal title than by the District Forest Manager.

104 The District Manager did not address the question of whether the proposed cutting permit interfered with the asserted aboriginal right, nor did he address the question of whether the cutting permit would be an unreasonable interference with that right, would impose undue hardship on the Haida in their exercise of that right, or would prevent the Haida the preferred means of exercising that right. At this second stage of the analysis the District Manager must also consider the strength of the asserted claim.

Third Stage - Justification Analysis

105 The third stage of the analysis is the justification stage, the so-called *Sparrow* test set out above.

106 In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at ¶ 165, Lamer C.J. said this:

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.

107 The District Manager did articulate some reasons why he denied the cutting permits. He acknowledged the importance of the areas to Husby's business and the efforts to minimize the number of CMTs that would be cut, but stated that these efforts were "insufficient to address the values associated with this area." He also said, "I am not convinced in this case that the potential infringement, necessary to achieve the desired objective of a productive forest industry, is as small as reasonably possible." This last quoted part of the District Manager's decision seems to be an application of the second branch of the *Sparrow* test. However, he has not, in my opinion, articulated what "values associated with this area" he refers to. The failure to define the values may result from the original failure to articulate the aboriginal right allegedly infringed. I would remit the decision to the District Manager to reconsider the third stage of the analysis in relation to the specific aboriginal right(s) if any found in the first stage of his analysis, and the extent to which the issuance of the cutting permits would infringe that right or those rights.

Duty To Consult

108 The issue of consultation is an important step in the whole process. As already mentioned there must be consultation at all stages of the District Manager's decision-making process. In *Haida Nation* (B.C.C.A.) No. 1, Lambert J.A. commented on the relationship between the strength of the claim and the correlative obligation to consult. At ¶ 51, he said:

But certainly the scope of the consultation and the strength of the obligation to seek an accommodation will

be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights.

109 In this case the strength of the claim has been described by the trial judge in *Haida Nation* (S.C.) as a substantial probability of establishing the aboriginal right to harvest red cedar.

110 The purpose of consultation in the final stage of the analysis is to seek workable accommodation and to balance the competing interests. Gerow J. stated in *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422 (B.C. S.C.), at ¶ 114:

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 . . .

111 It is incumbent on the Haida and Husby to co-operate fully in the consultation process. In the letter of April 3, 2003, Guujaaw says that "logging is not compatible or acceptable in the few remaining areas of high cultural significance for short term profits to third party interests." I would interpret this part of his letter as objecting to any logging at all in the three cut blocks applied for. But the letter continues, "To protect these forests, we ask for the co-operation of your office in establishing adequate buffers and necessary measures to ensure that no further degradation of these sites is to occur." I would interpret this last sentence as a request that the District Manager ensure the buffering of CMTs was adequate. Although the District Manager did leave open to Husby that it could reapply for the cutting permits, he gave no guidance as to what range of accommodations Husby should be considering. Notwithstanding that Husby was able to apply after the November hearing for different cutting permits (as discussed above), the failure to identify the nature and scope of the claimed aboriginal right as it may conflict with the intended logging leaves Husby uncertain about how to proceed. Adequate consultation in which the District Manager requires the parties to clarify their positions is necessary to enable Husby and the District Manager to determine if the aboriginal interests can be accommodated. It is incumbent on both Husby and the Haida to participate in meaningful consultation which is site specific and timely.

112 Having failed to identify the scope of the right, consultation between the parties was quite meaningless.

Summary of the Three-Stage Analysis

113 I acknowledge that the District Manager is not equipped to undertake a close and detailed examination of complex questions of aboriginal rights as would be done in a court of law. That is simply impractical. Decisions of the District Manager are intended to be made within 45 days of the application for the cutting permit - ¶ 8:10 of the Forest Licence. However, he must follow the three basic steps discussed above in his analysis:

- (1) Identify the nature and scope of the aboriginal right in issue in relation to the potentially conflicting use.
- (2) Determine if the asserted right may be infringed by the contemplated government action and determine the strength of the claim.
- (3) If there is infringement, determine if it is justified.

114 I decline to make a decision myself as to what aboriginal claim is here asserted. It was not fully argued before me and is a matter that should be decided in the first instance by the District Manager in consultation

with the parties.

115 The Haida did not, in their limited and vague responses to the District Manager's constitutionally mandated consultation initiative, respond adequately. It is the responsibility of the Haida, not that of the District Manager, to delineate clearly the aboriginal right they assert would be infringed. As discussed above, the delineation of the right must be context specific and must set out the traditions and practices relied on to establish the right (*Mitchell*). It is also necessary for Husby to engage fully in the consultation process (*Haida Nation* (B.C.C.A.) No. 2). Husby's counsel did not dispute the findings in *Haida Nation* (S.C.) concerning the area of Naden Harbour. Husby's duty to consult is not a hollow responsibility. The Haida are entitled to meaningful involvement in the consultation process (*Taku*). Consultation requires Husby to notify the Haida of applications for site alteration permits, and cutting permits and any revisions.

Application To Tender Additional Evidence

116 At the hearing of this petition the Haida applied to file an affidavit of Guujaaw. It is said by his counsel that the purpose of his affidavit is to provide a concise explanation of the importance of CMTs in Haida culture. Counsel for the Haida submits that this affidavit is explanatory of, and consistent with, other evidence provided by Guujaaw and the Haida which the District Manager referred to in making his decision. Husby says there is not, before the District Manager, evidence of the importance of CMTs to Haida culture and therefore no evidence of aboriginal right infringement. It is to counter this submission that counsel for the Haida seeks leave to file further affidavit material to provide an evidentiary basis for the asserted infringement. It is unnecessary to decide this issue because I have already decided to remit the matter to the District Manager. The Haida will be free to put such additional material before the District Manager in the consultation process as is necessary. Husby will likewise have the appropriate opportunity to put further material before the District Manager.

(e) Remedy

117 Husby applies for an order in the nature of mandamus compelling the District Manager to issue the cutting permits applied for. As will be clear from these reasons, it is my view that the District Manager failed to properly fulfil his constitutional responsibilities, which ought to have formed the basis of his discretionary decision. It is not, therefore, appropriate to make any order, other than to remit the matter back to him to reconsider in accordance with these reasons.

Conclusion

118 In summary, I have concluded that, despite what has already been a somewhat lengthy process, the application for the cutting permits must be remitted to the District Manager to reconsider his decision in accordance with these Reasons.

119 The parties may make submissions concerning costs by contacting the registry to arrange a convenient time to do so.

Application allowed.

FN* On June 3, 2004, the court released additional reasons for judgment regarding costs, Doc. Vancouver L032472, Garson J. (B.C. S.C.), reported at [2004 BCSC 734](#), [2004 CarswellBC 1244](#).

2004 CarswellBC 200, 2004 BCSC 142, [2004] B.C.W.L.D. 422, 25 B.C.L.R. (4th) 289, [2004] 5 W.W.R. 662, 12 Admin. L.R. (4th) 264

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IN THE MATTER OF

BRITISH COLUMBIA TRANSMISSION CORPORATION

RECONSIDERATION OF THE
INTERIOR TO LOWER MAINLAND TRANSMISSION PROJECT

DECISION

February 3, 2011

Before:

A.J. Pullman, Commissioner
A.A. Rhodes, Commissioner
P.E. Vivian, Commissioner



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March 22, 2011

CORRIGENDA II

British Columbia Transmission Corporation Reconsideration of the Interior to Lower Mainland Transmission Project

Please note the following corrections to the Commission's February 3, 2011 Decision on the Reconsideration of British Columbia Transmission Corporation's Interior to Lower Mainland Transmission Project.

On page 156: "The Commission found in Section 7.8 that BC Hydro did not respond adequately to the issue of revenue sharing when it was raised at that meeting. It is for this reason alone that the Commission Panel finds that the consultation that took place between BC Hydro and Siska was not adequate."

Should read:

"The Commission found in Section 7.8 that BC Hydro did not respond adequately to the issue of revenue sharing when it was raised at that meeting. It is for this reason alone that the Commission Panel finds that the consultation that took place between BC Hydro and Ashcroft was not adequate."

On page 234, the following should be added to the table:

First Nation / Tribal Council	Deficiencies in Consultation
Siska Indian Band, Ashcroft Indian Band	<ul style="list-style-type: none">• BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.



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CORRIGENDA

British Columbia Transmission Corporation Reconsideration of the Interior to Lower Mainland Transmission Project

Please note the following corrections to the Commission's February 3, 2011 Decision on the Reconsideration of British Columbia Transmission Corporation's Interior to Lower Mainland Transmission Project.

On page 36, the table should include the following First Nation Intervener:

First Nation / Tribal Council	Month (2007)	Intervening Group
Cook's Ferry	March	Coldwater <i>et al.</i>

On page 58: "As far as concerns whether consultation had to be completed by the date of the BCTC Board Decision, the Commission Panel considers that The Court of Appeal instructed it to determine whether the Crown's duty to consult had been met up to the date of the CPCN decision [consultation by the date of the Options Decision had to be adequate in respect of the choice of the Preferred Alternative but did not have to be complete for the ILM Project as a whole because the Project was not complete]."

Should read:

"As far as concerns whether consultation had to be complete by the date of the BCTC Board Decision, the Commission Panel considers that consultation by the date of the Options Decision had to be adequate in respect of the choice of the Preferred Alternative but did not have to be complete for the ILM Project as a whole because the Project was not complete."

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COMMISSION ORDER G-15-11

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EXECUTIVE SUMMARY

Background

On August 5, 2008 the British Columbia Utilities Commission (Commission) granted a Certificate of Public Convenience and Necessity (CPCN) to the British Columbia Transmission Corporation (BCTC) for the Interior to Lower Mainland Transmission Project (ILM Project). During that Proceeding, the Commission decided that it need not consider the adequacy of First Nations consultation and accommodation efforts on the ILM Project. Kwikwetlem First Nation appealed that decision to the British Columbia Court of Appeal. On February 18, 2009 the Court of Appeal issued its decision in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68. The Court suspended the CPCN and directed the Commission to reconsider First Nations consultation and to determine whether the Crown's duty to consult and accommodate First Nations had been met up to August 5, 2008, the date the CPCN was granted. The Commission has completed this task with the issuance of this Decision.

The ILM Project is a new, 246 kilometre 500 kV alternating current transmission line (5L83) from the Nicola substation near Merritt to the Meridian substation in Coquitlam. 5L83 was planned by BCTC¹ with an in-service date of October 2014. The line would deliver additional transmission capacity from the Interior of BC, where BC Hydro generates most of its hydro electric power to areas of greatest power consumption, the Lower Mainland and Vancouver Island. Of importance in this Proceeding is the fact that the transmission line would cross a number of traditional territories where First Nations have asserted Aboriginal rights and title.

Aboriginal rights and title are constitutionally protected by section 35 of the *Constitution Act, 1982*. As such, the Crown has an obligation to consult meaningfully with First Nations when its action may adversely affect those rights. The ILM Project has this potential. BCTC, as the project proponent, delegated the consultation responsibility to British Columbia Hydro and Power Authority (BC

¹ On July 3, 2010 BCTC merged with BC Hydro pursuant to the *Clean Energy Act*.

Hydro) but remained involved in some consultation activities. Both BCTC and BC Hydro were Crown actors at all relevant times.

Commission Process

To assess the adequacy of consultation on the ILM Project, the Commission conducted a Proceeding that included written evidence and a thirteen day Oral Public Hearing. First Nations potentially affected by the ILM Project were provided an opportunity to participate. Of those, a number intervened in the Proceeding while many others chose not to do so. In this Decision, the Commission makes an assessment of the adequacy of Crown consultation for the First Nation Interveners' complaints on the adequacy of the consultation.

The Proceeding originally had seven active First Nation Interveners, who intervened either as individual First Nations or as groups. During the course of the Proceeding, consultation between the proponent utilities and First Nations continued and as a result, two of the First Nation Interveners, Kwikwetlem First Nation and Stó:lō Hydro Ad Hoc Committee withdrew from the Proceeding, advising the Commission that they had been adequately consulted and were now in support of the ILM Project. The remaining First Nation Interveners in this Proceeding are:

- Okanagan Nation Alliance and Upper Nicola Indian Band;
- Coldwater et al. - Coldwater, Cook's Ferry, Siska, and Ashcroft Indian Bands;
- Nlaka'pamux Nation Tribal Council – Spuzzum and Lytton First Nations and Boothroyd, Kanaka Bar, Skuppah and Oregon Jack Creek Indian Bands;
- Stó:lō Tribal Council – Cheam, Kwaw-kwaw-a-pilt, Shxw'ow'hamel, Soowahlie, Sumas and Seabird Island First Nations; and
- Hwlitsum First Nation.

The Commission Panel has reviewed the extensive written evidence and oral testimony from the proponent utilities and the First Nation Interveners. The task of the Commission Panel in adjudicating the issue of adequacy is made more complex by certain factors:

- the analysis is retrospective with reference to factual situations, meetings, and discourse that are now over two years in the past;
- the First Nations represented themselves both individually and as members of Tribal Councils and collectives during consultation and the Commission Proceeding;
- there was disparity in terms of cultural background, personnel resources, education and financial capacity between the utilities and First Nations, and among the First Nation groups themselves; and
- a primary issue during consultation and in the First Nation Interveners' evidence and submissions before the Commission was the assertion that BCTC/BC Hydro failed to consult on Existing Assets (transmission lines, rights-of-way, and other assets associated with lines built in the 1960s and 1970s). The historical infringement of asserted Aboriginal rights permeated the discussions between BCTC/BC Hydro and First Nations and, in some cases, led to hard positions being taken on both sides of the issue. On October 28, 2010, the Supreme Court of Canada released its decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 SCC 43 wherein it addressed the issue of the required consultation in respect of Existing Assets. In response to this decision, the First Nation Interveners withdrew their submissions on Existing Assets.

Commission Determinations

In making its assessment of adequacy, the Commission Panel explored the issue of when the duty to consult arose and determined the date as December 2005. The Commission Panel also determined that its task was to assess the adequacy of the consultation with the First Nation Interveners up to August 5, 2008 in respect of the Options Decision – the decision by the BCTC Board of Directors on May 23, 2007 to select a Preferred Alternative, from the various options it was considering, for additional definitional funding and filing of a CPCN Application with the Commission. The Commission Panel also determined that consultation did not have to be complete for the ILM Project as a whole by August 5, 2008, but that it had to be adequate.

The Commission Panel then examined the consultation process carried out by BCTC and BC Hydro prior to the Options Decision. In general, BC Hydro began consultation with First Nations in August 2006. The consultation focused on two transmission alternatives that had been examined by BCTC as means of providing additional transmission capacity from the Interior to the Lower Mainland. The extent to which First Nations were made aware of the various options under study and their ability to comment on and influence the Options Decision, became a central issue in this

Proceeding. After the Options Decision, BC Hydro and BCTC continued to consult with First Nations on 5L83.

The First Nation Interveners submitted that the consultation that took place was inadequate for many reasons. The common complaints were:

- BC Hydro/BCTC failed to consult on all the seven options it considered before the Options Decision;
- reconciliation was not achieved between First Nations and the Crown;
- accommodation was not complete prior to the CPCN Decision;
- there was a lack of consultation in respect of asserted Aboriginal title;
- the Options Decision was made before the Crown had sufficient information on First Nations interests and potential adverse impacts;
- capacity funding was insufficient;
- the consultation process was driven by the strict schedule of BCTC;
- BC Hydro/BCTC refused to discuss revenue sharing;
- BC Hydro's strength of claim assessments were flawed; and
- BC Hydro/BCTC failed to consult on Existing Assets.

The Commission Panel considered the evidence and found the Crown's consultation was not adequate for certain First Nations. Specifically, the Commission Panel found the following deficiencies in consultation:

- Regarding the complaint that BCTC/BC Hydro did not consult with First Nations on the seven options it considered, the Commission Panel found that BCTC screened out various alternatives at an early stage which relieved them of the obligation to consult on those options. Of the seven options, BC Hydro presented four to the First Nations for consultation but, for certain First Nations, did not adequately explain why three of these options were removed from consideration and why 5L83 had been selected over the others. The Commission Panel also found that BCTC seriously contemplated another of the seven options, a High Voltage Direct Current (HVDC) transmission line, but found that it did not adequately consult with the potentially affected First Nations on this alternative; and
- BCTC/BC Hydro failed to adequately respond to the issue of revenue sharing raised by many of the First Nations.

The Commission Panel examined the specific facts relating to each individual First Nation Intervener and found consultation with the following First Nation Interveners was inadequate to August 5, 2008: Upper Nicola Indian Band; Coldwater Indian Band; Cook's Ferry Indian Band; Nlaka'pamux Nation Tribal Council; Spuzzum First Nation; Boothroyd Indian Band; Skuppah Indian Band; Lytton First Nation; Oregon Jack Creek Band; Stó:lō Tribal Council; Shxw'ow'hamel First Nation; Cheam First Nation; and Seabird Island First Nation.

The Commission Panel found BC Hydro/BCTC's consultation with the following First Nation Interveners was adequate to August 5, 2008: Okanagan Nation Alliance; Kanaka Bar Indian Band; Kwaw-kwaw-a-pilt First Nation; Soowahlie First Nation; Sumas First Nation; and the Hwlitsum First Nation.

The Commission examined the relief sought by the Interveners, BCTC and BC Hydro and determined that maintaining the suspension of the CPCN would allow BC Hydro an opportunity to remedy the deficiencies identified. Accordingly, the CPCN remains suspended.

Commission Directives

The Commission Panel directs BC Hydro to remedy the specific deficiencies identified and report back to the Commission within 120 days. The First Nation Interveners for whom consultation was found to be inadequate will have 21 days from the date of the filing of the report to file a written response to the report. BC Hydro will have 7 days from the date of filing of the First Nation Intervener responses to file a written reply to the responses. The Commission will review the submissions and, if the deficiencies in consultation have been remedied to the Commission's satisfaction, will lift the suspension of the CPCN.

INTRODUCTORY COMMENTS OF THE COMMISSION PANEL

This Commission Panel's complex task is to assess the adequacy of the Crown's consultation with First Nations for the ILM Project. The ILM Project is a new 246 kilometre transmission line (5L83) starting from the Nicola substation near Merritt to the Meridian substation in Coquitlam. The transmission line passes through a number of traditional Aboriginal Nation territories including Syilx (Okanagan), Nlaka'pamux, and Solh Temexw (Stó:lō). Aboriginal groups potentially adversely affected by the ILM Project have a right to be consulted by the Crown. A number of these potentially affected First Nations intervened in this Proceeding. Many other potentially affected First Nations chose not to intervene.

During the Proceeding, filings included evidence from BCTC and BC Hydro, evidence from the First Nations, and Information Requests on the evidence. In addition, the Commission Panel heard testimony from BCTC/BC Hydro and First Nations in the Oral Public Hearing that occurred over 13 days in January 2010. The information is voluminous, broad, and deep. With one exception, the evidence admitted in this Proceeding related to consultation that took place up to August 5, 2008, the original CPCN decision date. This Commission Panel has been tasked to review the evidence on consultation that occurred over 2-1/2 years ago. Since August 5, 2008, time has marched on and BC Hydro has continued to consult with First Nations.

During the Oral Public Hearing, the Commission Panel heard from BCTC/BC Hydro and the First Nations. BCTC/BC Hydro explained how they conducted the First Nation consultation for the ILM Project, its most significant transmission project in 30 years. Of particular note, the Commission Panel appreciates the appearances made by the Elders from the Okanagan Nation and the Nlaka'pamux Nation. The Commission Panel heard sincere and heart-felt testimony from the First Nations on how they perceived the consultation conducted by BC Hydro. As well, the Commission Panel heard from the First Nation Chiefs and Councillors on the importance of Aboriginal culture and values, traditional use, oral tradition, and collective decision-making. This differs from the Crown's approach that generally follows Eurocentric practices. Consultation between two parties requires an understanding of cultural and communication differences. These differences can often lead to quite different approaches to the issues under study.

BC Hydro faced significant challenges in its consultation due to the large number of First Nations and the various ways the First Nations wished to be represented. Initially, BCTC and BC Hydro faced the task of identifying the potentially affected First Nations. Eventually, 60 First Nations and 7 Tribal Councils were identified by the BC Environmental Assessment Office (EAO) as being potentially affected by 5L83. After initiating contact with First Nations, BC Hydro needed to find out how each First Nation wanted to be consulted and the appropriate person to engage with such as the Chief, Councillor, Band manager, or policy advisor. Some First Nations wanted to be consulted at the Band level while others delegated consultation to the Tribal Council. In some instances both Band and Tribal Council wished to be consulted, separately and together. Particular challenges occurred when First Nations representatives changed or when an Aboriginal group changed its member Bands. In some instances it was not clear how much delegated authority a First Nation representative had to address consultation on the ILM Project. Unfortunately, in some cases, there were First Nations with limited capacity to consult.

The Commission Panel heard in the testimony that many First Nations, due to limited staffing levels, face challenges responding to referrals and participating in consultation. There are wide differences in the background, experience, and education level of First Nation representatives. Fortunately, some First Nations are able to delegate consultation to a better resourced Tribal Council. However, smaller First Nations acting independently faced greater challenges in capacity.

The Commission Panel was apprised of some of the capacity challenges faced by First Nations during the Oral Public Hearing. The following are two examples.

Councillor Chaffee from the Kwikwetlem First Nation explained:

MR. CHAFFEE: A: I asked about what I understood. I tried to. As I've stated before, my education is only Grade 11 and the majority of the people who are in my Nation are the same way. We look at this stuff and we try and understand it to the best of our knowledge and when we see alarm bells go up that's when we'll go to our consultants or we will go to the lawyers, because that's the way we have to do it.

This stuff to me is like rocket science. (T12:1774)

Chief Sampson from the Siska Indian Band testified:

CHIEF SAMPSON: A: Yes, most certainly. When the – I don't know how many boxes, it must have been three or -- it was huge anyway -- it came into my office and I looked at that and I said, oh my God, there is no way I'll ever be able to digest all of this information and give constructive responses and recommendations, so of course we incorporated legal counsel to assist us with that challenge. (T14:2263-4)

These testimonies underscore the fact that the Commission and public utilities may be very familiar with transmission lines, energy needs, and capacity constraints but this is not necessarily the case when dealing with First Nations who lack resourcing and understanding. The Commission Panel recognizes that different Aboriginal groups face different issues and different challenges. Successful consultation requires addressing these challenges.

Communication and consultation should be conducted at a level that allows for understanding by the other side, even where capacity and education may be limited. Consultation is an interactive process where the dialogue proceeds to meaningful understanding. To facilitate consultation, some First Nations had consultation protocols on how they wished to be consulted. These protocols should assist in the consultation by establishing the desired process, method of communication, and delegated authority levels.

During the course of the Proceeding consultation and negotiation continued and some disagreements with First Nations were resolved. Following Argument, the Commission was advised by the Kwikwetlem First Nation and the Stó:lō Hydro Ad Hoc Committee First Nations (Aitchelitz, Leq'á:Mel, Skawahlook, Skowkale, Tzeachten, and Yakwekwioose) that they have all been adequately consulted and now support the ILM Project. In this case, continued consultation led to a sufficient level of understanding that satisfied Aboriginal concerns. We are encouraged by these developments of relationship building.

For the remaining First Nation Interveners, they have continued to dispute the adequacy of the Crown's consultation. In this Decision, we have made determinations of certain inadequacies in the Crown's consultation. The CPCN remains suspended for further consultation. We encourage the parties to carry on discussions in good faith and build understanding, so that they can move toward the goal of reconciliation and strengthen the relationship between the Crown and First Nations.

1.0 INTRODUCTION

The Interior to Lower Mainland (ILM) grid comprises eight 500 kV transmission lines that bring the power generated by the BC Hydro and Power Authority (BC Hydro) in the Peace and Columbia river systems to the Lower Mainland and Vancouver Island where 70 percent of the Province's power is consumed.

The British Columbia Transmission Corporation (BCTC) (as it then was) describes the ILM grid as the most critical transmission path in BC since it connects the main electricity generation sources to the areas of greatest electricity demand. BCTC describes the reinforcement of the ILM grid as the "largest expansion to BC's transmission system in 30 years" (Exhibit B-3-1, Appendix Y).

The ILM grid traverses large areas of the Province. These areas are subject to claims of Aboriginal rights and title by a large number of First Nations.

Section 35 of the *Constitution Act, 1982* recognizes and affirms the potential rights and titles which are the subject of these claims. It states:

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.

In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (*Haida Nation*) the Supreme Court of Canada stated that the "honour of the Crown" requires that Aboriginal claims to rights and title be "determined, recognized and respected," which "in turn

requires the Crown, acting honourably, to participate in the processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests” (*Haida Nation*, para. 25).

The *Haida Nation* case was the first case of its kind to be heard by the Supreme Court of Canada. In *Haida Nation* the Court established a general framework for the Crown’s duty to consult and, where indicated, accommodate, First Nations whose asserted claims remain to be determined. The Court also held that the duty to consult arises “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it...” (*Haida Nation*, para. 35).

This decision is about whether the Crown had adequately fulfilled its duty to consult in respect of reinforcement of the ILM grid. On one side of the issue is the provincial Crown represented by the Attorney General of BC and Crown actors BC Hydro and BCTC. On the other side are the potentially affected First Nation Interveners including:²

- Kwikwetlem First Nation;³
- Upper Nicola Indian Band (UNIB);⁴
- Okanagan Nation Alliance (ONA);⁴
- Coldwater Indian Band, Cook’s Ferry Indian Band, Siska Indian Band and Ashcroft Indian Band (Coldwater *et al.*);
- Nlaka’pamux Nation Tribal Council (NNTC);
- Stó:lō Hydro Ad Hoc Committee (SHAC);⁵

² Other First Nations that intervened but did not actively participate were: Nicomen Indian Band; Nicola Tribal Association; Nooiatch Indian Band. As well, the following First Nations registered as Interested Parties: Penelakut Tribe; Tsawwassen First Nation; and Okanagan Indian Band.

³ The Kwikwetlem First Nation withdrew as an Intervener from the ILM Reconsideration Proceeding, stating it had been adequately consulted and accommodated, by letter dated May 20, 2010 (Exhibit C4-22).

⁴ The Upper Nicola Indian Band and the Okanagan Nation Alliance intervened in the ILM Reconsideration Proceeding separately but filed a joint Argument with the NNTC. In this decision the Commission refers to the NNTC/ONA/Upper Nicola in relation to their Final Argument. Otherwise the groups are referred to as they filed evidence and submissions.

⁵ SHAC withdrew as an Intervener from the ILM Reconsideration Proceeding, stating it had been adequately consulted and accommodated, by letter dated November 24, 2010 (Exhibit C9-9).

- Stó:lō Tribal Council (STC) and Seabird Island First Nation; and
- Hwlitsum First Nation (Hwlitsum).

In addition there are two other Interveners: a ratepayer group, British Columbia Old Age Pensioners' Organization *et al.* (BCOAPO) and a coalition of landowners, Harris/Casselman.

The process followed by the Commission to hear the Proceeding and the parties to the Proceeding are more extensively described in Appendix B.

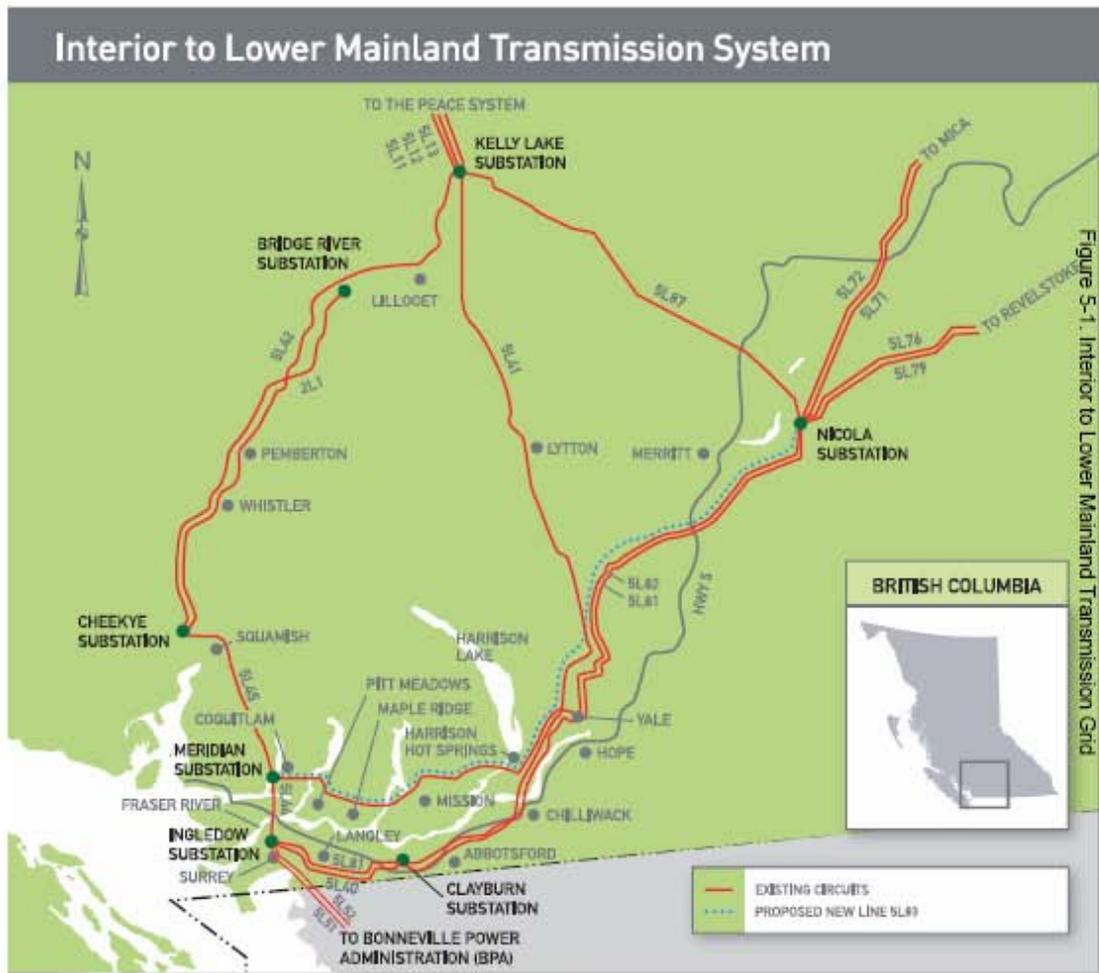
2.0 BACKGROUND

This section describes the background to the Proceeding including the Project, the chronology, the original Commission process and the Court of Appeal ruling.

2.1 The ILM Grid

The power transfer from the Interior to the Lower Mainland and Vancouver Island regions takes place over four of the eight lines which make up the ILM grid: 5L81 and 5L82 which connect Nicola substation in the South Interior to Ingledow and Meridian substations in the Lower Mainland; 5L42 which connects Kelly Lake substation near Clinton in the Interior to Cheekeye substation near Squamish and 5L41 which connects Kelly Lake to Clayburn substation in the Lower Mainland. The remaining four lines allow for power sharing among the various substations. Five of the ILM lines (5L41, 5L42, 5L87, 5L81, and 5L82) have a capacitor station somewhere near the middle of the line to increase energy transfer capability.

A map of this system is set out below. The proposed 5L83 line is indicated by the dotted line from the Nicola to the Meridian substation.



(Exhibit B-10-6, Attachment 6 to Coldwater *et al.* 1.2)

2.2 Chronology

In late 2005, BCTC was then the Crown corporation charged with planning, constructing and operating the transmission system in the Province. It began to study possible alternatives to reinforce the ILM grid in this timeframe.

In December 2005, the BCTC Board of Directors approved funding in the amount of \$15.7 million for the Definition Phase of BCTC's project to reinforce the ILM grid (Exhibit B-10-6, Attachment 6 to Coldwater *et al.* 1.2).

In August 2006 BCTC and BC Hydro commenced a process of consultation with First Nations and Tribal Councils which they had identified as potentially affected by the reinforcement of the ILM grid.

In December 2006 BCTC filed a pre-application for one of the options, namely New Line 5L83 with the BC Environmental Assessment Office (EAO).

On May 23, 2007 BCTC's Board of Directors selected a Preferred Alternative (the Options Decision), New Line 5L83 between Nicola and Meridian substations (the ILM Project, Project) and authorized funding for the completion of the Definition Phase and preparation of an application to the British Columbia Utilities Commission (Commission) for a Certificate of Public Convenience and Necessity (CPCN) for the 5L83 option.

On November 5, 2007 BCTC filed an application for a CPCN for the ILM Project with the Commission. In considering BCTC's application for a CPCN, the Commission concluded that the matter of adequacy of consultation and accommodation with First Nations on the ILM Project was out of scope of its review of the application (Scoping Decision).⁶ After a written public Hearing process, the Commission subsequently granted a CPCN approving the ILM Project (Order C-4-08) on August 5, 2008.

The Kwikwetlem, NNTC, ONA and Upper Nicola sought leave to appeal the Scoping Decision to the British Columbia Court of Appeal. Leave was granted and the appeal was heard on November 28 and 29, 2008 together with an appeal by the Carrier Sekani Tribal Council from another decision of the Commission involving First Nations issues.

⁶ Exhibit A-8 in the Original ILM Proceeding.

On February 18, 2009 the Court of Appeal issued its companion decisions *Kwkwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68 (*Kwkwetlem*)⁷ and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* 2009 BCCA 67).⁸

The Court of Appeal ruled that, before the Commission certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether the duty was fulfilled. The Court found that the Commission did not undertake that analysis (*Kwkwetlem*, para. 13), remitted the Scoping Decision to the Commission for reconsideration of whether the Crown's duty to consult and accommodate the appellants had been met, and directed that the effect of the CPCN be suspended (*Kwkwetlem*, paras. 15 and 70-71).

Consequently, the Commission established a Proceeding, including an Oral Public Hearing held in January 2010, to consider whether the Crown had adequately fulfilled its duty to consult. This issue is the subject matter of this Decision.

While the basis for this Proceeding is the decision in *Kwkwetlem*, the Supreme Court of Canada's decision in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (*Carrier Sekani*) impacted the submissions filed on behalf of the First Nations and extended the time period of the Proceeding.

⁷ As an aid to reading this decision, the Kwkwetlem First Nation is referred to as Kwkwetlem, while the BC Court of Appeal decision in *Kwkwetlem First Nation v. British Columbia (Utilities Commission)* is referred to as *Kwkwetlem*, in italics.

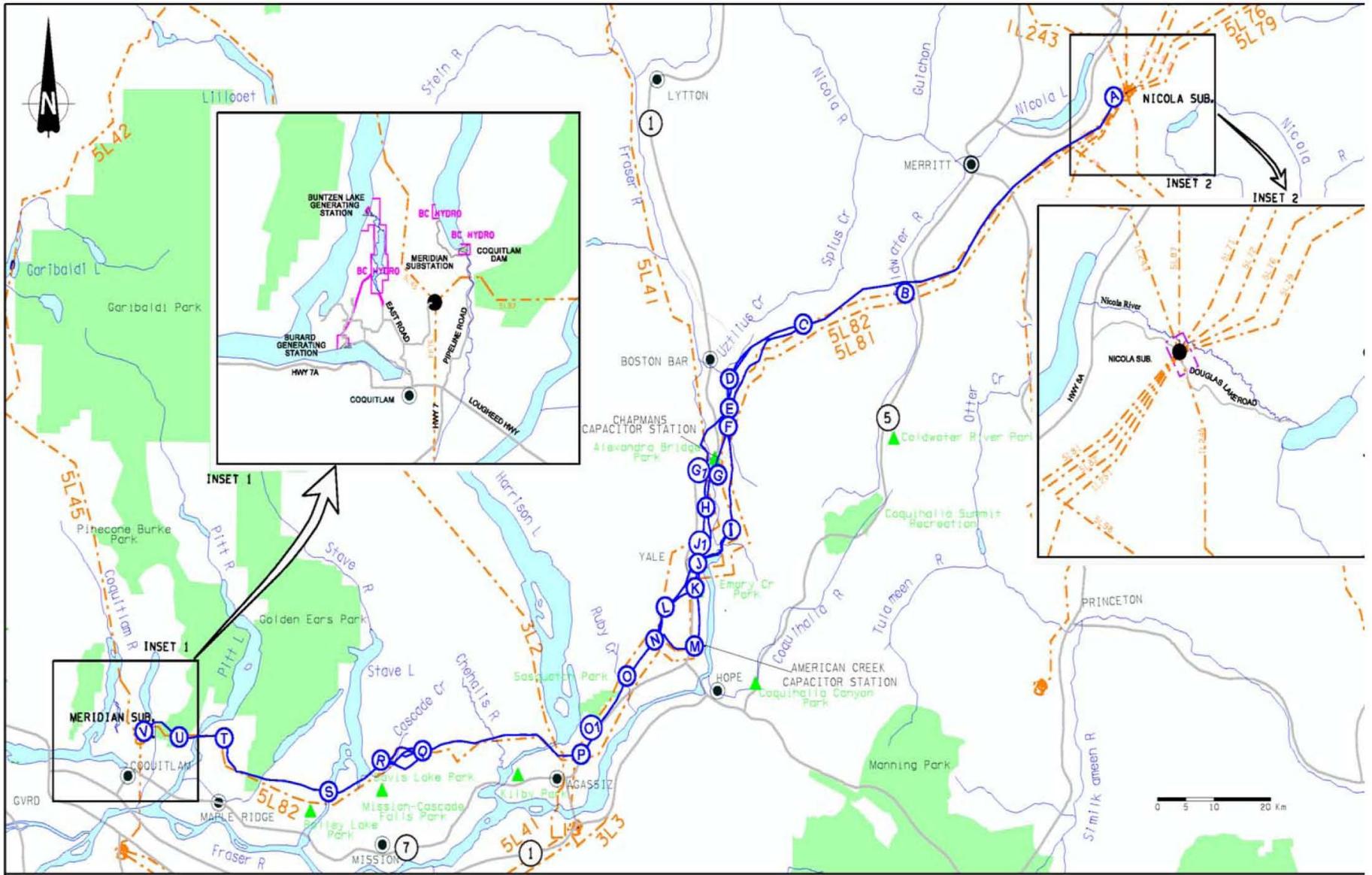
⁸ The Court of Appeal's decision in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* was appealed to the Supreme Court of Canada. On October 28, 2010, the Supreme Court of Canada released its decision, allowing the appeal and restoring the Commission's original decision. The Supreme Court's decision is discussed in Section 7.5.

2.3 The Original CPCN Application

On November 5, 2007 BCTC filed an application with the Commission for an order granting a CPCN for its proposed project to increase the transfer capability of the ILM grid.

The proposed ILM Project consisted of a new 500 kV AC transmission line (5L83) from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a series capacitor station at a location to be determined near the mid-point of the line, and 500 kV single circuit terminations at both substations. The new line would parallel an existing 500 kV AC transmission line (5L82) for most of its 246 km length.

BCTC divided the 5L83 route into a number of segments between the Nicola and Meridian substations, which were identified by 25 Nodes labelled A through V shown in the map below (ILM Original Proceeding Exhibit B-1, p. 45). The reference alignment for the purposes of the CPCN Application required 79 km of new right of way (ROW) and 41 km of ROW widening (ILM Original Proceeding Exhibit B-1, p. 6).



Source: ILM Original Proceeding Exhibit B-1, p. 45

2.4 The Scoping Decision

The Commission held a Procedural Conference on December 20, 2007 at which it established a process to determine whether the adequacy of consultation and accommodation with First Nations potentially affected by the ILM Project should be within the scope of issues the Commission Panel would examine during the original CPCN Proceeding. The process included submissions from BC Hydro, BCTC and interested First Nations.

The Commission Panel made its Scoping Decision on February 21, 2008 wherein it concluded that it should not consider the adequacy of consultation and accommodation on the ILM Project in deciding whether to grant a CPCN. By Letter L-6-08 dated March 5, 2008, the Commission published its reasons for decision.

Kwikwetlem, NNTC, ONA and Upper Nicola sought leave to appeal the Scoping Decision to the Court of Appeal. Leave was granted on May 15, 2008, and the appeal was heard on November 28 and 29, 2008.

3.0 COURT OF APPEAL DECISION IN *KWIKWETLEM*

On February 18, 2009 the Court of Appeal issued its decision on the appeal of the Scoping Decision in *Kwikwetlem*. It made the following Order:

THIS COURT ORDERS that the appeal is allowed and the Scoping Decision is remitted to the Commission for reconsideration in accordance with this Court's opinion.

AND THIS COURT FURTHER ORDERS THAT the effect of the certificate of public convenience and necessity issued by the Commission on August 5, 2008 (the "CPCN") is suspended for purposes of determining whether the Crown's duty to consult and accommodate the appellants had been met up to the point of the Commission's decision to grant the CPCN.

In its Reasons for Judgment, the Court of Appeal summarized the Commission's obligation as follows:

The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. (*Kwikwetlem*, para. 13)

The Commission Panel determines the Commission's duty in Section 3.1, when the Crown's duty to consult arose in Section 3.2, and whether the duty was fulfilled in Sections 7, 8 and 10.

3.1 The Commission's Duty

The Court of Appeal provides direction as to the role of the Commission, as follows:

The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it

was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.

The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources [emphasis added]. (*Kwikwetlem*, paras. 62-63)

The Court of Appeal's Order (as discussed earlier in Section 3.0) requires the Commission to "determin[e] whether the Crown's duty to consult and accommodate the appellants had been met up to the point of the Commission's decision to grant the CPCN." While the date of the Commission's decision to grant the CPCN was August 5, 2008, paragraphs 62-63 of the *Kwikwetlem* decision (shown above) direct the Commission to assess the adequacy of consultation in respect of the Options Decision.

Kwikwetlem submits the Court of Appeal requires assessment of the consultation and accommodation in respect of the Options Decision because that is the decision that is dealt with in the CPCN Proceeding rather than in the EAO process (*Kwikwetlem* Argument, para. 5a).

Kwikwetlem further submits that the Court's statements at paragraphs 15 and 70 of *Kwikwetlem*:

I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point. (See *Utilities Commission Act*, ss. 99 and 101(5).) (para. 15)

If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether

the consultation efforts up to the point of its decision were adequate (para. 70).
[emphasis added by the Commission Panel]

have both “a timing and a substance component.” The timing relates to the Commission’s decision in August 2008 which allows the Commission to consider evidence of consultation efforts up to that point, while the substance is the consultation and accommodation activities in relation to the Options Decision in May 2007 (Kwikwetlem Argument, paras. 34-35).

Commission Determination

The Commission Panel considers that the Court of Appeal has instructed it to assess whether the Crown had, by August 5, 2008, met its duty to consult and if necessary accommodate First Nations in respect of the Options Decision taken by the BCTC Board of Directors on May 23, 2007.

The Commission Panel notes the difference between the assessment date of August 5, 2008 established by the Court of Appeal Order, and the date of BCTC’s Options Decision (May 23, 2007) referred to in the Court of Appeal Reasons at paragraph 62. The Commission Panel resolves this difference by interpreting the Court’s directions to mean that the Commission Panel must assess the consultation on the Options Decision up to August 5, 2008.

3.2 When the Crown's Duty to Consult Arose

Haida Nation states that the duty to consult arises “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it...” (*Haida Nation*, para. 35).

On the issue of when the Crown's duty to consult arose, the Court of Appeal in *Kwikwetlem* stated:

BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007[emphasis added]. (*Kwikwetlem*, para. 66)

BCTC submits that none of the First Nations brought complaints on when the Crown's duty arose (BCTC Argument, para. 46).

In its original CPCN Application, BCTC included a public consultation schedule which indicated that its initial public consultation plan was prepared in May 2006 and it met with provincial and regional officials to introduce the Project alternatives and seek input on proposed consultation activities in July 2006. As well, the Application mentions that BC Hydro's preparation for consultation was to identify First Nations which were potentially affected by the options and to establish a team of field coordinators for the large number of Aboriginal groups potentially interested in the ILM Project (Exhibit B-1, Original CPCN Application, pp. 114, 129-130).

Commission Determination

The Court of Appeal found that BC Hydro acknowledged its duty to consult by initiating contact with First Nations in August 2006. The Court's acknowledgement, however, does not mean that is when the duty to consult arose. The Commission Panel finds that the duty to consult was triggered in December 2005 when the BCTC Board of Directors approved funding of \$15.7 million for the Definition Phase of the ILM Project, because approval of funding indicates the Project was seriously contemplated. During the Definition Phase, BCTC explored a number of options at a high level, many of which were subsequently screened out in the definition process, and planned and prepared for its First Nation consultation. Of the potential transmission options, New Line 5L83 and UEC emerged as viable for further consideration. Subsequently, in August 2006, BC Hydro commenced contact with First Nations and said it was going to consult on four options.

The Commission Panel finds that although the duty to consult was triggered in December 2005, it was reasonable for BCTC to start consultation in August 2006 because it required time to implement the screening process to determine which options were feasible and which were not, to coordinate with BC Hydro's Aboriginal Relations and Negotiation (ARN) department and for BC Hydro to plan, organize, and carry out research on which First Nations were potentially affected and recruit staff for its consultation. As well, the Options Decision was planned for the end of May 2007 which allowed nine months of consultation before the Options Decision would be made.

4.0 CRITERIA FOR ASSESSING THE FULFILLMENT OF THE DUTY TO CONSULT

The Court of Appeal directed the Commission to determine the scope of the Crown's duty to consult and whether it was fulfilled. In this section, the Commission Panel determines the criteria which it will apply in carrying out these directions.

The duty to consult First Nations is grounded in the honour of the Crown. To assess whether BCTC and BC Hydro's consultation has been adequate to fulfill the duty and thus uphold the honour of the Crown, the Commission Panel has taken direction from the case law on the duty to consult.

On the issue of the scope and content of the duty to consult, in cases where Aboriginal rights and title claims have not been decided, *Haida Nation* states:

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 (para. 39).

Thus the level of consultation required, differs depending on the preliminary assessment of strength of claim to rights and/or title and the seriousness of the potentially adverse impact(s) on the right(s) and/or title claimed.

Haida Nation establishes a framework, envisaged as a spectrum, for assessing consultation based on the scope of the duty.

In circumstances "where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor," the scope of the duty is at the low end of the spectrum (para. 43). In situations "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,” the scope of the duty falls at the high end of the spectrum (para. 44).

When the scope of the duty to consult is low, *Haida Nation* states:

... the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. Consultation in its least technical definition is talking together for mutual understanding (para. 43).

On the other hand, when the scope of the duty to consult is high, *Haida Nation* provides:

... 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 (para. 44).

Thus, *Haida Nation* provides bookends for low and high levels of consultation. For cases that fall between the high and low ends of the spectrum *Haida Nation* offers the following guidance:

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 (para. 45).

The case law provides that at a minimum, consultation must be meaningful, responsive and interactive (*Haida Nation*, para. 10, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550, 2004 SCC 74, para. 25, *Mikisew Cree First Nation v.*

Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388; 2005 SCC 69, para. 64, *Halfway River First Nation v. British Columbia*, 1999 BCCA 470, para. 146, *Kwikwetlem*, para. 68).

There is a reciprocal obligation upon both the Crown and First Nations to act in good faith as *Haida Nation* provides that:

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 (para. 42).

The consultation process does not give Aboriginal groups a veto over what can be done with land prior to final proof of claim. "Rather, what is required is a process of balancing interests, of give and take" (*Haida Nation*, para. 48).

Commission Determination

Applying the legal principles found in *Haida Nation* and other decisions referred to in this section, to the circumstances before the Commission Panel, the Panel finds that a low standard of consultation on matters surrounding the ILM Options Decision required the Crown to give notice about the Project and the options it was considering to First Nations who would be potentially adversely affected, disclose to those First Nations information it had on the potential adverse impacts of the options, if any, discuss with the First Nations any issues raised by the First Nations and provide notice of the Options Decision. The Commission Panel is also of the view that throughout the process First Nations had to have been offered appropriate capacity funding and a

reasonable amount of time to respond or raise concerns. This view was recognized by BC Hydro in its Consultation Plan described in Section 5.1.3.

For those First Nations who were owed a high level of consultation in respect of the ILM Project, in addition to the criteria required for a low duty of consultation, the Commission Panel finds that the Crown was required to learn more about the potential adverse impacts on First Nations' asserted rights and title and discuss those potential adverse impacts with the First Nations, allowing the First Nations an opportunity to make submissions for consideration. As well, as the consultation process unfolded, the Commission Panel views it necessary for the Crown to have explained to the First Nations when and why some options became less viable and were eventually removed from consideration and why 5L83 emerged as the Preferred Alternative.

Prior to the Options Decision, 73 separate First Nation Bands and 9 Tribal Councils had been identified for consultation focusing on two alternatives, Upgrade Existing Circuits (UEC) and New Transmission Line 5L83 (Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, p. 3). At this point, BCTC did not know which First Nations would be affected by the final ILM Project because it had not decided on the Preferred Alternative, although some First Nations had been identified as potentially affected by both options. Thus, the Commission Panel is of the view that the Options Decision marked a stage in the consultation process where the information content would need to change. Up to the selection of the Preferred Alternative, the information about the options and the adverse impacts of the options could be quite general in nature due to the number and nature of options being considered. After the selection, the proponents became focused on completing the definition of the Preferred Alternative and, as a result, the information content would necessarily become more specific and granular.

5.0 BC HYDRO'S CONSULTATION

In this section the Commission Panel considers BC Hydro's planned consultation process and describes its general consultation efforts in respect of the May 2007 Options Decision and any further consultation that took place between then and August 2008, the date of the Commission's CPCN decision. The specific interaction efforts for the same time period are included in Section 8 for the individual First Nations.

5.1 Consultation Process

5.1.1 BCTC and BC Hydro's Division of Responsibility

In accordance with designated agreements formerly in place between BCTC and BC Hydro, BC Hydro had the primary responsibility for First Nations consultation. BC Hydro's ARN staff therefore undertook the bulk of the consultation activities for BCTC.

The overall Project Manager for the ILM Project at BCTC was Melissa Holland, who reported to Bruce Barrett, the Vice-President of Major Projects. As well, Claire Marshall, BCTC Aboriginal Relations Manager, was involved in the consultation process.

The BC Hydro ARN staff members or contractors who were involved in consultation between August 2006 to August 2008 are:

Name(s)	Position
Keith Anderson	Manager
Charles Littledale Darrel Mounsey Corry Archibald Jennifer Hooper	ARN Consultation Coordinators
Patricia Isackson	ARN Clerical Support

John Kafka Julian Wake	Contracted Consultation Coordinators
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(Exhibits A2-4 and 5)

5.1.2 Project Schedule

As noted in Section 2.2, in December 2005, the Board of Directors of BCTC approved Definition Phase funding of \$15.7 million for the ILM Reinforcement Project.

BCTC and BC Hydro state that they were operating in accordance with a schedule established by the ILM Project Team that remained generally static throughout the initial consultation period:

Date	Milestone
August 2006	Begin Consultation
December 2006	File Draft EAO Pre-Application
May 2007	Options Decision
November 2007	File CPCN Application
August 2008	Receive Commission Decision
November 2008	File EAO Application
May 2009	Receive EA Certificate
May 2010	Commence Implementation
October 2014	In Service Date

(Exhibit B-26, p. 22)

This basic timetable was communicated to every First Nation and Tribal Council potentially affected by 5L83, with whom BC Hydro entered into consultation on the ILM.

5.1.3 BC Hydro's Strategy Document/Consultation Plan

In response to an undertaking given at the Hearing to produce a written description of the consultation plan in place in September 2006, BC Hydro filed draft version 5 (dated November 2006) of its strategy document for consultation with affected First Nations for the “options definition phase” of the ILM Project. The document’s stated purpose was to:

...lay out the scope, key First Nations, schedule and implementation details for engagement and consultation with First Nations that may be impacted by the ILM project. The primary objective of the engagement and consultation is to ensure that the First Nations are provided with appropriate information to understand the nature of the proposed project and to ensure that the potential impacts to First Nations' [sic] are clearly understood. In addition to understanding potential impacts, options for avoidance or mitigation of impacts will be explored. Throughout the consultation process First Nations will be provided appropriate capacity funding and other resources to fully participate in both the consultation and more formal environmental and regulatory review processes. (Exhibit C3-27, p. 1)

The document states that the two primary focuses of consultation were to be UEC and construction of a new 500 kV transmission line, and that the secondary focus was to be the “Non-Wires” options (Exhibit C3-27, p. 1).

5.1.4 BC Environmental Assessment Office Process

BCTC states that in order to meet an in-service date of October 2014 for the ILM Reinforcement Project it was obliged to commence its pre-application process for an Environmental Assessment Certificate (EAC) for 5L83 before its Board had made the Options Decision. Since UEC did not require an EAC, it planned to withdraw its pre-application from the EAO were its Board to select UEC as the Preferred Alternative (Exhibit B-3-1, p. 7).

BCTC therefore filed its pre-application with the EAO on December 4, 2006 for the 5L83 Alternative. The EAO subsequently identified 60 First Nations and 7 Tribal Councils, whom the EAO considered might be affected by 5L83, and asked them to attend an initial EAO Working Group meeting in

Harrison Hot Springs on February 21, 2007. BC Hydro also wrote to the same First Nations and Tribal Councils encouraging them to attend the initial EAO Working Group meeting and offering funding for preparation and attendance.

At the February 21, 2007 EAO meeting, an information binder including a 5L83 Alternative Project Description, draft Terms of Reference for the EAO process, and a February 21, 2007 Project Overview Presentation was handed out to attendees. Representatives from 12 of the 67 First Nations and Tribal Councils, as well as many staff members from BCTC, BC Hydro and various levels of government attended.

The Project Description states:

There are three alternatives for providing the required ILM transmission capacity:

1. Upgrade several existing transmission circuits;
2. Construct a new 500 kV alternating current (AC) transmission line; or
3. Construct a new High-Voltage Direct Current (HVDC) line and two converter stations.

There are also other potential "non-wires" solutions that could defer the need for additional ILM transmission capacity. These include:

1. Additional coastal generation;
2. Higher Demand Side Management (DSM) targets for load reduction; and
3. Additional imports from the US.

(Exhibit B-26, p. vi)

The following Interveners sent representatives to the meeting:

Intervener	Representative
ONA	Dixon Terbasket
Upper Nicola	Bernadette Manuel
Coldwater	Chief Harold Aljam
Ashcroft	Alan Torng, Band Manager
Boothroyd	Councillor Mike Campbell
Spuzzum	Councillor Gordie Edwards
Spuzzum	Edith Florence
STC	Andy Phillips, Senior Policy Advisor
Seabird Island	Brian Jones, Economic Development Manager
Soowahlie	Councillor Nelson Kahama
Cheam	Chief Sidney Douglas
Cheam	Dora Demers
Cheam	June Quipp
Hwlitsum	Chief Roland Wilson
Hwlitsum	Alan Grove, Consultant

At the meeting, BCTC/BC Hydro provided information on the project and how the new line would be constructed. BC Hydro's Engineering Department made a video presentation of construction aspects of new transmission lines and presented information on how ROW is prepared for construction and how towers are erected. Bruce Barrett of BCTC also presented information on the UEC alternative and informed the Working Group that the option may have a greater net cost than 5L83. He also informed the group that there are more First Nations along the UEC corridor than along the 5L83 corridor. In response to a question, Bruce Barrett estimated that the UEC upgrade would be adequate for ten years after which further upgrades would be required (Exhibit B-3-1, Appendix U).

The information binder was also sent to those First Nations and Tribal Councils identified by the EAO that had not attended the meeting.

Two key documents in the EAO process are:

- a Section 11 Order which determines the scope of the assessment and the procedures and methods to be used for a particular project; and
- a Terms of Reference, which determines the information the applicant must provide in its application to the EAO.

In March of 2007, the EAO circulated a draft Section 11 Procedural Order for the environmental assessment process for the 5L83 Alternative for comments to the 60 First Nations and 7 Tribal Councils that were ultimately listed in the Section 11 Procedural Order. BC Hydro followed up with the relevant First Nations and Tribal Councils to ensure that they had received copies of the draft Section 11 Procedural Order and provided those groups with copies where the draft had not been received.

In March and April of 2007, the EAO and BC Hydro also distributed draft Work Plans to the same 60 First Nations and 7 Tribal Councils for the discipline-specific studies that would take place as part of the environmental assessment process for 5L83 to obtain First Nations' input on the draft Work Plans. The draft Work Plans provided detailed information regarding the discipline-specific studies described in the draft Terms of Reference.

On May 31, 2007, the EAO issued the Section 11 Order for the ILM Project, directing that the environmental assessment process for the ILM Project, including consultation with the 60 First Nations and 7 Tribal Councils previously identified (the Section 11 Order First Nations), be conducted according to the scope, procedures and methods set out in attachments to the Order (Exhibit B-3-1, pp. 42-50).

On September 20, 2007 (prior to the August 5, 2008 CPCN decision), a second EAO Working Group meeting took place in Chilliwack. All Section 11 Order First Nations and Tribal Councils were invited to this meeting. The following Intervener First Nations and Tribal Councils attended the September 20 Working Group meeting:

Intervener	Representative
ONA	Kathy Holland
Coldwater	Chief Harold Aljam
Esh-kn-am (Coldwater)	Brenda Aljam
Siska	Betsy Munro
Spuzzum	Cathy Speth , Band Manager
STC	Otis Jasper
Shxw'ow'hamel	Martin Edwards
Seabird Island	Brian Jones
Hwlitsum	Chief Roland Wilson
Hwlitsum	Fred Wilson
Hwlitsum	Alan Grove, Consultant
Lytton	Christine Brown, Lands Manager

Discussion at the meeting included the current status of the EAO process, project route and ROW requirements, ROW clearing and considerations, field study updates, and finalization of the draft Terms of Reference. First Nations noted the importance of consultation and accommodation of First Nations' interests. A copy of the most recent Project Description was handed out and hard copies of the materials were sent to all First Nations and Tribal Councils whether they attended or not (Exhibit B-3-1, p. 63 and Appendix DD).

5.2 Consultation Activities

5.2.1 Meetings

5.2.1.1 Round One Meetings (August - November 2006)

In August 2006, BC Hydro started to make contact (mostly by telephone) with its initial list of First Nations and Tribal Councils. Following these calls, it conducted introductory meetings with a number of First Nations to provide them with information about the ILM Project and the transmission reinforcement alternatives.

At these meetings BC Hydro presented a PowerPoint entitled “Interior - Lower Mainland Project First Nations Briefing - October 2006” to most of the First Nations, which set out four alternatives to meet the Lower Mainland’s growing electricity needs:

- Upgrade Existing Infrastructure (the UEC Alternative);
- Construct a new 500 kV transmission line between Nicola and Meridian substations (the 5L83 Alternative);
- Non-Wires options such as local generation, conservation and power imports; and
- Do-Nothing (which was indicated to be a non-viable option).

(Exhibit B-3-1, Appendix D)

Included in the presentation were:

- a map and photographs of the transmission corridor;
- information about the four options;
- a project timeline indicating a date for the BCTC decision on the preferred option of June 2007;
- a slide suggesting how First Nations could be involved.

(Exhibit B-3-1, p. 24 and Appendix D)

For the UEC option, BCTC listed the work that could be required as:

- improvements at several substations;
- new equipment between the substations;
- selectively raising existing towers; and
- replacing wires on one or more of the existing lines.

(Exhibit B-3-1, Appendix D)

For 5L83, BCTC noted:

- a ROW existed for 70 percent of corridor (some limited ROW widening would be required);
- new ROW that would be required for the balance of the proposed route on Crown Land; and
- a 500 kV series capacitor station, near the mid-point of corridor.

(Exhibit B-3-1, p. 24 and Appendix D)

A number of First Nations were also given a two-page brochure entitled “Electricity Supply Challenges Interior to the Lower Mainland” which listed the same four alternatives as the PowerPoint, presented Spring 2007 as the anticipated date of the Options Decision and contained the phrase “[b]efore making a decision on how to improve the transmission system, BC Hydro will consult with affected First Nations about all the options” (Exhibit B-3-1, Appendix E, p. 2).

5.2.1.2 Round Two Meetings (November 2006 – February 2007)

BCTC states that the purpose of its November 2006 to February 2007 second round of consultation was to encourage First Nations and Tribal Council participation in BCTC’s selection of the preferred transmission alternative (Exhibit B-3-1, p. 28).

BC Hydro's presentations in this period were made by way of a second PowerPoint entitled "Interior - Lower Mainland Project First Nations Briefing – November 2006." The presentation identified the same four alternatives as the October 2006 PowerPoint presented in the Round One Meetings, although notably, while the October presentation had a summary slide of all options and separate slides for each of the four options, the November 2006 presentation had only a summary slide and separate slides for the UEC and 5L83 options. The November 2006 presentation included much of the same information as the October 2006 presentation with the addition of slides describing:

- further details of the work required for UEC:
 - replacing and upgrading some equipment at several substations;
 - replacing some overhead lines;
 - selectively raising existing towers (3 to 8 m);
 - recontouring in some locations (.5 to 1 m);
- further details concerning 5L83:
 - existing ROWs cross First Nations' reserve land;
 - widening in a number of sections of the existing ROW (70kms) would be done on Crown land and some private parcels;
 - approximately 30km of new statutory ROW would be required all on Crown land;
 - approximately 70 percent of the new line could be located within existing ROWs;
 - a new capacitor station, near the mid-point of corridor would be required;
- regulatory processes requirements;
- the EAO process;
- that First Nations' preferred consultation and capacity funding would be considered; and
- the nine decision criteria the BCTC Executive Committee would use to decide on the Preferred Alternative in May 2007:
 - Transmission capacity;
 - Capital cost;
 - Transmission line losses;

- Reliability;
- Outcome of the Commission's review of BC Hydro's 2006 IEP/LTAP [Integrated Energy Plan/Long-term Acquisition Plan];
- First Nations' input;
- Public input;
- Social and environmental effects; and
- Transmission customer benefits.

(Exhibit B-3-1, Appendix M)

5.2.1.3 Rounds Three and Four Meetings (January – April 2007)

BCTC states that the purpose of the third and fourth rounds of meetings that took place between January and April 2007 was to continue to attempt to receive input on the UEC and 5L83 Alternatives, discuss capacity funding agreements, obtain initial input on the draft EAO Section 11 Procedural Order and on the draft Terms of Reference (for the 5L83 New Line Alternative), and discuss the participation of First Nations in requisite studies. BCTC and BC Hydro made a PowerPoint presentation dated January 2007 which was only slightly modified from that given in the Round Two meetings (Exhibit B-3-1, Appendix O).

5.2.1.4 Open Houses

BCTC states that in February and March 2007, it held a series of open houses in Merritt, Coquitlam, Hope, Kent, Maple Ridge and Mission for the general public to discuss and learn about the ILM Project which some First Nations people attended (Exhibit B-3-1, pp. 50-51).

5.2.2 Initial Capacity Funding

BCTC states that towards the end of November 2006, BC Hydro sent a letter to those whom it considered to be the most potentially affected First Nations and Tribal Councils offering initial capacity funding of \$10,000 to participate in:

- (i) consultation efforts on the ILM Project;
- (ii) the EAO terms of reference process; and
- (iii) review studies and to provide input on the ILM upgrade option.

(Exhibit B-3-1, Appendix H)

BC Hydro also attached a draft of a 9-page “more formal consultation and capacity funding agreement” intended to be discussed and entered into at a future time (Exhibit B-3-1, Appendix I).

None of the First Nations or Tribal Councils who received this letter took BC Hydro up on its offer of \$10,000 or entered into the draft Capacity Funding Agreement (Exhibit B-3-1, p. 30).

In February 2007 BC Hydro sent a number of First Nations and Tribal Councils another letter offering \$10,000 in initial capacity funding with an attached, revised 10-page draft Capacity Funding Agreement (Exhibit B-3-1, Appendix J). Again, none of the recipient First Nations accepted the \$10,000 offer or chose to enter into the Capacity Funding Agreement (Exhibit B-3-1, p. 31).

Given the lack of acceptance of the draft agreements, in March 2007, BC Hydro distributed simplified, or “less formal” one page letter agreements offering initial capacity funding of \$10,000.

The letter agreement states that the \$10,000 funds were to be used to:

- provide BC Hydro with “input either written or verbal on the two transmission reinforcement options prior to April 2, 2007”;
- participate in EAO activities;
- review Golder and Associates Ltd.’s (Golder) report; and
- meet as requested by either the First Nation or BC Hydro.

(Exhibit B-3-1, Appendix K)

BC Hydro received responses to the letter agreements and BCTC states that by the date of the Options Decision the following First Nations Interveners entered into the initial capacity funding agreements, usually in the amount of \$10,000.

First Nation / Tribal Council	Month (2007)	Intervening Group
Ashcroft	March	Coldwater <i>et al.</i>
Cheam	March	STC
Coldwater	March	Coldwater <i>et al.</i>
Kanaka Bar	March	NNTC
Kwaw-kwaw-a-pilt	March	STC
Kwikwetlem	May	none
Okanagan Indian Band	March	ONA/Upper Nicola
Seabird Island	March	STC
Shxw'ow'hamel	March	STC
Soowahlie	March	STC
Spuzzum	April	NNTC
Stó:lō Tribal Council	April	STC
Sumas	March	STC
Upper Nicola	March	ONA/Upper Nicola

(Exhibit A2-6, pp. 1-3; Exhibit B-20, Attachment E4)

As well, in March 2007, Hwlitsum received funding to reimburse it for attending the EAO Working Group meeting in February 2007 (Exhibit A2-6, p. 1).

Between June 2007 and August 2008, the following First Nations and Tribal Councils accepted Initial Capacity Funding, usually in the amount of \$10,000.

First Nation / Tribal Council	Month (2007)	Intervening Group
NNTC	December	NNTC
ONA	July	ONA

(Exhibit A2-6, pp. 1-3)

The following First Nations Interveners did not accept any Initial Capacity Funding before August 5, 2008:

- Siska, Boothroyd, Skuppah, Lytton, and Oregon Jack Creek Indian Bands.

5.2.3 Project Updates

BCTC provided all stakeholders, including the Section 11 Order First Nations, with five ILM Project Updates.

ILM Project Update No. 1 was distributed by BCTC in early April 2007. The one page document provided very general information about the ILM Project, and stated, in part:

BCTC wants to understand public perspectives before recommending a preferred alternative. BCTC is committed to developing mutually beneficial relationships with First Nations, stakeholders and the communities in which we operate...

In the coming weeks BCTC will be completing further studies and gathering additional input from First Nations and the public. All comments received and issues identified will be considered when BCTC makes a decision on a preferred alternative in May 2007. (Exhibit B-3-1, Appendix V)

ILM Project Update No. 2 was distributed on June 4, 2007. Project Update No. 2 presented BCTC's decision on the Preferred Alternative stating:

“after careful consideration of the alternatives, BCTC believes that it has selected the alternative that is the most effective and energy-efficient solution to increase the province's transmission capacity.”

and

“ultimately the BCUC has the final decision-making authority on whether to approve BCTC’s recommended solution and may choose an alternative solution or combination of solutions.”

The Update presented the public comment period for the draft EAO Terms of Reference, and the schedule of Open Houses for June 2007 (Exhibit B-3-1, Appendix Y).

Project Update No. 3 was distributed on August 20, 2007. It presented information on the BC Energy Plan, the regulatory review process, the status of the EAO process and the issues raised during the June Community Open Houses (Exhibit B-3-1, Appendix CC).

Project Update No. 4 was distributed on November 30, 2007 and informed the reader that the CPCN Application had been filed with the Commission on November 5, 2007. The Update provided information on how interested parties could participate in the Commission process (Exhibit B-3-1, Appendix EE).

Project Update No. 5 was distributed on February 25, 2008 and provided information on the Commission review of the Project including information on Community Input Sessions scheduled by the Commission in Merritt, Harrison Hot Springs, and Coquitlam (Exhibit B-3-1, Appendix FF).

5.2.4 Consultation Log

BCTC filed a copy of BC Hydro’s Consultation Log in confidence with the Commission. The Log was maintained by BC Hydro to record details of meetings, emails, phone calls and other correspondence between BC Hydro, BCTC and all the First Nations and Tribal Councils, including those not participating in the Proceeding. The Consultation Log, as it related to each First Nation participating in the Proceeding, was provided to that First Nation in advance of the Oral Hearing and was, in a number of cases, the subject of cross-examination.

Through cross-examination during the Oral Hearing, some log entries were revealed to be inaccurate, omitted or duplicated but BC Hydro submits “[t]he flaws revealed in the Consultation Logs during the hearing process are relatively minor and, when viewed in context, understandable” (BC Hydro Argument, p. 22).

The Commission Panel accepts BC Hydro’s submission on this point, and has relied on meeting notes or minutes as the primary source of evidence on interaction backed up by the Consultation Log and the narrative responses to BCUC IR 1.1.1. The Commission Panel considers that the minutes and Log represent the most contemporaneous record of meetings and discussions which took place and are therefore the best documentary evidence available to the Commission on consultation activities. In those instances where the Consultation Log is patently in error, the Commission Panel has ignored the entry.

This Decision cites the confidential Consultation Log only as it relates to First Nation Interveners.

5.3 Documents that Informed the Options Decision

BCTC states the ILM Project Manager based her May 4, 2007 recommendation to the BCTC Executive Committee for the selection of the Preferred Alternative on four main documents:

- Draft Heritage Overview Briefing Report Statement - Interior to Lower Mainland, by Golder Associates dated May 4, 2007 (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2);
- Interior to Lower Mainland Project First Nations Consultation Summary Report May 2006 to April 2007, by BC Hydro ARN dated April 2007 (Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2,);
- Environmental Briefing Report Interior To Lower Mainland (ILM) Transmission Reinforcement Project: Nicola To Meridian New Transmission Line Alternative, by Golder Associates dated April 26, 2007 (Exhibit B-10-2, Attachment 2 to Coldwater *et al.* 1.2); and
- Environmental Overview Assessment Upgrade to Existing Circuits Alternative Kelly Lake Substation to Lower Mainland, B.C., by Golder Associates dated April 27, 2007 (Exhibit B-10-3, Attachment 3 to Coldwater *et al.* 1.2).

The Project Manager also considered information obtained from her involvement in meetings and the consultation process with First Nations (Exhibit B-10, Coldwater *et al.* 1.2).

5.3.1 Draft Heritage Overview Briefing Report Statement

BCTC states that in February 2007, Golder began to prepare a Heritage Overview Assessment (HOA). An HOA is a study to identify archaeological, traditional use, historical and paleontological resources, to predict the significance of potential effects of projects on heritage resources and to identify measures to avoid, reduce or mitigate those effects (Exhibit B-3-1, p. 47).

Golder defines archaeological sites as those sites protected under the *BC Heritage Conservation Act* which include physical remains of human origin (such as lithic scatters - stone tools and fragments, food caches, dwelling sites, culturally modified trees, rock art, etc.) which predate 1846 AD. Golder defines traditional use sites as areas that were or continue to be used for activities such as hunting, food and medicine gathering, meeting places and spiritual sites. Golder states:

[o]f particular importance are areas that may be intensively used, or that are associated with particularly sensitive values such as burials, major village sites, sacred or spiritual sites, and transformer sites (*i.e.*, landscape features such as rocks, mountains, and water features that embody spiritual entities).
(Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 20)

Golder defines historic sites as those resulting from historic uses such as agriculture, forestry, habitation and recreation. Paleontological sites are areas that contain fossils. Both historic and paleontological sites do not necessarily pertain to Aboriginal use(s) of the land or to Aboriginal rights (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, pp. 19-21).

BCTC commissioned the report to help inform its decision between the 5L83 and UEC Alternatives (Exhibit B-3-1, p. 47). By the time of the May 2007 Options Decision, Golder had not completed the full HOA but submitted the Draft Heritage Overview Briefing Report Statement to BCTC as an interim HOA (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, Attachment 1, p. i).

To prepare the Draft Heritage Overview Briefing Report Statement, Golder compiled various sources of existing data, as well as specific traditional use and archaeological information from Cheam, Seabird Island, Upper Nicola, Spuzzum and the Stó:lō Nation (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 27).

Golder studied the complete proposed route alignment for 5L83 and, at the request of the Stó:lō Research and Resource Management Centre (SRRMC), also studied three line segments of the upgrade to existing line 5L41 which was a portion of the UEC alternative (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. i).

Golder interviewed elders from Upper Nicola Band and community members from Spuzzum at the First Nations' specific request (Exhibit B-11, BCUC 1.1.1, p. 102 and Exhibit B-12, BCUC 1.1.1, p. 135). Golder also engaged partners including the SRRMC and T'mixw Research (T'mixw) of the Nicola Tribal Association (NTA). SRRMC and T'mixw were retained to provide archaeological and traditional use data that were to be compiled from primarily existing sources. Golder received SRRMC's work on April 23, 2007, which included data on archaeological and traditional use sites for the Stó:lō territory. T'mixw had not provided the archaeological or traditional use information by the time Golder delivered its Draft Heritage Overview Briefing Report Statement (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 41).

In the report, Golder identified several key issues that could be challenging to address and could require major alterations to schedule, budget or planning. The key issues identified included:

- Human burial sites – eight within the proposed 5L83 corridor and two within the portion of the UEC corridor studied;
- Traditional use sites with cultural or spiritual values – 14 within the 5L83 corridor and three within the portion of UEC studied; and
- Potential alterations to the project schedule to accommodate ceremonial activities.

(Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. iii)

The report concluded:

[b]ased on available information at this early stage of the heritage overview process, Golder and its partners Stó:lō First Nation and the Nicola Tribal Association have not identified any archaeological, traditional use, historic and paleontological issues that may not be avoided or otherwise mitigated through the implementation of best management practices and other appropriate management activities. Most potential adverse effects can likely be managed through careful planning and design, implementation of appropriate Best Management Practices and construction criteria, and open and transparent communication and consultation with First Nations, the public, and other affected stakeholders. (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. ii).

Golder also included the caveats that the study was completed at an overview level and that its use of readily available information limited the study to the records available from government archives, databases and mapping sources, and information shared by First Nations and the public (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, Attachment 2, p. 41). Golder acknowledged its report had information gaps on traditional use and historic resource information due, in part, to some First Nations being unable or declining to participate in the study. Despite identified information gaps, Golder's conclusion was that the available traditional use information provided by the Stó:lō Nation and for the Fraser River Canyon was adequate for the purposes of the overview report (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, pp. 41-42).

Melissa Holland testified that at the time of the Options Decision, the report was interim. She stated:

M. HOLLAND: A: So at the time this report was written, it was not finalized, because we didn't have the rest of the data from T'mixw, and so we couldn't consider it a final report...We spent the rest of 2007 into 2008 trying to resolve with T'mixw and subsequently Esh-kn-am the completion of this report.

So at the time, I can agree it was an interim. We had substantial data and input from Sto:lo [R]esearch and [R]esource [M]anagement [C]entre, and the work done by Golder, and we had some gaps. (T9:1169)

Melissa Holland further testified:

M. HOLLAND: A: And so at this stage, yes, there are data gaps, but with the archeological [sic] overview assessment, which was a completed piece of work as part of this report, and with the traditional use information that we have been able to gather, and again we're in an area of a lot of overlapping traditional territories, we haven't identified anything that says, don't choose one option over another. (T9:1174-5)

Golder eventually completed the HOA for 5L83 in February 2008 (Exhibit B-3-1, Appendix JJ).

5.3.2 ILM-First Nations Consultation Summary Report

For the BCTC Project Manager's recommendation on a Preferred Alternative, BC Hydro ARN prepared a document entitled "ILM-First Nations Consultation Summary Report May 2006 to April 2007" which was a comparative analysis of the risks to the 5L83 and UEC alternatives presented by the asserted claims of First Nations.

The report's Executive Summary states in part:

For both potential alternatives the primary objectives of the consultation processes with First Nations to date have been to receive input from the First Nations on the proposed ILM projects and to ensure that the First Nations are provided with appropriate information to understand the nature of the proposed projects. It has also been important to ensure that the potential adverse and beneficial impacts on First Nations [sic] interests are clearly understood by BC Hydro and the First Nations. (Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, p. 1)

The ILM-First Nations Consultation Summary Report stated that a strength of claim analysis had been completed, and based on an assessment of preliminary impacts, the First Nations were ranked according to the level of consultation owed. The following table summarizes BC Hydro's preliminary assessment of the scope of consultation owed for the 5L83 option:

First Nation Bands	High⁹	Medium	Low	<i>De Minimis</i>	No Assessment	Total
Active Interveners	2	4	3	2	13	24
Interveners who Withdrew from the Reconsideration	1		2		4	7
Non-active Interveners			1		1	2
Non-Interveners	3	3	7	5	9	27
Section 11 Order First Nations	6	7	13	7	27	60

(Derived from Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, Appendix 3)

The report concluded that there was no obvious or material differentiation as to which of the two alternatives presented a higher level of risk, and that, for either alternative, BC Hydro was confident that consultation could be effectively carried out within the project timelines (Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, p. 5).

Kwikwetlem describes this report as a risk summary and submits that “this document cannot be described as an attempt to quantify the harm to First Nations; it is a simple attempt by BCTC to describe to their Board and Executive the degree of harm that First Nations present to BCTC and its plans” (Kwikwetlem Argument, para. 69).

5.3.2.1 Strength of Claim Assessments

BC Hydro prepared its preliminary strength of claim assessment for the First Nations and Tribal Councils affected by 5L83 and UEC for its ILM-First Nations Consultation Summary Report by reviewing readily available ethnographic and historic records on the use of the ILM area. It also had an outside legal assessment of the how the use of the area would support Aboriginal rights and title claims.

⁹ Includes assessments of high and medium-high.

For 5L83, BC Hydro stated “[d]epending upon the proximity of the new line option to the various Indian Reserves and extent of any localized impacts along the route option, the level of consultation will vary” (Exhibit B-10-4, Attachment 4 to Coldwater 1.2, p. 7).

BC Hydro assessed the level of impact by considering only the area of lands and clearing required and also looked at rights including hunting, gathering, grazing and fishing. The report stated, “[i]nformation regarding specific impacts such as environmental, archaeological, or impacts on traditional uses will be provided through future studies” (Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, p. 1).

The report combined the strength of claim and degree of negative impact assessments to determine a preliminary level or scope of consultation required for a number of affected First Nations and Tribal Councils for UEC and 5L83.

5.4 The Options Decision

On May 4, 2007 the BCTC Executive Committee accepted the recommendation of the ILM Project Management team to proceed with the full scope of Definition Phase activities for the New Line 5L83, and to file an application for a CPCN for the 5L83 Alternative with the Commission. On May 23, 2007, BCTC’s Board of Directors accepted the Executive Committee’s recommendation (Exhibit B-10-5, Attachment 5 to Coldwater *et al.* 1.2).

In its Briefing Paper to its Board of Directors, BCTC discussed why certain alternatives were less viable than 5L83. It described how early analysis screened out New Line 5L46 between Kelly Lake and Cheekeye and a New Line between Nicola and Ingledow, because the lines either had poorer performance or were similar in performance but were more costly than 5L83 (Exhibit B-10-6, Attachment 6 to Coldwater *et al.* 1.2, p. 4).

The Briefing Paper also noted that:

- Demand Side Management (DSM) and Coastal Generation were not considered viable because BC Hydro's 2006 IEP/LTAP filing already included aggressive goals for DSM, and included no plans for any significant coastal generating resources;
- the Do-Nothing alternative was considered unreasonable as it would fail to meet BCTC's mandate for reliable transmission service;
- a High Voltage Direct Current (HVDC) Line, would not be economic for a new line of approximately 240 km, that conversion of one of the existing 500 kV lines to HVDC would not provide the additional capacity required, and that conversion of two of the existing lines would be exceedingly expensive; and
- "[b]oth BC Hydro's [Network Integration Transmission Service] and amended LTAP applications result in a need to upgrade of the transfer capacity of the ILM system as soon as practical."

(Exhibit B-10-5, Attachment 5 to Coldwater *et al.* 1.2, pp. 3-5)

The Board's choice of the Preferred Alternative was communicated to all stakeholders, including affected First Nations and Tribal Councils, by a second Project Update dated June 4, 2007 (Exhibit B-3-1, Appendix Y) and form letters addressed to each First Nation dated June 6, 2007 (Exhibit B-3-1, Appendix W).

Both the letter and the Project Update contain almost identical wording:

...BCTC has decided that it will seek the necessary approvals to construct a new 500-kilovolt (kV) alternating current (AC) transmission line, mostly along existing right-of-way from the Nicola Substation near Merritt to the Meridian Substation in Coquitlam...

After careful consideration of the alternatives, BCTC believes that it has selected the alternative that is the most effective and energy-efficient solution...BCTC will be required to present its assessment of alternatives in its application to the British Columbia Utilities Commission (BCUC). Ultimately the BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution or combination of solutions.

(Exhibit B-3-1, Appendix Y, p. 1)

The letter also stated “please feel free to contact [BC Hydro] if you have any questions” (Exhibit B-3-1, Appendix W).

5.5 Consultation during the Period between the Options Decision and the Issuance of the CPCN by the Commission

This section describes the main First Nations consultation activities undertaken by BC Hydro and BCTC during the period from May 2007 to August 2008.

5.5.1 June 2007 Community Open Houses

BCTC states that in June 2007, it held Community Open Houses in Merritt, Kent, Coquitlam, Spuzzum and Mission which were attended by representatives from the STC, Seabird Island, and Spuzzum (Exhibit B-3-1, p. 56).

5.5.2 Capacity Funding

BCTC states that BC Hydro sent draft Comprehensive Capacity Funding Agreements (CCFAs) to those First Nations it believed would be most affected by the Project. The purpose of the CCFAs was to provide specific funding for the First Nation to participate in the EAO and other regulatory processes associated with the Project including the identification of any concerns and issues, and the preparation and delivery of reports, submissions, or comments on the Project.

BCTC states that in July, 2007 BC Hydro sent a draft CCFA to the following First Nations Interveners:

First Nation / Tribal Council	Intervening Group
Cheam	STC
Coldwater	Coldwater <i>et al.</i>
Cook's Ferry	Coldwater <i>et al.</i>
Nicola Tribal Association	NTA
NNTC	NNTC
Seabird Island	STC
Shxw'ow'hamel	STC
Siska	Coldwater <i>et al.</i>
Spuzzum	NNTC
Stó:lō Tribal Council	STC
Upper Nicola	Upper Nicola

(Exhibit B-3-1, p. 56)

BCTC states that the following First Nations Interveners were provided with a draft CCFA, but had not entered into a CCFA with BC Hydro as of August 5, 2008: Coldwater, Cooks Ferry, Siska, Spuzzum, Upper Nicola and NNTC (Exhibit B-3-1, p. 56).

5.5.3 Traditional Use Studies

BCTC states that on August 10, 2007 BC Hydro wrote to 49 (of the 60) First Nations and all six Tribal Councils requesting meetings to discuss the collection of traditional use information for the area that could potentially be affected by the ILM Project, and that a number of First Nations agreed to undertake a Traditional Use Study (TUS). For the most part these were commenced in 2007/2008 (Exhibit B-3-1, pp. 61-2).

BCTC does not state which of the Intervener First Nations and Tribal Councils entered into TUS arrangements. Throughout June 2008, Coldwater and BC Hydro continued to negotiate the terms and deliverables for a collective TUS agreement between BC Hydro and Coldwater, Cook's Ferry, Siska and Boston Bar (through Esh-kn-am, a research organization described in Section 8.5.1.5.6).

On July 15, 2008, BC Hydro provided Esh-kn-am with the final Terms of Reference for the TUS (Exhibit B-11, BCUC 1.1.1, p. 48).

Upper Nicola indicated that it did plan to complete a TUS but that it would not do this until after the discussions regarding past infringements had concluded (Exhibit B-11, BCUC 1.1.1, p. 117).

On June 4, 2008, SRRMC provided its report entitled “Initial Project Update/Preliminary Report.” The purpose of the report was to provide preliminary TUS results and recommendations; to provide a condensed set of information and results gathered and processed to date; and to present priority findings according to the severity of potential impact in need of mitigation/management actions (Exhibit B-13, BCUC 1.1.1, p. 248).

NNTC did not complete a TUS before August 5, 2008.

On January 29, 2009 Hwlitsum completed its TUS for the route alignment in its asserted traditional territory (Exhibit C1-11)¹⁰. This TUS was funded by BC Hydro.

5.5.4 Route Alignment Options

BCTC states that it consulted with a number of First Nations to determine a preferred route alignment to be submitted in the EAC Application, since, although 70 percent of the proposed ILM Project route was on existing ROW, a number of route alignment options existed in other areas and, in particular, three areas along the proposed route were identified in early 2008 as having alignment options.

¹⁰ The Hwlitsum filed as evidence a TUS (Exhibit C1-11) which was completed on January 29, 2009 which was well after August 5, 2008, the date the Commission Panel set for admissible evidence. The TUS was the subject of cross-examination as a “reference point to confirm a few basic facts or...some basic understanding about the Hwlitsum First Nation” (T15:2280). The Commission Panel has used basic facts from the TUS in this Decision for the same purpose.

BCTC states that the process to select the preferred alignment took place between March and July 2008 and was informed by First Nations' comments, as well as by environmental and engineering considerations. BCTC states that BC Hydro wrote to all Section 11 Order First Nations on March 4, 2008 regarding upcoming route alignment options activities, attaching maps illustrating the three identified areas.

BCTC states that it held two Open Houses on the route alignment options for the First Nations, the first in Merritt on March 25, 2008 and the second in Chilliwack on March 26, 2008 to which it invited all Section 11 Order First Nations, and that personnel from BC Hydro, BCTC and Golder attended to answer questions and provide information on the route alignment options.

In addition, BCTC states that it scheduled a series of meetings with First Nations directly affected by the route alignment options, at which a series of maps (and in some cases a Google Earth overview) were presented for review. Consultation on route alignment options took place with a number of ILM Project First Nations in their communities, including the following Interveners:

- STC and various member First Nations (April 23, 2008);
- Coldwater First Nation (April 28, 2008); and
- Spuzzum First Nation (June 5, 2008).

BCTC states that it received the following concerns and comments from the First Nations with whom it consulted:

- identification of areas where berries are gathered;
- concern about vegetation management practices;
- identification of an area with Culturally Modified Trees;
- identification of an historic trail;
- interest in reducing the overall footprint of the Project by using previously cleared areas and paralleling existing ROW;
- the need to avoid watercourses and fish bearing streams;

- concerns about slope stability and potential for erosion; and
- the need to limit access to areas by All-Terrain Vehicles and other recreational users.

BCTC states that it selected the preferred alignment for two of the three areas (in the upper and lower Fraser Canyon) after the consultation with the First Nations described above and communicated its decision by letter dated June 6, 2008 to the affected First Nations. BCTC states that in August 2008 it selected the third area, located within the Cascade Creek drainage, following completion of further engineering work and a geotechnical assessment (Exhibit B-3-1, pp. 64-7).

5.5.5 Archaeological Impact Assessment (AIA)

BCTC states that the archaeology fieldwork carried out for the archaeological component of the Heritage Overview Assessment included the participation of various First Nations groups, and that, under *Heritage Conservation Act (HCA)* Permit 2008-034, the AIA field work commenced in March 2008 and was coordinated with those First Nations groups that the BC Archaeology Branch identified as having traditional interests that encompass the ILM Project ROW. The following First Nations Interveners were provided with Golder's *HCA* Permit Application for review and comment:

- Boothroyd;
- Nooaitch;
- Cheam;
- Okanagan Indian Band;
- Coldwater;
- Stó:lō Nation;
- Upper Nicola; and
- NTA.

BCTC states that Golder contacted these First Nations in an attempt to secure their participation in the AIA field program within each of their traditional territories.

BCTC states that by August 2008, the AIA field program had been completed for the vast majority of the preferred transmission line right-of-way and potential capacitor station locations, with the exception of (i) ROW situated within the Upper Nicola territory where crews had been told by Upper Nicola not to carry out fieldwork and (ii) along the east and west shores of Pitt River where landowner issues precluded AIA field work (Exhibit B-3-1, pp. 68-9).

5.6 BCTC and BC Hydro's Views on Adequacy of Consultation

The Intervener First Nations and Tribal Councils' individual views on the adequacy of BC Hydro and BCTC's consultation are included in Section 8.0. Below are the views of BCTC and BC Hydro.

5.6.1 BCTC's View of the Process

BCTC states "BCTC and BC Hydro believe that the consultation process with respect to the ILM Project has been reasonable to the point of the Commission's decision" (BCTC Argument, para. 518). BCTC submits that many of the First Nation Intervener complaints:

- are not supported by evidence;
- arise from a different interpretation of *Haida Nation*;
- were not raised during consultation; and
- fail to acknowledge the staged decision making process BCTC was taking.

(BCTC Argument, paras. 520-521)

In response to a question from the Panel as to whether there had been sufficient consultation with First Nations in respect of the Options Decision, Ms. Holland replied for BCTC:

MS. HOLLAND: A: ...Yes. Otherwise I wouldn't have made the decision. And after we made the decision, made the announcement, we didn't hear anything. And to me, that confirms that it had been adequate. (T11: 1546)

5.6.2 BC Hydro's View of the Process

BC Hydro submits “that the evidence in this proceeding is adequate for the Commission...[t]o determine that the Crown’s duty to consult and accommodate First Nations had been met up to the date of the Commission’s decision” (BC Hydro Argument, p. 96).

In response to the Panel’s question, BC Hydro testified:

MR. ANDERSON: A: And from our standpoint, the process that we had followed leading up to the Options Decision was a very good process. It was early engagement, it looked to provide funding, lots of literature, lots of feedback -- or lots of input into here is what the decision is going to be, here is an explanation of what the project looks like, if there were any more -- if there were any desire to meet specifically about it, come and talk to us. Several indications to most of the First Nations, and certainly all of the key First Nations, that we want your input, please provide it in writing or verbally. For many of the First Nations, we got some feedback on the respective options, or how one of the particular options would impact them. We had a strength-of-claim analysis. We had some TUS information which, at that point in the project, is more than we would typically get. So all of that made us quite comfortable with -- given where we were in the spectrum of the project, that we had more than ample information, more than ample feedback from First Nations, and that we had given them a lot of opportunity, so that BCTC could adequately make that Options Decision. (T11:1546-47)

6.0 THE NATURE OF THE OPTIONS DECISION

To assess whether the duty to consult was fulfilled, the Commission Panel must consider the nature of the Options Decision, namely:

- whether the Options Decision resulted in the “die being cast”; and
- whether both consultation and accommodation had to be complete by the time of the Options Decision.

6.1 Was the Die Cast by the Options Decision?

The Court of Appeal stated:

[w]hen BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year...it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. (Kwikwetlem, para. 67)

BCTC submits that the May 2007 choice of the Preferred Alternative was not any form of definitive point of no return and that BCTC and BC Hydro continued to be open to further input from First Nations regarding the UEC alternative. BCTC asserts that if, subsequently, a “show-stopper” had come to light for the 5L83 Alternative, the May 2007 choice of the Preferred Alternative could have been revisited (BCTC Argument, para. 131). BCTC cites the testimony of its Project Manager on this issue:

MS. HOLLAND: A: We were willing to receive input from First Nations post the May [Options] Decision, and are still willing to receive information from First Nations, if there is something that could be identified that said, “This project can’t be built.” (T9:1222)

Coldwater *et al.* submit that “[l]ittle more was achieved in the process between the May 2007 decision and August 2008, when the Commission granted the CPCN...by then the die had already been cast” (Coldwater *et al.* Argument, para. 9).

Kwikwetlem submits that there was no further consideration by the BCTC Executive or Board and no further consultation with the Kwikwetlem or other First Nations on the UEC alternative, and that the CPCN application to the Commission in November 2007 was a direct result of the May 2007 decision. “There were no changes to the project or to the application between May 2007 and November 2007 at all, and certainly no changes that can be attributed to First Nations consultation” (Kwikwetlem Argument, para. 36).

Kwikwetlem submits that to the extent that consultation was continuing during the period from May 2007 to August 2008, such consultation was clearly no longer about a choice of options and that for First Nations, such as Kwikwetlem, whose primary desire was that the project not proceed in their territory, there was nothing left to discuss as the major impacts to their traditional territory from the existence of the new line, and infringements on Aboriginal title were “a given” (Kwikwetlem Argument, paras. 33-36).

BCTC reminds the Commission that the decision of the Board of Directors “approved additional Definition Phase funding and proceeding with a CPCN Application for the 5L83 Alternative” and repeats its assertion that it continued “to be willing to receive input from First Nations after that decision” (BCTC Reply, paras. 184, 188).

BC Hydro takes the position that the consultation program ought to be evaluated as a continuum—not a series of distinct, separate decisions, each of which acts as a separate trigger for the duty to consult. BC Hydro believes that the entirety of the consultation process from August 2006 to August 2008 should be the focus of the Commission’s assessment and that “it is not necessary or appropriate to attempt to sub-divide this process into a number of slices or subdivisions and to separately measure or assess the adequacy of consultation at one or more mid-stations or checkpoints along the way” (BC Hydro Argument, pp. 25, 29).

6.2 Did Consultation Have To Be Complete Before the Options Decision?

Kwikwetlem submits that the Court of Appeal's use of the past tense in describing the assessment of the duty of consultation, namely the use of the word "fulfilled" at paragraphs 13 and 65 and the use of the words "had been met" at paragraph 15 of *Kwikwetlem* make it clear the Court has directed the Commission to consider whether the duty of consultation and "substantive" accommodation had been met in respect of the strategic decision to proceed with the ILM option at the time of the Crown's [BCTC's] decision (Kwikwetlem Argument, para. 22).

Coldwater *et al.* submit that the decision was not merely about whether to go with the 5L83 option or the UEC option but rather, it was a decision about whether to do the project at all. Coldwater *et al.* state that as of May 2007, there were a number of options under consideration, including Do-Nothing and other Non-Wires options. Coldwater *et al.* assert that "it was at this point that the decision was made to proceed with the ILM project and it was at the time of this decision that the Crown was to have fulfilled its duties of consultation and accommodation in respect of that decision" (Coldwater *et al.* Argument, para. 171).

NNTC/ONA/Upper Nicola submit that May 2007 is a key decision date, as that is the point at which the Crown conduct at issue moved from the strategic alternatives assessment phase, to the project development and implementation phase. Only input received prior to May 2007 could have any potential to affect the strategic assessment process, and, by the same token, no discussions after May 2007 could have any effect on a decision that had already been made and was in the process of being implemented (NNTC/ONA/Upper Nicola Argument, para. 72).

BCTC points out that the Court directed the Commission to consider whether BCTC and BC Hydro's consultation efforts were adequate up to August 5, 2008, the date of the issuance of the CPCN, and submits that the direction requires the Commission to consider the adequacy of consultation on matters relevant to the CPCN decision but does not require the Commission to consider it as a

bifurcated process in which consultation must be fulfilled up to specific, discrete points in time as Coldwater *et al.* and Kwikwetlem suggest (BCTC Reply, para. 90).

Commission Determination

The Commission Panel accepts BCTC's Project Manager's testimony that BC Hydro remained "willing to receive input" after the Options Decision.

Project Update 2 and BC Hydro's June 6, 2007 letter advising of the Options Decision (see Sections 5.2.3 and 5.4) both state that final approval of the alternative will be made by the Commission. Specifically, the June 6, 2007 letter states:

BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or a combination of solutions. (Exhibit B-3-1, Appendix W)

This communication to the First Nations indicates that the final decision on the Preferred Alternative would be made by the Commission. The Commission made its Decision on August 5, 2008.

The Commission Panel therefore determines that the die was not necessarily cast by the May 2007 Options Decision of the BCTC Board of Directors because BCTC could have conceivably revisited the Options Decision had the existence of major adverse impacts which could not be avoided or mitigated come to light.

In addition, the Commission Panel agrees that the taking of the Options Decision was not an irrevocable step, but one that committed additional funding to proceed with the regulatory processes that New Line 5L83 would require.

As far as concerns whether consultation had to be completed by the date of the BCTC Board Decision, the Commission Panel considers that The Court of Appeal instructed it to determine whether the Crown's duty to consult had been met up to the date of the CPCN decision [consultation by the date of the Options Decision had to be adequate in respect of the choice of the Preferred Alternative but did not have to be complete for the ILM Project as a whole because the Project was not complete].

7.0 THE FIRST NATION INTERVENERS' COMPLAINTS ABOUT BC HYDRO'S CONSULTATION

The First Nations Interveners all stated in Argument that BC Hydro's consultation was inadequate. Since these Arguments relied on one another, there are shared or common complaints among two or more First Nation Interveners. This section examines the following reasons given by First Nation Interveners in support of their Arguments that BC Hydro's consultation efforts were inadequate:

- BCTC and BC Hydro did not consult on all seven options;
- there was no reconciliation;
- accommodation was not complete at the time of the CPCN decision;
- BCTC and BC Hydro had insufficient information on Aboriginal interests at the time of the Options Decision;
- the process was driven by BCTC's schedule;
- capacity funding was inadequate;
- BC Hydro refused to discuss revenue sharing; and
- BC Hydro's strength of claim assessments were flawed.
- The First Nation Interveners also submitted that BCTC and BC Hydro failed to consult on "Existing Assets" but later withdrew their reliance upon their submissions in this regard.

7.1 BCTC and BC Hydro Did Not Consult On All Seven Options

This section addresses whether BC Hydro and BCTC needed to have consulted on the seven Project alternatives set out in the CPCN Application for consultation to be deemed adequate.

In its November 2007 application for a CPCN, BCTC identified seven options that it had assessed:

Option	Description
Upgrade-Existing-Circuits (UEC)	Increase the thermal rating of the existing ILM transmission grid.
New Line – 5L83	Construct a new 500 kV transmission line between Nicola Substation and Meridian Substation. The approximate length of the circuit would be 246 km and, for most of the route, it would be parallel to the existing 5L82 circuit using existing right of way.
Non-Wires Options	<ul style="list-style-type: none"> • Coastal Generation in the Lower Mainland and Vancouver Island and limited dispatch of interior generation during heavy load hours. • Use of the Canadian Entitlement to the Columbia River Treaty. • Firm power imports. • Additional Demand Side Measures in the Lower Mainland and Vancouver Island.
Do-Nothing	Rely on the existing ILM grid.
New Line – 5L46	Construct a new 500 kV line between Kelly Lake Substation and Cheekeye Substation through the Pemberton Valley and Whistler corridor.
New Line – Nicola Substation to Ingledow Substation	Construct a new 500 kV line between Nicola Substation and Ingledow Substation either through the Abbotsford-Langley-Surrey corridor or by extending 5L83 from Coquitlam to Surrey.
High Voltage Direct Current (HVDC)	Construct a new HVDC line from Nicola Substation to Meridian Substation or convert one or both existing AC circuits to HVDC.

(Derived from ILM Original Proceeding, Exhibit B-1, pp. 79-80)

NNTC/ONA/Upper Nicola submit that the Court of Appeal “specifically concluded that consultation is required in relation to the Crown's strategic level assessment of the seven options identified in the CPCN application” (NNTC/ONA/Upper Nicola Argument, para. 70).

NNTC/ONA/Upper Nicola suggest that BC Hydro should have: (i) identified the full range of options; (ii) shared information concerning their respective merits and potential implications for NNTC, ONA and Upper Nicola; and iii) sought input in relation to that information. NNTC/ONA/Upper Nicola submit that “[h]aving never turned its mind to the proper focus of its consultation obligation, BC Hydro cannot be said to have discharged its obligation, whether in fact or in law” (NNTC/ONA/Upper Nicola Argument, para. 75).

BCTC acknowledges that the duty to consult is triggered when the Crown has knowledge of the potential existence of an Aboriginal right or title and contemplates conduct that could adversely affect it but submits that it never considered proceeding with all of the seven alternatives identified in the Original ILM CPCN Application. Rather, BCTC performed a screening analysis to determine which alternatives were not viable. BCTC submits that undertaking a screening analysis does not amount to contemplating conduct such as to trigger a duty to consult. BCTC submits that the only alternatives it contemplated that might have adversely affected asserted Aboriginal rights and title were the UEC and New Line 5L83 alternatives (either AC or HVDC). BCTC submits that it was not required to consult with First Nations on alternatives it was never contemplating (BCTC Reply, para. 308).

BCTC submits the NNTC/ONA/Upper Nicola’s view would require consultation on all alternatives, regardless of when these would be screened-out during an alternatives assessment process. BCTC submits that there is no justification to support this approach (BCTC Reply, para. 310).

BC Hydro also provided the “Electricity Supply Challenges” brochure to some First Nations in meetings held between August and October 2006 (Exhibit B-3-1, p. 27). The brochure listed four potential solutions: UEC; building a new line along an existing ROW from Merritt to Coquitlam (5L83); Non-Wires Options and Do-Nothing. The document states “[b]efore making a decision on how to improve the transmission system, BC Hydro will consult with affected First Nations about all of the options” (Exhibit B-3-1, Appendix E, p. 2). BC Hydro’s PowerPoints presented between October 2006 and February 2007 (see Sections 5.2.1.1 and 5.2.1.2) also listed four potential categories of options: UEC; 5L83; Non-Wires Options; and Do-Nothing.

Conversely, BC Hydro's testimony indicates that it focused its consultation on two options.

MR. HOWARD: Q: So is it fair to say with reference to these two [capacity funding] letters that in terms of what you were communicating in writing to First Nations, you were specifically seeking their consultation input on the UEC and 5L83 alternatives?

MR. ANDERSON: A: I think that's fair to say, yes. (T7:769)

BC Hydro's and BCTC's testimony also reveals that Coastal Generation and New Line 5L46 were known to be less viable than other options. Melissa Holland testified that she was told New Line 5L46 would not resolve the issue of the need to reinforce the grid (T7:803). Charles Littledale also testified that there was general discussion and acknowledgement in September of 2006 that there were challenges associated with the option of local [coastal] generation (T5:481-82). As well, BCTC testified:

MS. HOLLAND: A: Well, the do-nothing option exists because that's your benchmark...It stays on the slides and in the documents because it's a question and it's your baseline, if you will. (T7: 803-4)

Commission Determination

The Commission Panel agrees with the NNTC that the information presented by BC Hydro to First Nations as part of the consultation process differs from the information filed by BCTC with the Commission in its CPCN application, concerning alternatives which it considered.

However, for the consultation leading to the Options Decision, the Commission Panel finds BCTC was required to consult on options that were contemplated seriously. The Commission Panel agrees with BCTC that the performance of a screening analysis at an early stage in the definition process can, under most circumstances, relieve the Crown of the obligation to consult on an option that is found to be infeasible or inferior to other options.

The Commission Panel finds that New Line 5L46 between Kelly Lake and Cheekeye was screened out at an early stage and was not contemplated seriously enough to oblige the Crown to consult on that option. Regarding a new line between Nicola and Ingledow, the Commission Panel again finds there is no evidence that this option was ever contemplated by BCTC seriously enough to oblige the Crown to consult on it.

The Commission Panel finds that contemplation of the Do-Nothing and the various Non-Wires Options would not necessarily oblige the Crown to consult because these options may not involve any potential adverse impacts to the Section 11 Order First Nations' Aboriginal rights and title.

Despite the lack of potential adverse impacts, Do-Nothing and the Non-Wires Options were presented to the First Nations as options on which they would be consulted. The PowerPoint presentations and the "Electricity Supply Challenges" brochure included these options as possible solutions, although the October 2006 PowerPoint presentation eliminated Do-Nothing as a viable option. The Commission Panel therefore finds that meaningful and interactive consultation would oblige the Crown to explain why the Non-Wires Options were removed from consideration. Furthermore, the Commission Panel finds that this information should have been communicated in a transparent fashion to those First Nations with a medium or high scope of duty to consult. The evidence indicates that BC Hydro may have orally communicated this information to relatively few First Nations.

The Commission Panel accepts that BCTC/BC Hydro's consultation leading to the Options Decision focused on 5L83 and UEC. However, the evidence indicates that the reasons why BCTC's Board of Directors selected 5L83 over UEC were only explained to a small number of affected First Nations after the decision was made.

The Commission Panel therefore finds that BCTC/BC Hydro's consultation was inadequate for some of the First Nation Interveners due to BCTC/BC Hydro's failure to explain why the Non-Wires Options were removed from consideration, and for failing to adequately explain the reasons for selecting 5L83 over UEC.

BC Hydro is directed to address this deficiency in Section 10.

7.1.1 The HVDC Option

In 2007, BCTC retained DC Interconnect Inc. (DCI) to analyze the feasibility of the 5L83 HVDC option. The 71-page report was completed and submitted to BCTC in June 2007 (ILM Original Proceeding, Exhibit B-1, Appendix L).

NNTC/ONA/Upper Nicola take special issue with BCTC's consideration of an HVDC option for a new line and submit that at no time prior to May 2007 or at any point thereafter did BC Hydro provide them with any information concerning the HVDC option. NNTC/ONA/Upper Nicola further submit that BC Hydro did not mention HVDC in the PowerPoint presentations, or at any of the meetings between August 2006 and May 2007, did not mention or describe the HVDC options during the February 21, 2007 EAO Working Group meeting, did not disclose that a consultant was preparing an assessment of the HVDC option, did not identify the various alternatives available if HVDC was used, and did not at any time explain to Upper Nicola or ONA that various HVDC options under consideration could have quite different on-the-ground effects and, consequently, quite different potential impacts on the Upper Nicola and ONA (NNTC/ONA/Upper Nicola Argument, para. 53).

NNTC /ONA/ Upper Nicola note the options involving HVDC technology included (i) adding a new HVDC line to the ILM system, and (ii) replacing one or both the existing 5L81 and 5L82 lines with HVDC lines. They submit that BC Hydro was at all material times aware that the HVDC options under consideration would impact Okanagan and Nlaka'pamux Aboriginal rights and title, and that the HVDC options under consideration had different levels of potential impact on the Nlaka'pamux and the Okanagan Nation, both as between themselves and as compared to the 5L83 option (NNTC/ONA/Upper Nicola Argument, paras. 78-79).

NNTC/ONA/Upper Nicola submit that BC Hydro's failure (i) to give notice that the HVDC option was being considered, and (ii) to share any information regarding HVDC, is a "fatal deficiency in the options assessment consultation process" (NNTC/ONA/Upper Nicola Argument, para. 81). The Upper Nicola/ONA and NNTC assert that disclosure of the nature of the decision at issue and the sharing of relevant information is the minimum standard that applies to Crown conduct. They rely upon *Halfway River First Nation* at paragraph 160:

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action...(para. 160).

BCTC filed an initial project description for the ILM Project with the EAO on December 4, 2006. It indicated that an HVDC solution would follow the same Nicola to Meridian Substation path as a 500 kV AC solution and have a similar environmental footprint except for new large AC/DC converter stations at the existing Nicola and Meridian substations, which would require expansion of the existing property boundaries. The filing stated that, at that time, an HVDC solution was considered unlikely (Exhibit B-26, p. 3). BCTC admitted that this document, which was presented at an EAO working group meeting in February 2007, was the only mention BCTC made of the HVDC option to the First Nations (T7: 792-794, 811).

BC Hydro submits that the HVDC option that was being considered was the construction of a third line using HVDC technology (instead of alternating current technology). Due to BCTC's decision to use delta towers for most of the route for the 500 kV AC option, the HVDC option and the 500 kV AC option within the new line alternative would have had a similar footprint along the transmission line right of way (T7:783-83). BC Hydro's testimony indicates that it was aware that the HVDC option could potentially impact Aboriginal rights and title.

MR. ANDERSON: A: Yeah, I believe we certainly would have had an understanding that similar to the 5L83 project, [the HVDC option] would have the ability to impact rights and title of First Nations. (T9:774)

BCTC cites the testimony of Melissa Holland that the only HVDC option that it considered, although this was always considered to be unlikely, was adding a third line, and that BCTC never considered converting 5L81 and 5L82 to HVDC (BC Hydro Reply, p. 41 citing T7:817). Melissa Holland testified that from a system planning perspective, it was not possible to take those lines out of service (T7:817).

On the issue of the selection of alternatives and their feasibility, the following exchange took place between counsel for the ONA/Upper Nicola and Melissa Holland:

MR. HOWARD: Q: And again, none of that information that you just gave me, none of the assessment of what is and isn't viable, none of that was provided to Upper Nicola at all. Correct?

MS. HOLLAND: A: Where Upper Nicola asked questions about how the system works, I answered to the best of my layperson ability. I don't know whether I described for them the HVDC because I don't remember. I don't know whether I would have talked to them about taking 5L81 and 82 out of service. That is unlikely. In meetings that I was in with First Nations, I answered numerous questions on how the system works and why we needed sort of generally and reinforcement. I don't recall specifically what I said to Upper Nicola with respect to HVDC. (T7: 817-818)

Melissa Holland had earlier testified:

MS. HOLLAND: A: What we discussed with First Nations, and the information we took out, was about feasible alternatives...Our experience as a company, in looking at HVDC for VITR [Vancouver Island Transmission Reinforcement], we generally believed that HVDC was very unlikely to be a feasible technology for a transmission line of 250 kilometres. We knew that if we were going to make that case in front of the Utilities Commission for a CPCN application, for a new line alternative, that we were going to need a third party consultant to verify that. And that's -- in comes the engagement of DCI. And I believe in the Commission's decision in VITR, the utility is expected to screen at a high level feasible and non-feasible alternatives, and not to spend, you know, ongoing

efforts on those alternatives which are really infeasible. So at the time we're talking to First Nations, we're talking about a new line which would more than likely be AC. And we're talking about an upgrade to existing circuits. And you are correct, there wasn't information in writing provided on the HVDC alternative (T7: 794-795).

BC Hydro submits that the duty to consult does not require pursuit of alternatives that ignore societal interests, and that the HVDC new line alternative from Nicola to Meridian was not a cost-effective alternative to meet the Lower Mainland's anticipated energy shortage, being significantly more expensive with no material benefits (BC Hydro Reply, p. 39).

Commission Determination

The Commission Panel finds that the HVDC alternative, a new HVDC line from Nicola substation to Meridian substation, although not expressly presented as an option to First Nations for consideration, was also contemplated seriously enough to oblige the Crown to consult, given that BCTC retained an outside consultant (DCI) to specifically analyze the alternative and included it in its CPCN Application. The Commission Panel agrees with NNTC/ONA/Upper Nicola and finds that BCTC's consultation with the First Nations on the HVDC option was inadequate, for the following reasons:

- the only written source of information on HVDC technology was in the initial project description filed with the EAO ;
- no mention was made at meetings or in BC Hydro's presentations on the ILM Project to the First Nations that HVDC (because of the need for Converter Stations and the fact that no Capacitor Station would be required) could potentially have a different impact on Aboriginal rights and title than some of the AC options; and
- the reasons why the HVDC option was rejected by the BCTC Board of Directors were not explained.

BC Hydro is directed to address this deficiency in Section 10.

7.2 There Was No Reconciliation

This section addresses whether BC Hydro and BCTC had to achieve reconciliation for consultation to be deemed adequate.

SHAC and STC take the lead position, which was adopted by other First Nation Interveners, that BCTC and BC Hydro's consultation was inadequate, in part, because the consultation process did not achieve reconciliation of BCTC and BC Hydro's proposed conduct with asserted Aboriginal rights and title (SHAC Argument, paras. 10-12; STC Argument, para. 28).

BC Hydro disagrees with the position put forward by SHAC and STC. BC Hydro submits, in contrast, that consultation is part of reconciliation but that consultation is not inadequate simply because reconciliation has not been achieved (BC Hydro Reply, p. 43).

BCTC submits that the First Nations' position that consultation is about achieving reconciliation is inconsistent with the need to balance societal and Aboriginal interests; a need which is discussed in *Haida Nation* and that *Haida Nation* does not require the Crown to achieve full reconciliation through the duty to consult (BCTC Reply, paras. 31, 35).

Commission Determination

The Commission Panel agrees with BC Hydro and BCTC that consultation does not require reconciliation to be achieved to be found adequate.

The Commission Panel relies upon paragraph 10 of *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139:

Meaningful consultation may reveal a duty to accommodate aboriginal interests through an amendment to Crown policy or practice, in an attempt to resolve conflicting interests and move toward the ultimate goal of reconciliation. Where the aboriginal claim is strong and the potential adverse consequences of government action are significant to the claimed right or title, the honour of the

Crown may require accommodation to avoid irreparable harm or to minimize the infringement, pending final resolution of the claims. Inherent in this process is a need to reasonably balance aboriginal concerns over the potential impact of the decision with other societal interests (*Haida*, at paras. 47, 49-50). Responsiveness is a key requirement of both consultation and accommodation (*Taku*, at para. 25). [emphasis added]

In the Commission Panel's view, the reconciliation of Aboriginal rights with Crown sovereignty is the ultimate goal and the Commission Panel finds that while consultation moves towards that goal, there is no requirement that reconciliation be achieved before consultation can be determined to be adequate.

7.3 Accommodation Was Not Complete Prior to the CPCN Decision

This section addresses whether accommodation needed to be complete prior to either the Options Decision or the CPCN decision, for consultation to be deemed adequate.

BCTC and BC Hydro define accommodation as taking positive steps to avoid or minimize potential impacts on Aboriginal rights and title, which can take the form of avoidance, mitigation or other accommodation such as benefits agreements (Exhibit B-11, *Coldwater et al.* 1.8).

BCTC states that when evaluating alternatives, it did consider whether potential impacts could be avoided, mitigated or accommodated in other ways. BCTC concluded that both 5L83 and UEC would cause impacts but avoidance, mitigation or other accommodation were possible for both and that further consultation was necessary to fully understand the potential impacts of the Preferred Alternative and the options for accommodation (Exhibit B-11, *Coldwater et al.* 1.8).

Coldwater et al. cites paragraph 60 of *Kwikwetlem* which states that the First Nation appellants were "entitled to be consulted and accommodated with regard to the choice of the ILM Project by the BCTC." *Coldwater et al.* interpret this phrase to mean that consultation and accommodation in

respect of choice of the ILM Project must have been complete before the CPCN decision (Coldwater *et al.* Argument, para. 20).

BCTC submits that the court in *Kwikwetlem* did not expect consultation and accommodation to be complete before the CPCN decision. BCTC relies on the following quotations from *Kwikwetlem* in support of its submission: “[t]he Crown’s obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests” and “[i]f consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed” (*Kwikwetlem*, paras. 62 and 70, cited in BCTC Argument, para. 41).

Commission Determination

The Commission Panel notes paragraph 70 of *Kwikwetlem* which confirms that consultation continues from project definition to completion.

Accommodation addresses adverse impacts on asserted or established Aboriginal rights and/or title. In the Commission Panel’s view, accommodation cannot be expected to be complete until all impacts have been identified. At the points of the Options Decision and the CPCN decision, construction of the Project had not commenced, thus all impacts of the Project had not been identified. It follows that accommodation could not be complete without the Crown and First Nations having knowledge of all the Project’s potential adverse impacts on Aboriginal rights and title.

For these reasons, the Commission Panel does not agree with Coldwater *et al.*’s interpretation of the Court of Appeal’s statement that First Nations were “entitled to be consulted and accommodated with regards to the choice of the ILM Project by BCTC,” required BCTC to have completed the consultation and accommodation by August 5, 2008.

7.4 BCTC and BC Hydro Did Not Consult About Aboriginal Title

This section addresses the complaints of the Interveners, primarily Kwikwetlem and Coldwater *et al. that* BC Hydro and BCTC failed to consult about Aboriginal title and that consultation was therefore inadequate.

7.4.1 Kwikwetlem's Complaint

Kwikwetlem submits that “[a] fundamental flaw in the approach taken by BC Hydro and BCTC was that they appear to ignore the existence of potential aboriginal title, or pay mere lip service to it.”

Kwikwetlem points out that in the documents that informed the Options Decision “the absence of any reference to impacts upon aboriginal title is striking”, and that the focus is only on Indian Reserve lands, with no analysis at all of the impacts of crossing Aboriginal title land.

Kwikwetlem interprets BCTC and BC Hydro's actions to show a belief that “if there was no ‘proven’ Aboriginal title, there was no ‘veto’ and therefore Aboriginal title could be treated as if it did not exist...” and BC Hydro consequently only looked at Aboriginal rights such as hunting and fishing. (Kwikwetlem Argument, paras. 41-46).

Kwikwetlem submits that “[i]t is not legally correct to separate aboriginal title from aboriginal rights. The potential existence of aboriginal title is the primary reason why consultation and accommodation is required” (Kwikwetlem Argument, para. 50).

In particular, Kwikwetlem notes that the new transmission line will have serious impacts on Aboriginal title since it will:

- occupy a 25-51 m permanent ROW for 255 km (with an additional area required adjacent to the ROW for clearing trees);
- remove that land on a permanent basis; and

- involve clearing of land, most of which is presently wilderness.

Kwikwetlem submits that this “will be inconsistent with the use to which Aboriginal title lands could be put” (Kwikwetlem Argument, para. 45).

In summary, Kwikwetlem submits that “[t]he failure to assess or meaningfully discuss the loss of aboriginal title lands with First Nations (and to ‘demonstrate’ that they considered and integrated aboriginal title concerns into their decision making) should be fatal to the question of the adequacy of BCTC’s/BC Hydro’s consultation on the project” (Kwikwetlem Argument, para.51).

Kwikwetlem suggests that BC Hydro considered Aboriginal title as a matter that could be directed to the Province, and cites the testimony of Keith Anderson that it “is the Province’s mandate to deal with infringements of asserted rights and title” (T7:920). In the same vein, Charles Littledale, at a meeting with the NNTC, “acknowledged that historical issues of BC Hydro infrastructure on NNTC lands need to be worked on. BC Hydro needs the Province to be involved in title issues” (Exhibit B-20, Attachment B-2, p. 3).

BC Hydro rejects Kwikwetlem’s suggestion that it ignored Aboriginal title and submits that it was “keenly interested and aware of the existence of potential Aboriginal title (and other rights). The entirety of the consultation program was built around attempting to consult and accommodate First Nations as informed by the strength of claim and the seriousness of the potential adverse effect on such asserted rights, including title” (BC Hydro Reply, p. 34).

BC Hydro states that its submissions regarding the absence of Aboriginal veto did not indicate it was ignoring Aboriginal title but were reiterations of the direction given in *Haida Nation*:

[t]his 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 (*Haida Nation*, para. 48).

7.4.2 Coldwater *et al.*'s Complaint

Coldwater *et al.* submit that BCTC and BC Hydro's evidence concerned their efforts to identify localized impacts rather than aspects of Aboriginal title as defined in *Delgamuukw*, namely:

- an interest in land;
- an exclusive right of occupation;
- a right to choose how Aboriginal title lands will be used;
- a right to use Aboriginal title lands for any purpose (and not only traditional uses) that are not inconsistent with the First Nation's traditional attachment to the land; and
- an inescapable economic component.

(*Delgamuukw*, para. 166, cited in Coldwater *et al.* Argument, para. 154)

Coldwater *et al.* submit that these aspects of Aboriginal title should have been reconciled in the consultation process "because they go to the very question of whether the 5L83 line should be built" (Coldwater *et al.* Argument, paras. 153-6).

In summary Coldwater *et al.* submit that "[w]hile asserted aboriginal title does not give First Nations a veto over proposed Crown action (although a veto may arise once title is proved), there is still an obligation to seek reconciliation through consultation and accommodation in respect of these elements of aboriginal title. The Crown is required to weigh these aspects of title against its own proposed course of conduct and seek to reconcile the two interests. That process of reconciliation never occurred here" (Coldwater *et al.* Argument, para. 157).

BCTC submits that there is nothing in *Haida Nation* which suggests that the Crown must recognize title to satisfy its duty to consult. The duty to consult requires the Crown to recognize that there is a claim to title and to respond appropriately in the circumstances given the strength of that claim and the potential impacts (BCTC Reply, para. 269).

Commission Determination

The Commission Panel finds that BC Hydro’s use of the expression “rights and title” in its ILM-First Nations Consultation Summary Report indicates that BC Hydro considered both rights and title when it (i) assessed each First Nation’s strength of claim and (ii) considered the potential impact of its actions on those asserted rights and title when conducting its assessment of the scope and content of its duty to consult.

Accordingly the Commission Panel rejects the complaint of the First Nations Interveners that BCTC and BC Hydro ignored the existence of potential Aboriginal title and finds that BCTC and BC Hydro considered title, at least to some degree, in their pre-Options Decision consultation.

7.5 The Options Decision Was Made Before BCTC and BC Hydro Had Sufficient Information on First Nation Interests

This section addresses whether the level of information on First Nations’ interests BCTC and BC Hydro had at the time of the Options Decision was sufficient for consultation to be deemed adequate.

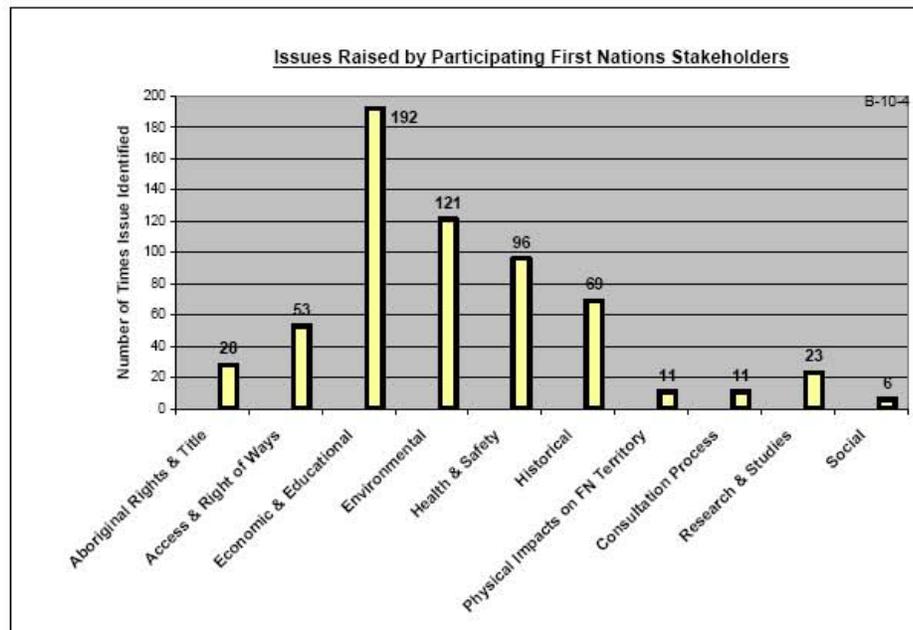
The Interveners contend consultation was inadequate because: (i) the Options Decision was made before BCTC and BC Hydro had sufficient knowledge of Aboriginal interests and impacts to Aboriginal rights and title; and (ii) no TUSs were completed before the Options Decision (Coldwater *et al.* Argument, paras. 5, 8).

7.5.1 BCTC and BC Hydro’s Knowledge of Aboriginal Interests and Potential Adverse Impacts

Section 5.3 describes the four documents BCTC’s Project Manager considered when recommending the Preferred Alternative to the BCTC Executive and Board of Directors. One of the four documents, BC Hydro ARN’s ILM-First Nations Consultation Summary Report (discussed in Section 5.3.3) states that in April 2007, at the preliminary stage of the ILM project, “the only impact

considered was the area of new lands/clearing required. Information regarding specific impacts such as environmental, archaeological or impacts on traditional uses will be provided through future studies” (Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, Executive Summary).

The ILM-First Nations Consultation Summary Report also contains the bar graph below, which aggregates the issues raised by the First Nations identified for consultation on UEC and 5L83:



(Source: Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, p. 4)

BC Hydro reports the most significant issues for some of the categories in the bar graph are:

- **Economic and Educational:** economic, training, and employment opportunities and issues;
- **Environmental:** vegetation management and pesticide and herbicide use in the ROWs
- **Health and Safety:** Electromagnetic Fields (EMFs);
- **Historical:** Includes a wide variety of concerns but generally involved resolution of the infringement of Existing Assets.

(Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, pp. 4-5)

Another of the documents, Golder's Draft Heritage Overview Briefing Report Statement (discussed in Section 5.3.2) identified known archaeological, traditional use, historic and paleontological issues for each segment of the proposed route for 5L83 and for two segments of the UEC option for existing line 5L41. For 5L83, Golder identified 33 areas of documented traditional use, including eight human burial sites and 14 traditional use sites which it described as "key issues that may be challenging to address." For the portion of the UEC project studied, Golder identified 19 areas of documented traditional use including two human burial sites and three cultural or spiritual traditional use sites which it described as key issues (Exhibit B-10-1, Attachment 1 to *Coldwater et al.* 1.2, pp. ii-iii, 47, and 50).

The minutes of the February 21, 2007 EAO meeting, which was focused on 5L83, indicate a member of BC Hydro Engineering showed video clips on construction of a new transmission line and gave an overview of ROW preparation and tower construction. Melissa Holland at this same meeting indicated the construction would take 4-5 years. A question and answer period followed the Project presentations by BCTC and BC Hydro where clearing and widening of the ROW, and changes to ground conditions on the existing ROW were discussed (Exhibit B-3-1, Appendix U).

In addition, the preliminary application to the EAO for 5L83 was filed by BCTC in December 2006 and contained in Appendix A: preliminary ROW requirements outlined by line segment; how much existing ROW would be used; how much new ROW would be required; and the amount in hectares of land to be cleared (Exhibit B-26, Appendix A).

Coldwater et al. submit that BCTC's Options Decision was:

- made long before First Nations were able to articulate their Aboriginal title claims and other Aboriginal interests;
- based on information that was not provided to the First Nations; and
- based on information, including the Draft Heritage Overview Briefing Report Statement, that contained critical gaps.

(*Coldwater et al.* Argument, para. 160)

BC Hydro submits:

First Nations have a duty to act in good faith which requires them to identify impacts and issues related to the proposed activity so that the Crown can take measures to avoid, mitigate, and where unable to do so, accommodate those impacts. This is a fundamental part of the consultation process.

The funding to T'mixw and Esh-kn-am [research organizations associated with Coldwater *et al.*] provided these organizations which were chose [sic] by Coldwater *et al.*, the capacity to do precisely this. These organizations supported Coldwater *et al.* by taking the information provided by the proponent, analysing it and assisting the bands in identifying impacts and issues related to the ILM Project. (BC Hydro Argument, Appendix 3, p. 15)

STC submits "that the process, however it might now be characterized, started far too late in the day, and did not advance to the stage of the First Nations putting forward their evidence of title (and other ancillary rights), and engaging in a discussion of the impacts of 5L83 on their title and rights..." (STC Argument, para. 12).

The Hwlitsum submit:

[a] fundamental flaw in the approach taken by BC Hydro and BCTC is to ignore the existence of potential aboriginal rights and title. That fundamental flaw was present at the date of the options decision in May 2007. It explains the lack of interest of BC Hydro in discussing or assessing aboriginal rights and title with First Nations prior to the option decision, and the lack of interest in funding traditional use studies or aboriginal title studies until after the option decision was made. (Hwlitsum Argument, p. 16)

Rather than identifying impacts to First Nations' interests or rights and titles, NNTC/ONA/Upper Nicola contend that BCTC focused on searching for showstoppers and submit that "[t]his is in essence what BC Hydro and BCTC were directing their minds to in the relevant time period - is there an immovable Aboriginal barrier to moving ahead with our project?"

NNTC/ONA/Upper Nicola submit that looking for Aboriginal showstoppers does not equate to consultation and that consultation is, in part, “about showing responsiveness to Aboriginal interests and being prepared to change a course of action based on Aboriginal input” (NNTC/ONA/Upper Nicola Argument, paras. 99-100).

Kwikwetlem describes BCTC’s practice [of focusing on showstoppers] as a ‘reverse onus’ placed on First Nations, which does not accord with the law. Kwikwetlem submits that First Nations, in the spring of 2007, without funding, did not have sufficient time for a technical and cultural review and were not able to produce sufficient evidence that BCTC would recognize as a showstopper (Kwikwetlem Argument, para. 59).

BCTC submits “if an Aboriginal group needs expert assistance to respond to a request for “showstoppers” in relation to its Aboriginal rights when the proposed location of the transmission line is, in large part, adjacent to existing lines, then, with respect, one has to wonder about the strength of claim or seriousness of the potential impact” (BCTC Reply, para. 288).

Melissa Holland testified:

MS. HOLLAND: A: ... I believe that the executive was, prior to May, well informed of the interests of First Nations and had the information they needed in front of them in May 4th to make a good decision (T6: 561-562).

Kwikwetlem contends that the BC Hydro ARN, in its ILM-First Nations Consultation Summary Report, used a simple statistical approach which aggregated all First Nations’ concerns and provided no analysis of the seriousness of impacts or any analysis of potential mitigation (Kwikwetlem Argument, para. 69).

Coldwater *et al.* argue that the concerns of their member First Nations were not given serious consideration when BCTC made the Options Decision. Coldwater *et al.* highlight BCTC’s testimony at T8:1216-17 that specific concerns of the Coldwater, Cook’s Ferry, Siska and Ashcroft Indian

Bands were not specifically drawn to the attention of the BCTC Executive Committee or the Board of Directors when making the Options Decision (Coldwater *et al.* Argument, para. 220).

BCTC submits that Coldwater *et al.* fail to recognize the staged decision-making process of the ILM Project or the influence of other societal considerations on this process. BCTC submits that “non-aboriginal considerations do not appear to play any role in Coldwater *et al.*’s analysis. The courts do not support this view of consultation” (BCTC Reply, para. 297).

BC Hydro testified that, as a result of the large number of First Nations and Tribal Councils involved in the initial consultation phase, addressing individual concerns created difficulties that BC Hydro resolved by aggregating the concerns in its report to the BCTC Board (T6:588). BCTC testified that BC Hydro’s ARN gave careful consideration to the input and the feedback it received from the First Nations and that its director, Lyle Viereck attended the Executive Committee meeting and that the Executive Committee gave “careful consideration” to his report (T6:559).

In response to a question on whether any changes had been made to the project as a result of First Nations input, BCTC testified:

MS. HOLLAND: A: The project, up until May, 2007, was, we need to reinforce the grid. The decision in May 2007 was, we need a new line to do that. I'm not sure what changes we would have made. We were trying to decide between two alternatives (T6: 573).

Both BC Hydro and BCTC testified that much of the input they received on the two options was that the First Nations affected by UEC preferred 5L83 and vice versa (T6:574, 588). Melissa Holland also testified “[s]o all of that input resulted in a conclusion that, from a First Nations’ perspective, either alternative was feasible” (T6:574).

In summary, BCTC stated:

[w]ith respect to First Nations input, BCTC’s conclusion was that it was clear that neither the UEC or 5L83 Alternatives would have broad First Nations support generally (although 5L83 could be designed to avoid crossing Indian Reserves).

When evaluating the project alternatives, BCTC did consider whether potential impacts could be avoided, mitigated or otherwise accommodated. BCTC's conclusion was that both alternatives would cause impacts but, for both alternatives, avoidance, mitigation or other accommodation was feasible. BCTC identified that in moving forward with one alternative (regardless of which one) further consultation would be required to more fully understand the potential impacts and options for avoidance, mitigation or other accommodation. (BCTC Argument, para. 124)

7.5.2 BCTC and BC Hydro Did Not Complete TUSs Before the Options Decision

Coldwater *et al.* submit that there was no TUS available to BC Hydro at any of the critical points before the CPCN Decision, including before the Options Decision, and "the absence of a TUS is a key flaw in the consultation process" (Coldwater *et al.* Argument, para. 158).

Coldwater *et al.* submit that a TUS is crucial to:

- identify Aboriginal interests in the area from a broad community perspective rather than just from the Chief and council level;
- to inform the strength of claim assessments; and
- to identify potential impacts of the Project.

(Coldwater *et al.* Argument, paras. 158-59, 173, 175)

Coldwater *et al.* testified that TUSs are needed to determine where Aboriginal rights are exercised and could be impacted (T14:2215-6).

STC submit in reference to studies: "meaningful consultation, involving a dialogue on title and rights claims and impacts, cannot begin until the parties have the requisite information in hand" (STC Argument, para. 134).

Kwikwetlem took the position that BC Hydro and BCTC needed to have a completed TUS prior to making the Options Decision (Exhibit B-3-1, Appendix G). In addition, Chief Walkem of Cook's Ferry raised the issue at a meeting on March 19, 2007, stating that a TUS would be important to show

Nlaka'pamux interests (Exhibit B-11, BCUC 1.1.1, p. 55).

BCTC testified that it understood a TUS was important to Cook's Ferry:

MR. KIRCHNER: Q: So you were aware that Chief Walkem thought a traditional use study was important at this stage.

MS. HOLLAND: A: I understood that traditional use was important, and that he said that if a study were undertaken that it would show past and current – both past and current importance of the area. (T9:1195)

BC Hydro testified:

MS. HOLLAND: A: ... we did not undertake broad-ranging traditional use studies with any First Nation on an individual basis prior to the May, 2007 decision because we did not think it was prudent to undertake traditional use studies at a detailed level with each individual First Nation prior to making a decision on which alternative to proceed with. (T5:390-91)

BC Hydro submits that the approach it took in funding TUSs after the Options Decision was both reasonable and appropriate given that the two options had the combined potential to affect numerous First Nations and Tribal Councils, and that funding TUSs for all those groups (a number of whom would need a TUS for each option), was unreasonable since one of the options would not proceed. BC Hydro submits that its approach of providing initial capacity funding allowed First Nations to provide input at a more general level on the options (BC Hydro Argument, Appendix 3, p. 8).

BCTC submits "that there is nothing in *Haida* to suggest a TUS is necessary for an Aboriginal claimant to know what its claims are, what the scope and nature of the Aboriginal rights asserted are, or what asserted rights may be affected by the Crown conduct" (BCTC Reply, para. 288). BCTC submits "First Nations must know or be able to easily learn where their members exercise rights and, with respect, they have an obligation to provide that information in the consultation process" (BCTC Reply, para. 289).

BCTC submitted that:

... none of Coldwater *et al.* [which include Cook's Ferry] took the position that a TUS had to take place prior to the May 2007 choice of the preferred alternative. To the contrary, BCTC and BC Hydro were engaged with T'mixw¹¹ in providing input into this decision through the draft HOA. Indeed, BCTC and BC Hydro subsequently agreed with Esh-kn-am, after the decision on the preferred alternative, to complete this work on behalf of Coldwater, Cook's Ferry and Siska. (BCTC Reply, para. 287)

Commission Determination

The First Nations complaints centre on the assertions that the Options and CPCN Decisions were taken before BCTC/BC Hydro had sufficient information on Aboriginal interests and potential adverse impacts; that Golder's report had gaps; that the information the proponent did have was not shared with the First Nations; and that no specific First Nations concerns were brought to the Board's attention.

Regarding the complaint that BCTC/BC Hydro did not have sufficient information on Aboriginal interests and potential adverse impacts, the Commission Panel determined in Section 4 that the Options Decision marked a stage in the consultation process where the information content had to change. Up to the selection of the Preferred Alternative, the information about the options and the adverse impacts associated with each option was general in nature, while after the Options Decision, the proponents became focused on completing the definition of the Preferred Alternative and, as a result, the information content became more specific and granular.

The Commission Panel finds that the information on Aboriginal interests and potential adverse impacts contained in Golder's Draft Heritage Overview Briefing Report Statement and the ILM-First Nations Consultation Summary Report addressed in general terms the potentially affected First Nations' interests and impacts to their rights and title, and the Commission Panel finds them sufficient for the BCTC Board of Directors to have made its choice of the Preferred Alternative.

¹¹ See Section 8.3 for a description of T'mixw Research and Esh-kn-am Cultural Resource Management.

Although the Golder Draft Heritage Overview Briefing Report Statement had gaps in information, the Commission Panel considers that the most significant reason for the gaps was that T'mixw had failed to deliver the information it had promised to Golder in time to be included in Golder's report (as discussed in Section 8.5.1.5.6). The Commission Panel finds that BCTC/BC Hydro contracted with T'mixw at the direction of the NTA, that BC Hydro advanced funds to T'mixw and that Golder made adequate attempts to obtain the information from T'mixw in time to be included in Golder's report, and that T'mixw never actually delivered any information to Golder. As a result the Commission Panel finds that the gaps in Golder's report that were caused by T'mixw's default should not cause BC Hydro's consultation to be considered inadequate.

Regarding the assertion that BCTC/BC Hydro did not share the information it had on adverse impacts with the First Nations, the duty to consult imposes upon the Crown:

...a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action...(Halfway River First Nation, para. 160).

At paragraph 64 of *Mikisew* the Court commented on the duty in that case as follows:

[t]he duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally

declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met. [paragraph 160 of *Halfway River First Nation* omitted].

The Commission Panel interprets the cited paragraphs to mean that BCTC and BC Hydro had a duty to provide, in a timely way, (as discussed in Section 4) information they had on the potential impacts of the options and to discuss with the First Nations any issues raised in response.

The Commission Panel finds that BC Hydro shared the high level impacts of the construction of 5L83 and of the required ROW clearing and acquisition with potentially affected First Nations at the February 2007 EAO Working Group meeting. BC Hydro also forwarded a copy of the binder of materials, which showed the required ROW clearing and new ROW acquisition, to those First Nations who did not attend the meeting. The Working Group meeting also provided an opportunity for First Nations to raise concerns in response to the impacts presented. The meeting was held and the binder was sent far enough in advance of the May 2007 meeting of the BCTC Board of Directors to allow First Nations enough time to raise concerns directly with BC Hydro before BCTC took the Options Decision.

Regarding the assertion that no specific First Nation's concerns were brought before the BCTC Board, the Commission Panel finds that the Options Decision was taken by BCTC's Board of Directors with First Nations interests and consultation as one of nine decision criteria the Board considered. In its choice of Preferred Alternative, BCTC's Board was required to balance societal and Aboriginal interests to make the best decision.

The evidence is that BCTC organized itself in a traditional corporate manner with a Board of Directors sitting over an Executive Committee which managed the business of the company by the establishment of an organization structure in which personnel were given responsibility for the day-to-day management of projects, subject to the oversight of the Executive Committee and the

Board of Directors. Thus the Commission Panel finds that the Board of Directors would be able to rely on its delegates to perform the necessary fieldwork and would not have to undertake the work itself. Accordingly the Commission Panel finds that BC Hydro's use of aggregated data and the Director of BC Hydro ARN's attendance at the Executive Committee meeting to summarize affected First Nations concerns, were appropriate and adequate to convey those concerns to the Board of Directors.

Regarding TUSs, the Commission Panel considers that it was not necessary for BC Hydro to have completed TUSs for all First Nations prior to making the Options Decision because it is not always practical or cost-effective to complete a TUS for options which may not be feasible or chosen as the Preferred Alternative. Similarly, regarding strength of claim assessments, the Commission Panel considers that a *prima facie* strength of claim assessment does not always require a TUS to inform it. The Commission Panel believes that preliminary information on traditional uses for strength of claim assessments can be gained from sources other than a TUS such as ethnographies, reference materials and experience from other projects.

Nonetheless, the Commission Panel recognizes the need for the Crown to be responsive to individual First Nations' concerns and requests during consultation. The Commission Panel is aware that Cook's Ferry raised the issue of a TUS prior to the Options Decision but finds that the evidence does not suggest that Cook's Ferry actually requested that one be undertaken prior to the Options Decision.

7.6 Initial Capacity Funding Was Inadequate

BC Hydro's process for providing initial capacity funding was described in Section 5.2.2. This section addresses whether BC Hydro's initial capacity funding offers caused consultation to be inadequate.

BCTC states that none of the First Nations who received the offer chose to enter into the Capacity Funding Agreement and that BC Hydro received very little feedback on the template, other than some First Nations indicating that the draft agreement appeared to be unduly formal for such an early stage in the consultation program, and Kwikwetlem informing BC Hydro that the template needed modification, as it was too long (Exhibit B-3-1, p. 31).

Kwikwetlem was particularly dismissive of BC Hydro's offers of \$10,000 in initial capacity funding characterizing the November and January offers as:

- completely inadequate for the magnitude of the tasks involved;
- a legal document with
 - i) potential implications for Aboriginal rights and title; and
 - ii) a potential waiver of rights to consultation and accommodation;
- lacking sincerity on BC Hydro's part and purely symbolic; and
- unilaterally determined by BC Hydro as to the amount offered, and not 'responsive' to First Nations' requests.

Kwikwetlem also criticized the new, simplified offer made in March 2007 as again being inadequate for the task to be undertaken, providing no time for any interactive process to occur, and again, purely symbolic (Kwikwetlem Argument, paras. 185-201).

Councillor George Chaffee of Kwikwetlem testified:

MR. CHAFFEE: A: Yes, sorry. Thank you. When the capacity agreement came in, you're right. It was brought to Chief and Council, and after looking at the documents and talking with them, it was agreed to that, number one, it was a very complex agreement. It was difficult for us. The advice of the council at that time was to seek legal advice on this. (T11:1645-6)

SHAC described the \$10,000 as "in no way sufficient" (SHAC Argument, para. 134), while STC observes that it was approached far too late in the day, and that consultation did not proceed to the point where any capacity provided could be utilized meaningfully (STC Argument, para. 126).

STC elaborates that “funding was not provided in sufficient time to allow it to be utilized for meaningful input into the options decision” and states it received its cheque on April 2, 2007 the same day as BCTC’s deadline for feedback on the Options Decision (STC Argument, paras. 117, 119; Exhibit B-20, Attachment E4).

Coldwater *et al.* submit that the First Nations were “ill equipped to deal with the very complex matters” concerning the transmission line and its impact on their territories and that \$10,000 in capacity funding was wholly inadequate to allow them to properly inform themselves about these complexities. Coldwater *et al.* questions whether a process can be interactive when one party is not in a position to properly understand the discussion, and submits that the fact that BC Hydro consistently refers to this as initial capacity funding is “an acknowledgment of its inadequacy to complete a consultation process” (Coldwater *et al.* Argument, para. 161).

BC Hydro submits that its use of the word “initial” does not prove that the consultation process was inadequate or incomplete but rather indicates the capacity funding offers were intended to provide immediate financial support until more comprehensive funding arrangements could be arranged (BC Hydro Reply, Appendix 1, para. 106).

BC Hydro testified:

MR. McDADE: Q: And capacity funding is certainly something you're very familiar with. Most First Nations need it in order to be able to comment on any major project.

MR. LITTLEDALE: A: I agree with that. (T4:289)

MR. McDADE: Q: So what did you tell them about capacity funding?

MR. LITTLEDALE: A: Actually it was, as I recall -- again, we're going back a couple of years now, but it was an item of discussion. The context was that B.C. Hydro understood that capacity funding would be needed to be provided to provide the resources to the First Nations, to provide input on the project alternatives at the time. And just to present to the First Nations that B.C. Hydro was prepared and we wanted to hear from them what sort of capacity funding that they would be needing.

MR. McDADE: Q: And most of the First Nations you talked to indicated they'd like capacity funding?

MR. LITTLEDALE: A: I was -- yeah, we got a positive response. (T4:297-8)

Commission Determination

The Commission Panel finds that the first two form letters sent out by BC Hydro were poorly drafted and, as a consequence, were not well understood by First Nations as shown by their lack of acceptance of the offers and Councillor Chaffee's testimony. The final offer (the one page letter agreement) was accepted by many First Nations Interveners but the funds were sent out for the most part in mid-March 2007, which gave First Nations around two weeks to respond to BCTC's April 2, 2007 deadline. For these reasons the Commission Panel finds that the initial capacity funding provided to First Nations did not in all instances allow First Nations adequate time to provide comments to inform the Options Decision.

In the Commission Panel's view, BC Hydro and BCTC should have taken action earlier to address the lack of acceptance of the first letter of November 2006, and in fact compounded the problem by sending out a virtual duplicate of the first letter in February 2007.

Despite this, the Commission Panel notes that the First Nations listed in Section 5.2.2 did sign the initial capacity funding offer and agreed to the five deliverables including providing "input either written or verbal on the two transmission reinforcement options prior to April 2, 2007," and that the evidence is at least one First Nation Intervener, Ashcroft, actually delivered in accordance with the terms of the agreement.

In addition the Commission Panel notes that in the period between the Options Decision and the issuance of the CPCN, BC Hydro and BCTC were able to continue with offers of comprehensive capacity funding and that these were executed by almost half the Section 11 Order First Nations and Tribal Councils, as described in Section 5.5.3 of this Decision. This suggests to the Commission

Panel that BC Hydro remained committed to providing the necessary capacity funding to potentially affected First Nations.

Accordingly, the Commission Panel finds, for the reasons above, that BC Hydro's initial capacity funding offers did not cause consultation to be inadequate prior to the Options Decision.

7.7 The Process Was Driven by BCTC's Schedule

This section addresses whether the BCTC's Project Schedule caused consultation to be inadequate.

Both Coldwater *et al.* and Kwikwetlem cite BCTC's testimony:

MS. HOLLAND: A: ... If you delay a project at the very beginning, you don't ever get that time back, and so if we delay the first milestone and we continue to delay each milestone after that, then you put your in-service date in jeopardy And I think the whole team was under a little bit of pressure to meet that milestone, but that's actually good for the team at the early outset, because then they know that milestones are real, and they don't slip. We made a decision, and then we moved on to the next step. (T11:1545-46)

They submit that BCTC's evidence demonstrates that it was far more concerned about its own schedule than it was with seriously considering First Nation interests and concerns (Coldwater *et al.* Argument, para. 202; Kwikwetlem Argument, para. 90).

At the February 15, 2007 meeting between BC Hydro/BCTC and NNTC, described Section 8.5.2.5.1, Raymond Phillips¹² is quoted as saying that he "did not think the NNTC could get organized in the EA process in such a short time, at least by May when the option decision needed to be made" (Exhibit B-20, Attachment B-2, p. 3).

¹² Raymond Phillips is a lawyer based in Lytton who acted as legal counsel to a number of NNTC and NTA First Nations including Coldwater, Siska, Cook's Ferry, Lytton, Nicomen, Shackan and Upper Nicola at various periods of time between approximately February 2007 and Spring 2008. Raymond Phillips is also a member of the Nlaka'pamux Nation.

Kwikwetlem further submits that “[o]n a project of this magnitude, a more reasonable timeline must be allowed” (Kwikwetlem Argument, para. 201).

STC submits that BCTC and BC Hydro did not ask First Nations if more time was needed or their timelines did not allow for that question to be asked (STC Argument, para. 121).

In response to a Commission Panel question whether BCTC ever considered postponing its recommendation for the Options Decision given the state of consultation immediately prior to the BCTC Executive Committee meeting, BC Hydro testified:

MR. ANDERSON: A: At that point in time we didn’t hear back from any First Nation that there was concern about the Options Decision, that they were looking for us to wait at all. As we’ve looked through our literature over the last little while, we asked for feedback I believe early April and the decision wasn’t happening until May and nowhere in that time frame did we hear back from anybody, that, “Look, we're really concerned, we want you to postpone this.” So, that, we didn't provide any feedback to BCTC that would -- to delay, because of what we were hearing from First Nations. (T11:1544-45)

BC Hydro submits that the First Nations were informed from the very beginning of consultation that the Options Decision would occur around May 2007, that the consultation process was started early and timelines were clearly communicated and that “[t]he evidentiary record is clear that no First Nation sought additional time to provide input prior to BCTC making the May 2007 selection of the preferred alternative” (BC Hydro Argument, pp. 58-59).

In response to the STC’s criticism of timelines, BCTC submits:

... it is STC’s responsibility to indicate whether they needed more time or not; the duty to consult is not one-sided. STC knew about the proposed May choice of the preferred alternative for a substantial period of time and not only did not ask for this date to be delayed but planned for it.
(BCTC Reply Argument, para. 238)

Commission Determination

The Commission Panel considers that an undertaking of the size and complexity of the ILM Reinforcement Project requires a project schedule that identifies the milestones on the critical path to a target in-service-date. The Commission Panel believes BCTC was prudent in establishing such a schedule, in communicating that schedule to all its stakeholders, including First Nations, and in seeking to maintain it.

The Commission Panel notes that at least one Intervener, NNTC, raised concerns about BCTC's timeline before the Options Decision but that its concern was couched around the EAO process timelines.

In addition, the Commission Panel notes that no First Nations Interveners expressly requested that BCTC's schedule be changed.

Although the Commission Panel finds that the schedule and BCTC's adherence to it put considerable time pressure on pre-Options Decision consultation, the Commission Panel, for the reasons above, finds that BCTC's Project Schedule did not cause the consultation to be inadequate.

7.8 BC Hydro Refused to Discuss Revenue Sharing

This section addresses whether BC Hydro's discussion of revenue sharing with First Nations caused consultation to be inadequate.

Revenue sharing was an important issue for many of the First Nation Interveners and was raised at a number of meetings with BC Hydro and BCTC prior to the CPCN Decision. These included:

- Upper Nicola - April 22, 2008 (Exhibit B-11, p. 115);

- NNTC - September 7 and 13, 2007, at one or both of which meetings representatives from Coldwater, Cook's Ferry, Siska, Oregon Jack Creek, Lytton, Boothroyd, Skuppah, Spuzzum, and Ashcroft were present (Exhibit B-12, p. 140; Exhibit B-20, Attachments B-3, B-4); and
- STC - April 2, May 23, and August 2, 2007 at the last of which representatives from Seabird Island, Cheam, and Sumas were present (Exhibit B-13, pp. 234-35, 237 and 240; Exhibit B-20, Attachment E-8)

In 2004 the provincial government issued its policy document on Government - First Nations relations entitled the "New Relationship" which stated "[w]e agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing ... and ... mutually acceptable arrangements for sharing benefits, including resource revenue sharing" (Exhibit A2-9, pp. 1, 3).

The Attorney General of BC submits that the New Relationship document is "neither a contract nor an attempt to redefine the Crown's legal obligations for consultation and accommodation as already established by the Supreme Court of Canada in *Haida*" but is a 'Statement of Vision' for improved government to government relations with First Nations, which proposes new processes and structures for working together on decisions regarding the use of land and resources and discusses the possibility of revenue-sharing (Attorney General Reply, paras. 6-7).

During meetings with First Nations, BC Hydro responded to any suggestion of revenue sharing by stating that neither it nor BCTC had a mandate to discuss revenue sharing and that this was a matter for the provincial government (Exhibit B-11, p. 4; Exhibit B-14, BCUC 1.2.1.1, Attachments 7a, 7b, 8 and 10).

Another response given to the issue of revenue sharing occurred at the September 13, 2007 meeting between BCTC/BC Hydro and the NNTC, (which was videotaped), where BCTC and BC Hydro addressed the issue of revenue sharing by stating that the New Line 5L83 would not generate revenues, as demonstrated by the following (videotaped) exchanges:

MR. ANDERSON: No, it's a cost recovery basis, right? So again, we charge out to everybody what our costs are, plus a return on equity.

MS. HOLLAND: There isn't revenue -- the transmission system doesn't generate revenue from Nicola along this transmission line, to Meridian along this transmission line. (Exhibit C5-25, Disc 3, 32:04)

FIRST NATIONS ATTENDEE: ... But then the electricity travelling down (inaudible) gets to the other side, it must be generating some revenue.

MR. ANDERSON: It generates electricity for people who pay their bill, and that bill is based on, again, adding up all the costs in the system. Now we've added a new line so there's a bit more cost, and that's it.

FIRST NATIONS ATTENDEE: So where do you -- if you are just generating costs, where do you generate revenue?

MR. ANDERSON: So like I said, we recover a return on equity, right? So that's -- so all of the costs, right? So you build up your tariff, all the costs get covered. Then you recover a return on equity, so that's the premium. So that's the incremental revenue portion, right? (Exhibit C5-25, Disc 3, 32:22)

Later BC Hydro made the following suggestion:

MR. ANDERSON: Yeah, I could bring a financial person out to talk to you about the model.

FIRST NATIONS ATTENDEE: Yes, please. That would be interesting because somewhere along the line revenue is being generated. (Exhibit C5-25, Disc 3, 35:38)

BC Hydro notes that several First Nations interveners referred in their Arguments to recent provincial initiatives and developments relating to revenue sharing initiatives in the forest and mining sectors. BC Hydro submits that these initiatives (i) are undertaken by the Province directly; and (ii) do not relate to the subject matter of the Application before the Commission. BC Hydro submits that the Commission has "no role in mandating such initiatives; nor are they a necessary precondition for the Commission to carry out its own statutory responsibilities" (BC Hydro Reply, p. 44).

Commission Determination

The Commission Panel notes BC Hydro's submission that the Commission has no role in this issue and the Attorney General's submission that the New Relationship document is a "political policy document" and not a contractual commitment of the Crown.

However, the Commission has been charged with the task of ascertaining if the consultation in respect of the Options Decision was adequate up to the point of its CPCN Decision, and whether the process was suitably interactive and addressed the concerns raised by the First Nations to uphold the honour of the Crown. Since one of the concerns raised by almost every First Nation Intervener was revenue sharing, the Commission Panel must consider the adequacy of BC Hydro's responses to the issue.

The Commission Panel finds that the statement of BC Hydro that "neither it nor BCTC had a mandate" does not constitute interactive consultation, and finds that BC Hydro as the Crown actor cannot be relieved of the Crown's obligation to engage in interactive consultation by denial of a mandate.

The Commission Panel has also considered BC Hydro and BCTC's response to the issue of revenue sharing given to the NNTC on September 13, 2007 and finds that it did not meaningfully address the First Nations' concerns or help First Nations to understand BC Hydro's policy on revenue or benefit sharing or ability to make other periodic payments. The Commission Panel considers that BC Hydro's offer to "bring a financial person out" may have constituted an adequate response but there is no evidence before it that the person was ever made available.

Accordingly, the Commission Panel finds that BC Hydro's consultation with respect to the issue of revenue sharing was inadequate in those instances where the issue was raised by First Nations' Interveners.

For clarity, nothing in this determination should be construed as directing BC Hydro to enter into revenue sharing agreements with First Nations Interveners. Such a determination would be beyond the scope of the Court of Appeal's Order to the Commission.

BC Hydro is directed to address this issue in Section 10.

7.9 BC Hydro's Strength of Claim Assessments Were Flawed

This section discusses the Interveners' common complaints about BC Hydro's strength of claim assessments, namely whether BC Hydro's consideration of overlapping and collective claims was flawed and whether a duty exists to share strength of claim assessments with First Nations. This section ultimately considers whether BC Hydro's strength of claim assessments caused consultation to be inadequate.

BC Hydro's ILM-First Nations Consultation Summary Report was based in part on a strength of claim report. The strength of claim report combined "an assessment of the readily available ethnographic and historic records to determine historic uses of the ILM corridor, with a legal assessment of how the use of the area would support a claim of Aboriginal rights and title. The rights considered including hunting, gathering, grazing and fishing. This report focused on the New Transmission Line alternative and did not directly review the Upgrade Existing Circuits alternative" (Exhibit B-10-4, Attachment 4 to *Coldwater et al.* 1.2, p. 5).

BC Hydro indicated, however, that it felt confident that past strength of claim reports would also provide information so that it would have a comprehensive understanding of the strength of claim for both alternatives (Exhibit B-10-4, Attachment 4 to *Coldwater et al.* 1.2, p. 5).

BC Hydro claimed privilege over the legal assessment so that document does not form part of the record of this Proceeding (T5:414).

7.9.1 Consideration of Overlapping and Collective Claims

BC Hydro lists the existence of overlapping claims as one factor that the courts have found to weaken claims to Aboriginal title (BC Hydro Argument, pp. 33-34).

Coldwater *et al.* submit that, prior to the CPCN decision, neither BC Hydro nor BCTC ever suggested to the Interveners that overlapping claims would affect their assessment of strength of claim and did not provide the opportunity for the First Nations to discuss the impact of overlaps. Coldwater *et al.* further submit that the Crown cannot consider overlapping claims to weaken one Aboriginal Nation's claim without discussing the assessment with the Aboriginal Nation (Coldwater *et al.* Argument, paras. 129-33).

BCTC submits that "a determination that one or more ... collective claims is a good or even strong *prima facie* claim of Aboriginal title to the area subject to the ILM Project will lead to the conclusion that other Intervening or non-Intervening First Nations do not have a good or a strong *prima facie* claim to those areas ... Until the Intervener First Nations resolve the many overlapping claims over the ILM Project area, or adduce compelling evidence that their claim to Aboriginal title is stronger than another First Nation's claim, BCTC submits that all collective claims to Aboriginal title are *prima facie* claims. They are arguable, but no stronger than arguable" (BCTC Reply, para. 209).

Coldwater *et al.* take the lead on the issue of collective claims and submit that Aboriginal rights and title are held collectively by an Aboriginal Nation, thus "[t]he aboriginal rights and title asserted by the Nlaka'pamux bands is based on collective aboriginal title of the Nlaka'pamux nation as a whole. It is not based on their status as Indian Bands." Further, they submit "[a]s a collective right, the strength of claim for one element of the Nlaka'pamux Nation cannot be stronger or weaker than the strength of claim for any other element of the Nlaka'pamux" (Coldwater *et al.* Argument, paras. 111, 118).

Coldwater *et al.* assert that strength of claim must be determined at a Nation level (the Nlaka'pamux Nation in their case) but also state that there is no central Nlaka'pamux governance authority and that each Band has its own government and must be consulted individually about impacts on Nlaka'pamux aboriginal rights and title (Exhibit C6-5, p. 2).

BC Hydro submits that this creates a dilemma and that Coldwater *et al.*'s answer to this dilemma is to "raise all individual bands to the highest level that could be claimed by any one of them individually." BC Hydro takes the position that this answer does not logically follow (BC Hydro Reply, pp. 15-16).

Coldwater *et al.* contend that the fact that different elements of the Nlaka'pamux Nation are represented by different political leadership does not change how Aboriginal title is held; it simply affects how the Crown must consult (Coldwater *et al.* Argument, para. 127).

BC Hydro submits that its approach did not indicate that it is the individual Bands that hold the Aboriginal rights and title. Rather, it submits that it assessed strengths of claim for the individual Bands if the Bands chose to consult individually.

BC Hydro continues:

Regardless of which entity holds rights and title, it does not follow that each individual band is similarly affected and/or entitled to the same scope and content of consultation. This view is consistent with the approach that was taken by these same bands during the consultation process. Multiple times during the consultation process, one member of the Nlaka'pamux Nation would refer BC Hydro to another Nlaka'pamux band on the basis that they could be more affected by the proposed ILM Project and that consultation efforts should be more focused on these bands...

BC Hydro believes that a more individualized approach to assessing the scope and content of the duty to consult with First Nations is appropriate for the purposes of the current proceeding. (BC Hydro Reply, pp. 16, 18)

BCTC submits that “[a]t no point did all fifteen members of the Nlaka’pamux Nation assert the proper rights and title holder for the member bands was the Nlaka’pamux Nation as a whole” (BCTC Reply, para 293).

Commission Determination

At paragraph 247 in *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.* 2005 BCSC 1712 (*Hupacasath*) the Court stated the following regarding overlapping claims:

I will first address the case regarding Crown land. I find that the [Hupacasath First Nation] has shown a strong *prima facie* case for aboriginal rights including title with respect to the portion of their asserted traditional territory on the Crown land which is not subject to any overlapping claims. I reach no conclusions on the strength of the competing claims by other First Nations, but take those claims into account in concluding that the HFN *prima facie* case for aboriginal title to the portion of Crown land subject to overlap is weaker than for the other portion. Regarding the portion of their asserted traditional territory on Crown land subject to overlapping claims, the petitioners have shown a good *prima facie* case for aboriginal rights to hunt, fish, gather food, harvest trees and visit sacred sites. Since those rights do not require exclusivity, the existence of the overlapping claims does not in general weaken the petitioners’ case.

In *Delgamuukw v. British Columbia* [1997] 3 S.C.R 1010, at paragraph 158, the Court stated the following with respect to joint title:

...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.

The Commission Panel relies on the statements in *Hupacasath* and *Delgamuukw* and concludes that overlapping claims must be considered on a case-by-case basis but cannot be seen to weaken strength of claim assessments in every case. The Commission Panel will therefore adopt this approach in its consideration of the First Nation Interveners' strength of claim assessments in Section 8.

Regarding collective claims, the Commission Panel notes that Aboriginal rights and title are communal and may be asserted collectively by an Aboriginal Nation but that in the consultation for the ILM Project, Bands represented themselves both individually and as part of Tribal Councils.

In this Proceeding, none of the Interveners that represented a number of Bands, with the exception of ONA, represented their entire Aboriginal Nation. In the case of ONA, Upper Nicola, its member with the highest strength of claim to the ILM Project area, chose to represent itself separately in consultation with BC Hydro but intervened together with the ONA. Of the other two Tribal Councils, NNTC represented six of the 15 Bands of the Nlaka'pamux Nation, another four members of the Nation appeared separately as Coldwater *et al.*, and the remaining five took little or no position in the Proceeding. Finally, STC and SHAC intervened separately representing 13 different members of the Stó:lō Nation, while the remaining members took no position in the Proceeding.

Therefore, given that BC Hydro had to consult with individual Bands or Tribal Councils representing a portion of the Bands of an Aboriginal Nation, the Commission Panel finds that BC Hydro's practice of making a strength of claim assessment for individual First Nations and Bands was reasonable.

7.9.2 BCTC and BC Hydro's Duty to Share Strength of Claim Assessments

BC Hydro testified that sharing strength of claim analysis and scope of duty to consult with First Nations was "problematic" and "an impediment to opening up fruitful conversations about the project" (T10:1483).

BC Hydro submits that there is no duty requiring the Crown to share its strength of claim and impact assessments with First Nations. BC Hydro contends that sharing a preliminary assessment, especially at an early stage, would not be helpful to the consultation process (BC Hydro Argument, p. 43).

BCTC adds that in the ILM Proceeding, no First Nation requested BC Hydro's strength of claim and impact assessments (BCTC Argument, paras. 65-66).

Coldwater *et al.* submit that there is generally a duty to share the strength of claim and impact assessment and at a minimum there is certainly a duty to share and discuss the evidence and information that underlies such an assessment. Coldwater *et al.* submit that discussing a strength of claim assessment is "part of the interactive and good faith nature of consultations which the Courts require. Consultation is a two-way street. If First Nations must provide information about their aboriginal rights and title interests (which would include information that is relevant to strength of claim), the Crown must do the same" (Coldwater *et al.* Argument, para. 97).

Coldwater *et al.* contend:

- it is not honourable for the Crown to withhold relevant information;
- sharing strength of claim information is a matter of procedural fairness because decisions on infringing Aboriginal rights and title will be made based on this information and it is only fair for First Nations to know the basis on which decisions will be made; and
- conducting an internal strength of claim assessment is not interactive and does not fulfill the Crown's positive obligation to hear from First Nations about their interests and concerns.

(Coldwater *et al.* Argument, paras. 97-100)

Coldwater *et al.*'s position is supported by all the First Nations Interveners.

BCOAPO submits that the question can only be answered on a case-by-case basis considering variables such as the content of the assessment, the course of the discussions and the use to which the assessments might be put (BCOAPO Argument, p. 22).

BC Hydro accepts that it has an obligation to provide First Nations with all “necessary information” in a timely way but it denies that this includes the overall assessment of the scope and content of the duty to consult (BC Hydro Reply, p. 23).

BC Hydro submits that the case law “makes it clear that it is information ‘about the project’ (*Mikisew*) and the potential effects of the project (*Halfway River*) that is meant by the term necessary information” (BC Hydro Reply, p. 24).

Commission Determination

The Commission Panel accepts BC Hydro’s testimony that sharing initial strength of claim assessments can be unproductive and accepts BC Hydro’s submissions that case law does not specifically require the Crown to disclose strength of claim assessments. The Commission Panel finds that the initial strength of claim assessments need not necessarily be disclosed at the outset of consultation and the fact that they were not disclosed prior to the Options Decision did not cause consultation to be inadequate.

The Commission Panel does agree that that consultation must include a sharing of relevant information between the parties engaged in consultation and that this could include the strength of claim assessments and scope of duty to consult, should a First Nation specifically request such information. There is no evidence before the Commission Panel that a First Nation Intervener specifically sought such information.

7.10 BCTC and BC Hydro Failed to Consult on Existing Assets¹³

The issue of whether BC Hydro ought to have included consultation on infringements resulting from Existing Assets was one of the major issues raised during the Proceeding.

First Nations Interveners expressed the view that Existing Assets Line 5L81 (which runs from the Nicola Substation to Ingledow Substation and was constructed in 1976) and Line 5L82 (which runs approximately 240 km from the Nicola Substation to Meridian Substation and was constructed in 1979) represent an “historical infringement” of their asserted rights and title. (Exhibit B-26, p. 4)

BC Hydro consistently took the position throughout the period from August 2006 to August 5, 2008 that it had no mandate to consult on or resolve concerns relating to Existing Assets other than as they related to current operational issues such as vegetation management and access and that, for any consultation on historical grievances, the government (at both the federal and provincial levels) needed to be involved.

7.10.1 Supreme Court of Canada Decision in *Carrier Sekani*

On October 28, 2010, the Supreme Court of Canada released its decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (*Carrier Sekani*).

Carrier Sekani was an appeal of a decision of this Commission, which had accepted an Energy Purchase Agreement (EPA) as between BC Hydro and Rio Tinto Alcan Inc., in circumstances where there was a pre-existing asset (the Kenney Dam) which was built by Alcan (now Rio Tinto Alcan) and authorized by the Crown in the absence of consultation. It was assumed that the construction of the dam infringed Aboriginal rights and title, in part by altering the flow of the Nechako River, which had been relied on by First Nations for fishing and sustenance since time immemorial. Critical to the Commission’s decision that no duty to consult was owed to First Nations was the fact

¹³ Existing assets in this context means existing transmission lines, stations, generating facilities and related assets such as ROW and access roads.

that the Commission Panel found the EPA would not result in any new adverse effects to First Nations.

The Supreme Court of Canada upheld the Commission's decision and in doing so, confirmed its decision in *Haida Nation* and provided some additional guidance around the Crown's duty to consult.

Of particular relevance to this Decision, in the Commission Panel's view, are the following paragraphs from *Carrier Sekani*:

An underlying or continuing breach, while remedial in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. (para. 48)

The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right....To trigger a fresh duty of consultation ...a contemplated Crown action must put current claims and rights in jeopardy. (para. 49)

[*Haida Nation*] confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue – not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration. (para. 53)

...the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. ...the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. (para. 83)

In the Commission Panel's view it is therefore clear that, in the context of the Crown's duty to consult, adverse impacts must be considered on a prospective basis as opposed to on a retrospective basis.

By letter dated November 15, 2010 the Commission Panel invited the parties to file written submissions "on the effect, if any, of *Carrier Sekani*, on their Final Arguments..." (Exhibit A-40).

In response, on November 19, 2010, all remaining First Nation Interveners advised that they were no longer seeking any determination or relief from the Commission on the issue of whether the scope of the Crown's duty to consult included consideration of existing transmission facilities. Coldwater *et al.* and NNTC/ONA/Upper Nicola also formally withdrew their reliance on specific paragraphs in their Final Arguments relating to the issue.

In response to the Commission's letter, BC Hydro¹⁴ confirmed its position that "[t]he subject of the consultation is the potential impacts on the claimed rights of the *current* decision under consideration" (BC Hydro Submission November 22, 2010, p. 4).

BC Hydro also submits that *Carrier Sekani* concludes that there is no obligation to consult on the impacts of Existing Assets themselves, regardless of whether there is a potential for new physical impacts as part of the ILM Project (BC Hydro Submission November 22, 2010, p. 5).

Coldwater *et al.* submits "[c]ontrary to BC Hydro's submissions, *Carrier Sekani* concludes that there is an obligation to consult on the impacts of existing assets when there is the potential for new physical impacts" (Coldwater *et al.* Submission December 6, 2010, para. 13). Coldwater further submits:

[t]here are new physical impacts associated with the ILM Project. Some of these involve Crown lands for which new land tenures are required and are thus, even on BC Hydro's view, within the scope of the Crown's consultation obligations.

¹⁴ On July 3, 2010, BCTC and BC Hydro merged pursuant to the *Clean Energy Act*. After July 3, 2010, BCTC no longer filed submissions and BC Hydro assumed BCTC's role in the proceeding.

Others are new physical impacts in areas where past infringements have occurred: additional land will be cleared and towers constructed within existing transmission corridors. It is clear from *Carrier Sekani* that these new impacts are also within the scope of the Crown's consultation obligations. (Coldwater *et al.* Submission December 6, 2010, para. 16)

Regarding the Commission's role, BC Hydro submits that the Commission should conclude that the Crown was not obligated "to consult with the Intervener First Nations in respect of the 'existing, ongoing and future' impacts of BC Hydro's existing facilities (BC Hydro Submission November 22, 2010, p. 9).

Coldwater *et al.* submit that *Carrier Sekani* at paragraphs 35, 55, 69, 73, and 75 confirms that the Crown was obligated to fulfill its duty to consult in respect of the Options Decision prior to making the decision. Coldwater *et al.* further submit that *Carrier Sekani* confirms that the duty to consult includes strategic, higher level decisions where there may not be physical impacts and that the Options Decision was the key strategic decision for the ILM Project (Coldwater *et al.* Submission, paras. 6-10).

In its reply submission, BC Hydro states:

... a duty only arises with respect to existing assets if there is some contemplated conduct which changes the impact of *those assets* on asserted First Nation rights. Even in this case, BC Hydro submits that the Court made it clear that the subject of consultation is the "impact on the claimed rights of the *current* decision under consideration" and this does not require consultation with respect 'historical infringements'. (BC Hydro Reply Submission, December 20, 2010, p. 6)

Commission Determination

The Commission Panel acknowledges the withdrawal of the First Nations' complaints that BC Hydro failed to consult on Existing Assets. However, the issue of past infringements influenced the overall consultation stance of several First Nations. For the purposes of this Proceeding, it became a negative influence that pervaded consultation discussions and ultimately led to a breakdown in

communication. The issue has now been resolved by the Supreme Court of Canada in *Carrier Sekani* such that the position on Existing Assets taken by First Nations in this Proceeding was found to be wrong in law.

The Commission Panel therefore finds that BCTC/BC Hydro were correct in taking the position that they were not required to consult on the issue of historical grievances arising from the construction of existing lines 5L81 and 5L82 and their continued existence, or on the existence of other, unrelated Existing Assets in First Nations' asserted territories, as part of the consultation for the ILM Project.

The Commission Panel agrees with BC Hydro that only new adverse impacts need be considered, whether or not they are related to an historical infringement. What is in issue is *current* government conduct which may adversely impact aboriginal claims or rights. In the Commission Panel's view, new adverse impacts from new conduct will not have the effect of re-activating past historical wrongs. Past grievances can be addressed in another forum.

In terms of application to the current proceedings, the Commission Panel finds that consultation for the 5L83 line needed to address any new, incremental adverse impacts on First Nations' asserted rights and/or title arising from the construction of the new line. Such consultation would necessarily include consultation on new, incremental adverse impacts arising from the Existing Assets as well as new adverse impacts which do not involve Existing Assets. For example, in the Commission Panel's view, BCTC/BC Hydro were required to consult on any new clearing of an existing ROW, as well as on new ROW to be acquired, as part of its consultation. The Commission Panel is also of the view that a consideration of past impacts is not necessarily beyond the scope of consultation, but would be relevant only to the extent that it may serve to inform the consultation on new, incremental adverse impacts.

8.0 CONSULTATION WITH SPECIFIC FIRST NATION INTERVENERS

This section considers the issue of collective claims and representation, the Intervening First Nations groups including their description and location, BC Hydro's determination of strength of claim and scope of duty to consult, the adverse impacts of the Project, and the interactions that took place with BC Hydro and BCTC up to August 5, 2008.

8.1 Issues in the Assessment of Consultation with Specific First Nation Interveners

8.1.1 Individual and Collective Representation

BC Hydro submits that the current Proceeding requires an individualized approach to First Nations consultation given the fact (as was demonstrated during the course of the Proceeding) that individual First Nations chose to arrange and re-arrange themselves in a variety of groupings and/or sub-groupings which continued to evolve and change during the course of the consultation process (BC Hydro Argument, pp. 39-40).

BC Hydro further submits that First Nations have both the discretion to determine and the responsibility to communicate if and how they wish to group themselves for consultation purposes. Such groups (formed for consultation purposes on a particular project and/or for other purposes) may or may not correspond to larger Nation groups. For example, BC Hydro suggests that while NNTC and Coldwater *et al.* appeared to generally agree on the existence and membership of the Nlaka'pamux Nation, they took a fundamentally different approach on how they wished to engage (individually as First Nations or collectively as a Tribal Council). BC Hydro points out that, for example, Ashcroft ceased membership in the NNTC, and Boston Bar First Nation (which continues to be a member of the NNTC) did not act in concert with the NNTC for the purpose of the Reconsideration Proceeding (BC Hydro Argument, pp. 39-40).

Commission Determination

Regarding representation in the face of collective claims, the Commission Panel relies upon the following paragraphs in *Nlaka'pamux Nation Tribal Council v. Griffin* 2009 BCSC 1275 which states:

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.

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 [counsel for Mr. Griffin] 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.

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. [emphasis added] (paras. 73-75)

The Commission Panel considers that BC Hydro faced a diversity of representation on behalf of the First Nations and that BC Hydro's approach to consult at the Band or Nation level, where so directed by the Band or Tribal Council, was appropriate for consultation.

8.1.2 Assessment of Strength of Claim and Scope of Duty to Consult

In this Proceeding, the Commission Panel must assess consultation that took place at both the individual Band level and, in three cases, the Tribal Council level. To do this, the Commission Panel must consider the interactions that took place having regard to the Band or Tribal Council's required scope of duty to consult. In a number of cases, the Commission Panel has had to determine for itself the scope of duty to consult, a task that proved complex given the representation of Bands both by their Band-level government and the Tribal Council government.

To make strength of claim determinations, the Commission Panel had limited information before it. By Order G-83-09, the Commission Panel determined it would consider evidence existing up to August 5, 2008 in this Proceeding. NNTC, STC, and Hwlitsum submitted reports that contain useful TUS and other information for assessing strength of claim as part of their evidence but all the reports are dated after August 5, 2008 and are therefore not admissible as evidence (Exhibit C-5-7-1; Exhibit C8-8-1, Confidential Exhibit A; Exhibit C1-11). The Hwlitsum's witnesses were cross-examined on a portion of their TUS and the Commission Panel has used facts from the transcript as basic facts on the Hwlitsum. NNTC and ONA/Upper Nicola also submitted previously published ethnographies that the Commission Panel has reviewed but finds the information to pertain mainly to the larger Nation group and rather than to the individual Bands.

Before the Commission Panel is BC Hydro's evidence of each Band's distance of main community (reserve) from the proposed alignment of 5L83 and information on ROW clearing and acquisition and access requirements.

Coldwater *et al.* criticize BC Hydro's approach to making strength of claim determinations by using the distance of reserves from the Project, submitting that this approach ignores the fact that Aboriginal rights and title are based on pre-contact practices and occupation which pre-date the establishment of Indian reserves (Coldwater *et al.* Argument, para. 123).

In this Proceeding, the Commission asked the Interveners:

[a]s of August 5, 2008, what further evidence, if any, did the [First Nation] have to support its asserted or proven Aboriginal rights and title? What further evidence, if any, did the [First Nation] have with respect to the potential adverse effects of the commencement of the ILM CPCN Project upon its asserted or proven Aboriginal rights and title? (Exhibit A-8)

None of the Interveners provided evidence of asserted rights and title. NNTC and ONA/Upper Nicola referred the Commission to BC Hydro's or its own general evidence of strength of claim in this Proceeding. NNTC, ONA/Upper Nicola and STC submit that since BC Hydro and the relevant Intervener do not contest the strength of claim assessment, the Commission does not need to make its own strength of claim determinations (Exhibit C5-9, BCUC 1.1; Exhibit C5-12, BCUC 1.1; Exhibit C8-11, BCUC 1.1). Coldwater *et al.* submit that an evaluation of the rights and title of each of the First Nations is outside the scope of this Proceeding (Exhibit C6-6, BCUC 1.1). Hwlitsum stated it provided preliminary information about its section 35 rights and the potential impacts of the ILM Project in the EAO process (Exhibit C-1-12, BCUC 1.1).

Commission Determination

In many instances, BC Hydro did not make an assessment of the scope of the duty to consult or the Intervener has asserted a level of consultation required that is different from that assessed by BC Hydro.

The Commission Panel has made a determination of strength of claim using the following methodology:

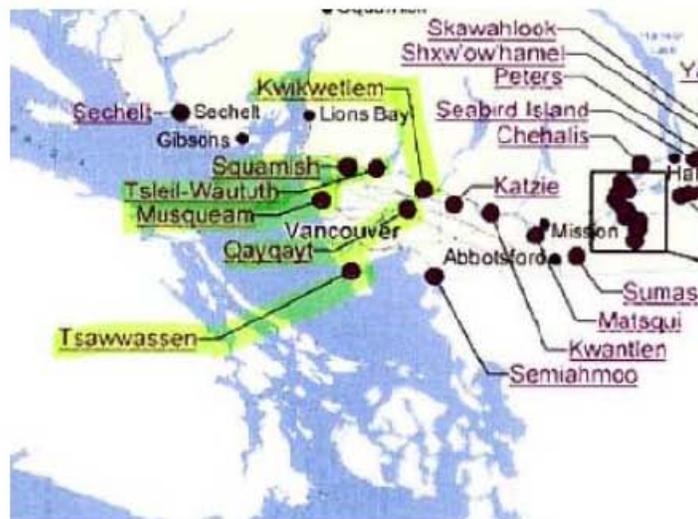
- where parties do not dispute BC Hydro's assessment of strength of claim, the Commission Panel accepts the assessment;
- where parties do dispute BC Hydro's assessment, or where BC Hydro did not make an assessment, the Commission Panel has reviewed the evidence before it to make a determination;

- for Tribal Councils, the Commission Panel considers that the scope of duty to consult the Tribal Council can be no higher than the highest level assessed for any of its member Bands. For Tribal Council assessments, the Commission Panel has elected to look at the specific circumstances of each Tribal Council and its member Bands as each Tribal Council had different delegated authority and consultation activities.

The majority of evidence before the Commission Panel on Bands' strengths of claim and potential adverse impacts is the distance of their respective main community or reserve from the proposed alignment and the impacts of ROW clearing and acquisition. The Commission Panel recognizes that distance from reserve and ROW impacts present less than a complete picture of Aboriginal use of the land, assertion of rights and potential impacts of the Project. However, the Commission Panel finds that the information is useful and reasonable, given the lack of other detailed evidence before it, to make a preliminary assessment of strength of claim to the ILM Project area.

8.2 Kwikwetlem First Nation

Kwikwetlem is an unaffiliated First Nation Intervener. A map showing the location of the Kwikwetlem (and surrounding communities) is set out below:



(Exhibit B-13, BCUC 1.3.1, p. 61)

Kwikwetlem's traditional territory includes the area of Nodes U to V of the 5L83 alignment (Exhibit B-13, BCUC 1.3.1, p. 62).

Kwikwetlem has 61 members, 31 of whom live on its main reserve community located approximately 9 km from the preferred alignment—to the south of the Meridian Substation. Kwikwetlem is not participating in the B.C. Treaty Commission process.

Kwikwetlem intervened in these Proceedings, filed evidence, cross examined the BCTC/BC Hydro panel, and filed Argument.

By letter dated May 20, 2010 (Exhibit C4-22) the Chief of the Kwikwetlem advised the Commission that Kwikwetlem supported the ILM Project and consented to the issuance of the Certificate of Public Convenience and Necessity and any other permits or authorizations to be issued by or on behalf of the Commission that pertained to the ILM Project.

Further, Kwikwetlem confirmed that it had been adequately consulted and accommodated with respect to any Aboriginal rights and title asserted by its members in respect of the ILM Project.

Accordingly, Kwikwetlem withdrew as an Intervener and withdrew its evidence and submissions in respect of its participation in the Commission Proceedings. The Commission advised all parties that Kwikwetlem's evidence and submissions remain on the record (Exhibit A-39).

8.3 Stó:lō Hydro Ad Hoc Committee

The Stó:lō Hydro Ad Hoc Committee (SHAC) is an “umbrella group” representing the following six Bands from the Stó:lō Aboriginal Nation for the purpose of the ILM Reconsideration Proceeding: Aitchelitz First Nation; Leq'á:mel First Nation; Skawahlook First Nation; Skowkale First Nation (a late addition to the group in 2008); Tzeachten First Nation; and Yakweawkwoose First Nation.

Below is a map showing the location of all 19 Stó:lō communities:



Source: Exhibit B-13, BCUC 1.3.1, p. 48

The core interest area of the Stó:lō Nation is in the area of 5L83 from Nodes H to S or T, excluding the area of Nodes P to Q (Exhibit B-13, BCUC 1.3.1, p. 49).

The six SHAC Bands have approximately 1,150 members (Exhibit B-3-1, Appendix B). SHAC filed evidence and a final submission but did not participate in the Oral Phase of the Hearing.

By letter dated November 24, 2010 (Exhibit C9-9), SHAC filed letters from the Chiefs of each of the SHAC member First Nations: Skawahlook; Skowkale; Aitchelitz; Leq'á:mel; Yakweakwioose; and Tzeachten where each stated that his/her First Nation supports the ILM Project and consents to the issuance of the CPCN and any other permits or authorizations to be issued by or on behalf of the Commission that pertain to the ILM Project.

The letters further state that each of the Chiefs confirms that his/her First Nation has been adequately consulted and accommodated in respect of the ILM Project.

Accordingly, each of the SHAC First Nations withdrew as an Intervener and withdrew its reliance upon its evidence and submissions in respect of the Commission Proceedings. The Commission advised all parties that the SHAC evidence and submissions remain on the record (Exhibit A-42).

8.4 The Okanagan Nation Alliance and the Upper Nicola Indian Band

8.4.1 Description and Location

8.4.1.1 Okanagan Nation Alliance

The Okanagan Nation Alliance (ONA) is a contemporary political organization representing the collective Aboriginal rights and title of the Okanagan Nation. Upper Nicola is a member of ONA, along with six other Okanagan Bands: Lower Similkameen, Okanagan, Osoyoos, Penticton, Upper Similkameen and Westbank. ONA's office is located in Westbank, BC. Approximately 5,200 Aboriginal people are members of the seven ONA Bands (Exhibit B-3-1, Appendix B).

ONA and the Upper Nicola registered jointly as Interveners and participated actively in the Proceedings. The Okanagan Indian Band registered as an interested party.

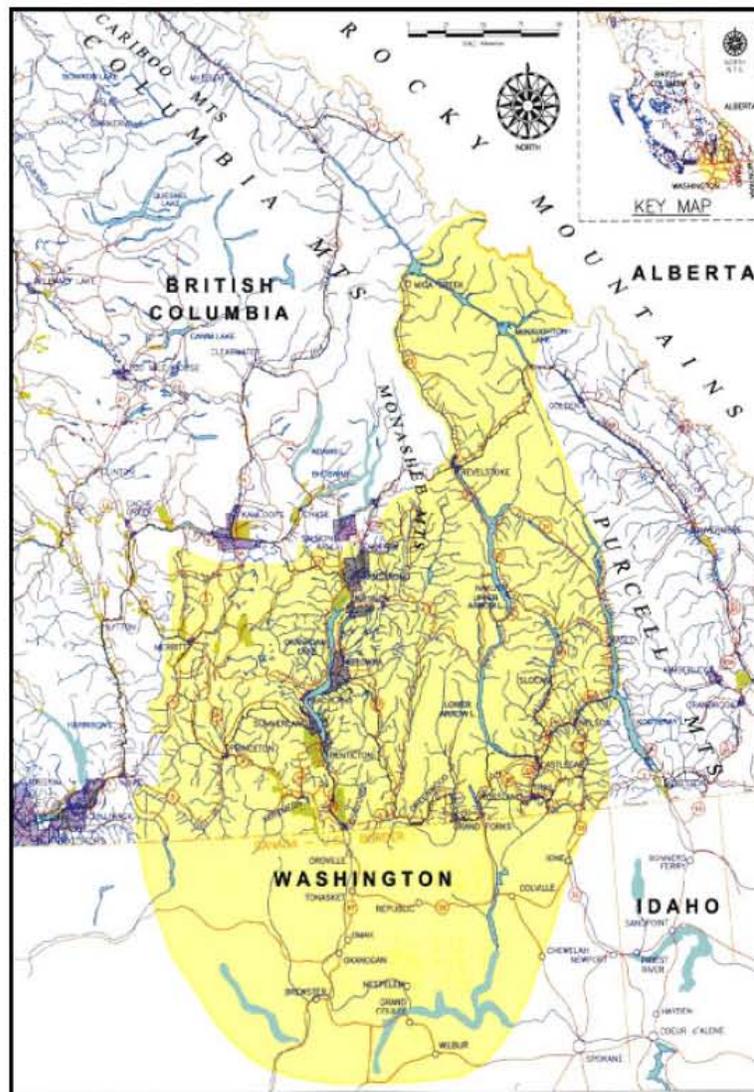
The map below shows the location of all the ONA members except Upper Nicola:



Source: Exhibit B-13, BCUC 1.3.1, p. 4

ONA states that the Okanagan Nation is an Aboriginal cultural, political and social entity that predates the onset of European colonization in British Columbia. Prior to and as of the date of assertion of Crown sovereignty in British Columbia, the Okanagan people used, occupied and stewarded Okanagan territory. The asserted traditional territory of the Okanagan people extends north to near Revelstoke, east to Kootenay Lake, south to the vicinity of Wilbur, Washington, and west to near the Nicola Valley. Okanagan Aboriginal title and rights have never been surrendered, extinguished or ceded through treaty or otherwise (Exhibit C-5-8-1, paras. 2-3).

ONA's asserted traditional territory is shown in the map below:



Source: Exhibit B-13, BCUC 1.3.1, p. 5

ONA's asserted traditional territory is over 69,000 sq. km in area and overlaps with the eastern segment of the proposed alignment of 5L83 corresponding with Nodes A to C. This area is subject to overlapping claims by the Nlaka'pamux Nation.

By Writ of Summons dated December 10, 2003, ONA and its member Bands (including the Upper Nicola) commenced an action in the Supreme Court of British Columbia seeking compensation and other relief from the Province of British Columbia and the Government of Canada. The Plaintiffs in the action allege, "[t]he defendants have unlawfully alienated lands and resources and authorized activities in the Territory by issuing licences, leases, permits, and other tenures..." (Exhibit B-20, Rebuttal Evidence C, Attachment C-9, p. 4).

BCTC states that it and BC Hydro decided to consider both collective and individual claims of Aboriginal rights and title in determining the consultation duty owed to ONA and its member First Nations for the following reasons:

- during the course of consultation on the ILM Project one member of ONA (Upper Nicola) chose to engage with BC Hydro both directly and with the support of ONA;
- during the course of consultation on other BC Hydro projects in the area, members of ONA, at times, chose to engage with BC Hydro directly and not through ONA; and
- the Westbank First Nation, a member Band of ONA, was at one time negotiating independently from ONA in the BC Treaty Commission process.

(Exhibit B-13, BCUC 1.3.1, p. 6)

8.4.1.2 Upper Nicola Indian Band

Upper Nicola is the closest ONA member to the proposed 5L83 alignment, with eight reserves in the vicinity of Nicola Lake and Douglas Lake, near Merritt, BC, west of the communities shown in the map above (Exhibit C5-8, p. 2). It is the only Okanagan Band in the Nicola watershed. Upper Nicola's main community is about 4 km from Node A (Nicola Substation) while it has another reserve about 2 km from Node A (Exhibit B-13, BCUC 1.3.1, pp. 6, 11).

ONA/Upper Nicola state that “[m]embers of Upper Nicola possess, and have a responsibility to protect, the Aboriginal title and rights held collectively by the Okanagan Nation in relation to Okanagan traditional territory” (Exhibit C5-8-1, p. 2).

BCTC’s evidence is that the Upper Nicola is also a member of the Nicola Tribal Association (NTA) but frequently asserts rights independently of ONA and NTA, as in this case where it participated as a separate entity (Exhibit B-13, BCUC 1.3.1, p. 12).

8.4.2 Strength of Claim Assessment

BC Hydro’s preliminary assessment of strength of claim for the ONA First Nations was:

First Nations	Preliminary Strength of Claim	
	5L83	UEC
Upper Nicola	High	Not included in assessment
ONA: Okanagan Indian Band Upper Similkameen Lower Similkameen Westbank First Nation Penticton Osoyoos	No assessment	

(Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, Appendix 3)

BC Hydro made no preliminary assessment of the strength of claim for the Penticton, Westbank, Osoyoos or Lower Similkameen Indian Bands because it considered that the ILM Project had no potential to impact them. BCTC states that this was consistent with ONA’s explanation at a September 1, 2006 meeting, that Upper Nicola and the Okanagan Indian Band were the only Okanagan First Nations with the potential to be affected by the ILM Project. (BC Hydro did make a preliminary assessment of the scope of duty to consult the Okanagan Indian Band). BCTC states

that BC Hydro believes that any contribution that these communities may make to the strength of ONA's collective claim appears to be minimal (Exhibit B-13, BCUC 1.3.1, p. 13).

The following table shows the ONA member Band's, excluding Upper Nicola, distances from the proposed line:

First Nations	Distance from Proposed 5L83 Route (km)	
	Main Community	Closest Reserve
Okanagan Indian Band	67	67
Upper Similkameen	79	43
Lower Similkameen	124	90
Westbank First Nation	66	66
Penticton	77	77
Osoyoos	119	119

(Exhibit B-3-1, Appendix B)

BCTC takes the position that the collective claim of ONA is strengthened by the extent to which the Upper Nicola asserts its claims as part of ONA and weakened by the extent to which the Upper Nicola asserts independent claims (Exhibit B-13, BCUC 1.3.1, p. 12).

NNTC/ONA/Upper Nicola accept BC Hydro's strength of claim assessment for Upper Nicola as high (NNTC/ONA/Upper Nicola Argument, para. 66).

8.4.3 Potential Adverse Impacts

ONA's asserted traditional territory includes segments of the proposed 5L83 line from Nodes A to C. The line segment from Nodes A to B passes immediately adjacent to the Hamilton Creek Indian Reserve of the Upper Nicola (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 11). Node A is the Nicola Substation.

BCTC states that BC Hydro owns the 41.96 acre land parcel that contains the Nicola Substation (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 11) and that the modifications at the Nicola Substation associated with the new line will be installed and constructed within the existing substation property and fence line (Exhibit B-3-1, p. 85).

BCTC testified that the HVDC option would have required it to construct a converter station that could not have been contained within the existing substation and would have required more land at Node A (T7:813), and that the land around the Nicola Substation is owned privately (T7:867).

As has been discussed earlier, at the time of its initial assessment of the scope of the duty to consult owed to First Nations, the only impact considered by BC Hydro was the area of new lands/clearing required (Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, Executive Summary).

The Draft Heritage Overview Briefing Report Statement prepared by Golder identified known archaeological, traditional use, historic and paleontological issues and risks for every segment of the line (see Section 5.3.2).

For Nodes A to C, Golder summarized the land/clearing required and the known archaeological and traditional use issues at a preliminary level¹⁵:

¹⁵ Historic and paleontological issues are omitted from this summary as they do not typically pertain to Aboriginal use(s) of an area (See Section 5.3.2). Golder states “the findings of this preliminary overview are neither comprehensive nor complete” (Exhibit B-10-1, Coldwater *et al.* 1.2, Attachment 1, p. 49).

Node	Land/Clearing Required, Access, Type of Land, Archaeological and Traditional Use Sites
A-B – 50 km	<ul style="list-style-type: none"> • 1.8 km of ROW widening by 30 m (1 hectare) • Access entirely from existing 5L81/82 ROW • Crown and private land, including ranches in the Agricultural Land Reserve • 2 archaeological sites, 5 traditional use sites including 1 burial site
B-C – 19.4 km	<ul style="list-style-type: none"> • 6.5 km new ROW, 50 m wide • 4.4 km ROW widening by 36 m • New access required along new ROW • Entirely Crown land

(Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 11; Appendix III)

BC Hydro assessed the overall potential adverse impacts of 5L83 on the Upper Nicola's asserted Aboriginal rights as moderate. BC Hydro based its assessment on the fact that the preferred alignment would require clearing of 7.1 hectares of land between Nodes A and B and 69.7 hectares between Nodes B and C and that the preferred alignment would require new right of way between Nodes B and C (Exhibit B-13, BCUC 1.3.1, p. 11).

BC Hydro did not provide a discussion of the impacts of 5L83 on ONA separate from the Upper Nicola.

ONA/Upper Nicola stated that as of August 5, 2008 BC Hydro had not identified and communicated any specific impacts to Okanagan Aboriginal rights and title from the ILM Project (Exhibit C5-12, BCUC 2.1).

ONA/Upper Nicola state that in response to requests regarding concerns, they identified the following potential adverse impacts and concerns regarding the installation of new transmission facilities:

- disruption of wildlife habitat relied upon by Okanagan members for hunting;
- displacement of Okanagan peoples from areas used and relied upon for hunting, fishing, gathering of food and medicinal plants, and spiritual practices;
- potential increased non-Aboriginal access to areas relied upon by Okanagan for the foregoing practices;
- risks associated with exposure to EMF;
- introduction of or increase in invasive plant species;
- potential risks to Okanagan people and the Nicola river and related waterways from any accidents or malfunctioning at the Nicola substation, which is in close proximity to the Upper Nicola community of Quilchena;
- infringement to Okanagan Aboriginal title, which includes ownership of the lands and resources subject to title and the right to determine how those lands and resources will be used, and to benefit from the use of those lands and resources; and
- cumulative infringement to Okanagan Aboriginal title and rights arising from the expansion of existing ILM transmission facilities, where there had been no consultation or accommodation concerning those facilities.

(Exhibit C5-12, BCUC 1.1, pp. 3-4)

8.4.4 Scope of Duty to Consult

BC Hydro made the following preliminary assessment of the scope of the duty to consult:

First Nations	Preliminary Scope of Duty to Consult	
	5L83	UEC
Upper Nicola	High	Not included in assessment
ONA	No assessment	
Okanagan Indian Band	Low	
Upper Similkameen	Low	
Lower Similkameen	No assessment	
Westbank First Nation		
Penticton		
Osoyoos		

(Exhibit B-10-4, Attachment 4 to Coldwater 1.2, Appendix 3)

BCTC takes the position that the level of consultation required with the remaining ONA member First Nations looked at individually, would all be very low on the *Haida* spectrum, as the Upper Nicola is the closest ONA community to the preferred alignment (Exhibit B-13, BCUC 1.3.1, pp. 11-12).

NNTC/ONA/Upper Nicola state they accept BC Hydro's preliminary assessment on the scope of the duty to consult the Upper Nicola as high and that the Commission must therefore measure BC Hydro's consultation against the standard of deep consultation (NNTC/ONA/Upper Nicola Argument, paras. 66-67).

8.4.5 Interactions with BC Hydro and BCTC

Between August 2006 and May 2007, BC Hydro and BCTC met or contacted the Upper Nicola, ONA and the Okanagan Indian Band on a number of occasions.

8.4.5.1 ONA

BC Hydro held three meetings individually with ONA. The first was held between Darrell Mounsey and ONA's Land Resources Manager, Gwen Bridge, on August 31, 2006 to introduce the Project. Gwen Bridge suggested at the meeting that Penticton, Osoyoos and Lower Similkameen were less affected by the Project and could be sent letters explaining the project but that Upper Nicola and Okanagan Indian Band would be affected, and suggested that BC Hydro meet face to face with those two Bands (Exhibit B-12, BCUC 1.1.1, p. 154; Confidential Exhibit B-4, p. 459).

According to the Consultation Log, BC Hydro and BCTC met with the Okanagan Indian Band on three separate occasions between August 2006 and July 2007, and accepted initial capacity funding of \$10,000.

The second meeting with ONA took place on October 28, 2006. Darrell Mounsey again met with Gwen Bridge who asked questions about EMFs and their effects on the eco-system, animal migration and mating habits. She also indicated that the ONA expected to be awarded vegetation management contracts in their traditional territory and that they wanted control of the ROW as recently two elders had nearly died from using tea leaves they had picked near the ROW which had been sprayed with a pesticide (Exhibit B-12, BCUC 1.1.1, p. 154; Confidential Exhibit B-4, p. 453).

A third meeting was held between Gwen Bridge and Melissa Holland, Darrell Mounsey and Corry Archibald on November 28, 2006. The meeting minutes indicate that Gwen Bridge did not have much time to meet because her son was ill. New ortho-maps were presented and reviewed to ensure the Okanagan Nation traditional territory was impacted by both reinforcement options. The November 2006 initial capacity funding form letter was also provided. Gwen Bridge advised that ONA would be having an internal meeting within the next few weeks and that she would bring the information to that meeting. BCTC/BC Hydro committed to follow up with a further meeting in January (Exhibit B-3-1, Appendix P).

On February 21, 2007, a representative of ONA (Dixon Terbasket) attended the EAO Working Group meeting (Exhibit B-12, BCUC 1.1.1, p. 154).

An initial capacity funding cheque for \$10,000 was sent by BC Hydro on March 16, 2007 to ONA.

On June 6, 2007, BC Hydro sent its letter advising of the Options Decision to Chief Stewart Phillip of ONA, with a copy to all the Chiefs of the ONA members.

Chief Tim Manuel represented both ONA and Upper Nicola at the May 16, 2008 meeting between NNTC and their legal counsel and BC Hydro, BCTC and their counsel to discuss Existing Assets (Exhibit B-20, Attachment B-10).

8.4.5.2 Upper Nicola Indian Band

On August 31, 2006, Darrell Mounsey and Charles Littledale met with Chief Tim Manuel of the Upper Nicola in Merritt in order to introduce the ILM Project, and to provide an overview of the transmission reinforcement alternatives (Exhibit B-11, p. 96; T8: 833-36). BC Hydro provided Upper Nicola with a copy of the "Electricity Supply Challenges" brochure (Exhibit B-3-1, Appendix E) discussed in Section 5.2.1.1.

On November 27, 2006, BC Hydro sent its November 2006 initial capacity funding form letter to Upper Nicola (Exhibit B-11, BCUC 1.1.1, p. 96).

On January 10, 2007 Charles Littledale, Corry Archibald, Melissa Holland and Ian Frank of Golder met with Chief Manuel of the Upper Nicola. During the meeting, Chief Manuel indicated that the Upper Nicola Band was in a unique position since it was part of both the NTA and the ONA and it normally conducted joint consultation and referrals with the Lower Nicola Indian Band. He said that this process had recently broken down following the Juliet Creek ski resort development project in their territory. Chief Manuel indicated that the ONA did not need to be involved as their territory was quite far away from the potential transmission project and, therefore, Upper Nicola would deal directly with BC Hydro. Upper Nicola did encourage BC Hydro to work with the NTA and suggested that this might bring the Bands in the NTA together (Exhibit B-3-1, Appendix R).

At the meeting, BC Hydro and BCTC gave the January 2007 PowerPoint presentation discussed in Section 5.2.1.3.

BC Hydro also provided a further copy of the initial capacity funding offer letter which Chief Manuel said he would take to a Council meeting the following day. Corry Archibald also committed to contacting Chief Manuel to get a formal capacity funding agreement in place (Exhibit B-3-1, Appendix R; T7: 840-41, 845-46).

Chief Manuel noted that when this project was first discussed at the NTA's AGM, a number of people were concerned about EMF. He noted that two reserves are near to the proposed line. Melissa Holland advised him that BCTC measures the EMF level at the edge of the ROW and that the reserves are outside World Health Organization EMF standards. Chief Manuel also expressed concerns about EMF on plant life and noted that there are plants in the area which are not found anywhere else. Melissa Holland committed to see if there was any research on EMF and plant life.

Chief Manuel also suggested that there needed to be a public forum for disclosure of the information to community members, referencing the Juliet Creek project where the community was not kept advised. He suggested the September/October AGM in 2007 could be a good community forum on the issue (Exhibit B-3-1, Appendix R).

On January 25, 2007 BC Hydro sent its revised initial capacity funding form offer of \$10,000 to the Upper Nicola (T7:840-41, 845-46; Confidential Exhibit B-4, p. 893).

On January 26, 2007, representatives from BCTC and BC Hydro travelled to Merritt to meet with the NTA. However, when they arrived, the Chiefs said that they were not ready or willing to speak at that time. (Exhibit B-11, p. 98; T7:849)

Bernadette Manuel of Upper Nicola attended the EAO Working Group meeting February 21, 2007 (Exhibit B-3-1, Appendix U).

In March 2007, BC Hydro made two requests to Upper Nicola to meet for an update on the ILM Project on March 21, 2007, but did not receive a reply (Confidential Exhibit B-4, pp. 901-902).

BC Hydro sent an initial capacity funding cheque to Upper Nicola on March 16, 2007 seeking input, inter alia, on the transmission reinforcement alternatives prior to April 2, 2007 (Exhibit B-11, BCUC 1.1.1, p. 100).

BCTC states that on April 19, 2007, Golder conducted a Traditional Use interview with five Upper Nicola elders and three Upper Nicola support staff members and that on April 24, 2007, Upper Nicola requested Golder share the information from the interview with the Upper Nicola. In mid-May 2007, Golder shared the notes from the interview with Upper Nicola but received no comment back (Exhibit B-11, BCUC 1.1.1, pp. 102-103).

BCTC states that after the Options Decision had been made, BC Hydro made a presentation at an Upper Nicola community meeting on July 19, 2007. During this meeting there was a discussion of the alternatives to 5L83 and the reasons why BCTC had selected the 5L83 Alternative. The Upper Nicola members raised concerns regarding EMFs, herbicides, effects on wildlife and safety and security at the Nicola Substation. BC Hydro also provided further information on capacity funding. In addition, Upper Nicola noted that it expected compensation for loss of traditional territory and impacts to its rights (Exhibit B-20, Attachment C-1; Exhibit B-11, BCUC 1.1.1, p. 106).

The July 19, 2007 meeting was the first time BC Hydro received concerns from the Upper Nicola membership on impacts, other than opportunities available to Chief Manuel in his meetings and in the EAO Working Group sessions (T7:874-75).

On July 23, 2007 and August 9, 2007 BC Hydro provided responses to issues raised at the July 19 meeting including herbicide use, additional information about the Project, and safety and security issues at the Nicola substation (Exhibit B-11, BCUC 1.1.1, p. 106).

BCTC states that on August 15, 2007, Upper Nicola advised BC Hydro:

- that Upper Nicola Council had directed that the Band would proceed with ILM negotiations separately from, but with the support of, the ONA and NTA, and
- that Upper Nicola and BC Hydro needed to discuss accommodation.

(Exhibit B-11, BCUC 1.1.1, p. 107)

On October 5, 2007 Darrell Mounsey, Corry Archibald, Patricia Isackson, Julian Wake, Rick McDougall (BC Hydro), and David Pranteau (BCTC) attended the NTA AGM. The ILM Project was one of a number of items discussed. BC Hydro states that it had a booth displaying the ILM Project mapping and project updates, the BC Energy Plan and BC Hydro's scholarship and work opportunities. BC Hydro representatives were present at the booth to answer questions. BC Hydro also had a representative attend to answer questions on EMFs. A one-page EMF information sheet was also available for interested attendees. At the meeting, BCTC offered to return and make a presentation to each Band individually (Exhibit B-11, BCUC 1.1.1, p. 109; Confidential Exhibit B-4, p. 929).

On October 16, 2007 Darrell Mounsey and Corry Archibald met with Chief Manuel and two councillors and discussed the mitigation of current substation issues and EMF (Exhibit B-11, BCUC 1.1.1, p. 109; Confidential Exhibit B-4, pp. 929-30).

On January, 15, 2008 Corry Archibald and Jennifer Hooper met Chief Manuel to discuss the proposed Capacity Funding Agreement (Exhibit B-11, BCUC 1.1.1, pp. 111-12; Confidential Exhibit B-4, p. 932).

Chief Manuel attended the April 22, 2008, May 16, 2008 and June 17, 2008 meetings in Vancouver with the NNTC and Eric Denhoff (Exhibit B-20, Attachment C-2, 3 and 6). These meetings are discussed in greater detail in Section 8.5.2.5.1.

Following a phone conversation on May 23, 2008 between Jennifer Hooper and Chief Manuel about the status of consultation, Councillor Dan Manuel refused to allow Golder to start its archaeological assessment work on Upper Nicola territory on June 10, 2008 (Exhibit B-20, Attachments C-4 and C-6).

8.4.6 The Parties' Views of the Consultation Process

NNTC/ONA/Upper Nicola submit that BC Hydro “failed to fulfill the Crown’s constitutional obligation to consult and accommodate in relation to the ILM CPCN application” based on BC Hydro’s errors in failing to meaningfully consult regarding the selection of alternatives (NNTC/ONA/Upper Nicola Argument, para. 1).

Consultation on BCTC’s selection of alternatives is discussed in Section 7.1.

In their rebuttal evidence, BC Hydro and BCTC state that the alternatives were discussed at a meeting on November 28, 2006 with ONA, in which it sought their input regarding the options (Exhibit B-20, p. 3).

ONA does not dispute that the November 28, 2006 meeting occurred but says that “there was no discussion of alternatives to the ILM Expansion Project at the November 28, 2006 meeting between Gwen Bridge of the ONA and BCH” (Exhibit C-5-8-1, para. 35). ONA’s evidence is that BC Hydro “quickly flipped through a binder that contained maps” but ONA cannot say what the maps specifically depicted. ONA’s evidence is that the meeting was introductory and cursory in nature and that no alternatives to building new line 5L83 were discussed (Exhibit C-5-13, BC Hydro 1.5.1).

NNTC/ONA/Upper Nicola submit that discussion at meetings with BC Hydro from August 2006 onwards was on construction of the ILM Expansion Project and that the First Nations did not understand that their input on the selection of alternatives was being sought. NNTC/ONA/Upper Nicola submit that they understood that BC Hydro was proposing to build a new line and was contacting them as part of the EAO pre-application phase (NNTC/ONA/Upper Nicola Argument, para. 48).

BCTC submits that NNTC/ONA/Upper Nicola’s position regarding consultation on alternatives is not supported by the evidence, and identifies 14 items of evidence that refute the complaint regarding consultation on the choice of the Preferred Alternative. These items of evidence include the

provision of the "Electricity Supply Challenges" brochure, the provision of the draft Capacity Funding Agreements, and the presentation of the January PowerPoint which all indicated BCTC was analyzing several alternatives. BCTC also points out that at no time did either Upper Nicola or ONA raise any complaints about the choice of the Preferred Alternative or the consultation that took place regarding the choice of alternatives, and the issue was not raised again during consultations with ONA or Upper Nicola up to August 5, 2008 (BCTC Argument, paras. 397-98).

In addition, the NNTC/ONA/Upper Nicola submit that BC Hydro's consultation was inadequate because BC Hydro failed to meaningfully consult on the selection of alternatives, specifically:

1. BC Hydro did not consult at the required strategic level;
2. BC Hydro failed to disclose information regarding the HVDC alternative;
3. BC Hydro denied the NNTC and Upper Nicola any meaningful opportunity for input into the alternatives decision; and
4. BC Hydro failed to develop a process of "deep" consultation.

Issues 1-3 have been discussed in Section 7. Issue 4 will be addressed below as part of the Commission Panel's determination of the adequacy of BC Hydro's consultation.

Commission Determination

ONA

The Commission Panel notes that BC Hydro did not perform a separate preliminary assessment of ONA's strength of claim or scope of duty to consult. The Commission Panel will consider the strength of claim and duty to consult for Upper Nicola and ONA separately because it finds that Upper Nicola was representing itself in the consultation process, independently from ONA, as shown by the fact that Upper Nicola advised that it would deal directly with BC Hydro on January 10, 2007 and that it would proceed with ILM negotiations separately, from, but with the support of, ONA and NTA on August 15, 2007. Although the Commission Panel is aware that ONA asserts Aboriginal rights and title at the Okanagan Nation level and that ONA/Upper Nicola state

Upper Nicola has a “responsibility to protect the Aboriginal title and rights held collectively by the Okanagan Nation in relation to Okanagan traditional territory”, the consultation process was nonetheless carried out separately and the Commission Panel must assess the adequacy of consultation as such.

Therefore, in this case, where one ONA member, the Upper Nicola, has a reserve 2 km from the Project area, the Commission Panel finds it reasonable to consider the Upper Nicola as the primary Okanagan Nation member in the Project area.

The Commission Panel has reviewed the evidence put forward by ONA and considers the ONA, with the exclusion of Upper Nicola, to have a low strength of claim in the ILM Project area. Specifically, the Commission Panel considers the distance of the remaining ONA members from Nodes A to C (the Bands’ main communities range from 66 to 124 km from the proposed line and the Bands’ closest Reserves range from 43 to 119 km away) to result in a low strength of claim to the ILM Project area.

Nodes A to C require 6.5 km new ROW on entirely Crown land and 8 km of ROW widening on Crown and private land. Known archaeological and traditional use sites exist in the ROW. The new ROW requires new access roads. The Commission Panel considers that these represent a medium-high level of potential adverse impact.

Given the low strength of claim, the medium-high level of impact and the fact that Upper Nicola is the primarily affected ONA member, the Commission Panel considers ONA to require a low scope of duty to consult. This assessment is consistent with BC Hydro’s assessment of ONA’s member Bands, the highest of which, the Okanagan Indian Band, was assessed as having a low scope of duty to consult.

In Section 4 the Commission Panel set out its criteria for a low duty to consult and so far as concerns BC Hydro’s consultation with ONA, the Commission Panel has considered the interaction in the period from August 2006 to May 2007 and then to August 2008 and finds the following:

- notice of 5L83, UEC, and the Non-Wires Options was given at:
 - the three meetings held between BCTC/BC Hydro and ONA's Land Resource Manager Gwen Bridge. Although NNTC/ONA/Upper Nicola assert that there was no discussion of alternatives to the ILM Project at the third meeting on November 28, 2006, the Commission Panel finds that Gwen Bridge must have at least been aware that BCTC was considering UEC and thus the requirement for notice was met; and
 - the EAO Working Group meeting attended by Dixon Terbasket;
- notice of UEC and 5L83 was also given in the initial capacity funding letter dated March 2007;
- discussion of issues raised by ONA occurred at the three meetings held between BC Hydro/BCTC and Gwen Bridge. Specifically, ONA raised concerns about EMF, herbicides and ROW issues;
- the potential adverse impacts of construction of 5L83 were presented at the EAO Working Group meeting and the ROW requirements were set out in the Project Description handed out at the meeting;
- ONA accepted initial capacity funding of \$10,000 in mid-March 2007; and
- ONA was informed of the Options Decision by letter dated June 6, 2007.

Based on the above the Commission Panel considers that the consultation that took place between BC Hydro and ONA was adequate to meet the low level of consultation required for the ILM in Options Decision.

Upper Nicola Indian Band

The Commission Panel notes that Upper Nicola does not dispute BC Hydro's assessment that it has a high strength of claim and a high scope of duty to consult. Therefore the Commission Panel accepts BC Hydro's assessment of Upper Nicola's strength of claim and scope of duty to consult as both being high.

The Commission Panel set out its criteria for high consultation in Section 4. The Commission Panel has considered the interaction between Upper Nicola and BC Hydro in the period from August 2006 to May 2007 and then to August 2008 and notes the following:

- notice of 5L83, UEC, and the Non-Wires Options was given at:
 - the August 31, 2006 and January 10, 2007 meetings held between BC Hydro/BCTC and Chief Manuel. At the January 10, 2007 meeting the PowerPoint presentation was made showing the options under consideration;
 - the EAO meeting attended by Bernadette Manuel;
- discussion of issues raised by Upper Nicola occurred at the January 10, 2007 meeting. Specifically, Upper Nicola raised concerns about EMF to which BCTC responded. Chief Manuel also suggested BCTC/BC Hydro attend the NTA's AGM in the fall to hear community input. BC Hydro/BCTC attended the NTA AGM on October 5, 2007;
- BCTC learned about potential adverse impacts on Upper Nicola's asserted rights and title through Golder's interview with Upper Nicola's elders on April 19, 2007, which informed the Draft Heritage Briefing Report Statement;
- BCTC/BC Hydro presented the impacts of construction of 5L83 at the EAO Working Group meeting and in the Project Description handed out at the meeting;
- BC Hydro explained why and when options were removed from consideration and the reasons why BCTC selected the 5L83 Alternative at the meeting held with Upper Nicola on July 19, 2007; and
- BC Hydro sent Upper Nicola initial capacity funding of \$10,000 on March 16, 2007.

The Commission Panel finds that BC Hydro/BCTC's consultation was inadequate to meet a high duty to consult for the Upper Nicola for the following reasons:

- although BCTC seriously contemplated a new HVDC line, which would have different impacts on the Upper Nicola than a new AC line, BC Hydro did not present the HVDC option to the Upper Nicola for discussion (as discussed in Section 7.1); and
- although Upper Nicola raised the issue of revenue sharing with BC Hydro, BC Hydro/BCTC did not adequately respond to the issue (as discussed in Section 7.8).

BC Hydro is directed to address these deficiencies in Section 10.

8.5 Nlaka'pamux Nation

The Nlaka'pamux Nation is an Aboriginal people whose traditional territory includes the Lower Thompson River, the Fraser Canyon, the Nicola Valley, the Coldwater River Valley and the Coquihalla area (Exhibit C6-5, p. 1). In relation to the 5L83 preferred alignment, Nlaka'pamux asserted territory includes land between Nodes A and P (Exhibit B-13, BCUC 1.3.1, p. 19).

The Nlaka'pamux Nation is composed of 15 individual Indian Bands. Six of the Bands are Intervening as the NNTC and four are Intervening as Coldwater *et al.* The six NNTC Bands are:

- Boothroyd;
- Kanaka Bar;
- Lytton;
- Oregon Jack Creek;
- Skuppah; and
- Spuzzum.

The four Coldwater *et al.* Bands are:

- Ashcroft;
- Coldwater;
- Cook's Ferry; and
- Siska.

Of the remaining Nlaka'pamux Nation members, two (Nicomen and Nooaitch) intervened but took no part in the Proceedings, and three (Lower Nicola, Shackan, and Boston Bar) did not intervene.

BCTC states that during the period between August 2006 and August 2008, none of the 15 Nlaka'pamux First Nations was participating in the BC Treaty Commission Process (Exhibit B-3-1, Appendix B).

On December 10, 2003, the Chiefs of all 15 Nlaka'pamux-speaking First Nations filed a Writ in the Supreme Court of British Columbia seeking a declaration of Aboriginal title over Nlaka'pamux traditional territory (Exhibit B-20, Attachment B-12).

NNTC states "Nlaka'pamux people have a collective identity formed around shared linguistic, historic and cultural ties. Nlaka'pamux Aboriginal title and rights are collective rights, held and protected by the Nation on behalf of all Nlaka'pamux people" (Exhibit C5-7-1, para. 10).

BCTC states that, early in the consultation process, BC Hydro was informed by Raymond Phillips that the Nlaka'pamux would be engaging on a "common-title basis," which appeared to include all Nlaka'pamux First Nations. However, as the consultation process progressed, it became clear that:

- the NNTC, NTA and Lower Nicola Indian Band were largely choosing independent approaches, although they were cooperating and coordinating in some respects;
- some members of the NNTC and NTA expressed a willingness or desire to engage in direct, bi-lateral engagement with BC Hydro; and
- some Nlaka'pamux First Nations formed into other groups.

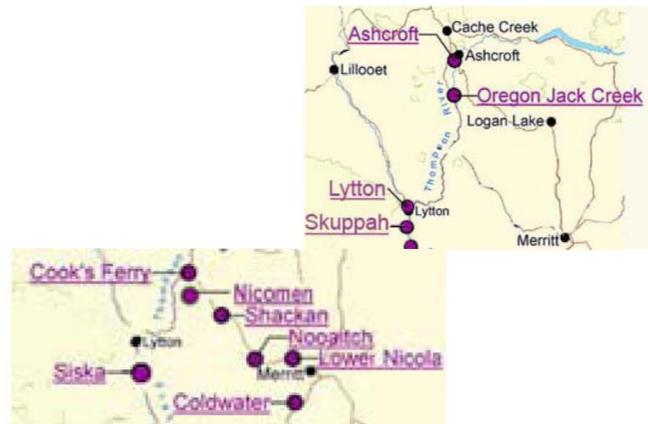
As a result, BC Hydro decided that, while title has been asserted collectively (in the 2003 Writ and elsewhere), it should also consider individual Nlaka'pamux First Nations that may have greater potential for adverse effects than those First Nations who were located farther from the preferred alignment (Exhibit B-13, BCUC 1.3.1, p. 20).

8.5.1 Coldwater *et al.*

8.5.1.1 Description and Location

Coldwater *et al.* comprise four Nlaka'pamux Indian Bands: Coldwater, Cook's Ferry, Siska and Ashcroft. Three of the Bands, Coldwater, Cook's Ferry, and Siska have been or continue to be affiliated with the NTA. Ashcroft was formerly a member of the NNTC but was seeking to sever its association in the period around November 2006 (T14:2178).

The following map shows the location of the four Coldwater *et al.* First Nations:



Source: Exhibit B-13, BCTC Response to BCUC IR 1.3.1, p. 17

Coldwater *et al.* take the position that the Nlaka'pamux Nation "holds aboriginal rights in and aboriginal title to an area that includes the route of the proposed line." It states "[t]he ILM line is a massive project that will cut through Nlaka'pamux territory" (Exhibit C6-5, p. 1).

The 5L83 alignment between Nodes A and C is the segment in closest proximity to the Coldwater *et al.* communities with part of the alignment running approximately 3 km from a Coldwater Indian Reserve (Exhibit B-13, BCUC 1.3.1, p. 24).

The four Bands of Coldwater *et al.* collectively have over 1000 members (Exhibit B-3-1, Appendix B). None of the Bands are participating in the BC Treaty Commission Process.

In their evidence Coldwater *et al.* state:

[t]here is no central Nlaka’pamux governance authority. Each of the First Nations (bands) that make up the Nlaka’pamux nation has its own chief and council which represents the members of that First Nation and these councils are the highest level of governance authority within the Nlaka’pamux nation. There is no single person or body that represents the Nlaka’pamux nation as a whole. (Exhibit C6-5, p. 2)

8.5.1.2 Strength of Claim

BC Hydro’s preliminary assessment of strength of claim for Coldwater was:

First Nations	Preliminary Strength of Claim	
	5L83	UEC
Coldwater	High	Not Included
Siska	Medium	Medium
Cook’s Ferry	No assessment	Not Included
Ashcroft	No assessment	Not Included

(Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, Appendix 3)

The following table shows the Coldwater *et al.* Band’s distances from the proposed line between Nodes A and C:

First Nations	Distance from Proposed 5L83 Route (km)	
	Main Community	Closest Reserve
Coldwater	6	3
Cook’s Ferry	59	Less than 8
Siska	34	32
Ashcroft	85	82

(Exhibit B-3-1, Appendix B)

In April 2007, BC Hydro assessed Cook’s Ferry’s closest Reserve to be 55 km from the Proposed line. Coldwater *et al.* point out that BC Hydro did not take into account a Cook’s Ferry reserve that is less than 8 km from the proposed line in Merritt (Coldwater *et al.* Argument, para. 136).

Coldwater *et al.* do not take issue with the strength of claim determination for the Coldwater Indian Band but do dispute BC Hydro’s conclusion on strength of claim for Cook’s Ferry, Siska and Ashcroft, stating that BC Hydro assessed strength of claim prematurely, before completion of a TUS and without input from First Nations. Furthermore, Coldwater *et al.* submit that assessing the strengths of claim differently for individual Bands shows a misunderstanding of Nlaka’pamux title. Coldwater *et al.* reasons that because Aboriginal title is asserted collectively at a nation level, Cook’s Ferry, Siska and Ashcroft’s “claim to Aboriginal title is the same claim advanced by Coldwater *et al.*, the NNTC and all members of the Nlaka’pamux Nation and its strength can be no different than any other Nlaka’pamux band because it is the same claim” (Coldwater *et al.* Argument, paras. 83-5, 88, 101, 103-4).

8.5.1.3 Potential Adverse Impacts

BCTC states the 5L83 line between Nodes A and C runs about 3 km south of one of Coldwater Indian Band’s reserves. BCTC concludes that 5L83 will have a “fairly minimal effect in Line Segment A-B but moderate localized effect in Line Segment B-C” (Exhibit B-13, p. 10).

For Nodes A to C, Golder’s Draft Heritage Overview Briefing Report Statement summarized the land/clearing required and the known archaeological and traditional use issues:

Node	Land/Clearing Required, Access, Type of Land, Archaeological and Traditional Use Sites
A-B – 50 km	<ul style="list-style-type: none"> • 1.8 km of ROW widening by 30 m (1 hectare) • Access entirely from existing 5L81/82 ROW • Crown and private land, including ranches in the Agricultural Land Reserve

	<ul style="list-style-type: none"> • 2 Archaeological sites, 5 traditional use sites including 1 burial site
B-C – 19.4 km	<ul style="list-style-type: none"> • 6.5 km new ROW, 50 m wide • 4.4 km ROW widening by 36 m • New access required along new ROW • Entirely Crown land

(Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 11 and Appendix III)

Coldwater *et al.* state that the ILM Project will infringe on the asserted Aboriginal rights and title of the Nlaka'pamux, specifically the cultural, traditional and economic interests of the Bands (Exhibit C6-5, p. 6).

Coldwater *et al.* further state that as of August 5, 2008:

BC Hydro had not communicated specific impacts the project would or could have on Coldwater *et al.*'s rights and title. Other than identifying general concerns, consultation never developed to the point where Coldwater *et al.* were able to define their rights in the affected area, due largely to delays by BC Hydro in the providing funding for the studies that would assist in doing so. (Exhibit C6-6, BCUC 2.1)

8.5.1.4 Scope of Duty to Consult

BC Hydro's preliminary assessments of the scope of duty to consult were:

First Nations	Preliminary Scope of Duty to Consult	
	5L83	UEC
Coldwater	Medium	Not Included
Siska	<i>De Minimis</i>	<i>De Minimis</i>
Cook's Ferry	<i>De Minimis</i>	Not Included
Ashcroft	No Assessment	Not Included

(Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, Appendix 3)

8.5.1.5 Interactions with BC Hydro/BCTC

The Coldwater *et al.* Bands received all information and capacity funding offers discussed in Section 5. Below is a chronology of the interactions between BCTC, BC Hydro and the individual member Bands of Coldwater *et al.*

8.5.1.5.1 Coldwater Indian Band

Between August 2006 and the end of May 2007, BCTC and BC Hydro met with the Coldwater Indian Band twice.

At the August 31, 2006 meeting of NTA, Darrell Mounsey met with Chief Harold Aljam of Coldwater, Chief David Walkem of Cook's Ferry, Chief Fred Sampson of Siska and the Chiefs of five other NTA member Bands and discussed topics including EMF, First Nation benefits related to the Project, ROW issues both on and off reserve, Existing Assets, the EAO process, power exports and whether capacity funding was available (Exhibit B-11, BCUC 1.1.1, p. 26).

On November 27, 2006, BCTC hosted a dinner for Coldwater. Melissa Holland presented a version of BCTC's November 2006 PowerPoint presentation. Corry Archibald and Darrell Mounsey were also in attendance. Coldwater was represented by Band members other than councillors. Coldwater members raised several issues including: capacity funding, benefits agreements, the sale of power to the US, how long the line would last and where it would cross rivers, local Independent Power projects (IPP) and why First Nations partnerships were not being utilized by BC Hydro on these projects, training and employment opportunities for First Nations, the impact of the new line on hydro bills, how much widening of the ROW would be needed for the new line and where, how the tower raising would take place for the UEC Alternative, climate change and a reduction in flow in the Coldwater River, and the importance of watersheds to Coldwater because changes to them have an impact on the salmon. At the close of the meeting, Coldwater stated that its members would like to have another meeting with the full Band and leaders in attendance at the same time (Exhibit B-11, BCUC 1.1.1, p. 27; Confidential Exhibit B-4, p. 98).

On February 21, 2007, Chief Aljam attended the EAO Working Group meeting (Exhibit B-3-1, Appendix U).

BC Hydro provided a \$10,000 cheque for initial capacity funding to Coldwater which was cashed on March 21, 2007.

On April 16, 2007, Chief Aljam wrote to Joan Hesketh, Associate Deputy Minister of the EAO (with copies to BC Hydro, BCTC and the other Nlaka'pamux Bands) that Coldwater believed the new 500 kV transmission line would have significant impacts and requested Ms. Hesketh to help avoid the continuance of past exploitation and requested a meeting to begin a dialogue on hydro development with Nlaka'pamux Chiefs and BC Hydro, BCTC, the EAO and the Province (Exhibit C6-5, Appendix C). Ms. Hesketh responded to Chief Aljam on May 11, 2007 by way of a letter stating there would be many opportunities for discussion and that she had delegated responsibility for the environmental assessment of the Project to Brian Murphy, Project Assessment Director for the EAO (Exhibit C3-11, BC Hydro Response to Coldwater *et al.* 3.1).

On June 6, 2007, BC Hydro sent Chief Aljam a letter advising of the Options Decision.

Chief Aljam was in attendance at the September 13, 2007, meeting between BC Hydro and Siska, Lytton, Cook's Ferry, Nooaitch, Shackan, Nicomen, Boothroyd, Lytton, Skuppah, Boston Bar and Lower Nicola Indian Bands, NTA, and NNTC in Lytton. This meeting is described in detail in Section 8.5.2.5.1.

On January 11, 2008, Eric Denhoff (Chief Negotiator for BC Hydro ARN) and Jennifer Hooper met with Chief Aljam, Chief Walkem, Chief Webster of Lytton and Raymond Phillips. Raymond Phillips indicated that the new line travels through the Nlaka'pamux territory extending from Spuzzum and Boston Bar, to Upper Nicola through Coldwater. Raymond Phillips took the position that BC Hydro had to settle historical grievances surrounding the existing high voltage line, and that there were heritage sites along the routes for both lines. In addition, the Bands were interested in having

employment and contracting opportunities on the table with regard to future discussion and felt they needed to increase employment levels in the communities.

BC Hydro stated that it had the mandate to negotiate in respect of consultation, capacity funding, and benefits but not revenue sharing. It stated that some First Nations would negotiate business deals into their impact and benefit agreements. The First Nations affirmed that they were open to discussing benefits with regard to impacts to their territory as a whole, not just with individual communities. The parties also discussed capacity funding agreements and budgets for a TUS (Exhibit B-11, BCUC 1.1.1, p. 40).

On April 28, 2008, BC Hydro and BCTC met with Coldwater and Esh-kn-am to discuss the route alignment options and get Coldwater's input. BCTC provided satellite route maps and explained the options. Coldwater stated that it would be looking at Nodes A to P for the TUS and that, without the TUS data, input into species such as wildlife, plants, and rare/endangered species would be lacking. BCTC stated that it and BC Hydro were interested in getting Coldwater's information as soon as it became available.

In response to Coldwater's concern that the route options might change as a result of economic reasons, BCTC indicated that it could not foresee economic reasons that would impact the route. Coldwater also stated that it did not have the capacity to review 16 discipline specific reports, and stated that the draft capacity funding agreement it had received from BC Hydro was still with Raymond Phillips (Exhibit B-11, BCUC 1.1.1 p. 44).

Coldwater *et al.* state that the comments ascribed to Coldwater in this meeting were actually made by Mary Sandy of Esh-kn-am (Exhibit C6-5, p. 5).

BCTC states that BC Hydro met with Coldwater on July 4, 2008 under the existing transmission lines to discuss potential locations for transmission towers on either side of the Coldwater River, and that two locations were discussed. Coldwater expressed concerns for cattle fencing and cattle

trails in the area, wanting to ensure that existing cattle fences would not be disturbed as well as requesting additional fencing be built to keep cattle in its own range area.

BCTC states that following this meeting, it and BC Hydro met with Coldwater on July 9, 2008, and that BC Hydro gave a Google Earth presentation that showed the eastern section of the route alignment from the Nicola substation to the Fraser River crossing. Coldwater again expressed concerns about cattle trails and the need for additional drift fencing to keep cattle contained, how improved access roads would increase recreational access, the need for vegetation management, and a desire to protect historical deer cairns in certain gullies. BCTC explained that fencing matters could be addressed in an Impact Benefits Agreement. BC Hydro stated that where roads are no longer needed they are decommissioned or blocked off to mitigate the effect of increased access. BCTC agreed to provide information on grasses used to re-seed disturbed areas in that area (which was subsequently provided) (Exhibit B-11, BCUC 1.1.1, p. 48).

8.5.1.5.2 Cook's Ferry Indian Band

The first meeting between BC Hydro and Cook's Ferry took place on August 31, 2006 with NTA as discussed in Section 8.5.1.5.1.

Cook's Ferry did not attend the February 21, 2007 EAO Working Group Meeting.

BC Hydro authorized initial capacity funding of \$10,000 for Cook's Ferry on March 16, 2007.

A second meeting was held in Spence's Bridge on March 19, 2007 between Melissa Holland, Darrell Mounsey, and Julian Wake, and Chief Walkem of Cook's Ferry. BCTC and BC Hydro provided a presentation on the 5L83 and UEC alternatives. Chief Walkem brought up concerns that 90 percent of reserve lands are not serviced by BC Hydro and that Cook's Ferry did not approve of Golder as the environmental consultant. Chief Walkem stated that a TUS is important to show Nlaka'pamux interests (Exhibit B-11, BCUC 1.1.1, p. 55; Confidential Exhibit B-4, pp. 142-3).

On April 5, 2007, BC Hydro sent information regarding the remote communities' electrification program to Chief Walkem (Exhibit B-11, BCUC 1.1.1, p. 55).

BC Hydro sent a letter to NTA, copied to Chief Walkem, informing of the Options Decision on June 6, 2007.

Chief Walkem attended the September 13, 2007 meeting between BC Hydro and the Siska, Lytton, Cook's Ferry, Nooaitch, Shackan, Nicomen, Boothroyd, Lytton, Skuppah, Boston Bar and Lower Nicola Indian Bands, the NTA, and NNTC in Lytton (Discussed in Section 8.5.2.5.1).

On January 11, 2008, Eric Denhoff and Jennifer Hooper met with Chief Aljam and Chief Walkem. The Chief of Lytton and Raymond Phillips were also in attendance. This meeting was described in Section 8.5.1.5.1.

8.5.1.5.3 Siska Indian Band

BC Hydro and BCTC met with the Siska Indian Band three times between August 2006 and May 2007.

The first meeting took place on August 31, 2006 with the NTA and is discussed in Section 8.5.1.5.1.

Siska did not attend the February 21, 2007 EAO Working Group meeting but was provided with the materials after the meeting.

On March 19, 2007, Julian Wake met with Chief Fred Sampson and Terry Raymond, CEO of Siska Economic Development and Band Administrator. At the meeting, Terry Raymond stated the Band was assessing whether to consult on a tribal basis, i.e. through the NTA (Exhibit B-11, BCUC 1.1.1, p. 74; Confidential Exhibit B-4, p. 632).

On April 4, 2007, Chief Sampson met with Melissa Holland, Charles Littledale, and Julian Wake.

BCTC's evidence on the April 4 meeting is that Chief Sampson said that Siska was well informed about the Project, and declined to accept the \$10,000 initial capacity funding until the Chief had assessed Siska's interest. The Chief expressed his main concerns as being: accommodation, reconciliation of past infringements and the potential for extinguishment of Aboriginal rights and title. Chief Sampson affirmed the Band would take a tribal approach to consultation through the NTA because the Coldwater Indian Band was the most affected by the ILM project (Exhibit B-11, BCUC 1.1.1, p. 74; Confidential Exhibit B-4, p. 632).

The Siska's evidence on the April 4, 2007 meeting is that when Chief Sampson said he was "well-informed" about the Project, he meant that "he had reviewed the limited material that had been provided at that early date and that he had informed himself about the project based on that early information. He did not suggest that Siska had been given full information about the project that would satisfy consultation requirements." Siska also states that Chief Sampson was content to let the Coldwater Band take the lead, as it is located closer to the location of the proposed line, but that Chief Sampson did not suggest that this diminished Siska's Aboriginal rights and title interests and that he expressly reserved Siska's right to negotiate on its own behalf. (Exhibit C6-5, pp. 13-14)

Chief Sampson attended the September 13, 2007, meeting between BC Hydro and the Siska, Lytton, Cook's Ferry, Nooaitch, Shackan, Nicomen, Boothroyd, Lytton, Skuppah, Boston Bar and Lower Nicola Indian Bands, the NTA, and NNTC in Lytton (discussed in Section 8.5.2.5.1).

On September 20, 2007, Betsy Munro, a representative of Siska attended the second EAO Working Group meeting (Exhibit B-3-1, Appendix DD).

8.5.1.5.4 Ashcroft Indian Band

BCTC and BC Hydro first met with Ashcroft at the February 15, 2007 meeting (described in Section 8.5.2.5.1) with other Nlaka'pamux First Nations, during which the First Nations raised concerns about the lack of consultation on existing lines. Ashcroft was represented by Councillor Wilson.

Ashcroft's Band Manager Allan Torng attended the February 21, 2007 EAO Working Group meeting.

On February 22, 2007, Ashcroft sent BC Hydro an invoice for \$10,500 for participation funding. BC Hydro responded on March 14, 2007 by sending a cheque for \$10,000.

On March 27, 2007, Ashcroft provided comments to the EAO on the draft work plans and terms of reference. Ashcroft phoned BC Hydro on April 3, 2007 to advise that it had commented on the EAO materials but had not received the draft Section 11 Order. BC Hydro subsequently sent the order to the Band.

On April 11, 2007, Allan Torng sent a letter advising BC Hydro that Ashcroft had no comments on the draft Section 11 Order.

On April 10, 2007, BCTC received a letter from Ashcroft stating that Ashcroft should be consulted independently of the NNTC, and noting that Ashcroft had not delegated its role in the consultation process to NNTC (Exhibit B-11, BCUC 1.1.1, p. 89).

On June 6, 2007, BC Hydro sent a letter to Chief Blain informing of the Options Decision.

On June 20, 2007, Julian Wake met with Allan Torng who advised that Chief and Council should be directly involved, but with a different approach since the impacts of the ILM Project affected Ashcroft's affiliated Bands more than Ashcroft itself. Ashcroft indicated that being informed may be adequate and, if Chief and Council agreed to this, Ashcroft would send a letter defining what they believed "being informed" meant (Exhibit B-11, BCUC 1.1.1, p. 89).

On August 9, 2007, Allan Torng advised Julian Wake that Ashcroft would only stay updated on the ILM Project and that due to internal affairs, would not be able to deliver whatever may be required by accepting BC Hydro funds. Allan Torng expressed that BC Hydro should keep sending letters to Chief Blain, with a copy to the Band Manager and should assume Ashcroft was not participating if

there was no response (Exhibit B-11, BCUC 1.1.1, p. 90; Confidential Exhibit B-4, p. 13)

On September 7, 2007, Councillor Wilson of Ashcroft attended the meeting with BC Hydro and the NNTC described in Section 8.5.2.5.1 (Exhibit B-20, Attachment B-3).

8.5.1.5.5 BCTC and BC Hydro Interactions with the Nicola Tribal Association

The Interactions with the NTA are recorded in this section because BC Hydro submits: “[t]he evidence clearly supports that the chiefs of Coldwater *et al.* advised BC Hydro on several occasions and in fact directed BC Hydro to deal with the NTA” and ... “[i]n a subsequent meeting on April 4, 2007, Chief Sampson advised that capacity funding should be done through the NTA and that all communications on the ILM Project should go through the NTA who would then circulate that information to the member bands” (BC Hydro Argument, Appendix 3, p. 4).

BC Hydro contacted the NTA in August 2006. The August 31, 2006 meeting described in Coldwater *et al.* sections above was the first meeting with the NTA Chiefs.

On October 6, 2006, Charles Littledale, Patricia Isackson and Gary Hollisco (BCTC) attended the NTA AGM and made a presentation on the ILM Project and EMF (Exhibit B-12, BCUC 1.1.1, p. 167; Confidential Exhibit B-4, p. 355).

BCTC states that on November 27, 2006, it and BC Hydro met with the NTA in Merritt as part of a meeting that had been arranged with the Nooaitch Indian Band, and that at the meeting, it presented the maps of the ILM transmission alternatives and made the November 2006 PowerPoint presentation. During the meeting, the NTA requested that BC Hydro arrange a further meeting with the NTA and T’mixw (Exhibit B-12, BCUC 1.1.1, p. 167).

As noted earlier in Section 8.4.5.2, on October 5, 2007, BCTC and BC Hydro sponsored and attended the NTA AGM, where BC Hydro established a booth to display the ILM Project mapping and Project Updates, the BC Energy Plan and BC Hydro’s scholarship and work opportunities. BC

Hydro representatives were present at the booth to answer questions, including questions on EMFs. A single-page EMF information sheet was also available for interested attendees. At the meeting, BCTC offered to return and make a presentation to each Band individually (Exhibit B-12, BCUC 1.1.1, p. 180).

BC Hydro submits that it attended the AGM at the suggestion of Chief Manuel during the January 10, 2007 meeting with the Upper Nicola so that his community members could gain further understanding of the ILM Project (BC Hydro Argument Appendix 3, p. 52).

The NTA intervened in the ILM Reconsideration Proceeding but did not actively participate.

8.5.1.5.6 T'mixw Research and Esh-kn-am

Coldwater, Cook's Ferry and Siska were associated with two research organizations during the period under review:

- T'mixw Research (T'mixw) of the NTA which operated from approximately August 2006 to summer 2007; and
- Esh-kn-am Cultural Resource Management Services (Esh-kn-am) which was started in the summer of 2007 with various staff members of T'mixw.

(Exhibit C6-5, p. 3)

Some interactions between BC Hydro and T'mixw and Esh-kn-am are included because T'mixw was contracted by Golder, at the request of NTA (of which Coldwater, Cook's Ferry, and Siska are members) to carry out research on archaeology and traditional uses in the Project area.

BCTC testified that it "received direction" from the NTA to work with T'mixw (T9:1150). In January 2007, T'mixw and Golder met and arranged how T'mixw would be involved with providing archaeological and traditional use information to Golder.

On March 16, 2007, BC Hydro issued T'mixw a cheque for \$10,000 for participation in Golder's review process.

On March 19, 2007, Golder called T'mixw to discuss whether or not their archaeological potential model would be ready for review. T'mixw advised that nothing had been done as of that time because they were still waiting for their capacity funding to be finalized. On March 21, T'mixw provided an estimate of \$15,000 to complete the feasibility stage work.

On April 13, 2007, BC Hydro advised NTA that it would start processing a second cheque for T'mixw for \$5,000 for completion of the archaeological assessment but that it would not release the cheque until Golder received the work from T'mixw (Exhibit B-12, BCUC 1.1.1, pp. 172-74).

T'mixw and Golder communicated on numerous occasions by telephone and email from February to early summer 2007 to track the progress of T'mixw's work.

On April 27, 2007, Golder called T'mixw to discuss the progress of its work and to inform it that the information would not be included in the Draft Heritage Overview Briefing Report Statement unless it was received soon. T'mixw committed to providing the information by May 2, 2007. T'mixw had not produced the information by May 4, 2007, the date of Golder's Draft Heritage Overview Briefing Report Statement (Exhibit B-12, BCUC 1.1.1, pp. 172 *et seq.*).

In the summer of 2007, BC Hydro was informed that key staff had resigned from T'mixw. Shortly thereafter, Coldwater, Cook's Ferry and Siska left T'mixw to start a new archaeology company called Esh-kn-am Cultural Resource Management (Exhibit B-11, p. 33).

8.5.1.6 The Parties' Views of the Consultation Process

Coldwater *et al.* assert that consultation failed for the following six reasons:

1. there was no reconciliation of asserted Aboriginal title and the objectives of the Crown;
2. BCTC and BC Hydro did not consult about fundamental elements of Aboriginal title;
3. no TUS was available before the CPCN Decision;
4. critical decisions were made prematurely;
5. the process was not interactive and critical information was not shared by BCTC (either in a timely way or at all); and
6. there was no accommodation.

(Coldwater *et al.* Argument, para. 142)

Specifically regarding issue 4, Coldwater *et al.* assert that critical decisions (the Options and CPCN decisions) were premature because they were:

- based on inadequate information;
- based on an incorrect assessment of strength of claim;
- based on information that was not shared with First Nations in a timely way or at all;
- decided before the First Nations could articulate their interests;
- decided before receiving specific information from Coldwater *et al.*;
- decided without consideration of historical and ongoing infringements of Aboriginal rights; and
- decided without reconciliation of asserted Aboriginal title and the Crown's objectives.

(Coldwater *et al.* Argument, paras. 10, 249-50)

Coldwater *et al.*'s submissions on issues 1-6 were considered in Section 7 of this Decision.

Regarding T'mixw's involvement, Coldwater *et al.* state:

Whatever the reason for T'mixw not being able to provide the information before the Options Decision, it is clear that BCTC was not prepared to delay that key decision due to the absence of T'mixw's information or the absence of any other TUS information. (Coldwater *et al.* Argument, para. 202)

Commission Determination

The Commission Panel has considered the four Coldwater *et al.* Bands' assertion that by assessing the strengths of claim differently for the four individual Bands, BC Hydro showed a misunderstanding of Nlaka'pamux title. However, the Commission Panel accepts the evidence of the four Bands that "[t]here is no single person or body that represents the Nlaka'pamux nation as a whole" and that "consultation with each of the Coldwater, Cook's Ferry, Siska and Ashcroft bands cannot be conducted through a centralized Nlaka'pamux government agency. Each band has its own band-level government and each must be consulted individually about impacts of government decisions on Nlaka'pamux aboriginal rights and title" (Exhibit C6-5, p. 2). As discussed in Section 8.1, the Commission Panel therefore finds that BC Hydro was correct in consulting with each of the four Coldwater *et al.* Bands individually and in determining the strength of claim and duty to consult on a Band-by-Band basis.

Accordingly, the Commission Panel will review BC Hydro's assessment of each of the four Coldwater *et al.* Bands' strengths of claim and duty to consult.

Coldwater Indian Band

The Commission Panel notes that Coldwater does not dispute BC Hydro's assessment of a high strength of claim and a medium scope of duty to consult. Therefore the Commission Panel accepts BC Hydro's assessment of Coldwater's strength of claim as high and the scope of the duty to consult as medium.

The Commission Panel set out its criteria for low and high consultation in Section 4. The Commission Panel has considered the interaction between Coldwater and BC Hydro in the period from August 2006 to May 2007 and then to August 2008 and notes the following:

- Notice of 5L83, UEC, and the Non-Wires Options was given to Chief Aljam at:
 - the August 31, 2006 meeting with the NTA;
 - the February 21, 2007 EAO Working Group Meeting;
- Notice of 5L83, UEC, and the Non-Wires Options was given to Coldwater Band members at the November 27, 2006 community dinner where a PowerPoint presentation was given;
- discussion of issues raised by Coldwater also occurred at these two meetings;
- BCTC/BC Hydro presented the impacts of construction of 5L83 to Chief Aljam at the EAO Working Group meeting and in the Project Description handed out at the meeting. The EAO Meeting also provided an opportunity for First Nations to raise concerns about the impacts of the Project with BC Hydro;
- Coldwater cashed the initial capacity funding cheque of \$10,000 on March 21, 2007.

As well, the Commission Panel finds that Coldwater had the opportunity to provide information on its potential adverse impacts through T'mixw but that T'mixw did not provide its information in time for incorporation into Golder's report as T'mixw had committed to do, as determined in Section 7.5 (and the information was therefore not available for the Options Decision). Given T'mixw's default on its commitment, the Commission Panel finds BCTC was reasonable to proceed with its Options Decision, rather than delay it. Given the circumstances, BC Hydro met its obligation to learn more about the impacts to Coldwater by having Golder partner with T'mixw.

The Commission Panel finds that BC Hydro/BCTC's consultation was inadequate to meet a medium duty to consult for Coldwater for three reasons:

- although BCTC seriously contemplated a new HVDC line, which would have different impacts on Coldwater than a new AC line, BC Hydro did not present the HVDC option to Coldwater for discussion (as discussed in Section 7.1); and

- BC Hydro did not explain to Coldwater why options were removed from consideration and the reasons why BCTC selected the 5L83 Alternative. Although BC Hydro provided the form letter advising of the Options Decision, in the Commission Panel's view, a medium-high duty to consult, in this Proceeding, requires BC Hydro to explain in greater detail why the options other than 5L83 were eliminated;
- Coldwater was in attendance at the NNTC meeting where revenue sharing was raised with BC Hydro/BCTC. In Section 7.8 the Commission Panel found that BC Hydro/BCTC did not respond adequately to this issue.

BC Hydro is directed to address these deficiencies in Section 10.

Cook's Ferry Indian Band

The Commission Panel notes that while BC Hydro did not assess Cook's Ferry's strength of claim and assessed its duty to consult as *de minimis*, it overlooked a Cook's Ferry reserve which was less than 8 km from the proposed alignment (although the main community is about 59 km away). BC Hydro assessed Coldwater, which has a small reserve 3 km away from the proposed line, as having a medium to high strength of claim and the Commission Panel considers that Cook's Ferry can have a strength of claim no higher than Coldwater. The Commission Panel determines that Cook's Ferry has a medium strength of claim to the Project area because it has a small reserve within fairly close proximity to the line but its main community is a fair distance away.

The Commission Panel finds that potential adverse impacts on Coldwater and Cook's Ferry are similar because their asserted territory encompasses the same line segments. Nodes A to C require 6.5 km new ROW on entirely Crown land and 8 km of ROW widening on Crown and private land. Known archaeological and traditional use sites exist in the ROW. The new ROW requires new access roads. The Commission Panel considers this to have a medium-high level of potential adverse impact.

Accordingly, the Commission Panel considers Cook's Ferry to require a medium duty to consult.

The Commission Panel set out its criteria for low and high consultation in Section 4. The Commission Panel has considered the interaction between Cook's Ferry and BC Hydro in the period from August 2006 to May 2007 and then to August 2008 and finds the following:

- Notice of 5L83, UEC, and the Non-Wires Options was given to Chief Walkem at:
 - the August 31, 2006 meeting with the NTA and BC Hydro;
 - the March 19, 2007 meeting with BC Hydro and BCTC;
- Cook's Ferry was invited to the EAO Working Group meeting in February 2007, and although no member of Cook's Ferry did attend, the binder of materials, including the Project description which gave an overview of impacts such as ROW clearing by line segment (discussed in Section 5.1.4) was provided to Cook's Ferry after the meeting;
- initial capacity funding of \$10,000 was authorized on March 16, 2007.

As well, the Commission Panel finds that Cook's Ferry had the opportunity to provide information on its potential adverse impacts through T'mixw but that T'mixw defaulted on its commitment to provide its information in time for incorporation into Golder's report (and was therefore not available for the Options Decision) as determined in Section 7.5. The Commission Panel finds that given the circumstances, BC Hydro met its obligation to learn more about the impacts to Cook's Ferry by having Golder partner with T'mixw.

The Commission Panel finds that BC Hydro/BCTC's consultation was inadequate to meet a medium duty to consult for Cook's Ferry for the following reasons:

- although BCTC seriously contemplated a new HVDC line, which would have different impacts on Node A than a new AC line, BC Hydro did not present the HVDC option to Cook's Ferry for discussion (as discussed in Section 7.1);
- BC Hydro did not explain to Cook's Ferry why options were removed from consideration and the reasons why BCTC selected the 5L83 Alternative. BC Hydro provided the June 6, 2007 form letter advising of the Options Decision but, in the Commission Panel's view, a medium duty to consult, in this Proceeding, requires BC Hydro to explain why the options other than 5L83 were eliminated from consideration; and

- although Cook's Ferry attended a meeting where revenue sharing was raised as an issue, BC Hydro/BCTC did not adequately respond to the issue (as discussed in Section 7.8).

BC Hydro is directed to address these deficiencies in Section 10.

Siska Indian Band

BC Hydro assessed Siska to have a medium strength of claim and a duty to consult as *de minimis*. As previously noted in the determination for Cook's Ferry, the Commission Panel considers the potential impacts in the segments from Nodes A to C to be medium-high. However, Siska's main community is 34 km away from the proposed line and both Coldwater and Cook's Ferry, other members of the Nlaka'pamux Nation, are closer to the proposed line. Accordingly, the Commission Panel considers Siska to have a low strength of claim to the Project area and a low duty to consult.

In Section 4 the Commission Panel set out its criteria for a low duty to consult and so far as concerns BC Hydro's consultation with Siska, the Commission Panel has considered the interaction in the period from August 2006 to May 2007 and then to August 2008 and finds the following:

- Notice of 5L83, UEC, and the Non-Wires Options was given at:
 - The August 31, 2006 meeting between BC Hydro and the NTA;
 - The March 19, 2007 and April 4, 2007 meetings between Chief Sampson and BC Hydro/BCTC;
- Notice of UEC and 5L83 was also given in the initial capacity funding letter dated March 2007;
- Siska did not attend the EAO Working Group Meeting in February 2007 but was provided with the binder of materials, including the Project description which outlined the impacts of clearing and new ROW required for each line segment;
- Siska was offered initial capacity funding but declined to accept it at the April 4, 2007 meeting; and
- Chief Sampson was informed of the Options Decision by letter dated June 6, 2007.

The Commission Panel finds that the above findings of fact would have been sufficient for the Commission Panel to conclude that BC Hydro's consultation with Siska was adequate to meet the low level of consultation required. However, Siska was also present at the September 13, 2007 meeting with the NNTC where revenue sharing was discussed. The Commission found in Section 7.8 that BC Hydro did not respond adequately to the issue of revenue sharing when it was raised at that meeting. It is for this reason alone that the Commission Panel finds that the consultation that took place between BC Hydro and Siska was not adequate.

BC Hydro is directed to address this deficiency in Section 10.

Ashcroft Indian Band

The Commission Panel has considered the fact that BC Hydro made no preliminary assessment of Ashcroft's strength of claim or of its duty to consult. The Commission Panel considers Ashcroft to have a very low strength of claim to the area based on its 85 km distance from the 5L83 route. As previously noted in the determination for Cook's Ferry, the Commission Panel considers the potential impacts in the segments from Nodes A to C to be medium-high. However, both Coldwater and Cook's Ferry, other members of the Nlaka'pamux Nation, are closer to the proposed line. Accordingly the Commission Panel considers Ashcroft to have a low duty to consult.

In Section 4 the Commission Panel set out its criteria for a low duty to consult and so far as concerns BC Hydro's consultation with Ashcroft, the Commission Panel finds the following:

- BC Hydro provided notice of the Project at:
 - the February 15, 2007 meeting with the NNTC which Councillor Wilson attended;
 - the February 21, 2007 EAO Working Group Meeting which Allan Torng, Ashcroft Band Manager attended;
- BC Hydro sent Ashcroft an initial capacity funding cheque on March 14, 2007; and
- BC Hydro provided notice of the Options Decision to Chief Blain by letter dated June 6, 2007.

Although Ashcroft was contacted by BC Hydro at a later stage in the consultation process, the Commission Panel finds that the above findings of fact would have been sufficient for the Commission Panel to conclude that BC Hydro's consultation with Ashcroft was adequate to meet the low level of consultation required. However, Ashcroft was also present at the September 13, 2007 meeting with the NNTC where revenue sharing was discussed. The Commission found in Section 7.8 that BC Hydro did not respond adequately to the issue of revenue sharing when it was raised at that meeting. It is for this reason alone that the Commission Panel finds that the consultation that took place between BC Hydro and Siska was not adequate.

BC Hydro is directed to address this deficiency in Section 10.

8.5.2 Nlaka'pamux Nation Tribal Council

8.5.2.1 Description and Location

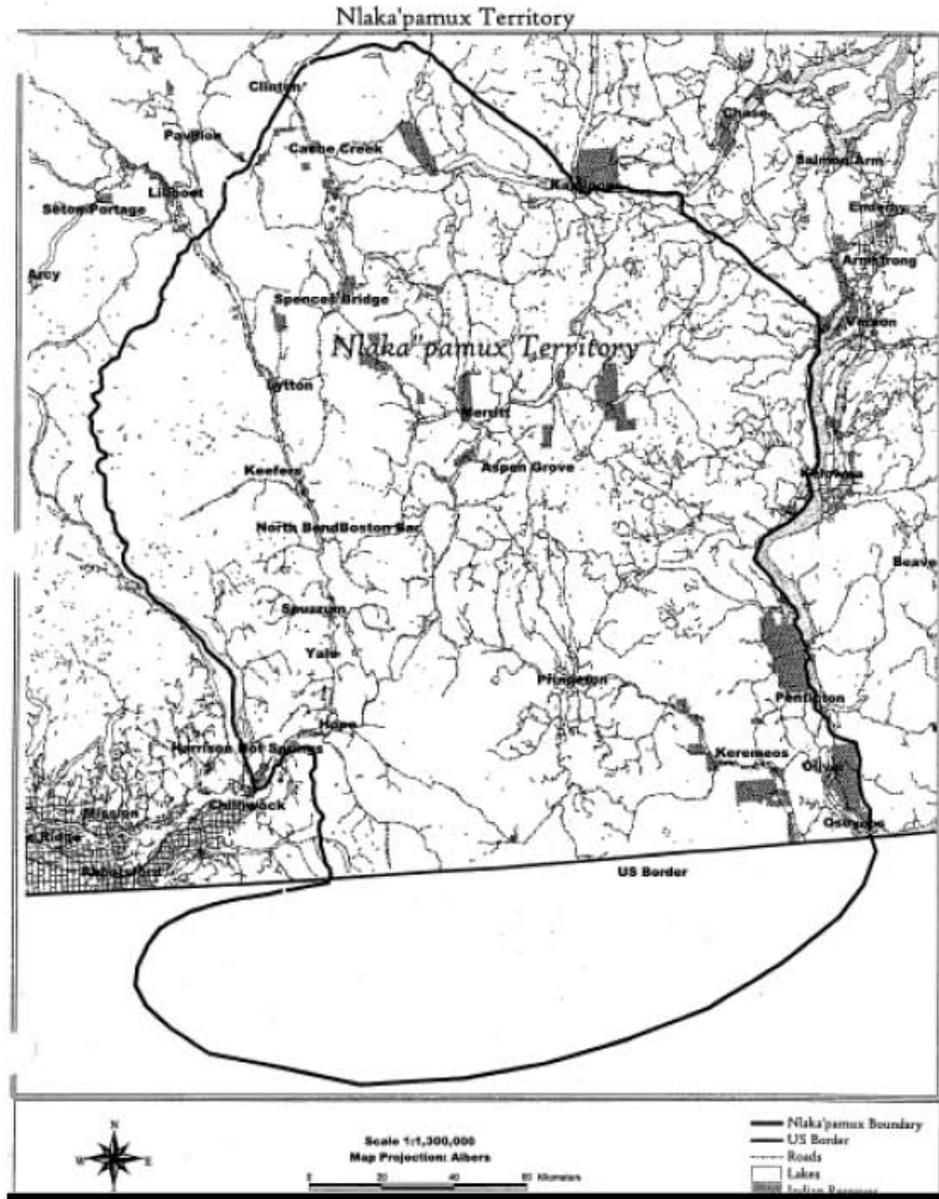
The NNTC is a political organization formed in 1982 to represent Nlaka'pamux collective interests. The NNTC states that it represents the following six Nlaka'pamux Nation members: Skuppah Indian Band, Spuzzum First Nation, Boothroyd Indian Band, Kanaka Bar Indian Band, Oregon Jack Creek Band, and Lytton First Nation (Exhibit C5-10, BC Hydro 1.1.2, 1.1.3, 1.1.4, pp. 1-2). The six NNTC Bands have approximately 2,700 members collectively (Exhibit B-3-1, Appendix B).

The following maps show the location of the six NNTC communities:



(Source: Exhibit B-13, BCUC 1.3.1, p. 20)

The NNTC's asserted traditional territory is shown in the map below:



Source: Exhibit B-13, BCUC 1.3.1, p. 19

The NNTC asserted territory is in the area of Nodes A to P of the 5L83 line (Exhibit B-13, BCUC 1.3.1, p. 19). Nodes A to C have been discussed in relation to Coldwater *et al.* Accordingly, Nodes D to P will be discussed in relation to the NNTC.

8.5.2.2 Strength of Claim Assessment

BC Hydro's preliminary strength of claim assessments were:

First Nations	Preliminary Strength of Claim	
	5L83	UEC
Spuzzum	On Reserve - High	On Reserve - High
Skuppah	Medium	Medium
Boothroyd	Medium	Medium
Kanaka Bar	Low - Medium	Low-Medium
Lytton	Low	Low
Oregon Jack Creek	Low	No assessment
NNTC	High	High

(Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, Appendix 3)

BC Hydro's evidence is that it considered strengths of claim both collectively, for the NNTC as a whole, as well as individually for the six NNTC members. BC Hydro states that it treated all members of the NNTC as having a strong *prima facie* strength of claim for Aboriginal rights in the Project area because of their membership in the Tribal Council (Exhibit B-13, BCUC 1.3.1, pp. 30-1).

BCTC states that Spuzzum's 16 Indian Reserves are the closest Aboriginal communities to Nodes F, G and H. During the period of pre-Options Decision consultation, the proposed route alignment for 5L83 crossed Spuzzum's Indian Reserves (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 13) but in post-Options Decision consultation, the route alignment for 5L83 was further defined to run less than one kilometre from Spuzzum's reserves and main community (Spuzzum 1 and 1A) (Exhibit B-13, BCUC 1.3.1, p. 29).

The following table shows the distances of NNTC's member Bands from the proposed line:

First Nations	Distance from Proposed 5L83 Route (km)	
	Main Community	Closest Reserve
Spuzzum	Less than 1	Less than 1
Boothroyd	14	9
Kanaka Bar	31	31
Skuppah	39	37
Lytton	46	39
Oregon Jack Creek	75	75

(Exhibit B-3-1, Appendix B)

BCTC states “[t]he location of these other NNTC First Nations [namely Oregon Jack Creek and Lytton] indicates that their strongest individual ‘core territories’ would likely be remote from the preferred alignment (Exhibit B-13, BCUC 1.3.1, pp. 27-31).

8.5.2.3 Potential Adverse Impacts

BCTC states that the preferred alignment between Nodes C and H falls within the Nlaka’pamux traditional territory and, in this area, is relatively free of overlapping claims. In the southern portion along the Fraser River (around Nodes E to G1 to H), the closest First Nation is Spuzzum.

Golder’s Draft Heritage Overview Briefing Report Statement identified, at a preliminary level, the following land/clearing required, access and archaeological and traditional use sites:

Node	Land/Clearing Required, Access, Type of Land, Archaeological and Traditional Use Sites
C-D – 16.3 km	<ul style="list-style-type: none"> • 16.3 km new ROW , 50 m wide (81.5 hectares) • Some access from existing logging roads, helicopter construction may be necessary • Entirely Crown land

Node	Land/Clearing Required, Access, Type of Land, Archaeological and Traditional Use Sites
C-E – 19.4 km	<ul style="list-style-type: none"> • 19.4 widening of ROW by 36 m (91.8 hectares) • Access from existing 5L81/82 ROW • Entirely Crown land • 1 archaeological site
D-E – 5.2 km	<ul style="list-style-type: none"> • 3.9 km new ROW (19.5 hectares) • 1 km widening of ROW (3.2 hectares) • Some access from existing logging roads, helicopter construction may be necessary • Entirely Crown land
E-F – 3.6 km	<ul style="list-style-type: none"> • 1.5 km widening of ROW by 35 m (4.8 hectares) • Alternatively, new ROW may be required due to unfavourable terrain • Access from existing 5L81/82 ROW • Entirely Crown land
F-G – 8.4 km	<ul style="list-style-type: none"> • 1.2 km new ROW (6 hectares) • Sufficient ROW exists to bypass existing capacitor station or install additional capacitor bank • Access from logging roads and existing 5L41 ROW • Entirely Crown land, new rights required for ROW, BC Hydro owns 6.67 acres of land containing a capacitor station • 10 archaeological sites
E-G1 – 13 km	<ul style="list-style-type: none"> • 13 km new ROW (65 hectares) • No access exists • Entirely Crown land, all new rights required • 11 archaeological sites, 1 traditional use site including a village site and possible burial site

Node	Land/Clearing Required, Access, Type of Land, Archaeological and Traditional Use Sites
G1-G – 1 km	<ul style="list-style-type: none"> • 1 km new ROW (9.1 hectares) • No access exists • Entirely Crown land, all new rights required • 2 traditional use sites
G1-H – 5.2 km	<ul style="list-style-type: none"> • 5.2 km new ROW • No access exists • Entirely Crown land, all new rights required • 7 archaeological sites, including 1 unregistered burial
G-H – 5 km	<ul style="list-style-type: none"> • No new ROW or widening required • Access from logging roads and existing 5L41 ROW • Segment passes through Spuzzum Indian Reserve #1 and #1A, Crown land and CP Rail private land • 3 archaeological sites including 1 unregistered burial
F-I – 15.9 km	<ul style="list-style-type: none"> • 15.9 km ROW widening by 36 m (65.9 hectares) • Access from existing 5L81/82 • Entirely Crown land • 3 archaeological sites

(Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, pp. 11-13 and Appendix III)

Golder also identified known traditional use site trails at:

- Nodes G1, G, H, J, J1;
- Nodes D, E, F, G;
- Node D;
- Nodes E to G1;

and subsistence and cultural/spiritual sites at Nodes F, G, H and Nodes G1 to H.

Golder acknowledges that there are gaps in the identified heritage sites for the NNTC territory. Golder states “NTA was unable to provide their archaeological and traditional use data for this report in the timelines provided” and “[i]nformation gaps for the GVRD region, and for the NTA and Nlaka’pamux Nation Tribal Council portions of the alignment are greater” (Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, pp. 41, 46).

BCTC considers that there would be a relatively high potential adverse impact between Nodes C and H, since:

- in the segment between Nodes C and E, the majority of ROW required is new; and
- in the segment between Nodes E and H, virtually all ROW would be new and some new road access may be required in some segments.

(Exhibit B-13, BCUC 1.3.1, pp. 22, 29)

The NNTC did not provide information on specific impacts of the Project because it accepts BC Hydro’s scope of the duty to consult determination. In NNTC’s view, its acceptance of BC Hydro’s determination does not necessitate a “full evidentiary basis for proof of a strong *prima facie* case of Nlaka’pamux Aboriginal title and right” (Exhibit C5-9, BCUC 1.1, p. 2).

The NNTC submitted evidence of Aboriginal title and rights exercised in Nlaka’pamux asserted territory including hunting, trapping and fishing, harvesting trees and plants for food, medicinal, and manufacturing purposes, managing fisheries and terrestrial resources, maintaining a network of trails, maintaining and transmitting laws governing resource use and management, farming, ranching and grazing cattle; and practicing spiritual and sacred customs and traditions (Exhibit C5-7, para. 9).

As well, the NNTC submitted that “[a]n issue of long-standing and growing concern to the NNTC has been the cumulative impacts of third-party development in Nlaka’pamux Territory, including the use of the Fraser Canyon as a ‘transportation corridor’ for automobiles, trains and electricity” (Exhibit C5-7, para. 13).

NNTC states that by August 5, 2008 BC Hydro had not identified or communicated any “specific information of impacts to Nlaka'pamux Aboriginal title” (Exhibit C5-9, BCUC 2.1).

The NNTC states that it identified the following potential adverse impacts and concerns regarding the installation of new transmission facilities:

- disruption of wildlife habitat relied upon by Nlaka'pamux members for hunting;
- displacement of Nlaka'pamux peoples from areas used and relied upon for hunting, fishing, gathering of food and medicinal plants, and spiritual practices;
- potential increased non-Aboriginal access to areas relied upon by Nlaka'pamux for the foregoing practices;
- risks associated with exposure to EMF;
- introduction of or increase to invasive plant species;
- infringement to Nlaka'pamux Aboriginal title, which includes ownership of the lands and resources subject to title and the right to determine how those lands and resources will be used, and to benefit from the use of those lands and resources; and
- cumulative infringement to Nlaka'pamux Aboriginal title and rights arising from the expansion of existing ILM transmission facilities, where there had been no consultation or accommodation concerning those facilities.

(Exhibit C5-9, BCUC 1.1, pp. 3-4)

8.5.2.4 Scope of Duty to Consult

BC Hydro's preliminary assessment of the scope of duty to consult was:

First Nations	Preliminary Scope of Duty to Consult	
	5L83	UEC
Spuzzum	Consent/High	Consent/High
Skuppah	No assessment	No assessment
Boothroyd	Low	Low
Kanaka Bar	No assessment	No assessment
Lytton	No assessment	No assessment
Oregon Jack Creek	No assessment	Not Included
NNTC	No assessment	No Assessment

(Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, Appendix 3)

The First Nations Consultation Summary Report advises that “[a] First Nation’s consent will be required for any new permits required for the occupation of reserve lands”, and that 5L83 will potentially affect the reserve lands of the Spuzzum First Nation and Shxw'ow'hamel First Nation. An appendix to the report suggests that one route option will touch a corner of Spuzzum’s reserve, while another routing option would transect at least two reserves and touch a corner of a third (Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, p. 7 and Appendix 3).

BCTC states that “First Nations interests have been taken into account in ... the avoidance of new facilities on Reserves” (Exhibit B-3-1, p. 77).

NNTC states that the Commission may rely on a number of Crown findings relating to the existence and strength of a *prima facie* case for Nlaka'pamux Nation Aboriginal title and rights, and the scope and content of the duty of consultation and accommodation owed to the NNTC, one of which the NNTC states was the EAO Report of May 2009 which concluded:

[t]hat a "medium to deep level of consultation is required with the Nlaka'pamux Nation based on the *Haida* spectrum." (Exhibit C5-7-1, Appendix D, p. 171)

NNTC points out that BC Hydro's April 2007 Consultation Summary Report concedes a high strength of claim for the NNTC, and submits that “this concession is consistent with the evidence filed by the NNTC establishing a strong *prima facie* case for Nlaka'pamux Aboriginal title and rights in the area of the ILM Expansion Project defined as Nodes A to G and a strong *prima facie* case for Nlaka'pamux Aboriginal rights, including title, to the area of the ILM Expansion Project defined as Nodes C to H, which includes those sections of the project in closest proximity to the Nlaka'pamux community of Spuzzum and that deep level of consultation is required.”

NNTC continues: “[f]or purposes of this reconsideration hearing, the NNTC accepts BC Hydro's preliminary assessment as to both the strength of claim and the scope of the duty” [emphasis added] (NNTC Argument, para. 65).

BC Hydro addresses this submission somewhat obliquely in Reply, where it submits:

[g]iven that some of the First Nation Intervenors have not chosen (as is their prerogative) to participate in these proceedings as a larger nation grouping (e.g. the Nlaka'pamux Nation as a whole), it is not appropriate for the purposes of these proceedings that the assessment of the scope and content of consultation required to [sic] be conducted solely on that basis. BC Hydro believes that a more individualized approach to assessing the scope and content of the duty to consult with First Nations is appropriate for the purposes of the current proceeding (BC Hydro Reply, p. 18).

BC Hydro did not make a determination of the scope of the duty to consult for the NNTC as a whole but the NNTC asserts that “the Commission must measure [the adequacy of BC Hydro's conduct] against the standard of deep consultation” (NNTC/ONA/Upper Nicola Argument, para. 67).

8.5.2.5 Interactions with BC Hydro/BCTC

Between August 2006 and May 2007, BC Hydro and BCTC met with the NNTC and the constituent members as follows:

8.5.2.5.1 NNTC

Melissa Holland, Charles Littledale and Julian Wake met with the NNTC on February 15, 2007 where they gave the February 2007 PowerPoint presentation. In attendance at the meeting were Chief Pasco (NNTC and Oregon Jack Creek), Chief Webster (Lytton), Donnie Sam, representing Chief McIntyre (Skuppah), Councillor Wilson (Ashcroft), Councillor Edwards (Spuzzum), Alison Duncan (Heritage Manager, NNTC), Byron Spinks (Restorative Justice, NNTC), Christine Brown (Lands Manager, Lytton), and Raymond Phillips, legal counsel (Exhibit B-20, Attachment B-2).

NNTC displayed a map showing the area over which it asserted rights and title and raised the following matters:

- why there should be any options at all especially concerning new land that might be lost;
- whether studies would be undertaken on the effects of the UEC or 5L83 options, particularly the effects of transmission lines on vegetation, animals and human health;
- the possibility for the NNTC to do research and studies on the effects of the transmission lines;
- concerns that traditional patterns of hunting, gathering and farming have changed since the existing lines were installed;
- concerns that transmission lines lower property values;
- concerns about reserve lands lost to transmission corridors and further impacts in the Fraser Canyon;
- concerns that the NNTC could not get organized to participate in the EAO process by May when the Options Decision would be made;
- concern that the EAO process does not deal with title issues;
- the direct impact on NNTC's territory that both alternatives would cause ;
- many outstanding issues between the Nlaka'pamux people and BC Hydro; including issues of past infringements and lost values;
- the need for a protocol with actions and timelines for moving forward;
- the wish to continue meeting with BC Hydro outside of the EAO process; and

- a request for a map identifying Indian Reserves on the BC Hydro grid system along the UEC Alternative.

(Exhibit B-20, Attachment B-2)

In response, Charles Littledale offered that BC Hydro would consider a proposal from the NNTC to do research. Melissa Holland and Charles Littledale offered to bring an independent researcher on transmission lines and their health effects to the communities, and Melissa Holland presented maps showing that UEC would not take up more land and 5L83 would not affect the Fraser Canyon (Exhibit B-20, Attachment B-2).

This was the only meeting in the period up to the Options Decision, although BC Hydro states that Claire Marshall had left “ a detailed message” with the NNTC’s receptionist on August 29, 2006 and that it sent emails on November 16 and 23, 2006 attempting to set up a meeting.

On February 21, 2007, the Environmental Assessment Office held its first Working Group meeting for the ILM Project. The NNTC did not attend the meeting but BC Hydro forwarded the materials to it afterwards.

On March 14, 2007, Julian Wake e-mailed Raymond Phillips asking for input from NNTC communities as to which option would be preferable and to discuss capacity funding. Julian Wake informed him that the only NNTC First Nation to have requested and received capacity funding was Ashcroft and that Boothroyd, Lytton and Skuppah had said they would be represented by the NNTC. Julian Wake asked for confirmation about the funding for the other NNTC First Nations (Exhibit B-12, BCUC 1.1.1, p. 135; Confidential Exhibit B-4, pp. 485-6).

On March 15, 2007, Raymond Phillips emailed BC Hydro that he had reviewed BC Hydro’s capacity funding letter, and that it raised legal issues that should be discussed before the Bands sign it.

On March 15, 2007, Raymond Phillips emailed Julian Wake that the Nlaka'pamux Nation member communities were still getting organized and therefore it was too early for them to provide any meaningful and informed feedback on the draft documents from the BCEAO. Raymond Phillips stated he appreciated the timelines and deadlines that had been set.

Raymond Phillips indicated that those of the leadership he had spoken to were deeply concerned with both 5L83 and UEC as neither alternative dealt with past impacts, and that primary concerns with 5L83 were (i) its impact on the environment and (ii) that the Nlaka'pamux communities would be downplayed or not considered because 5L83 followed an existing high voltage line. Raymond Phillips indicated that the Nlaka'pamux communities were trying to move towards a common entity to address the proposed development in the territory.

On March 16, 2007, the NNTC indicated that it still had not been determined what its approach would be (Exhibit B-12, BCUC 1.1.1, p. 135).

By letter dated June 6, 2007 BC Hydro informed Chief Pasco of the Options Decision.

In the period between the Options Decision and August 5, 2008, BC Hydro and BCTC met with the NNTC, either in person or by conference call ten times, primarily to address Existing Assets.

On September 7, 2007, Charles Littledale and Jennifer Hooper met with Chief Pasco of NNTC and Oregon Jack Creek, Chief Spinks of Lytton, Chief Campbell of Boothroyd, Councillor Wilson of Ashcroft and Debbie Abbott of the NNTC. BC Hydro explained the need for the new line. Chief Pasco requested an opportunity to meet with BC Hydro executives regarding addressing past grievances, revenue sharing and the "big picture" (Exhibit B-20, Attachment B-3).

On September 13, 2007, Keith Anderson, Melissa Holland, Darrell Mounsey, Charles Littledale and Julian Wake met in Lytton with a number of Nlaka'pamux chiefs and councillors, including Chief Spinks and Councillors Charlie and Brown of Lytton, Councillor Campbell of Boothroyd, Councillor McIntyre of Skuppah; John Warren, Administrator of Spuzzum; and Alison Duncan, Researcher with

the NNTC, who also videotaped the meeting (which was subsequently filed as Exhibit C5-25). In addition, the Chiefs of Siska, Coldwater, Cook's Ferry and three non-Intervening First Nations, as well as Raymond Phillips, legal counsel, attended the meeting (Exhibit B-20, Attachment B-4).

During the meeting, concerns were raised including historical infringements, revenue generation and sharing from transmission lines, the inadequacy and "piecemeal" nature of the EAO process, and the cumulative impacts of various projects on Nlaka'pamux traditional territory.

Melissa Holland and Keith Anderson presented information on a number of topics including the regulatory process and the Commission, and the growing need for electricity. Keith Anderson indicated BC Hydro's priorities were to negotiate capacity funding agreements and work out a process to identify the impacts of the Project on the Nlaka'pamux within ten months of the meeting. Melissa Holland summarized BCTC's priority as the need to obtain information so the Project team can avoid, mitigate or compensate for the impacts.

Raymond Phillips summarized the Nlaka'pamux priorities including resolving the question of past impacts, consultation on a common title basis, revenue sharing, capacity funding, and having studies performed to assess the impact of the Existing Assets and 5L83 (Exhibit B-20, Attachment B-4).

The second EAO Working Group meeting took place on September 20, 2007. Representatives of Spuzzum and Lytton attended while the NNTC did not (Exhibit B-12, BCUC 1.3.1, p. 141).

Between November 15, 2007 and August 5, 2008, NNTC and their legal advisers met with BC Hydro representatives, including Eric Denhoff (Chief Negotiator), James Ross (Manager, BC Hydro ARN) and at times, Lyle Viereck (Director of BC Hydro ARN) on the following occasions:

- November 15, 2007;
- November 23, 2007;
- December 5, 2007;

- February 5, 2008;
- April 22, 2008;
- May 12, 2008 (sub-committee);
- May 16, 2008 (sub-committee); and
- June 17, 2008;

At these meetings, discussions were focused on Existing Assets and on attempts to create a mutually acceptable process for consultation on them. The NNTC took the position that consultation on Existing Assets had to be a joint process with consultation on the ILM Project while BC Hydro took the position that it could move forward in two separate, but parallel processes; the first to consult on certain aspects of the existing line as part of the consultation on 5L83, and the second to consult on the historical grievances concerning the original construction. BC Hydro also made it clear that the outcome of the second process could not inform the first process and that NNTC should take the issue up with the provincial and federal governments.

On July 18, 2008, NNTC states that it and ONA wrote to the Minister of Energy Mines and Petroleum Resources requesting the Province give BC Hydro and BCTC a mandate to consult regarding Existing Assets. A meeting was arranged but then cancelled by the Minister (Exhibit C5-10, BC Hydro 10.1). By August 5, 2008 no meeting had taken place.

8.5.2.5.2 Spuzzum First Nation

On September 22, 2006, Charles Littledale and Claire Marshall met Cathy Speth, Band Manager of Spuzzum and gave a presentation on the ILM Project. Cathy Speth raised concerns about power surges in the community and indicated she would likely withhold comment on the ILM Project until the power surges were resolved (Confidential Exhibit B-4, p. 701).

Three further meetings took place between BC Hydro/BCTC and Spuzzum's Band Manager, primarily on the issue of power surges, on October 5, 2006, November 21, 2006, and February 7, 2007 (Confidential Exhibit B-4, pp. 702-3, 707).

Councillor Gordie Edwards of Spuzzum attended the February 15, 2007 meeting with BC Hydro, BCTC and the NNTC (Exhibit B-20, Attachment B-2).

Councillor Edwards and Edith Florence attended the February 21, 2007 EAO Working Group meeting on behalf of Spuzzum (Exhibit B-3-1, Appendix U).

Chief Bobb and Council met with Charles Littledale and Ken McKillop of BC Hydro and Gary Holisco of BCTC on February 27, 2007. The ILM presentation was given and power surges were discussed (Confidential Exhibit B-4, p. 707).

On March 27, 2007, Charles Littledale and two employees of Golder attended Spuzzum's monthly general members meeting. Twelve members attended. Mr. Littledale presented on the ILM Project and Golder presented on gathering TUS information (Confidential Exhibit B-4, p. 714).

BCTC states that on April 4, 2007, Golder completed a TUS overview focus group with four representatives from Spuzzum First Nation to discuss specific traditional use areas. Non-traditional use issues were also raised, including:

- concerns with impacts of the Existing Assets due to their proximity to the Spuzzum community and Reserves, and impacts of previous projects on human burial and archaeological sites;
- concern that there was inadequate consultation on past BC Hydro projects;
- opportunities for economic benefits or contracts from construction of a new transmission line.

(Exhibit B-12, BCUC 1.1.1, p. 135)

Spuzzum advised BC Hydro that its Chief and Council agreed to sign the initial capacity funding agreement for \$10,000 on April 28, 2007 (Confidential Exhibit B-4, p. 716).

On May 10, 2007, Charles Littledale attended Spuzzum's weekly community luncheon (Confidential Exhibit B-4, p. 716).

BC Hydro and Spuzzum were in contact by telephone and email over the period from the Options Decision to August 2008, primarily on the issues of power surges, traditional use studies and route alignment. The discussion of power surges led to the formation of the Fraser Canyon Reliability Working Group, which was created to address concerns about power reliability and power quality in the Fraser Canyon.

Spuzzum attended a meeting on June 5, 2008 with BC Hydro concerning route alignment options for 5L83 (Exhibit B-3-1, p. 64).

8.5.2.5.3 Boothroyd Indian Band

BC Hydro had a meeting with Chief Phillip Campbell of Boothroyd on September 5, 2006, during which Chief Campbell indicated that, within the NNTC, member bands take the lead on issues on a watershed basis. The Chief asked questions about the export of power from IPPs, the approval process for IPPs, EMFs, and whether the Community Development Fund would be adjusted if a new or upgraded line was built, and indicated that his community would prefer electricity over cash (Exhibit B-13, BCUC 1.3.1, p. 31).

An internal BC Hydro memo states "[t]he Chief also gave us some good insights into how the member bands work within the TC [Tribal Council] - the member bands take the lead on issues on a watershed basis - he mentioned that Boston Bar would likely take the lead on this and emphasized the importance of having a mtg w[ith] them before the TC mtg" (Exhibit B-20, Appendix B-1).

Councillor Mike Campbell of Boothroyd attended the EAO Working Group Meeting in February 2007.

BCTC states that Golder contacted Boothroyd on February 28, 2007, regarding the planned heritage overview work. After initially agreeing to participate in the TUS, Boothroyd indicated on March 28, 2007 that they would collect their own TUS through the NNTC (Exhibit B-13, BCUC 1.3.1, p. 132).

BC Hydro wrote Chief Campbell advising of BCTC's Options Decision on June 6, 2007 and Julian Wake followed up with a phone call the next day.

Boothroyd did not meet with BC Hydro or BCTC again until Councillor Campbell attended the larger NNTC meeting on September 13, 2007 (described in Section 8.5.2.5.1).

8.5.2.5.4 Kanaka Bar Indian Band

No representative of Kanaka Bar attended the February 21, 2007 EAO Meeting (Exhibit B-3-1, Appendix U).

Melissa Holland, Bryan Corns (BCTC) and Julian Wake met with Chief Frank of Kanaka Bar on March 21, 2007. BCTC states that Kanaka Bar raised concerns about cumulative loss of land as a result of development, and lack of involvement in Lytton-Spences Bridge upgrade where Kanaka Bar's IPP was seeking access to the grid. BCTC responded by saying that they proposed to maximize the use of existing ROW and to use delta tower configuration to minimize the Project footprint. BCTC also advised BC Hydro's IPP department of the Band's concern (Exhibit B-14, BCUC 1.2.2.1, Attachment 1; Confidential Exhibit B-4, p. 184).

On March 28, 2007, BC Hydro sent initial capacity funding to Kanaka Bar (Exhibit A2-6, p. 1).

On June 6, 2007, BC Hydro wrote to Chief Frank, informing him of the Options Decision, and then followed up with a phone call on June 7, 2007.

Julian Wake met with Chief Frank on June 19, 2007. At the meeting, the Chief indicated he wanted to be kept informed but was not directly affected by 5L83 and would not be involved in the EAO process (Exhibit B-14, BCUC 1.2.2.1, Attachment 1).

No further meetings took place between BC Hydro and Kanaka Bar before August 5, 2008.

8.5.2.5.5 Skuppah Indian Band, Lytton First Nation, and Oregon Jack Creek Indian Band

BC Hydro did not meet individually with these bands in the period August 2006 to May 2007.

At the February 15, 2007 meeting with NNTC, Melissa Holland, Charles Littledale, and Julian Wake, met with Donnie Sam of Skuppah, Chief Janet Webster and Christine Brown of Lytton, and Chief Robert Pasco of Oregon Jack Creek. Chief Webster raised concerns about lost lands and the lack of consultation on existing lines (discussed in Section 8.5.2.5.1).

No representative of these Bands attended the February 21, 2007 EAO Meeting (Exhibit B-3-1, Appendix U).

On March 7, 2007, Lytton and Skuppah were offered initial capacity funding and both advised BC Hydro that they would be represented by NNTC and would not require initial capacity funding (Confidential Exhibit B-4, pp. 303, 681).

BC Hydro's evidence is that neither First Nation received initial capacity funding (Exhibit A2-6).

BC Hydro sent letters to Chief McIntyre of Skuppah, Chief Byron Spinks of Lytton and Chief Pasco informing them of the Options Decision on June 6, 2007.

Chief Byron Spinks, Councillor Jim Brown and Councillor Fred Charlie of Lytton, and Councillor Sherri McIntyre of Skuppah were in attendance at the September 13, 2007 meeting of the NNTC (described in Section 8.5.2.5.1).

8.5.2.6 The Parties' Views of the Consultation Process

The NNTC/ONA/Upper Nicola's submissions on the adequacy of consultation are discussed in Section 8.4.6.

Commission Determination

In this Proceeding the NNTC speaks for six of the member Bands of the Nlaka'pamux Nation. Accordingly, the Commission Panel will examine the assessments of strength of claim and scope of duty to consult for each of the six member Bands and the Tribal Council itself. The Commission Panel will then make determinations on whether the consultation carried out by BC Hydro and BCTC met the determined level of consultation required.

NNTC

The Commission Panel will first address the NNTC statement: "[f]or purposes of this reconsideration hearing, the NNTC accepts BC Hydro's preliminary assessment as to both the strength of claim and the scope of the duty" [emphasis added] (NNTC/ONA/Upper Nicola Argument, para. 65).

The Commission Panel notes that BC Hydro assessed NNTC's strength of claim as high but did not actually make a preliminary assessment of NNTC's scope of duty to consult. As discussed in Section 8.1.2, the Commission Panel has determined that a Tribal Council cannot have a strength of claim or scope of duty to consult which is higher than the highest of its member Bands. In this case BC Hydro's preliminary assessment of Spuzzum's strength of claim and scope of duty to consult were both high. Despite this, the Commission Panel finds it reasonable to assess NNTC's scope of duty to consult as medium-high given the following facts:

- Spuzzum represented itself for much of the consultation process;

- All member Bands of NNTC represented themselves individually for consultation indicating that consultation authority was not fully delegated to NNTC;
- Boothroyd, Lytton and Skuppah specifically indicated they would be represented by the Tribal Council. BC Hydro assessed the scope of duty to consult Boothroyd as low and did not assess Lytton and Skuppah;
- BC Hydro assessed the potential adverse impacts to rights and title at a Band level and, given that NNTC does not represent the Nlaka'pamux Nation as a whole, the Commission Panel does not have an assessment of the impacts to rights and title at a Tribal Council level; and
- NNTC took the lead role for its member Bands on certain issues in the consultation process, however this was primarily in respect of Existing Assets.

The Commission Panel set out its criteria for low and high consultation in Section 4. The Commission Panel has considered the interaction between NNTC and BC Hydro in the period from August 2006 to May 2007 and then to August 2008 and finds the following:

- Notice of 5L83, UEC, and the Non-Wires Options was given to NNTC at the February 15, 2007 meeting with BC Hydro/BCTC;
- NNTC was advised of adverse impacts of the Project through the EAO Working Group binder of materials, including the Project description showing the options under consideration and the ROW requirements by line segment;
- BC Hydro met individually with Spuzzum more than ten times, Boothroyd once, and Kanaka Bar three times before August 5, 2008 to discuss their individual interests;
- BCTC learned about Aboriginal interests when Golder conducted its traditional use interview with Spuzzum. Golder also attempted to obtain traditional use and other information on impacts to other Nlaka'pamux rights through partnering with T'mixw. As discussed in Section 7.5, the information from T'mixw was not provided in time for the Options Decision because T'mixw defaulted on its obligation to provide its information; and
- BC Hydro met with NNTC a number of times after the Options Decision, primarily to discuss consultation on Existing Assets. As discussed in Section 7.10, NNTC removed its reliance on this aspect of its Argument following the release of the decision in *Carrier Sekani*.

The Commission Panel finds that BC Hydro/BCTC's consultation was inadequate to meet a medium to high duty to consult NNTC for the following reasons:

- BC Hydro did not explain to NNTC why options were removed from consideration and the reasons why BCTC selected the 5L83 Alternative. Although BC Hydro provided the form letter advising of the Options Decision, in the Commission Panel's view, a high duty to consult, in this Proceeding, requires BC Hydro to explain in greater detail why the options other than 5L83 were eliminated; and
- although NNTC brought up the issue of revenue sharing at its September 7 and 13, 2007 meetings, BC Hydro/BCTC did not adequately respond to the issue (as discussed in Section 7.8).

BC Hydro is directed to address these deficiencies in Section 10.

Spuzzum First Nation

The Commission Panel notes that NNTC appears to accept BC Hydro's assessment for Spuzzum of a high strength of claim and a high scope of duty to consult. As such, the Commission Panel accepts BC Hydro's assessment of Spuzzum's strength of claim and scope of the duty to consult.

The Commission Panel set out its criteria for high consultation in Section 4. The Commission Panel has considered the interaction between Spuzzum and BC Hydro in the period from August 2006 to May 2007 and then to August 2008 and notes the following:

- notice of 5L83, UEC, and the Non-Wires Options was given at:
 - the September 22, 2006 meeting between BC Hydro/BCTC and Spuzzum's Band Manager. At that meeting, the Band Manager raised a serious concern about power surges. The Commission Panel considers BC Hydro to have been very responsive to this issue by meeting at least four more times to discuss the issue. These discussions eventually led to the creation of the Fraser Canyon Reliability Working Group as a body to deal with the issue on an ongoing basis.
 - the February 27, 2007 meeting between BC Hydro/BCTC and Chief Bobb and Spuzzum Council;
 - the EAO meeting attended by Gordie Edwards and Edith Florence;

- BCTC learned about potential adverse impacts on Spuzzum's asserted rights through Golder's April 4, 2007 interview with four representatives of Spuzzum, which informed the Draft Heritage Briefing Report Statement;
- BCTC/BC Hydro presented the adverse impacts of construction of 5L83 at the EAO Working Group meeting and in the Project Description handed out at the meeting, and provided an opportunity for the First Nations to raise concerns;
- BC Hydro offered capacity funding in early March 2007 although Spuzzum did not sign the agreement until April 28, 2007. The Commission Panel cannot ascertain why there was a delay between the offer and Spuzzum's acceptance of capacity funding. Therefore, the Commission Panel finds BC Hydro's offer in early March to be adequate.

The Commission Panel considers that BC Hydro/BCTC's consultation was inadequate to meet a high duty to consult for the Spuzzum for the following reasons:

- BC Hydro did not explain to Spuzzum why options were removed from consideration and the reasons why BCTC selected the 5L83 Alternative. Although BC Hydro provided the form letter advising of the Options Decision, in the Commission Panel's view, a high duty to consult, in this Proceeding, requires BC Hydro to explain in greater detail why the options other than 5L83 were eliminated.
- although John Warren of Spuzzum was at NNTC's September 13, 2007 meeting with BC Hydro/BCTC where the issue of revenue sharing was raised, BC Hydro/BCTC did not adequately respond to the issue (as discussed in Section 7.8).

BC Hydro is directed to address these deficiencies in Section 10.

Boothroyd Indian Band

The Commission Panel notes that NNTC does not specifically address BC Hydro's assessment for Boothroyd of a medium strength of claim and a low scope of duty to consult. Boothroyd's main community is 14 km from the proposed line and its closest Reserve is 9 km away but Boston Bar, another Nlaka'pamux Nation member is in closer proximity.

Based on review of Exhibit B-3-1, Appendix C, Boothroyd appears to be closest to Nodes C and D. The corresponding line segments require around 20 km of new ROW on entirely Crown land and 20 km of ROW widening. Some new access will be required and at least one known archaeological site exists. The Commission Panel finds the potential impacts in these line segments to be high.

Based on a review of Boothroyd's proximity to 5L83, and given the fact that Boston Bar is in closer proximity to the line with greater potential adverse impacts, the Commission Panel finds Boothroyd to have a medium preliminary duty to consult.

In Section 4 the Commission Panel set out its criteria for the low and high duties to consult. So far as concerns BC Hydro's consultation with Boothroyd, the Commission Panel has considered the interaction in the period from August 2006 to May 2007 and then to August 2008 and finds the following:

- notice of 5L83, UEC, and the Non-Wires Options was given at:
 - the September 5, 2006 meeting between BC Hydro and Chief Campbell
 - the EAO Working Group Meeting in February 2007 which Councillor Campbell attended;
- the potential adverse impacts of construction of 5L83 were presented at the EAO Working Group meeting and in the Project Description handed out at the meeting;
- Golder contacted Boothroyd to obtain TUS information but Boothroyd indicated it would do so through NNTC; and
- Chief Campbell was informed of the Options Decision by letter dated June 6, 2007.

The Commission Panel notes that Boothroyd did not receive initial capacity funding. The evidence is clear that Boothroyd was offered initial capacity funding but that Raymond Phillips indicated on Boothroyd's behalf that the Band would be represented by NNTC. The Commission Panel considers the reason why it chose not to accept the funding is not clear and may be related to the fact that Boothroyd expected the funding to go to the NNTC. In any event, the Commission Panel finds the fact that BC Hydro offered initial capacity funding to be adequate.

The Commission Panel finds BC Hydro's consultation with Boothroyd was inadequate to meet the medium level of consultation required because:

- BC Hydro did not explain to Boothroyd why and when options were removed from consideration and the reasons why BCTC selected the 5L83 Alternative. BC Hydro provided the form letter advising of the Options Decision but, in the Commission Panel's view, a medium duty to consult, in this Proceeding, requires BC Hydro to explain why the options other than 5L83 were eliminated from consideration; and
- Boothroyd attended the September 7 and 13, 2007 meetings of the NNTC where revenue sharing was raised as an issue, but BC Hydro/BCTC did not adequately respond to the issue (as discussed in Section 7.8).

BC Hydro is directed to address this deficiency in Section 10.

Kanaka Bar Indian Band

The Commission Panel notes that NNTC does not specifically address BC Hydro's assessment for Kanaka Bar of a low to medium strength of claim and no assessment of duty to consult. Kanaka Bar's main community and closest Reserve is 31 km from the proposed line, north of Boothroyd. It is also in closest proximity to Nodes C and D which the Commission Panel determined was an area with high potential adverse impacts. But, given Kanaka Bar's distance from the line and the fact that Boothroyd is closer, the Commission Panel finds it reasonable to assess Kanaka Bar as having a low preliminary duty to consult.

In Section 4 the Commission Panel set out its criteria for a low duty to consult. The Commission Panel has considered the interaction between Kanaka Bar and BC Hydro/BCTC in the period from August 2006 to May 2007 and then to August 2008 and finds BC Hydro's consultation with Kanaka Bar met the low duty to consult, for the following reasons:

- notice of 5L83, UEC, and the Non-Wires Options was given at:
 - the March 21, 2007 meeting between BC Hydro/BCTC and Chief Frank;

- the March 21, 2007 meeting also provided an opportunity for Chief Frank to raise and discuss issues;
- the potential adverse impacts of construction of 5L83 were presented by line segment in the EAO Working Group's project binder sent to Kanaka Bar because it did not attend the meeting;
- Kanaka Bar received initial capacity funding on March 28, 2007; and
- Chief Frank was informed of the Options Decision by letter dated June 6, 2007.

Skuppah Indian Band

The Commission Panel notes that NNTC does not specifically address BC Hydro's assessment for Skuppah of a medium strength of claim and no assessment of the duty to consult. Skuppah's main community and closest reserve are 39 km and 37 km, respectively, away from the proposed route alignment, north of Kanaka Bar. It is also in closest proximity to Nodes C and D which the Commission Panel determined was an area with high potential adverse impacts. But, given Skuppah's distance from the line and the fact that both Kanaka Bar and Boothroyd are closer, the Commission Panel finds it reasonable to assess Skuppah as having a low preliminary duty to consult.

In Section 4 the Commission Panel set out its criteria for a low duty to consult. The Commission Panel has considered the interaction between Skuppah and BC Hydro/BCTC in the period from August 2006 to May 2007 and then to August 2008 and finds:

- notice of 5L83, UEC, and the Non-Wires Options was given at the February 15, 2007 meeting between BC Hydro/BCTC and NNTC which Donnie Sam attended;
- the potential adverse impacts of construction of 5L83 were presented by line segment in the EAO Working Group's project binder sent to Skuppah because it did not attend the meeting;
- Skuppah was offered initial capacity funding but did not accept it; and
- Chief McIntyre was informed of the Options Decision by letter dated June 6, 2007.

BC Hydro/BCTC did not meet individually with Skuppah but Raymond Phillips indicated that Skuppah would be represented by NNTC. Therefore, the lack of individual meetings with the Band does not mean consultation was inadequate.

The findings of fact above would have been sufficient for the Commission Panel to conclude that BC Hydro's consultation with Skuppah was adequate to meet the low level of consultation required. However, Skuppah was present at the September 13, 2007 meeting with NNTC where revenue sharing was raised. In Section 7.8 the Commission Panel found that BC Hydro/BCTC did not respond to this issue adequately.

BC Hydro is directed to address this deficiency in Section 10.

Lytton First Nation

The Commission Panel notes that NNTC does not specifically address BC Hydro's assessment for Lytton of a low strength of claim and no assessment of the duty to consult. Lytton's main community and closest reserve are 46 km and 39 km, respectively, away from the proposed route alignment, north of Skuppah. It is also in closest proximity to Nodes C and D which the Commission Panel determined was an area with high potential adverse impacts. But, given Lytton's distance from the line and the fact that Skuppah, Kanaka Bar and Boothroyd are closer, the Commission Panel finds it reasonable to assess Lytton as having a low preliminary duty to consult.

In Section 4 the Commission Panel set out its criteria for a low duty to consult. The Commission Panel has considered the interaction between Lytton and BC Hydro/BCTC in the period from August 2006 to May 2007 and then to August 2008 and finds:

- notice of 5L83, UEC, and the Non-Wires Options was given at the February 15, 2007 meeting between BC Hydro/BCTC and NNTC which Chief Webster and Christine Brown attended;

- the potential adverse impacts of construction of 5L83 were presented by line segment in the EAO Working Group's project binder sent to Lytton because it did not attend the meeting;
- Lytton was offered initial capacity funding but did not accept it; and
- Chief Spinks was informed of the Options Decision by letter dated June 6, 2007.

BC Hydro/BCTC did not meet individually with Lytton but Raymond Phillips indicated that Lytton would be represented by NNTC. Therefore, the lack of individual meetings with the Band cannot be determinative for adequacy of consultation.

The findings of fact above would have been sufficient for the Commission Panel to conclude that BC Hydro's consultation with Lytton was adequate to meet the low level of consultation required. However, Lytton was present at both the September 7 and 13, 2007 meetings with NNTC where revenue sharing was raised. In Section 7.8 the Commission Panel found that BC Hydro/BCTC did not respond to this issue adequately.

BC Hydro is directed to address this deficiency in Section 10.

Oregon Jack Creek Indian Band

The Commission Panel notes that NNTC does not specifically address BC Hydro's assessment for Oregon Jack Creek of a low strength of claim and no assessment of the duty to consult. Oregon Jack Creek's main community and closest reserve is 75 km away from the proposed route. Given Oregon Jack Creek's far distance from the proposed line, the Commission Panel finds the Band's scope of duty to consult can be no higher than low.

In Section 4 the Commission Panel set out its criteria for a low duty to consult. The Commission Panel has considered the interaction between Oregon Jack Creek and BC Hydro/BCTC in the period from August 2006 to May 2007 and then to August 2008 and finds:

- notice of 5L83, UEC, and the Non-Wires Options was given at the February 15, 2007 meeting between BC Hydro/BCTC and NNTC which Chief Pasco attended;
- the potential adverse impacts of construction of 5L83 were presented by line segment in the EAO Working Group's project binder sent to Oregon Jack Creek because it did not attend the meeting;
- Oregon Jack Creek was offered initial capacity funding but did not accept it; and
- Chief Pasco was informed of the Options Decision by letter dated June 6, 2007.

BC Hydro/BCTC did not meet individually with Oregon Jack Creek but Chief Pasco is also the Chair of NNTC and the Band was therefore informed of the Project through the Tribal Council. As well, Raymond Phillips indicated that Oregon Jack Creek would be represented by NNTC. Therefore, the lack of individual meetings with the Band cannot be determinative for adequacy of consultation.

The findings of fact above would have been sufficient for the Commission Panel to conclude that BC Hydro's consultation with Oregon Jack Creek was adequate to meet the low level of consultation required. However, Oregon Jack Creek was present at the September 7, 2007 meeting with NNTC where revenue sharing was raised. In Section 7.8 the Commission Panel found that BC Hydro/BCTC did not respond to this issue adequately.

BC Hydro is directed to address this deficiency in Section 10.

8.6 Stó:lō Tribal Council and Seabird Island First Nation

8.6.1 Description and Location

The Stó:lō Tribal Council was incorporated on July 21, 2004 by eight First Nations. For the purposes of this Proceeding, the STC represents the Cheam, Kwaw-kwaw-a-pilt, Shxw'ow'hamel, Soowahlie, and Sumas First Nations (STC Argument, para. 1). Seabird Island intervened separately but joined STC for the submission of Final Argument. All the above First Nations will be referred to collectively as the STC in this Decision.

Three STC First Nations (Kwantlen, Chawathil and Scowlitz) did not participate with the STC in this Proceeding. The six First Nations intervening as the STC have over 2,000 members collectively (Exhibit B-3-1, Appendix B).

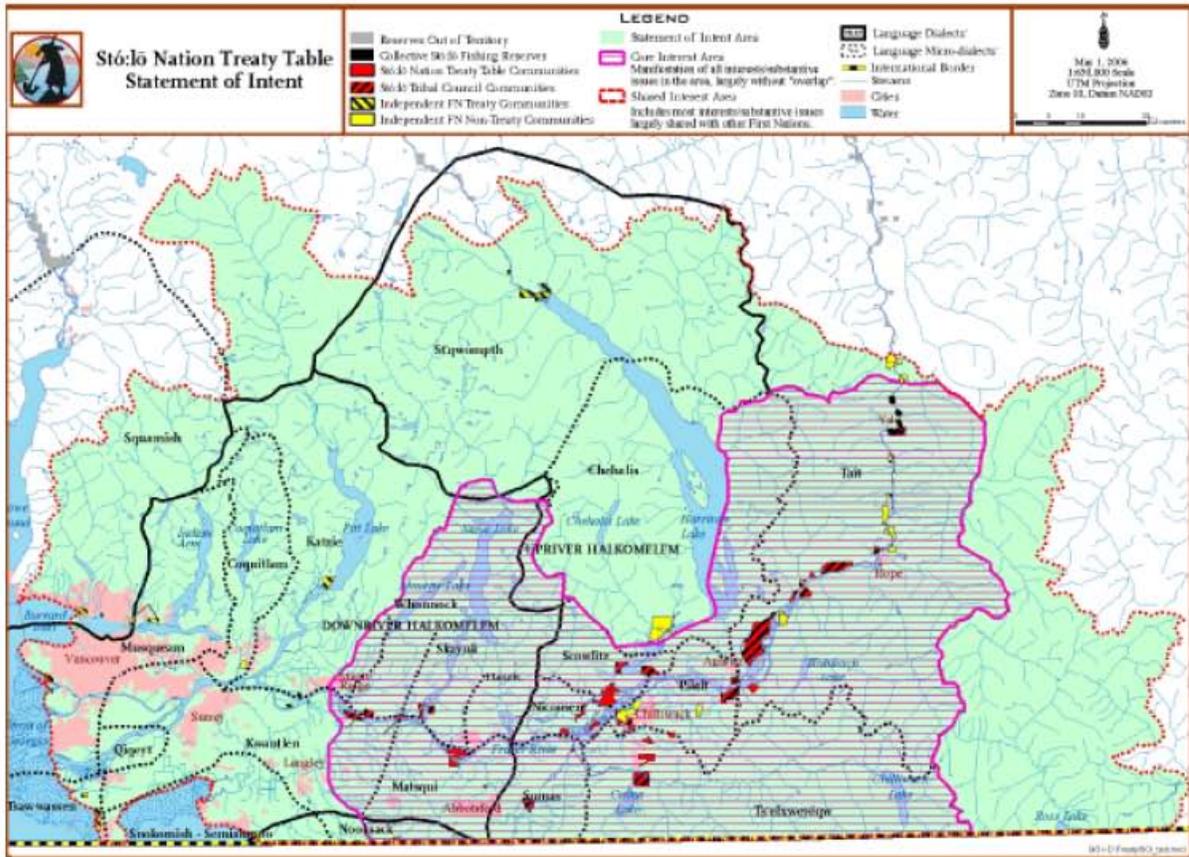
In 2006, a large group of Stó:lō First Nations submitted a map to the BC Treaty Commission identifying the Stó:lō “Core Interest Area.” This area overlaps with the preferred 5L83 alignment from approximately Node H (north of Yale) to a point between Nodes S and T (near Langley), but excludes the segment of the preferred alignment west of Harrison Lake near the Chehalis Indian Reserve in an area between Nodes P and Q. The Stó:lō Core Interest Area overlaps with the Nlaka’pamux asserted traditional territory in the area between Nodes H and P.

A map showing the location of all 19 Stó:lō communities is set out below:



(Source: Exhibit B-13, BCUC 1.3.1, p. 48)

A map of S'olh Temexw, Stó:lō traditional territory is shown below:



Source: Exhibit B-13, BCUC 1.3.1, p. 49

BCTC states that the STC office is located in Agassiz and that none of the First Nations associated with the STC are currently involved in the BC Treaty Commission process (Exhibit B-3-1, p. 19).

8.6.2 Strength of Claim Assessment

BC Hydro's preliminary strength of claim assessments were:

First Nations	Preliminary Strength of Claim	
	5L83	UEC
Cheam	High	High
Kwaw-kwaw-a-pilt	No Assessment	No Assessment
Scowlitz	Low	Low
Shxw'ow'hamel	High	High
Soowahlie	No Assessment	No Assessment
Sumas	No Assessment	No Assessment
Seabird Island	High	High
STC	No Assessment	No Assessment

(Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, Appendix 3)

BCTC states that Cheam's main community is located within about 6 km of the preferred alignment in the vicinity of Node P. The main community of Kwaw-kwaw-a-pilt is 15 km from the preferred alignment and Soowahlie's main community is 23 km away. Both are in the general vicinity of Nodes P to Q.

Sumas is approximately 13 to 20 km from the preferred alignment and its present communities are all located south of the Fraser River (Exhibit B-13, BCUC 1.3.1, p. 58).

Seabird Island's main reserve and community is located less than 1 km from the preferred alignment in the vicinity of Nodes O to P (Exhibit B-13, BCUC 1.3.1, p. 54).

Shxw'ow'hamel is approximately 3 to 4 km from the preferred alignment (Exhibit B-13, BCUC 1.3.1, pp. 51-53). However, the ILM-First Nations Consultation Summary Report dated April 2007 in Table 2 shows the location of the proposed transmission line options relative to Indian Reserves and indicates that Shxw'ow'hamel's Kuthlalth Indian Reserve No. 3 would be affected by the Proposed Eastern Option of the new line where that option would transect the entire northwest side of the reserve. The three other line routing options would not cross any Shxw'ow'hamel Indian Reserve (Exhibit B-10-4, Attachment 4 to Coldwater *et al.* 1.2, p. 13)

STC objects to the strength of claim assessments in that they were not discussed with First Nations and submits that:

proximity to reserve land was a key factor in assessing the scope and content of the duty to consult. This approach is predicated on the “postage stamp” approach to Aboriginal title rejected by the Court in *Tsilhqot’in* ...and completely ignores the wider title claim being asserted by the STC over S'olh Temexw. (STC Argument, para.140)

8.6.3 Potential Adverse Impacts

BCTC addresses the potential effects between Node H (near Spuzzum Creek) to Node V (Meridian Substation).

Golder’s Draft Heritage Overview Briefing Report Statement identified, at a preliminary level, the following land/clearing required, access and archaeological and traditional use sites:

Node	Land/Clearing Required, Access, Type of Land
H-J – 10 km 2 route alignment options	<ul style="list-style-type: none"> • Alignment Option 1: No new ROW • Alignment Option 2: 3 km widening of ROW by 36 m (12.4 hectares) • Access from 5L41 ROW and logging road • Crown and private lands • 10 archaeological sites, 3 traditional use sites, including burial grounds
I-J – 9.3 km	<ul style="list-style-type: none"> • 3.2 km new ROW (16 hectares) • 6.1 km of widening of ROW (30.1 hectares) • Access is good • Entirely Crown land

Node	Land/Clearing Required, Access, Type of Land
H-J1 – 5.5 km	<ul style="list-style-type: none"> • 5.5 km new ROW (27.5 hectares) • New access required from logging road • Entirely Crown land, new rights required
J1-L – 13 km	<ul style="list-style-type: none"> • 13 km new ROW (65 hectares) • Majority of access from logging roads • Entirely Crown land, new rights required
J1-J – 3.8 km	<ul style="list-style-type: none"> • 3.8 km new ROW (19 hectares) • Some access from logging roads, helicopter construction likely necessary • Entirely Crown land, new rights required
J-K(W) – 3.8 km	<ul style="list-style-type: none"> • 3.8 km widening of ROW (19.6 hectares) • Access excellent • Entirely Crown land
J-K(E) – 3.7 km	<ul style="list-style-type: none"> • 2.8 km new ROW (14 hectares) • 0.9 km widening of ROW (3.2 hectares) • Access excellent • Entirely Crown land
K-L – 6.3 km	<ul style="list-style-type: none"> • 6.3 km widening of ROW (23 hectares) • Access poor, helicopter construction likely necessary • Entirely Crown land
K-M – 9.3 km	<ul style="list-style-type: none"> • 3.2 km new ROW (16 hectares), 6.1 km ROW widening (30.1 hectares) • Access good • Entirely Crown land

Node	Land/Clearing Required, Access, Type of Land
M-N – 8.6 km	<ul style="list-style-type: none"> • Widening of 4 km of ROW by 36 m (33.5 hectares) • 4.6 km new ROW (26 hectares) • Access from existing forest service road and existing ROW • Entirely Crown land
L-N – 5.3 km	<ul style="list-style-type: none"> • 4.2 km new ROW (21 hectares) • 1.1 km ROW widening (4.3 hectares) • Access from logging roads, helicopter construction likely necessary • Entirely Crown land
N-O – 7.3 km	<ul style="list-style-type: none"> • 7.3 km ROW widening (28.3 hectares) • Access from adjacent ROWs • Entirely Crown land
O-O1 – 9.8 km	<ul style="list-style-type: none"> • 9.8 km ROW widening (47.3 hectares) • Majority of access from existing 5L82 ROW, helicopter construction required in some areas • Crown land and Sasquatch Provincial Park • 1 traditional use site
O1-P – 5 km	<ul style="list-style-type: none"> • 0.7 km ROW widening, otherwise sufficient ROW exists • Majority of access from 5L82 ROW, some helicopter construction required • Crown and private lands • 7 archaeological sites, 1 traditional use site (same as site in Nodes O-O1)
P-Q – 29.5 km	<ul style="list-style-type: none"> • 8.9 km ROW widening (16.2 hectares) • Access from existing 5L82 ROW • Crown and private lands, runs parallel to the boundary of Chehlais Indian Reserve #5 but does not enter it • 11 archaeological sites, 8 traditional use sites, including burials

Node	Land/Clearing Required, Access, Type of Land
Q-R – 8.7 km	<ul style="list-style-type: none"> • 8.7 new ROW (43.5 hectares) • Access from existing 5L82 ROW • Entirely Crown land
R-S – 10.7 km	<ul style="list-style-type: none"> • No new ROW or widening required • Access from 5L82 ROW • Crown and private lands
S-T – 22.6 km	<ul style="list-style-type: none"> • No new ROW or widening required • Access from 5L82 ROW • Crown and private land, large farms and UBC Research Forest • 14 archaeological sites including an unregistered burial, 1 traditional use site
T-U – 8.7 km	<ul style="list-style-type: none"> • 0.09 km widening of ROW (2.4 hectares) • Access from existing 5L82 ROW • Crown land, private land, large farms and Burke Mountain • 1 archaeological site, 1 traditional use site
U-V – 8.2 km	<ul style="list-style-type: none"> • No additional ROW or widening • Access from existing 5L82 ROW • Crown land, private land and Burke Mountain

(Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, pp. 14-18 and Appendix III)

Golder also studied the impacts of UEC on 3 line segments within Stó:lō territory:

Node	Land/Clearing Required, Access, Type of Land
YC-SB	<ul style="list-style-type: none"> • No new ROW • Access from existing ROW • Crown land and Seabird Island Indian Reserve • 5 archaeological sites, 3 traditional use sites including a burial site
SB-SD	<ul style="list-style-type: none"> • No new ROW • Access from existing ROW

	<ul style="list-style-type: none"> • Crown land, Seabird Island Indian Reserve and Cheam Indian Reserve 1 • 27 archaeological sites, 4 traditional use sites including a burial site
SD-CBN	<ul style="list-style-type: none"> • No new ROW • Private and municipal lands • 5 archaeological sites, 5 traditional use sites including burial sites and 7 traditional use trails

(Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 18 and Appendix IV)

STC states that by August 5, 2008 BC Hydro was not able to identify and communicate specific adverse impacts on STC First Nations' rights and title because a TUS had not yet been completed (Exhibit C8-11, BCUC 2.1).

8.6.4 Scope of Duty to Consult

BC Hydro's preliminary assessment of the scope of duty to consult was:

First Nations	Preliminary Scope of Duty to Consult	
	5L83	UEC
Cheam	Medium	Medium
Kwaw-kwaw-a-pilt	No Assessment	No Assessment
Shxw'ow'hamel	Medium	Medium
Soowahlie	No Assessment	No Assessment
Sumas	No Assessment	No Assessment
Seabird Island	Medium	Medium
STC	No Assessment	No Assessment

(Exhibit B-10-4, Coldwater *et al.* 1.2, Attachment 4, Appendix 3)

8.6.5 Interactions with BC Hydro/BCTC

8.6.5.1 STC

On September 7, 2006 Grand Chief Clarence Pennier of the STC met with Claire Marshall. Grand Chief Pennier indicated that the STC would, at least initially, take a leadership role in dealings with BC Hydro on the ILM Project. Grand Chief Pennier committed to planning a follow-up meeting with the affected Bands (Exhibit B-20, Attachment E-1; Confidential Exhibit B-4, p. 801).

On October 16, 2006, Darrell Mounsey, Corry Archibald, and Claire Marshall met with the STC at its regularly scheduled Tribal Council meeting. Grand Chief Pennier, Grand Chief Doug Kelly and Tyrone McNeil represented the STC. Individual First Nations were represented by Chief Sidney Douglas (Cheam), Chief Betty Henry (Kwaw-kwaw-a-pilt), Chief Dalton Silver (Sumas), and Councillor Nelson Kahama (Soowahlie). Seabird Island was represented by Chief Wayne Bob. Chief Ron John of Chawathil, Councillor Les Anton from Kwantlen First Nation and Councillor Andy Phillips of Scowlitz First Nation were also in attendance.

BC Hydro made a PowerPoint presentation and provided copies of the "Electricity Supply Challenges" brochure. During the meeting, Grand Chief Kelly, Councillor Kahama and Chief Douglas expressed interest in contracting and training opportunities. BCTC explained that it had an Aboriginal Business Development Program, which provided training and workshops through a tender process and that it had revised its procurement policy to allow for direct award contracts to build capacity in Aboriginal businesses. Councillor Anton raised concerns about pesticide practices. In response, BCTC offered to have someone go to the Kwantlen community to discuss pest management techniques. The First Nations asked questions about whether there is a true shortage of power in British Columbia and about trading between BC Hydro and the U.S. (Exhibit B-20, Attachment E-2).

On November 20, 2006, Melissa Holland, Charles Littledale, and Corry Archibald met with Grand Chief Pennier and David Schaepe of the SRRMC. The November 2006 PowerPoint presentation was given. The groups reviewed Project maps and BC Hydro committed to providing STC with digital data for the maps for both the UEC and the 5L83 Alternatives. David Schaepe indicated that he did not consider technical input to be consultation and consultation would not start until after the results from technical studies were completed. David Schaepe expressed concerns about capacity for review of the ILM Project and Melissa Holland indicated BCTC would discuss funding positions at SRRMC. BCTC ultimately funded two positions at SRRMC.

David Schaepe indicated a number of culturally sensitive areas and heritage sites were in the Project area and expressed an expectation that the Project process would identify impacts to the land and avoid specific areas.

David Schaepe indicated he would like both UEC and 5L83 included in Golder's study. BCTC complied with this request. David Schaepe also indicated that the SRRMC would like to be equal partners with Golder for this work but would need capacity funding. SRRMC received funding on April 2, 2007 (Exhibit A2-6).

Grand Chief Pennier said the STC would pass information on to its member Bands and was meeting with a number of provincial agencies in January/February to discuss cumulative impacts to its territory. Corry Archibald indicated she would follow-up on this process and Melissa Holland discussed the cumulative impacts assessment that would take place under the EAO process if the 5L83 Alternative was chosen.

In response to a question concerning the meaning of the term "First Nations Input", as listed as criteria for choosing the Preferred Alternative in the PowerPoint presentation, Melissa Holland replied that the BCTC Executive Committee had indicated that it wanted to hear from First Nation communities about both the UEC and 5L83 options. Melissa Holland indicated BCTC would consider concerns and interests and what it can do to mitigate them.

At the meeting, BC Hydro provided its November form letter offering initial capacity funding with the attached draft capacity funding agreement (Exhibit B-3-1, Appendix P).

On January 29, 2007, Darrell Mounsey and Corry Archibald and Donna McGeachie of BCTC met with Grand Chief Pennier, Tyrone McNeil (Vice President, STC), Chief Betty Henry (Kwaw-kwaw-a-pilt and STC Cultural Tribal Chief), Councillor Andy Phillips (Scowlitz and STC Senior Policy Advisor), Councillor Sheridan Roberts of Soowahlie, Gilbert Joe of Kwaw-kwaw-a-pilt and Ernie Crey of STC.

BC Hydro and BCTC reviewed the January 2007 ILM PowerPoint presentation. Ernie Crey raised the issue that many of the villages did not have capacity to participate in consultation. BC Hydro confirmed that capacity funding would be available to all affected First Nations and gave a copy of the initial \$10,000 capacity funding form letter to STC, Kwaw-Kwaw-a-pilt, and Soowahlie and gave the letters for Chawathil, Seabird and Shxw'ow'hamel to STC to forward. Cheam and Sumas had been provided with letters earlier.

In response to BC Hydro's question as to whether the individual STC Bands would be consulting through STC, Grand Chief Pennier and Councillor Phillips stated that it depended on the Band. BC Hydro indicated it would need Band Council Resolutions from the Bands who would consult through the STC (Exhibit B-20, Attachment E-3).

On February 21, 2007, Councillor Phillips, Brian Jones of Seabird Island, Nelson Kahama of Soowahlie, and Chief Sidney Douglas, Dora Demers and June Quipp of Cheam attended the EAO Working Group meeting.

On March 28, 2007, BC Hydro mailed a \$10,000 cheque for initial capacity funding to the STC.

Corry Archibald and Charles Littledale met with Councillor Phillips on April 2, 2007. Councillor Phillips raised concerns about STC member Bands that do not have capacity and stated he would like to see minimal impact on fish and trees. He indicated that BCTC and BC Hydro needed to choose the right option for the system and the need. Charles Littledale and Corry Archibald

discussed the studies, including geotechnical studies, that would be undertaken and advised that impacts would be identified, mitigated and avoided wherever possible. Councillor Phillips asked about revenue sharing and raised a concern about the lack of consultation that occurred when the existing lines were constructed. Charles Littledale and Corry Archibald hand delivered capacity cheques for STC and Kwaw-kwaw-a-pilt. Councillor Phillips identified STC communities that did not have the capacity to raise concerns as Shxw'ow'hamel, Soowahlie, and Kwaw-kwaw-a-pilt. The First Nations that did have capacity were Seabird Island and Cheam (Exhibit B-20, Attachment E-4; Confidential Exhibit B-4, p. 70).

The SRRMC submitted its report on the ILM Project and its potential impacts on heritage resources within Stó:lō Territory on April 23, 2007 (Exhibit B-13, BCUC 1.1.1, p. 236).

On May 23, 2007 Melissa Holland, Darrell Mounsey, Patricia Isackson, and Alison McMillan (BCTC) met with Otis Jasper, Andrea Dickson and Laurie Kelly of the STC. BCTC discussed the selection of 5L83 as the Preferred Alternative and advised that the Commission could direct BCTC to choose UEC. BCTC justified the selection of 5L83 as better supplying the electrical system need than UEC. Discussion was held on the approvals needed from the Commission and the EAO and that consultation and mitigation of impacts would occur. The STC raised concerns about the original taking of ROW and the title of the territory. BC Hydro replied that it did not have a mandate or authority to negotiate in the treaty process or negotiate past infringements. The STC also asked questions about EMF which BCTC answered.

The STC had previously raised concerns about herbicides and BCTC brought Alison McMillan from BCTC's Vegetation Management Program to explain BCTC's herbicide practices. Alison McMillan followed-up with an email after the meeting with more information on herbicides.

There was further discussion of capacity funding and the STC advised that it was interested in revenue sharing. BCTC stated that profits are offset by the costs of maintaining the system. BC Hydro explained that the Community Development Fund provided compensation when transmission lines cross reserves (Exhibit B-20, Attachment E-5).

On June 27, 2007, Otis Jasper commented to the Agassiz Observer newspaper that BC Hydro's efforts to engage in meaningful consultation with First Nations was encouraging. He is quoted as saying "[o]thers have participated in the consultation process but none have on this level" (Exhibits C3-39 and C3-40). During cross-examination by counsel for BC Hydro, now Chief Jasper, recalled making the statement to the reporter (T12:1865).

On July 18, 2007, Corry Archibald, Darrell Mounsey, Jennifer Hooper and Melissa Chaun of Golder met with Otis Jasper of the STC, June Quipp of Cheam, Brian Jones of Seabird Island and the Chief of the Scowlitz Band about the summer fieldwork program. Discussion centred on the environmental field work and potential First Nations involvement. There was also some discussion on TUSs and a brief discussion on future capacity funding. Brian Jones raised concerns about the existing line running through old village sites on Green Mountain, and the fact that Bear Mountain is also an issue for village sites. Concerns were also raised around the impacts of pesticide use on birds, animals and the watershed (Exhibit B-20, Attachment E-7).

On September 24, 2007, Corry Archibald and James Ross met Otis Jasper, Brian Jones, Chief Phillips (Chief of the Scowlitz and STC Policy Advisor), Ronda Peters and Rose Peters of Chawathil, Chief Silver of Sumas and David Schaepe of the SRRMC to discuss TUSs. James Ross provided an overview of the TUS and provided a hard copy guideline to all attendees, and stated that BC Hydro expected that First Nations would develop their own terms of reference. Otis Jasper asked what level of information BC Hydro was seeking from a TUS and expressed fears of where the information would go. James Ross advised that it needed to be meaningful, but was up to the discretion of the First Nations. Otis Jasper said that the decision-making process, the impacts of the Project and whether mitigation was worthwhile remained to be determined and that First Nations leaders needed to make a decision and possibly take a stand against the Project. (Exhibit B-20, Attachment E-9)

BCTC states that STC and BC Hydro were engaged in discussions around capacity funding from October 2007 through February of 2008 (Exhibit B-13, BCUC 1.1.1, pp. 242-244), and that on

January 9, 2008 the STC and others entered into a Terms of Reference for a Traditional Land and Resource Use Impact Study. (Exhibit B-20, Part E, p. 3)

On April 23, 2008, Corry Archibald, Melissa Holland, Gary Barnet (BC Hydro Engineering), and Don Gamble (Golder) met with Otis Jasper, Brian Jones, Sally Hope, Jay Hope and Donna Watson of Seabird Island, Chief Ron John, Deanna John and Rose Peters of Chawathil, Councillor Jeffrey Point of Skowkale, and Patricia Kelly, Amanda King and Erin Hanson of SRRMC, among others, to discuss alignment options. The First Nations representatives wanted to address the impact of the existing lines before dealing with the proposed project and also noted that they were just starting their research and were well behind Golder (Exhibit C8-8-1, Appendix B; Exhibit B-20, Attachment E-10).

The meeting focussed on general questions on ILM and route alignment options. Brian Jones expressed the view that a decision on the route alignment should not be made until the preliminary reports were complete and that historical impacts, such as the existing line being situated on old village sites, needed to be addressed. BC Hydro confirmed its lack of mandate to discuss past grievances. Melissa Holland noted the difference between reserves and traditional territories and that BCTC needed to know if there were culturally sensitive areas. In response to a question as to whether there was any research done for the initial lines, BC Hydro responded that old studies may still be in existence, but that the previous line pre-dated environmental legislation (Exhibit C8-8-1, Appendix B; Exhibit B-20, Attachment E-10).

On June 6, 2008 Eric Denhoff and Corry Archibald met with Chief Doug Kelly of the STC, Chief Clem Seymour and Brian Jones of Seabird Island, Otis Jasper, Betty Henry of Kwaw-waw-a-pilt, Tyrone McNeil of the STC, Chris Jackson of Chawathil, and Chief Phillips of the Scowlitz. Eric Denhoff stated that the Province, not BC Hydro, is responsible for historical infringements from Existing Assets. STC complained that it was not being heard and that the current timeline did not allow for it to assess the adverse effects (Exhibit C8-14).

8.6.5.2 Cheam First Nation

Chief Sidney Douglas of Cheam was in attendance at the meeting between BC Hydro and STC held on October 16, 2006 which is discussed in Section 8.6.5.1.

On January 30, 2007, Melissa Holland, Corry Archibald, Al Boldt (BC Hydro), and Darrell Mounsey met with Chief Sidney Douglas, Councillor R. Quipp, Councillor Joe Aleck and CEO Dora Demers of Cheam to review the January PowerPoint presentation (Confidential Exhibit B-4, pp. 64-65).

Chief Sidney Douglas and Dora Demers attended a meeting on February 8, 2007 with Golder to discuss how information would be gathered for the Project and to express a desire to have community members involved in interviews and that the community had concerns about the impact of the existing lines (Confidential Exhibit B-4, p. 66).

Three representatives of Cheam, Chief Sidney Douglas, Dora Demers and June Quipp attended the EAO Working Group meeting of February 21, 2007.

BC Hydro sent \$10,000 in initial capacity funding on March 20, 2007 (Exhibit A2-6, p. 2).

On April 18, 2007, Golder held a traditional use interview with five members of Cheam (Confidential Exhibit B-4, pp. 70-71; Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, p. 27).

On June 6, 2007, BC Hydro sent a letter to Chief Sidney Douglas informing of the BCTC Options Decision.

On July 18, 2007, June Quipp of Cheam attended the meeting with STC described in Section 8.6.5.1.

Chief Sidney Douglas and Councillor Joe Aleck attended the Open House meeting on March 26, 2008 in Chilliwack with representatives of BC Hydro, BCTC and Golder, and representatives from other Stó:lō bands. The discussion focused on areas of the project which required new route

alignments. Chief Douglas expressed interest in obtaining any monumental cedar harvested to use for canoe-building, and Joe Aleck is reported as indicating he had no immediate concerns about the ILM alignment as it was across the valley from the Cheam, although he did express concern about EMF and hydro lines crossing houses on the reserve (Confidential Exhibit B-4, pp. 80-81).

On June 6, 2008 BCTC wrote to a number of Chiefs, including Chief Sidney Douglas, to advise that BCTC had selected a preferred route alignment, which could be modified should new information emerge during the EAC review (Exhibit B-3-1, Appendix II).

8.6.5.3 Kwaw-kwaw-a-pilt First Nation

BC Hydro and Kwaw-kwaw-a-pilt met on 7 September, 2006 to receive an overview of the ILM Project alternatives (Confidential Exhibit B-4, p. 219).

Chief Betty Henry, Ernie Crey and Gilbert Joe of Kwaw-kwaw-a-pilt attended the January 29, 2007 meeting between Darrell Mounsey and Corry Archibald and the STC described above.

No representative of Kwaw-kwaw-a-pilt attended the February 21, 2007 EAO Meeting.

By letter dated March 23, 2007 BC Hydro mailed the initial capacity funding cheque in the amount of \$10,000 (Confidential Exhibit B-4, pp. 218-19).

On June 6, 2007, BC Hydro sent a letter to Chief Henry informing of the BCTC Options Decision.

8.6.5.4 Shxw'ow'hamel First Nation

Shxw'ow'hamel First Nation attended the September 7, 2006 meeting between BC Hydro and STC. On April 2, 2007, Corry Archibald and Charles Littledale met with members of Shxw'ow'hamel and its Band Manager (Melody Andrews) to deliver the initial capacity funding cheque for \$10,000. The Consultation Log notes that Chief Kelley and Ernie Crey were also present. BC Hydro asked the

Shxw'ow'hamel for its input on some alignment options that would not cross the reserve (Confidential Exhibit B-4, pp. 620-21).

On June 6, 2007, BC Hydro sent a letter to Melody Andrews informing of the BCTC Options Decision.

On July 25, 2007, James Ross of BC Hydro wrote to Melody Andrews enclosing a Capacity Funding Agreement and asking the Band to review and sign it (Confidential Exhibit B-4, p. 624).

Martin Edwards of the Shxw'ow'hamel attended the September 20, 2007 meeting of the EAO Working Group.

On October 10, 2007 Corry Archibald phoned and left a message for Melody Andrews to follow up on the capacity funding agreement (Confidential Exhibit B-4, p. 628).

On December 20, 2007 Melody Andrews wrote to Corry Archibald of BC Hydro advising that the Band would consult through the STC and that the STC would enter the Capacity Funding Agreement on its behalf (Confidential Exhibit B-4, p. 628).

8.6.5.5 Soowahlie First Nation

Soowahlie First Nation attended the following meetings between BC Hydro and STC: September 28, 2006 (Councillor Nelson Kahama), October 16, 2006 (Councillor Kahama) and January 8, 2007 (Councillor S. Roberts).

Soowahlie Chief Joanne Armstrong attended at the EAO Working Group meeting of February 21, 2007.

Soowahlie accepted the offer of initial capacity funding on March 28, 2007 (Confidential Exhibit B-4, p. 693).

On June 6, 2007, BC Hydro sent a letter to Chief Armstrong informing of the BCTC Options Decision.

On December 7, 2007, Councillor Francis Mussell handed Corry Archibald a letter confirming that the Soowahlie would be consulting through the STC.

8.6.5.6 Sumas First Nation

Sumas First Nation attended the meeting between BC Hydro and STC on September 7, 2006. Chief Dalton Silver attended the September 28, 2006 meeting with Darrell Mounsey and Corry Archibald of BC Hydro and the STC. On December 13, 2006, Darrell Mounsey and Corry Archibald met separately with Chief Silver and presented the November 2006 PowerPoint, studied the maps and observed that both UEC and 5L83 were within the traditional territory of the Sumas First Nation.

Sumas accepted the offer of initial capacity funding on March 7, 2007.

On June 6, 2007, BC Hydro sent a letter to Chief Dalton Silver informing of the BCTC Options Decision.

Chief Dalton Silver was in attendance at the August 2, 2007 meeting between Corry Archibald and the STC.

On December 10, 2007, Chief Dalton Silver wrote to Corry Archibald to advise that the Sumas First Nation would consult through the STC and that the STC would enter the capacity funding agreement on its behalf.

8.6.5.7 Seabird Island First Nation

Chief Wayne Bob of Seabird Island attended the meeting between BC Hydro and STC on October 16, 2006.

On February 2, 2007, Corry Archibald e-mailed Brian Jones, the Economic Development Officer of Seabird Island, attaching a copy of the PowerPoint presentation made in an earlier meeting.

Brian Jones attended the February 21, 2007 EAO Working Group Meeting.

BC Hydro sent initial capacity funding to Seabird Island on March 19, 2007 (Exhibit A2-6, p. 3).

On March 20, 2007, Corry Archibald, Charles Littledale and Patricia Isackson met with Chief Seymour and a number of councillors. BC Hydro explained the various project options. Seabird Island expressed concerns about EMF and sagging transmission lines. BC Hydro provided \$10,000 in initial capacity funding. BC Hydro explained the EAO process and provided details of the deliverables required from First Nations in respect of the initial capacity funding. The Consultation Log states that "BCH noted that the Upgrade Option would be the preferred option for Seabird provided that the transmission line is raised" (Confidential Exhibit B-4, p. 556).

On April 2, 2007 Corry Archibald and Charles Littledale met with Grand Chief Pennier, Chief Clem Seymour and Brian Jones. Seabird expressed interest in revenue sharing, addressing historical grievances, job shadowing and acquiring the skills to manage a TUS, and archaeological and GIS matters that it might obtain from a closer relationship with Golder (Confidential Exhibit B-4, p. 557).

On April 17, 2007, Towagh Behr of Golder met with Seabird Island Chief Clem Seymour and Brian Jones to conduct a TUS Overview Interview.

On June 6, 2007, BC Hydro sent a letter to Chief Seymour informing of the BCTC Options Decision.

On June 27, 2007, Seabird Island contacted BC Hydro to discuss capacity building following BCTC's decision to proceed with 5L83 (Confidential Exhibit B-4, p. 559).

Brian Jones of Seabird Island First Nation attended the meeting on July 18, 2007 which was described under STC above. As noted, Brian Jones raised concerns about the existing line running through old village sites on Green Mountain, and the fact that Bear Mountain is also an issue for village sites. He stated that Seabird Island would be looking at the area where the impacts occurred but did not know what they were. He also noted that in the 1950s, the line impacted sites and some areas were bulldozed. He advised that Seabird Island wanted to ensure old on-going issues were addressed prior to new ones.

Brian Jones also expressed interest in the development of skill sets to support long term employment opportunities and the potential to build an in-house environmental services department through working with Golder.

Concerns were also raised around the impacts of pesticide use on birds, animals and the watershed (Exhibit B-20, Attachment E-7).

On July 25, 2007, James Ross of BC Hydro sent a letter to Chief Seymour of the Seabird Island Band with a Capacity Funding Agreement for review and signature (Confidential Exhibit B-4, p. 566).

Brian Jones attended the meeting between BC Hydro and members of the STC on August 2, 2007.

Brian Jones also attended the September 24, 2007 meeting with BC Hydro to discuss traditional use studies (Exhibit B-20, Attachment E-9).

On December 4, 2007, Brian Jones met with Corry Archibald to discuss a capacity funding budget (Confidential Exhibit B-4, p. 573).

A number of e-mails were exchanged during January and February of 2008 as between BC Hydro and the Seabird Island First Nation regarding the draft Capacity Funding Agreement and Seabird Island's TUS proposal. On January 24, 2008 Seabird Island executed a Capacity Funding Agreement with BC Hydro (Confidential Exhibit B-4, pp. 575-6).

On February 12, 2008, Corry Archibald and Charles Littledale met Brian Jones and Jay Hope of Seabird Island. Issues raised included: Community Development Fund payments, the issue of existing infrastructure and Seabird Island's TUS proposal, budget and work plan (Confidential Exhibit B-4, p. 576).

On May 22, 2008 Chief Seymour, Jay Hope and Brian Jones of Seabird Island met with Andrew Mason of Golder. There was general discussion of the ILM Project, opportunities for fieldwork and TUS work, sensitivities around Bear and Green Mountain, comments on a draft AIA report, spiritual considerations, and overlaps with other First Nations. Seabird Island took the position that past impacts would need to be addressed or the Band could not consider the new line. Golder agreed to coordinate field investigations with Jay Hope (Confidential Exhibit B-4, p. 579).

On July 10, 2008, Corry Archibald and Carrie Oloriz (BC Hydro) met Jay Hope and Brian Jones and discussed TUS and heritage works, progress, timelines, information requirements and the incorporation of Seabird Island's results into the EAC application and overall project implementation (Confidential Exhibit B-4, p. 580).

8.6.6 The Parties' Views of the Consultation Process

STC asserts that consultation failed for several reasons:

1. BCTC and BC Hydro did not engage in consultation in the early stages which was information gathering only;
2. capacity funding was too late and there was a lack of human capacity;
3. the assessment of strength of claim was flawed and should have been shared;
4. the assessment was based on proximity to reserves;
5. overlapping claims weakened the strength of claim;
6. no TUS was available before the CPCN Decision;
7. critical decisions were made prematurely;

8. the process was not interactive and critical information was not shared by BCTC (either in a timely way or at all); and
9. there was no accommodation.

(STC Argument, paras. 1-17)

STC's submissions on issues 3-9 were considered in Section 7 of this Decision.

STC's submissions on issues 1 and 2 are considered below.

1. BCTC and BC Hydro did not engage in consultation in the early stages which was information gathering only.

For the November 20, 2006 meeting between BC Hydro and the STC, the STC says that it was indicated at the outset of the meeting that First Nations did not consider a meeting requesting technical input to be consultation. First Nations felt that proper consultation could not begin until technical studies were complete and issues of concern could be taken up with the political leadership. Concerns were also expressed about cumulative effects (Exhibit C8-8-1).

BCTC and BC Hydro disagree that meetings were only information sharing and deny indicating that any meeting was not part of the consultation process (Exhibit B-20, Rebuttal Evidence E, p. 1).

STC submits that the process of information gathering is properly seen as a precursor to the heart of the consultation process which it describes as "the dialogue on title and rights and the impacts of the project" (STC Argument, para.131).

2. Capacity funding was too late and there was a lack of human capacity.

STC submits that First Nations must be meaningfully included early on in strategic planning for new development, not handed a \$10,000 cheque a few months or even weeks before important strategic level decisions are made. Reconciliation requires early, meaningful and interactive

engagement (STC Argument, para. 9).

BCTC submits that STC, including Grand Chief Pennier, never advised BCTC or BC Hydro that more time was required prior to the May choice of the preferred alternative or the filing of the CPCN Application (BCTC Reply, para. 230).

In answer to BCTC IR 1, STC took the position that it was not advised that it could seek an extension of the date for the Options decision and so did not do so. STC also noted that it had very little capacity during this time to provide comments on the preferred alternative decision (Exhibit C8-10).

BC Hydro submits that its role in providing human resources capacity is usually to provide funding to First Nations to engage the resources and to allow them to identify the staff assistance needed. BC Hydro submits that in the period from August 2006 to May 2007 STC did not communicate to BC Hydro that the initial offer of \$10,000 in initial capacity funding (to both the STC and its member communities) was insufficient to provide input on the ILM Project alternatives or that more money was needed to fund consultants (BC Hydro Reply, Appendix 1, para 39).

STC hired Otis Jasper as Policy Analyst, in part, with initial capacity funding (T12:1938).

After the Options Decision, BC Hydro provided funding to SRRMC for two positions, one for an Environmental Researcher and the other for a Research Assistant (Exhibit C3-23-1).

BC Hydro points out that STC only accepted BC Hydro's offer of initial capacity funding on March 27, 2007, and submits "it is not surprising that STC (and its member Bands) did not receive the actual cheques until April 2, 2007." BC Hydro submits that STC was aware that BCTC was seeking its input on the ILM Project alternatives by this date, but chose not to accept BC Hydro's offer until just days before BCTC's requested date (BC Hydro Reply, Appendix 1, para. 41).

BC Hydro states that on February 7, 2007, it had assured SRRMC that it could invoice BC Hydro until the contract for the HOA was in place (Exhibit B-13, BCUC 1.1.1, p. 232) and that on March 13, 2007, it had offered to provide immediate capacity funding to SRRMC (Exhibit B-13, BCUC 1.1.1, p. 234).

BC Hydro submits that it was “responsive and proactive in ensuring that STC understood that funding was available in a timely manner to it (and its members and SRRMC)” (BC Hydro Reply, Appendix 1, para. 119).

Commission Determination

The Commission Panel considers that all contacts with First Nations - be they telephone calls, face-to-face meetings, e-mails, letters or faxes –contribute to the interactive dialogue envisaged by the *Haida Nation* decision. Given that *Haida Nation* dictates that consultation must take place early on in the decision-making process, it does not admit of the notion that there are pre-requisites to be met before actual consultation commences.

In this Proceeding, the real issue is not when, precisely, consultation started but rather whether consultation was adequate up to the point of the Commission’s decision to issue a CPCN.

In result, the Commission Panel rejects the STC’s complaint that early contact was only information gathering and includes in its considerations of adequacy, all contacts with First Nations related to the ILM project.

The Commission Panel finds that STC communicated the fact to BC Hydro some of its member villages lacked the human capacity to respond to consultation but that BC Hydro addressed this fact by having Golder contract with SRRMC to provide input on the HOA on both 5L83 and UEC as they affected S'olh Temexw. Elsewhere in this Decision the Commission Panel has addressed the issue of BC Hydro’s administration of the initial capacity funding.

The Commission Panel will consider BC Hydro's strength of claim and scope of duty to consult assessments for each of the seven First Nations who intervened as STC.

Stó:lō Tribal Council

The Commission Panel notes that BC Hydro did not assess STC's strength of claim or scope of duty to consult but assessed the strength of claim and scope of duty to consult the individual First Nations.

STC states there is insufficient evidence before the Commission upon which it can assess the scope and content of the duty to consult with the STC (STC Argument, para. 22).

The Commission Panel finds that it must determine a level of consultation owed to the First Nations to assess the adequacy of consultation in respect of the Options Decision and therefore will consider the evidence before it as to strength of claim and degree of potential adverse impact.

BCTC submits that STC's position does not include any evidence which contradicts BC Hydro's assessment of the scope of the duty owed to the members of the STC. In addition, BCTC submits that BC Hydro's assessment is supported by the STC's evidence on strength of claim and impacts:

- there are overlapping claims within and over Stó:lō traditional territory (strength of claim);
- STC is not involved in the BC Treaty process (strength of claim);
- STC identified as a concern power lines through existing reserves. None of STC reserves will be crossed by 5L83 (no impact);
- STC identified vegetation management as a concern and BCTC was willing to discuss and provide information on vegetation management, herbicide and pesticide use to STC (impact mitigation); and

- If STC had identified any “show-stoppers” with respect to the New Line Alternative it would have had an impact on Ms. Holland’s recommendations for the choice of the preferred alternative. Ultimately, no show stoppers were identified by STC (no differential impact identified as between alternatives).

(BCTC Argument, para. 216-17)

The Commission Panel will consider BCTC’s submission, as appropriate, in the determinations for each of STC and its member Bands.

The degree of delegation of consultation authority from the individual member Bands to STC is unclear but the Commission Panel notes that at the first meeting with STC on September 7, 2006 the Grand Chief informed BC Hydro that STC would take a leadership role. In any event, as discussed in Section 8.1.2, the scope of the duty to consult owed to STC can be no higher than the highest scope of the duty to consult assessed for the individual member Bands.

The Commission Panel has assessed the evidence and finds that STC was owed a high duty to consult for the following reasons:

- the Commission Panel finds that Shxw’ow’hamel, an STC member, was owed a high duty to consult;
- STC stated it had a leadership role in consultation with BC Hydro for certain of its Bands, including Shxw’ow’hamel;
- Shxw’ow’hamel only met through the STC, never individually; and
- STC members expressly told BC Hydro and BCTC that certain STC members had no capacity to consult.

Given this evidence, it appears to the Commission Panel that certain Bands were consulting on their interests through the STC. Therefore, the Commission Panel considers STC was owed a high duty to consult.

The Commission Panel set out its criteria for high consultation in Section 4. The Commission Panel has considered the interaction between STC and BC Hydro in the period from August 2006 to May 2007 and then to August 2008 and notes the following:

- notice of 5L83, UEC, and the Non-Wires Options was given at:
 - the September 7, 2006, October 16, 2006, November 20, 2006, January 29, 2007, and April 2, 2007 meetings between BCTC/BC Hydro and STC. At these meetings discussion took place and responses were given to the issues raised and concerns expressed by STC members concerning training and business opportunities, EMF and the use of herbicides. BCTC then brought a herbicide specialist to meet the STC;
 - the EAO meeting attended by Andy Phillips of the STC;
- SRRMC's report on the ILM Project provided BCTC with information on potential adverse impacts on Stó:lō asserted rights. This work was incorporated into Golder's Draft Heritage Briefing Report Statement;
- BCTC/BC Hydro presented the impacts of construction of 5L83 at the EAO Working Group meeting and in the Project Description handed out at the meeting and provided an opportunity for the First Nations to raise concerns;
- BC Hydro explained why and when options were removed from consideration and the reasons why BCTC selected the 5L83 Alternative at the meeting held with STC on May 23, 2007;
- BC Hydro sent STC initial capacity funding of \$10,000 on March 28, 2007; and
- Otis Jasper praised BC Hydro's consultation in June 2007.

The findings of fact above would have been sufficient for the Commission Panel to conclude that BC Hydro's consultation with STC was adequate to meet the high level of consultation required. However, STC raised the issue of revenue sharing with BC Hydro. In Section 7.8 the Commission Panel found that BC Hydro/BCTC did not respond to this issue adequately.

BC Hydro is directed to address this deficiency in Section 10.

Cheam First Nation

The Commission Panel notes that BC Hydro assessed Cheam's strength of claim to be high and scope of duty to consult as medium.

Cheam's main community is in the vicinity of Node P. Therefore the impacts in line segments O1-P and P-Q are relevant. Segments O1 to Q require ROW clearing only and no new ROW. Given the existence of access from existing right of way for segment P-Q, the Commission Panel finds the level of potential adverse impact in these segments to be low. Accordingly, the Commission Panel accepts BC Hydro's assessment of a medium scope of duty to consult for Cheam.

The Commission Panel set out its criteria for low and high consultation in Section 4. The Commission Panel has considered the interaction between Cheam and BC Hydro in the period from August 2006 to May 2007 and then to August 2008 and finds the following:

- Notice of 5L83, UEC, and the Non-Wires Options was given to Chief Douglas at:
 - the September 28, 2006 meeting with STC and BC Hydro;
 - the January 30, 2007 meeting with BCTC/BC Hydro. At this meeting Councillors Quipp and Aleck and CEO Dora Demers were also present;
 - the EAO Working Group Meeting February 21, 2007
- potential adverse impacts of the construction of 5L83 were given to the First Nations in the EAO Working Group materials and the Cheam had an opportunity at the meeting to raise issues and concerns in response;
- BCTC learned more about the specific impacts on Cheam through Golder who held a traditional use interview with Cheam members on April 18, 2007;
- Cheam was not in attendance at any of the meetings where STC raised the issue of revenue sharing;
- Cheam received initial capacity funding of \$10,000 on March 20, 2007; and
- BC Hydro informed Chief Douglas of the Options Decision by form letter June 6, 2007.

The Commission Panel considers that BC Hydro/BCTC's consultation was inadequate to meet a medium duty to consult for Cheam because BC Hydro did not explain to Cheam why options were removed from consideration and the reasons why BCTC selected the 5L83 Alternative. Although BC Hydro provided the form letter advising of the Options Decision, in the Commission Panel's view, a medium duty to consult, in this Proceeding, requires BC Hydro to explain in greater detail why the options other than 5L83 were eliminated.

BC Hydro is directed to address this deficiency in Section 10.

Kwaw-Kwaw-a-pilt First Nation

The Commission Panel notes that BC Hydro did not assess Kwaw-kwaw-a-pilt's strength of claim or scope of duty to consult.

Kwaw-kwaw-a-pilt's main community is 15 km from the preferred alignment, in the vicinity of Nodes P and Q. The impacts in line segments P to Q are likely minimal because no new ROW will be taken and access exists from existing ROW. Accordingly, the Commission Panel finds Kwaw-kwaw-a-pilt's scope of duty to consult as low.

In Section 4.0 the Commission Panel set out its criteria for a low duty to consult and so far as concerns BC Hydro's consultation with Kwaw-kwaw-a-pilt, the Commission Panel has considered the interaction in the period from August 2006 to May 2007 and then to August 2008 and finds the following:

- notice of 5L83, UEC, and the Non-Wires Options was given at:
 - the September 7, 2006 meeting with BC Hydro;
 - the January 29, 2007 meeting with STC and BC Hydro;

- No representative of Kwaw-kwaw-a-pilt attended the EAO Working Group meeting but the binder of materials was sent afterwards. The potential adverse impacts of construction of 5L83 were listed in the Project Description included in the binder;
- Kwaw-kwaw-a-pilt accepted initial capacity funding of \$10,000 on March 23, 2007; and
- Chief Henry was informed of the Options Decision by form letter June 6, 2007.

Based on the above the Commission Panel considers that the consultation that took place between BC Hydro and Kwaw-kwaw-a-pilt was adequate to meet the low level of consultation required for the ILM in Options Decision.

Shxw'ow'hamel First Nation

The Commission Panel notes that one of the four routing options for New Line 5L83 would cross Shxw'ow'hamel's Kuthlalth Indian Reserve No. 3. If 5L83 proceeded with the Proposed Eastern Option, the potential adverse impact to Shxw'ow'hamel could be high. Therefore, the Commission Panel determines that prior to the Options Decision, the potential adverse impact to Shxw'ow'hamel was high. Based on a high strength of claim and a high potential adverse impact, the Commission Panel assesses the Crown's preliminary duty to consult to be at a high level for Shxw'ow'hamel prior to the Options Decision.

The Commission Panel set out its criteria for high consultation in Section 4. The Commission Panel has considered the interaction between Shxw'ow'hamel and BC Hydro in the period from August 2006 to May 2007 and then to August 2008 and notes the following:

- BC Hydro did not meet separately with Shxw'ow'hamel to describe the Project;
- Shxw'ow'hamel attended the September 7, 2006 meeting with STC and BC Hydro;
- BC Hydro asked for Shxw'ow'hamel's input on route alignment that did not pass through Indian Reserves;
- BC Hydro invited Shxw'ow'hamel to attend the EAO Working Group Meeting in February 2007, and, although no representative did attend, the binder of materials was subsequently sent to Shxw'ow'hamel. Included in the binder was the Project

Description which contained a high level listing of the clearing and new ROW required by line segment;

- SRRMC's traditional use study informed the Golder Draft Heritage Overview Briefing Statement;
- Shxw'ow'hamel accepted the offer of initial capacity funding in April 2007; and
- Shxw'ow'hamel received the June 2007 form letter from BC Hydro advising of the Options Decision.

The Commission Panel considers Shxw'ow'hamel to have a unique situation in this Proceeding in that it has a high scope of duty to consult but appears to have been consulting through the STC. Therefore, although Shxw'ow'hamel was not consulted individually, the Commission Panel considers the consultation to have been inadequate for reasoning included in the Commission's determination on the STC's consultation.

Soowahlie First Nation

The Commission Panel notes that BC Hydro did not assess Soowahlie's strength of claim or scope of duty to consult.

BCTC did not provide information on the distance of Soowahlie's main community from the proposed alignment of 5L83 but the Commission Panel has reviewed Exhibit B-3-1, Appendix C and notes that Soowahlie's main community is farther away from 5L83 than Kwaw-kwaw-a-pilt's main community. Therefore, in the absence of detailed information about Soowahlie's strength of claim in the ILM Project area, the Commission Panel finds the scope of duty to consult as low.

In Section 4, the Commission Panel set out its criteria for a low duty to consult and so far as concerns BC Hydro's consultation with Soowahlie, the Commission Panel has considered the interaction in the period from August 2006 to May 2007 and then to August 2008 and finds the following:

- Notice of 5L83, UEC, and the Non-Wires Options was given at:

- the September 28, 2006, October 16, 2006 and January 8, 2007 meetings between BC Hydro and STC which Councillors Kahama and Roberts attended;
- the EAO Working Group Meeting that Chief Armstrong attended;
- Notice of UEC and 5L83 was also given in the initial capacity funding letter dated March 2007;
- The EAO Working Group Meeting presented the potential adverse impacts of construction of 5L83 and the ROW clearing and new ROW needed by line segment and provided Soowahlie an opportunity to raise issues in relation to the adverse impacts presented;
- Soowahlie accepted initial capacity funding on March 28, 2007; and
- Chief Armstrong was informed of the Options Decision by letter dated June 6, 2007.

Based on the above the Commission Panel considers that the consultation that took place between BC Hydro and Soowahlie was adequate to meet the low level of consultation required for the ILM in Options Decision.

Sumas First Nation

The Commission Panel notes that BC Hydro did not assess Sumas' strength of claim or scope of duty to consult.

Sumas' main communities are 13 - 20 km away from the proposed alignment of 5L83 and are all south of the Fraser River. Given that the Commission Panel does not have detailed information on Sumas' use of the land in the ILM Project area, the Commission Panel finds a low duty to consult reasonable for Sumas based on this lack of proximity.

In Section 4 the Commission Panel set out its criteria for a low duty to consult and so far as concerns BC Hydro's consultation with Sumas, the Commission Panel has considered the interaction in the period from August 2006 to May 2007 and then to August 2008 and finds the following:

- Notice of 5L83, UEC, and the Non-Wires Options was given at:
 - the September 7 and 28, 2006 meetings between BC Hydro and STC which Chief Silver attended;
 - the December 13, 2006 meeting between BC Hydro and Chief Silver;
- Notice of UEC and 5L83 was also given in the initial capacity funding letter dated March 2007;
- Sumas did not attend the EAO Working Group Meeting in February 2007 but was provided with the binder of materials, including the Project description which outlined the impacts of clearing and new ROW required for each line segment;
- Sumas accepted initial capacity funding on March 7, 2007; and
- Chief Silver was informed of the Options Decision by letter dated June 6, 2007.

Based on the above the Commission Panel considers that the consultation that took place between BC Hydro and Sumas was adequate to meet the low level of consultation required for the ILM Options Decision.

Seabird Island First Nation

BC Hydro assessed Seabird Island as having a high strength of claim and medium duty to consult. The STC submits that it was too early in the consultation process to make a strength of claim assessment and does not put forward its own assessment of strength of claim and duty to consult for Seabird Island.

The Commission Panel notes that Seabird Island's reserve is less than 1 km from the proposed line, in the area of Nodes O and P. The relevant area for assessment of impacts is line segments O to Q which require widening along about 20 km of ROW but no new ROW. As well, the majority of access on segments O to P is from existing ROW and on segment P to Q is all from existing ROW. The Commission Panel finds Seabird Island's strength of claim to be high in the ILM Project area, the level of potential impact to be low and the scope of duty to consult to be medium.

The Commission Panel set out its criteria for low and high consultation in Section 4.0 and finds a medium duty to consult requires consultation to a level between low and high. The Commission Panel has considered the interaction between Seabird Island and BC Hydro in the period from August 2006 to May 2007 and then to August 2008 and notes the following:

- Notice of 5L83, UEC, and the Non-Wires Options was given at:
 - the September 28, 2006 and October 16, 2006 meetings between BC Hydro and the STC which Chief Seymour and Brian Jones attended;
 - the April 2, 2007 meeting with BC Hydro and the STC which Chief Seymour and Brian Jones attended;
 - the March 20, 2007 meeting between BC Hydro and Seabird Island, at which BC Hydro noted that Seabird Island preferred the UEC alternative;
- Notice of the options was given in the PowerPoint presentation Corry Archibald emailed to Brian Jones on February 2, 2007 and in the initial capacity funding letter;
- Brian Jones attended the EAO Working Group Meeting where BC Hydro presented the potential adverse impacts of construction of 5L83. The Project Description given at the meeting included descriptions of the ROW required by line segment. The meeting also offered an opportunity for Seabird Island to raise concerns;
- Golder completed a TUS interview with Chief Seymour and Brian Jones on April 17, 2007; and
- BC Hydro sent initial capacity funding to Seabird Island on March 19, 2007.

The Commission Panel considers that BC Hydro/BCTC's consultation was inadequate to meet a medium duty to consult for Seabird Island for the following reasons:

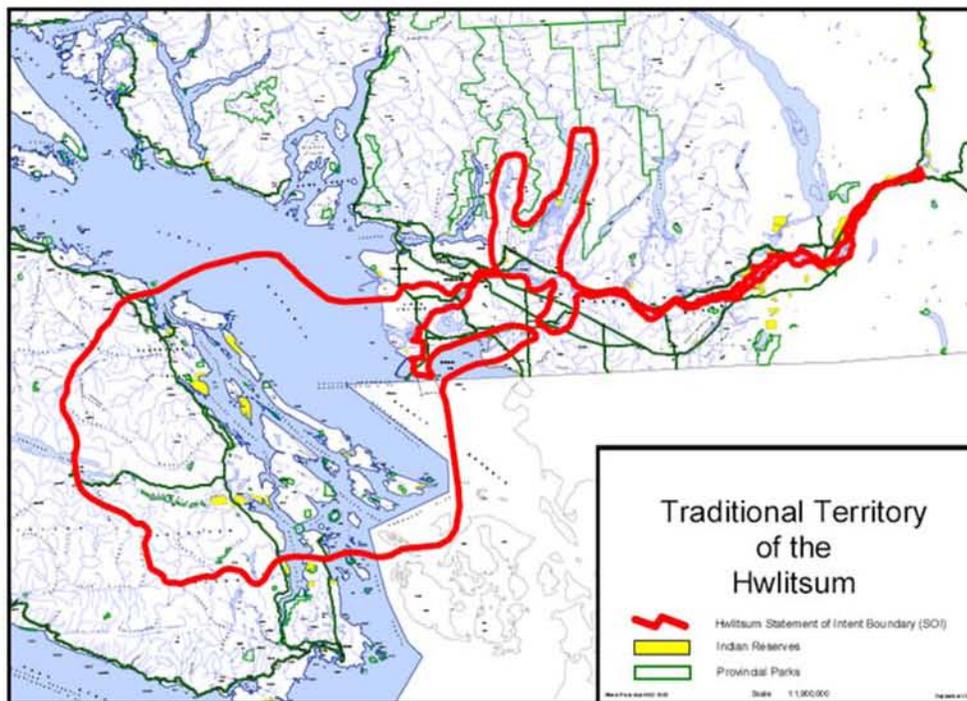
- BC Hydro did not explain to Seabird Island why options were removed from consideration and the reasons why BCTC selected the 5L83 Alternative. Although BC Hydro provided the form letter advising of the Options Decision, in the Commission Panel's view, a medium duty to consult, in this Proceeding, requires BC Hydro to explain in greater detail why the options other than 5L83 were eliminated; and
- Seabird Island raised the issue of revenue sharing at the April 2, 2007 meeting with the STC. As discussed in Section 7.8 the Commission Panel find BC Hydro/BCTC did not adequately respond to the issue.

BC Hydro is directed to address these deficiencies in Section 10.

8.7 Hwlitsum First Nation

8.7.1 Description and Location

The Hwlitsum is an Aboriginal group who assert traditional territory that includes the Lower Mainland, the Gulf Islands (including some of the U.S. San Juan Islands) and the southeast portion of Vancouver Island (T15:2279-80) shown in the map below:



Source: Exhibit B-13, BCUC IR 1.3.1, p. 68

The Hwlitsum states that prior to contact, their ancestors, the Lamalchi, employed a seasonal cycle where:

[t]he Lamalchi would also travel upriver each year to the Coquitlam River and Pitt River, where they would harvest plants for medicinal and food purposes, the various runs of salmon and sturgeon, visit relatives and hunt and trap in the watershed areas. (Exhibit C1-11, p. 12)

The Hwlitsum currently has around 300 members, approximately half of whom live within the municipal boundaries of Delta, BC at Hwlitsum (Canoe Pass) with the remainder dispersed throughout the asserted territory. Historically, members of the Hwlitsum speak Hul'qumi'num or Island Hul'qumi'num (T15:2279-80, 2283).

While the Hwlitsum is not a "Band" under the *Indian Act*, it follows some of the procedures under that Act such as the election of a Chief (T15:2277-78). The Hwlitsum has applied to be recognized as a Band under the *Indian Act*, is at Stage 2 of the BC Treaty Commission process, and is exploring membership in the Hul'qumi'num Treaty Group (T15:2301).

8.7.2 Strength of Claim Assessment

BC Hydro made no preliminary strength of claim assessment for the Hwlitsum for either 5L83 or UEC.

Given the geographical location and asserted rights of the Hwlitsum, BC Hydro subsequently assessed the Hwlitsum strength of claim respecting title as weak but noted that the claim in respect of Aboriginal rights (fishing) was medium in the Project area.

8.7.3 Potential Adverse Impacts

BCTC states that it received the Hwlitsum's TUS in January 2009 and that it studied the area between Nodes T and V and downstream (Exhibit B-3-1, p. 72). For Nodes T-V, Golder summarized, in April 2007, the land/clearing required and the known archaeological and traditional use issues at a preliminary level:

Node	Land/Clearing Required, Access, Type of Land, Archaeological and Traditional Use Sites
T-U – 8.7 km	<ul style="list-style-type: none"> • 0.09 km widening of ROW (2.4 hectares) • Access from existing 5L82 ROW • Crown land, private land, large farms and Burke Mountain • 1 archaeological site
U-V – 8.2 km	<ul style="list-style-type: none"> • No additional ROW or widening • Access from existing 5L82 ROW • Crown land, private land and Burke Mountain

(Exhibit B-10-1, Attachment 1 to Coldwater *et al.* 1.2, pp. 17-18)

The route segment crosses the Pitt River between Nodes T and U and the Coquitlam River between Nodes U and V.

Alan Grove, consultant to the Hwlitsum, testified that the Hwlitsum raised concerns about the impact of the Project on Aboriginal fishing rights in the context of the second EAO meeting in September 2008 (T15:2309). In response to a Commission IR, the Hwlitsum also identified impacts on Aboriginal harvesting rights, particularly impacts on salmon and other fish (Exhibit C1-12, BCUC 1.3). The Hwlitsum states that by August 5, 2008, BC Hydro/BCTC had not identified “any specific potential adverse impacts of the ILM Project on the *Hwlitsum* First Nation’s asserted section 35 rights” (Exhibit C1-12, BCUC 2.1).

During cross-examination, Mr. Grove testified:

MR. GROVE: A:...We were concerned about the impact the project would have, because it crosses three rivers; the Pitt, the Coquitlam and the Fraser River, which the Hwlitsum First Nation rely on it. We were concerned because the Pitt area and the Coquitlam, particularly around Westwood, where the Meridian was, was where we harvest and gather...(T15:2309-10)

He was unable to provide more detail on impacts to Hwlitsum’s asserted rights, as shown by the following exchange with Mr. Willms, counsel for BCTC:

MR. WILLMS: Q: But what I'm asking for is, where in your evidence can I find a reference to what the impact, for example, of constructing the new transmission line would be on fish and fish habitat? Where can I find that?

MR. GROVE: A: The impacts are in that we never were consulted and that is why we're here (T15:2312-2313).

BCTC/BC Hydro are of the view that 5L83 creates little potential for adverse effects on asserted Aboriginal fishing rights because the Project would be built within existing ROW without new ROW or widening in the Fraser River area (Exhibit B-13, BCUC 1.3.1, p. 69). BCTC concluded that:

there are no anticipated significant residual effects to fisheries and aquatic habitat if proper construction practices, mitigation measures, and Best Management Practices are implemented during the construction and operation/maintenance of the Project infrastructure. [Department of Fisheries and Oceans Canada] agrees with this assessment and BCTC is committed to take these measures. (Exhibit B-14, BCUC 1.2.1.1, Attachment 11, p. 1)

8.7.4 Scope of the Duty to Consult

BC Hydro made no preliminary assessment of the scope of the duty to consult the Hwlitsum for either 5L83 or UEC.

After the Options Decision was made, BC Hydro assessed the level of consultation required for Hwlitsum at the low end of the *Haida* spectrum in part, because it anticipated no potential adverse effects on fishing rights arising from the Project (Exhibit B-13, BCUC 1.3.1, p. 69).

BC Hydro supported its placement of the Hwlitsum at the low end of the *Haida* spectrum for the following reasons:

- Hwlitsum traditional territory overlaps with several other First Nations;
- The Hwlitsum First Nation is generally far removed from the ILM Project area. (The Hwlitsum's main community at Canoe Pass at the mouth of the Fraser River is approximately 36 Km from the preferred alignment of the 5L83 option);

- The Hwlitsum's ancestors were also generally far removed from the ILM Project area; and
- There are no anticipated effects on the rights asserted by the Hwlitsum.

(BCTC Reply, para. 320)

8.7.5 Interaction with BC Hydro/BCTC

The Hwlitsum was not originally identified by BC Hydro for consultation and were added to the list when the EAO brought the group to the attention of BC Hydro as possibly being affected by 5L83.

BC Hydro met the Hwlitsum once before the Options Decision, at the EAO Working Group meeting February 21, 2007. Chief Rocky Wilson and Alan Grove attended (Exhibit B-3-1, Appendix U).

On March 15, 2007, BC Hydro reimbursed the Hwlitsum for attending the EAO Meeting.

On June 6, 2007, BC Hydro sent Chief Wilson a letter advising of the Options Decision.

The Hwlitsum (Chief Wilson, Elder Fred Wilson and Alan Grove) met BC Hydro again at the second EAO Working Group meeting on September 20, 2007 where concerns were raised about the possible impacts of the project on fish and fish habitat (Exhibit B-3-1, Appendix DD).

8.7.4 The Parties' Views of the Consultation Process

The Hwlitsum asserts that BC Hydro's strength of claim determination was not credible. Its expert witness Dr. Miller of the University of British Columbia gave evidence that the Hwlitsum have been deeply and continuously connected to the territory in question (T15:2271). In addition, the Hwlitsum states that on October 19, 2005 (at the time of the Vancouver Island Transmission Reinforcement Hearing), BC Hydro, BCTC and the Commission "had credible information that the Hwlitsum First Nation had section 35 interests on the lower mainland of British Columbia" [emphasis in original] (Hwlitsum Argument, p. 30).

The Hwlitsum submits that it was not consulted in the period up to May 2007 and raises the following specific complaints:

- so far as capacity funding was concerned, it was not treated the same as Hul'qumi'num Treaty Group and/or Lake Cowichan First Nation, and that it should have been since it is similarly situated in terms of the ILM Project;
- there was no consultation for the Options Decision;
- it was not adequately consulted in relation to the specific concerns they communicated to BCTC and BC Hydro (fish and fish habitat and contaminated sites); and
- there was no accommodation provided with respect to their concerns.

(Hwlitsum Argument, pp. 19-26, 32-25, 37-50)

Hwlitsum further state that from January to April 2007 "BC Hydro chose not to contact or meet with Hwlitsum First Nation" (Hwlitsum Argument, p. 22).

BC Hydro states that this view is not accurate and that "... BC Hydro did contact Hwlitsum and in fact many of the topics typically discussed in round three meetings were discussed with the Hwlitsum albeit in a group format" (BC Hydro Reply, p. 97).

Commission Determination

The Hwlitsum disagrees with BC Hydro's assessment that its strength of claim for Aboriginal title in the area appears to be weak, while its strength of claim for Aboriginal rights (fishing) in the area is of medium strength, and asserts that this assessment is not credible.

The Commission Panel has reviewed the evidence, and, given the emphasis Hwlitsum placed on fishing rights and, in the absence of a strength of claim specified by the Hwlitsum, accepts Hwlitsum's strength of claim to fishing rights in the Project area as medium given their consistent, annual use of a limited portion (the Pitt River and Coquitlam River watersheds) of the Project area.

BC Hydro states that it anticipates no significant residual effects to fisheries and aquatic habitat and in the absence of evidence from Hwlitsum regarding specific adverse impacts of the ILM Project to their asserted fishing rights, the Commission Panel finds the impacts to fish and fish habitat from the ILM Project are likely to be negligible.

Accordingly, given the negligible potential for impact on the Hwlitsum's Aboriginal rights in the Project area, the Commission Panel finds that BC Hydro's scope of duty to consult the Hwlitsum was at the low end of the *Haida* spectrum.

The Commission Panel finds that BC Hydro's interaction with the Hwlitsum was adequate to meet the duty to consult with Hwlitsum at the low end of the *Haida* spectrum by reason of BC Hydro:

- providing notice of the Project and the other options it was considering and presenting the potential impacts of construction to Chief Wilson and Alan Grove at the EAO Working Group meetings;
- reimbursing the Hwlitsum for attending the meetings; and
- providing Chief Wilson of notice, by letter, of the Options Decision in June 2007.

BC Hydro's consultation provided the Hwlitsum with notice of the Project and an opportunity, albeit in a group setting, to discuss the Project and raise any concerns.

9.0 RELIEF SOUGHT

At the close of the Oral Hearing, the Commission Panel asked seven questions of the parties to be addressed in argument. These questions are described in greater detail in Appendix B.

This section sets out the responses to the Commission’s questions 1 and 7 (a) and (b):

- Question 1: What is the nature of the relief sought by each of the parties?
- Question 7(a): What is the impact on the CPCN that the Commission issued, if the Commission Panel were to determine that, for instance, one of the First Nation intervenors had not been adequately consulted?
- Question 7(b): Under this scenario, what options are available to the Commission in respect of the CPCN decision?

(T16:2455-2457)

9.1 The Crown’s Position

Both BC Hydro and BCTC seek an Order:

- (i) that the Crown’s duty to consult and accommodate the STC, Coldwater *et al.*, ONA/Upper Nicola, NNTC and Hwlitsum had been met up to August 5, 2008; and
- (ii) lifting the suspension on the effect of the CPCN.

BC Hydro and BCTC submit that “this form of relief would mean that the CPCN issued by the Commission on August 5, 2008 continues, subject to all of its existing terms and conditions” (BCTC Argument, paras. 523-4; BC Hydro Argument, p. 90).

If the Commission finds consultation to be inadequate, BCTC submits that it should be afforded more time to discharge the duty, and BC Hydro submits that the Commission would have the following options:

- (i) Direct that further evidence of consultation be provided to the Commission, while still lifting the suspension on the effect of the CPCN;
- (ii) Impose an additional term or condition on CPCN, while still lifting the suspension on the effect of the CPCN; or
- (iii) Continue the “suspension” currently imposed on the CPCN until the Commission had reviewed further evidence and was satisfied.

BC Hydro submits that a determination of inadequate consultation for one First Nation should not automatically result in a continuation of the suspension of the CPCN, and that consideration of third-party interests would weigh in favour of lifting the suspension.

BC Hydro submits that options (ii) and (iii) both create risks either of inadvertently conferring on First Nations a “veto” where the common law does not provide for one, or of inappropriately delegating the Commission’s authority to determine what is in the public interest. BC Hydro’s preference is for option i) (BC Hydro Argument, pp. 90-95).

9.2 The First Nation Interveners’ Positions

The NNTC/ONA/Upper Nicola submit that the Commission should find that the Crown failed to meet its obligation to consult and accommodate in relation to the subject matter of the CPCN application. The NNTC/ONA/Upper Nicola submit that the Commission has two options:

- (i) rescind the CPCN pursuant to s. 99 of the *UCA* on the grounds that the CPCN embeds the flawed outcome of a legally inadequate consultation process.; or
- (ii) issue a determination that the Crown's duty to consult and accommodate has not been met up to the CPCN decision point, the effect of which will be to leave the CPCN suspended.

NNTC/ONA/Upper Nicola submit that rescission is their primary remedy and that if the Crown wishes to remedy its consultation failures, it must do so from a point of being genuinely open to input that would alter its selection of the ILM Expansion Project as the preferred option. This

cannot occur in a meaningful fashion if the approval for that Project remains in place (NNTC/ONA/Upper Nicola Argument, para. 150).

Coldwater *et al.*, STC and Hwlitsum all seek the rescission of the CPCN.

Hwlitsum opposes any order that would continue the existing suspension of the CPCN, or provide further time for BCTC and BC Hydro to discharge the duty of consultation to the Hwlitsum or any other First Nations, and submits that to do so would be inconsistent with the duty for the Crown to consult with First Nations in the early stages of planning and decision-making for the CPCN Application (Hwlitsum Argument, pp. 58-59).

On question 7 a) and b) NNTC/ONA/Upper Nicola submit that if the Commission were to find that the Crown had failed to adequately consult any one of the Aboriginal Interveners, then a fundamental legal and constitutional prerequisite to the valid exercise of the Commission's jurisdiction had not been met. "Simply put, the effect of a finding of a failure to consult would be to render the CPCN decision illegal and unconstitutional," and would require rescission of the CPCN (NNTC/ONA/Upper Nicola Argument, Tab C, p. 4).

The remaining First Nations Interveners support this response.

9.3 Other Interveners

BCOAPO submits that it seeks the outcome which best reconciles the following three objectives:

- getting 5L83 up and operational without undue delay;
- avoiding regulatory and other legal costs where possible; and
- respecting the constitutional rights of First Nations.

(BCOAPO Argument, p. 20)

BCOAPO considers that BCTC would have been more prudent to have “rebooted” the process upon receiving the Court of Appeal ruling, and submits that in order to make the “best of a bad situation”, the Commission should either set aside the CPCN or make it conditional upon the BCTC satisfying the Commission that it has satisfactorily discharged the Crown’s obligations, which will enable BCTC to “come back to the Commission in due course with a package which includes sign-on by as many affected First Nations as possible.” (BCOAPO Argument, p. 20)

Alternatively, BCOAPO supports affording BCTC more time to discharge its duties (BCOAPO Argument, p. 20).

In response to question 7a), relating to the impact on the CPCN if the Panel were to determine a First Nation Intervener had not been adequately consulted, BCOAPO submits that “it follows directly from the Court of Appeal decision that such a circumstance would constitute a fatal error in the granting of the CPCN, as the grant would violate rights of First Nations which are guaranteed under the Constitution” (BCOAPO Argument, p. 24).

In response to question 7 b), as to the options available to the Panel, BCOAPO submits that the Commission has three options available to it:

- (i) to set aside the CPCN;
 - (ii) to amend it to attach a condition that BCTC and BC Hydro satisfy the Commission in an open public process that they had fulfilled the Crown obligations (preferably with the benefit of specific guidance from the Commission as to what was expected of them) prior to commencing and [sic] installation or construction which might impinge upon the affected First Nation Intervener; or
 - (iii) to afford sufficient time to BCTC and BC Hydro to discharge the Crown’s obligations.
- (BCOAPO Argument, p. 25).

Harris/Casselmann recommend that any reopening of the ILM CPCN for further consultation and accommodation include First Nations and affected landowners (Harris/Casselmann Argument, p. 2).

9.4 The Crown's Reply

BCTC addresses the First Nation Interveners' positions on rescission of the CPCN and that further consultation must proceed "with all options on the table" submitting that:

- the First Nation Interveners never complained to BCTC or BC Hydro about the choice of the 5L83 alternative prior to this proceeding; and
- no First Nation Intervener led any evidence to support the choice of another alternative to 5L83, given the significant advantage of 5L83 over UEC.

(BCTC Reply, paras. 432-433)

BCTC points out that:

- (i) considerable amounts of both time and money have been incurred studying and consulting with respect to 5L83,
- (ii) the superiority of 5L83 over UEC on other considerations, and
- (iii) the fact that UEC also had the potential to affect First Nations, including Aboriginal title.

BCTC submits that, if the Commission finds that one or more of the First Nation Interveners were not consulted properly regarding the 5L83 Alternative, "the only reasonable balance is to allow further time to allow this to happen" (BCTC Reply, para. 434).

BCTC further submits that rescinding the CPCN would be inconsistent with the manner in which the Interveners have proceeded. None of the First Nation Interveners appealed the CPCN decision itself, which established the need for ILM Project and the choice of the 5L83 over UEC. BCTC submits that to rescind the CPCN so that these issues could be revisited would be a collateral attack on the CPCN order, which was not appealed (BCTC Reply, para. 436).

BCTC addresses BCOAPO's suggestion to "reboot" and submits that abandoning the CPCN process to date and "rebooting" would be the least cost-effective manner of dealing with consultation issues, even if the Commission were to conclude that consultation to the date of the CPCN was inadequate (BCTC Reply, para. 382).

Commission Determination

The Commission Panel considers that lifting the suspension and imposing additional conditions on the CPCN has the potential to create the uncertainty that ratepayer groups such as BCOAPO are seeking to avoid.

The Commission Panel has considered the relief requested by the Intervener First Nations for rescission of the CPCN and finds:

- other than the requirement to hear the First Nations' complaints on consultation, the findings contained in Commission Order C-04-08 that awarded the CPCN for the ILM Project remain relevant and germane;
- no information has come to light on First Nations consultation during this Proceeding, specifically information on adverse impacts to Aboriginal rights and title, that warrants rescission of the CPCN;
- two of the First Nation Interveners who sought such relief from the Commission have since acknowledged that they have been consulted and accommodated in respect of 5L83. In addition, the Commission Panel notes that a large number of the 60 First Nations and 7 Tribal Councils that are potentially affected by 5L83 (as well as the 43 First Nations and 7 Tribal councils affected by UEC) chose not to intervene in the Reconsideration Proceeding. The Commission Panel considers that it must also take their interests into account in determining the nature of the relief it will grant.

For these reasons, the Commission Panel is not persuaded that rescission is the best means of curing the deficiencies it found in BC Hydro's consultation on the ILM Project.

Rather, the Commission Panel finds that maintaining the suspension while BC Hydro addresses the deficiencies is the best remedy in the case of the ILM Project.

The Commission Panel notes that at paragraph 37 of *Carrier Sekani*, the Court stated:

[t]he remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct. [citation omitted]

Maintaining the suspension of the CPCN is a remedy contemplated by *Carrier Sekani*. This remedy will allow BC Hydro an opportunity to remedy the deficiencies identified by the Panel.

Accordingly, the Commission Panel directs that the suspension of the CPCN remain in place until the Commission approves a report by BC Hydro that it has complied with all the directives in Section 10.

10.0 COMMISSION SUMMARY OF THE ADEQUACY OF THE CROWN'S CONSULTATION ON THE ILM PROJECT AND DIRECTIVES

In Sections 7 and 8, the Commission Panel made the following findings in respect of the First Nation Interveners:

Inadequate Consultation	
First Nation / Tribal Council	Deficiencies in Consultation
Upper Nicola Indian Band	<ul style="list-style-type: none"> • BC Hydro/BCTC did not present the HVDC option to Upper Nicola for discussion; and • BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.
Coldwater Indian Band	<ul style="list-style-type: none"> • BC Hydro/BCTC did not present the HVDC option to Coldwater for discussion; • BC Hydro/BCTC did not explain why the Non-Wires Options were removed from consideration and the reasons why BCTC selected 5L83 over the UEC Alternative; and • BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.
Cook's Ferry Indian Band	<ul style="list-style-type: none"> • BC Hydro/BCTC did not present the HVDC option to Cook's Ferry for discussion; • BC Hydro/BCTC did not explain why the Non-Wires Options were removed from consideration and the reasons why BCTC selected 5L83 over the UEC Alternative; and • BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.
NNTC	<ul style="list-style-type: none"> • BC Hydro/BCTC did not explain why the Non-Wires Options were removed from consideration and the reasons why BCTC selected 5L83 over the UEC Alternative; and • BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.

First Nation / Tribal Council	Deficiencies in Consultation
Spuzzum First Nation	<ul style="list-style-type: none"> • BC Hydro/BCTC did not explain why the Non-Wires Options were removed from consideration and the reasons why BCTC selected 5L83 over the UEC Alternative; and • BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.
Boothroyd Indian Band	<ul style="list-style-type: none"> • BC Hydro/BCTC did not explain why the Non-Wires Options were removed from consideration and the reasons why BCTC selected 5L83 over the UEC Alternative; and • BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.
Skuppah Indian Band, Lytton First Nation, Oregon Jack Creek Indian Band	<ul style="list-style-type: none"> • BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.
STC, Shxw'ow'hamel First Nation	<ul style="list-style-type: none"> • BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.
Cheam First Nation	<ul style="list-style-type: none"> • BC Hydro/BCTC did not explain why the Non-Wires Options were removed from consideration and the reasons why BCTC selected 5L83 over the UEC Alternative.
Seabird Island	<ul style="list-style-type: none"> • BC Hydro/BCTC did not explain why the Non-Wires Options were removed from consideration and the reasons why BCTC selected 5L83 over the UEC Alternative; and • BC Hydro/BCTC did not adequately respond to the issue of revenue sharing.

The Commission Panel found consultation with the following First Nation Interveners to be adequate:

- Okanagan Nation Alliance;
- Kanaka Bar Indian Band;
- Kwaw-kwaw-a-pilt First Nation;
- Soowahlie First Nation;

- Sumas First Nation; and
- Hwlitsum First Nation.

10.1 Commission Directives

The Commission Panel is cognizant of BC Hydro's submission, at page 95 of its Argument that parties would not be well served by "a long list of prescriptive directions" for future CPCN Applications and the direction in *Haida Nation* at paragraph 45 that each case must be approached individually and flexibly. The determinations set out below are ILM-specific and are not to be considered in any way prescriptive for any future CPCN Applications. The Commission Panel directs BC Hydro as follows:

1. For those First Nation Interveners where the Commission Panel has found that BC Hydro/BCTC did not explain why the Non-Wires Options were removed from consideration and why BCTC selected 5L83 over the UEC Alternative, BC Hydro is to explain, in writing, why BCTC chose 5L83 over the UEC Alternative and why the Non-Wires Options were removed from consideration. BC Hydro is also to offer to meet with those First Nation Interveners to discuss and respond to any concerns that may arise from BC Hydro's explanations.
2. For those First Nation Interveners where the Commission Panel has found that BC Hydro/BCTC did not present the HVDC Option for discussion, and for those First Nation Interveners not identified specifically, but who would be potentially impacted by the proposed capacitor station required for AC technology but not for HVDC technology, BC Hydro is to explain in writing to those First Nation Interveners (i) the potential adverse impacts of HVDC technology versus those of AC technology, and (ii) why it chose AC technology over HVDC. BC Hydro is also to offer to meet with the First Nation Interveners to discuss and respond to any concerns that may arise from BC Hydro's explanations.
3. For those First Nation Interveners who raised the issue of revenue sharing, BC Hydro is to explain, in a meaningful manner, its ability to revenue share or make similar periodic payments, for the ILM Project, in the context of provincial government policy and BC Hydro's rate structures. BC Hydro is also to discuss and respond to any concerns that may arise from BC Hydro's explanations.

BC Hydro is directed to undertake the required consultation within a reasonable and flexible timeline, and to offer appropriate capacity funding to the affected First Nations.

In Section 9, the Commission Panel determined that it would maintain the suspension of the CPCN under s. 99 and 101 of the *UCA* until BC Hydro has completed the specific consultation the Commission Panel has directed.

The Commission Panel directs BC Hydro to file a compliance report within 120 days of the date of the Order issued concurrently with this Decision. The First Nation Interveners for whom consultation was found to be inadequate will have 21 days from the date of the filing of the report to file a written response. BC Hydro will have 7 days from the date of the filing of the First Nation Interveners' responses to file a written reply to the responses. The Commission will then assess the report and, if the deficiencies in consultation have been remedied to the satisfaction of the Commission, will lift the suspension of the CPCN.

The Commission Panel expects that since the Commission issued the CPCN for the ILM Project on August 5, 2008, BC Hydro will have continued to consult on the Project, but notes that details of such consultation are not in evidence before it. Should it be the case that the deficiencies identified above have been addressed in consultation since August 5, 2008, BC Hydro can so advise the Commission in the compliance report. BC Hydro need not repeat its consultation on any matters that the Commission Panel has directed it to consult where BC Hydro has already consulted on those matters in a manner similar to that contemplated by the Commission Panel's directives or where a First Nation Intervener agrees it has been adequately consulted.

11.0 DISSENT OF COMMISSIONER RHODES

I have read the draft Decision of the majority of the Panel and, with respect, am unable to agree with a number of the conclusions reached. For the reasons set out below, I find the Crown's overall consultation efforts to be inadequate. I would continue the suspension of the CPCN pending further consultation with the remaining Intervening First Nations. This consultation should focus on the new adverse impacts resulting from the construction and operation of New Line 5L83. Once the Crown has satisfied the Commission that it has sufficiently identified and consulted on the potential adverse impacts to the Intervening First Nations' asserted rights and title interests to be in a position to confirm that such adverse impacts are amenable to accommodation (through avoidance, mitigation or some other form), I would lift the suspension.

1.0 Background

1.1 Task of the Panel

The Panel must consider the adequacy of the Crown's consultation efforts with the Intervening First Nations on the Options Decision as of August 5, 2008. In my view, this task requires an assessment of whether, as of the date the CPCN was granted, the Crown had met its duty in terms of having consulted sufficiently with these First Nations to confirm its decision to proceed with its Preferred Alternative, the New Line 5L83, for which a CPCN was sought and awarded. This, in turn, effectively requires the Panel to be satisfied that the adverse impacts to the Intervening First Nations' asserted rights and title interests, and any issues or concerns which they raised, had been properly identified and considered and were capable of being addressed by way of, for example, modifications to the alignment of the proposed line (during the EAO process) or some other more minor amendment, or through some form of other accommodation, with no need to revisit the choice of the preferred alternative for which a CPCN was granted.

This view is supported by the language used by the Court of Appeal in *Kwikwetlem*. The Court of Appeal accepted the position advanced by the First Nation Appellants that the CPCN “fixes” the essential structure of the project such that, practically speaking, BCTC’s preferred option (to pursue construction of new transmission line 5L83) cannot be revisited, whatever consultation occurs later in the EAO process. This understanding was derived in part from “the Commission’s own words that the CPCN process is “the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project...”. (*Kwikwetlem*, paras. 47, 49)

This view is also supported by the evidence. BC Hydro’s first Project Update provided to all stakeholders indicates:

In the coming weeks BCTC will be completing further studies and gathering additional input from First Nations and the public. All comments received and issues identified will be considered when BCTC makes a decision on a preferred alternative in May 2007.

Whatever alternative is selected, it will require the approval of the British Columbia Utilities Commission (BCUC). Before filing an application with the BCUC, BCTC will be seeking further public and First Nations input. (Exhibit B-3-1, Appendix V)

BC Hydro’s June 6, 2007 letter to First Nations advising of the selection of the Preferred Alternative states, in part:

In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province’s transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commission (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC’s recommended solution and may choose an alternative solution, or combination of solutions. (Exhibit B-3-1 Appendix W)

The Court of Appeal also recognized the separate roles of the Commission and the EAO. Huddart J.A. stated:

As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen ... as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion. (*Kwikwitlem*, para. 55)

The Court of Appeal found:

...certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line. (*Kwikwetlem*, para. 59)

In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them. (*Kwikwetlem*, para. 60)

1.2 Scope and Content of the Duty to Consult

It is acknowledged by all parties that BCTC and BC Hydro, as Crown actors, are required to satisfy any duty to consult with First Nations concerning their proposed conduct.

The government's duty to consult with Aboriginal peoples is a "core precept" which is grounded in the "honour of the Crown." This has been explained by the Supreme Court of Canada in its seminal decision in *Haida Nation*:

[p]ut 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. (*Haida Nation*, para 25)

The *Haida Nation* case was the first case of its kind to be considered by the Supreme Court of Canada. The Court described its task as "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" (*Haida Nation*, para. 11).

In *Haida Nation*, the Court approved certain phrases from its earlier discussion of the duty to consult in relation to established claims at paragraph 168 of *Delgamuukw* as being equally applicable to unresolved claims (*Haida Nation*, paras. 24, 40). The Court in *Haida Nation* also quoted the comments of Lamer C.J. at paragraph 168 of *Delgamuukw* more fully as follows:

[t]he 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.

The case of *Taku River* was heard concurrently with *Haida Nation*. As in *Haida Nation*, the Supreme Court of Canada was concerned with the Crown's duty to consult with and accommodate Aboriginal peoples in the context of decisions that might adversely affect as yet unproven Aboriginal rights and title claims.

The Court in *Taku River* held that the Crown was required to consult meaningfully, and as long as consultation is meaningful, there is no ultimate duty to reach agreement. Rather, it is necessary that: "...Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process" (*Taku River*, para. 2).

Responsiveness is also a key requirement for both consultation and accommodation. (*Taku River*, para.25)

The Chief Justice, for the Court, stated: "[t]he scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" citing *Haida Nation* at para. 39. She stated: "[i]t will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process" (*Taku River*, para. 29).

The Supreme Court of Canada considered its decision in *Haida Nation* and elaborated on the ability of the Crown to make decisions and take actions which might have the effect of infringing existing Aboriginal treaty rights in its unanimous decision in *Mikisew*.

Mr. Justice Binnie, for the Court, stated at the outset:

[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the

indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case. (*Mikisew*, para. 1)

In *Mikisew*, the Mikisew Cree First Nation was a party to Treaty 8, which was made in 1899 and involved the surrender of a huge expanse of land by numerous First Nations in the area to the Crown in exchange for reserves and other benefits, including hunting, trapping and fishing rights throughout the surrendered lands. These rights were limited in that they were specifically subject to government regulations and as well, there was an exception for "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." (*Mikisew*, para. 2)

The *Mikisew* case involved the approval by the federal government of a 118 km. winter road, initially planned to run through the Mikisew reserve, and then realigned to track the boundary of the reserve when the Mikisew complained. The winter road was approved pursuant to the Crown's treaty right to "take up" surrendered lands for regional transportation purposes.

The Mikisew argued that the Crown owed "a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road" [reference omitted] (*Mikisew*, para. 16).

The Supreme Court of Canada held that it was not necessary for the purposes of that case to invoke fiduciary duties, as the honour of the Crown exists as a source of obligation independently of treaties. The Court held that adequate consultation in advance of the federal government approval did not take place. Mr. Justice Binnie stated: "[t]he government's approach did not advance the process of reconciliation but undermined it" (paras. 4, 51).

The Supreme Court of Canada agreed that the winter road was a permissible purpose for the "taking up" of lands under Treaty 8. Rather, the issue was whether the Minister pursued the permitted purpose in accordance with the Crown's duty to consult (paras. 60, 61). The Court

confirmed that the “content of the duty to consult will, as *Haida* suggests, be governed by the context” (para. 63).

In the context of the *Mikisew* case, the Supreme Court of Canada found that the Crown’s duty lay at the lower end of the *Haida* spectrum, as the project entailed a “fairly minor winter road” on *surrendered* lands where the Mikisew hunting, fishing and trapping rights were expressly subject to the “taking up” limitation. Nonetheless, the Court held that the duty had both informational and response components. As such, “[t]he Crown was required to provide notice to the Mikisew and to engage directly with them...This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impacts on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impact on the Mikisew hunting, fishing and trapping rights.” The fact that the Crown shifted the road alignment so that it did not go through the Mikisew reserve but along its border did not discharge its obligation (*Mikisew*, para. 64).

Mr. Justice Binnie approved the comments of Finch, CJBC in *Halfway River First Nation* at paras. 159-160 of that decision:

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added].” [Emphasis in original]

1.3 What is Consultation?

Consultation has been described as, in its least technical definition, “talking together for mutual understanding”. (*Haida Nation*, para. 43)

The Court decisions cited above suggest:

- In all cases, the Crown must act in good faith to provide meaningful consultation appropriate to the circumstances “with the intention of substantially addressing [First Nations’] concerns as they are raised” (*Haida Nation*, para. 41, para. 42 citing *Delgamuukw* at para. 168);
- Good faith on both sides is required at all stages (*Haida Nation*, para. 42);
- Consultation must be “meaningful” (*Taku River*, para. 2);
- There are both informational and response components (*Mikisew*, para. 64);
- The process is an interactive one (*Kwikwetlem*, para. 62);
- Responsiveness is a key requirement (*Taku River*, para. 25);
- There is a positive obligation on the Crown to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns (*Halfway River First Nation*, paras. 159-160; as approved in *Mikisew* at para. 64);
- Engagement should include the provision of information about the project addressing the First Nation interests and what the Crown anticipates might be the potential adverse impacts on those interests, with a view to attempting to minimize adverse impacts (*Mikisew*, para. 64);
- First Nations should outline their claims with clarity, focussing on the scope and nature of their asserted rights and on the alleged infringements (*Haida Nation*, para. 36);
- First Nations must not frustrate the Crown’s reasonable good faith attempts or take unreasonable positions to thwart government from making decisions or acting where, in spite of meaningful consultation, agreement is not reached (*Haida Nation*, para. 42);
- Meaningful consultation may require the Crown to make changes to its proposed action based on the information obtained (*Haida Nation*, para. 46);
- Aboriginal groups do not have a veto over what can be done with land pending final proof of their claims (*Haida Nation*, para. 48);
- There is no duty at the end of the day to agree (*Haida Nation*, para. 49; *Taku River*, para. 2).

In its initial pre-application to the EAO in December 2006, BCTC noted that both BCTC and BC Hydro “recognize that consultations must be meaningful from a First Nations perspective” and that specific expectations may be First Nation specific and may change over time. BCTC sets out the following objectives as defining elements of meaningful consultation:

1. To show respect for Aboriginal rights, duties and authority;
2. To ensure flexibility and a mutually agreeable process;
3. To provide funding to First Nations to engage in consultation processes;
4. To address First Nations interests;
5. To share information; and
6. To allow adequate time for the consultation process.

(Exhibit B-26, p. 9)

1.4 Purpose of Consultation

Consultation, in essence, is concerned with potential adverse impacts to Aboriginal rights and/or title, either established or asserted: “...[T]he purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed...”[reference omitted]. The duty to consult is not triggered absent a potential adverse impact to the claim or right in question: “[T]he adverse impact must be on the future exercise of the right itself; an adverse effect on a First Nation’s future negotiating position does not suffice. (*Carrier Sekani*, paras. 41, 46)

2.0 Factual Circumstances Before the Panel in the Reconsideration Proceeding

In the case of the ILM Project, BC Hydro and BCTC recognized consultation obligations with 60 First Nations and 7 Tribal Councils who were affected to varying degrees by the New Line 5L83 Alternative which was selected by BCTC’s Board of Directors in May of 2007. It is only the consultation with those First Nations who were affected by the new line alternative and who also intervened in the Reconsideration Proceeding which is in issue. Therefore, the Commission Panel

did not have evidence specifically addressing the consultation process relating to the 43 Bands and 7 Tribal Councils affected by the UEC alternative, except to the extent that a First Nation or Tribal Council was affected by both options and also intervened in the Reconsideration Proceeding (Exhibit B-10-4, Attachment 4 to Coldwater 1.2).

The Commission Panel, therefore, had a very narrow and incomplete picture of BC Hydro and BCTC's total consultation efforts for what might be described as the strategic level decision as to which option, as between UEC and the New Line 5L83 alternative, to pursue. The Commission Panel is therefore not in a position, nor has it been asked, to comment on the full consultation process undertaken.

2.1 The Consultation Process in Issue

As noted by counsel for the Kwikwetlem in his opening statement, "there's remarkably little factual dispute" (T4:200-201). The parties are not so much at odds as to what meetings occurred and when they occurred, but whether what transpired satisfied the Crown's duty to consult and, if necessary, accommodate, a particular First Nation to the point of the Commission's decision to award a CPCN on August 5, 2008. A detailed review of the meetings has been set out in decision of the Majority.

3.0 Deficiencies in the Consultation Efforts

3.1 Initial Capacity Funding

While I agree with the Commission Panel Majority that the issue relating to the provision of initial capacity funding to the Intervener First Nations is not determinative of the adequacy of consultation, I do so solely on the basis that the relevant date for the Panel's consideration of the adequacy of consultation on the Options Decision is August 5, 2008.

BCTC's witness panel testified that in the preliminary meetings, the subject of initial capacity funding was raised and First Nations were asked about their expected needs. There was no presumption on the part of BCTC/BC Hydro as to what capacity funding a First Nation would require (T4:293). The capacity funding was to be provided to allow First Nations to understand the Project and its impacts on them and to provide feedback on the Project alternatives (T4:298, 300). Most First Nations indicated that that they wished to receive initial capacity funding (T4:297-298).

Following the preliminary "Round One" meetings, on November 27, 2006, BC Hydro sent a letter to First Nations purporting to offer initial capacity funding in the amount of \$10,000. This letter was basically a form letter sent to all the First Nations who had been identified at that time as being potentially affected by either or both of the UEC or 5L83 alternatives. It offered \$10,000 for the First Nation to participate "in consultation efforts on the Lower- Mainland Transmission Reinforcement (ILM) Project. This includes participation in the Environmental Assessment Office terms of reference process as well as participation in review studies and providing input on the ILM upgrade option."

The letter enclosed a draft capacity funding agreement entitled "Interior to Lower Mainland Project Options Definition Phase Capacity Funding Agreement," nine pages long, "for consideration and discussion."

Of the 60 or so First Nations who received the letter and draft agreement, no First Nation chose to accept the funding or enter into the Agreement (Exhibit B-3-1, pp. 28-30, Appendices H, I).

In February of 2007, BC Hydro sent a further offer with an even lengthier detailed draft funding agreement to a number of First Nations. No recipient of this draft funding agreement chose to accept it (Exhibit B-3-1, pp. 30-31).

Given the lack of response to the draft capacity funding agreements provided in November of 2006 and February of 2007, BC Hydro prepared a simple, less formal offer of capacity funding which was sent to First Nations, in March 2007.

Deliverables suggested in this letter were:

- Provide written or verbal input on the two transmission options prior to April 2, 2007;
- Provide initial overview comments on the Draft Terms of Reference as provided and requested by the EAO. The EAO request was for comments by March 21, 2007;
- Participate in the review of the Section 11 order as issued by the EAO;
- Review the Archaeological Overview Assessment Report prepared by Golder Associates Ltd. and the Sto:lo Research and Resource Management Centre; and
- Meet with BC Hydro to discuss opportunities and issues as requested by either party.

The letter also indicated that there would be further discussions in the future concerning further capacity funding agreements and a letter setting out the deliverables was provided so the First Nation could simply sign and return it to obtain initial capacity funding (Exhibit B-3-1, pp. 31-32, Appendix K).

The First Nations Interveners who were offered initial capacity funding complain as to both the adequacy and timing of the offer, given that the funding was to be used, in part, to enable the First Nations to provide comments on the two transmission reinforcement options (UEC and New Line 5L83) prior to April 2, 2007, with the Board decision to be made in May.

BCTC points in part to its early offers of initial capacity funding in November and February in support of its position that capacity funding was adequate and, at least in respect of Coldwater *et al.*, that any delays were “not due to any fault or lack of diligence on the part of BCTC and BC Hydro” (BCTC Argument, para. 319).

In my view, to the extent that the offers of initial capacity funding were provided to allow First Nations to comment on the two reinforcement options prior to the May Board decision, those offers were made too late in the day to allow for meaningful feedback. I am of the view that the standard form offers of November 2006 and February 2007 did nothing to advance the process of

consultation, and, in some cases, could only have served to undermine it, given that they were legalistic in nature as well as in standard form and amount, and thus, were in no way responsive to earlier discussions with individual First Nations.

However, I agree that the date of the Options Decision of the Board is not determinative of this issue in the unique circumstances of this case. In terms of comment on the options, First Nations can only realistically be expected to support whatever position they may take by indicating how a particular option would likely affect them, in terms of its various adverse impacts on their asserted claims to rights and title. In this case, as noted earlier, the Commission is not charged with analysing the impacts of the two alternatives on all affected First Nations' interests, as might now be expected to occur as part of a CPCN application. Only the complaints about the Crown's consultation with the remaining First Nations Interveners, all of whom are affected by New Line 5L83, are before the Commission Panel. As the relevant date for the purposes of the Commission Panel's review is August 5, 2008, by which time a number of additional offers of comprehensive funding had been advanced or were available to support a more detailed investigation, the inadequacy as of May 2007 is not necessarily determinative of inadequate consultation as at August 5, 2008.

3.2 Timeline

As a corollary to the above, I would find that BCTC's strict adherence to its timeline, in the face of circumstances where none of the First Nations Interveners were in timely receipt of initial capacity funding, the purpose of which was to allow them to be in a position to understand the Project, and its impacts and to provide feedback, was a deficiency. I do not find the argument that the First Nations did not seek an extension to the timeline/date for the Options Decision persuasive given that the purpose of this funding was, in part, to enable them to understand the Project.

However, for the reasons given above, in the unique circumstances of this Proceeding, where the relevant date for consultation on the Options Decision is the date of the Commission's decision to award a CPCN, and the CPCN has now been suspended for the better part of two years, BCTC's

strict adherence to its timeline is also not determinative of the adequacy of consultation.

3.3 Sharing of Strength of Claim Assessments and Adverse Impacts

BC Hydro/BCTC take the position that there is no duty to share strength of claim and impact assessments during the course of a consultation process and that imposing such a duty would be detrimental to the consultation process, especially if done at an early stage (BC Hydro Argument, p. 43).

Coldwater *et al.* argue that, at a minimum, the Crown must share and discuss the evidence and information that formed the basis for its assessment of a First Nation's strength of claim and the adverse impacts which it has identified (Coldwater et al. Argument, para. 92).

In my view, it was incumbent upon BCTC/BC Hydro to, at a minimum, share the facts which they relied on in support of their strength of claim assessments as well as their view of the potential adverse impacts on a particular First Nation, if not as an opening position, at an early stage in the process. In my view, it does not suffice to simply present a high level overview of a project and expect First Nations to respond with particularity. This is especially the case, in my opinion, when BC Hydro and BCTC had identified the affected First Nations and at least their reserves, had undertaken to meet with most of them individually, had detailed information on the proposed route, including clearing and new rights of way requirements, and had identified a range of adverse impacts including:

1. Aquatic species and habitat;
2. Terrestrial ecosystems, vegetation and wildlife;
3. Land use and socioeconomic/socio-community conditions
4. Visual landscape and recreational resources;
5. First Nations traditional use;
6. Heritage and archaeological resources; and
7. Public health issues.

(Exhibit B-26, Executive Summary, p. x)

The scope of the Crown's duty to consult is based on a preliminary assessment of a First Nation's strength of claim and corresponding adverse impact to its asserted rights, including title. These issues are fundamental to and drive the consultation process. To ignore them, in my view, is to ignore the elephant in the room. First Nations need to be in a position to respond to issues including their strength of claim assessment and potential adverse impacts. It may be that their input will affect those assessments. A discussion including these issues will also, of necessity, be specific to a particular First Nation, which will provide a baseline and tend to promote, rather than hinder, a meaningful, good faith discussion.

Such disclosure, in my view, is also consistent with the comments of the Supreme Court of Canada in *Mikisew*, that engagement should address the First Nation interests and what the Crown anticipates might be the potential adverse impacts on those interests, with a view to attempting to minimize adverse impacts (*Mikisew*, para. 64).

I also disagree with the conclusion of the Majority that the Working Group meeting held on February 21, 2007 as part of the EAO process, or the materials sent to non-attendees, provided a sufficient sharing of potential adverse impacts on First Nations' interests. The meeting minutes indicate the presence of in excess of 50 people, more than half of whom were representatives of BC Hydro, BCTC or their consultants, or various governments/government agencies, at federal, provincial and municipal levels. Representatives of approximately 20 different Bands or First Nations attended.

Numerous PowerPoint presentations were made. Topics addressed at the meeting included: the Environmental Assessment process, both provincial and federal, an overview of the new line 5L83 Project, proposed consultation, the Draft Section 11 Order, a brief overview of the Upgrade Existing Circuits alternative, the Working Group structure, and Draft Terms of Reference.

The meeting minutes further indicate that BC Hydro's engineering department showed video clips depicting "construction aspects of new transmission lines" and also provided an overview of ROW preparation and structure (such as towers) construction. General questions relating to Rights of Way, among others, were also fielded. (Exhibit B-3-1, Appendix U)

Participants were provided with a binder of materials which included the 5L83 Project Description, Draft Terms of Reference, and the Project Overview Presentation (made by Melissa Holland). These materials were also provided to those First Nations and Tribal Councils who did not attend the meeting. (Exhibit B-3-1, p. 44)

In my view, this meeting and its materials did not amount to a meaningful sharing of adverse impacts on First Nations' asserted rights and title claims. The information provided was of a general nature and at high level and was not specific to any particular First Nations' interests.

Nor did the May 4, 2007 Draft Heritage Overview Briefing Report Statement, or the April 26, 2007 Environmental Briefing Report for the ILM Transmission Reinforcement Project, Nicola to Meridian New Transmission Line Alternative, both of which were prepared by Golder Associates for BCTC and relied upon by Melissa Holland for her recommendation to the BCTC Executive further any sharing by the Crown of relevant information, as, to the extent that they were shared with First Nations, it was not in a timely fashion, if at all. (Exhibit B-10, BCTC Response to Coldwater *et al.* IR 1.2)

Although discussion with First Nations in this case did not, in my opinion, include an adequate sharing by the Crown of information on strength of claim assessments and adverse impacts, again, in these unusual circumstances, this deficiency may not be determinative of a total failure to adequately consult at the end of the day, as much of this information did eventually come out during the Proceeding, some of which is the subject of submissions. I am of the view that additional consultation efforts, which may or may not have already taken place, could serve to rectify this deficiency.

3.4 Consultation on Aboriginal Title

A number of First Nations also complain that BCTC/BC Hydro did not consult on or consider Aboriginal title in its assessment of strength of claim and adverse impacts. BCTC/BC Hydro disagree and take the position that they considered First Nations' rights, including title, and that they do have to recognize title to satisfy the duty to consult.

In my opinion, there is little in the evidence to suggest that BC Hydro/BCTC considered First Nations' claims to title independently of their claims to "rights and title." I agree with BC Hydro/BCTC that there is no need to formally recognize title to satisfy the duty to consult, as the First Nation claims in issue are asserted, not proven, and title will be eventually be determined in another forum. However, given that the concept of title involves different considerations than rights (for example, the relevant date to establish title is the date of Crown Sovereignty, whereas the relevant date to establish rights is first contact with Europeans) and the fact that title includes broader and more significant rights, such as the right to choose how lands will be used, it was, in my view , necessary for BC Hydro/BCTC to consider both rights and title in its assessments of strength of claim and adverse impacts. I am of the view that additional consultation on the issue of title is required.

3.5 Information Relied on by BC Hydro/BCTC for the May, 2007 Options Decision

The First Nations Interveners also take the position that consultation was inadequate because the Crown did not have sufficient information on Aboriginal rights and title claims and adverse impacts thereto prior to the May, 2007 Options Decision, and in particular, no Traditional Use Studies were undertaken prior to the Decision.

While I agree with the Majority that a TUS is not a necessary precondition to a preliminary strength of claim or adverse impact assessment, I do not agree that the Crown has demonstrated that it had sufficient information on the asserted rights and titles of the Intervening First Nations or on the potential adverse impacts to those asserted claims to make an informed preliminary assessment of

the scope of the duty to consult for each First Nation Intervener as of the date of the Options Decision. It is the preliminary assessment of these factors which provides the basis for the scope of the duty to consult in the first instance. Thus, in my view, it is important that the Crown have sufficient information to arrive at an informed assessment.

However, in many cases First Nations did not disagree with BC Hydro's assessment of the scope of duty to consult, so an inadequately informed determination is not necessarily determinative of the issue.

Conclusion

From my conclusions that: the initial capacity funding was provided too late in the day to allow for meaningful feedback from First Nations prior to May of 2007, the timeline was compressed, there was no sharing by the Crown of its information relating to strength of claim and First Nations – specific adverse impacts or consideration of Aboriginal title separate from Aboriginal “rights and title”, and the information supporting the May Options Decision was inadequate, it follows that, in my opinion, consultation with the remaining Intervening First Nations to the point of the May Options Decision was inadequate. However, as noted above, in my opinion, the circumstances of this Proceeding are unique in that the relevant date for assessing consultation on the alternatives is August 5, 2008; by which time the evidence establishes that consultation focussing on the Intervening First Nations' asserted rights has continued, additional funding has been offered and/or provided and Traditional Use Studies have, in some cases been either started or completed. Much additional information has also been shared by both First Nations and BC Hydro and BCTC during this Proceeding. Further, although no details are before the Panel, it appears that consultation has also continued beyond August 5, 2008, as is evidenced by the recent withdrawal of some of the Intervening First Nations from this Proceeding.

To summarize, in my opinion, more information on additional consultation is needed before the Commission can be in the position so satisfy itself that consultation with the remaining Intervening First Nations has reached the point of being adequate.

Given my finding as to the general inadequacy of consultation to August 5, 2008, I do not find it necessary to review deficiencies in the consultation which occurred with each individual First Nation or Tribal Council.

4.0 Remedy

Accordingly, and as discussed above, in the unusual circumstances of this case, where the CPCN has now been suspended for almost two years for the Commission to consider the single issue of the adequacy of consultation with the Intervening First Nations, and consultation with at least some of the Intervening First Nations has continued during that time, I agree with the Panel Majority that there is no merit in rescinding the CPCN. Although consultation with a select group of First Nations was the focus of this proceeding, First Nations do not have a veto, and there were many other issues of significance which were considered and determined during the original CPCN proceeding.

The Supreme Court of Canada in *Carrier Sekani* suggested that the Crown's failure to consult can lead to a number of remedies including "an order to carry out the consultation prior to proceeding further with the proposed government conduct" (para. 37). Therefore, I agree that the suspension of the CPCN should be continued, but, to remedy the deficiencies I see in BC Hydro's consultation, I would direct BC Hydro to continue its consultation efforts with the remaining Intervening First Nations and, when complete, report to the Commission outlining:

- The potential adverse impacts to First Nations' asserted rights and title interests identified as resulting from the construction and operation of new line 5L83 for each remaining Intervener First Nation/Tribal Council;
- The consultation and/or any negotiation that has taken place as between BC Hydro and each remaining Intervener First Nation/Tribal Council in respect of these potential adverse impacts; and
- How BC Hydro proposes to avoid or mitigate the potential adverse impacts or otherwise accommodate each remaining First Nation/Tribal Council in respect of the adverse impacts.

I would also invite the First Nations to provide any comments they may have on the report following its filing with the Commission.

Once these requirements have been met to the satisfaction of the Commission, I would order that the suspension of the CPCN be lifted.

DATED at the City of Vancouver, in the Province of British Columbia, this *Third* day of February 2011.

Original signed by:

A.J. (TONY) PULLMAN
PANEL CHAIR/COMMISSIONER

Original signed by:

PETER E. VIVIAN
COMMISSIONER

DISSENT

I have had the opportunity to read the Decision of the Majority of the Commission Panel in draft. While I accept much of the analysis, I am unable to agree with a number of the conclusions reached, in particular with respect to the general adequacy of the overall consultation efforts of the Crown. I respectfully dissent from the Decision of the Majority on the issues and for the reasons set out in Section 11.

Original signed by:

ALISON A. RHODES
COMMISSIONER



**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER** G-15-11

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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

British Columbia Transmission Corporation
Reconsideration of the
Interior to Lower Mainland Transmission Project

BEFORE: A.J. Pullman, Commissioner February 3, 2011
A.A. Rhodes, Commissioner (dissenting in part)
P.E. Vivian, Commissioner

O R D E R

WHEREAS:

- A. On November 5, 2007, the British Columbia Transmission Corporation (BCTC) applied pursuant to sections 45 and 46 of the *Utilities Commission Act* (Act) for a Certificate of Public Convenience and Necessity (CPCN) for the Interior to Lower Mainland Transmission Project (ILM Project);
- B. On August 5, 2008 the British Columbia Utilities Commission (Commission) issued its Decision accompanied by Order C-4-08 that granted BCTC the CPCN for the ILM Project subject to conditions;
- C. The Court of Appeal for British Columbia released its decision in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68 on February 18, 2009. Madam Justice Huddart, on behalf of the Court, stated at paragraph 15:

“I would remit the scoping decision to the Commission for reconsideration in accordance with this Court’s opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown’s duty to consult and accommodate the Appellants had been met up to that decision point”;

- D. The First Nations Interveners in order of intervention are: Hwlitsum First Nation (Hwlitsum), Kwikwetlem First Nation (Kwikwetlem), Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, and Upper Nicola Indian Band (NNTC/ONA/Upper Nicola), Coldwater, Cook's Ferry, Siska and Ashcroft Indian Bands (Coldwater et al.), Stó:lō Tribal Council (STC), Stó:lō Hydro Ad Hoc Committee (SHAC), Seabird Island First Nation, Nicomen Indian Band, Nicola Tribal Association, and Nooiatch Indian Band;
- E. The other Interveners in order of intervention are: British Columbia Old Age Pensioners’ Organization et al. (BCOAPO), British Columbia Hydro and Power Authority (BC Hydro), Donald Harris and Alan Casselman, and the Ministry of Attorney General for the Province of British Columbia (Attorney General of BC);

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- F. The Oral Public Hearing commenced on January 11, 2010 and concluded on January 29, 2010;
- G. At the conclusion of the Oral Public Hearing, the Commission set the deadline for Arguments;
- H. The filing of Arguments was completed on May 4, 2010 with the filing of Reply by BCTC and BC Hydro to a part of the NNTC/ONA/Upper Nicola Argument that had been inadvertently omitted from the filed copy of their original Argument;
- I. By letter dated May 19, 2010 the Commission cancelled the Oral Phase of Argument that had been set for June 2, 2010;
- J. By letter dated May 20, 2010 the Chief of Kwikwetlem advised the Commission that Kwikwetlem now supported the ILM Project and wished to withdraw as an Intervener. Subsequently, on June 3, 2010 the Commission granted Kwikwetlem permission to withdraw. The Kwikwetlem evidence and submissions remained on the record;
- K. On July 3, 2010, pursuant to section 22 of the *Clean Energy Act*, all of BCTC's rights property, and assets, including the CPCN, became the property of BC Hydro, with the exception of contracts governed by or permits issued under the law of a jurisdiction other than British Columbia. Accordingly, BCTC's role in the ILM Reconsideration Proceeding was assumed by BC Hydro;
- L. One of the major issues raised by the First Nations Interveners during the Proceeding was whether BC Hydro ought to have consulted on infringements resulting from existing transmission assets;
- M. On October 28, 2010 the Supreme Court of Canada released its decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 SCC 43 (*Carrier Sekani*);
- N. By letter L-90-10 dated November 5, 2010, the Commission invited the parties to file written submissions on the effect, if any, of *Carrier Sekani* on their Final Arguments;
- O. By letters dated November 19, 2010 NNTC/ONA/Upper Nicola, Coldwater et al., STC, and Hwlitsum advised the Commission that they no longer sought any determination or relief from the question of whether the scope of consultation includes a consideration of the existing transmission assets;
- P. On November 22, 2010 BC Hydro and the Attorney General of BC filed their submissions on the effect of *Carrier Sekani* on their Final Arguments;
- Q. By letter dated November 24, 2010 SHAC advised the Commission that that the SHAC First Nations (Aitchelitz, Leq'á:Mel, Skawahlook, Skowkale, Tzeachten, and Yakwekwioose) now supported the ILM Project and wished to withdraw as Interveners. Subsequently, on November 29, 2010 the Commission granted the SHAC First Nations permission to withdraw. The SHAC evidence and submissions remained on the record;
- R. By December 6, 2010, NNTC/ONA/Upper Nicola, BCOAPO, Coldwater et al., Hwlitsum, and STC filed their submissions on the effect of *Carrier Sekani* on their Final Arguments;
- S. On December 20, 2010 BC Hydro and the Attorney General of BC filed their Reply to the submissions of the Interveners on the effect of *Carrier Sekani* on their Final Arguments;
- T. On December 22, 2010 STC wrote with the consent of NNTC/ONA/Upper Nicola, Coldwater et al., and Hwlitsum to dispute the BC Hydro Reply and argue BC Hydro had split its case; and

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- U. The Commission has considered the evidence and Arguments on whether the Crown's duty to consult and accommodate the First Nations had been up to August 5, 2008 as set forth in the Decision issued concurrently with this Order.

NOW THEREFORE the Commission, for the reasons stated in the Decision, orders that:

1. The Crown's duty to consult with certain First Nations for the ILM Project had not been adequately met as of August 5, 2008.
2. The ILM CPCN issued in Commission Order C-4-08 remains suspended.
3. BC Hydro is directed to comply with the directives of the Commission set out in the Decision issued concurrently with this Order.
4. BC Hydro is directed to file a compliance report, containing a comprehensive and detailed description of its consultation in respect of the directives, within 120 days from the date of this Order. The First Nation Interveners for whom consultation was found to be inadequate will have 21 days from the date of the filing of the report to file a written response to the report, and BC Hydro will then have 7 days from the date of the filing of the First Nation Interveners' responses to file a written reply to the responses. The Commission will review the submissions and, if the deficiencies in consultation have been remedied to the Commission's satisfaction, will lift the suspension of the CPCN.
5. Commission Order C-4-08 included a directive on Quarterly Progress Reports. BC Hydro is directed to include in its Quarterly Progress Reports detailed reporting on First Nations consultation similar to the Revelstoke Unit 5 Project Quarterly Progress Reports.
6. Commission Order C-4-08 included a directive on a Final Report. If the ILM CPCN suspension is lifted, BC Hydro is directed to include in its Final Report a comprehensive and detailed report on its consultation with First Nations.

DATED at the City of Vancouver, in the Province of British Columbia, this *Third* day of February 2011.

BY ORDER

Original signed by:

A.J. Pullman
Commissioner

LIST OF ACRONYMS

5L81	500 kV AC transmission line from Nicola to Ingledow Substation
5L82	500 kV AC transmission line from Nicola to Meridian Substation
5L83	Proposed 500 kV AC transmission line from Nicola to Meridian Substation
AGM	Annual General Meeting
AIA	Archaeology Impact Assessment
AIUS	Aboriginal Interest and Use Study
AOA	Archaeology Overview Assessment
ARN	BC Hydro's Aboriginal Relations and Negotiation Department
Attorney General, AG	Attorney General of British Columbia
BC Hydro	British Columbia Hydro and Power Authority
BCTC	British Columbia Transmission Corporation
CCFA	Comprehensive Capacity Funding Agreement
CHOIA	Cultural Heritage Overview and Impact Assessment
Coldwater <i>et al.</i>	Coldwater, Cook's Ferry, Siska and Ashcroft Indian Bands
Commission, BCUC	British Columbia Utilities Commission
CPCN	Certificate of Public Convenience and Necessity
DSM	Demand Side Management
EA	Environmental Assessment
EAO	British Columbia Environmental Assessment Office
EMF	electro-magnetic frequency, electromagnetic fields
Esh-kn-am	Esh-kn-am Cultural Resource Management Services
Golder	Golder Associates Ltd.
<i>Haida Nation, Haida</i>	<i>Haida Nation v. British Columbia (Minister of Forests)</i> [2004] 3 S.C.R. 511, 2004 SCC 73

LIST OF ACRONYMS

HOA	Heritage Overview Assessment
HVDC	High Voltage Direct Current
ILM	Interior to Lower Mainland
ILM Project, Project	Interior to Lower Mainland Transmission Line
IPP	Independent Power Project
Kwikwetlem	Kwikwetlem First Nation
<i>Kwikwetlem</i>	<i>Kwikwetlem First Nation v. British Columbia (Utilities Commission) 2009 BCCA 68</i>
NNTC	Nlaka’pamux Nation Tribal Council
NTA	Nicola Tribal Association
ONA	Okanagan Nation Alliance
Options Decision	The May 23, 2007, decision by the BCTC Board of Directors to authorize funding for the completion of the definition phase of the 5L83 option and the application to the British Columbia Utilities Commission for a Certificate of Public Convenience and Necessity.
ROW	right of way
SHAC	Stó:lō Hydro Ad Hoc Committee
SNS	Stó:lō Nations Society
SRRMC	Stó:lō Research and Resource Management Centre
STC	Stó:lō Tribal Council
T’mixw	T’mixw Research
TOR	Terms of Reference
UCA	<i>Utilities Commission Act</i>
UEC	Upgrade to Existing Circuits Alternative

THE REGULATORY PROCESS

The purpose of this Appendix is to describe the Regulatory Process the Commission followed to hear the reconsideration ordered by the Court of Appeal.

Court of Appeal Decision

On February 18, 2009 the Court of Appeal issued its decision in *Kwikwetlem* stating at paragraph 15 "...and I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point (See *Utilities Commission Act*, ss. 99 and 101 (5))."

Certified Order

On March 19th, 2009 the Court of Appeal made the following Order on the appeal from the Scoping Decision:

THIS COURT ORDERS that the appeal is allowed and the Scoping Decision is remitted to the Commission for reconsideration in accordance with this Court's opinion.

AND THIS COURT FURTHER ORDERS THAT the effect of the certificate of public convenience and necessity issued by the Commission on August 5, 2008 (the "CPCN") is suspended for purposes of determining whether the Crown's duty to consult and accommodate the appellants had been met up to the point of the Commission's decision to grant the CPCN.

First Procedural Conference

By letter dated March 23, 2009 the Commission announced that it proposed to schedule a Procedural Conference and that prior to doing so, it wished to receive submissions from the parties on the following issues:

- what issues need to be addressed and what existing or additional evidence needs to be examined to determine whether the Crown's duty to consult and, if necessary accommodate has been met up to the Commission's decision point?;
- what process (written and/or oral hearing) should the Commission use in this reconsideration to consider the adequacy of the Crown's duty to consult and, if necessary, accommodate up to the Commission's decision point?; and
- are further information requests necessary?

The letter directed BCTC to file its submissions by March 30, 2009, Interveners to file their submissions by April 3, 2009 and BCTC to file its reply submissions by April 6, 2009 (Exhibit A-1).

BCTC filed its submission on March 30, 2009. Subsequently, submissions from Interveners were received from Hwlitsum; BCOAPO; BC Hydro; Kwikwetlem; NNTC/ONA/Upper Nicola; Coldwater *et al.* and STC. BCTC filed its reply submission on April 6, 2009.

By letter dated April 7, 2009 the Commission scheduled the First Procedural Conference for April 15, 2009 (Exhibit A-2), and published an agenda for the conference in Exhibit A-3, dated April 9, 2009.

The First Procedural Conference was attended by BCTC, BC Hydro, BCOAPO, Kwikwetlem, NNTC/ONA/Upper Nicola, Hwlitsum, Coldwater *et al.*, and the Joint Industry Electricity Steering Committee.

Following the First Procedural Conference, the Commission issued Order G-38-09, which directed:

- BCTC to send a copy of Order G-38-09 to the 67 First Nations listed in Exhibit B-4 of the ILM Proceeding as well as to those First Nations whom it considered to be potentially affected by the UEC alternative but not by 5L83, together with directions how to intervene, how to communicate any questions they may have to the Commission Secretary, and to provide a link to the Commission's website and the transcript of the Procedural Conference;
- Interveners and Interested Parties to register with the Commission by May 15, 2009;
- BCTC and BC Hydro to tender additional evidence on consultation and accommodation together with a submission setting out why the Commission should accept it by May 22, 2009;
- Interveners to make submissions, in writing, by June 5, 2009 on whether the Commission should admit the tendered evidence into the record; and
- BCTC and BC Hydro to file reply submissions by Friday, June 12, 2009, with an Oral Phase scheduled for June 17, 2009, if necessary.

Order G-38-09 also provisionally established a subsequent regulatory timetable for Commission and Intervener Information Requests (IR) and BCTC's response thereto and gave notice of a Second Procedural Conference (Exhibit A-4).

The following parties also registered as Interveners in May 2008 or afterwards: SHAC; Seabird Island, Attorney General of BC; Nicomen Indian Band; NTA; and Nooiatch Indian Band.

BCTC's Filed Evidence

On May 25, 2009 BCTC filed its supplemental evidence on Aboriginal Consultation, its submission on admissibility of supplemental evidence on the adequacy of Crown consultation and accommodation, and Brief of Authorities. BC Hydro submitted on the same day its submission on the admissibility of the supplemental evidence on Aboriginal consultation.

Intervener submissions were received from Hwlitsum; BCOAPO; Kwikwetlem; NNTC/ONA/Upper Nicola; Coldwater *et al.*; STC; and Attorney General of BC, and on June 19, 2009 BCTC and BC Hydro filed their Reply Submissions on the admissibility of supplemental evidence.

By Order G-83-09, the Commission determined that it would consider Supplemental Evidence existing up to August 5, 2008, and addressed objections to three specific appendices of the Supplemental Evidence which post-dated August 5, 2008, as follows:

- Appendix OO, which contained the notification to First Nations that the Commission had directed in Order G-38-09, was determined to be admissible;
- Appendix JJ, which contained Golder's final HOA dated November 10, 2008, but was included to indicate the nature of the consultation and accommodation efforts which were underway as of August 5, 2008. The Commission Panel determined that the HOA contained in Appendix JJ was admissible for the limited purpose of showing the consultation and accommodation efforts undertaken up to August 5, 2008 and directed BCTC to redact the report to eliminate or otherwise identify those portions of the report which reflect work undertaken after August 5, 2008; and
- Appendix NN contained comments from First Nations, some of which predated and some of which post-dated the CPCN decision. The Commission Panel determined that those comments in Appendix NN that had been received by August 5, 2008 were admissible but those which post-dated August 5, 2008 were inadmissible.

(Exhibit A-7)

Second Procedural Conference

By letter dated July 31, 2009 the Second Procedural Conference, which had been scheduled for August 6, 2009 by Order G-83-09, was postponed (Exhibit A-9) due to BCTC's inability to respond to the volume of Commission IRs in the envisaged timeframe and was rescheduled for August 28, 2009 (Exhibit A-10). By letter dated August 21, 2009 the Commission issued the agenda for the Second Procedural Conference, which was to comprise:

- an update on the status of BCTC's responses to IRs;
- submissions on the hearing process format: oral, written or other;
- an indication of any party proposing to lead evidence; and

- a Regulatory Timetable for the balance of the Proceeding.
(Exhibit A-11)

At the Second Procedural Conference, the Commission heard submissions from BCTC; BC Hydro; BCOAPO; Kwikwetlem; NNTC/ONA/Upper Nicola; Coldwater *et al.*; STC; and Hwlitsum regarding the fulfillment of the remaining Intervener Information Requests by BCTC, Intervener evidence, the need for (and location of) an oral hearing, a further procedural conference, and the timing of further regulatory process.

Following the Second Procedural Conference, the Commission issued Order G-98-09, dated August 31, 2009 which established a Revised Regulatory Timetable (including deadlines for Intervener evidence, IRs on Intervener evidence, and Intervener responses to IRs), directed BCTC to file the remaining Responses to Commission and Intervener IR No. 1 by September 4, 2009, established a Third Procedural Conference on November 26, 2009, and unless determined otherwise at the Third Procedural Conference, determined that the Reconsideration Proceeding would be heard by way of an Oral Public Hearing set to commence in Vancouver on January 11, 2010 (Exhibit A-12).

New Panel Members

By letter dated September 14, 2009 counsel for Kwikwetlem submitted that “it is not fair to the First Nations Interveners to have this important decision made by a single Commissioner” and requested that the Chair of the Commission appoint two other Commissioners to the Panel (Exhibit C4-7).

By letter dated September 17, 2009 the Commission requested that BCTC and the Interveners advise it in writing if they consented to the appointment of either one or two new Commissioner(s) to the Panel at that stage of the Reconsideration, stating that, by providing the requested consent, BCTC and the Interveners would agree to waive any objection arising from the late appointment of additional Panel members, and that if BCTC and all the Interveners consented, the determination of whether one or two new Commissioner(s) would be appointed would be at the discretion of the Chair of the Commission (Exhibit A-13).

By letter dated November 18, 2009 following submissions from BCTC and all Interveners, all of whom had expressed a strong preference for the appointment of two new commissioners rather than one, the Commission Chair appointed Commissioners Rhodes and Vivian to the Panel (Exhibit A-23).

Interveners’ Evidence

The following Interveners filed evidence:

- Hwlitsum (C1-11);

- NNTC (C5-7-1);
- Coldwater et al. (C6-5);
- SHAC (C9-4);
- Kwikwetlem (C4-10);
- ONA and Upper Nicola(C5-8-1);
- STC (C8-8-1 and 2); and
- NTA (C13-2).

Third Procedural Conference

By letter dated November 25, 2009 the Commission established an agenda for the Third Procedural Conference (Exhibit A-24) to be held on November 30, 2009, following which the Commission issued Order G-144-09 which established a revised Regulatory Timetable that:

- established deadlines for the filing of Rebuttal Evidence by BCTC and BC Hydro together with submissions as to its admissibility, Intervener submissions on the admissibility of the Rebuttal Evidence, and BCTC and BC Hydro Reply submissions;
- established deadlines for identification of Witness Panels and filing of direct evidence for the Oral Public Hearing; and
- confirmed that the Oral Public Hearing would commence in Vancouver on January 11, 2010.

(Exhibit A-25)

Rebuttal Evidence

BCTC and BC Hydro filed their Rebuttal Evidence together with submissions as to its admissibility on December 7 and 11, 2009 respectively (Exhibits B-20 and C3-23). Submissions were received from the following Interveners on the admissibility of the Rebuttal Evidence: SHAC (Exhibit C9-8); BCOAPO (Exhibit C2-7); Kwikwetlem (Exhibit C4-13); Coldwater *et al.* (Exhibit C6-8); NNTC/ONA/Upper Nicola (Exhibit C5-17); and STC (Exhibit C8-13). BCTC and BC Hydro filed their Reply on December 31, 2009 (Exhibits B-24 and C3-25).

By letter dated January 5, 2010 the Commission issued Order G-2-10 which,

- admitted the Rebuttal Evidence;
- admitted as sur-rebuttal evidence a December 18, 2009 letter from Mary Sandy;
- allowed other Interveners the opportunity to file sur-rebuttal evidence limited to issues raised in the Rebuttal Evidence by January 11, 2010;

- determined that cross-examination of the BCTC/BC Hydro witness panel on issues that are the admitted subject of sur-rebuttal evidence would not commence for forty-eight hours.

(Exhibit A-27)

The Commission Panel's reasons for its decision on the admissibility of Rebuttal Evidence were published on January 13, 2010 (Exhibit A-28).

Oral Hearing

The Oral Hearing opened on January 11, 2010 and continued for 13 hearing days. The following parties tendered witness panels:

- BCTC/BC Hydro;
- Kwikwetlem;
- STC;
- ONA and Upper Nicola;
- Coldwater et al.;
- Hwlitsum; and
- NNTC.

Neither the SHAC nor the NTA took any part in the Proceeding, made opening statements, tendered witness panels or cross-examined any of the witness panels.

Opening Statements were made by counsel for BCTC (T4:187), BC Hydro (T4:191), Hwlitsum (T4:194), Kwikwetlem (T4:200), NNTC/ONA/Upper Nicola (T4:213), Coldwater *et al.* (T4:220), STC (T4:227), BCOAPO (T4:233) and Harris/Casselmann (T4:242).

Confidential Data

By letter dated January 7, 2010, counsel for Kwikwetlem advised that he wished to cross-examine the BC Hydro/BCTC witness panel on their response to Exhibit C1-4, BCUC IR 115 in the original CPCN Hearing.

On January 11, 2010, BC Hydro filed its response to Commission IR 1.115.1 from the original CPCN Hearing with BC Hydro's anticipated range of Aboriginal accommodation costs for the ILM Project redacted together with the January 10, 2008 covering letter (Exhibit C3-26).

Kwikwetlem applied for an order seeking the production of:

- (a) the estimate of the cost of accommodating First Nations that was redacted from Exhibit C3-26; and
- (b) any information which may have subsequently particularized the consideration of impacts in formulating that estimate.

Time was set aside on the morning of January 15, 2010 to hear submissions from all parties in this regard (T8:966 *et seq.*). The Commission Panel reserved its decision, which it rendered orally with written reasons published in L-7-10 dated January 20, 2010 (Exhibit A-29), in which it denied Kwikwetlem's application for production.

At the close of the Oral Hearing, the Commission Panel directed participants to respond to seven questions in their filed Arguments. The questions were as follows:

1)"What is the nature of the relief sought by each of the parties?"

2 (a), "With reference to paragraph 65 of the *Kwikwetlem* decision, did the change as the ILM project moved through different stages?"

2(b), "If so, how?"

3(a) "Again with reference to paragraph 65 of the *Kwikwetlem* decision, if the Commission were to determine, for instance, that there had been inadequate consultation up to the point of the BCTC Board of Directors decision to pursue 5L83, does that mean that the duty cannot be fulfilled at later stages of the ILM project?"

3(b), "Does the answer to question 3(a) depend on where the Commission finds that the duty lies on the *Haida* spectrum?"

4(a), "Is there a duty upon the Crown to share with First Nations its strength of claim and impact assessments?"

4(b), "If so, when does that duty arise?"

5(a), "Does the Commission have the jurisdiction to address historical ongoing infringements and the consultation on such infringements in reaching its determination as to the adequacy of consultation to the point of its CPCN decision?"

5(b), "Does the answer to question 5(a) depend on whether the proposed infringement is incremental to the original infringement?" 5(c), "If the answer to question 5(b) is 'Yes', is the Commission's jurisdiction limited to the assessment of adequacy with respect to the incremental infringement?"

6, "What effect does B.C. Hydro and BCTC's offer to address historical ongoing infringements at a separate table have upon the adequacy of their consultation obligation for the ILM project?"

7(a), "What is the impact on the CPCN that the Commission issued, if the Commission Panel were to determine that, for instance, one of the First Nation intervenors had not been adequately consulted?"

7(b), "Under this scenario, what options are available to the Commission in respect of the CPCN decision?"

(T16:2455)

Questions 1 and 7 are dealt with in Section 9. Question 4 is dealt with in Section 7.9.2, while questions 5 and 6 deal with Existing Assets, and have been explored extensively in *Carrier Sekani* and are discussed at Section 7.10. Question 2 is addressed in Section 4 where the Commission Panel finds that what changed as a result of the Options Decision was not the scope and content of the duty to consult, but the information content.

Question 3 is addressed in Section 3, where the Commission Panel addresses the instructions it received from the BC Court of Appeal, and determined that it must assess the consultation on the Options Decision up to August 5, 2008.

The record was closed at 3:10 p.m. on January 29, 2010.

Written Argument was filed on March 1, 2010 by BCTC, BC Hydro and the Attorney General of BC.

The following Interveners submitted Written Argument on or before March 29, 2010:

- BCOAPO;
- Harris/Casselman;
- Hwlitsum;
- Kwikwetlem;
- NNTC/ONA/Upper Nicola;
- Coldwater et al.;
- SHAC; and
- STC.

By letter dated March 26, 2010 the NNTC enclosed a copy of the video of the September 13, 2007 meeting.

Reply was filed by BC Hydro, BCTC and the Attorney General of BC on April 26, 2010.

By letter dated 29 April 2010, counsel for NNTC/ONA/Upper Nicola submitted page 8 of Tab B of their clients' final written submissions, which was inadvertently omitted from their filed copy.

On May 4, 2010 BCTC filed its reply to paragraphs 22 and 23 of the page that was missing from NNTC/ONA/Upper Nicola filed submissions which were specifically directed to BCTC's submissions, together with the case authority referred to therein.

By letter also dated May 4, 2010 BC Hydro adopted the reply submissions of BCTC in respect of paragraph 22 of the missing page 8.

By letter dated May 19, 2010 the Commission Panel advised parties that, having considered the submissions of all the parties, it had concluded that the Oral Phase of Argument scheduled for June 2, 2010 at 8:30 a.m. was no longer required and that it was cancelled.

By letter dated May 20, 2010 the Chief of Kwikwetlem advised that Kwikwetlem supported the ILM Project and consented to the issuance of the Certificate of Public Convenience and Necessity and any other permits or authorizations to be issued by or on behalf of the Commission that pertained to the ILM Project.

Kwikwetlem also confirmed that it had been adequately consulted and accommodated with respect to any Aboriginal rights and title asserted by its members in respect of the ILM Project.

Accordingly, Kwikwetlem withdrew as an Intervener and purported to withdraw its evidence and submissions in respect of the Commission Proceedings (Exhibit C4-22).

By letter dated May 26, 2010 counsel for Kwikwetlem advised that it was the intent of his client to withdraw *its reliance upon* the evidence and submissions it presented in respect of the Commission Proceedings, and did not seek to have the Commission withdraw the actual evidence, nor to prevent reference by the other Interveners' to the Kwikwetlem submissions to the extent those Interveners have indicated reliance upon them [emphasis in original] (Exhibit C4-23).

By letter dated June 3, 2010 the Commission advised all parties that "as the only request before the Commission is for the Kwikwetlem to withdraw as an Intervener, the Commission grants Kwikwetlem leave to do so. The Kwikwetlem evidence and submissions remain on the record" (Exhibit A-39).

On October 28, 2010 the Supreme Court of Canada released its decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (*Carrier Sekani*). Since the decision appeared to answer several of the issues raised in the Final Arguments of the parties in this Proceeding, the Commission

Panel invited the parties to file written submissions on the effect, if any, of *Carrier Sekani* on their Final Arguments in accordance with the following schedule:

1. BC Hydro/BCTC and Attorney General of BC by November 22, 2010;
2. Interveners by December 6, 2010; and
3. BC Hydro/BCTC and Attorney General of BC Reply by December 20, 2010.

(Exhibit A-40)

By letter dated November 24, 2010 counsel for SHAC advised the Commission that his clients supported the ILM Project and consented to the issuance of the Certificate of Public Convenience and Necessity and any other permits or authorizations to be issued by or on behalf of the Commission that pertained to the ILM Project.

Further, by letters dated November 15, 2010 to the Commission Secretary, each of the Chiefs of the member Bands of SHAC (Aitchelitz First Nation, Leq'á:mel First Nation, Skawahlook First Nation, Skowkale First Nation, Tzeachten First Nation, and Yakwekwioose First Nation) individually confirmed that their respective First Nations had been adequately consulted and accommodated with respect to any Aboriginal rights and title asserted by its members in respect of the ILM Project.

The November 15, 2010 letters also stated each First Nation withdrew as an Intervener and withdrew its reliance upon its evidence and submissions in respect of the Commission's Proceeding for ILM.

By letter dated November 29, 2010, the Commission granted SHAC leave to withdraw as an Intervener (Exhibit A-42).

By letter dated November 19, 2010 counsel for the NNTC, ONA and Upper Nicola Indian Band advised the Commission that his clients no longer sought any determination or relief from the Commission in relation to the question of whether the scope of consultations includes a consideration of the existing transmission facilities. NNTC, ONA and Upper Nicola identify portions of their written argument dated March 29, 2010 which they no longer advance and on which they no longer rely.

Similar letters were received from counsel for Coldwater *et al.*, STC and Hwlitsum.

In its submission dated November 22, 2010 BC Hydro addressed the letters of November 19, 2010 from NNTC/ ONA/Upper Nicola Indian Band, STC and Hwlitsum and submitted:

In particular, BC Hydro believes that at least the NNTC *et al.*'s letter may have been motivated by issues in a subsequent judicial review that the NNTC *et al.* have brought to challenge the ILM Environmental Assessment Certificate and not because they concede that the Crown was not obliged to consult with the Intervenor First Nations in respect of the "existing, ongoing and future" impacts of BC Hydro's existing

facilities. If this is the case, this means that the question of whether the scope of consultations includes a consideration of the existing transmission facilities is still a live issue.

(BC Hydro November 19, 2010 Submission, p. 2)

BC Hydro requested that each of the First Nation Interveners be required to indicate whether they have purported to withdraw their reliance on these arguments because they concede *Carrier Sekani* addresses this issue or for another reason and, if so, requested that they provide that other reason.

The Interveners filed their submissions on December 3, 2010 (NNTC/ONA/Upper Nicola) and December 6, 2010 (BCOAPO, Coldwater *et al.*, STC and Hwlitsum).

The Attorney General of BC and BC Hydro filed their Reply on December 22, 2010.

BC Hydro states that it does not seek any further relief from the Commission on the First Nations Interveners' reasons for withdrawing their original submissions on the issue of *Carrier Sekani* and the need to consult on Existing Assets.

The central issue on which the Commission sought submissions is considered in Section 7.10 of this Decision.

By letter dated December 22, 2010 counsel for the STC wrote with the consent of NTC/ONA/Upper Nicola, Coldwater *et al.* and Hwlitsum in response to BC Hydro's submission of December 20, 2010, to object to BC Hydro providing new argument and authority in its November 22, 2010 Reply Submission. Since this letter prompted no rebuttal from BC Hydro, and since the Commission Panel did not rely on BC Hydro's citation of a new authority, the Commission Panel took no action in response to this letter.

LIST OF APPEARANCES

G. FULTON, QC T. OLDING	Commission Counsel
A. CARPENTER C. WILLMS D. CURTIS K. GRIST	British Columbia Transmission Corporation
K. BERGNER M. JONES	British Columbia Hydro and Power Authority
P. YEARWOOD	Ministry of Attorney General for British Columbia
M.A.K. MUIR	Hwlitsum First Nation
G. McDADE, Q.C. M. SKEELS	Kwikwetlem First Nation
T. HOWARD B. STADFELD	Nlaka'pamux Nation Tribal Council (NNTC) Okanagan Nation, Alliance (ONA) Upper Nicola Indian Band
M. KIRCHNER M. SKEELS	Coldwater, Cook's Ferry, Siska and Ashcroft Indian Bands
M. UNDERHILL R. HEASLIP	Stó:lō Tribal Council and Seabird Island First Nation
J. QUAIL	BCOAPO - B.C. Old Age Pensioners' Organization, Active Support Against Poverty, B.C. Coalition of People with Disabilities, Counsel Of Senior Citizens' Organizations of B.C. End Legislated Poverty, Federated Anti- Poverty Groups of B.C. TRAC (Tenants Rights Action Coalition)
B. HARRIS	Mr. Casselman and Mr. Harris

LIST OF WITNESS PANELS

British Columbia Transmission Corporation and British Columbia Hydro and Power Corporation

MELISSA HOLLAND	Senior Project Manager, Major Projects BCTC
KEITH ANDERSON	Manager, Negotiation and Consultation, BC Hydro ARN (2006-2008)
JAMES ROSS	Senior Negotiator, BC Hydro ARN
CHARLES LITLEDALE	Aboriginal Relations Coordinator, BC Hydro ARN

Kwikwetlem First Nation

GEORGE CHAFFEE	Lead Negotiator and Past Councillor Kwikwetlem First Nation
LESLIE GIRODAY	Attorney-at-Law

Okanagan Nation Alliance and Upper Nicola Indian Band

TIM MANUEL	Chief, Upper Nicola Indian Band
DAN MANUEL	Councillor, Upper Nicola Indian Band
GWEN BRIDGE	Natural Resource Land Team Coordinator, ONA

Coldwater, Cook's Ferry, Siska and Ashcroft Indian Bands

DAVID WALKEM	Chief, Cook's Ferry Indian Band
HAROLD ALJAM	Chief, Coldwater Indian Band
FRED SAMPSON	Chief, Siska Indian Band
GREG BLAIN	Chief, Ashcroft Indian Band

Hwlitsum First Nation

BRUCE MILLER	Professor, Department of Anthropology, UBC
ALAN GROVE	Managing Partner, Alan Lloyd Grove Consulting Inc.

Nlaka'pamux Nation Tribal Council

ROBERT PASCO	Chair, NNTC and Chief, Oregon Jack Creek Indian Band
DEBBIE ABBOTT	Executive Director, NNTC
MELVIN BOBB	Chief, Spuzzum First Nation
JENNIFER BOBB	Past Chief, Spuzzum First Nation (2007-2009)
AMY CHARLIE	Nlaka'pamux Elder

D. CHONG
A. RICHTER
D. COHEN

Commission Staff

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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

British Columbia Transmission Corporation
Interior to Lower Mainland (ILM) Transmission Project
Court of Appeal Reconsideration of the Duty to Consult First Nations

EXHIBIT LIST

Exhibit No.	Description
<i>COMMISSION DOCUMENTS</i>	
A-1	Letter L-20-09 dated March 23, 2009 requesting submissions from interested parties on the proposed schedule for Procedural Conference and issues to be addressed
A-2	Letter dated April 07, 2009 Procedural Conference schedule
A-2-1	SUBMITTED AT HEARING January 19, 2010 – ASSET MANAGEMENT AND MAINTENANCE AGREEMENT...DATED AS OF NOVEMBER 12, 2003
A-2-2	SUBMITTED AT HEARING January 19, 2010 – UNSIGNED FIRST NATIONS PROTOCOL AGREEMENT
A-2-3	SUBMITTED AT HEARING January 19, 2010 – BC HYDRO DOCUMENT HEADED "PRINCIPLES" LAST MODIFIED: JAN 19, 2009
A-2-4	SUBMITTED AT HEARING January 19, 2010 – COLOUR-CODED CHART HEADED BC HYDRO ABORIGINAL RELATIONS & NEGOTIATIONS
A-2-5	SUBMITTED AT HEARING January 19, 2010 – THREE BC HYDRO ABORIGINAL RELATIONS AND NEGOTIATION: ILM PROJECT REPORTING STRUCTURE ORGANIZATION CHARTS
A-2-6	SUBMITTED AT HEARING January 19, 2010 – ILM PROJECT FIRST NATION FUNDING
A-2-6-1	CONFIDENTIAL SUBMITTED AT HEARING January 20, 2010 – CONFIDENTIAL DOCUMENT HEADED ILM PROJECT FIRST NATION FUNDING AUG 2006 TO AUG 2008, UPDATED WITH CONFIDENTIAL NUMBERS
A-2-7	SUBMITTED AT HEARING January 20, 2010 – EXCERPTS FROM APPENDIX G FROM THE 2006 BC HYDRO IMP LAP

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Exhibit No.	Description
A-2-8	SUBMITTED AT HEARING January 20, 2010 – THREE INTERIOR LOWER MAINLAND PROJECT REPORTING STRUCTURE ORGANIZATIONAL CHARTS FOR PERIODS AUGUST 2006, MAY 2007 AND AUGUST 2008
A-2-9	SUBMITTED AT HEARING January 25, 2010 – DOCUMENT HEADED THE NEW RELATIONSHIP
A-2-10	SUBMITTED AT HEARING January 26, 2010 – 2007 B.C. ENERGY PLAN
A-3	Letter dated April 08, 2009 Agenda for the Procedural Conference
A-4	Letter dated April 17, 2009 and Order G-38-09 establishing the Regulatory Timetable for the proceeding
A-5	Letter dated June 3, 2009 amending the Regulatory Timetable
A-6	Letter dated June 23, 2009 cancelling the Oral Phase of Argument
A-7	Letter dated June 30, 2009 Supplementary Evidence and Revised Regulatory Timetable
A-8	Letter dated July 3, 2009 – Commission Information Request No. 1
A-9	Letter dated July 31, 2009 extending the filing date for information request responses to August 14, 2009 and cancelling the Procedural Conference
A-10	Letter L-57-09 dated August 10, 2009 amending the Regulatory Timetable with respect to the Procedural Conference
A-11	Letter dated August 21, 2009 issuing the Agenda for the Procedural Conference scheduled for August 28, 2009
A-12	Letter dated August 31, 2009 and Order G-98-09 issuing Revised Regulatory Timetable
A-13	Letter dated September 17, 2009 Comments on additional panel members
A-14	Letter dated October 2, 2009 Extension for filing Intervenor Evidence
A-15	Letter dated October 20, 2009 issuing the Revised Regulatory Timetable
A-16	Letter dated October 28, 2009 issuing Commission Information Request No. 1 to Kwikwetlem First Nation

Exhibit No.	Description
A-17	Letter dated October 28, 2009 issuing Commission Information Request No. 1 to Coldwater, Cook's Ferry, Siska and Ashcroft Indian Bands
A-18	Letter dated October 28, 2009 issuing Commission Information Request No. 1 to Hwlitsum First Nation
A-19	Letter dated October 28, 2009 issuing Commission Information Request No. 1 to Nlaka'pamux Nation Tribal Council
A-20	Letter dated October 28, 2009 issuing Commission Information Request No. 1 to Stó:lō Hydro Ad Hoc Committee
A-21	Letter dated October 28, 2009 issuing Commission Information Request No. 1 to Stó:lō Tribal Council
A-22	Letter dated October 28, 2009 issuing Commission Information Request No. 1 to Upper Nicola Band and Okanagan Nation Alliance
A-23	Letter dated November 18, 2009 - Appointment two additional Commissioners
A-24	Letter dated November 25, 2009 issuing the Agenda for the November 30, 2009 Procedural Conference
A-25	Letter dated December 3, 2009 and Order G-144-09 - Issuing a Revised Regulatory Timetable
A-26	Letter dated December 7, 2009 - Providing participants with Procedural Information
A-27	Letter dated January 5, 2010 and Order G-2-10 – Admission of Rebuttal and Sur-Rebuttal Evidence
A-28	Letter dated January 13, 2010 – Order G-2-10 Reasons for Decision regarding the Admission of Rebuttal and Sur-Rebuttal Evidence
A-29	Letter No. L-7-10 dated January 19, 2010 – Reasons for Decision regarding the Kwikwetlem request for the production of confidential information
A-30	Letter dated February 17, 2010 – Notice regarding Expiry of Commissioner Pullman's Order in Council appointment
A-31	Letter dated February 25, 2010 – Order No. L-16-10 Final Argument Extension Request

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Exhibit No.	Description
A-32	Letter dated March 19, 2010 – Extension to Intervener Arguments Deadline
A-33	Letter dated April 1, 2010 – Reply submission to Video Evidence
A-34	Letter dated April 9, 2010 – Reply Argument Extension and Oral Phase
A-35	Letter dated May 6, 2010 – Confirmation of Oral Phase of Argument
A-36	Letter dated May 19, 2010 – Cancellation of Oral Phase of Argument
A-37	Letter dated May 21, 2010 – Participant Assistance/Cost Award Deadline
A-38	Letter dated May 24, 2010 – Request Comment on Kwikwetlem First Nation withdrawal
A-39	Letter dated June 3, 2010 – Granting the Kwikwetlem First Nation Leave to Withdraw as an Intervener

APPLICANT DOCUMENTS BCTC

B-1	Letter Dated March 30, 2009 BCTC Providing Submissions in Response to A-1
B-2	Letter Dated April 06, 2009 BCTC ILM Reply Submission
B-3-1	Letter Dated May 25, 2009 BCTC supplemental evidence on Aboriginal consultation
B-3-2	Letter Dated May 25, 2009 BCTC Admissibility of supplemental evidence on the adequacy of Crown consultation and accommodation
B-3-3	Letter Dated May 25, 2009 BCTC's index Brief of Authorities
B-3-4	Letter Dated December 14, 2009 – BCTC submitting the Route Alignment maps which were omitted from the Supplemental Evidence on Aboriginal Consultation (B-1-1)
B-4	Letter Dated May 25, 2009 BCTC's supplemental evidence to BCUC- confidential attachment removed
B-4-1	CONFIDENTIAL SUBMITTED AT HEARING January 14, 2010 – CONFIDENTIAL EXCERPTS FROM CONSULTATION LOG RE.OKANAGAN NATION ALLIANCE

Exhibit No.	Description
B-4-2	CONFIDENTIAL SUBMITTED AT HEARING January 14, 2010 – CONFIDENTIAL EXCERPTS FROM CONSULTATION LOG RE. UPPER NICOLA BAND
B-4-3	CONFIDENTIAL SUBMITTED AT HEARING January 14, 2010 – CONFIDENTIAL EXCERPTS FROM CONSULTATION LOG RE. NLAKA'PAMUX NATION TRIBAL COUNCIL
B-4-4	CONFIDENTIAL SUBMITTED AT HEARING January 18, 2010 – CONFIDENTIAL FOUR EXCERPTS FROM CONSULTATION LOG RE. COLDWATER, COOK'S FERRY, SISKA AND ASHCROFT
B-4-5	CONFIDENTIAL SUBMITTED AT HEARING January 18, 2010 – CONFIDENTIAL EXCERPTS FROM CONSULTATION LOG RE STO:LO TRIBAL COUNCIL, MARKED EXHIBIT B-4-5
B-4-6	CONFIDENTIAL SUBMITTED AT HEARING January 18, 2010 – CONFIDENTIALEXCERPTS FROM CONSULTATION LOG RE SEABIRD ISLAND FIRST NATION
B-4-7	CONFIDENTIAL SUBMITTED AT HEARING January 19, 2010 – CONFIDENTIAL - EXCERPTS FROM CONSULTATION LOG RE HWLITSUM FIRST NATION
B-5	Letter dated May 29 2009 request for extension for filing of Intervenor submissions
B-6	Letter dated June 19, 2009 BCTC Reply Submission on Admissibility of Supplemental Evidence
B-7	Letter dated July 09, 2009 BCTC Archaeological Impact Assessment Report, of BCTC's Supplemental Evidence.
B-7-1	Letter received July 09, 2009 Appendix II Route Segment Descriptions
B-7-2	Letter received July 09, 2009 Appendix XIII Mapping
B-7-3	Letter received July 09, 2009 Appendix XV Photographs
B-8	Letter received July 28, 2009 BCTC request for an extension to the date for filing IR responses
B-9	Letter dated August 19, 2009 BCTC responses to outstanding IR's delays
B-10	Letter dated August 14, 2009 BCTC responses to BC Old Age Pensioners' Organization et al IR-1, Coldwater, Cook's Ferry, Siska and Ashcroft Indian Bands' IR-1, Hwlitsum First Nation IR-1, Kwikwetlem First Nation IR-1, and the Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Band IR-1 – attachments separate

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Exhibit No.	Description
B-10-1	Coldwater 1.2 - Attachment 1
B-10-2	Coldwater 1.2 - Attachment 2
B-10-3	Coldwater 1.2 - Attachment 3
B-10-4	Coldwater 1.2 - Attachment 4
B-10-5	Coldwater 1.2 - Attachment 5
B-10-6	Coldwater 1.2 - Attachment 6
B-10-7	Coldwater 1.3 - Attachment
B-10-8	Coldwater 1.9 - Attachment
B-10-9-1	Hwlitsum 1.1 - Attachment 1a
B-10-9-2	Hwlitsum 1.1 - Attachment 1b
B-10-9-3	Hwlitsum 1.1 - Attachment 1c
B-10-10	Hwlitsum 1.1 - Attachment 2
B-10-11	Hwlitsum 1.3a - Attachment 1
B-10-12	Hwlitsum 1.3a - Attachment 2
B-10-13	Hwlitsum 1.4a - Attachment
B-10-14	Hwlitsum 1.5b - Attachment
B-10-15	Kwikwetlem 1.15 - Attachment
B-10-16	Kwikwetlem 1.17 - Attachment 1
B-10-17	Kwikwetlem 1.17 - Attachment 2
B-10-18	Kwikwetlem 1.17 - Attachment 3
B-11	Letter dated August 21, 2009 BCTC partial response to BCUC IR 1.1.1
B-12	Letter dated August 27, 2009 BCTC to BCUC IR-1 Partial Response 2
B-13	Letter dated September 4, 2009 BCTC to BCUC IR-1 Partial Response 3

Exhibit No.	Description
B-14	Letter dated September 9, 2009 BCTC to BCUC IR-1 Partial Response 4
B-15	Letter dated September 21, 2009 consents to the appointment of two new Commissioners
B-16	Letter dated October 9, 2009 comments regarding dates for Intervenor Information Requests and BCTC Responses
B-17	Letter dated October 28, 2009 filing Information Requests on Intervenor Evidence to the following Intervenors: <ul style="list-style-type: none"> <li data-bbox="347 693 651 720">• Hwlitsum First Nation <li data-bbox="347 762 688 789">• Kwikwetlem First Nation <li data-bbox="347 831 818 858">• Nlaka’pamux Nation Tribal Council <li data-bbox="347 900 1097 928">• Okanagan Nation Alliance and Upper Nicola Indian Band <li data-bbox="347 970 1105 997">• Coldwater, Cook’s Ferry, Ashcroft and Siska Indian Bands <li data-bbox="347 1039 630 1066">• Sto:lo Tribal Council <li data-bbox="347 1108 878 1136">• Sto:lo Hydro Ad Hoc Committee (SHAC) <li data-bbox="347 1178 688 1205">• Nicola Tribal Association
B-17-1	Appendix IV to Responses to Information Requests on Intervenor Evidence
B-18	Letter dated November 2, 2009 issuing Correction to Information Request 2.6 to SHAC references Appendix IV
B-19	Letter dated December 3, 2009 – BCTC’s comments on to BCTC’s Information Request to Nicola Tribal Association (NTA)
B-20	Letter dated December 7, 2009 – BCTC’s filing on Rebuttal Evidence and its submission on the admissibility of the Rebuttal Evidence
B-20-1	Confidential Letter dated December 7, 2009 – BCTC’s confidential Rebuttal Evidence
B-20-2	SUBMITTED AT HEARING January 13, 2010 – BCTC Attachment B-4 Revised
B-21	Letter dated December 15, 2009 – BCTC providing map and permission in regards with KFN Information Request

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Exhibit No.	Description
B-22	Letter dated December 21, 2009 – BCTC filing the witness panel for BCTC/BC Hydro
B-23	Letter dated December 30, 2009 – BCTC filing revised IRs 1.1 and 1.2 to Kwikwetlem
B-24	Letter dated December 31, 2009 – BCTC filing reply to Intervenor Submissions on the admissibility of Rebuttal Evidence
B-25	Letter dated January 7, 2010 – BCTC filing of direct evidence
B-26	SUBMITTED AT HEARING January 14, 2010 – BCTC DOCUMENT HEADED INTERIOR TO LOWER MAINLAND...NICOLA TO MERIDIAN TRANSMISSION LINE OPTION REV 1 - DECEMBER 4, 2006
B-27	SUBMITTED AT HEARING January 21, 2010 – INDEX OF DOCUMENTS USED IN CROSS-EXAMINATION BY BCTC
B-28	SUBMITTED AT HEARING January 21, 2010 – DOCUMENT HEADED APPENDIX A, KWIKWETLEM FIRST NATION PARTICIPATING BUDGET
B-29	SUBMITTED AT HEARING January 21, 2010 – INDEX OF DOCUMENTS USED IN CROSS-EXAMINATION OF STC PANEL BY BCTC
B-30	SUBMITTED AT HEARING January 25, 2010 – PRESS RELEASE DATED NOVEMBER 27, 2007 FROM OKANAGAN NATION ALLIANCE, ENTITLED TSILHQOT IN COURT VICTORY SUPPORTS STRONG STAND ON ABORIGINAL TITLE AND RIGHTS
B-31	SUBMITTED AT HEARING January 27, 2010 – INDEX OF DOCUMENTS USED IN CROSS-EXAMINATION OF HWLITSUM FIRST NATION PANEL BY BCTC
B-32	SUBMITTED AT HEARING January 29, 2010 – BCTC THREE-PAGE LETTER DATED JULY 18, 2008 TO HON. RICHARD NEUFELD FROM CHIEF BOB PASCO AND GRAND CHIEF STEWART PHILLIP
B-33	Letter dated February 22, 2010 – BCTC's Response regarding NNTC submission C5-24
B-34	Letter dated February 24, 2010 – BCTC's Requests an extension for the filing of submission
B-35	Removed

Exhibit No.	Description
B-36	Letter dated April 8, 2010 - BCTC Request for Extension of filing deadline for Reply Argument
B-37	Letter dated May 27, 2010 – BCTC Response to the Commission's letter dated May 25, 2010 (Exhibit A-38)

INTERVENOR DOCUMENTS

C1-1	HWLITSUM FIRST NATION (HFN) - Letter dated February 20, 2000 from Chief Raymond (Rocky) Wilson and Mr. Alan Grove, requesting Intervenor status
C1-2	Letter dated April 3, 2009 filing its submission on the proposed schedule for Procedural Conference and issues to be addressed (Exhibit A-1)
C1-3	Letter dated June 2, 2009 request for extension of filing until June 10, 2009
C1-4	Letter dated June 10, 2009 submission on the admissibility of supplemental evidence on aboriginal consultation and accommodation
C1-5	Letter dated June 26, 2009 submission regarding Mr. Dade's letter of June 25, 2009 (Exhibit C4-3)
C1-6	Letter dated July 10, 2009 issuing Information Request No. 1 to BC Transmission Corporation
C1-7	Letter dated August 4, 2009 Procedural conference availability
C1-8	Letter dated August 31, 2009 Via Email Hwlitsum First Nation contacts update, addition of Magdalena A K Muir International Energy, Environmental and Legal Services Ltd. as counsel
C1-9	Letter dated September 3, 2009 Revised civic and mailing address for the Hwlitsum First Nation
C1-10	Letter dated September 18, 2009 Via Email - Supports the appointment of additional Commissioners
C1-11	Letters dated October 16, 2009 and October 20, 2009 Via Email – Revised Submission of Evidence
C1-12	Letter dated November 27, 2009 - Hwlitsum First Nation to BCUC Information Request No. 1 and BCTC Information Request No. 1

Exhibit No.	Description
C1-13	Letter dated December 21, 2009 – Hwlitsum First Nation Notice of Witness Panel
C1-14	Letter dated December 30, 2009 - Hwlitsum First Nation submission regarding preparations for oral hearing
C1-15	Letter dated January 7, 2010 - Hwlitsum First Nation submission of direct testimony
C1-16	SUBMITTED AT HEARING January 12, 2010 – HFN LETTER DATED JANUARY 12, 2010, FROM HWLITSUM FIRST NATION TO B.C.U.C., WITH ATTACHED DIRECT TESTIMONY OF ALAN GROVE AND BRUCE GRANVILLE MILLER
C1-17	Letter dated May 28, 2010 – Hwlitsum First Nation filing support for inclusion of Kwikwetlem First Nation evidence and submissions
C2-1	BRITISH COLUMBIA OLD AGE PENSIONERS’ ORGANIZATION (BCOAPO) - Letter dated April 1, 2009 response to letter L-20-09 Exhibit A-1
C2-2	Letter dated April 02, 2009 from Jim Quail requesting Intervenor Status for Leigha Worth, and Bill Harper, Econalysis Consulting
C2-3	Letter dated June 10, 2009 submission on the admissibility of supplemental evidence on aboriginal consultation and accommodation
C2-4	Letter dated July 8, 2009 BCOAPO Information requests
C2-5	Letter dated August 4, 2009 BCOAPO Procedural conference preferable dates
C2-6	Letter dated September 18, 2009 Via Email - Consent to the appointment of additional Commissioners
C2-7	Letter dated December 11, 2009 –Filing comment regarding admissibility of rebuttal evidence
C3-1	BRITISH COLUMBIA HYDRO AND POWER AUTHORITY (BCH) – Letter dated April 3, 2009 filing its submission on the proposed schedule for Procedural Conference and issues to be addressed (Exhibit A-1)
C3-2	Letter dated May 11, 2009 filing request by Tatiana Noskova for Intervenor Status
C3-3	Letter dated May 22, 2009 BCH submission on the admissibility of the Supplemental Evidence on Aboriginal Consultation
C3-4	Letter dated May 27, 2009 BCHydro’s supplemental book of authorities.

Exhibit No.	Description
C3-5	Letter dated June 19, 2009 BC Hydro Reply Submissions on the issue of whether the Commission has the power to admit additional evidence and whether the Commission should admit the evidence filed as Exhibit B-3-1
C3-6	Letter dated July 24, 2009 BC Hydro's request for rescheduling the Procedural Conference
C3-7	Letter dated July 28, 2009 BC Hydro's comments regarding rescheduling the Procedural Conference
C3-8	Letter dated August 7, 2009 BC Hydro's additional comments regarding rescheduling the Procedural Conference
C3-9	Letter dated September 21, 2009 BC Hydro's Consent to the appointment of two additional commissioners
C3-10	Letter dated October 15, 2009 BC Hydro filing request for Extension to Intervenor Evidence Deadline
C3-11	Letter dated October 28, 2009 filing Information Request No. 1 to Coldwater, Cook's Ferry, Ashcroft and Siska Indian Bands
C3-12	Letter dated October 28, 2009 filing Information Request No. 1 to Kwikwetlem First Nation
C3-12-1	Letter dated December 9, 2009 - BC Hydro Amended Information Request No.1 to Kwikwetlem First Nation
C3-13	Letter dated October 28, 2009 filing Information Request No. 1 to Nlaka'pamux Nation Tribal Council
C3-14	Letter dated October 28, 2009 filing Information Request No. 1 to Nicola Tribal Association
C3-15	Letter dated October 28, 2009 filing Information Request No. 1 to Upper Nicola Indian Band and the Okanagan Nation Alliance
C3-16	Letter dated October 28, 2009 filing Information Request No. 1 to Sto:lo Tribal Council
C3-17	Letter dated October 28, 2009 filing Information Request No. 1 to Sto:lo Hydro Ad Hoc Committee

APPENDIX D

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Exhibit No.	Description
C3-17-1	Letter dated November 24, 2009 – BC Hydro submission of IR No. 1 with correction to Attachment 5
C3-18	Letter dated November 30, 2009 - BC Hydro additional Contact Information
C3-19	Letter dated November 30, 2009 - BC Hydro comments on confidential submissions in regards to IR No.1 to SHAC
C3-19-1	CONFIDENTIAL Letter dated November 30, 2009 - BC Hydro enclosing Confidential attachments
C3-20	Letter dated November 30, 2009 - BC Hydro comments on confidential submissions in regards to IR No.1 to NTA
C3-20-1	CONFIDENTIAL Letter dated November 30, 2009 - BC Hydro enclosing Confidential attachments
C3-21	Letter dated December 7, 2009 - BC Hydro's submission regarding the admissibility of rebuttal evidence
C3-22	Letter dated December 7, 2009 - BC Hydro's comments regarding confidential submission
C3-22-1	CONFIDENTIAL Letter dated December 7, 2009 - BC Hydro's Confidential Filings
C3-22-2	Letter dated December 11, 2009 - Notice regarding confidential attachments not previously included
C3-22-2-1	CONFIDENTIAL Letter dated December 11, 2009 – Filing Confidential attachments not previously included
C3-23	Letter dated December 11, 2009 – Filing submission regarding Rebuttal Evidence
C3-23-1	CONFIDENTIAL Letter dated December 11, 2009 – Filing Confidential attachments not previously included
C3-24	Letter dated December 15, 2009 – BC Hydro's Book of Authorities submission
C3-25	Letter dated December 31, 2009 – BC Hydro filing submission to Intervenors' submissions on the admissibility of the Rebuttal Evidence

Exhibit No.	Description
C3-26	CONFIDENTIAL SUBMITTED AT HEARING January 12, 2010 – BC Hydro further information in respect of BCUC IR NO. 1.115.1 2007...PAGE 1 OF 1
C3-27	SUBMITTED AT HEARING January 13, 2010 – RESPONSE TO BCTC/B.C. HYDRO UNDERTAKING, RE: VOLUME 4, PAGE 273, LINES 5 TO 19
C3-28	SUBMITTED AT HEARING January 13, 2010 – BC Hydro RECORD OF ALL COMMUNICATIONS WITH FIRST NATIONS
C3-29	SUBMITTED AT HEARING January 20, 2010 – BC Hydro INDEX OF DOCUMENTS USED IN CROSS-EXAMINATION BY BC HYDRO
C3-30	SUBMITTED AT HEARING January 20, 2010 – BC Hydro COPY OF SEVERAL E-MAILS, FIRST ONE SENT: WEDNESDAY, JANUARY 24, 2007
C3-31	SUBMITTED AT HEARING January 20, 2010 – BC Hydro MAP ENTITLED KWIKWETLEM NATION CORE TERRITORY, DATED FEB. 14, 2002
C3-32	SUBMITTED AT HEARING January 20, 2010 – BC Hydro MAP ENTITLED FIGURE 2. HALQ'EMEYLEM PLACE NAMES ASSOCIATED WITH KWIKWETLEM TRADITIONAL TERRITORY
C3-33	SUBMITTED AT HEARING January 20, 2010 – BC Hydro MAP ENTITLED FIGURE 3. RECORDED ARCHAEOLOGICAL SITES IN THE STUDY AREA
C3-34	SUBMITTED AT HEARING January 20, 2010 – BC Hydro GROUP OF E-MAILS, FIRST ONE DATED SENT: 2007, FEBRUARY 06 9:35 AM
C3-35	SUBMITTED AT HEARING January 20, 2010 – BC Hydro GROUP OF E-MAILS, FIRST ONE DATED SENT: 2007, APRIL24 9:41 AM
C3-36	SUBMITTED AT HEARING January 20, 2010 – BC Hydro GROUP OF E-MAILS, FIRST ONE DATED SENT: 2007, MAY 01 1:04 PM
C3-37	SUBMITTED AT HEARING January 21, 2010 – DOCUMENT HEADED NEGOTIATING MAJOR BUSINESS AGREEMENTS UNDER FIRST NATION LITIGATION: DEVELOPING BUSINESS MAJOR PROJECT AND ACCOMMODATION AGREEMENTS
C3-38	SUBMITTED AT HEARING January 21, 2010 – INDEX OF DOCUMENTS USED IN CROSS-EXAMINATION OF STC PANEL BY BC HYDRO

Exhibit No.	Description
C3-39	SUBMITTED AT HEARING January 21, 2010 – BC Hydro PRINTOUT FROM AGASSIZ OBSERVER WEBSITE OF ARTICLE HEADED CONSULTATION TAKING PLACE WITH FIRST NATIONS, FROM JUNE 27, 2007
C3-40	SUBMITTED AT HEARING January 21, 2010 – COPY FROM AGASSIZ OBSERVER HEADED CONSULTATION TAKING PLACE WITH FIRST NATIONS
C3-41	SUBMITTED AT HEARING January 25, 2010 – BCTC/BC HYDRO UNDERTAKING RESPONSE, TRANSCRIPT REFERENCE VOLUME 8, PAGE 1122, LINES 11 TO 25
C3-42	SUBMITTED AT HEARING January 25, 2010 – INDEX OF DOCUMENTS USED IN CROSS-OF UNIB AND ONA PANEL BY B.C. HYDRO, MARKED EXHIBIT C3-31
C3-43	SUBMITTED AT HEARING January 25, 2010 – COLOURED MAP ENTITLED OKANAGAN NATION TRADITIONAL TERRITORY
C3-44	SUBMITTED AT HEARING January 26, 2010 – BC Hydro INDEX OF DOCUMENTS USED IN CROSS-EXAMINATION OF COLDWATER, COOK'S FERRY, ASHCROFT AND SISKIA INDIAN BANDS PANEL BY B.C. HYDRO
C3-45	SUBMITTED AT HEARING January 27, 2010 – BC Hydro RESPONSE TO BCTC/B.C. HYDRO UNDERTAKING, TRANSCRIPT REFERENCE: VOLUME 11, PAGE 1576, LINES 3 TO 25
C3-46	SUBMITTED AT HEARING January 27, 2010 – BC Hydro RESPONSE TO BCTC/B.C. HYDRO UNDERTAKING, TRANSCRIPT REFERENCE: VOLUME 12, PAGE 1943, LINES 19 TO 26 TO PAGE 1944, LINES 1 TO 4
C3-47	SUBMITTED AT HEARING January 29, 2010 – RESPONSE TO BCTC/B.C. HYDRO UNDERTAKING, TRANSCRIPT REFERENCE: VOLUME 7, PAGE 809, LINES 1 TO 6 AND PAGE 937, LINES 10 TO 22
C3-48	SUBMITTED AT HEARING January 29, 2010 – B.C. HYDRO STATEMENT OF CLARIFICATION, TRANSCRIPT REFERENCE: VOLUME 11, PAGE 1357, LINES 14 TO 26 TOPAGE 1358, LINES 1 TO 9
C3-48-1	Letter dated February 1, 2010 – BCHydro Revised statement of clarification
C3-49	SUBMITTED AT HEARING January 29, 2010 – INDEX OF DOCUMENTS USED IN CROSS-EXAMINATION OF NLAKA'PAMUX FIRST NATION PANEL BY B.C. HYDRO

Exhibit No.	Description
C3-50	SUBMITTED AT HEARING January 29, 2010 – ONE-PAGE LETTER DATED NOVEMBER 29, 2007 FROM LYLE VIREECK TO CHIEF PASCO
C3-51	SUBMITTED AT HEARING January 29, 2010 – ONE-PAGE LETTER DATED MARCH 14, 2008 FROM LYLE VIREECK TO CHIEF ROBERT PASCO
C3-52	SUBMITTED AT HEARING January 29, 2010 – RESPONSE TO BCTC/B.C. HYDRO UNDERTAKING, TRANSCRIPT REFERENCE: VOLUME 11, PAGE 1575, LINES 14 TO 17
C3-52-1	CONFIDENTIAL SUBMITTED AT HEARING January 29, 2010 – ONE-PAGE DOCUMENT HEADED COMMUNITY DEVELOPMENT FUND RECIPIENTS: 2007, PRIVATE & CONFIDENTIAL
C3-53	Letter dated February 22, 2010 – BC Hydro’s Response regarding NNTC Undertaking of January 29, 2010
C3-54	Letter dated April 8, 2010 - BC Hydro Request for Extension of filing deadline for Reply Argument
C3-55	Letter dated May 27, 2010 - BC Hydro Response to the Commission's letter dated May 25, 2010 (Exhibit A-38)
C4-1	KWIKWETLEM FIRST NATION (KFN) – Letter dated April 3, 2009 filing its submission on the proposed schedule for Procedural Conference and issues to be addressed (Exhibit A-1)
C4-2	Letter dated June 10, 2009 submission on the admissibility of supplemental evidence on aboriginal consultation and accommodation
C4-3	Letter dated June 25, 2009 regarding outstanding issues
C4-4	Letter dated July 10, 2009 - via email Information request No. 1
C4-5	Letter dated August 4, 2009 availability for the procedural conference
C4-6	Letter dated August 5, 2009 regarding amending intervenor evidence filing date
C4-7	Letter dated September 14, 2009 Via Email - Commission panel request
C4-8	Letter dated September 18, 2009 Via Email - Consent to the appointment of two new Commissioners

Exhibit No.	Description
C4-9	Letter dated October 9, 2009 Via Email from Mr. McDade (KFN Counsel) – availability regarding Procedural Conference attendance
C4-10	Letter dated October 16, 2009 filing Intervenor Evidence
C4-10-1	SUBMITTED AT HEARING January 20, 2010 – DOCUMENT HEADED CORRECTIONS TO KWIKWETLEM FIRST NATION, SUBMISSION ON THE ADEQUACY OF B.C. HYDRO CONSULTATION EFFORTS, RE: THE ILM TRANSMISSION PROJECT(EX. C4-10)
C4-11	Letter dated November 27, 2009 - Kwikwetlem First Nation to BCUC Information Request No. 1 , BC Hydro Information Request No. 1 and BCTC Information Request No. 1
C4-11-1	Letter dated December 10, 2009 - Kwikwetlem First Nation's Revised Responses to BC Hydro's Information Request No.1
C4-12	Letter dated December 21, 2009 – Kwikwetlem First Nation Notice of Witness Panel
C4-13	Letter dated December 21, 2009 - Kwikwetlem First Nation Submission on the Admissibility of Rebuttal Evidence
C4-14	Letter dated January 7, 2010 - Kwikwetlem First Nation Submission of Direct Testimony of Lesley Giroday and George Chaffee
C4-15	Letter dated January 7, 2010 - Kwikwetlem First Nation notice of request to cross-examine the BCTC/BC Hydro Panel upon their response to BCUC Information Request 1.115 on the original Hearing
C4-16	SUBMITTED AT HEARING January 14, 2010 – PROVINCIAL POLICY FOR CONSULTATION WITH FIRST NATIONS, OCTOBER 2002, AS DOWNLOADED FROM THE WEB
C4-17	SUBMITTED AT HEARING January 14, 2010 – Kwikwetlem First Nation's Responses to BCTC's Revised Information Request No. 1.1
C4-18	SUBMITTED AT HEARING January 20, 2010 –KFN COPY OF HANDWRITTEN NOTES OF MEETING ON 03/26/07
C4-19	SUBMITTED AT HEARING January 20, 2010 –KFN COPY OF HANDWRITTEN NOTES OF MEETING ON 06/18/07

Exhibit No.	Description
C4-20	SUBMITTED AT HEARING January 20, 2010 –KFN COPY OF HANDWRITTEN NOTES OF MEETING ON July 31, 2007
C4-21	SUBMITTED AT HEARING January 26, 2010 –KWIKWETLEM FIRST NATION RESPONSE TO UNDERTAKING, TRANSCRIPT REFERENCE: VOLUME 12, PAGES 1827, LINES 8 TO 26, TO PAGE 1828, LINES 1 AND 2
C4-22	Letter dated May 20, 2010 Via Email – KFN Withdrawal of Intervener status and submissions
C4-23	Letter dated May 26, 2010 Via Email – KFN clarifying the intent of C4-22
C5-1	NLAKA’PAMUX NATION TRIBAL COUNCIL (NNTC), OKANAGAN NATION ALLIANCE, UPPER NICOLA INDIAN BAND (ONA&UN)- Letter dated April 3, 2009 filing its submission on the proposed schedule for Procedural Conference and issues to be addressed (Exhibit A-1)
C5-2	Letter dated June 10, 2009 submission on the admissibility of supplemental evidence on aboriginal consultation and accommodation
C5-3	Letter dated June 26, 2009 submission regarding Mr. Dade’s letter of June 25, 2009 (Exhibit C4-3)
C5-4	Letter dated July 10, 2009 issuing Information Request No. 1 to BC Transmission Corporation
C5-5	Letter dated September 18, 2009 Via Email - Consent to the appointment of additional Commissioners
C5-6	Letter dated September 29, 2009 Request for an extension to the deadline for the filing of evidence
C5-7	Letter dated October 16, 2009 Nlaka’Pamux Nation Tribal Council Final Evidence
C5-7-1	Revised filing of Letter dated October 16, 2009 Nlaka’Pamux Nation Tribal Council Final Evidence
C5-8	Letter dated October 16, 2009 Okanagan Nation Alliance, Upper Nicola Indian Band Final Evidence
C5-8-1	Letter dated October 16, 2009 REVISED Okanagan Nation Alliance, Upper Nicola Indian Band Final Evidence

Exhibit No.	Description
C5-9	Letter dated November 27, 2009 – NNTC response to BCUC Information Request No. 1
C5-10	Letter dated November 27, 2009 – NNTC response to BC Hydro Information Request No. 1
C5-10-1	SUBMITTED AT HEARING January 15, 2010 – POINTS DISCUSSED AT MAY 16, 2008 MEETING...DRAFT 3: MAY 16, 2008
C5-11	Letter dated November 27, 2009 – NNTC response to BCTC Information Request No. 1
C5-12	Letter dated November 27, 2009 – ONA & UN response to BCUC Information Request No. 1
C5-13	Letter dated November 27, 2009 – ONA & UN response to BC Hydro Information Request No. 1
C5-13-1	SUBMITTED AT HEARING January 15, 2010 – POINTS DISCUSSED AT MAY 16, 2008 MEETING...DRAFT 3: MAY 16, 2008
C5-14	Letter dated November 27, 2009 – ONA & UN response to BCTC Information Request
C5-15	Letter dated December 3, 2009 – ONA & UN supplementary to BCTC IR's
C5-16	Letter dated December 21, 2009 – NNTC Notice of Witness Panel
C5-17	Filing dated December 21, 2009 – NNTC-ONA-UN Submission on the Admissibility of Rebuttal Evidence
C5-18	Letter dated December 21, 2009 – ONA & UN – Notice of Witness Panel
C5-19	Letter dated January 7, 2010 – NNTC, ONA and UN Witness panel members
C5-20	SUBMITTED AT HEARING Letter received January 11, 2010- NNTC Sur-rebuttal Evidence
C5-21	SUBMITTED AT HEARING January 14, 2010 – Submission of TWO-PAGE B.C. HYDRO NEWS RELEASE DATED OCTOBER 24, 2008

Exhibit No.	Description
C5-22	SUBMITTED AT HEARING January 14, 2010 - Submission of TWO-PAGE B.C. HYDRO NEWS RELEASE DATED JULY 2, 2009
C5-23	SUBMITTED AT HEARING January 29, 2010 – OPENING STATEMENT ENTITLED AN INTRODUCTION TO THE NIha.kapmhhchEEEn
C5-24	Letter dated February 11, 2010 – NNTC Comments on delayed Undertaking
C5-25	Letter dated March 26, 2010 – NNTC Submission of video regarding September 13, 2007 meeting ~ Copies of DVD's available upon request
C5-26	Letter dated May 25, 2010 – NNTC comments on KFN Withdrawal of Intervener status and submissions
C6-1	COLDWATER, COOK'S FERRY, ASHCROFT AND SISKA INDIAN BANDS (ACCFN) - Letter dated April 3, 2009 filing its submission on the proposed schedule for Procedural Conference and issues to be addressed (Exhibit A-1)
C6-2	Letter dated June 10, 2009 submission on the admissibility of supplemental evidence on the adequacy of consultation and accommodation
C6-3	Letter received June 10, 2009 submission on case law
C6-4	Letter dated September 21, 2009 Via Email - Consent to the appointment of additional Commissioners
C6-5	Letter dated October 16, 2009 filing Intervenor Evidence
C6-6	Letter dated November 27, 2009 - Response of the Intervenors the Coldwater, Cook's Ferry, Siska and Ashcroft Indian Bands to Information Request No. 1 of the BCUC, Information Request No. 1 of BC Hydro and Information Request No. 1 of BCTC
C6-7	Letter dated December 21, 2009 – Coldwater <i>et al.</i> Notice of Witness Panel
C6-8	Letter dated December 21, 2009 - Coldwater <i>et al.</i> Submission on the Admissibility of Rebuttal Evidence
C6-9	Letter dated January 7, 2010 – Coldwater submission of direct testimony of the witness panel for the Intervenors the Coldwater, Cook's Ferry, Siska and Ashcroft Indian Bands

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Exhibit No.	Description
C7-1	HARRIS/CASSELMAN - Letter dated April 21, 2009 filing its submission on the proposed schedule for Procedural Conference and issues to be addressed (Exhibit A-1)
C7-2	Letter dated October 25, 2009 Via Email - Consent to the appointment of additional Commissioners
C8-1	STÓ:LŌ TRIBAL COUNCIL (STC) - Via Email Letter dated April 3, 2009 Robyn Heaslip and Otis Jasper filing to register as Intervenors
C8-2	ONLINE REGISTRATION dated June 10, 2009 Dave Joe filing to register as Intervenor
C8-3	Letter dated June 10, 2009 Submission of Sto:Lo on admissibility of supplemental evidence on the adequacy of crown consultation and accommodation
C8-4	Letter dated August 28, 2009 issuing submission regarding questions put forth at Procedural Conference
C8-5	Letter dated September 30, 2009 - Via Email Notice of New Counsel and request for filing extension of evidence
C8-6	Letter dated October 5, 2009 - Via Email Comments on appointment of additional Commissioners
C8-7	Letter dated October 16, 2009 - Via Email Request for an extension in filing intervenor evidence
C8-8-1	Letter received October 20, 2009 Submission of Intervenor Evidence
C8-8-2	Letter received October 20, 2009 Confidential Intervenor Evidence Appendix A
C8-9	Letter dated November 27, 2009 – STC response to IR BC Hydro No.1
C8-10	Letter dated November 27, 2009 – STC response to IR BCTC No.1
C8-11	Letter dated November 27, 2009 – STC response to IR BCUC No.1
C8-12	Letter dated December 21, 2009 – STC Notice of Witness Panel
C8-13	Letter dated December 21, 2009 – STC Submission on the Admissibility of Rebuttal Evidence

Exhibit No.	Description
C8-14	SUBMITTED AT HEARING January 13, 2010 - STC MEETING WITH B.C. HYDRO & STO:LO TRIBAL COUNCIL
C8-15	SUBMITTED AT HEARING January 21, 2010 - DIRECT TESTIMONY OF CLARENCE PENNIER AND OTIS JASPER
C9-1	Stó:lō Hydro Ad Hoc Committee (SHAC) - Via Email Letter dated May 08, 2009 Bram Rogachevsky filing to register as Intervenors
C9-2	Letter dated September 30, 2009 - Via Email Request for filing extension of evidence
C9-3	Letter dated October 2, 2009 - Via Email Consent to the appointment of two new commissioners
C9-4	Letter dated October 16, 2009 - Via Email filing Intervenor Evidence
C9-5	Letter dated November 27, 2009 – SHAC response to IR BC Hydro No.1
C9-6	Letter dated November 27, 2009 – SHAC response to IR BCTC No.1
C9-7	Letter dated November 27, 2009 – SHAC response to IR BCUC No.1
C9-8	Letter dated December 21, 2009 – SHAC Submission on the Admissibility of Rebuttal Evidence and Notice of Witness Panel
C10-1	SEABIRD ISLAND FIRST NATION (SIFN)– ONLINE REGISTRATION dated May 15, 2009 Brian Jones filing to register as Intervenors
C10-2	ONLINE REGISTRATION dated May 15, 2009 Jay Hope filing to register
C10-3	Letter dated May 29, 2009 SIFN partnering with STC in their submission to apply for an Interim Cost Award
C10-4	Letter dated November 10, 2009 concur with pending appointment of additional commissioners
C11-1	MINISTRY OF ATTORNEY GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA (MAGBC) – ONLINE REGISTRATION dated May 15, 2009 Paul Yearwood filing to register as Intervenors
C11-2	Letter dated June 10, 2009 - Submission on evidence, consultation and accommodation

Exhibit No.	Description
C11-3	Letter dated September 22, 2009 - Agreeing to waive any objection to the late appointment of the additional commissioners
C11-4	Letter dated April 8, 2010 – MAGBC Request for Extension of filing deadline for Reply Argument
C11-5	Letter dated May 27, 2010 – MAGBC filing support for withdrawal of Kwikwetlem First Nation evidence and submissions
C12-1	NICOMEN INDIAN BAND – VIA EMAIL dated May 15, 2009 Bernadette Manuel filing to register as Intervenors
C13-1	NICOLA TRIBAL ASSOCIATION – VIA EMAIL dated May 15, 2009 Bernadette Manuel filing to register as Intervenors
C13-2	Letter dated October 2, 2009 - Nicola Tribal Association evidence of the intervener
C13-3	Letter dated November 4, 2009 consenting to the appointment of two new Commissioners to the Panel
C13-4	Letter dated November 27, 2009 – Nicola Tribal Association response to BC Hydro’s Information Request 1
C14-1	NOOIATCH INDIAN BAND – VIA EMAIL dated May 15, 2009 Bernadette Manuel filing to register as Intervenors Updated May 19, 2009 regarding contact information

INTERESTED PARTY DOCUMENTS

D-1	PENELAKUT TRIBE – ONLINE REGISTRATION dated May 15, 2009 Dr. Daniel Marshall filing to register as Interested Party
D-2	TSAWWASSEN FIRST NATION –Email dated May 15, 2009 requesting Interested Party Status, forwarded by BC Transmission Corporation on May 19, 2009
D-3	OKANAGAN INDIAN BAND (OIB) – ONLINE REGISTRATION dated May 20, 2009 Chief Fabian Alexis filing to register as Interested Party



IN THE MATTER OF

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR THE RUSKIN DAM AND POWERHOUSE UPGRADE PROJECT

DECISION

March 30, 2012

Before:

**M.R. Harle, Commissioner/Panel Chair
A.W.K. Anderson, Commissioner
N.E. MacMurchy, Commissioner**

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COMMISSION ORDER C-5-12

APPENDIX 1 Background and Regulatory Process

APPENDIX 2 List of Acronyms

EXECUTIVE SUMMARY

This Decision relates to an application to the British Columbia Utilities Commission by the British Columbia Hydro and Power Authority (BC Hydro) pursuant to section 46(1) of the *Utilities Commission Act* for a Certificate of Public Convenience and Necessity for the Ruskin Dam and Powerhouse Upgrade Project (Project). In this Decision, the Ruskin Dam and Powerhouse (also described as the Ruskin Generating Station) are collectively referred to as the Ruskin Facility. The Ruskin Facility provides dependable capacity in BC Hydro's major load center, as well as voltage support to a significant transmission network.

The Application identifies that the Project is needed because, without the investment contemplated, the Ruskin Facility will no longer be fit for its intended purpose and its deficiencies pose significant safety, reliability, environmental, and financial risks.

The Project includes work to the Upper Dam, Right Abutment, Left Abutment, Powerhouse superstructure, Powerhouse equipment, and Switchyard. The Application states that the status quo is not an option and, in addition to the Project, BC Hydro explored several alternative long term solutions, including two de-rating and three decommissioning alternatives. The Expected Amount of the Project applied for is \$718.10 million.

The proceeding was conducted as a written hearing. There were eleven interveners, of which eight filed submissions: Association of Major Power Customers of British Columbia, British Columbia Old Age Pensioners Organization, British Columbia Sustainable Energy Association, Clean Energy Association of British Columbia, Commercial Energy Consumers of British Columbia, Kwantlen First Nation, Mission Regional Chamber of Commerce, and William Quigley.

Several key issues emerged during the proceeding. These are addressed in the Decision and include:

- The scope of the Project, including matters such as the spillway gates and piers configuration, Right Abutment remediation, road widening crossing the Dam, the relocating of the Switchyard, replacement or refurbishment of the Powerhouse, the replacement/refurbishment of all three generating units including the timing of such actions;
- Project costs, particularly in relation to the potential for “gold-plating”; and
- The adequacy of First Nations consultation.

On February 2, 2012, the Government of British Columbia amended the Electricity Self-Sufficiency Regulation issued under the *Clean Energy Act* and Special Direction No. 10 to the British Columbia Utilities Commission issued under the *Utilities Commission Act*. These changes had to be fully considered in the Commission Panel’s deliberations and decision making regarding the Application.

After carefully considering the evidence and arguments of all parties, **the British Columbia Utilities Commission grants a Certificate of Public Convenience and Necessity for the Project, subject to the directives set out in this Decision.**

1.0 INTRODUCTION

1.1 The Application

On February 2, 2011 the British Columbia Hydro and Power Authority (BC Hydro) filed an application (the Application) with the British Columbia Utilities Commission (BCUC, Commission) pursuant to section 46(1) of the *Utilities Commission Act (UCA)*¹ for a Certificate of Public Convenience and Necessity (CPCN) for the Ruskin Dam and Powerhouse Upgrade Project (Project).

The Ruskin Generating Station, a Heritage Asset under Section 1 and Schedule 1 of the *Clean Energy Act (CEA)*², and Ruskin Dam (together referred to as the Ruskin Facility) are classified as a strategic asset for BC Hydro asset management purposes. In this Decision, the Ruskin Generating Station (also described as the Ruskin Powerhouse or Powerhouse) and the Ruskin Dam are collectively referred to as the Ruskin Facility. The Ruskin Facility provides dependable capacity in BC Hydro's major load center, as well as voltage support to a significant transmission network. As a cascading station, it also forms part of the Stave River System.

The Project has two main components:

1. Replacement/refurbishment of parts of the seismically deficient dam, which was completed in 1930. This includes replacement of the spillway piers and gates, rehabilitation of the spillway surface, replacement of the roadway crossing the top of the dam, anchoring and reinforcing sections of the existing right abutment, construction of a new seepage cut off wall at the right abutment, and reducing the slope and installing a filter blanket and monitoring instrumentation at the left abutment; and
2. Rehabilitation/replacement of the Ruskin Powerhouse, including generating equipment brought into service between 1930 and 1950 and associated transmission facilities. This entails seismic upgrades to the Powerhouse superstructure, replacement/rehabilitation of the three generating units, electrical and mechanical equipment and ancillary systems, water conveyancing components, and step-up transformers. It also includes the upgrade and relocation of the switchyard from the roof of the existing Powerhouse to an area near the Powerhouse.

¹ RSBC 1996, c. 473.

² SBC 2010, c. 22.

Appendix 1 to this Decision describes the background of the Application, including a description of the Applicant, the Order sought by the Applicant, and the regulatory process by which the Application was heard.

1.2 Key Participants

There were eleven registered interveners involved in the proceeding:

1. Association of Major Power Customers of British Columbia (AMPC);
2. British Columbia Old Age Pensioners Organization (BCOAPO);
3. British Columbia Sustainable Energy Association (BCSEA);
4. Clean Energy Association of British Columbia (CEBC);
5. Commercial Energy Consumers Association of British Columbia (CEC);
6. Kwantlen First Nation (Kwantlen);
7. District of Mission;
8. Mission Regional Chamber of Commerce (MRCC);
9. William Quigley;
10. Ruskin Townsite Residents Association; and
11. Vernon Ruskin.

1.3 Key Issues

While a number of parties explicitly supported the Project, a number of key issues did emerge and were addressed during the proceeding. These include:

- The proposed scope of the Project including such items as the spillway gates and piers configuration, Right Abutment remediation, road widening crossing the Dam, the relocating of the Switchyard, replacement or refurbishment of the Powerhouse, the replacement/refurbishment of all three generating units including the timing of such actions;
- Project costs, including contingency amounts and Project administration; and

- The adequacy of consultation with First Nations.

These issues are explored more fully in the Decision.

On February 2, 2012, the Government of British Columbia amended the Electricity Self-Sufficiency Regulation issued under the *Clean Energy Act (CEA)* and Special Direction No. 10 (SD 10) to the Commission issued under the *UCA*. These changes had to be fully considered in the Commission Panel's deliberations and decision making regarding the Application.

1.4 Overview of the Decision

Section 2 of this Decision overviews the legislative authority and legal context of the Decision. It also addresses issues related to the attempted introduction of new materials into the proceeding through final submissions.

Section 3 addresses the need for the Project and its justification.

Section 4 reviews the alternatives considered to meet the need, and concludes that the proposed Project is the preferred alternative. These alternatives address the need and provide options for addressing Upper Dam work, Right Abutment work, Left Abutment work, Powerhouse work, Powerhouse equipment work including the number of generation units, and Switchyard work. In addressing the need it also describes the project scope issues including those related to the roadway crossing the Dam, the location of the Switchyard, and the timing of replacement of the third generation unit in the Powerhouse.

Section 5 considers costs, the Project schedule, and Project risk management.

Section 6 addresses public engagement, while Section 7 deals with First Nations Consultation.

Section 8 summarizes our overall Decision conclusions and determinations.

After having carefully considered and weighed the evidence and arguments of all parties participating in the proceeding, the Commission Panel concludes that the Project is needed to address safety, reliability, environmental, and financial risks. For the reasons given in this Decision, **the Commission Panel finds that the Ruskin Dam and Powerhouse Upgrade Project is necessary and in the public interest as it is the most cost-effective long term solution. The Project also serves the British Columbia energy objectives including meeting both the BC Hydro self-sufficiency requirements of the CEA, consistent with the February 2012 amendments to the Electricity Self-Sufficiency Regulation, and the BC Hydro self-sufficiency requirements resulting from the February 2012 amendments to Special Direction No. 10 to the Commission. In addition, section 6(1) of the amended SD 10 also requires the Commission to assume that there is need for the Project's firm energy and dependable capacity. We also find that public consultation has been sufficient, and that First Nations consultation has been adequate to the date of this Decision. Subject to the directives contained in this Decision and the related Order, the Commission Panel grants BC Hydro a CPCN for the Ruskin Dam and Powerhouse Upgrade Project.**

2.0 BCUC LEGISLATIVE AUTHORITY

2.1 Legal Context

The Application has been made by BC Hydro pursuant to section 46(1) of the *UCA*. Section 46(3), which is subject to section 46(3.3) in the case of BC Hydro, grants authority to the Commission to issue or refuse to issue the CPCN, or issue a certificate for a part of the proposed facility. When deciding whether to issue a CPCN to BC Hydro under section 46(3.3) the Commission must consider the interests of persons in British Columbia (BC) who may receive power from BC Hydro and must consider and be guided by British Columbia's energy objectives.

Pursuant to section 1 of the *UCA*, "British Columbia's energy objectives" have the same meaning as in section 1(1) of the *CEA*, which refers to the objectives set out in section 2 of the *CEA*. The following objectives listed in section 2 of the *CEA* are relevant for the purposes of the Application:

- (a) to achieve electricity self-sufficiency;
- (b) to generate at least 93% of the electricity in British Columbia from clean or renewable resources and to build the infrastructure necessary to transmit the electricity;
- (e) to ensure [BC Hydro's] ratepayers receive the benefits of the heritage assets and to ensure the benefits of the heritage contract under the *BC Hydro Power Legacy and Heritage Contract Act* continue to accrue to [BC Hydro's] ratepayers; and
- (g) to reduce BC greenhouse gas emissions
 - (i) by 2012 and for each subsequent calendar year to at least 6% less than the level of those emissions in 2007;
 - (ii) by 2016 and for each subsequent calendar year to at least 18% less than the level of those emissions in 2007;
 - (iii) by 2020 and for each subsequent calendar year to at least 33% less than the level of those emissions in 2007;
 - (iv) by 2050 and for each subsequent calendar year to at least 80% less than the level of those emissions in 2007; and
 - (v) by such other amounts as determined under the *Greenhouse Gas Reduction Targets Act*.

The Commission is also bound by section 6 of the *CEA*, SD 10 and the Electricity Self-Sufficiency Regulation. The impact of the recent amendments to SD 10 and the Electricity Self-Sufficiency Regulation on the Application are discussed further in Section 2.2.

BC Hydro takes the position that the test of whether the Project is in the interests of persons in British Columbia who receive power from BC Hydro consists of: “(1) Whether or not the Project will meet a demonstrated need; and (2) Whether or not the Project has been demonstrated to be cost-effective in meeting that need.” (BC Hydro Final Submission, p. 6)

BC Hydro relies upon the Commission’s decision *In the Matter of British Columbia Transmission Corporation: An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Project*, July 7 2006 (Order C-4-06) at p. 15 where the Commission states that the task is “not to select the least cost project, but to select the most-cost effective project.” (BC Hydro Final Submission, p. 6)

Both the CEC and BCSEA concur that demonstrating need and cost-effectiveness is the appropriate public interest test for the Project. CEC submits that “the cost-effectiveness part of the test is multi-faceted, including safety, reliability, security, environment, socio-economics, first nations as well as cost, scope, schedule, procurement, task plan and risks.” (CEC Final Submission, p. 1)

BC Hydro cautions the BCUC in granting a CPCN for only a part of the Project. “This Application concerns a technically complex project. If the BCUC were to grant a CPCN for a part only of the Project it could be materially altering not just the Project scope, but the schedule, costs, risks, and even the fundamental nature of the Project, and therefore would be effectively be placing itself in the position of managing BC Hydro.” (BC Hydro Final Submission, p. 15) CEC does not believe that BCUC’s jurisdiction is quite as constrained as BC Hydro might be proposing. CEC indicates that “BC Hydro would be wise to work with whatever conditions the Commission judges as necessary for the public convenience and necessity. The CEC is not at all sure that there is a bright line excluding the Commission from conditioning what would otherwise be viewed as BC Hydro management areas of responsibility.” (CEC Final Submission, p. 3)

The Commission Panel concurs and determines that the tests of the need for the Project, and its cost-effectiveness are the appropriate basis for assessing whether the public interest will be met in granting a CPCN. The Commission Panel notes the BCOAPO's concerns that BC Hydro may be implying that the "provincial energy goals may trump the public interest consideration when the two are in conflict." (BCOAPO Final Submission, p. 3) As noted above, section 46(3.3) of the *UCA* provides that the Commission must consider and be guided by British Columbia's energy objectives. However, as BC Hydro indicates there may be no inherent conflict between the public interest and the Commission's duty to consider and be guided by British Columbia's energy objectives as the Project both aligns with and advances the objectives, and is in the interests of persons in British Columbia who receive or may receive service from BC Hydro. (BC Hydro Final Submission, pp. 5-6)

One of the BCUC's roles in this proceeding is to assess whether or not consultation has been adequate with Kwantlen and other First Nations that may be affected by the Project. Kwantlen submits that BC Hydro has not fulfilled its duty to meaningfully consult with and accommodate Kwantlen in relation to the Application. This subject is dealt with in greater depth in Section 7.

However, at this stage of the Project we can acknowledge that, as has been determined by the British Columbia Court of Appeal in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68 (*Kwikwetlem*) that the assessment of the adequacy of the Crown's duty to consult with First Nations is up to the date of the Commission's decision.³ *Kwikwetlem* has been followed by this Commission.⁴

When considering the "public interest" before granting a CPCN, we recognize that "the public interest" is a flexible and broad test. It transcends the interests of any one stakeholder group. However, our assessment of the merits of the Application requires achievement of a reasonable weighing and balancing of individual stakeholder interests with the broader public interest.

³ *Kwikwetlem* at paras 15 and 70.

⁴ Decision *In the Matter of An Application by British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Columbia Valley Transmission Project*, September 3, 2010 (Order C-5-10); Decision *In the Matter of British Columbia Transmission Corporation ;Reconsideration of the Interior to Lower Mainland Transmission Project*, February 3, 2011 (Order G-15-11).

2.2 Legislative Amendments

On January 9, 2012, BC Hydro filed its Reply to the Kwantlen Sur-Reply, initially bringing to a close the parties submissions on the Application. However, on February 2, 2012, the Government of British Columbia amended SD 10 and the Electricity Self-Sufficiency Regulation by Order in Council Numbers 35 and 36 respectively of the Lieutenant Governor in Council.

Prior to the issue of Order in Council No. 36, the Electricity Self-Sufficiency Regulation (Regulation) had mandated that the water conditions prescribed for purposes of the definition of “heritage energy capability” in section 6(1) of the *CEA* were critical water conditions, which the Regulation defined as “the most adverse sequence of stream flows occurring within the historical record.” The amendments to the Regulation now prescribe water conditions for the purposes of “heritage energy capability” as “average water conditions” which the Regulation defines to mean “the average stream flows occurring within [BC Hydro’s] historical record.”

The amendments to SD 10 also substitute the same definition of “average water conditions” for “critical water conditions” and result in the definition of “firm energy capability” to now mean “the maximum amount of annual energy that a hydroelectric system can produce under average water conditions.” In considering a BC Hydro application for a CPCN under section 46 of the *UCA*, Section 3 of the amended SD 10 now requires the Commission, to use the new planning criterion of average water. Section 1(2) of the amended SD 10 requires the Commission to interpret “firm energy capability” for the purposes of SD 10 to be consistent with the fact that in 2011, BC Hydro’s firm energy capability was 48,200 gigawatt hours.

Further, as a result of the amendments to Section 3 of SD 10 the 3,000 GWh/year “insurance” requirements have been repealed.

The amended SD 10 also contains a new Section 6. In deciding whether to issue a CPCN to BC Hydro for the Project, Subsection 6(1) requires the BCUC to assume that BC Hydro requires the

Project's 334 GWh/year of firm energy, and 114 megawatts (MW) of dependable capacity by 2018 to meet its electricity supply obligations. Section 1 of the amended SD 10 defines "electricity supply obligations" to mean:

- (a) electricity supply obligations for which rates are filed with the commission under section 61 of the [UCA]; and
- (b) any other electricity supply obligations that exist at the time this Special Direction comes into force.

In short, the BCUC must assume that the firm energy and dependable capacity output that the Project is capable of delivering are needed.

BC Hydro's uncontested evidence in this proceeding, which the Commission Panel accepts, is that "... the Powerhouse Work would result in an increase in the equipment efficiency and energy amount of approximately 28 GWh/year for a total of 334 GWh/year of firm energy and an increase of 9 MW of capacity for a total of 114 MW of dependable capacity." (Exhibit B-1, pp. 1-3, 1-4)

BC Hydro notified the Commission of the amendments to the Regulation and SD 10 by letter dated February 8, 2012, provided its submissions on the effect of the amendments, and suggested a process for interveners to provide their submissions and for BC Hydro to reply to intervener submissions. In its letter, it submitted:

"The effect of subsection 6(1) is that no matter what the energy and capacity LRBs [Load Resource Balances] are, the BCUC must accept there is a need for the Project's firm energy and dependable capacity. Therefore, BC Hydro's evidence concerning the LRBs under different self-sufficiency assumptions ... is no longer relevant to the Project CPCN decision." (BC Hydro letter to BCUC dated February 8, 2012, p. 2 of 3)

By letter dated February 9, 2012, the Commission agreed to BC Hydro's suggested process and established a timetable for intervener submissions and BC Hydro reply. (Exhibit A-19) Seven interveners filed submissions and BC Hydro filed its reply on February 15, 2012. BCSEA and CEC accepted BC Hydro's interpretation of the amendments to SD 10, AMPC advised it had no further

submissions arising from the amendments, Kwantlen did not disagree with BC Hydro's interpretation, and Mr. Quigley did not seem to disagree. The CEBC asked the regulatory approval of the Project be held in abeyance pending BC Hydro providing an updated load and resource balance and its assessment of the changes on its cost assumptions.

By letter dated February 29, 2012, the Commission agreed with BC Hydro's assessment of the legal impact of amended SD 10 and denied CEBC's request to re-open the evidentiary record.

(Letter L-11-12)

In view of the foregoing, the Commission Panel considers that, with respect to the Project, any issues which might negatively impact the Project's ability to enable the Ruskin Facility to achieve the firm energy and capacity need assumptions specified in amended SD 10 are rendered moot, irrespective of whatever determination the Commission Panel may have otherwise reached based on the evidence.

2.3 The Introduction of New Materials Through Final Submissions

As BC Hydro has identified in its Reply Submission, "CEABC [CEBC] and Mr. Quigley have improperly attempted to introduce new materials through their Final Submissions. (BC Hydro Reply Submission, p. 2) Mr. Quigley has attempted to introduce new materials largely relating to electric and magnetic fields (EMF). In the case of CEBC, BC Hydro submits that: "Virtually every section of CEABC's [CEBC's] Final Submission contains new material not on the record". (BC Hydro Reply Submission, p. 3) These CEBC materials relate to such subject areas as climate change, the cost of alternative supply, the value of capacity, the cost of decommissioning, cost effectiveness and the priority ranking of capital projects, and a project alternative.

The regulatory timetable provided for three rounds of Information Requests (IRs). The timetable for filing of evidence extended for over nine months. The Commission Panel considers that this was ample time to have permitted both Mr. Quigley and CEBC to have filed evidence and pursued the lines of questioning in those areas where they sought to introduce new materials during their

Final Submissions. Furthermore, as BC Hydro indicates “Unlike Kwantlen, who properly requested that the BCUC amend the regulatory timetable to permit the filing of Kwantlen’s evidence, CEBC took no such step.” (BC Hydro Reply Submission, p. 8)

For reasons of natural justice and fairness, the Commission Panel will not give any weight whatsoever to the materials that Mr. Quigley and CEBC attempted to introduce for the first time during Final Argument.

3.0 NEED FOR A PROJECT

3.1 BC Hydro Submission

BC Hydro submits that “Without investment the Ruskin Facility will no longer be fit for its intended purpose. There is a need for significant upgrading and rehabilitation of the Ruskin Facility to meet ... modern seismic/safety and operational requirements, standards and best practices.” (Exhibit B-1, p. 1-7) BC Hydro purports that the Dam does not meet the present Canadian and international safety guidelines, and the Powerhouse structure does not meet National and BC building codes. The Dam and the Powerhouse are essentially 80 years old, as are the Powerhouse components except for Unit 3 (U3) which is 60 years old.

Dam Deficiencies

The Dam is classified as “Very High Consequence” under the British Columbia Dam Safety Regulation. Engineering studies have determined there is a risk of failure of the Dam spillway piers and gates with ground movement below expected earthquake design standards. The Right Abutment has had seepage and piping issues, and could fail in a moderate to large earthquake. The Left Abutment has similar concerns. To reduce the seismic risk, BC Hydro has taken interim measures but submits that, given the age and condition of the Ruskin Facility, substantial work is now needed to implement a long-term solution.

Powerhouse Deficiencies

BC Hydro submits that the Powerhouse does not conform to the present National Building Codes for seismic standards. In addition, it says that “...the Powerhouse contains 80 year old equipment and is no longer reliable.” It also concludes that “major Powerhouse equipment and ancillaries have reached ‘poor’ or ‘unsatisfactory’ equipment health ratings.” (Exhibit B-1, p. 1-8) Recent engineering studies of the condition of the Powerhouse have concluded that “there are remaining safety and environmental risks associated with the continued operation of the plant ...The condition of these structures and equipment ... lead us to conclude that there is a high likelihood of a major equipment failure that could cause personnel injury as well as an extended outage and result in extensive repair and replacement costs.” (Exhibit B-1, Appendix B-3, p. 7 of 54)

Furthermore, “Current performance data shows that the reliability of the Powerhouse’s three generating units is declining; the three units are at an increasing risk of failure.” (Exhibit B-1, p. 1-9)

BC Hydro indicates that it would be “exposing itself and ratepayers to significant risks ... [if it ignored] ... the fact that the Powerhouse superstructure does not meet seismic safety requirements even under a moderately low earthquake scenario. BC Hydro has knowledge that the Powerhouse superstructure is seismically deficient, and has knowledge of the consequences that could include: injury or death to personnel ...injury or death to the public ...environmental consequences ...loss of electricity generation.” (Exhibit B-18, BCUC 3.7.1)

Regulatory Requirements

In addition to the concerns around safety and environmental considerations associated with the condition of the Ruskin Facility, there are concerns that its condition may impact the ability of BC Hydro to achieve electricity self-sufficiency as is required by the *CEA*. (Exhibit B-1, p. 3-17) The firm energy and dependable capacity of the Ruskin Facility are necessary elements of meeting this objective, as is emphasized in the recent amendment to SD 10.

3.2 Intervener Submissions

3.2.1 AMPC Submission

AMPC has not challenged the fundamental need for the Project. However, it does not support the Project as proposed. It has several significant reservations with regard to approach, scope, and associated cost estimates of the Project. These concerns will be addressed in Sections 4.0 (Project Alternatives) and 5.0 (Project Costs).

3.2.2 BCOAPO Submission

BCOAPO endorses the designated consequence rating of the Ruskin Facility as “Very High Consequence” “given the strong potential for property damage, environmental impacts, financial loss, or even more importantly loss of life in the event of a breach.” (BCOAPO Final Submission,

p. 3) Furthermore, BCOAPO states “it is possible to conclude that the proposed Project will be cost-effective in whether Self-Sufficiency remains unchanged or not” and “Based on the outlook for the load/resource balance going forward, our clients see a clear need for Ruskin’s firm energy and dependable capacity to meet the currently legislated Self-Sufficiency requirement in F2017.” (BCOAPO Final Submission, p. 4)

In summary BCOAPO supports the need for the Project. “Based on the evidence...BCOAPO does not oppose the inclusion of these three components [3 generating units] in an Order granting a CPCN” (BCOAPO Final Submission, p. 5), and “...BCOAPO supports the Ruskin Project.” (BCOAPO Final Submission, p. 10)

3.2.3 BCSEA Submission

“BCSEA is satisfied that the Project is the most cost-effective way to meet the need for energy, capacity, and transmission support that would be provided by the Project.” (BCSEA Final Submission, p. 2) Also, “BCSEA supports BC Hydro’s application for a CPCN for the Ruskin Dam and Powerhouse Upgrade Project.” (BCSEA Final Submission, p. 3)

3.2.4 CEBC Submission

CEBC asserts that “while the Project appears to be cost effective in the limited context in which it has been evaluated, there are several considerable risks that it may not be the most cost effective project for BC Hydro at this time. Accordingly, the Association believes the Application could benefit from temporarily being set in abeyance, while alternatives are re-evaluated in an attempt to find the best option that balances the needs for safety and security with the need to both maintain and grow the electricity system in a way that regulates the pace of future electricity rate increases.” or, failing this, “the Application should be rejected outright.” (CEBC Final Submission, p. 11)

While CEBC has raised concerns with respect to climate change, the cost of alternative supply, the value of capacity, the cost of decommissioning, capital rationing, and other alternatives to the

Project, there is little on the evidentiary record that would support CEBC's position to set the Application in abeyance or to reject it outright. **The Commission Panel rejects CEBC's proposal to place the Application in abeyance or to reject it outright.**

3.2.5 CEC Submission

CEC accepts that the driving force for the Project as it relates to the Dam is dam safety for seismic and flood risks, and for the Powerhouse is safety and reliability of generation. CEC submits that BC Hydro has provided sufficient evidence that makes the Ruskin Dam safety improvements a necessity, subject to a demonstration of cost-effectiveness. Also, BC Hydro has provided sufficient evidence regarding safety and reliability issues with the Powerhouse superstructure and equipment to support the Powerhouse components of the Project. Further, it concludes that the switchyard portions of the Project are in the public interest and should be approved, subject to demonstration of cost-effectiveness. Finally, CEC submits the "Commission should conclude that the Ruskin Project is in the public interest with respect to closing the load resource gap, subject to demonstration of cost-effectiveness." (CEC Final Submission, pp. 4-5)

3.2.6 Kwantlen Submission

Kwantlen has not objected to the basic need for the Project. However, it submits that BC Hydro has not fulfilled its duty to meaningfully consult and accommodate Kwantlen in relation to the Application. Its concerns include: BC Hydro's alleged failure: (a) to correctly assess the scope of consultation owed to Kwantlen, and (b) to adequately consult Kwantlen regarding the selection of the preferred option for addressing the seismic and power generation deficiencies of the Ruskin Facility. In addition, it believes that the CPCN application has been made prematurely. These concerns are dealt with in Section 7.0.

3.2.7 MRCC Submission

"The Mission Regional Chamber of Commerce fully supports the proposed BC Hydro Ruskin Dam and Powerhouse Upgrade Project for the benefit of the community." (MRCC Final Submission, p. 2)

3.2.8 Quigley Submission

Mr. Quigley's intervention in the proceeding largely related to his concerns around potential EMF. It is unclear whether he supports or opposes the need for the Project. This notwithstanding, there is no sufficient evidence on the record to justify his concerns that the Project will materially impact EMF levels. Indeed, BC Hydro has fully responded to such concerns in Exhibit B-7-2, Quigley IRs 1.1.1-1.1.3 and 1.2.1-1.2.8. EMF levels associated with the Ruskin Facility remain within internationally accepted levels.

3.2.9 Other Interveners

No other intervener made Final Submissions. However, Vernon Ruskin does provide implied support for the Project in Exhibit C11-6.

3.2.10 Legislative Requirements

As indicated in Section 2.2, the amendments to the Electricity Self-Sufficiency Regulation and to SD 10 prescribe the need for the firm energy and dependable capacity associated with the Project.

Commission Determination

The evidentiary record confirms that the current condition of the Dam, Powerhouse superstructure, Powerhouse equipment, and Switchyard are such that they represent significant safety and environmental risks, and they merit significant upgrading and rehabilitation. **The Panel determines that the need for the Project has been established for safety, and environmental reasons. This clear need for the Project is fully consistent with the amended Electricity Self-Sufficiency Regulation and the amended SD 10 described in Section 2.2.**

Alternative approaches to address the established need are assessed in Section 4.0.

4.0 PROJECT ALTERNATIVES

BC Hydro has proposed several alternative solutions to address the need that was established in Section 3. These alternative solutions include:

1. The Ruskin Dam and Powerhouse Upgrade Project;
2. Permanently de-rate two generating units and remove the third generating unit (Alternative A);
3. Abandon with overflow (Alternative B);
4. Abandon and Dam removal (Alternative C);
5. Abandon without Dam removal (Alternative D); and
6. Permanently de-rate all generating units and perform intake modifications (Alternative E).

BC Hydro also briefly considered a deferral alternative.

Each of these alternatives is discussed in the following subsections.

4.1 The Project: The Ruskin Dam and Powerhouse Upgrade

The Project consists of the replacement of parts of the seismically deficient dam (completed in 1930), and the rehabilitation/replacement of the Ruskin Powerhouse, including generation equipment brought into service between 1930 and 1950, and relocation of the associated Switchyard facilities. (Exhibit B-1, p. 1-2) This subsection describes the components of the Project, and alternative means for carrying them out. The discussion is organized around work for the Dam (Upper Dam, Left Abutment, Right Abutment, Dam crossing), the Powerhouse (superstructure, equipment), and the Switchyard, including its location.

4.1.1 The Dam Work

The dam work addresses deficiencies in the Upper Dam, the Right Abutment, and the Left Abutment. This work is described below.

4.1.1.1 Upper Dam Work

This component of the Project includes the reinforcement of the Dam's upper right bank against further seepage, reducing the slope of the left bank, replacement of the spillway piers and spillway gates, rehabilitation of the spillway surface, installation of new unit intake gates, and replacement of the roadway crossing the top of the Dam. (Exhibit B-1, p. 1-2)

The work is needed to provide adequate post-earthquake performance, including the ability to draw down the Hayward Lake and Slave Lake Reservoirs as needed, and to provide high reliability to open spill gates in response to floods, up to and including the Probable Maximum Flood.

Under the British Columbia Dam Safety Regulation the Upper Dam, Right Abutment, and Left Abutment are "Very High Consequence" structures. This means that:

1. The downstream impacts of a breach may include loss of life and significant financial, property, and environmental damage; and
2. These structures must be capable of withstanding a Maximum Design Earthquake (MDE) corresponding to a 1/10,000 return period (1/10,000 earthquake).

For the spillway gates the seismic criteria are:

1. That there be no damage to the spillway gate system in 1/500 year earthquake; and
2. At least two gates must survive a 1/10,000 year earthquake.

All the gates need to be replaced to meet the first seismic criteria since not all of the existing piers and gates would survive a 1/500 year earthquake and pier damage is expected at a 1/100 year earthquake. Seismic damage could include a complete failure of one or more gates. Complete failure of a gate could lead to uncontrolled water releases. These flows are generally expected to be contained within the downstream river channel and not result in flooding. Inability to operate the spill gates due to seismic damage is not acceptable as the ability to draw down Hayward Lake

Reservoir and Stave Lake Reservoir post-earthquake would be impaired. An inability to pass inflows increases the likelihood of overtopping the Dam and/or both Left and Right Abutments, and could lead to an eventual catastrophic failure.

BC Hydro requires that the spillway gates system be reliable to allow for a post-earthquake drawdown or to provide safe passage of the Probable Maximum Flood (PMF). BC Hydro submits that “The spillway system at the existing Ruskin Facility is deficient. Once the Project is implemented, the Ruskin Facility will be able to safely pass floods up to the PMF without overtopping the Dam.” (BC Hydro Final Submission, pp. 20-21)

4.1.1.2 Right Abutment Work

This part of the Project consists of anchoring and reinforcing sections of the Right Abutment and construction of a new seepage cut-off wall. (Exhibit B-1, p. 1-2)

The Right Abutment has been identified as the weakest seismic point in the Dam. The Right Abutment has had ongoing seepage and piping issues, and could fail in a moderate to large earthquake. (Exhibit B-1, p. 1-8) At shaking levels close to the 1/475 earthquake, movements and damage of the existing cut-off wall are expected, including the possibility of a catastrophic collapse resulting in an uncontrolled release of the Hayward Lake Reservoir. However, due to liquefaction susceptibility, seismic damage to the cut-off wall may occur at less than a 1/475 earthquake. (BC Hydro Final Submission, pp. 21-22)

4.1.1.3 Left Abutment Work

The proposed work at the Left Abutment includes reducing the downstream slope and installing a filter blanket and monitoring instrumentation. (Exhibit B-1, p. 1-2)

The method of failure in the Left Abutment by a seismic event that would impact public safety would be from abutment failure due to prolonged seepage eroding the sand layers causing piping and slope instability, eventually leading to degradation of the abutment. This failure mode could

be the result of increased seepage from leakage of the U3 power tunnel and the presence of erodible sands within the embankment. In its current state the Left Abutment's downstream slope (immediately behind the Powerhouse) is prone to failure. In an earthquake less than a 1/2,475 earthquake, this over steepened slope could suffer a localized failure and could send slope material into the transformers and rear wall of the Powerhouse building. (BC Hydro Final Submission, pp. 22-23)

4.1.2 Intervener Proposal to Reduce the Work Required for the Upper Dam, the Right Abutment, and the Left Abutment

In its Final Submission AMPC points out that the Ruskin Dam's very high consequence rating results from the expectation that damage resulting from a major earthquake could result in the deaths of more than 100 people, property damage estimate exceeding \$100 million, and likely damage to salmon spawning habitat. The AMPC asserts the consequence rating could be reduced if BC Hydro took steps to reduce fatalities and property damage in the event of a worst case scenario earthquake, and developed a fish habitat compensation plan. A reduced Dam MDE consequence rating could change the scope of work required for the Upper Dam Work, the Right Abutment Work, and the Left Abutment Work (e.g., withstanding a 1/2,475 event corresponds to structures being capable of withstanding a ground acceleration of 0.47 g).

The AMPC submits that the fatality and property damage estimate is driven by the number of trailer park and industrial park residents, as well as the number of beach users in proximity to the Dam. Examples of steps that BC Hydro could consider to reduce these risks are relocating the Ruskin Dam Recreation Area, and relocating or indemnifying trail park residents and industrial park facility owners against property damage.

The AMPC states that it is reasonable to speculate that this would be cheaper than seismic reinforcement of the Dam. In addition, the Commission should be certain that withstanding a 1/2,475 year seismic event is not a potentially applicable standard before authorizing reinforcement to withstand a one in 10,000 year event. (AMPC Final Submission, pp. 15-16)

The AMPC requests that the BCUC re-open the record to require further evidence concerning the feasibility of indemnifying and/or relocating the downstream population as a way of reducing the Very High Consequence classification.

In BC Hydro's view the re-opening of a lengthy evidentiary phase which lasted nearly nine months for the purpose of exploring an idea put forward for the first time in argument does not accord with an efficient or effective hearing. (BC Hydro Reply Submission, p. 90)

BC Hydro asserts that AMPC's concepts of indemnification and relocation as a way of potentially reducing the scope of the Upper Dam, Right Abutment, and Left Abutment Work through reduction in the MDE are not workable and are unacceptable. (BC Hydro Reply Submission, p. 90)

To reduce consequences and ensure fewer deaths, BC Hydro would need to relocate the trailer park and all residents, as well as the industrial operations in the lower Stave River and prevent access to that reach of the Stave River by recreational users and members of the Kwantlen exercising their asserted right to the Stave River fishery. It could not simply provide indemnification against personal and property damage. (BC Hydro Reply Submission, p. 90)

BC Hydro also sees indemnification as unworkable given that some of the population at risk are recreational and other periodic users of the lower Stave River and surrounding areas. BC Hydro raises the question as to how it would identify and indemnify users of the Lougheed Highway and Canadian Pacific Railway bridges, or anglers and swimmers in the lower Stave River. It is also not clear that Department of Fisheries and Oceans, the Canadian federal regulatory agency responsible for the fish protection and fish habitat provisions of the *Fisheries Act*⁵, would accept indemnification in lieu of actual protection of salmon habitat. (BC Hydro Reply Submission, p. 91)

BC Hydro believes that relocation is not as simple as a one-off buying out of: (1) the two trailer parks located one km and two km downstream; (2) an industrial area 2.8 km downstream;

⁵ RSC 1985, c.F-14.

(3) residences at the shoreline of Silvermere Lake; and (4) moving the Ruskin Dam Recreation Site, the BC Hydro Ruskin Site Office, and the Powerhouse. (BC Hydro Reply Submission, p. 92)

In BC Hydro's view, the buy-out would need to be extended into land use restrictions that effectively prohibited development of both banks of the Stave River below Ruskin Dam and around Silvermere Lake due to the remaining seismic risks associated with the Upper Dam, Right Abutment, and Left Abutment. BC Hydro suggests it is reasonable to speculate that Mission would not accept such a low value land use. It is also unclear where the Powerhouse would be re-located as there are significant constraints on placement. (BC Hydro Reply Submission, p. 92)

BC Hydro further notes that (1) the seepage cut-off wall and downstream filter work on the Right Abutment is required to protect against the 1/2,475 year seismic event, as well as larger events up to the 1/10,000; and (2) the setting of the applicable standard falls under the authority of the BC Controller of Water Rights (CWR), not the BCUC. (BC Hydro Reply Submission, p. 92)

BC Hydro submits that mitigating the risk of uncontrolled release of Hayward Lake Reservoir by improving the seismic withstand of the Upper Dam, Right Abutment, and Left Abutment, and rectifying the remaining Right Abutment seepage/piping issues, is clearly preferable and is in the public interest. (BC Hydro Reply Submission, p. 93)

Five interveners (BCOAPO, BCSEA, CEC, MRCC and Mr. Ruskin) support the granting of the CPCN to BC Hydro for the Project as proposed. No intervener other than the AMPC raised specific objections related to Upper Dam Work, the Right Abutment Work, or the Left Abutment Work. "The CEC agrees with BC Hydro that the driving force for the Ruskin Project as it relates to the dam is dam safety for seismic risks and for flood risks affecting the dam facility... The CEC submits that the BC Hydro evidence with respect to the right abutment and the left abutment of the dam is sufficient evidence of seismic risk making the Ruskin dam safety improvement a necessity. The CEC submits that the BC Hydro evidence with respect to the reliability risk from potential seismic events and flooding events is sufficient evidence to support the upper dam work portion of the Ruskin Project. [and] the dam safety and reliability conditions are sufficient to demonstrate that those

portions of the Ruskin Project improving the dam abutments and upper dam work are in the public interest and should be approved ..." (CEC Final Submission, p. 4)

Commission Determination

The Commission Panel determines that AMPC's indemnification and relocation option to reduce the Very High Consequence classification and to mitigate the risks inherent with the existing conditions of the Upper Dam, the Right Abutment, and the Left Abutment are insufficient. The evidence on the record for the option does not adequately mitigate the potential risks of loss of life, property loss, and likely damage to salmon habitat. AMPC had ample opportunity to explore the option over the more than nine months of the regulatory timetable. It waited until its Final Submission to first introduce the option. **The AMPC's proposal to reopen the evidentiary record for further submissions on its indemnification and relocation option as a means of mitigating risks associated with the Upper Dam, Right Abutment, and Left Abutment is, therefore, denied.** Reopening the evidentiary phase on this matter is not deemed as in the public interest as BC Hydro has demonstrated that there are sufficient risks with the current condition of the Upper Dam, Right Abutment, and Left Abutment to consider, long term solutions now, and reopening the evidentiary record for further submissions will not change this.

The Commission Panel finds that there are sufficient risks associated with the current condition of the Upper Dam, the Right Abutment, and the Left Abutment to consider long-term alternative solutions to address these risks, solutions that will mitigate against uncontrolled release of Hayward Lake Reservoir by improving seismic withstand of the Upper Dam, Right Abutment, Left Abutment, and rectifying the remaining seepage and piping issues. These alternatives should be considered within the scope of the Project.

4.1.3 Powerhouse Work

Powerhouse work proposed for the Project encompasses both the superstructure and its equipment. It includes:

- seismic upgrades to the Powerhouse superstructure;
- rehabilitation/replacement of the three generating units, electrical and mechanical equipment, and ancillary systems;
- rehabilitation of water conveyance components (draft tubes, penstocks and intakes); and
- the replacement of step-up transformers.

(Exhibit B-1, p. 1-2)

The Powerhouse structure seismic withstand is estimated to be within the range of 0.1 to 0.15g horizontal ground acceleration. As indicated in Section 3.1 this rating does not conform to the present National Building Code of Canada (NBCC) or BC Hydro's expectation of meeting a 1/2,475 year earthquake estimated at 0.47g. In addition, the Powerhouse contains 60 to 80 year old equipment which is at the end of useful life and is no longer reliable. BC Hydro identified a number of deficiencies which present ongoing safety, environmental, and financial risks. Pursuant to BC Hydro's Equipment Health Ratings (EHRs) the major Powerhouse equipment and ancillaries have reached "poor" or "unsatisfactory" equipment health ratings and should be replaced. R.W. Beck, Inc., a consultant engaged by BC Hydro to conduct a condition assessment of the Powerhouse, reached a similar conclusion in its November 2010 report entitled "Ruskin Power Plant Assessment Report" (RW Beck Report). (Exhibit B-1, Appendix B-3, pp. 1-8 to 1-9)

4.1.3.1 Intervener Objection to the Need for Powerhouse Work

AMPC contends that the Powerhouse replacement can be deferred, and that the refurbishment of the Powerhouse equipment can be managed and replaced on an as-needed basis.

(a) Powerhouse Superstructure

AMPC notes that:

- The NBCC generally does not require reconstruction following a building code update. Given that BC Hydro has known of the Powerhouse seismic withstand capability since 2000, AMPC assumes replacing the superstructure is not urgent;

- Incremental improvements such as filling in windows, air vents, and bracing can be scheduled to correspond with generation refurbishment or replacement – when refurbishment or replacement of a specific unit is required;
- It is concerned about the scope of the additional miscellaneous work. Given that Ruskin is an unmanned facility located in a mild climate, AMPC sees no need for an air conditioned control room; and
- While supporting the addition of a fire suppression system and handrails, the AMPC does not believe BC Hydro has adequately justified replacing the existing overhead cranes. In AMPC’s view the cranes should be operated until they reach the end of their economic lives. AMPC believes BC Hydro should not “seek a gold plated standard” (AMPC Final Submission, pp. 9-10)

In response to the AMPC proposals BC Hydro submits:

- The AMPC assumption that “replacing the powerhouse superstructure is not urgent” is not correct. BC Hydro initiated a project in 2000 to complete a design, in preparation for construction and tendering, for replacement of U3 asbestos panels and seismic strengthening of the Powerhouse. However, that work was not carried out as BC Hydro determined that it should address all the Ruskin Facility issues and risks simultaneously.
- There is nothing on the record to indicate that seismic strengthening of the Powerhouse structure on a fragmentary basis as proposed by AMPC is technically possible, or that it would address the existing seismic deficiencies in the Powerhouse.
- Air conditioning of the control room is necessary to provide a clean and safe environment for a complex array of electronic control and communications equipment. Given the concentration of electronic equipment in the control room considerable heat is produced which must be offset with cooling (that is, air conditioning) to protect the electronic equipment from failure.
- BC Hydro rejected upgrading or rehabilitating the existing cranes (which was \$1 million less than BC Hydro’s proposal for the Project) because this would not address all reliability risks, such as motors and controls, electric feeds, existing wooden walkways, and mechanical parts. Responding to these issues is estimated at a further \$1.9 million.
- Reliable operation of the cranes is a critical requirement in both the implementation of the Powerhouse Work and the ongoing operation of the Ruskin Facility. There are significant schedule, worker safety, and equipment issues with an unreliable crane.
- Any delays resulting from a failure of the crane to safely operate, particularly during the installation of the generating units, will result in a delay of the Project’s completion.

Costs associated with such a delay could more than offset the marginal cost of the new crane.

(BC Hydro Reply Submission, pp. 93-95)

No other intervener took exception to BC Hydro's proposed approach to the Powerhouse work. The CEC submits that "the powerhouse portions of the Ruskin Project improving safety and reliability are in the public interest and should be approved..." (CEC Final Submission, p. 4)

(b) Powerhouse Equipment

It is AMPC's view that BC Hydro should run the existing generating units to the end of their economic lives, continuing to maintain the units and taking advantage to extend their operating lives. This would include refurbishing units as needed, with regular maintenance and replacement when required. This is seen as a prudent approach as opposed to rebuilding or replacing every component of the powerhouse to a Greenfield standard.

APMC supports this position on the following grounds:

- AMPC makes several references to the RW Beck report. While acknowledging that RW Beck's overall recommendation is to replace all of the Powerhouse Equipment at the same time, AMPC points out that the RW Beck report "is clear that the existing units retain value and their lives can be extended."
- AMPC also sees that there is flexibility in the timing of the replacement of the generation units given that the component most likely to fail, the stator windings, are referred to in the RW Beck report as follows:

The Ruskin stator windings visually "[show] some surface contamination, but not more than would be expected, especially considering the open cooling systems." Also stated by RW Beck "[T]he stator windings of the Ruskin generators all have the original insulation system.....which historically has proven to have a very long life, often outlasting newer, modern insulation systems. We attribute the very long life attained by the Ruskin generator stator windings to an initial robust winding design and to relative low and stable loading of the generators..."

- AMPC notes that BC Hydro has conceded that "conceptually it would be possible to split the Powerhouse portion of the Project into three parts, and undertake each only when a given unit has failed." However, BC Hydro rejected this approach based on "the

increased costs for multiple mobilizations, uncertainty in timing, and lack of scale in attempting three small projects.” However, BC Hydro rejected a recommendation by Pacific Liaicon to install all three generators at once on the basis that “[s]hutting down the Powerhouse does not ... significantly increase lay down area to allow multiple units to be installed in parallel.” AMPC agrees with BC Hydro that, given the cathedral architecture associated with the Ruskin vintage of powerhouses, there is adequate lay down area and submits that, given BC Hydro’s refusal to simultaneously replace the three units, its refusal to consider three projects on an as-need basis because of “multiple mobilizations” and “lack of scale”, makes little sense.

(AMPC Final Submission, pp. 10-12)

BC Hydro disputes the AMPC assertion that the optimal approach is to run the existing units to the end of their economic lives with refurbishment and maintenance as required. BC Hydro bases its objections to the AMPC approach by asserting that AMPC takes selected, fragmented quotations from the RW Beck Report and attempts to convey a completely different meaning than the Report intended. In its Reply Submission BC Hydro provides more extensive extracts from the RW Beck Report that include those portions quoted by AMPC in its Submission. The more extensive extracts, in BC Hydro’s view, make it clear that the RW Beck Report justifies the claim that the Powerhouse Equipment needs to be replaced. The findings of the Report are summarized as follows:

“We are of the opinion that given the unreliable condition of many plant elements and the overall poor condition of the equipment, all equipment and systems need to be replaced or refurbished, to be determined during detail design development. We do not recommend to only perform rehabilitation or replacement of selected components or systems if BC Hydro intends to continue operation of the Ruskin plant into the future. We recommend that the rehabilitation work, once the scope has been determined, be performed at the same time by one or more contractors. Only where there is a safety issue, which requires immediate attention and resolution, should, in our opinion, partial rehabilitation be considered. The step-up transformers fall into this category.”
(Exhibit B-1, Appendix B-3, p. 32 of 54) (BC Hydro Reply Submission, pp. 95-98)

BC Hydro also takes exception with APMC’s assertion that it rejected Pacific Liaicon’s suggestion to install all three generators at once because “shutting the Powerhouse down does not ... significantly increase the lay down area to allow multiple units to be installed in parallel.” BC Hydro states that, while this may be true, the reasons BC Hydro rejected Pacific Liaicon’s suggestion

related more to overall scheduling improvements as being unlikely, and the unacceptable environmental risks of a three year continuous spill, than to the potential size of the lay down area. BC Hydro again accuses AMPC of “selective citation” of the Pacific Liaison report and notes that in its transmittal letter Pacific Liaison acknowledges that it had not taken into account the potential environmental impact of its recommendation. (BC Hydro Reply Submission, pp. 104-105)

Furthermore, as outlined in BC Hydro’s response to AMPC IR 1.5.2, Exhibit B-7-2, BC Hydro submits that splitting the Powerhouse project into three separate projects to be implemented on an as-needed basis will increase costs and risks for various reasons. These reasons include: (1) multiple mobilizations for each major contract which will add costs, as compared to the Project which will require a single mobilization; (2) uncertainty in supplier timing if implementation is on an ‘as-needed’ basis which will attract a risk premium, as compared to the Project which presents a known schedule; and (3) a smaller scope of three single Turbine-Generator and three single ancillary equipment and installation contracts which requires one contract for each work package and must therefore increase procurement costs (both for BC Hydro and suppliers) which will eventually be reflected in the capital costs incurred, as compared to the Project. (BC Hydro Reply Submission, p. 105)

BC Hydro does not believe that it is possible to retain the existing Powerhouse equipment and continue to operate it, even with an increased level of effort and expenditure on repair and maintenance. BC Hydro suggests that such an approach is the same as a deferral approach and would only have a positive economic impact if the Ruskin Facility could continue in service for another eight years before the Project is undertaken. This is an unrealistic expectation in BC Hydro’s view. BC Hydro would have to remove the Ruskin Facility from its resource stack at some time in the deferral period given the poor condition of the Powerhouse equipment. The Ruskin Facility would not be able to provide dependable capacity and firm energy. The result would be that BC Hydro would have to acquire replacement firm energy and dependable capacity from alternative BC sources, and this may need to be done in an accelerated fashion. The residual risks and related cost of deferral are not deemed by BC Hydro as cost-effective over any time period. (Exhibit B-7-2, AMPC 1.5.2, pp. 4-8)

No other interveners took exception to the improvements to the Powerhouse equipment. “The CEC submits that BC Hydro has provided sufficient evidence with respect to the safety issues in the powerhouse superstructure and for the reliability issues with the powerhouse equipment to support the powerhouse components of the Ruskin Project.” (CEC Final Submission, p. 4)

Commission Determination

The Commission Panel accepts the evidence as presented by BC Hydro that there are substantial safety, reliability, environmental, and financial risks associated with the existing condition of the Powerhouse, including both the superstructure and equipment. **The Panel determines that these risks are deemed sufficiently worthy to explore alternative solutions and they need to be addressed in a timely and deliberately planned manner. Refurbishment and deferral of replacement on an as-needed basis is not sufficient to satisfy these risks.**

The Commission Panel acknowledges AMPC’s efforts through its IRs and Final Submission to demonstrate ways in which the Project could be modified in order to reduce costs. However, AMPC did not introduce evidence of its own in support of its positions. While AMPC has made observations regarding the adequacy of the lay down area for scheduling the refurbishment or replacement of the generating units, AMPC seems to have misinterpreted BC Hydro’s comments as suggesting that there is adequate lay down area for parallel generator installation. In any event, we agree with BC Hydro that this is not determinative in assessing the condition of the equipment, or how it relates it to the scheduling and environmental factors for addressing the equipment shortcomings. (BC Hydro Reply Submission, p. 105)

The Commission Panel concludes that there is insufficient evidence to support AMPC’s positions. We accept BC Hydro’s evidence provided in support of the Project components relating to the Powerhouse Work, including both superstructure and equipment. **The Commission Panel approves the Powerhouse Work as described in the Application.**

4.1.4 Switchyard Work

The Switchyard Work consists of upgrading and relocating the switchyard from the roof of the existing Powerhouse to an area near the Powerhouse. (Exhibit B-1, p. 1-2).

BC Hydro identified a number of issues at the switchyard.

- Limits of Approach (LOA)

BC Hydro is most concerned with the safety risk that the Switchyard poses to workers. The most significant issue with respect to the current condition of the Switchyard is the LOA deficiency. LOA issues are governed by WorkSafeBC's Occupational Health and Safety Regulation. LOA impacts both qualified and unqualified workers. The limited space, low profile, and close proximity to energized equipment put all individuals who access the Powerhouse roof at risk of electrical contact.

As a result of the restricted space and configuration of the Switchyard, it is unavoidable to be no more than three meters away from energized 69 kV equipment when walking on the Powerhouse roof. This distance is not within the safe LOA for unqualified electrical workers and accordingly, these workers cannot enter onto or perform work on the Powerhouse roof without either the supervision of qualified electrical workers or a suitable facility outage. The Powerhouse rooftop is a multiple use area and there is significant maintenance and repair work to be carried out on a regular basis, which normally would not require qualified electrical worker training to perform the tasks. Tasks not requiring a qualified electrical worker include work on the roof and walls, heating/ventilation air conditioning systems, telecommunications facilities, auxiliary power systems, and general building maintenance including light bulb replacements and gutter cleaning. Currently, overall access to the Switchyard is restricted to authorized electrical workers, and areas of the switchyard are taped off and cannot be accessed by others due to LOA violations.

- Design Deficiencies

The 1930 Switchyard design is outdated and lacks the switching and isolation capability for performing maintenance work in accordance with LOA standards. As a result, an outage of one or more 69 kV circuits is required to perform most maintenance tasks on the Powerhouse roof or on the Switchyard equipment. Outages impact the Ruskin Facility's ability to maintain flow continuity and may also require BC Hydro to spill water inflows, which results in lost energy and has the potential to cause a harmful alteration, disruption or destruction of fish habitat (HADD).

- Roof Condition

The existing roof has drainage issues and requires repair, which will necessitate 69 kV circuit outages and take three or four weeks to perform. Such outages can result in lost energy, Lower Mainland transmission impacts, and affect Stave River downstream flow continuity.

- Environmental Concerns

The design and location of the high voltage Switchyard equipment atop the Powerhouse creates a risk of accidental contact to birds. This has resulted in Blue Heron mortalities. Blue herons are federally and provincially protected. Relocating the Switchyard to a less exposed location and reconfiguring equipment spacing will reduce the potential for bird strikes. BC Hydro also notes that there will be no oil containing equipment in the proposed new Switchyard as the entire station will be at the 69 kV voltage level and no oil-filled transformers are needed. (Exhibit B-7, BCUC 1.8.1)

- Seismic Deficiencies

The existing Switchyard does not meet current seismic standards as defined in the Electrical and Electronics Engineering Recommended Practice for Seismic Design of Substations standard 693 (IEEE 693). To upgrade and maintain the Switchyard on the Powerhouse roof to this standard, BC Hydro would be required to upgrade the steel framing to withstand the design earthquake.

Structural upgrades were estimated at about \$200,000 (direct construction cost including contingency) in a 2000 study. (Exhibit B-10-2, AMPC 2.10.4)

- Location of the Switchyard

The Switchyard was originally developed on the roof of the Powerhouse to keep clear of the construction when the second and third generators were installed in the 1930s and 1950s, and to keep the units operational during construction. The current roof condition's drainage issues could require a substantial station outage to repair the deficiencies. Also, the design and location of the existing Switchyard and high voltage conductors give rise to environmental concerns related to bird strikes. (Exhibit B-1, p. 3-9)

4.1.4.1 Assessment of Alternative Means of Carrying out the Switchyard Work

BC Hydro looked at three alternative means of carrying out the Switchyard Work to address the foregoing issues, concerns, and deficiencies. The three options examined were:

Option 1 –Relocate the Switchyard to the Stave Falls Facility

This option was determined not to be feasible given the need for approximately seven kilometres of new transmission rights of way, impacting 400,000 square meters of land and requiring the purchase of private property. In addition Option 1 would be less reliable and more costly than BC Hydro's proposed solution.

Option 2 – Refurbish the Switchyard and leave it in its current location on the Powerhouse roof

In assessing Option 2, BC Hydro examined the potential for installing new Switchyard equipment that could possibly resolve the LOA issues. Roof top design configurations included gas insulated switchgear (GIS), a compact ring-bus design, and hybrid style switchgear. GIS Bus-work migration to the Powerhouse control room was also evaluated.

BC Hydro submits that all of these design options (and any other option where a new Switchyard is built on the Powerhouse roof) would have the following disadvantages:

- A temporary Switchyard off the roof would have to be constructed;
- All four transmission lines currently connected to the existing Ruskin Switchyard will need to be taken out of service for up to six months during construction; and
- Crane placement alongside the Powerhouse building is required because the only access to the roof is through the elevator inside the Powerhouse, which is limited in its lifting capacity to no more than four persons.

In a study dated April 2009, British Columbia Transmission Corporation also concluded that the option to maintain the Ruskin Switchyard on the roof of the Powerhouse was unfeasible for the following reasons:

- Safety issues during redevelopment and construction of the Powerhouse while maintaining a live operating high voltage Switchyard needed to supply power to the area;
- Outage scheduling challenges to accommodate construction schedule;
- Difficulties in maintaining proper limits of approach during construction and the effects this would have on the safety of workers as well as the construction schedule; and
- Impractical to redevelop the powerhouse superstructure due to shared ground/grid roof structure.

BC Hydro rejected this option since it was not cost-effective or a feasible solution due to the constructability risks and seismic vulnerabilities as outlined above. (Exhibit B-7, BCUC 1.8.1, p. 4)

Options 1 and 2 were found to have serious deficiencies and/or to be more expensive than the proposed option, Option 3.

Option 3 – Re-locate the Switchyard from the Powerhouse roof to an area near the Powerhouse on previously disturbed land owned by BC Hydro

The 2009 British Columbia Transmission Corporation Report concluded that Option 3 is more cost-effective, more reliable, and has less social/environmental impacts than Option 1. Relevant factors supporting the Option 3 solution include:

- Option 3 results in a limited footprint impact and the limited right-of-way impacts associated with the realignment of the circuits to connect to the new switchyard. This compares to the requirement to secure seven km of new transmission ROW impacting significant land areas, and the need to purchase private property dictated by Option 1. Option 1 was deemed not feasible because of less intrusive solutions were available.
- Option 3 is estimated to cost \$22 million compared to over \$30 million for Option 1. (Exhibit B-7, BCUC 1.8.1, p. 3 of 5)
- Option 3 is closer to the existing load and provides higher interconnection reliability than Option 1 which would leave the Ruskin Facility relying on a single circuit for its energy transmission.

In the 2009 study, the BC Transmission Corporation found Option 3 to be the preferred option. (Exhibit B-7, BCUC 1.8.1, pp. 3-5)

BC Hydro also concluded that Option 3 is the preferred option.

4.1.4.2 Intervener Views of Switchyard Work

The only intervener objecting to the Switchyard Work as proposed by BC Hydro was AMPC. AMPC believes BC Hydro's assessment of the need to move the Switchyard from the Powerhouse roof does not provide sufficient reasons for moving away from the status quo (maintaining the Switchyard on the Powerhouse roof). AMPC argues that the BC Hydro's analysis is deficient for the following reasons:

- The risk of electrical contact is a risk that BC Hydro has proven capable of managing for 80 years, by relying on trained and qualified staff.
- BC Hydro's technical design deficiency explanation in its response to BCUC IR 1.8.1, Exhibit B-7, is that the Switchyard cannot be isolated for repair and maintenance work, unlike a more modern facility, and accordingly an outage is required to undertake this work. This condition is also one that BC Hydro has been able to manage for 80 years.
- The roof requires repairs to address "drainage issues" and issues associated with outages are cited. The response presumably means that repairing drainage issues may trigger an outage, but it is still unclear why BC Hydro cannot repair and maintain the roof as it has since 1930.
- "Environmental concerns" are described in response to BCUC IR 1.8.1, Exhibit B-7, as Blue Heron bird strikes. While AMPC supports efforts to minimize impacts on species at risk, AMPC submits that there are likely alternative bird strike mitigation measures other than Switchyard relocation that could be implemented (e.g., effigies and sound cannons could be considered). This issue does not justify a \$20 million cost.

AMPC argues that BC Hydro missed the point of the Commission Panel's question asking BC Hydro to "discuss how BC Hydro's risk tolerance affected the choice of project options for safety related scope items," including the Switchyard. In AMPC's view the status quo is a reasonable option and should not only have been considered, but preferred. (AMPC Final Submission, pp. 6-7) While AMPC acknowledges that safety conditions would be improved by reducing exposure to energized equipment and reducing the chance of relying on scaffolding instead of a hydraulic lift, "in AMPC's view the degree of improvement does not warrant the cost." and it "is concerned that BC Hydro does not sufficiently take cost into account when choosing how to pursue safety objectives." (AMPC Final Submission, pp. 5-6)

BC Hydro's response to AMPC's objections is to reiterate its evidence submitted in response to BCUC IR 1.8.1 which, amongst other observations, concludes that "As a result of worker safety issues, the BC Hydro Board of Directors (Board) rejected the status quo for the Switchyard."

The CEC submits that worker safety issues related to the LOA to equipment, as well as the general age of the Switchyard assets warrants inclusion in the Project. "The CEC submits that the

Commission should conclude that the switchyard portions of the Ruskin Project improving safety and reliability are in the public interest and should be approved...” (CEC Final Submission, pp. 4-5)

No other intervener made specific observation in relation to the need to address safety and reliability concerns related to the Switchyard equipment.

BC Hydro concludes that:

“The Ruskin Switchyard Redevelopment Project is a small portion of the overall cost of the Ruskin Powerhouse and Dam Improvement Project. Despite the switchyard’s small relative costs, it is an integral component of the whole project’s success as it could significantly impact the complete project schedule.... building a new switchyard at Ruskin ... provides for the long term development of the transmission system, is more cost-effective, more reliable, and has less social environmental impacts than [the other alternatives considered]”
(Exhibit B-7-1, BCUC 1.8.1, Attachment 1, p. 16 of 16)

Commission Determination

The Commission Panel accepts that the safety, reliability, and environmental issues merit the upgrade work on the Switchyard, and that the relocation of the Switchyard to an area of previously disturbed land owned by BC Hydro is the preferred alternative. The new Switchyard does provide for the long-term development of the transmission system in a complementary manner to the other elements of the Project. We acknowledge the CEC’s observations that “The CEC is not persuaded by the evidence that deferral of portions of the Ruskin Project [such as deferring the improvements associated with the Switchyard Work] would contribute significant value ...” and “A piecemeal approach may run significant risks of interactions between components of the project, which could have unintended consequences.” (CEC Final Submission, p. 6) Further, the potential for outages associated with the inability to isolate areas of the Switchyard for repairs and maintenance from support the need to address current design deficiencies. Relying on BC Hydro’s ability to manage these risks over the past 80 years is, in itself, insufficient to defer development of an appropriate solution to the Switchyard deficiencies.

Therefore, the Panel determines that the Switchyard Work should be included in the scope of the project alternatives considered for the Project. Option 3, relocation of the Switchyard location from the roof of the Powerhouse to an area near the Powerhouse on previously disturbed land owned by BC Hydro is the appropriate Option.

4.2 Alternative Solutions to the Project

BC Hydro does not consider the status quo to be an alternative solution to the Project given the significant seismic/safety deficiencies of the Dam and Powerhouse, and the need to maintain the reliability of the Powerhouse. Therefore, BC Hydro considered two de-rating and three decommissioning long-term alternatives to the Project. BC Hydro concluded that the Project described in Section 4.1 is more cost-effective than any of the alternatives considered. This is considered further below.

BC Hydro filed two reports that it had prepared to assist with the selection of a preferred solution, and investigation of the alternatives:

- The Black and Veatch Report “Ruskin Hydroelectric Facility Minimum Cost Analysis Study” (B&V Report) focused on the minimal direct engineering, demolition, and construction costs of the alternatives. (Exhibit B-1, Appendix G-2)
- The Hemmera Report “Minimum Cost Analysis Study, Socio-Economic and Environmental Assessment of Alternatives, RUSKIN” focused on the socio-economic and environmental costs of the alternatives, including mitigation and compensation costs likely to be required. (Exhibit B-1, Appendix G-3)

The estimates in both reports were prepared to an accuracy of -35/+65 percent, in line with BC Hydro’s standard for feasibility-stage estimates.

The long term alternatives considered are outlined below. These are more fully described in the Application, Exhibit B-1, pages 3-19 to 3-21.

4.2.1 Permanently De-Rate Two Generating Units, Remove the Third Generating Unit (Alternative A)

This alternative consists of:

- Removing the spillway gates and installing small (about 2.5 m in height) automated crest gates on the Dam crest to provide enough spill capability to ensure that a plant trip does not dewater the Stave River;
- Maintaining the reservoir elevation at 37 m;
- Removing Unit 3 as it is inoperable at this reservoir level;
- Replacing Units 1 and 2 and ancillary equipment as proposed in the Project;
- Constructing a berm in the Stave Falls GS tailrace to maintain tailrace elevation and prevent turbine cavitation problems at Stave Falls (this is a requirement for all of the long-term alternatives); and
- Undertaking the ground improvement work to stabilize the Right Abutment. (Also required for Alternatives B and E described below.)

4.2.2 Abandon with Overflow (Alternative B)

This alternative consists of:

- Removing the spillway gates and installing flashboards on the crest of the five interior spillway bays;
- Lowering the operating level of the Hayward Lake Reservoir;
- Leaving the Dam in place;
- Constructing a berm in the Stave Falls GS tailrace to maintain tailrace elevation and to prevent turbine cavitation problems at Stave Falls;
- Removing the Powerhouse down to the generator floor;
- Installing new discharge valves in a newly-constructed valve-house. These valves would be sized to allow the Unit 1 and Unit 2 penstocks to pass the normal flow of approximately 100 m³/s each into the Unit 1 and Unit 2 draft tubes; and

- Filling the Unit 3 penstock and draft tube with gravel, and cap them with concrete at both ends.

4.2.3 Abandon and Dam Removal (Alternative C)

This alternative consists of:

- Removing the Dam;
- Returning of the Hayward Lake Reservoir, to the extent practicable, to its original condition;
- Constructing a berm in the Stave Falls GS tailrace to maintain tailrace elevation and prevent turbine cavitation problems at Stave Falls;
- Removing the Powerhouse down to the generator floor; and
- Filling all three penstocks, as well as all three draft tubes, with gravel and cap with concrete at both ends.

This alternative would require dewatering of the Hayward Lake Reservoir prior to the removal of the Dam.

4.2.4 Abandon without Dam Removal (Alternative D)

This alternative is similar to Alternative C. However, rather than completely removing the Dam, a large opening would be cut through the base of the Dam to allow water passage.

4.2.5 Permanently De-Rate all Generating Units and Perform Intake Modifications (Alternative E)

This alternative consists of:

- Removing the spillway gates and installing small (about 2.5 m in height) automated crest gates on the Dam crest to provide enough spill capability to ensure that a plant trip does not dewater the lower Stave River;

- Maintaining the reservoir elevation at 37 m, leaving 0.5 m of freeboard on the crest gates;
- Modifying the intake to Unit 3 to permit its continued use by excavating the approach channel to the intake and lowering the intake to the same elevation as the two other units (this allows continued use of Unit 3);
- Undertaking the Powerhouse work substantially as proposed in the Project, leaving the facility with three operating units but with a reduced hydraulic head, resulting in lower energy and capacity at the Ruskin facility.

4.2.6 Economic Analysis of the Alternatives

BC Hydro analyzed the economic impact of the alternatives, both on the basis of the net present of benefits, and on the basis of the levelized unit cost of energy (UEC) for each alternative. The UEC is the net present value of all costs of the alternative, divided by the net present value of all of the energy delivered. A summary of the net present value (NPV) analysis is set out in Exhibit B-1, Table 3-4, p. 3-26. It indicates that the NPV of the alternatives are:

Alternative	NPV at FY 2011 in \$million 2010
The Project (Retain 3 Units)	301.4
Alt A: De-rate 2 Units	259.1
Alt B: Overflow	-
Alt C: Remove	(71.8)
Alt D: Tunnel	(67.5)
Alt E: De-rate 3 Units	(229.8)

The Project has the most attractive NPV when compared to the other alternatives.

The UEC calculated by BC Hydro for the Project and each of the Alternatives is as set out below.

Levelized Cost of Energy						
2010 \$/MWh (Using Expected Amount Costs)						
	Project Retain <u>3 Units</u>	Alt A De-rate <u>2 Units</u>	Alt B <u>Overflow</u>	Alt C <u>Remove</u>	Alt D <u>Tunnel</u>	Alt E De-rate <u>3 Units</u>
Unit Cost -Gross	67.5	59.4	119.5	135.9	134.9	75.0
Capacity credit	(16.5)	(12.5)	-	-	-	(17.0)
Unit Cost - Net	50.9	46.9	119.5	135.9	134.9	58.0

Source: Exhibit B-1, Table 3-5, p.3-28

BC Hydro notes that the UEC, net of decommissioning costs can be compared between the Project, Alternatives A and E, and to the cost of long-term firm energy obtained from the BC electricity market (IPPs). The most recent BC market acquisitions stem from the Clean Power Call, with a price of \$129/MWh (F2011\$) for a flat block of energy delivered to the lower mainland, and \$50/MWh for non-firm energy. For a resource with the Ruskin Facility's firmness profile, the weighted average value would be \$120/MWh. BC Hydro sees this as a fair comparison to the gross UEC's shown above. (Exhibit B-1, pp. 3-28, 3-29)

With gross UECs less than the external supply cost of \$120/MWh for equivalent firmness, the Project, and Alternatives A and E are attractive. Between these three choices, the Project provides the greatest amount of energy and capacity. The energy volume from the Project and the margin between the Project UEC and the BC market cost of energy is, in BC Hydro's view, enough to more than make up for the Project's marginally higher UEC compared to Alternative A, which results in the Project being BC Hydro's preferred alternative. (Exhibit B-1, p. 3-29)

The CEBC requested BC Hydro to provide a sensitivity analysis to the Table shown above to reflect alternative firm energy costs of \$70/MWh and \$100/MWh. BC Hydro in its response states that the "break-even" energy value for the Project is \$67.46/MWh for average energy, or \$69.84/MWh for firm energy. BC Hydro notes that there is no evidence that future resources can provide firm energy at \$69.84/MWh. The lowest accepted Levelized Firm Energy Price in the Clean Power Call was \$105.36/MWh. The results of the sensitivity analysis are set out below:

Levelized Cost of Energy						
2010 \$/MWh using Expected Amount Costs						
	Project Retain <u>3 Units</u>	Alt A De-rate <u>2 Units</u>	Alt B <u>Overflow</u>	Alt C <u>Remove</u>	Alt D <u>Tunnel</u>	Alt E De-rate <u>3 Units</u>
Assuming \$100/MWh Alternative Energy						
Unit Cost - Gross	67.5	59.4	94.0	110.3	109.4	75.0
Capacity Credit	(16.5)	(12.5)	-	-	-	(17.0)
Unit Cost - Net	50.9	46.9	94.0	110.3	109.4	58.0
Assuming \$70/MWh Alternative Energy						
Unit Cost - Gross	67.5	59.4	67.6	93.9	83.0	75.0
Capacity Credit	(16.5)	(12.5)	-	-	-	(17.0)
Unit Cost - Net	50.9	46.9	67.9	83.9	83.0	58.0

Source: Exhibit B-10-2 CEBC IR 2.6.1

The benefit cost analysis of the Project and the alternatives used a \$55/KW-year for valuation of the capacity. This was based on the capacity from Revelstoke 6. Given the 50+ expected life of the Ruskin Facility, post-Project, BC Hydro believes the value of dependable capacity from Ruskin is likely to be greater than \$55/KW-year. Looking at large-scale capacity options beyond Revelstoke 6 BC Hydro capacity values ranging from \$70/KW-year (Simple Cycle Gas Turbine at Kelly Lake) to \$112/KW-year (pumped storage at Mica). (Exhibit B-10-2, CECBC 2.2.1)

“It is BCOAPO’s position that BC Hydro has considered a reasonable range of alternatives and chosen the most cost-effective.” (BCOAPO Final Submission, p. 5) Also, “The CEC is satisfied that the BC Hydro alternatives developed include sufficient options to cover a reasonable range of options necessary to evaluate cost-effectiveness.” (CEC Final Submission, p.5) No other intervener commented specifically on the comparative Alternatives examined by BC Hydro.

Commission Determination

In Section 3 of this Decision, the Commission Panel determined the need for the Project had been established for safety and environmental reasons, and that this was fully consistent with the recent amendments to the Electricity Self-Sufficiency Regulation and to SD 10. As noted in Section 2.2, the Commission Panel accepts BC Hydro's uncontested evidence that the Project would result in approximately 334 GWh/year of firm energy and a total of 114 MW of dependable capacity. To address these needs **the Commission Panel finds that BC Hydro has explored sufficient and appropriate options to address the safety, reliability, environmental, and financial risks represented by the Project. It is evident that the Project is the most attractive option from an economic perspective when compared with the alternatives.**

The economic analysis of the Alternatives is somewhat redundant as amended SD 10 requires that the Commission take full account of the need for the Ruskin Facility's capability to deliver 334 GWh/year of firm energy and 114 MW of dependable capacity by 2018 and over the expected life of the Project. SD 10 trumps the economic analysis of the Alternatives. The Alternatives considered would fail to meet the assumed needs identified in amended SD 10 for firm energy and capacity.

The Commission Panel determines that the Project is the preferred alternative to address the need.

4.2.7 Deferral Alternative

BC Hydro also considered a deferral alternative. This is not a long-term alternative but could act as a one to three year bridge to implementing (1) the Project; (2) either of the two de-rating alternatives; or (3) the lowest-cost decommissioning alternative, all of which will require the completion of the Right Abutment work. The net effect of the deferral alternative is that it reduces the net present value of the Project as a whole unless the deferral exceeds eight years. Given the worker safety risks, environmental risks, and the reliability risks, BC Hydro submits that the deferral

alternative is not as cost-effective as the Project over any time period. The RW Beck Report agrees with BC Hydro that deferring the Powerhouse work was not the best option given the unsafe condition of many plant components and the poor condition of the equipment. (Exhibit B-1, Appendix B-3, p. 7 of 54)

Commission Determination

The Commission Panel concurs that a deferral alternative is not an appropriate solution to be considered further, given the necessity to address the safety, reliability, environmental, and financial risks in a timely manner.

4.3 Issues Associated with Various Components of the Project

In the process of developing its application BC Hydro identified a number of issues associated with various components of the Project. It also assessed a number of alternative means to carry out the Project. These issues and alternatives are:

1. Options with respect to the Spillway gate and piers configuration.
2. Options with respect to remediation of the Right Abutment.
3. The Dam Crossing
4. An alternative location for the Powerhouse (New versus rehabilitate/replace).
5. A two turbine-generator unit development versus a three unit configuration.
6. Timing of Replacement of a third generating unit

4.3.1 Dam – Spillway Gates and Piers Configuration

The Upper Dam, consisting of seven spillway gates, six inner piers and a roadway, is seismically deficient. BC Hydro considered three spillway gate configurations and pier options, each of which is capable of passing the probable maximum flood.

Option 1 (Pier Hybrid Option) – Replace three of the existing central piers with new piers, anchor the remaining three of the weaker existing central piers, and install seven new radial gates.

This option was not selected because:

- It would not withstand the maximum design earthquake or meet the 1/500 year earthquake “no damage to spillgate system” criteria;
- It would limit space available for vertical anchors (which limits flexibility in design);
- It would prohibit the ability to easily incorporate a stop log system; and
- It had the lowest maximum spill capacity of the considered options (which reduces flexibility in spill management).

Option 2 (Widened Pier Option) – Widen the six existing central piers, replace and install seven new radial gates.

This option would involve the encapsulation of the existing piers with new concrete in an effort to reduce costs. This option was not selected because:

- It was assessed as having a high degree of constructability uncertainty;
- There is concern about the bonding between existing and new concrete;
- There is concern that seismic load may generate shear forces that might split the pier along the interface and/or that the existing and new concrete may experience differential deformation under post-tensioned stresses.

Option 3 – (New Pier Option) – Replace the six existing central piers, with four new inner piers. Replace the existing seven radial gates with five new larger radial gates.

This is the preferred option from a technical and constructability perspective. The option was selected because:

- It provides increased strength to the Upper Dam structure;
- New wider piers provide increased overall pier strength;
- It provides greater trunnion anchorage and allows the Upper Dam to accommodate a stop log maintenance gate system requiring a two-lane roadway.

Overall BC Hydro estimates that Option 3 is about 10 percent more expensive than Option 2 (\$134 million to \$122 million in 2005 \$). In BC Hydro's view the technical and constructability advantages justify the incremental increase in cost between the two options. (Exhibit B-1, p. 3-50)

No intervener made specific observations or took exception to the option selected by BC Hydro for the proposed dam spillway and piers configuration.

Commission Determination

The Commission Panel accepts BC Hydro's view that Option 3's technical and constructability advantages justify the incremental cost. **We determine that the replacement of the six central piers with four new inner piers, and the replacement of the seven existing radial gates with five new larger gates is the appropriate option to address concerns related to the spillway gate and pier configuration for the Project.**

4.3.2 Dam – Right Abutment Remediation

The seepage cut-off wall of the Right Abutment was found to be seismically deficient, and a static deficiency with respect to seepage and piping was also identified. BC Hydro considered three high-level upgrade approaches to remediate these deficiencies:

- Approach 1 – Upgrade the existing cut-off structure (above the Dam).
- Approach 2 – Build a new cut-off structure (above the Dam).
- Approach 3 – Improve drainage and downstream slope (below the Dam).

Through the engineering process BC Hydro determined that Approach 3 was required in conjunction with either Approach 1 or 2. It then developed Approaches 1 and 2 to the feasibility-level design phase before selecting Approach 2. Approach 1 was not selected because of the considerable constructability risk of drilling through the existing cut-off slabs and because there was concern about the effectiveness of this option below the treated zone. In addition, implementation of this option would require an extended deep drawdown on the Hayward Lake Reservoir. Approach 3 on its own, does not fully address the seismic issue, but was adopted (in conjunction with Approach 2) because it greatly reduced the static (piping) and post-seismic risks.

No intervener made observations or took exception with BC Hydro's preference to build a new cut-off structure above the Dam (Approach 2) and improve drainage and the downstream slope below the dam.

Commission Determination

The Commission Panel accepts that building a new cut-off structure above the Dam and improving drainage and the downstream slope below the dam is the appropriate solution for the Right Abutment remediation component of the Project. We accept BC Hydro's assessment of constructability and seismic risks that lead to this as the preferred Approach.

4.3.3 The Dam Crossing

BC Hydro submits that the Upper Dam portion of the Project has been designed for the installation of stop logs to provide isolation of the spillway gates to carry out maintenance and inspection work on the Dam. Without these stop logs BC Hydro would be required to draft the reservoir each time it carries out maintenance and inspection of the spillway gate, potentially impacting flow continuity and giving rise to *Fisheries Act* violations. Furthermore, it could impact public access which is required under a perpetual agreement with the District of Mission. (Exhibit B-7-2, AMPC 1.5.2)

The placement and removal of the stop logs requires either a gantry crane or a large mobile crane. The Project scope includes a gantry crane to avoid future crane availability risk and gain the benefit of a custom stop log handling system. The gantry crane requires that the dam crossing be widened to two lanes. While a pedestrian walkway is not needed for the gantry crane, it will improve worker and public safety with “minimal incremental cost.” The District of Mission, Mission Chamber of Commerce, Fraser Valley Regional District, District of Mission Fire and Rescue Service, and RCMP all support the widening of the crossing and the provision of a pedestrian walkway. (Exhibit B-10-2, BCOAPO 2.1.1)

A gantry crane was selected over a mobile crane because a mobile crane would need more than two lanes of road width to accommodate stabilizing outriggers. (Exhibit B-10-2, BCUC 2.36.1.1.1)

“AMPC submits that in fairness to its ratepayers BC Hydro should seek a funding contribution [for the Dam crossing] from the Municipal District of Mission” and “BC Hydro refuses to do so, however, because accepting contributions could purportedly have a negative impact on operating costs.” (AMPC Final Submission, p. 8) BC Hydro indicates that it has not solicited contributions “to safeguard BC Hydro’s right to use the roadway for the purposes of Dam maintenance, including periodic road closures as required, without allowing the argument that a third party’s contributions would entitle them to approve or deny such closures, or place conditions on the timing and duration of a closure. BC Hydro believes that such interference in scheduling operations on top of the Dam would ultimately have a negative impact on operating costs.” (Exhibit B-7-1, BCUC 1.30.3)

AMPC disagrees with this rationale and submits BC Hydro should adopt a “best efforts” approach to consultation and “ought to pursue a reasonable road funding contribution given the benefits it provides to Mission residents.” (AMPC Final Submission, p. 8)

Commission Determination

The Commission Panel accepts the benefits of widening the roadway to two lanes and the addition of a pedestrian walkway. The operational benefits of using a gantry crane to place and

remove the stop logs, combined with the minimization of potential *Fisheries Act* violations and the increased worker and public safety with the pedestrian walkway, merit the widening of the roadway to two lanes and addition of the pedestrian walkway.

However, the Commission Panel also agrees with AMPC that BC Hydro could pursue a funding contribution from the District of Mission for the addition of the road widening and pedestrian walkway, to partially compensate for the costs of line painting and the pedestrian walkway which contribute to public safety. We do not fully accept BC Hydro's arguments that it would be giving Mission the authority to approve or deny road closures or place conditions on the timing and duration of closures. BC Hydro will still own the road and be able to control it for operational requirements. However, as AMPC points out, it should take stakeholder concerns into account when closing the road, if only to be a good neighbour. BC Hydro is encouraged to consider seeking a funding contribution from the District of Mission for the road widening and addition of the pedestrian walkway, and to agree on the nature of consultations that would take place around road closures.

4.3.4 Powerhouse – New versus Rehabilitate/Replace

In 2005, BC Hydro initially explored the option of building a new Powerhouse on the same site or rehabilitating the existing structure. The building of a new Powerhouse was estimated at that time to be \$109 million more costly than rehabilitating the existing structure.

In 2007, BC Hydro retained Klohn Crippen Berger Ltd. (KCBL) to examine the cost-effectiveness of a third option: construction of a new Powerhouse downstream of the existing site. KCBL concluded that the preferable option was to rehabilitate/replace the existing Powerhouse for the following reasons:

- While a new Powerhouse downstream would permit reconfiguration using two larger units, it would not result in significant benefits due to the limited storage in the Hayward Lake Reservoir and the resulting need to coordinate flows between the Stave Falls and Ruskin Facilities;

- There was a net present value benefit of at least \$100 million (in 2007\$) to rehabilitate/replace the current building compared reasonably to building a new Powerhouse;
- There were significant construction constraints associated with building a new powerhouse downstream due to unknown geotechnical issues associated with bedrock at a new powerhouse location, rather than rehabilitation/replacement at the existing site (Exhibit B-7, BCUC 1.9.1; and
- No significant additional head can be developed by building a new powerhouse downstream.

No intervener made specific observations regarding an alternative location for the powerhouse.

Commission Determination

The Commission Panel accepts the evidence in the KCBL Report and determines that it is appropriate to rehabilitate the current Powerhouse, rather than developing a new one in a different location.

4.3.5 Powerhouse – Two versus Three Unit Configuration

BC Hydro considered the alternative of upgrading only Turbine-Generator Units 1 (U1) and 2 (U2). In BC Hydro's view, the benefits of having three units and a greater amount of capacity than might strictly be required to capture the available energy associated with only two units were worthy of pursuit. These benefits include:

- Flexibility and reliability in the management of water and releases;
- System support benefits; and
- Benefits of capacity in meeting load requirements, system reliability requirements, and market trade benefits.

BC Hydro's economic evaluation of three units versus two units concluded:

- The annual energy generated by a three unit system versus a two unit system is an additional 18.6 GWh. The firm energy component (where the contribution of U3 is prorated based on its average energy contribution) is an additional 16.4 GWh;
- The NPV of the incremental power generated from a 3 unit system versus a 2 unit system is \$52.4 million (Exhibit B-1, p. 3-48 and Exhibit B-10, BCUC 2.33.1);
- The incremental cost of the third unit installation is \$41.7 million (direct cost);
- The NPV benefit of a Three Unit Alternative versus a 2 unit alternative is \$10.7 million (considering direct costs only). (Exhibit B-1, p. 3-48)

The Commission Panel notes that only the incremental direct cost of the third unit installation (\$41.7 million) is included in the NPV benefit determination of installing the third unit.

BC Hydro considers loaded cost figures in evaluating projects or project alternatives to be irrelevant. (Exhibit B-10-1, BCUC 2.33.1) BC Hydro also makes reference to the Commission's Decision in the Revelstoke Unit 5 proceeding in which the Commission states: "In evaluating a project which primarily provides dependable capacity to its ratepayers BC Hydro has calculated the UCC [Unit Capacity Cost] of the project using incremental costs and excluding IDC [Interest During Construction] and Corporate Overhead and the Commission Panel agrees with this approach."⁶

The Panel disagrees with BC Hydro that only direct costs should be included in this determination. Calculating UCC for tax purposes as was referred to in the Revelstoke 5 proceeding is not the same as calculating a revenue requirement for regulatory purposes. An appropriate analysis of the NPV of the net benefit of the installation of the third unit should include the loaded cost amounts. Notwithstanding this, we also note BC Hydro's observation that "Including the Capital Overhead loading as part of the incremental capital costs of installing the third unit would reduce the NPV of the decision to install a third unit by that amount, or from \$10.7 million to \$3.8 million." (Exhibit B-10-1, BCUC 2.33.1) Inclusion of capital overhead loading would still render a positive NPV for installing the third unit.

⁶ *In the Matter of British Columbia Hydro and Power Authority: Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5, July 12, 2007, Order C-8-07 at p.59 (Revelstoke Decision)*

BC Hydro states that, from a system perspective, the recent increase of variable wind generation and non-dispatchable run-of-river hydro results in the need to balance loads in real-time. System generation must be dispatchable to a much greater degree than historical demands. Units with “a flat efficiency curve” offer a more effective way to meet this need as these units will provide the variable energy required without operating outside their intended limits. Flexibility in unit output provided by the ability to change output while using water effectively has become more critical for dispatchability services as a marketable asset. These benefits are largely attributable to the additional capacity provided by a three-unit Powerhouse. (Exhibit B-10, BCUC 2.29.6.1)

A variation on the two versus three unit operation that has been examined by BC Hydro is to replace units 1 and 2 and run U3 until it fails, and then replace it. The estimated cost for the future replacement of the third unit is \$44.9 million direct costs. BC Hydro calculates the “break-even” time for deferral in installing U3 is 5.5 years (any shorter deferral would result in an economic cost rather than a benefit). BC Hydro further notes that it would take three years after failure to procure and install a new unit, which implies that U3 would have to remain in service for nine years to make deferral an economically attractive alternative. (Exhibit B-10, BCUC 2.33.4, p. 3)

BC Hydro also notes that it is problematic as to whether it would run U3 to failure. Consequences of that failure are difficult to predict but could include worker safety issues, environmental issues associated with oil contamination and debris, possible damage to other generating units, and the loss of capacity to the Lower Mainland until U3 is replaced. (Exhibit B-10, BCUC 2.33.4)

Commission Determination

The Commission Panel accepts BC Hydro’s evidence related to the benefits of the three unit configuration, including those related to flexibility and reliability of water and releases, system support, and capacity, as well as its economic evaluation of having a positive NPV. **We determine that the benefits of three generating units exceed those of only having two units. We determine that the three generating unit configuration is appropriate for the Project.** This is consistent with the requirements of the amended Electricity Self Sufficiency Regulation and amended SD 10.

4.3.6 Timing of Replacement of the Third Generating Unit

In Section 4.1.2 the Commission Panel determined the need to address the safety, reliability, environmental, and financial risks associated with the current state of the Powerhouse equipment, and the three generating units in particular, as one component of the Project. Refurbishment and replacement of them on an as-needed basis was not deemed to satisfy these risks. While BC Hydro explored the option of upgrading only U1 and U2, it determined that a three unit configuration was necessary to meet the legislated needs for firm energy and dependable capacity. This is consistent with the amended Electricity Self-Sufficiency Regulation and amended SD 10. The three unit solution also provided a financial benefit by providing the ability to shape output into higher value periods. It also decreased the risks of a spill with the attendant environmental impacts, while at the same time in improving flexibility in scheduling outages. Further, it provides redundancy for the Ruskin Facility. (Exhibit B-7-2, AMPC 1.5.2) The Panel confirmed that the three unit solution was appropriate in Section 4.3.5, leaving only the question of timing of replacement of U3.

4.3.6.1 BC Hydro Position

BC Hydro states that:

- “Notwithstanding the worker safety, reliability, and environmental concerns raised by continuing to run U3 in its current condition, it is conceptually possible to gain the benefits of retaining a three-unit powerhouse by deferring the capital expenditure of replacing the third unit. In this case, BC hydro would replace U1 and U2 and retain the existing U3 on a ‘run to failure’ basis as described in Exhibit B-10, BC Hydro’s response to BCUC IR 2.33.4. In BC Hydro’s analysis, this alternative is uneconomic. In addition, this alternative would exacerbate concerns related to capacity sufficiency in the Lower Mainland.... this strategy gains a time-value of money benefit by delaying the expenditures for the U3 replacement, but it also incurs additional costs for the second mobilization, an extended outage following failure of U3, additional procurement activities, and anticipated lower construction efficiencies in a smaller project....”
- “... the break-even delay was 5.5 years: U3 must remain in service at least 5.5 years after the currently planned replacement in 2017 for the deferral to provide an economic benefit” RW Beck assessed the annual probability of failure of the generating unit is

approximately 39 percent. “The probability of U3 remaining in service for the 5.5 year period required to provide an economic benefit is less than 7 percent.”

- “BCH is concerned with any reduction in dependable capacity in the Lower Mainland, given among other things, DSM deliverability risk, the legislated constraints on Burrard Thermal Generating Station, and the intermittent nature of the IPPs awarded EPAs in the Lower Mainland region.”
- “For these reasons, BC Hydro does not believe that this would be a satisfactory or cost-effective solution.”

(Exhibit B-18, BCUC 3.10.2)

BC Hydro also states:

- “The annual benefit of retaining a third generating unit rather than replacing only two generating units is shown in Exhibit B-1, Table 3-12, page 3-48 as \$3.3 million, and provides a NPV benefit of \$10.7 million by including the third generating unit in the Project scope.”

(Exhibit B-18, BCUC 3.10.1)

U3 provides the ability to shape output into periods when customers have the greatest need for power and during the time of system contingencies. Few clean or renewable energy resources provide this capability. That is, U3 enhances the ability to meet the demand for firm energy and dependable capacity. When BC Hydro is able to achieve its legislated requirements for self-sufficiency + 3,000 GWh/year energy, it will be able to sell surplus energy and have the ability to shape output to allow it to maximize the value of what is sold externally for the benefit of BC Hydro ratepayers. (Exhibit B-7-2, CEC 1.19.0)

U3 provides a limited amount of additional energy due to avoided spill. Its primary economic benefit, however, is the additional capacity and the ability to shape the output into high load periods and out of low load periods. The incremental value of the energy from the Ruskin Facility with U3 in place is 18.6 GWh with an incremental value of \$3.3 million, after adjusting for firmness.

(Exhibit B-10-2, BCUC 2.4.1)

Deferring replacement of U3 would also incur costs. According to BC Hydro: “A future replacement will require a second mobilization and demobilization for the installation. In addition during the extended operating period maintenance costs for the existing U3 may be higher than anticipated for the new unit installed in the Project. The timing of replacement, and therefore the supplier’s order backlog at the time of that replacement, cannot be predicted ... BC Hydro will bear the cost exposure to a single-source contract for a turbine/generator to match those installed under the reduced Project scope ... or face the cost of multiple designs in a small three unit powerhouse and the increase in future spares stocking and maintenance costs.” (Exhibit B-10, BCUC 2.33.4) A smaller project to replace a single unit will also lead to lower construction productivity and loss of economies of scale.

BC Hydro states: “The ‘break-even’ duration for the deferral is 5.5 years, and a deferral of any shorter duration is an economic cost, rather than a benefit.” If the replacement of U3 were deferred, the consequences of a “failure are difficult to predict but could include worker safety issues, environmental issues associated with oil contamination and debris, possible damage to other generating units and the loss of capacity in the LM until U3 is replaced.” (Exhibit B-10, BCUC 2.33)

4.3.6.2 Intervener Positions

AMPC submits that “it is entirely reasonable to replace components as needed and take steps to refurbish them in a prudent manner, without rebuilding every component of the powerhouse [including U3] to a Greenfield standard.” (AMPC Final Submission, p. 12)

The RW Beck Report concludes: “it is R.W. Beck’s opinion that the serious safety concerns should be addressed immediately and that an overall life extension program be formulated and initiated as soon as possible. In our opinion, major replacement of critical equipment and reconstruction and refurbishment of the vital Project components [including U3] will be the best path to ensuring a continued and long Project life at the Ruskin Hydroelectric Power Project.” (Exhibit B-1, Appendix B-3, p. 33 of 54) [emphasis added]

“The CEC submits that the choices BC Hydro has made with respect to the alternative approaches to the Ruskin Project work represent reasonable choices and that there is no substantive alternative which the CEC could focus on to recommend to the Commission that it should impose terms and conditions with respect to the Ruskin Project work, which would have the effect of substantially improving upon BC Hydro’s recommended Ruskin Project approach.” (CEC Final Submission, p. 7)

Commission Determination

The Commission Panel determines that it is appropriate to include the replacement/refurbishment of U3 within the scope of the Project at this time. There is no financial benefit to deferring it until the existing unit fails; in fact there could be substantial additional cost, as well as the worker safety and environmental risks through such a deferral. Further, such a deferral could impact BC Hydro’s ability to satisfy its legislated targets for self-sufficiency in 2017, as well as lose its ability to shape output to optimize value for its ratepayers. Replacing/refurbishing U3 at this time is fully consistent with the requirements of the amended Electricity Self-Sufficiency Regulation and the amended SD 10.

4.4 Commission Determination

The Commission Panel has considered the evidence related to the various alternatives presented in the Application and the submissions made by all interveners. BCOAPO, BCSEA, CEC, and MRCC fully support the Project as proposed. Mr. Ruskin has given implied support. We acknowledge CEC’s submission that BC Hydro’s evaluation of the Project may be too conservative:

“The CEC submits that the BC Hydro evaluation is likely too conservative and therefore submits that because the Ruskin Project has the highest capacity contribution of the alternatives that the economic case for the Ruskin Project is stronger than BC Hydro has shown.”

Furthermore, CEC states “The CEC submits that the valuation basis of clean and renewable firm energy used by BC Hydro is likely significantly understated.” and

“CEC submits the Commission should conclude that the Ruskin Project is the most cost-effective option among the alternatives reviewed and leads to strong support for the view that the public interest would best be served through approval of the Ruskin Project.”

Finally, “... a piecemeal approach may run significant risks of the interactions between the components of the project, which could have unintended consequences. The CEC does not believe there is sufficient merit in any potential savings to warrant undertaking the risks.”

(CEC Final Submission, pp. 5-6)

The Panel also acknowledges AMPC’s concerns related to “excessive costs” and Kwantlen’s concerns regarding the adequacy of consultation. These will be further addressed in subsequent Sections of this Decision. Further, the Panel acknowledges the concerns raised by CEBC and Mr. Quigley in their Final Submissions but, as previously stated, concludes that there is insufficient evidence on the record to merit further consideration of them.

The Commission Panel determines that the proposed Ruskin Dam and Powerhouse Upgrade Project is the most cost-effective alternative to address the underlying safety, reliability, environmental, and financial risks that give rise to the Project. The Commission Panel approves the scope of the Ruskin Dam and Powerhouse Upgrade Project as requested in the Application.

This includes:

- Replacement of the six central piers with four new inner piers and replacement of the existing radial gates with five new larger gates to address concerns related to the spillway gate and pier configuration component of the Project;
- Building a new cut-off structure above the dam and improving the drainage and downstream slope below the dam for the Right Abutment remediation component of the Project;
- Widening of the roadway to two lanes and the addition of a pedestrian walkway for the dam crossing component of the Project;

- Rehabilitation of the current Powerhouse, rather than developing a new one at a different location for the powerhouse component of the Project;
- A three generating unit configuration for the generation component of the Project;
- Replacement/refurbishment of generating unit U3 at this time; and
- Relocation of the Switchyard from the roof of the Powerhouse to an area near the Powerhouse on previously disturbed land owned by BC Hydro for the switchyard component of the Project.

This is fully consistent with the requirements of the amended Electricity Self-Sufficiency Regulation and amended SD 10.

5.0 PROJECT COSTING, SCHEDULE, AND RISK MANAGEMENT

In this Section of the Decision the Project Costs are reviewed (Sections 5.1 and 5.2), the Project Schedule is considered (Section 5.3), and Project Risk Management is assessed (Section 5.4).

5.1 Project Cost Components

BC Hydro's original application requested approval for a CPCN in the amount of \$856.9 million for the Project, which included \$718.10 million for the "Expected Amount" of Project costs based on P50 cost estimates, \$98.80 million for incremental other costs to bring its cost estimates to a P90 level, plus a further \$40 million "Management Reserve". BC Hydro subsequently amended its Application in its Evidentiary Update (Exhibit B-15) to request a CPCN be granted on the basis of the Expected Amount of \$718.10 million, a summary breakdown of which is shown in Table 2.4 of the Application (Exhibit B-1, p. 2-31).

BC Hydro explains that expenditures in excess of the Expected Amount up to the Authorized Amount require the prior approval of its internal Board Capital Projects Committee. BC Hydro also states that expenditures in excess of the Expected Amount could be subject to a prudence review in a future revenue requirements application proceeding. (Exhibit B-15, p. 2)

This Section of the Decision addresses the development of the Project costs resulting in the Expected Amount of \$718.10 million, including contingency, inflation, capital overhead and interest during construction (IDC). The Expected Amount represents the Project scope discussed and approved in Section 5.0.

The Project comprises the following components and cost elements:

	Ruskin Dam Project Cost Component	(\$ million)
1	Direct Construction	325.20
2	Project Management and Engineering	40.30
3	Other Indirect Construction	4.70
4	Sub-total Direct and Indirect	380.20
5	Contingency on Expected Amount	56.00
6	Dismantling and Removal	10.40
7	Inflation	41.40
8	Sub-total	107.80
9	Sub-total Implementation Amount	488.00
10	Capital Overhead (COH)	77.50
11	IDC	65.60
12	Sub total	143.10
13	Sub-total, Implementation, Loaded	631.10
14	Identification, Definition, Early Implementation	87.00
15	Total Expected Amount	\$718.10
	Less: Capital Overhead	77.50
	Expected Amount less COH	\$640.6

(Source: Exhibit B-1, Table 2-4, p. 2-31)

5.2 Project Cost Component Determinations

5.2.1 Direct and Indirect Costs

The direct construction costs of the Project are estimated as \$325.16 million. In addition there are project management and engineering costs of \$40.33 million, and indirect construction costs of \$14.68 million, resulting in total direct and indirect Project costs of \$380.20 million, before contingencies, loadings, and other costs.

BC Hydro describes the Expected Amount, \$718.10 million, as having an accuracy range of +/- 20 percent. It states that:

“The elements of the Project include items similar to those associated with the development of hydroelectric generation projects of a similar size. With the exception of the Right Abutment, there is little new or unusual technology, or

construction methodology, required in implementation that would necessitate an unusual form of contracting or specific assumption of construction risk by BC Hydro. However, there are two main challenges impacting construction at the site: [Space Limitations and Downstream Flow Requirements]” (Exhibit B-1, p. 2-30)

BC Hydro describes its Cost Risk Management approach in Exhibit B-1, Section 5.3.1, discussed below. The Panel determination with respect to direct costs follows that discussion.

5.2.2 Contingency on Expected Amount, Dismantling and Removal, and Inflation Contingency on Expected Amount

The Expected Amount costs include estimated contingency costs of \$56.0 million, calculated using a Monte Carlo statistical analysis based on the expected range of values for major cost categories. The analysis results in a probability distribution for the total construction costs. The resulting P50 and P90 values are then used as the basis for determining the Expected and Authorized Amounts for the Project cost estimate. (Exhibit B-7-1, BCUC 1.45.1)

BCOAPO seems to suggest that the Expected Amount of \$718.10 million excludes capital overheads and IDC. (BCOAPO Final Submission, p. 6) The Panel notes that both capital overhead and IDC calculated on the Expected Amount are included in requested \$718.10 million. (Exhibit B-1, Table 2-4)

AMPC comments on what it describes as “additional larger contingency amounts” and “margins in the construction cost estimate” of \$25 million for contract management and service fee, and \$20 million for currency exchange fees being, in addition to “a generous built-in contingency estimate.” (AMPC Final Submission, p. 13) The Panel notes that the \$20 million foreign exchange reserve amount was part of the Authorized Amount which is not included in the amended Application, and the \$25 million contract management fee is included in Direct Costs as Construction Management.

There were no comments from the other interveners addressing contingencies.

Commission Determination

The Commission Panel considers the Monte Carlo analysis methodology to be an appropriate tool for calculating contingencies, and considers BC Hydro's application of the Monte Carlo analysis to be acceptable for estimating the contingency of \$56.0 million on the Expected Amount. The \$56.0 million contingency provision included in the Expected Amount represents 14.7 percent of the total direct and indirect costs of \$380.20 million, a proportion which the Panel considers to be within a reasonable range for projects of this magnitude and complexity.

5.2.2.1 Dismantling and Removal

Dismantling and removal costs have been estimated at \$10.40 million, +/-2 percent of costs. No submissions have been made in respect of these costs.

Commission Determination

The Commission Panel accepts the estimate of dismantling and removal costs of \$10.40 million as reasonable.

5.2.2.2 Inflation

BC Hydro has used an inflation rate of 2.1 percent. Its rationale for the use of this inflation rate is described as follows:

“An inflation rate of 2.1 per cent is the current recommended rate used for cost estimating purposes for BC Hydro Generation projects for the years 2010 and onwards. The rate is consistent with the B.C. CPI rates provided by the B.C. Ministry of Finance which are used by BC Hydro for planning and net income forecast purposes; these are 2 per cent for 2011 and 2012, and 2.1 per cent for 2013 and 2015.” (Exhibit B-7-1, BCUC 1.39.1)

The Panel notes that the 2.1 percent annual inflation rate used in the Project cost estimate is the same as the BC Consumer Price Index annual planning value. (Exhibit B-7-1, BCUC 1.47.2) BC Hydro also indicates that cash flows for inflation and IDC calculations were determined on the basis of activity schedules and task duration assumptions. (Exhibit B-1, Appendix G-1, p. 5 of 14)

No intervener submissions were received with respect to the rate or method of calculating inflation for determination of the Expected Amount estimates.

Commission Determination

The Commission Panel considers that BC Hydro's rate and methodology for calculating inflation are appropriate for the Project, and determines that the rate and methodology are approved for the purposes of the CPCN Expected Amount cost estimates.

5.2.3 Capital Overhead (COH) Rate and Interest During Construction

BC Hydro states that its "... Capital Overhead (COH) rate is established at the beginning of each fiscal year for each BC Hydro business group and is determined by dividing the planned capital overhead amount by the planned capital expenditures eligible for COH. The COH rate increased from 13.3 percent in F2010 to 16.41 percent in F2011 because the amount of planned capital expenditures eligible for capital overhead decreased from F2010 to F2011." (Exhibit B-7-1, BCUC 1.39.1)

BC Hydro's response to CEC IR 1.11.6, Exhibit B-7-2 includes the observation that "... BC Hydro changes the overhead accumulation rate, either as costs and the level of capital activity change, or in response to applicable accounting requirements ... without affecting the economic outcome of any particular project. For these reasons, BC Hydro excludes IDC and capital overhead in project evaluation. This treatment was accepted by the BCUC in the *Revelstoke Decision* at p. 59."

Total COH included in the Expected Amount is \$77.50 million based on using a rate of 16.41 percent, the rate determined for 2011. BC Hydro estimates that the implementation of International Financial Reporting Standards (IFRS) would decrease BC Hydro's Generation Business Group Capital Overhead rate to 4.07 percent for 2012, but it is undertaking a more detailed study of COH allocation to confirm or revise the appropriate amount of overhead to allocate to capital under IFRS. (Exhibit B-18, BCUC 3.1.1)

BC Hydro comments on the COH rates as follows: "following the implementation of IFRS, the capital overhead rate will be lower because IFRS requires that additions of 'Property, Plant and Equipment' must be 'directly attributable' to the asset." In addition, BC Hydro "submits that the proper forum to examine capital overhead allocation is the F2012 to F2014 RRA." (Exhibit B-15, p. 4) BC Hydro is requesting that a CPCN be issued for the Project on the basis of, among other things, the Expected Amount, which includes a COH rate of 16.41 percent using existing Canadian Generally Accepted Accounting Principles (CGAAP).

BC Hydro notes that, "given that future capital overhead rates are unknown due to the variability of both capital expenditures and capitalizable overhead costs in future years, the rate in effect at the time of preparing the Project estimate is used as the proxy for future rates. BC Hydro acknowledges that in particular, there is uncertainty regarding future capitalized overhead rates relating to the application of IFRS. However, both BC Hydro's capitalizable overhead costs and the impact of applying IFRS can be addressed within BC Hydro's F12-F14 RRA and future RRA proceedings. As set out in Exhibit B-1-1, page 1-4, BC Hydro is proposing to submit semi-annual progress reports to the BCUC should a CPCN be granted for the Project. BC Hydro proposes that the semi-annual progress reports include the following:

- The cost impact/effect on the Expected Amount which reflects the application of IFRS; and
- A revised Project expenditure forecast reflecting the application of IFRS.

This information would be included in BC Hydro's ongoing semi-annual reporting to the BCUC after the BCUC issues its decision concerning BC Hydro's F12-F14 RRA." (Exhibit B-18, BCUC 3.1.4)

Although some interveners have expressed concern regarding the overall level of Project costs, no intervener submissions were received specifically with respect to the rate or method of calculating COH rates for determination of the Expected Amount estimates.

Commission Determination

The Commission Panel notes that the impact of any IFRS adjustment on the determination of the capital overhead rate would be significant. The Panel also notes BC Hydro's statement that the use of the current 16.41 percent capital overhead rate for the purposes of determining an Expected Amount for this Project would be a proxy for whatever rate is ultimately established for each year over the lifetime of the construction of the Project. However, the Panel is concerned that the use of a proxy rate as high as the proposed 16.41 percent may become "embedded" in the Expected Amount for the purpose of evaluating the actual versus estimated performance of the Project costs. The Panel does note the rather significant yearly variations in capital overhead rates which appear to be driven primarily by fluctuations in direct capital expenditures, without corresponding fluctuations in the annual expenditures on capital overhead items.

The Panel concurs with BC Hydro's view that the ultimate determination of the Capital Overhead is, at this point of time, appropriately made in the course of BC Hydro's Revenue Requirement proceedings.

The Commission Panel is not convinced that the current Capital Overhead Rate of 16.74 percent used by BC Hydro is the appropriate rate given the uncertainty with respect to the determination of the applicable rate for 2012 and subsequent years. **The Commission Panel determines that the Basic Expected Amount for the Project should exclude Capital Overhead, with the provision to add Capital Overhead at the applicable Capital Overhead Rate approved by the Commission from time to time, to arrive at a Total Expected Amount. This approach results in a Basic Expected**

Amount for the Project of \$640.6 million, being the requested Expected Amount of \$718.10 million less the proposed COH of \$77.50 million. This \$640.6 million will be supplemented in the future as COH rates are approved by the Commission. The Commission Panel directs BC Hydro to reflect this approach in its proposed semi-annual progress reports for the Project.

5.2.3.1 Interest During Construction

BC Hydro states that “The IDC rate represents the cost of borrowing to BC Hydro and is the forecast weighted average cost of debt. For purposes of establishing IDC rates, BC Hydro uses financial assumptions from the B.C. Ministry of Finance.” (Exhibit B-7, BCUC 1.39.1)

As stated above some interveners have expressed concern regarding the overall level of Project costs. However, no intervener submissions were received specifically with respect to the rate or method of calculating IDC for determination of the Expected Amount estimates.

Commission Determination

The Commission Panel notes that the rate for calculation of IDC will fluctuate and will be based on actual costs of debt as the Project progresses. **The Panel considers that BC Hydro’s rate and methodology for calculating IDC are appropriate, and determines that the rate and methodology are approved for the purposes of the CPCN Expected Amount cost estimates.**

5.2.4 Intervener Submissions Related to the Expected Amount

AMPC submits that the Commission’s review should bear in mind the broader conclusions of the Independent Review Panel of BC Hydro’s operations. AMPC states that it “... is concerned about the scope of the Project and BC Hydro’s overall approach, and surprised that, following a senior and credible review of its operations and practices, BC Hydro ‘[determined] that modification of the Project scope and the Expected Amount is not required’. It is improbable that the Project is free of the issues raised by the Independent Review Panel.” (AMPC Final Submission, pp. 2-3)

While “BCOAPO has serious concerns about the cost uncertainties associated with BC Hydro’s application for its ‘Expected Amount’ Those concerns are subsumed by the greater public interest and as such, BCOAPO supports the Ruskin Project.” (BCOAPO Final Submission, p. 10) In support “CEC accepts the BC Hydro Expected Amount cost estimate for the Ruskin Project of \$718.10 million...” (CEC Final Submission, p. 7)

BCSEA, CEBC, Kwantlen, MRCC, and Mr. Quigley made no specific submissions in relation to the Expected Amount.

5.2.5 Commission Determination

The Panel notes the references to the Independent Review Panel report, in the Final Submission of AMPC to BC Hydro’s “zero risk culture”, “gold plating”, and “over-engineering” with respect to its capital projects. AMPC submits that “BC Hydro has in fact adopted a ‘gold plated’ approach to the Project, missing opportunities to limit Project scope and reduce costs and ratepayer impacts.” (AMPC Final Submission, p. 3) Further, AMPC submits that it “has focussed its attention on several discrete areas of the Project. AMPC seeks a determination by the Commission that these amounts are excessive, and a corresponding reduction of the Project’s Authorized Amount.” (AMPC Final Submission, p. 4)

The Panel considers that were these allegations valid, they may well be applicable to both cost estimates and the design/scoping of such projects. However, in this Application, there has been no evidence adduced which can be said to give any supporting weight to the allegations.

Consequently, the Panel has no basis on which to consider any adjustments to the Application associated with such the allegations. Furthermore, while AMPC seeks a reduction in the Project’s Authorized Amount, the Panel notes that the revised Application in the Evidentiary Update seeks only the Expected Amount and not the Authorized Amount.

In respect to AMPC’s reference to zero risk culture, gold plating, and over engineering, **the Commission Panel has reviewed BC Hydro’s evidence, including responses to Information**

Requests, and concludes that there is no evidentiary basis upon which to make a finding other than to accept BC Hydro's evidence with respect to the direct cost estimates for the Project.

Subject to the directive provided in Section 5.2.3, the Commission Panel approves the Expected Amount of \$640.6 million for the Project, plus Capital Overhead at the rates determined from time to time by the Commission in its decisions on BC Hydro's Revenue Requirement Applications.

5.3 Schedule

BC Hydro has developed a Project schedule to achieve a completion date of March 2018. The schedule is the result of the Project elements and construction period constraints itemized in Section 2.5.1 of the Application. Details of the schedule are provided in Appendix D of Exhibit B-1.

No intervener made submissions on the proposed Project schedule.

Commission Determination

The Commission Panel accepts the Project Schedule set out in the Application.

5.4 Risk Management

BC Hydro describes its risk management of the Project in Exhibit B-1, Section 5. It describes risks of the Definition Phase of the Project to include:

- Delays caused by the Commission not issuing a CPCN in a timely manner, thereby contributing to project implementation delays, impacts on project costs, and extension of operational risks. The status quo is not considered an option; BC Hydro must address the current condition of the Ruskin Facility irrespective of the long-term alternative implemented.
- Risks associated with First Nations whose rights or interests are potentially impacted by the Project. The Kwantlen have raised concerns in relation to the Project and these are

more fully addressed in Section 7.0. No other First Nation has raised any issues or objections to the Project.

The Implementation Phase risks discussed are set out in Exhibit B-1, Section 5.3 and include:

1. Cost
2. Schedule
3. Construction
4. Resource
5. Worker Safety
6. Public Safety
7. Outage and Failure
8. Environmental

These are discussed below.

5.4.1 Cost Risk Management

BC Hydro states that “In the absence of treatment including mitigation measures, the Project cost risk is high; With treatment, the Project cost risk is medium;” (Exhibit B-1, p. 5-3) BC Hydro indicates that the risk of incorrect cost estimates has been reduced by:

- Clearly defining the scope of the Project and conducting a detailed cost analysis using range estimating techniques (Monte Carlo simulation) that take into account the differing levels of uncertainty.
- Including a Management Reserve in the Project cost to fund potential items which are not currently in scope but which BC Hydro may determine are necessary and appropriate to be included in the Project. In its Evidentiary Update (Exhibit B-15), BC Hydro was no longer seeking approval for this Management Reserve as it is not included in the Expected Amount.
- Retaining a third party consultant to provide a due diligence review of BC Hydro’s cost estimate, contracts strategy, and schedule.

- Developing a detailed Project schedule to enable best estimate for accumulation of direct and indirect costs, and loadings such as IDC.
- Developing a procurement strategy for the Project which incorporates advanced level of design, the assignment of experienced staff to the Project, early contractor involvement in the most specialized portion of the Project, preparing detailed specifications, and bi-weekly contractor progress reports.

In its Final Submission BCOAPO also notes that the Expected Amount does not include the Management Reserve allowance and, therefore, “does not adequately address the risks associated with cost escalation.” (BCOAPO Final Submission, p. 6) As indicated above, the Panel notes that expenditures in excess of the Expected Amount could be subject to a prudency review.

The Commission Panel notes that BC Hydro’s amended request for approval of the Expected Amount instead of the Authorized Amount no longer recognizes the \$40 million Management Reserve originally sought. As such foreign exchange risks and potential price fluctuations are of concern to the Panel. However, the Panel takes note of the semi-annual reports suggested by BC Hydro, and BC Hydro’s claim that “expenditures in excess of the Expected Amount could be subject to a prudency review” in the future. (Exhibit B-15, p. 3)

5.4.2 Schedule Risk Management

BC Hydro has identified three risks potentially impacting the Project schedule. These include:

- Excavation work and material challenges;
- Adverse weather; and
- Inflow conditions.

A series of management techniques and scheduling strategies have been identified to mitigate these risks.

5.4.3 Construction Risk Management

BC Hydro has identified that the three Project components with the greatest risk potential include:

- The Upper Dam piers and gates;
- The Right Abutment cut-off wall; and
- The Turbine and Generator Technical Design.

A Construction Management Plan (CMP) will be prepared with various management activities and construction strategies designed to mitigate the risks identified.

5.4.4 Resource Risk Management

BC Hydro has identified risks associated with:

- Availability of scarce technical expertise; and
- Coordination of contractor activities.

BC Hydro has rated these activities as low and medium risk respectively. It believes adequate resources are available locally. Furthermore, most of the responsibility to secure the scarce resources will fall on contractors and their ability to fulfill this responsibility will be considered in contractor selection. BC Hydro is structuring work packages to minimize the interdependencies between major work packages and possible interference between contractors performing the main contracts.

5.4.5 Worker Safety Risk Management

BC Hydro is well familiar with the hazards of working in its own generating facilities. A full-time staff member will be assigned as the Person in Charge during construction with responsibilities including supervising electrical and mechanical hazard isolation for the contractor's work, and

supervision of the contractor's safety staff. Several control and mitigation measures have also been identified for worker safety, including a Site Specific Safety Management Plan (SSSMP), emergency response plans, and ongoing compliance audits with WorkSafeBC regulations and the SSSMP.

5.4.6 Public Safety Risk Management

BC Hydro will develop a Public Safety Management Plan for the Project. It will address risks related to:

- Road closures and road access restrictions;
- Dam and waterway access restrictions; and
- Flood and seismic risk management.

Appropriate procedures and protocols in regards to these will be introduced to minimize and mitigate risks to public safety.

5.4.7 Outage and Failure Risk Management

BC Hydro recognizes that there are risks associated with extending the use of the Powerhouse equipment during the implementation phase. BC Hydro will minimize the risks of forced outages during construction by replacing units in the sequence from the least reliable to the most reliable. BC Hydro does not believe there are any means to reduce residual risks. Forced outage risks reduce significantly after each new unit is placed in service and after residual commissioning and start up deficiencies are corrected.

Also, there are risks that during construction contractors could accidentally damage one or more units resulting in an unplanned outage. To mitigate this, contractors will be required to submit a CMP and Risk Management Plan prior to starting construction.

5.4.8 Environmental Risk Management

BC Hydro has identified the areas of greatest potential environmental risk during construction.

These include:

- Loss of continuity of flow;
- Spill volumes to maintain flow continuity exceeding Total Dissolved Gas guidelines;
- Potential reservoir draw-downs impacting the ability to maintain tailwater elevations by spilling in the event of a forced outage;
- Relocation of the Switchyard to a previously disturbed area increasing the Ruskin Facility footprint; and
- Concrete, soil and excavation work in proximity to water.

During construction, BC Hydro will have an on-site environmental risk monitor to ensure appropriate risk management of such environmental matters.

Commission Determination

BC Hydro provides a summary of material risks for the Project, control and mitigation strategies employed, and the level of residual risk remaining after implementation of the control and mitigation strategy in Exhibit B-1, Table 5-1, pp. 5-19 to 5-22.

The Panel accepts the adequacy of BC Hydro's risk identification and approaches to their management and mitigation. BC Hydro's assessment of these risks is reasonable and they should be manageable through appropriate monitoring and mitigation.

5.5 Project Reporting

As BC Hydro proceeds with the Project the Commission Panel expects to be kept informed of its progress in relation to issues encountered, cost performance, schedule, and risk management.

Commission Determination

We direct BC Hydro to file with the Commission semi-annual progress reports on the Project schedule, costs with a comparison to the Expected Amount as set out in the Application, and any variances or difficulties that the Project may be encountering. The form and content of the semi-annual progress reports will be consistent with other BC Hydro capital project progress reports filed with the Commission. The semi-annual progress reports will be filed within 45 days of the end of each reporting period.

We also direct BC Hydro file a final report within six months of the end or substantial completion of the Project. The final report is to include a breakdown of the final costs of the Project, a comparison of these costs to the Expected Amount set out in the Application and provide an explanation of all material cost variances.

6.0 PUBLIC ENGAGEMENT

BC Hydro has identified a variety of public groups affected by the Ruskin Facility including local businesses and local area residents in the Ruskin Townsite, mobile home parks, and general vicinity. They include users of Hayward Street, the single lane roadway crossing over the dam, and users of several recreational sites and facilities in the general area of the Ruskin Facility. BC Hydro states that the Ruskin Facility is an integral part of the community and because of past public engagement that it has carried out in the area, “BC Hydro has built an understanding of the community surrounding the Ruskin Facility, their issues and interests, and preferred methods of communication.” (Exhibit B-1, p. 4-18).

Since 2005, BC Hydro has identified and engaged the following groups with respect to the Project: Mission Mayor and Council, local residents and property owners, recreational users, local businesses and the Mission Chamber of Commerce, local community and environmental groups, Members of the Legislative Assembly for Mission-Maple Ridge and Mission-Abbotsford Electoral Districts, emergency responders, School District #75, Stave Monitoring Advisory Committee, Department of Fisheries and Oceans, Transport Canada, Canadian Wildlife Service, Ministry of Environment (MOE), and Environmental Assessment Office (EAO).

Approaches and methods of communication have occurred with individuals, communities, and local governments and have included workshops, open houses, site visits, local newspaper advertisements and articles, newsletters, project signage, the BC Hydro website, emails, and personal communications with project staff. Project newsletters were issued regularly via postal drop to about 4,000 area residents.

There have been site visits and meetings with various government agencies, including the MOE and EAO.

The Mission Mayor and Council and Mission Chamber of Commerce have expressed direct support for the Project, as have the Fraser Valley Regional District, and the MLA for Maple Ridge-Mission.

The Mission Royal Canadian Mounted Police, the Mission Fire and Rescue Service, and the Mission Early Childhood Development Committee have also supported the widening of the dam crossing to two lanes.

Particular issues raised through consultation activities largely relate to impacts during construction and deal with Dam crossing closure during construction, recreation facility closure during construction, safety, environmental matters, construction related noise, and duration of construction. BC Hydro has proposed a number of mitigation measures to deal with these issues. It has also committed to continue to meet with the various groups to understand where improvements can be made during construction of the Project. Engagement activities proposed as the Project progresses include meetings, presentations, workshops, targeted newsletters, media releases, and the installation of notification signage. BC Hydro has identified specific publics, dates and timing, and descriptions of communications proposed for:

- Project updates, briefings, and reports to local governments
- Briefing and updates to the Provincial Government
- Public updates, information sessions, notifications, and workshops
- Media releases and advertising, website and phone

BC Hydro has committed to continuing public engagement as the Project progresses.

No interveners have commented on or taken exception to the manner in which BC Hydro has undertaken its public consultation activities regarding the Project. The Kwantlen First Nation has serious concerns with BC Hydro's consultations with the Kwantlen. These concerns are more fully addressed in Section 7.0, First Nations Consultation.

Commission Determination

The Commission Panel finds that overall public consultation efforts have been adequate to date.

The Commission's Public Consultation Guidelines have been followed in that: stakeholders who

may be directly impacted by the Project have been identified; information and consultation programs have been undertaken with them; their issues and concerns have been identified; measures to address these have been indicated or explanations provided as to why no further action is required; outstanding issues and concerns have been identified; and BC Hydro has committed to address these as the Project proceeds.

7.0 FIRST NATIONS CONSULTATION

Section 7 explores the nature and adequacy of consultation with First Nations potentially impacted by the Project, focusing primarily on the Kwantlen First Nation which was the only First Nation to actively intervene in this proceeding.

7.1 The Duty to Consult

7.1.1 The Crown's Duty

BC Hydro, as a Crown Corporation, has a constitutional duty to consult First Nations for the activities it undertakes that may impact First Nations' rights or title when it has knowledge of the potential existence of a First Nations' right or title. The consultation duty is grounded in the honour of the Crown. The duty is triggered when the Crown has knowledge, real or constructive, of the rights asserted under section 35(1) of the *Constitution Act, 1982* which states, in part, "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

The Supreme Court of Canada has examined the origin of the duty to consult and accommodate. The Court in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (*Haida Nation*) states at paragraph 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.

In *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, 2010 SCC 43 (*Rio Tinto Alcan*) the Court states:

The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right.

...The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests... (paras. 33-34)

The level of consultation and accommodation required in a given case is proportionate to a preliminary assessment of a First Nation's strength of claim to rights or title and to the seriousness of the potentially adverse effect on that claimed right and title (*Haida Nation*, para. 39). This is commonly referred to as the *Haida* spectrum. In cases where the claim to title is weak, the First Nation right is limited or the infringement will be minor, the level of consultation required will be at the low end of the spectrum. Conversely, where a strong claim is established, the rights and infringement are of high importance to the First Nation and the risk of damage is high then the scope of the duty is at the high end of the spectrum.

7.1.2 The Commission's Role

The Commission's role in assessing the Crown's duty to consult was confirmed by the Supreme Court of Canada in *Rio Tinto Alcan* where it held that the Commission has the power to consider whether adequate consultation with First Nations has taken place. (*Rio Tinto Alcan*, para. 74)

Further, in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (*Kwikwetlem*), the British Columbia Court of Appeal affirmed the Commission's obligation at paragraph 13 in relation to BC Hydro's Interior to Lower Mainland (ILM) Transmission Project:

The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled.

In *Kwikwetlem*, the Court also held that the Commission's duty is to determine whether the Crown's duty to consult and accommodate First Nations has been adequate up to the point of the Commission's decision.⁷

The following Sections of this Decision address the Commission's duty.

7.2 BC Hydro's Consultation with First Nations other than Kwantlen

This Section considers the scope of consultation with all First Nations and Tribal Councils excluding Kwantlen First Nation as Kwantlen was the only group to actively intervene in the Proceeding and present evidence and Argument. Consultation with Kwantlen is addressed in Section 7.3 of this Decision.

7.2.1 Identification of Potentially Impacted First Nations

BC Hydro reviewed publicly available information on First Nations asserted traditional territories and used knowledge it had developed from working in the Project area to identify five First Nations and Tribal Councils that are potentially impacted by the Project: Kwantlen; Stó:lō Nation (SN); the Stó:lō Nation Tribal Council (STC); Matsqui First Nation (Matsqui); and the Hul'qumi'num Treaty Group (HTG). (Exhibit B-1, p. 4-2)

The STC represents 8 First Nations, including Kwantlen. The SN represents 11 First Nations, including Matsqui. The HTG is made up of 6 Vancouver Island-based First Nations and the Project is located within the group's asserted "Marine Traditional Territory." (Exhibit B-1, p. 4-3)

7.2.2 BC Hydro's Strength of Claim Assessments

BC Hydro relied on various sources of information to assess strength of claim, including publicly available information such as information from the BC Treaty Commission website, BC Hydro's own

⁷ *Kwikwetlem*, paras 15 and 70.

knowledge, and information from the BC EAO. For Matsqui, BC Hydro also relied on an ethnography entitled “An Examination of Matsqui Traditional Territory, A Literature Review” written by Kennedy and dated 2011 (2011 Matsqui Report). (Exhibit B-7, BCUC 1.14.1, Attachment 2) The 2011 Matsqui Report was commissioned by BC Hydro in March 2011 to summarize known and available evidence and concludes that Matsqui’s traditional territory was on the south bank of the Fraser River. It further claims that Matsqui were forced from the Fraser by Kwantlen sometime before 1900 but the time frame of Matsqui’s resulting migration is not known. (Exhibit B-7, BCUC 1.14.1, Attachment 2, p. 21 of 29)

Based on the evidence it reviewed, BC Hydro’s preliminary assessment is that Matsqui has a weak claim to the Project area and that the scope of the duty to consult Matsqui is at the lower end of the *Haida* spectrum. (Exhibit B-7, BCUC 1.14.1)

BC Hydro did not assess a strength of claim for SN and STC given their directions to BC Hydro to consult with Kwantlen on the Project, which are discussed in the next section.

BC Hydro’s view is that there is no duty to consult the HTG member First Nations because the Project area is outside the core territory of the HTG members. (Exhibit B-7, BCUC 1.14.1)

7.2.3 Consultation with SN, STC and HTG

BC Hydro notified the SN of the Project by email dated March 28, 2007, and offered to make a presentation to the Tribal Council. The SN responded by letter dated May 18, 2007, and provided a further letter at BC Hydro’s request, dated December 22, 2009, whereby they informed BC Hydro that the Project is within the core territory of Kwantlen and referred consultation to the Kwantlen. (Exhibit B-1, Appendix H-2, pp. 1-6) At the time of BC Hydro’s first letter Matsqui were members of the SN. (Exhibit B-7, BCUC 1.27.1)

BC Hydro notified the STC of the Project by email dated May 17, 2007. STC responded to BC Hydro by letter dated June 22, 2007, stating that it respects Kwantlen's authority to deal with its own territory. (Exhibit B-1, Appendix H-3, pp. 1-6)

BC Hydro informed the HTG of the Project in November 2008, after it applied to the EAO and the EAO identified the HTG as potentially being affected by the Project. BC Hydro also provided the HTG with the Summary of Information document in December 2009 (which is discussed further in Section 7.3 below) requesting the HTG to contact BC Hydro if further information about the Project was required or if the HTG had any concerns.

In response, HTG sent BC Hydro a letter on February 1, 2010, informing BC Hydro that the HTG Referrals Office was permanently closed and that the HTG member First Nations must be contacted individually. The letter provided contact information for the six member First Nations. (Exhibit B-1, Appendix H-5, pp. 6-7)

BC Hydro decided not to provide further information to HTG members because the Project is located outside the core territory asserted by the HTG as shown in the map provided to the BC Treaty Commission. (Exhibit B-1, Appendix H-5, p. 1; Exhibit B-1, p. 4-14).

7.2.4 Consultation with Matsqui

In November 2008, BC Hydro informed Matsqui of the Project after the EAO identified Matsqui as potentially being affected. BC Hydro subsequently provided Matsqui with the Summary of Information (discussed in Section 7.3) and informed them of BC Hydro's plan to file the Application with the Commission. BC Hydro received no response from Matsqui until February 2011. (Exhibit B-1, p. 4-12)

In February 2011, BC Hydro sent a copy of the CPCN Application to Matsqui. On February 28, 2011, BC Hydro held a public workshop on the CPCN Application which legal counsel for Matsqui attended. BC Hydro states it first learned Matsqui were interested in the Project from the

workshop because BC Hydro had received no indication from Matsqui that they were interested before that date. (Exhibit B-7, BCUC 1.27.3)

In March 2011, Matsqui requested capacity funding to review the CPCN Application. BC Hydro provided the Matsqui with capacity funding in March and April 2011. (Exhibit B-7, BCUC 1.14.3.1)

In late March and early April of 2011, BC Hydro sent Matsqui a copy of two ethnographies, including the 2011 Matsqui Report and a copy of BCUC IR 1.14.1 (found at Exhibit B-7) which provides BC Hydro's detailed assessment of Matsqui's strength of claim assessment as weak and the scope of duty to consult as at the lower end of the *Haida* spectrum.

In response, on April 18, 2011, Matsqui emailed BC Hydro stating they had reviewed the 2011 Matsqui Report and BC Hydro's response to BCUC IR 1.14.1 and disagreed with BC Hydro's assessment that they have a weak claim to the Project area. Matsqui raises concerns that BC Hydro used the wrong map to assess their strength of claim, that the Project infringes Matsqui title, and that they should have been involved in BC Hydro's determination of which project alternative to pursue. In the email, Matsqui made requests for:

- i. information on which BC Hydro made the decision not to pursue decommissioning;
- ii. an explanation of capital costs for the Project and how any aboriginal consultation and accommodation costs were arrived at; and
- iii. information on whether revenue sharing was considered.

(Exhibit B-7, Attachment 1 to BCUC 1.27.1)

BC Hydro confirms it previously received the map Matsqui refers to on February 20, 2009 in relation to the ILM Project. (Exhibit B-10, BCUC 2.38.1)

The Matsqui did not intervene in this Proceeding and did not raise concerns with the Commission about the adequacy of consultation.

Commission Determination

The Commission Panel finds BC Hydro's consultation with respect to the Stó:lō Nation, the Stó:lō Nation Tribal Council, Matsqui First Nation, and the Hul'qumi'num Treaty Group to date to be adequate for the Project. Both the SN and the STC clearly directed BC Hydro to consult with the Kwantlen.

The Commission has reviewed the Statement of Intent Map provided by the HTG to the BC Treaty Commission (Exhibit B-1, Appendix H-5, p. 1) and agrees with BC Hydro that the Project is not within the core traditional territory claimed by the HTG. BC Hydro therefore does not have a duty to consult the HTG members.

Although Matsqui raised concerns to BC Hydro about the adequacy of consultation, they did not raise these same concerns with the Commission even though they were given proper notice of the Proceeding. Matsqui were aware of the Proceeding as they attended one of the activities on the Regulatory Timetable.

In *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage) 2005 SCC 69 (*Mikisew Cree*), para. 65 the Supreme Court of Canada states:

It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution.

Given that Matsqui had an opportunity to make their case known with the Commission but chose not to do so, the Commission interprets this lack of comment to the Commission to mean that Matsqui considers consultation to be adequate to this point.

7.3 BC Hydro's Consultation with Kwantlen

BC Hydro submitted an extensive consultation log outlining its meetings, correspondence and communications with Kwantlen. Between December 2006 and April 2011, BC Hydro and Kwantlen met 36 times and had 6 site visits. The consultation record is too large to recount; accordingly, this Section describes those events that have significance to the overall Decision.

On November 1, 2006, BC Hydro sent a form notification letter to the Kwantlen about the Project and followed up with an email and phone call to set up a meeting. The letter states, in part, "after examining a number of options for upgrading the dam, we are now completing engineering design for this work. Over the next several years, we will design and implement an upgrade to the dam." (Exhibit B-1, Appendix H-1, p. 3)

Kwantlen and BC Hydro met for the first time on the Project on December 20, 2006. Between December 2006 and December 2009 BC Hydro and Kwantlen met 12 times and had 2 site visits (Exhibit B-1, pp. 4-5 to 4-8)

Tumia Knott, the Kwantlen councillor who is the primary Band member engaged in consultation with BC Hydro on the Project, states that by the spring of 2007, Kwantlen understood the Project to consist of upgrades to the Dam to bring it up to seismic standards and replacement or upgrade of the generators. (Exhibit C3-6, Evidence of Tumia Knott, p. 5)

Ms. Knott recalls asking BC Hydro whether decommissioning would be considered at the October 22, 2007 meeting and she understood that BC Hydro would do a cost comparison of decommissioning to justify the expense associated with the Project. Ms. Knott submits there was no further information provided to indicate decommissioning was viable. (Exhibit C3-6, Evidence of Tumia Knott, p. 5)

At a meeting on October 22, 2007, Kwantlen presented BC Hydro with a Memorandum of Understanding (MOU) to establish a framework to deal with the broader relationship between

Kwantlen and BC Hydro and their mutual interests in the Stave River system rather than dealing with project-based matters. Over the next eleven months the proposed MOU was a topic of discussion at meetings between the parties. It is Kwantlen's evidence that BC Hydro responded to the MOU on September 25, 2008, and advised Kwantlen it did not have the mandate to address historical grievances but would be prepared to work with Kwantlen on other items in the MOU. (Exhibit C3-6, Evidence of Tumia Knott, p. 6)

In the fall of 2008 BC Hydro informed Kwantlen that Right Abutment Stage 1 work needed to occur on the area of a particular archaeological site, DhRo59. Kwantlen states that its archaeologist tried to identify construction alternatives to save the site but BC Hydro advised there were no other options. Kwantlen states it reluctantly agreed to archaeological work to identify and preserve artefacts at DhRo59. The archaeological work took place in the summer of 2009 and uncovered hearths, storage boxes, and house floors indicating the site was most likely used for habitation. (Exhibit C3-6, Evidence of Duncan McLaren, p. 2)

Kwantlen states that part way through the excavation BC Hydro advised Kwantlen that it had examined the soil at the site and found it to be unsuitable for the shoring work required and that BC Hydro would proceed with an alternative design that did not require destruction of DhRo59. Ms. Knott states:

We were frankly shocked that, after insisting that there was simply no option but destroying the site to build the concrete shoring, BC Hydro then announced that it did not in fact need to go ahead with the work on the site and had come up with another alternative. I would describe this event as a set-back in our relationship with BC Hydro. It undermined our faith in the reliability of the information BC Hydro was giving us, as well as our confidence in the thoroughness of their assessment of ways in which to avoid impacts to Kwantlen. It also affected the pace and timing of our consultations concerning the Ruskin Upgrade Project, as we were occupied in the summer of 2009 with the excavation and then, subsequent to BC Hydro revising its plans, with discussions about how to remedy what now appeared to be the needless destruction of an important archaeological site. (Exhibit C3-6, Evidence of Tumia Knott, pp. 7-9)

BC Hydro states that it and Kwantlen agreed on accommodation measures for this situation in the form of an artefact repository for archaeological materials recovered in the Right Abutment Stage 1 work. (Exhibit B-7, BCUC 1.23.1)

On May 30, 2008 BC Hydro sent Kwantlen draft Terms of Reference for four Environmental and Archaeological studies. BC Hydro states that Kwantlen only provided written comments on the draft Terms of Reference for the archaeology studies. (Exhibit B-7, BCUC 1.13.1)

Between May and August 2008, Kwantlen provided a field assistant for vegetation and wildlife studies, led archaeological assessments, and provided on-site archaeological and environmental monitoring for BC Hydro work. (Exhibit B-1, pp. 4-5, 4-6)

In October 2008, BC Hydro informed Kwantlen that it was going to voluntarily opt-in to the EAO process and requested Kwantlen to provide comments on the draft project description within two weeks. (Exhibit B-1, Appendix H-1, p. 92) BC Hydro eventually submitted an application to the EAO on January 15, 2009, but the EAO refused to grant the application. (Exhibit B-7-2, Kwantlen 1.1.1)

On February 20, 2009 Kwantlen participated in a site visit to the Ruskin Facility by the BC Minister of Environment and the Environmental Assessment Office. Kwantlen states that at this visit BC Hydro described the Project as a seismic upgrade and generator replacement. (Exhibit C3-6, Evidence of Tumia Knott, p. 8)

In March 2010, BC Hydro, Kwantlen and Kwantlen's archaeologist completed a jointly-developed plan for the management of archaeological work in the Stave and Hayward Lake Reservoirs from 2010 to 2030. (Exhibit B-7-2, Kwantlen 1.6.1)

At a meeting on December 15, 2009, BC Hydro provided Kwantlen with a document entitled "Ruskin Dam and Powerhouse Upgrade Project: Summary of Information." Appendix B of that document contains a five page section entitled "Project Design Alternatives Considered" which describes three alternatives that were considered to upgrade the Dam including an option to fix the

existing facility, an option to lower Hayward Lake Reservoir, and an option to decommission the dam. The document explains why the four options other than the Preferred Alternative were dismissed by BC Hydro. For decommissioning of the Dam, BC Hydro states in the Summary of Information that the option was not considered viable because of engineering, social, and environmental costs, as well as an uncertain time frame for completion. (Exhibit B-1, Appendix H-1, p. 128)

Kwantlen states it received the document but that BC Hydro made no indication that it was seriously considering other options.

“Everything we had been told to that date indicated that the decision to proceed with the Ruskin Upgrade Project had been made. I do not recall BC Hydro saying anything to indicate that this was not the case and in fact there was a real opportunity for Kwantlen to influence the selection of options and, importantly, to participate in a discussion about whether the dam should be removed or decommissioned.” (Exhibit C3-6, Evidence of Tumia Knott, p. 10)

Kwantlen states this is supported by the fact that the Summary of Information refers to the assessment of alternatives in the past tense. (Exhibit C3-6, Evidence of Tumia Knott, p. 10)

At that meeting Kwantlen also tabled a proposal to have BC Hydro fund an archaeological repository. BC Hydro agreed to the proposal. (Exhibit C3-6, Evidence of Tumia Knott, p. 9)

On July 22, 2010, BC Hydro made a PowerPoint presentation to update the Kwantlen on the Project. The presentation includes one slide which lists the three options BC Hydro presented in the Summary of Information, although the presentation uses slightly different names than the Summary. The presentation also includes a slide on the minimal cost studies that BC Hydro would complete on the alternatives as “[d]ue-diligence in evaluating all alternatives to the Ruskin Dam and Powerhouse Upgrade Project and ensuring preferred option is reflective of public interest objectives.” The presentation includes six slides on the Preferred Alternative. (Exhibit B-1, Appendix H-1, pp. 139-163)

Kwantlen acknowledges that it received the presentation but that Ms. Knott's understanding was that the slide with the information on alternatives was provided to explain the process by which BC Hydro had determined that it would proceed with the Project. (Exhibit C3-6, Evidence of Tumia Knott, p. 11)

On September 28, 2010, BC Hydro met with Kwantlen and their newly hired environmental consultant, Pottinger Gaherty. BC Hydro presented a PowerPoint on the results of the environmental studies. (Exhibit B-1, Appendix H-1, pp. 164-224)

On October 13, 2010, Pottinger Gaherty provided Kwantlen with its preliminary review on the Project. This preliminary review made 31 requests of BC Hydro including requests for more information, requests for BC Hydro to explain various issues, and requests for documents. (Exhibit B-1, Appendix H-1, pp. 225-228)

Between October 2010 and February 2011, BC Hydro provided responses to Pottinger Gaherty's requests. (Exhibit B-1, Appendix H-1, pp. 229-345)

7.3.1 Capacity Funding

Throughout the consultation timeline the issue of capacity funding was under consideration. BC Hydro offered capacity funding at the initial meeting with Kwantlen in December 2006. Kwantlen raised the issue at a February 14, 2007 meeting and an initial capacity funding payment was made in July 2007. BC Hydro states that it made additional capacity funding offers in October 2008 and September 2009 and offered to pay for Kwantlen's work on an invoice basis. BC Hydro provided interim funding on January 5, 2010 for Kwantlen to complete a Traditional Use Study. An overall Capacity Funding Agreement was concluded in June 2010 (Exhibit B-7, BCUC 1.14.3.1)

Kwantlen's evidence is that when BC Hydro initially started discussing a broader capacity funding agreement Kwantlen did not know the scope of the review, and whether it would include the BC EAO process or not. Kwantlen wanted to defer serious discussion about capacity funding until

there was more clarity around the Project review process. Kwantlen states that by 2010 they knew the Project would not go through the EAO process and accordingly finalized a funding agreement on June 28, 2010. (Exhibit C3-6, Evidence of Tumia Knott, pp. 7, 9)

In its Rebuttal Evidence, BC Hydro states that it informed Kwantlen about the EAO decision no later than June 2, 2009 and that the delay in executing a Capacity Funding Agreement was caused by the need to address the Right Abutment Work issues and Kwantlen's desire to address broader relationship issues. (Exhibit B-16, p. 3)

7.3.2 The Project Alternatives

BC Hydro states that although the five options considered are technically or theoretically plausible that does not mean they are acceptable to other government or regulatory agencies. Specifically BC Hydro cites the District of Mission, which draws on Hayward Reservoir for drinking water. All the alternatives would trigger *Canadian Environmental Assessment Act*⁸ assessments with the Department of Fisheries and Oceans as the likely lead agency. Three of the alternatives would also trigger reviews under the *Utilities Commission Act*.

BC Hydro submits that it presented the Project alternatives to Kwantlen, in writing, five times:

- December 15, 2009 – Summary of Information
- July 22, 2010 – PowerPoint Presentation
- December 2, 2010 –Black & Veatch 2010 Minimum Cost Analysis Study and Hemmera's 2010 Minimum Cost Analysis Study
- February 24, 2011 - CPCN Application
- February 28, 2011 – BC Hydro Workshop PowerPoint Presentation

(Exhibit B-7, BCUC 1.14.6)

⁸ SC 1992,c.37.

7.3.3 BC Hydro's Decision Making Timeline

On March 27, 2006, BC Hydro Senior Executives approved expenditures of \$80,000 to continue with Identification Phase work including the development of technically feasible, cost-effective options for the Dam refurbishment. Following that, on April 24, 2006, BC Hydro's Board of Directors approved BC Hydro management to spend \$3 million for initial engineering work for the Project. (Exhibit B-7-2, Kwantlen 1.3.2)

BC Hydro defines its Identification Phase as the phase when a project is conceptualized and the feasibility is determined. (Exhibit B-7-2, Kwantlen 1.5.9.1)

BC Hydro's view is that the duty to consult was likely triggered after August 2006 (Exhibit B-10, BCUC 2.48.1)

In the fall of 2008 BC Hydro voluntarily opted-in to the BC EAO process. (Exhibit B-1, p. 4-6)

BC Hydro states that the decision on the Preferred Alternative was made on February 17, 2011 when the Board authorized funding for the filing of the CPCN Application with the Commission. (Exhibit B-7-2, Kwantlen 1.2.1) At the time of this decision the Board had a summary document on the Project (Exhibit B-7, BCUC 1.97.1, Attachment 1) which states:

[Aboriginal Relations and Negotiation] has reviewed its records of consultation and has concluded that the consultation has been adequate up to this point in time and that it is honourable for the Board of Directors to give approval to proceed to the implementation phase of the project and to submit an application to the BCUC for a CPCN.

Kwantlen's view is that the evidence supports that BC Hydro had determined that the Ruskin Upgrade Project was the Preferred Alternative sometime before November 17, 2008, when it decided to opt-in to the EAO process. (Exhibit C3-9, BCUC 4.1)

7.3.4 Assessment of the Strength of Claim

BC Hydro relied on the various sources of information discussed in Section 7.2.2 above, to assess strength of claim. For Kwantlen, BC Hydro also relied on an ethnography by Bouchard and Kennedy entitled “An Evaluation of First Nations’ Aboriginal Rights and Title Interests in the Vicinity of the Ruskin Dam” written in 2008 (2008 Kennedy and Bouchard Report). (Exhibit B-7, BCUC 1.14.1)

BC Hydro had a Traditional Use Study on the Project area from 1996 but did not consult it at the time of its preliminary strength of claim assessment. BC Hydro states that Kennedy and Bouchard reviewed extensive traditional use information in the preparation of their report. (Exhibit B-10, BCUC 2.42.1, 2.42.2)

The 2008 Kennedy and Bouchard Report is a 54 page ethnography of the Ruskin Dam area that recounts and assesses various ethno-historic sources including journals of European settlers to the area, histories and archives, and anthropological papers and texts. On review of the evidence the authors conclude:

[T]he Kwantlen First Nation has Aboriginal interests in the Stave River and Stave Lake areas. The evidence supports the conclusion that Kwantlen people established and maintained a village site and more temporarily-occupied settlements in the Stave River area after all or most of the original Aboriginal occupants, the “Skayuks,” died, as a result of the first smallpox epidemics of the 1770s. While other tribes camped in this area along the Fraser River for short periods of time, or at least did so after Fort Langley was established by the Hudson’s Bay Company in 1827, their occupation was short term. (Exhibit B-7, BCUC 1.14.1, Attachment 1, p. 1)

The 2008 Kennedy and Bouchard Report also present evidence that by 1850 the Stave River was known as the Kwantlen River (Exhibit B-7, BCUC 1.14.1, Attachment 1, p. 39)

After review of the available information BC Hydro determined that Kwantlen has a “reasonable” rights and title claim in the Project area. BC Hydro defines “reasonable” as a claim that is not weak but for which there is insufficient evidence to conclude that the claim is strong. (Exhibit B-7, BCUC 1.14.1) BC Hydro made this assessment based on the following information:

- Kwantlen have reserves near the Project; and
- STC advised BC Hydro that Kwantlen have the strongest claim in the area;

and based on BC Hydro's view that:

- Kwantlen have not been in the Stave River area since "time immemorial" but moved into the area after another Aboriginal group, the Skayuks, died because of a smallpox epidemic;
- After the Skayuks left, the Kwantlen became the dominant First Nation in the area;
- It is unclear whether Kwantlen had "exclusive pre-sovereignty occupation" on or before 1846;
- Kwantlen probably have a reasonable claim to fishing and traditional activities in the Project area but it is difficult to determine the precise scope and nature of the rights because there is limited traditional use information on the area;
- Archaeological artefacts found in the area cannot be directly linked to Kwantlen; and
- BC Hydro cannot conclude that a Kwantlen village was definitively located at the Stave River.

(Exhibit B-7, BCUC 1.14.1; Exhibit B-10, BCUC 2.40.1)

BC Hydro did not share its preliminary strength of claim or the 2008 Kennedy and Bouchard Report with the Kwantlen until March 2011 during this CPCN Proceeding. (Exhibit B-10, BCUC 2.39.1)

Kwantlen disagrees with BC Hydro and submit it has a strong claim to Aboriginal rights and title in the Project area. (Exhibit C3-9, BCUC 6.3; Kwantlen Final Submission, para. 22)

Kwantlen has six reserves, two of which are located south of Hayward Lake, while the main community is located north of Fort Langley. Kwantlen submits the location of these reserves and Kwantlen's oral history reflects Kwantlen's use and occupation of the Project area. (Exhibit C3-6, Evidence of Tumia Knott, pp. 1-2)

Kwantlen's evidence is that the Stave River watershed is the "heart of our traditional territory" which supported an abundant salmon fishery, especially at Stave Falls, until the Stave Falls and

Ruskin Dams were built. Kwantlen submits that the area above the falls was used extensively for harvesting and processing fish, hunting, trapping, gathering, trading, and spiritual practices. Kwantlen recounts oral history provided by a Kwantlen member in 1997-1999 who grew up before the dams were built that identifies a village site near the current Ruskin Dam. Kwantlen submits it continues to use the Project area for fishing, spiritual practices, and gathering. (Exhibit C3-6, Evidence of Tumia Knott, pp. 2-3)

Kwantlen asserts title and the following Aboriginal rights in the Project area:

- The right to practice a food, social, and ceremonial fishery;
- The right to harvest and use forest resources;
- The right to carry out cultural and spiritual traditions;
- The right to preserve, manage, and steward Kwantlen cultural resources including archaeological resources; and
- The right to hunt for food, social, and ceremonial purposes.

(Exhibit C3-9, BCUC 1.1)

Kwantlen states that other First Nations, likely other Stó:lō groups, used the Project area but were “guests...permitted to use sites in the region based on kinship ties or friendly relations with Kwantlen members.” (Exhibit C3-8, BC Hydro 4.1, 4.2)

Kwantlen’s evidence is that the Skayuks were decimated by smallpox and that their territory was taken over by the Kwantlen prior to European contact. (Exhibit C3-8, BC Hydro 5.1)

Kwantlen presents evidence of European exploration (the Work expedition) that identified Kwantlen settlements at the mouth of the Stave River in 1824. (Exhibit C3-8, BC Hydro 5.3)

Kwantlen submitted in evidence its own ethnography, the “Report on Kwantlen Occupation and Land Use in *Sxeyə’qs* and the Surrounding Region” edited by Duncan McLaren, dated June 20, 2011 (McLaren Report). (Exhibit C3-6, Tab B to the Evidence of Duncan McLaren). The report

summarizes historic/ethnographic/ethnohistoric research including interviews and archival research, archaeological data and the history of reserve creation, and determines that the Project area was subject to long-term, repeated use by the Kwantlen for hunting, gathering, and fishing, settlement activities, forestry and tool-making, and ceremonial activities. (Exhibit C3-6, Tab B to Evidence of Duncan McLaren, p. i)

BC Hydro does not agree with the findings of the McLaren Report. Specifically BC Hydro is concerned with the report's opinions and conclusions on "the intensity, time frame and frequency of use of the identified sites; the potential overlapping areas of use and occupation by other groups, and Kwantlen's relationship with those groups; and the factual circumstances around the creation of the Kwantlen reserves." (Exhibit B-18, Kwantlen 3.2.5)

Commission Determination

The Commission has reviewed the ethnographic evidence on the record, including the 2008 Kennedy and Bouchard Report, the McLaren Report, and the evidence of Ms. Knott, and concludes that Kwantlen has a high strength of claim to rights and title in the Project area.

The 2008 Kennedy and Bouchard Report is a comprehensive survey of ethnographic evidence from the time of European settlement, commissioned by BC Hydro. The conclusion of that report is that the Kwantlen established and maintained a village site and other settlements in the Stave River area sometime after the 1770s and the report presents evidence that by 1850 the Stave River was known as the Kwantlen River. The McLaren report presents the Work expedition that encountered Kwantlen settlements at the mouth of the Stave River in 1824. The evidence in the two reports and from Ms. Knott is voluminous and, when reviewed as a whole, demonstrates that Kwantlen was the dominant group in the Project area before 1850. The Commission accepts the evidence of Kwantlen that if other Aboriginal groups used the area, they used it under the laws of Kwantlen.

7.3.5 Project Impacts

BC Hydro's assessment is that the Project will have minimal adverse impacts on First Nations because most of the impacts will be temporary, will take place within the existing facility footprint, and BC Hydro will mitigate the impacts. BC Hydro submits that the Project will cause only temporary impacts to fish during construction, and does not increase the risk of Total Dissolved Gas (TDG) incidents which could damage fish. BC Hydro submits that TDG will be monitored and the potential for impacts to fish and fish habitat will be reduced by the Project as the condition of the equipment is upgraded. (Exhibit B-1, p. 2-44) The permanent impacts from the Project are the relocation of Hayward Street by one road width, relocation of the switchyard causing a new 50 x 100 m footprint, and realignment of the transmission lines to the new switchyard location. (Exhibit B-1, p. 4-4; Exhibit B-7, BCUC 1.14.1)

BC Hydro gathered its knowledge of Kwantlen's asserted rights at meetings held in 2009 and 2010. It shared the Project impacts with Kwantlen by way of the draft environmental study Terms of Reference provided in May 2008, and the provision of the completed environmental and archaeological studies between September and November 2010 and February 2011. BC Hydro rates the Project incremental impacts to all asserted rights and interests as low after the mitigation measures it proposes. (Exhibit B-7, BCUC 1.15.1.1)

Kwantlen submits that the Project impacts are high, long-term and irreversible (Kwantlen Final Submission, para. 39). Kwantlen submits that the impacts of the Project include:

- The assumption of BC Hydro to use and occupy lands thereby depriving Kwantlen of the right and ability to exercise Kwantlen title rights;
- Fisheries impacts related to the drawdown and construction;
- Ongoing fisheries impacts from the refurbishment of the Dam, including TGP impacts;
- Impacts to archaeological sites;
- Impacts to wildlife from the draw downs and construction;
- Impacts to botanical and forest resources, soils, water, and air from the Project;

- The perpetuation, for an indefinite period of time, of the dam which is a barrier to fish passage and has destroyed Kwantlen's traditional fishery and village site.

(Exhibit C3-9, BCUC 1.2)

Kwantlen's archaeologist, Mr. McLaren, sees potential impacts to archaeological sites arising from the direct construction associated with the Project, and from the Hayward Reservoir drawdown which will expose the sites to rain, wind, waves and looting. Mr. McLaren provides recommendations for a plan to manage and mitigate the impacts of the draw down. (Exhibit C3-6, Evidence of Duncan McLaren, pp. 3-4)

BC Hydro states it is open to developing and funding an overall Project-related archaeological plan. (Exhibit B-7-2, Kwantlen 1.6.1)

Pottinger Gaherty identifies five impacts of highest concern:

- Harmful levels of TDG;
- Water quality effects (e.g., sedimentation) during construction;
- Flow continuity during sensitive periods in the Lower Stave River;
- Fish habitat loss in Hayward Reservoir during the Project drawdown; and
- Rate of reservoir drawdown.

(Exhibit C3-6, Evidence of Susan Wilkins, Tab D, p. 4)

Kwantlen submits that only the water quality effects concern is restricted to the construction phase while the other four concerns will occur during both the construction and the ongoing operation of the Dam. (Exhibit C3-10-1, BCOAPO 5.1) BC Hydro disagrees and submits that based on input from its environmental consultant and from the Department of Fisheries and Oceans, all five concerns are confined to the Project construction phase. (Exhibit B-16-2, p. 1)

BC Hydro submits that the Project is expected to reduce TDG incidents, while the Kwantlen submits that the scale of impacts to the Kwantlen exceed the construction-related impacts of the Project. (BC Hydro Final Submission, p. 60; Kwantlen Final Submission, para. 36)

In its Final Submission Kwantlen submits that the impacts of the Project include the lost opportunity to have the fishery restored. Kwantlen submits:

BC Hydro's assessment of impacts is thus restricted to impacts arising from the construction of the Project. It fails to take into account the impacts to Kwantlen of BC Hydro's higher level, strategic decision to select the Project as the preferred alternative. In omitting consideration of the impacts of this strategic aspect of BC Hydro's actions, BC Hydro erred in law, and took an unreasonably narrow approach to assessing the potential impacts of its actions to Kwantlen. (Kwantlen Final Submission, para. 30)

Kwantlen further submits that the options considered by BC Hydro have significantly different potential impacts. Kwantlen submits “[i]n particular, the complete removal of the Dam would restore the lower Stave River to a flow and condition that is as close to its natural state as can be achieved, given BC Hydro's other facilities on the system.” (Kwantlen Final Submission, para. 33)

BC Hydro states that the Stave River flows could only be restored to historic norms if both the Ruskin and Stave Falls facilities were decommissioned. (Exhibit B-18, Kwantlen 3.2.2)

Commission Determination

The Commission Panel finds the impacts from the Project on Kwantlen rights and title to be low.

The Commission Panel finds that the only green field impacts are the new location of the Switchyard and the movement of Hayward Street. Archaeological impacts can be mitigated through the Archaeology Plan for the Stave and Hayward Reservoirs developed jointly by BC Hydro and Kwantlen or the overall Project-related archaeological plan that BC Hydro is open to funding.

The other impacts from the Project are either temporary or have already been mitigated.

Regarding fishery impacts, the Commission Panel accepts BC Hydro’s submission that the Project

will reduce TDG events and could therefore be beneficial to the fishery. The concerns raised by Pottinger Gaherty will occur during the construction phase and will be temporary.

Kwantlen submits that BC Hydro's assessment of impacts fails to take into account the impacts to Kwantlen of BC Hydro's strategic decision to select the Project as the Preferred Alternative. Kwantlen appears to assert that BC Hydro was choosing between the Project and decommissioning the Dam which would return the river to its natural state and that the impact of the Preferred Alternative decision therefore creates the impact of the proposed Project versus the river in its natural state.

These assertions are flawed. The Preferred Alternative decision was between the Project and four other options considered. As well, decommissioning the Dam alone would not return the river to its natural state so the comparison of the impact from the Project versus the river in its natural state is not a valid comparison.

Regarding Kwantlen's submission that the impact of the Project includes the lost opportunity to have the fishery restored, the Court at paragraph 45 of *Rio Tinto Alcan* states:

The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

The impacts on the natural state of the fishery occurred with the original construction of the Dam. *Rio Tinto Alcan* holds that past grievances are not the subject of consultation and are therefore not considered in the assessment of the current Project impacts.

7.3.6 The Duty to Consult on the Project

Based on its assessment of a "reasonable" claim to rights and title and minimal impacts, BC Hydro concludes that it has a medium duty to consult Kwantlen. (Exhibit B-7, BCUC 1.14.1)

The Kwantlen asserts that it is owed deep consultation, at the upper end of the *Haida* spectrum, given their high strength of claim and the level of impact from the Project. (Kwantlen Final Submission, para. 39)

Commission Determination

Based on the determinations above, that Kwantlen have a high strength of claim to the Project area and the impacts of the Project are low, **the Commission Panel finds BC Hydro has a medium duty to consult with Kwantlen on the Project.**

7.4 BC Hydro and Kwantlen's Positions on the Adequacy of Consultation

BC Hydro's overall position is that its consultation has been adequate and has exceeded the medium range based on the following actions:

Engaging in consultation in November 2006, which was early on in the Project decision-making process; putting forward proposals that are not yet finalized; seeking Kwantlen input and opinion on those proposals; informing Kwantlen of all relevant information upon which those proposals are based; not promoting but listening with an open mind to what Kwantlen had to say; being prepared to alter the original proposal; and providing feedback during the consultation process (which will continue after the BCUC decision-process). (BC Hydro Final Submission, pp. 73-74)

Kwantlen's position is that BC Hydro's consultation has been inadequate for three main reasons:

1. BC Hydro failed to correctly assess the scope of consultation owed to Kwantlen;
2. BC Hydro failed to adequately consult Kwantlen on the selection of preferred option for addressing the seismic and power generation deficiencies at Ruskin; and
3. BC Hydro's CPCN application was made prematurely.

(Kwantlen Final Submission, para. 1)

The remainder of this Section addresses these assertions.

7.4.1 Did BC Hydro fail to correctly assess the scope of consultation owed to Kwantlen?

The Commission Panel has dealt with the assessment of the scope of consultation owed to Kwantlen in the sections above and found that BC Hydro erred in its assessment of the strength of Kwantlen's claim but not in its overall assessment of the scope of the duty to consult.

As part of this complaint Kwantlen also submits that BC Hydro "committed a threshold error by failing to prepare, and be guided by, an assessment of the scope and content of the duty owed Kwantlen at the outset of the consultation process." (Kwantlen Final Submission, para. 13) Kwantlen submits that there is nothing in the record to show that BC Hydro prepared a preliminary strength of claim assessment and BC Hydro did not provide Kwantlen opportunity for input into its assessment. (Kwantlen Final Submission, paras. 13, 17) Kwantlen submits that the recent cases *Adams Lake Indian Band v. British Columbia* 2011 BCSC 266 (*Adams Lake*) and *Halalt First Nation v. British Columbia (Environment)*, 2011 BCSC 945 (*Halalt*) require the Crown share the strength of claim assessment with the affected First Nation.

BC Hydro submits that there is no absolute obligation on the Crown to share strength of claim and impact assessments with First Nations and to find or impose such a duty would be detrimental to the consultation process. (BC Hydro Reply Submission, p. 37)

Kwantlen's evidence is that they did not receive BC Hydro's preliminary strength of claim assessment or the 2008 Kennedy and Bouchard Report until the end of March 2011. "Given the importance of this document in influencing the scope and nature of the consultation process, as well as the importance to our community that such a report reflect our input before it is made public by filing it with the Commission, we would have expected BC Hydro to provide us with a draft copy of this document at a much earlier date." (Exhibit C3-6, Evidence of Tumia Knott, p. 14)

Commission Determination

In *Adams Lake* at paragraph 131 the Court states, in part:

On my review of the authorities, it is well established that where the Crown has notice of a claim asserted by an aboriginal group and the duty to consult has been triggered, the Crown is obliged to make a preliminary assessment of the strength of the claim and the potential impact of the proposed decision on the asserted rights. The Crown's obligations also extend to providing the affected aboriginal group with an opportunity to comment on these preliminary assessments.

In *Halalt* at paragraph 641 the Court states, in part:

Second, as a matter of fairness, Halalt ought to have been given an opportunity to respond to the information in the possession of the EAO upon which it based its assessment of the strength of claim and the scope of its duty to consult with respect to both the rights and title claims of Halalt.

The Commission Panel finds that these cases do not require, by law, that the Crown share their strength of claim assessments.

The Commission has addressed this issue previously in its Decision on the ILM CPCN Court of Appeal Reconsideration and the further reconsideration of that Decision. In those Decisions, the Commission found that case law does not specifically require the Crown to disclose strength of claim assessments and that the Court's comments in *Adams Lake* were without binding force since no strength of claim assessment was prepared in that case. (Decision *In the Matter of British Columbia Transmission Corporation: Reconsideration of the Interior to Lower Mainland Transmission Project*, February 3, 2011, Order G-15-11, p. 101 (*ILM Reconsideration Decision*); Decision *In the Matter of British Columbia Transmission Corporation: Reconsideration of the Interior to Lower Mainland (ILM) Transmission Project Certificate of Public Convenience and Necessity*,

Court of Appeal Reconsideration, Application for Reconsideration of the ILM Decision, May 6, 2011, Order G-77-11, p. 10)⁹

At page 101 of the *ILM Reconsideration Decision*, the Commission states:

The Commission Panel accepts BC Hydro's testimony that sharing initial strength of claim assessments can be unproductive and accepts BC Hydro's submissions that case law does not specifically require the Crown to disclose strength of claim assessments. The Commission Panel finds that the initial strength of claim assessments need not necessarily be disclosed at the outset of consultation and the fact that they were not disclosed prior to the Options Decision did not cause consultation to be inadequate.

Halalt was decided after the *ILM Reconsideration Decision* and the reconsideration of the *ILM Reconsideration Decision*. In *Halalt*, the Court found the opportunity to respond to the strength of claim assessment to be a matter of fairness because in that case the Halalt were not provided with a strength of claim assessment until the conclusion of the environmental review. That is not the case here. BC Hydro shared its preliminary strength of claim analysis and the 2008 Kennedy and Bouchard Report with Kwantlen in March 2011. Kwantlen has had the opportunity in this proceeding to file evidence and make submissions in response. It has done so.

While *Adams Lake* and *Halalt* encourage the Crown to share its strength of claim assessments, they do not require the Crown to do so. In this case, BC Hydro has shared its assessments early on in the Commission proceeding.

7.4.2 Did BC Hydro fail to adequately consult Kwantlen on the selection of preferred alternative?

Kwantlen claims that BC Hydro failed to adequately consult it on the selection of the preferred alternative. Ms. Knott states: "I disagree that BC Hydro has carried out any, or adequate,

⁹ The Stó:lō Nation Tribal Council and the Seabird Island First Nation have appealed the *ILM Reconsideration Decision*. (BCCA File Number CA038855)

consultation with Kwantlen regarding its decision to select the Ruskin Upgrade Project as the preferred alternative.” (Exhibit C3-6, p. 12)

Ms. Knott further states:

At no point did BC Hydro approach Kwantlen and advise that they were making a strategic choice between various project alternatives, and at no point did BC Hydro seek to consult with Kwantlen regarding project alternatives. At each step of the consultation process the initial meetings, the overviews of the Project BC Hydro provided, the application to opt-in to the EA process, the discussion of the Right Abutment Stage I work, the discussion of potential Project-related opportunities - it was our understanding, based on the information provided by BC Hydro, that the Ruskin Upgrade Project was the work that was going ahead. As noted above, the alternatives-related information provided in the Project Summary of December 2009 was phrased in the past tense, referring to options that BC Hydro had already considered and, presumably, rejected. There was never any suggestion that Kwantlen could in fact have influence and a say in the decision about which alternative to select... If BC Hydro wanted our input on the selection of the best alternative, I would have expected them to identify that as an issue at the beginning of our consultations, back in 2006 and 2007. (Exhibit C3-6, Evidence of Tumia Knott, p. 12)

Kwantlen submits that the Project has been presented as a *fait accompli* based on the past tense used in the initial November 2006 notification letter and the Summary of Alternatives. Kwantlen submits that the first disclosure of substantive information concerning the assessment of alternatives was in December 2, 2010 when BC Hydro provided Pottinger Gaherty with BC Hydro’s environmental consultant’s study on the alternatives. (Kwantlen Final Submission, paras. 42, 52).

Kwantlen submits, in part:

“What the Commission should instead ask is ‘did BC Hydro proactively engage with Kwantlen in selecting the preferred alternative in a timely manner that facilitated meaningful Kwantlen participation in the decision on alternatives before key internal BC Hydro decisions were made?’ That is the standard that is required of BC Hydro by the law, and that is the standard that should be applied. If that standard is applied, the answer is clearly ‘no’

Consultation on this Project never reached the level of integrating Kwantlen into BC Hydro's decision-making processes. There was no Kwantlen involvement in selecting the Project as the preferred alternative.” (Kwantlen Final Submission, paras. 57, 65)

BC Hydro submits that the Decision on the Preferred Alternative was not made until February 2011 and that the Summary of Information includes the wording “[s]ome of these design alternatives continue to be assessed” and “[s]ome alternatives continue to be considered.” (Exhibit B-16, p. 17)

In its Rebuttal Evidence, BC Hydro points out that its “voluntary opt-in application to the EAO was not a strategic decision by BC Hydro to narrow the number of alternatives under consideration or to proceed with the Project without further consideration of alternatives to the Project...BC Hydro’s understanding is that generally the role of the EAO is to examine the environmental effects of a proposed project and not to review alternatives to a project. (Exhibit B-16, p. 16)

As well, BC Hydro states that other than Pottinger Gaherty’s request in October 2010 for alternatives analysis, Kwantlen did not raise the issue of alternatives and did not make its preference for any alternative known during consultation. (Exhibit B-16, p. 11)

Commission Determination

The Commission Panel finds that BC Hydro did not consult Kwantlen adequately in making the Decision on the Preferred Alternative.

The case law is clear that the Crown must consult First Nations at an early stage and on strategic level decisions. In *Haida Nation* the Court states at paragraph 76:

I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. [Tree Farm Licence] 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.

In *Kwikwetlem* the Court states at paragraph 70:

“If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC’s practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.”
[emphasis added].

Despite BC Hydro’s assertion that it did not make its decision on the Preferred Alternative until February 17, 2011, in the Commission Panel’s view, BC Hydro had its “chips” behind the Project in August 24, 2006, when the Board accepted \$3 million in spending for initial engineering work during the identification phase. BC Hydro obviously devoted considerable resources to the Project well before February 17, 2011, because it filed its CPCN Application with the Commission on February 24, 2011. BC Hydro defines the identification phase as when the project is conceptualized and the feasibility determined. The Commission is of the view that this is the stage where information about impacts to Aboriginal rights is necessary – the Crown needs to know whether or not a proposal affects Aboriginal rights and title. The Crown also needs to know how different proposals it is considering affect Aboriginal rights and title in different ways. Information about rights and title and the potential impacts to them cannot be gathered unilaterally by the Crown – First Nations must be consulted to have input into this information. It is the subject of consultation.

The Crown must then use this information in its screening and elimination process or in its decision on the Preferred Alternative. The Crown must weigh all project costs and benefits (including impacts to Aboriginal rights), and on balance, determine the Preferred Alternative.

Haida Nation states:

“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. (para. 45)

BC Hydro did not present the various alternatives to Kwantlen until December 2009 and when it did, it presented them in the past tense which indicates the decision was made. The Commission Panel is not persuaded by BC Hydro's submission that two phrases in the Summary of Information indicate that it was still considering alternatives when the majority of the language in the Summary of Information and in the initial Project letter present the Project as a decision already made. It appears that BC Hydro did not gather Kwantlen input on the alternatives before it made its choice of Preferred Alternative.

The Commission Panel does not agree with Kwantlen's assertion that consultation should integrate Kwantlen into BC Hydro's decision-making processes and that it was problematic that there was no Kwantlen involvement in selecting the Project as the Preferred Alternative. The Commission believes that First Nations do not necessarily have the right to be an integral part of the decision making as Kwantlen asserts. However, they do have the right to have their input considered at the earliest stage possible and when strategic decision making takes place. BC Hydro, in this case, remains the decision maker.

The Commission Panel does agree with Kwantlen's view that "[a]n assessment of the potential impacts and/or benefits to Kwantlen of the options should be included in BC Hydro's options selection process, in addition to the cost and power generation considerations that BC Hydro focused on." (Exhibit C3-9, BCUC 3.3)

The Commission Panel also finds Kwantlen did not uphold its reciprocal duty to engage in consultation. See *Mikisew Cree* at para. 69; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA at para. 161. Kwantlen was informed that there were alternative options in December 2009 but it did not seriously raise its concerns about the selection of alternatives with BC Hydro until 2011.

7.4.3 Was BC Hydro's CPCN application made prematurely?

In Kwantlen's view, as of August 2011 BC Hydro did not have full knowledge of the potential impacts to Kwantlen. (Exhibit C3-9, BCUC 1.4)

Ms. Knott submits that BC Hydro's consultation on environmental impacts has been inadequate, especially regarding ways to mitigate impacts to fish from TGP, having a comprehensive plan to identify and protect archaeological resources, and on revenue and benefit sharing. (Exhibit C3-6, Evidence of Tumia Knott, pp. 14-16) However, in response to a BC Hydro Information Request Kwantlen confirmed that it received the final version of "Stave and Hayward Reservoir Archaeology Program: A BC Hydro Archaeological Management Plan for the Years 2010 through 2030" on October 13, 2010. (Exhibit C3-8, BC Hydro 3.1)

Kwantlen submits that a CPCN is the only regulatory approval required by BC Hydro before commencing the Project. (Kwantlen Final Submission, para. 11) In this context, Kwantlen states:

"Consultations, including accommodation, concerning the Project's potential impacts to Kwantlen must be completed before the CPCN is issued. The fact that construction will occur after the CPCN is issued is irrelevant to the question of whether consultation must be completed prior to the issuance of the CPCN. The point of consultation is to ensure Aboriginal interests are addressed before decisions authorizing the activity are made, and demonstrably integrated into the course of action that will be authorized by the decision."
(Exhibit C3-9, BCUC 5.1)

For example Kwantlen submits that regarding a TDG Management Plan:

"The problem created by BC Hydro's way of proceeding is that the Project infrastructure will be determined and approved through the CPCN, and under construction, before the consultations on how to manage, reduce and mitigate TOP impacts get underway. As TOP is functionally an attribute of, and significantly determined by, infrastructure design, BC Hydro's proposal would severely limit the design-based mitigation and management measures open for discussion." (Exhibit C3-9, BCUC 7.1)

In its Rebuttal Evidence, BC Hydro states that Kwantlen's view is unreasonable and "would result in giving Kwantlen a de facto veto over the Project, which is contrary to findings of the Supreme Court of Canada and other courts." (Exhibit B-16, p. 11)

BC Hydro submits that the Commission must assess the adequacy of consultation to the close of the evidentiary phase of a proceeding. (BC Hydro Final Submission, p. 8)

Commission Determination

Kwikwetlem holds that the Commission must determine adequacy of consultation to the point of its decision. **Therefore, the Commission Panel must decide the adequacy of consultation to the point of its decision in this proceeding. That determination, however, will necessarily flow from the evidence of the consultation efforts on the evidentiary record before the Panel at the time of its decision.** The Commission Panel does not accept Kwantlen's submission that consultation must be complete before a CPCN is issued because consultation on the Project must continue on the Project until the Project is complete. The Project cannot be complete at a time when the CPCN is issued. The Commission Panel accepts Kwantlen's submission that the point of consultation is to ensure Aboriginal interests are addressed before decisions authorizing the activity are made, and demonstrably integrated into the course of action that will be authorized by the decision, but the Panel believes this can be accomplished to the point of the CPCN decision and does not require consultation to be complete for the Project as a whole.

7.5 Overall Assessment of the Adequacy of BC Hydro's Consultation with Kwantlen

BC Hydro further submits that its consultation has been adequate and that it has addressed all of Kwantlen's concerns including:

- Environmental concerns by sharing all the Terms of References for environmental studies; (Exhibit B-16, p. 9)
- Archaeological concerns by hiring Kwantlen's preferred archaeologist who has led all archaeological assessments and has completed an Archaeological Impact Assessments

for the entire Project area, and by including Archaeological monitoring commitments in Environmental Management Plan. Further, BC Hydro also submits it will consider developing and funding, an archaeological survey plan for the two currently anticipated Project construction related drawdowns of the Hayward Lake Reservoir; and (BC Hydro Final Submission, pp. 67-68; Exhibit B-7-2, Kwantlen 1.6.1)

- Revenue sharing concerns by the Director of BC Hydro Aboriginal Relations and Reconciliation meeting with Kwantlen to discuss BC Hydro's limited ability to revenue share. (BC Hydro Final Submission, p. 71)

Kwantlen's position is that BC Hydro's overall consultation has not been adequate because information sharing was not timely or adequate. Kwantlen submits that most key environmental documents were provided only because Pottinger Gaherty specifically requested them and that Kwantlen was only in position to fully understand and evaluate Project impacts as of February 2011 when the last report requested was provided. (Kwantlen Final Submission, paras. 67-73)

Kwantlen proposes that the appropriate remedy to its conclusion that consultation is inadequate is to deny the CPCN Application because BC Hydro failed to consult on the Project alternatives and this failure cannot be remedied if the Application remains in place. (Kwantlen Final Submission, para. 80)

In the alternative, Kwantlen suggests the CPCN could be suspended pending BC Hydro's completion of remedial consultation on Project alternatives, economic accommodation, fisheries impacts including TGP, and archaeological resources. (Kwantlen Final Submission, para. 81)

As a further alternative, in the event the Commission approves the CPCN, Kwantlen seeks the following conditions:

- “(a) BC Hydro is required to continue negotiation of a Project benefit agreement with Kwantlen;
- (b) BC Hydro is required to fund Kwantlen's participation in the development of a site-specific TGP guideline for the facility, including funding for technical assistance; and

- (c) BC Hydro is required to fund the preparation and implementation of a Project specific archaeological survey and protection plan with Kwantlen, prior to any drawdown of the Hawyard [sic] Reservoir.” (Kwantlen Final Submission, para. 82)

BC Hydro replies that these conditions are unnecessary because it is committed to continuing negotiations with Kwantlen on a Benefits Agreement, willing to consider funding to enable Kwantlen to participate in developing a site-specific TDG guideline, and committed to working with Kwantlen on the development of an overall Project-related archaeological plan. (BC Hydro Reply Submission, p. 85)

BC Hydro further submits that there is no clear statutory authority in the *UCA* that grants the Commission the jurisdiction to direct BC Hydro as to how to consult and that the Commission’s role is to assess, based on the evidence submitted in the proceeding, whether or not consultation has been adequate to the point of the CPCN decision. (BC Hydro Final Submission, p. 17)

BC Hydro further submits that the Commission’s role is *functus officio* with respect to assessing the adequacy of consultation after the CPCN is issued and that once a CPCN is issued the Commission has discharged its duties pursuant to section 46(3) of the *UCA*. It submits that if Kwantlen disagreed on how BC Hydro carried out the consultation it was directed to undertake, the Commission would have no power to act. BC Hydro accepts that the Commission can make “non-binding suggestions” in its Decision but it urges the Commission not to in this case because negotiations could be upset. (BC Hydro Reply Submission, p. 86)

Commission Determination

The Commission Panel has determined that the Kwantlen was owed a medium duty to consult. The Commission Panel also found that BC Hydro did not consult adequately on the selection of the Preferred Alternative but that once Kwantlen knew of the alternative, it did not uphold its reciprocal duty to raise the concern in a timely manner, but rather left it too late in the process. On the evidence, the Commission Panel cannot find that consultation efforts, which began, over five years ago, have been inadequate to this point.

The Commission Panel also finds that BC Hydro was responsive and engaged in consultation. The evidence shows that it responded to concerns and questions raised by Kwantlen, most notably by responding to the 31 requests for information made by Pottinger Gaherty.

The Commission Panel is concerned with BC Hydro's communication to Kwantlen about the required Right Abutment work that was then found to have alternatives. It appears that BC Hydro told Kwantlen there were no other alternatives but to excavate the archaeological site when in fact there were. These actions show disregard for something that was important to Kwantlen. The Commission Panel is not surprised that, as the Kwantlen says, its faith in BC Hydro was undermined and the pace and timing of consultation was slowed. That said, BC Hydro was quick to accommodate Kwantlen for those impacts with the commitment to create an artefact repository which is responsive and good faith consultation.

The Commission must assess consultation and its adequacy to the point of its decision on whether to grant a CPCN for the Project. Based on the findings above, the Commission Panel finds BC Hydro's consultation with Kwantlen adequate to this point in time to meet the medium duty to consult, which Kwantlen is owed. The Commission Panel agrees it can make suggestions to BC Hydro. Accordingly, we encourage BC Hydro to: i) involve Kwantlen in the development of a site-specific TGP guideline for the Ruskin Dam; and ii) develop and implement a Project specific archaeological survey and protection plan with Kwantlen, prior to any drawdown of the reservoir. We also direct BC Hydro to include in its semi-annual progress reports on the Project, detailed reporting on its ongoing consultation with First Nations, similar to the Revelstoke Unit 5 Project Quarterly Reports.

7.6 Adequacy of Consultation With First Nations

For all the reasons above **the Commission Panel finds that BC Hydro has adequately consulted with First Nations on the Project to the point of this Decision.**

8.0 CONCLUSION AND COMMISSION PANEL DETERMINATIONS

After having carefully considered and weighed the evidence and submissions of all parties participating in the proceeding, the Commission Panel concludes that the upgrade to the Ruskin Facility is needed to address safety, reliability, environmental, and financial risks. It is also consistent with the requirements of the amended Electricity Self-Sufficiency regulation and the amended SD 10. For the reasons given in this Decision, we find that the Ruskin Dam and Powerhouse Upgrade Project to be necessary and in the public interest as it is the most cost-effective long term solution. We also find that public consultation has been sufficient, and that First Nations consultation has been adequate to the point of the date of this Decision.

Subject to the directives contained in this Decision and the related Order, **the Commission Panel grants BC Hydro a CPCN for the Ruskin Dam and Powerhouse Upgrade Project as set out in the Application.**

In this Decision the Panel has made a number of specific determinations and directives. These are summarized below:

Overall

The Commission Panel finds that the Ruskin Dam and Powerhouse Upgrade Project is necessary and in the public interest as it is the most cost-effective long term solution. The Project also serves the British Columbia energy objectives including meeting both the BC Hydro self-sufficiency requirements of the CEA, consistent with the February 2012 amendments to the Electricity Self-Sufficiency Regulation, and the BC Hydro self-sufficiency requirements resulting from the February 2012 amendments to Special Direction No. 10 to the Commission. In addition, section 6(1) of the amended SD 10 also requires the Commission to assume that there is need for the Project's firm energy and dependable capacity. We also find that that public consultation has been sufficient, and that First Nations consultation has been adequate to the date of this

Decision. Subject to the directives contained in this Decision and the related Order, the Commission Panel grants BC Hydro a CPCN for the Ruskin Dam and Powerhouse Upgrade Project.

Legislative Authority

The Commission Panel concurs and determines that the tests of the need for the Project, and its cost-effectiveness are the appropriate basis for assessing whether the public interest will be met in granting a CPCN.

For reasons of natural justice and fairness, the Commission Panel will not give any weight whatsoever to the materials that Mr. Quigley and CEBC attempted to introduce for the first time during Final Argument.

The Need for a Project

The Commission Panel rejects CEBC's proposal to place the Application in abeyance or to reject it outright.

The Panel determines that need for the Project has been established for safety, and environmental reasons. This clear need for the Project is fully consistent with the amended Electricity Self-Sufficiency Regulation and the amended SD 10 described in Section 2.2.

Project Alternatives

The Dam Work

AMPC's proposal to reopen the evidentiary record for further submissions on its indemnification and relocation option as a means of mitigating risks associated with the Upper Dam, Right Abutment, and Left Abutment is, therefore, denied.

The Commission Panel finds that there are sufficient risks associated with the current condition of the Upper Dam, the Right Abutment, and the Left Abutment to consider long-term alternative solutions.

Powerhouse Work

The Panel determines that these risks are deemed sufficiently worthy to explore alternative solutions and they need to be addressed in a timely and deliberately planned manner. Refurbishment and deferral of replacement on an as-needed basis is not sufficient to satisfy these risks.

The Commission Panel approves the powerhouse work as described in the Application.

Switchyard Work

The Panel determines that the Switchyard Work should be included in the scope of the project alternatives considered for the Project. Option 3, relocation of the Switchyard location from the roof of the Powerhouse to an area near the Powerhouse on previously disturbed land owned by BC Hydro is the appropriate Option.

Alternative Solutions to the Proposed Project

The Commission Panel finds that BC Hydro has explored sufficient and appropriate options to address the safety, reliability, environmental, and financial risks represented by the Project. It is evident that the Project is the most attractive option from an economic perspective when compared with the alternatives.

The Commission Panel determines that the Project is the preferred alternative to address the need.

The Commission Panel concurs that a deferral alternative is not an appropriate solution to be considered further.

Dam Issues

The Commission Panel determines that the replacement of the six central piers with four new inner piers, and the replacement of the seven existing radial gates with five new larger gates is the appropriate option to address concerns related to the spillway gate and pier configuration for the Project.

The Commission Panel accepts that building a new cut-off structure above the dam and improving drainage and the downstream slope below the dam is the appropriate solution for the Right Abutment remediation component of the Project.

The Commission Panel accepts the benefits of widening the roadway to two lanes and the addition of a pedestrian walkway.

Powerhouse Issues

The Commission Panel accepts the evidence in the KCBL Report and determines that it is appropriate to rehabilitate the current Powerhouse, rather than developing a new one in a different location.

The Commission Panel determines that the benefits of three generating units exceed those of only having two units. We determine that the three generating unit configuration is appropriate for the Project.

The Commission Panel determines that it is appropriate to include the replacement/ refurbishment of U3 within the scope of the Project at this time.

Overall Determination on Alternatives

The Commission Panel determines that the proposed Ruskin Dam and Powerhouse Upgrade Project is the most cost-effective alternative to address the underlying safety, reliability, environmental, and financial risks that give rise to the Project. The Commission Panel approves the scope of the Ruskin Dam and Powerhouse Upgrade Project as requested in the Application.

Project Costing

The Commission Panel considers the Monte Carlo analysis methodology to be an appropriate tool for calculating contingencies, and considers BC Hydro's application of the Monte Carlo analysis to be acceptable for estimating the contingency of \$56.0 million on the Expected Amount.

The Commission Panel accepts the estimate of dismantling and removal costs of \$10.40 million as reasonable.

The Commission Panel considers that BC Hydro's rate and methodology for calculating inflation are appropriate for the Project, and determines that the rate and methodology are approved for the purposes of the CPCN Expected Amount cost estimates.

The Commission Panel determines that the Basic Expected Amount for the Project should exclude Capital Overhead, with the provision to add Capital Overhead at the applicable Capital Overhead Rate approved by the Commission from time to time, to arrive at a Total Expected Amount. This approach results in a Basic Expected Amount for the Project of \$640.6 million, being the requested Expected Amount of \$718.10 million less the proposed COH of \$77.50 million. This \$640.6 million will be supplemented in the future as COH rates are approved by the Commission. The Commission Panel directs BC Hydro to reflect this approach in its proposed semi-annual progress reports for the Project.

The Panel considers that BC Hydro's rate and methodology for calculating IDC are appropriate, and determines that the rate and methodology are approved for the purposes of the CPCN Expected Amount cost estimates.

The Commission Panel has reviewed BC Hydro's evidence, including responses to Information Requests, and concludes that there is no evidentiary basis upon which to make a finding other than to accept BC Hydro's evidence with respect to the direct cost estimates for the Project.

Subject to the directive provided in Section 5.2.3, the Commission Panel approves the Expected Amount of \$640.6 million for the Project, plus Capital Overhead at the rates determined from time to time by the Commission in its decisions on BC Hydro's Revenue Requirement Applications.

Project Schedule

The Commission Panel accepts the Project Schedule set out in the Application.

Risk Management

The Panel accepts the adequacy of BC Hydro's risk identification and approaches to their management and mitigation.

Project Reporting

We direct BC Hydro to file with the Commission semi-annual progress reports on the Project schedule, costs with a comparison to the Expected Amount as set out in the Application, and any variances or difficulties that the Project may be encountering.

We also direct BC Hydro file a final report within six months of the end or substantial completion of the Project. The final report is to include a breakdown of the final costs of the Project, a

comparison of these costs to the Expected Amount set out in the Application and provide an explanation of all material cost variances.

Public Engagement

The Commission Panel finds that overall public consultation efforts have been adequate to date.

First Nations Consultation

The Commission Panel finds BC Hydro's consultation with respect to the Stó:lō Nation, the Stó:lō Nation Tribal Council, Matsqui First Nation, and the Hul'qumi'num Treaty Group to date to be adequate for the Project.

The Panel has reviewed the ethnographic evidence on the record, including the 2008 Kennedy and Bouchard Report, the McLaren Report, and the evidence of Ms. Knott, and concludes that Kwantlen has a high strength of claim to rights and title in the Project area.

The Commission Panel finds the impacts from the Project on Kwantlen rights and title to be low.

The Commission Panel finds BC Hydro has a medium duty to consult with Kwantlen on the Project.

The Commission Panel finds that these cases do not require, by law, that the Crown share their strength of claim assessments.

The Commission Panel finds that BC Hydro did not consult Kwantlen adequately in making the Decision on the Preferred Alternative.

The Commission Panel also finds Kwantlen did not uphold its reciprocal duty to engage in consultation.

The Commission Panel must decide the adequacy of consultation to the point of its decision in this proceeding. That determination, however, will necessarily flow from the evidence of the consultation efforts on the evidentiary record before the Panel at the time of its decision.

The Commission must assess consultation and its adequacy to the point of its decision on whether to grant a CPCN for the Project. The Commission Panel finds BC Hydro's consultation with Kwantlen adequate to this point in time to meet the medium duty to consult, which Kwantlen is owed. The Commission Panel agrees it can make suggestions to BC Hydro. Accordingly, we encourage BC Hydro to: i) involve Kwantlen in the development of a site-specific TGP guideline for the Ruskin Dam; and ii) develop and implement a Project specific archaeological survey and protection plan with Kwantlen, prior to any drawdown of the reservoir. We also direct BC Hydro to include in its semi-annual progress reports on the Project, detailed reporting on its ongoing consultation with First Nations, similar to the Revelstoke Unit 5 Project Quarterly Reports.

The Commission Panel finds that BC Hydro has adequately consulted with First Nations on the Project to the point of this Decision.

DATED at the City of Vancouver, the Province of British Columbia, this 30th day of March 2012.

_____ *Original signed by:*

M. R. Harle
Panel Chair/Commissioner

_____ *Original signed by:*

A.W.K.A Anderson
Commissioner

_____ *Original signed by:*

N.E. MacMurchy
Commissioner

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER C-5-12**

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IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

Application by British Columbia Hydro and Power Authority
for a Certificate of Public Convenience and Necessity
to Construct and Operate the Ruskin Dam and Powerhouse Upgrade Project

BEFORE: M.R. Harle, Panel Chair/Commissioner
N.E. MacMurchy, Commissioner March 30, 2012
A.W.K. Anderson, Commissioner

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

WHEREAS:

- A. On February 22, 2011, British Columbia Hydro and Power Authority (BC Hydro) filed pursuant to section 46(1) of the *Utilities Commission Act* (the Act), an application for a Certificate of Public Convenience and Necessity (CPCN) to construct and operate the Ruskin Dam and Powerhouse Upgrade Project (the Project) as described in the Application;
- B. The Project is located at the existing Ruskin Dam and Generating Station (Ruskin Facility) located on the Stave River in the District of Mission. The Ruskin Facility was originally constructed in 1930, and has seismic and static deficiencies which require remediation to mitigate public and employee safety, financial and environmental risks. The age and condition of the existing units at the Ruskin Facility represent a significant and increasing risk to reliability;
- C. The Project has an Expected Amount of \$718.10 million that includes costs to date;
- D. The Project has two main components:
 - (i) the Dam upgrade entails measures to address the seismic/safety deficiencies of parts of the Dam, namely: the replacement of the spillway piers and spillway gates, rehabilitation of the spillway surface, replacement of the roadway crossing the top of the Dam, anchoring and reinforcement of sections of the existing Right Abutment and construction of a new seepage cut-off wall at the Right Abutment and construction of a new seepage cut-off wall at the Left Abutment, and
 - (ii) the Powerhouse upgrade includes seismic upgrades to the Powerhouse structure, rehabilitation/replacement of the three generating units, electrical and mechanical systems, rehabilitation of water conveyancing components, replacement of step-up transformers, and an upgrade and relocation of the Switchyard currently located on the roof of the existing Powerhouse to an area above the Powerhouse.

The Project has a target Completion Date of March 2018;

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- E. By Order G-34-11 dated February 24, 2011, the British Columbia Utilities Commission (Commission) established a Written Public Hearing process for the review of the Application having two rounds of Information Requests according to the Regulatory Timetable as set out in Appendix A to that Order;
- F. BC Hydro held a Workshop on the Application on February 28, 2011, at the Commission Hearing Room, 12th Floor, 1125 Howe Street in Vancouver, BC;
- G. By letter dated March 29, 2011, BC Hydro applied for a revision to the Regulatory Timetable to:
- provide BC Hydro additional time to respond to the large number of Intervener Information Requests (IRs);
 - allow more time for Interveners to review the Application; and
 - schedule an informal Ruskin site visit for Commission staff and Interveners;
- H. BC Hydro circulated a draft copy of the proposed changes to the Regulatory Timetable to all Interveners registered for the Proceeding on Friday, March 25, 2011, and no Intervener raised any concerns;
- I. By Order G-65-11 dated March 31, 2011, the Commission approved BC Hydro's request for a revised Regulatory Timetable as set out in Appendix A to that Order;
- J. By letter dated April 21, 2011, the Commission received a request from counsel for the Kwantlen First Nation (Kwantlen) to amend the Regulatory Timetable to extend the date for filing Intervener Evidence. The letter further stated Kwantlen's counsel had canvassed BC Hydro and Interveners and no concerns were raised;
- K. By Order G-76-11 dated May 4, 2011, the Commission approved the Kwantlen First Nation's request for a revised Regulatory Timetable as set out in Appendix A to that Order;
- L. By letter dated June 23, 2011, BC Hydro requested an amendment to the Regulatory Timetable in order to narrow Project-related issues through further dialogue with the Kwantlen First Nation. BC Hydro heard no objections to the proposed amendment from Interveners;
- M. By Order G-116-11 dated June 30, 2011, the Commission approved BC Hydro's request to amend the Regulatory Timetable as set out in Appendix A to that Order;
- N. By letter dated September 2, 2011, BC Hydro requested an amendment to the Regulatory Timetable:
- to permit a round of IRs from the Commission and Interveners to test BC Hydro's Evidentiary Update, which was submitted in response to the June 2011 Government panel report entitled "Review of BC Hydro";
 - to test BC Hydro's rebuttal evidence addressing aspects of Kwantlen First Nation's evidence submitted on July 29;
 - to extend the time to respond to a Commission information request for further clarification.

In this same letter, BC Hydro revised its request for the CPCN to be issued on the basis of an Expected Amount of \$728.6 million, and not the originally requested Authorized Amount of \$856.9 million.

BC Hydro canvassed and heard no objections to the proposed amendment from Interveners;

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- O By Order G-159-11 dated September 14, 2011, the Commission approved BC Hydro's request to amend the Regulatory Timetable as set out in Appendix A to that Order;
- P. By letter dated September 26, 2011, BC Hydro advised that the Procedural Conference placeholder was not required. By letter dated September 27, 2011, the Commission determined that the Procedural Conference was not warranted and the review of the Application would proceed in accordance with the Regulatory Timetable as per Appendix A to Order G-159-11;
- Q. By letter dated January 3, 2012, the Commission received a request from counsel for the Kwantlen First Nation seeking leave to file limited submissions in response to the reply argument filed by BC Hydro (Sur-Reply);
- R. By letter dated January 5, 2012, BC Hydro stated its view that although the Kwantlen failed to justify its Sur-Reply, BC Hydro will not oppose the Kwantlen Sur-Reply application provided that BC Hydro is afforded the opportunity to reply to the Kwantlen Sur-Reply by January 11, 2012;

BC Hydro shared a draft copy of this letter with the Association of Major Power Consumers of B.C. (AMPC), British Columbia Old Age Pensioners' Organization (BCOAPO) and the Commercial Energy Consumers Association of BC (CEC) because all three of these customer interveners took a position on the adequacy of consultation with Kwantlen and recommended these groups be given an opportunity to make submissions with respect to the Kwantlen Sur-Reply. BC Hydro copied its letter to all registered Interveners;

- S. By letter dated January 5, 2012, the Commission granted the Kwantlen leave to file its Sur-Reply and established deadlines for AMPC, BCOAPO and the CEC to submit responses to the Sur-Reply by January 9, 2012, and BC Hydro to provide its reply by January 11, 2012;
- T. Responses were received on the subject of the Sur-Reply by letter from AMPC, CEC and BC Hydro by the due dates;
- U. On February 2, 2012, the BC Government enacted amendments (Amendments) to: (1) the Electricity Self-Sufficiency Regulation issued under the *Clean Energy Act*, and (2) Special Direction No. 10 to the British Columbia Utilities Commission (Amended SD 10) issued under the *Utilities Commission Act*;
- V. By letter dated February 8, 2012, BC Hydro submitted its view of the effect of these Amendments on the Project-related CPCN public interest test, and suggested a process for Interveners to provide their submissions and for BC Hydro to reply to those submissions;
- W. By letter dated February 9, 2012, the Commission wrote to registered Interveners accepting BC Hydro's proposed process for review of the Amendments;
- X. Interveners submitted their views on the effect of the Amendments by February 13, 2012, and BC Hydro replied to those views by February 15, 2012, in accordance with the Commission's due dates.
- Y. The Commission has reviewed and considered the Application, the evidence and the submissions presented on the Application, and has determined, as set out in the Decision issued concurrently with this Order, that the Project is in the public interest and that a CPCN should be issued to BC Hydro for the Project, subject to the conditions and directions set out in this Order.

**BRITISH COLUMBIA
UTILITIES COMMISSION**

**ORDER
NUMBER C-5-12**

4

NOW THEREFORE the Commission orders as follows:

1. A CPCN is granted to BC Hydro for the Project as set out in the Application.
2. BC Hydro is directed to file with the Commission semi-annual progress reports on the Project schedule, costs with a comparison to the Expected Amount set out in the Application and any variances or difficulties that the Project may be encountering. The form and content of the semi-annual progress reports will be consistent with other BC Hydro capital project progress reports filed with the Commission. The semi-annual progress reports will be filed within 45 days of the end of each reporting period.
3. BC Hydro is directed to reflect in its semi-annual progress reports on the Project that the Commission has approved only a Basic Expected Amount of \$640.6 million, which excludes Capital Overhead (COH). This amount is to be supplemented in the future as COH rates are approved by the Commission from time to time in its decisions on BC Hydro's Revenue Requirement Applications, to arrive at a Total Expected Amount.
4. BC Hydro is directed to include in its semi-annual progress reports on the Project, detailed reporting on its ongoing consultation with First Nations, similar to the Revelstoke Unit 5 Project Quarterly Reports.
5. BC Hydro is directed to file a final report within six months of the end or substantial completion of the Project. The final report is to include a complete breakdown of the final costs of the Project, a comparison of these costs to the Expected Amount set out in the Application and provide an explanation of all material cost variances.

DATED at the City of Vancouver, in the Province of British Columbia, this 30th day of March 2012.

BY ORDER

Original signed by:

M.R. Harle
Panel Chair/Commission

BRITISH COLUMBIA
UTILITIES COMMISSION

ORDER
NUMBER C-5-12

4

NOW THEREFORE the Commission orders as follows:

1. A CPCN is granted to BC Hydro for the Project as set out in the Application.
2. BC Hydro is directed to file with the Commission semi-annual progress reports on the Project schedule, costs with a comparison to the Expected Amount set out in the Application and any variances or difficulties that the Project may be encountering. The form and content of the semi-annual progress reports will be consistent with other BC Hydro capital project progress reports filed with the Commission. The semi-annual progress reports will be filed within 45 days of the end of each reporting period.
3. BC Hydro is directed to reflect in its semi-annual progress reports on the Project that the Commission has approved only a Basic Expected Amount of \$640.6 million, which excludes Capital Overhead (COH). This amount is to be supplemented in the future as COH rates are approved by the Commission from time to time in its decisions on BC Hydro's Revenue Requirement Applications, to arrive at a Total Expected Amount.
4. BC Hydro is directed to include in its semi-annual progress reports on the Project, detailed reporting on its ongoing consultation with First Nations, similar to the Revelstoke Unit 5 Project Quarterly Reports.
5. BC Hydro is directed to file a final report within six months of the end or substantial completion of the Project. The final report is to include a complete breakdown of the final costs of the Project, a comparison of these costs to the Expected Amount set out in the Application and provide an explanation of all material cost variances.

DATED at the City of Vancouver, in the Province of British Columbia, this 30th day of March 2012.

BY ORDER



M.R. Harle
Panel Chair/Commission

BACKGROUND AND REGULATORY PROCESS

The Applicant

BC Hydro is a Crown Corporation established in 1962 under the *Hydro and Power Authority Act*. BC Hydro is mandated to generate, distribute, and sell electricity; upgrade its power sites; and purchase power from, or sell power to, a firm or person. BC Hydro is the largest electric utility in BC, serving over 94 per cent of the provincial population. BC Hydro is charged with the responsibility of, among other things, owning and operating the generation and storage Heritage Assets set out in Schedule 1 to the *Clean Energy Act (CEA)*, including the Ruskin Facility.

BC Hydro is an agent of Her Majesty the Queen in right of the Province of B.C. The B.C. Minister of Finance is the fiscal agent of BC Hydro. BC Hydro has the financial capacity to undertake the Project and other large projects by means of: borrowing guaranteed by the Province; borrowing directly from the Province; and funds generated internally from the operation of its business. Moody's Investors Service and Standard & Poor's Corporation rated BC Hydro bonds as Aaa and AAA respectively. The rating from the Dominion Bond Rating Service is AA High.

BC Hydro has been responsible for the planning, design, and construction of generation and distribution facilities since 1962. BC Hydro was also responsible for these functions with respect to the transmission system until 2003, when responsibility was transferred to British Columbia Transmission Corporation (BCTC). As per Part 7 of the *CEA*, BC Hydro and BCTC were integrated effective July 5, 2010 and BC Hydro resumed responsibility for the planning, design, and construction of the transmission system.

Between 2007 and 2010, BC Hydro placed a total of five generation facility upgrades into service, each of which had a capital cost of over \$50 million. These projects are: Revelstoke Unit 5; Mica Generator Stator Replacement (Units 1-4); Peace Canyon Generator Stator Replacement and Rotor Modification (Units 1-4); Aberfeldie Redevelopment; and Coquitlam Dam Seismic Improvement.

The Project Team is composed of full time BC Hydro employees and consultants who have extensive experience in all aspects of project delivery for major hydroelectric facilities, from design through to completion. Their collective experience includes past BC Hydro projects, including the Ruskin Facility-related Stage 1 Ruskin Dam Safety Right Abutment Upgrade and other such projects, as well as major projects prior to joining BC Hydro. (Exhibit B-1, pp. 1-16 to 1-18)

The Order Sought

BC Hydro requested that a Certificate of Public Convenience and Necessity (CPCN) be granted for the Project as proposed because, among other things: (1) the Project aligns with and advances

several of the “British Columbia’s energy objectives” set out in Section 2 of the *CEA*; and (2) the Project is in the interests of persons in B.C. who receive or who may receive service from BC Hydro. Applying for a CPCN for the Project is consistent with BC Hydro’s Capital Project Filing Guidelines (Guidelines). The rationale for applying for a CPCN for the Project pursuant to subsection 46(1) of the *UCA* was stated as follows:

Ruskin Generating Station has been in operation since 1930. As a result, pursuant to subsections 45(2)(a) and (b) of the *UCA*, BC Hydro has a deemed CPCN to operate the Ruskin GS, and to construct and operate extensions to the Ruskin GS such as the Powerhouse rehabilitation/replacement.

However, due to its condition the Powerhouse must either be rehabilitated/replaced or replaced with another electricity resource. In addition, the Powerhouse Work would result in an increase in the equipment efficiency and energy amount of approximately 28 GWh/year for a total of 334 GWh/year of firm energy and an increase of 9 MW of capacity for a total of 114 MW of dependable capacity. The rehabilitation/replacement of the Powerhouse is an “extension” as that term is used in section 45 of the *UCA* for two reasons – a facility requiring either rehabilitation/replacement or replacement with another electricity resource, and an increase in capacity rating and energy generation.

The Upper Dam Work, Right Abutment Work and Left Abutment Work are driven by seismic/safety issues and will not raise the level of Hayward Lake Reservoir, and therefore are not extensions.

Considering that the extent of work being undertaken at the Powerhouse and continued operation of the Powerhouse is a major factor in determining the options undertaken for the Upper Dam Work, Right Abutment Work and Left Abutment Work, BC Hydro is filing for a CPCN for the entire Project.

On February 22, 2011, BC Hydro requested that a CPCN be granted on the basis of, among other things, the Authorized Amount of \$867.4 million. On September 21, 2011 BC Hydro submitted an amendment to its Application seeking to revise the CPCN amount from the Authorized Amount down to the Expected Amount of \$718.1 million. BC Hydro stated the “expenditures in excess of the Expected Amount up to the Authorized Amount require the prior approval of the Board Capital Projects Committee. Accordingly, given that approval is required for expenditures above the Expected Amount, it is more appropriate that the CPCN be granted on the basis of the Expected Amount.”

BC Hydro also stated that “should a CPCN be granted for the Project as proposed, BC Hydro’s semi-annual reports to the BCUC will track Project costs against the Expected Amount, and expenditures in excess of the Expected Amount could be subject to a prudency review in a future Revenue Requirements Application (RRA) proceeding.”

BC Hydro is seeking a Commission order that provides as follows:

A CPCN is granted to BC Hydro for the Project as described in the Application.

BC Hydro is directed to file with the Commission semi-annual progress reports on the Project schedule, costs with a comparison to the Expected Amount as set out in the Application and any variances or difficulties that the Project may be encountering. The form and content of the semi-annual progress reports will be consistent with other BC Hydro capital project progress reports filed with the Commission. The semi-annual progress reports will be filed within 45 days of the end of each reporting period.

BC Hydro is directed to file a final report within six months of the end or substantial completion of the Project. The final report is to include a breakdown of the final costs of the Project, a comparison of these costs to the Expected Amount set out in the Application and provide an explanation of all material cost variances.

The Regulatory Process

On February 24, 2011, Commission Order G-34-11 established a Written Public Hearing and Regulatory Timetable for the review of the Application consisting two rounds of information requests. By way of Commission Orders G-65-11, G-76-11, G-116-11 and G-159-11, the Regulatory Timetable was amended to accommodate various delays requested by the Applicant and registered Interveners, which resulted in an overall 6 month delay of the proceeding. The actual milestone dates are summarized below:

Filing of Application	Tuesday, February 22, 2011
BC Hydro hosted Application Workshop	Monday, February 28, 2011
Intervener/Interested Party Registration	Thursday, March 10, 2011
BCUC Information Request (IR) No. 1	Thursday, March 10, 2011
Intervener IR No. 1	Friday, March 18, 2011
Participation Assistance/Cost Award Budget Submissions	Wednesday, March 23, 2011
BC Hydro responses to BCUC and Intervener IR No. 1	Wednesday, April 20, 2011
Ruskin Site Tour	Tuesday, April 26, 2011

BCUC and Intervener IR No. 2	Wednesday, May 18, 2011
BC Hydro responses to BCUC IR No. 2 and Intervener IR No. 2	Thursday, June 16, 2011
Kwantlen Evidence	Friday, July 29, 2011
IR's in Relation to Kwantlen Evidence	Thursday, August 11, 2011
Commission Panel IR's	Friday, September 2, 2011
Kwantlen Response to Information Requests	Wednesday, September 14, 2011
BC Hydro Rebuttal Evidence, Evidentiary Update and response to Exhibits A-13 and A-14	Wednesday, September 21, 2011
IR's on BC Hydro Rebuttal Evidence/Evidentiary Update/and Exhibit A-13 and A-14 responses	Friday, October 7, 2011
BC Hydro responses to IR's on BC Hydro Rebuttal Evidence/Evidentiary Update/and Exhibits A-13 and A-14 responses	Friday, November 4, 2011
BC Hydro Final Written Submission	Friday, November 25, 2011
Intervener Final Written Submission	Monday, December 12, 2011
BC Hydro Written Reply Submission	Friday, December 23, 2011
Kwantlen Sur-Reply	Thursday, January 5, 2012
AMPC, BCOAPO, CEBC Reply to Kwantlen Sur-Reply	Monday, January 9, 2012
BC Hydro Reply to Kwantlen Sur-Reply	Wednesday, January 11, 2012
BC Hydro Supplemental Submission	Wednesday, February 8, 2012
Intervener Supplemental Submission	Monday, February 13, 2012
BC Hydro Supplemental Reply	Wednesday, February 15, 2012

LIST OF ACRONYMS

2008 Kennedy and Bouchard Report	Ethnography by Bouchard and Kennedy entitled “An Evaluation of First Nations’ Aboriginal Rights and Title Interests in the Vicinity of the Ruskin Dam” written in 2008
2011 Matsqui Report	Ethnography entitled “An Examination of Matsqui Traditional Territory, A Literature Review” written by Kennedy and dated 2011
AMPC	Association of Major Power Customers of British Columbia
B&V Report	The Black and Veatch Report “Ruskin Hydroelectric Facility Minimum Cost Analysis Study”
BC Hydro	British Columbia Hydro and Power Authority
BCOAPO	British Columbia Old Age Pensioners Organization
BCSEA	British Columbia Sustainable Energy Association
BCUC, Commission	British Columbia Utilities Commission
CEA	<i>Clean Energy Act</i>
CEBC	Clean Energy Association of British Columbia
CEC	Commercial Energy Consumers Association of British Columbia
CGAAP	Canadian Generally Accepted Accounting Principles
CMP	Construction Management Plan
COH	Capital Overhead
CPCN	Certificate of Public Convenience and Necessity
CWR	Controller of Water Rights
EAO	Environmental Assessment Office
EHRs	Equipment Health Ratings
EMF	electric and magnetic fields
GIS	gas insulated switchgear
HADD	harmful alteration, disruption or destruction of fish habitat

LIST OF ACRONYMS

HTG	Hul'qumi'num Treaty Group
IDC	interest during construction
IEEE 693	Electrical and Electronics Engineering Recommended Practice for Seismic Design of Substations standard 693
IFRS	International Financial Reporting Standards
ILM	Interior to Lower Mainland Transmission Project
IPPs	BC Electricity Market – Independent Power Producers
IRs	Information Requests
KCBL	Klohn Crippen Berger Ltd.
Kwantlen	Kwantlen First Nation
Kwikwetlem	Kwikwetlem First Nation
LOA	Limits of Approach
Matsqui	Matsqui First Nation
McLaren Report	“Report on Kwantlen Occupation and Land Use in <i>Sxeyə’qs</i> and the Surrounding Region” edited by Duncan McLaren, dated June 20, 2011
MDE	Maximum Design Earthquake
MOE	Ministry of Environment
MOU	Memorandum of Understanding
MRCC	Mission Regional Chamber of Commerce
MW	megawatts
NBCC	National Building Code of Canada
NPV	net present value
PMF	Probable Maximum Flood
Project	Ruskin Dam and Powerhouse Upgrade Project

LIST OF ACRONYMS

Regulation	Electricity Self-Sufficiency Regulation
Ruskin Facility	Ruskin Generating Station and Ruskin Dam
Ruskin Powerhouse or Powerhouse	Ruskin Generating Station
RW Beck Report	R.W. Beck, Inc. November 2010 report entitled "Ruskin Power Plant Assessment Report"
SD 10	Special Direction No. 10
SN	Stó:lō Nation
SSSMP	Site Specific Safety Management Plan
STC	Stó:lō Nation Tribal Council
TDG	Total Dissolved Gas
U1, U2	Turbine-Generator Units 1 and 2
U3	Unit 3
<i>UCA</i>	<i>Utilities Commission Act</i>
UEC	Levelized unit cost of energy

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

2009 CarswellBC 341, 2009 BCCA 68, [2009] B.C.W.L.D. 1753, [2009] B.C.W.L.D. 1575, 76 R.P.R. (4th) 213, 41 C.E.L.R. (3d) 159, 89 B.C.L.R. (4th) 273, [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, [2009] 9 W.W.R. 92, 308 D.L.R. (4th) 285

Kwikwetlem First Nation v. British Columbia Transmission Corp.

In the Matter of the Utilities Commission Act, R.S.B.C. 1996, c. 473, and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Project

The Kwikwetlem First Nation (Appellant / Applicant / Intervenor) and British Columbia Transmission Corporation, British Columbia Hydro and Power Authority, and British Columbia Utilities Commission (Respondents)

In the Matter of the Utilities Commission Act, R.S.B.C. 1996, c. 473, and the Application by the British Columbia Transmission Corporation for a Certificate of Public Convenience and Necessity for the Interior To Lower Mainland Project

Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance and Upper Nicola Indian Band (Appellants / Applicants / Intervenor) and British Columbia Utilities Commission, British Columbia Transmission Corporation, and British Columbia Hydro and Power Authority (Respondents)

British Columbia Court of Appeal

Donald, Huddart, Bauman JJ.A.

Heard: November 26-27, 2008

Judgment: February 18, 2009

Docket: Vancouver CA035864, CA035928

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A.W. Carpenter for Respondent, British Columbia Transmission Corporation

Subject: Public; Property; Environmental

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Public law --- Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Miscellaneous

Duty to consult — First Nations intervenor made application for certificate of public convenience and necessity ("CPCN") for transmission line project proposed by respondent, British Columbia Transmission Corporation ("BCTC") — First Nations intervenor appealed decision of British Columbia Utilities Commission ("Commission") — Appeal allowed — Order was made that Commission reconsider scoping decision — Duty to consult with regard to CPCN process was acknowledged — Commission had obligation to inquire into adequacy of consultation before granting CPCN — If consultation was to be meaningful, it must take place when project was being defined and continue until project was completed — Pre-application stage of Environmental Assessment Certificate ("EAC") process in case appeared to have synchronized well with BCTC's practice of first seeking CPCN and not making formal application for EAC until CPCN was granted — Question Commission must decide was whether consultation efforts up to point of decision were adequate.

Aboriginal law --- Reserves and real property — Fiduciary duty

Duty to consult — First Nations intervenor made application for certificate of public convenience and necessity ("CPCN") for transmission line project proposed by respondent, British Columbia Transmission Corporation ("BCTC") — First Nations intervenor appealed decision of British Columbia Utilities Commission ("Commission") — Appeal allowed — Order was made that Commission reconsider scoping decision — Duty to consult with regard to CPCN process was acknowledged — Commission had obligation to inquire into adequacy of consultation before granting CPCN — If consultation was to be meaningful, it must take place when project was being defined and continue until project was completed — Pre-application stage of Environmental Assessment Certificate ("EAC") process in case appeared to have synchronized well with BCTC's practice of first seeking CPCN and not making formal application for EAC until CPCN was granted — Question Commission must decide was whether consultation efforts up to point of decision were adequate.

Cases considered by *Huddart J.A.*:

British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission) (1996), 36 Admin. L.R. (2d) 249, 20 B.C.L.R. (3d) 106, 71 B.C.A.C. 271, 117 W.A.C. 271, 1996 CarswellBC 352 (B.C. C.A.) — referred to

British Columbia Transmission Corp., Re (2006), 2006 CarswellBC 3694 (B.C. Utilities Comm.) — considered

British Columbia Transmission Corp., Re (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.) — considered

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (2009), 2009 CarswellBC 340, 2009 BCCA 67, 76 R.P.R. (4th) 159 (B.C. C.A.) — followed

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — considered

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Kwikwetlem First Nation v. British Columbia Transmission Corp. (2008), 2008 CarswellBC 958, 2008 BCCA 208 (B.C. C.A. [In Chambers]) — considered

Osoyoos Indian Band v. Oliver (Town) (2001), 95 B.C.L.R. (3d) 22, [2002] 1 W.W.R. 23, 2001 SCC 85, 2001 CarswellBC 2703, 2001 CarswellBC 2704, 45 R.P.R. (3d) 1, 278 N.R. 201, 75 L.C.R. 1, [2002] 1 C.N.L.R. 271, 206 D.L.R. (4th) 385, [2001] 3 S.C.R. 746, 160 B.C.A.C. 171, 261 W.A.C. 171 (S.C.C.) — referred to

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) — considered

Statutes considered:

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

Environmental Assessment Act, R.S.B.C. 1996, c. 119

Generally — referred to

Environmental Assessment Act, S.B.C. 2002, c. 43

Generally — referred to

s. 8(1)(a) — considered

s. 8(1)(c) — considered

s. 9 — referred to

s. 9(1)(a) — considered

s. 9(1)(c) — considered

s. 9(2) — considered

s. 10(1)(c) — considered

s. 11 — referred to

s. 11(1) — considered

s. 11(2)(f) — considered

s. 11(2)(g) — considered

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s. 11(3) — considered

s. 16 — considered

s. 17 — referred to

s. 17(1) — considered

s. 17(2)(a) — considered

s. 17(2)(b) — considered

s. 17(2)(c) — considered

s. 17(3) — considered

s. 17(4) — considered

s. 30 — considered

s. 50(2)(e) — considered

Hydro and Power Authority Act, R.S.B.C. 1996, c. 212

Generally — referred to

Transmission Corporation Act, S.B.C. 2003, c. 44

Generally — referred to

Utilities Commission Act, R.S.B.C. 1996, c. 473

Generally — referred to

s. 45 — referred to

s. 45(1) — considered

s. 45(3) — considered

s. 45(6) — considered

s. 45(7) — considered

s. 45(8) — considered

s. 45(9) — considered

s. 46(1) — considered

s. 46(3) — considered

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s. 46(3.1) [en. 2008, c. 13, s. 9(b)] — considered

s. 46(3.2) [en. 2008, c. 13, s. 9(b)] — considered

s. 71 — referred to

s. 99 — considered

s. 101 — pursuant to

s. 101(1) — considered

s. 101(5) — considered

Regulations considered:

Environmental Assessment Act, S.B.C. 2002, c. 43

Concurrent Approval Regulation, B.C. Reg. 371/2002

s. 3(2)(a) — referred to

APPEAL by First Nations intervenor from decision of British Columbia Utilities Commission.

Huddart J.A.:

1 This appeal under s. 101 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473, questions the approach of the British Columbia Utilities Commission ("the Commission") to the application of the principles of the Crown's duty to consult about and, if necessary, accommodate asserted Aboriginal interests on an application under s. 45 of that *Act*, for a certificate of public convenience and necessity ("CPCN") for a transmission line project proposed by the respondent, British Columbia Transmission Corporation ("BCTC").

2 The line is said by its proponents to be necessary because the lower mainland's current energy supply will soon be insufficient to meet the needs of its growing population: the bulk of the province's electrical energy is generated in the interior of the province while the bulk of the electrical load is located at the coast. BCTC's preferred plan to remedy this problem is to build a new 500 kilovolt alternating current transmission line from the Nicola substation near Merritt to the Meridian substation in Coquitlam, a distance of about 246 kilometres (the "ILM Project"). It requires transmission work at both the Nicola and Meridian substations and the construction of a series capacitor station at the midpoint of the line.

3 The proposed line originates, terminates, or passes through the traditional territory of each of the four appellants. Most of the line will follow an existing right of way, although parts will need widening. About 40 kilometres of new right of way will be required in the Fraser Canyon and Fraser Valley. The respondents agree the ILM Project has the potential to affect Aboriginal interests, including title, requires a CPCN, and has been designated a reviewable project under the *Environmental Assessment Act*, S.B.C. 2002, c. 43.

4 The Nlaka'pamux Nation Tribal Council represents the collective interests of the Nlaka'pamux Nation of which there are seven member bands. Their territory is generally situated in the lower portion of the Fraser River watershed and across portions of the Thompson River watershed. Their neighbour, the Okanagan Nation, con-

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sists of seven member bands whose collective interests are represented by the Okanagan Nation Alliance. The Upper Nicola Indian Band, one of the member bands of the Okanagan Nation, is uniquely affected by the ILM Project as it asserts particular stewardship rights in the area around Merritt where the Nicola substation is located. The Kwikwetlem First Nation is a relatively small band whose territory encompasses the Coquitlam River watershed and adjacent lands and waterways. Its territory, largely taken up by the development of a hydro dam and the urban centres, Port Coquitlam and Coquitlam, contains the Meridian substation, the terminus of the proposed transmission line.

5 The appellants all registered with the Commission as intervenors on BCTC's s. 45 application and asked to lead evidence at an oral hearing about whether the Crown had fulfilled its duty to consult before seeking a CPCN for the ILM Project. Their essential complaint is that the Commission's refusal to permit them to lead evidence about the consultation process in that proceeding effectively precludes consideration of alternatives to the ILM Project as a solution to the lower mainland's anticipated energy shortage.

6 The question arises in an appeal from a decision by which the Commission determined it need not consider the adequacy of the Crown's consultation and accommodation efforts with First Nations when determining whether public convenience and necessity require the proposed extension of the province's transmission system: *British Columbia Transmission Corp., Re* (March 5, 2008), Doc. L-6-08 (B.C. Utilities Comm.), First Nations Scoping Issue (the "scoping decision"). In the Commission's view, it could and should defer any assessment of whether the Crown's duty of consultation and accommodation with regard to the ILM Project had been fulfilled to the ministers with power to decide whether to issue an environmental assessment certificate under s. 17(3) of the *Environmental Assessment Act* (an "EAC").

7 The Commission based its scoping decision on two earlier decisions concerning CPCN applications: *British Columbia Transmission Corp., Re* [2006 CarswellBC 3694 (B.C. Utilities Comm.)], B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06 ("VITR") and *British Columbia Hydro & Power Authority, Re* (July 12, 2007), Doc. C-8-07, (B.C. Utilities Comm.) ("*Revelstoke*"). It is the reasoning in *VITR*, amplified in *Revelstoke* and the scoping decision, this Court is asked to review.

8 As a quasi-judicial tribunal with authority to decide questions of law on applications under its governing statute, the Commission has the jurisdiction and capacity to decide the constitutional question of whether the duty to consult exists and if so, whether that duty has been met with regard to the subject matter before it: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (B.C. C.A.) at paras. 35 to 50. The question on this appeal is whether the Commission also has the obligation to consider and decide whether that duty has been discharged on an application for a CPCN under s. 45 of the *Utilities Commission Act* as it did on the application under s. 71 in *Carrier Sekani*.

9 The Commission is a regulatory agency of the provincial government which operates under and administers that *Act*. Its primary responsibility is the supervision of British Columbia's natural gas and electricity utilities "to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition", subject to the government's direction on energy policy. At the heart of its regulatory function is the grant of monopoly through certification of public convenience and necessity. (See *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, 36 Admin. L.R. (2d) 249 (B.C. C.A.), at paras. 46 and 48.)

10 BCTC is a Crown corporation, incorporated under the *Business Corporations Act*, S.B.C. 2002, c. 57. In

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undertaking the ILM Project, it is supported by another Crown corporation, the British Columbia Hydro and Power Authority ("BC Hydro"), incorporated under the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212. Under power granted to BCTC by the *Transmission Corporation Act*, S.B.C. 2003, c. 44, and a series of agreements with BC Hydro, BCTC is responsible for operating and managing BC Hydro's transmission lines, which form the majority of British Columbia's electrical transmission system. Planning for and building enhancements or extensions to the transmission system, and obtaining the regulatory approvals they require, are included in BCTC's responsibilities; BC Hydro retains responsibility for consultation with First Nations regarding them. Like the appellants, BC Hydro registered as an intervenor on BCTC's application for a CPCN for the ILM Project.

The Issues

11 It is common ground that the ILM Project has the potential to affect adversely the asserted rights and title of the appellants, that its proposal invoked the Crown's consultation and accommodation duty, and that the Crown's duty with regard to the ILM Project has not yet been fully discharged. The broad issue raised by the scoping decision under appeal is the role of the Commission in assessing the adequacy of the Crown's consultation efforts before granting a CPCN for a project that may adversely affect Aboriginal title. The narrower issue is whether the Commission's decision to defer that assessment to the ministers is reasonable.

12 In granting leave, Levine J.A. defined the issue as "whether [the Commission] may issue a CPCN without considering whether the Crown's duty to consult and accommodate First Nations, to that stage of the approval process has been met": *Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2008 BCCA 208 (B.C. C.A. [In Chambers]). It may be thought this issue was settled when this Court stated at para. 51 in *Carrier Sekani*:

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.

13 The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.

14 As I will explain, I am persuaded the reasons expressed at paras. 52 to 57 for the conclusion reached at para. 51 in *Carrier Sekani* apply with equal force to an application for a CPCN and the Commission erred in law when it refused to consider the appellant's challenge to the consultation process developed by BC Hydro. However, in anticipation of that potential conclusion, the respondents asked this Court to step back from a narrow view having regard only to the Commission's mandate, and to find that, in this case, the Commission both acknowledged and fulfilled its constitutional duty when it deferred consideration of the adequacy of BC Hydro's consultation and accommodation efforts to the ministers' review on the EAC application. In my view, the nature

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and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.

15 I would remit the scoping decision to the Commission for reconsideration in accordance with this Court's opinion, once certified, and direct that the effect of the CPCN be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point. (See *Utilities Commission Act*, ss. 99 and 101(5).)

The Relevant Statutory Regimes

The CPCN Process

Utilities Commission Act

45.(1) Except as otherwise provided, after September 11, 1980, a person must not begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

.....

(3) Nothing in subsection (2) [deemed CPCN for pre-1980 projects] authorizes the construction or operation of an extension that is a reviewable project under the *Environmental Assessment Act*.

.....

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise, or

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

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46.(1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.

.....

(3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.

(3.1) In deciding whether to issue a certificate under subsection (3), 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, and
- (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 [achieving electricity self-sufficiency by 2016] and 64.02 [achieving the goal that 90% of electricity be generated from clean or renewable resources], if applicable.

(3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.

.....

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.

.....

(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.

16 The Commission issues *CPCN Application Guidelines* to assist public utilities and others in the preparation of CPCN applications. The preface to the guidelines issued March 2004 includes this advice:

The scope of the information requirement for a specific application will depend on the nature of the project and the issues that it raises. Project proponents are encouraged to initiate discussions with appropriate government agencies and the public very early in the project planning stage in order to obtain an appreciation of the issues to be addressed prior to the filing of the application.

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CPCN Applications may be supported by resource plans and/or action plans prepared pursuant to the Resource Planning Guidelines issued in December 2003. The resource plan and/or action plans may deal with significant aspects of project justification, particularly the need for the project and the assessment of the costs and benefits of the project and alternatives.

According to the *Guidelines*, the application should include the following:

2. Project Description

.....

(iv) identification and preliminary assessment of any impacts by the project on the physical, biological and social environments or on the public, including First Nations; proposals for reducing negative impacts and obtaining the maximum benefits from positive impacts; and the cost to the project of implementing the proposals;

.....

3. Project Justification

.....

(ii) a study comparing the costs, benefits and associated risks of the project and alternatives, which estimates the value of all of the costs and benefits of each option or, where not quantifiable, identifies the cost or benefit and states that it cannot be quantified;

(iii) a statement identifying any significant risks to successful completion of the project;

.....

4. Public Consultation

(i) a description of the Applicant's public information and consultation program, including the names of groups, agencies or individuals consulted, as well as a summary of the issues and concerns discussed, mitigation proposals explored, decisions taken, and items to be resolved.

.....

6. Other Applications and Approvals

(i) a list of all approvals, permits, licences or authorizations required under federal, provincial and municipal law; and

(ii) a summary of the material conditions that are anticipated in the approvals and confirmation that the costs of complying with these conditions are included in the cost estimate of the Application.

The EAC Process

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Environmental Assessment Act

8.(1) Despite any other enactment, a person must not

- (a) undertake or carry on any activity that is a reviewable project,

.....

unless

- (c) the person first obtains an environmental assessment certificate for the project, or

.....

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,

.....

unless satisfied that

- (c) the person has a valid environmental assessment certificate for the reviewable project, or

.....

(2) Despite any other enactment, an approval under another enactment is without effect if it is issued contrary to subsection (1).

10.(1) The executive director by order

.....

(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 .

.....

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

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(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:

.....

(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;

(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.

.....

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.

.....

17.(1) On completion of an assessment of a reviewable project ... the executive director ... must refer the proponent's 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 ...,

(b) the recommendations, if any, of the executive director, ..., and

(c) reasons for the recommendations, if any, of the executive director,

(3) On receipt of a referral under subsection (1), the ministers

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- (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.

.....

30.(1) At any time during the assessment of a reviewable project under this Act, and before a decision under section 17(3) about the proponent's application for an environmental assessment certificate ..., the minister by order may suspend the assessment until the outcome of any investigation, inquiry, hearing or other process that

- (a) is being or will be conducted by any of the following or any combination of the following:
 - (i) the government of British Columbia, including any agency, board or commission of British Columbia;
 - (ii) the government of Canada;
 - (iii) a municipality or regional district in British Columbia;
 - (iv) a jurisdiction bordering on British Columbia;
 - (v) another organization, and
- (b) is material, in the opinion of the minister, to the assessment, under this Act, of the reviewable project.

(2) If a time limit is in effect under this Act at the time that an assessment is suspended under subsection (1), the minister may suspend the time limit until the assessment resumes.

17 The *Guide to the Environmental Assessment Process* published by the Environmental Assessment Office ("EAO") outlines the general framework for a typical environmental assessment. Key to that process are an order issued under s. 11 of the *Act* determining the scope of the assessment and the procedures and methods to be used for that particular project, and the terms of reference, which define the information the proponent must provide in its application. Once the executive director (or a delegate) accepts the application for review (s. 16),

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he has 180 days to complete the review, prepare an assessment report and refer the application to the designated ministers. As noted in the *Guide* at page 18, "Government agency, First Nation and public review of the application, any formal public comment period, and opportunities for the proponent to respond to issues raised, are normally scheduled within the 180 days."

18 The assessment report documents the findings of the assessment, including the issues raised and how they have been or could be addressed. It may be accompanied by recommendations, with reasons, of the executive director. Currently, the responsible ministers are the Minister of the Environment and the minister designated as responsible for the category of the reviewable project, in this case, the Minister of Energy, Mines and Petroleum Resources. After the application is referred to them, they have 45 days to decide whether to issue an EAC or require further assessment (s. 17). At that stage, the *Guide* notes at page 20, the ministers must consider whether the province has fulfilled its legal obligations to First Nations.

19 The parties' disagreement about the nature and effect of these processes and their interplay is at the root of this appeal. However, they agree that both a CPCN and EAC are required before the ILM Project can proceed. They do not suggest that either s. 9 of the *Environmental Assessment Act* or s. 45(3) of the *Utilities Commission Act* requires the EAC to be issued before the CPCN can be considered and issued. The wording of those statutes suggests otherwise. While s. 30 of the *Environmental Assessment Act* permits the ministers to suspend the EAC assessment until a CPCN is issued, there is no comparable provision in the *Utilities Commission Act*.

20 The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.

Relevant Background

21 This brief summary of events (taken from the CPCN application) is intended only to help in understanding the procedural issue before this Court. The appellants do not accept the respondents' descriptions of their consultation efforts as "statements of facts". This evidence could not be tested because of the scoping decision.

22 BC Hydro began its consultation efforts when it contacted First Nations in August 2006; in Kwikwetlem's case, by telephone on 16 August 2006. At that time BCTC was considering four options: upgrade the existing infrastructure, build a new transmission line, non-wire options such as local energy generation and conservation, and doing nothing. Both the upgrade and the new line would require a CPCN; only the new line required an EAC. From August to October 2006, BC Hydro met with 46 First Nations and Tribal Councils to provide an overview of these options (including four potential routes for a new line) and the required regulatory processes.

23 Recognizing a new transmission line would require an EAC, and that consultation with First Nations would be required for both that option and the alternative upgrade, BCTC began the pre-application stage of the EAC process by filing a project description with the EAO on 4 December 2006. Two weeks later, the executive director of the EAO issued an order under s. 10(1)(c) of the *Environmental Assessment Act* stating that the proposed new transmission line was a reviewable project, required an EAC, and could not proceed without an assessment. Meanwhile, BC Hydro continued its efforts to consult with Aboriginal groups through the spring of 2007 by holding three more "Rounds of Consultation" and the first round of "Community Open Houses".

24 In February 2007, the EAO held an initial Technical Working Group meeting attended by 26 Aboriginal

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Groups where an overview of the ILM Project and the environmental assessment process was provided together with draft Terms of Reference on which comment was invited. In March, the EAO provided a draft of its procedural order issued pursuant to s. 11 of the *Environmental Assessment Act* and draft technical discipline Work Plans to 60 First Nations and 7 Tribal Councils for comment.

25 In May 2007, BCTC made its decision to pursue the ILM Project as its preferred option to increase the province's transmission capacity. On 31 May 2007, the executive director issued a s. 11 procedural order, establishing a formal consultation process for the ILM Project. At para. 4.1 of that order, it set out the scope of the assessment it required:

4.1 The scope of assessment for the Project will include consideration of the potential for:

4.1.1 potential adverse environmental, social, economic, health and heritage effects and practical means to prevent or reduce to an acceptable level any such potential adverse effects; and,

4.1.2 potential adverse effects on First Nation's Aboriginal interests, and to the extent appropriate, ways to avoid, mitigate or otherwise accommodate such potential adverse effects.

26 In Schedule B, the order identified 60 First Nations and 7 Tribal Councils with whom consultation was required. At recital F, it stated that the project area lay in their "asserted traditional territories", and at recital G, that BCTC had "held discussions or attempted to hold discussions" with them "with respect to their interests in the Project, including potential effects" on their "potential Aboriginal interests".

27 The order also affirmed that the Project Assessment Director had established a Working Group which was to contain representation from First Nations as well as federal, provincial and local government agencies (paras. 7.1, 7.2). The order contained directives that the proponent meet with the Working Group (para. 7.2), consult with First Nations (para. 9.1), and seek advice from First Nations on the means of that consultation (para. 9.2).

28 The order specified BCTC was to include a summary of its consultation efforts to date and a proposal for future consultation with First Nations and the comments of First Nations on both in its EAC application (paras. 13.1 and 13.2). In para. 15.5 the order required BCTC to provide a written report on the potential adverse effects of the project, including those on First Nations' Aboriginal interests, and its intentions as to how it would address those issues. The order also stated that, based on these submissions, the Project Assessment Director might require BCTC (or the EAO) to undertake further measures to ensure adequate consultation occurred during the review of the EAC application (paras. 13.3, 13.4, 15.6). Finally, the order stated that the Project Assessment Director would consult with BCTC, First Nations and other members of the Working Group in his preparation of the draft assessment report, "as a basis for a decision by Ministers" under s. 17(3) of the *Act*.

29 On 6 June 2007, BC Hydro sent a letter to the 67 First Nations and Tribal Councils identified by the EAO, notifying them of BCTC's decision to seek approvals for a new transmission line. That letter included this explanation:

In deciding to pursue the new transmission line alternative, BCTC believes that it has selected the alternative that is the most effective and energy efficient solution to increase the province's transmission capacity. BCTC will be required to present its assessment of the alternatives in its application for the approval for the Interior to Lower Mainland Transmission Project (ILM Project) to the British Columbia Utilities Commis-

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sion (BCUC). The BCUC has the final decision-making authority on whether to approve BCTC's recommended solution and may choose an alternative solution, or combination of solutions.

30 In June, BC Hydro held a second round of Community Open Houses. In August, it began discussions with Aboriginal Groups about the collection of traditional land use information. On 17 September, BCTC filed draft Terms of Reference and a Screening Level Environmental Report for the ILM Project with the EAO. (The Terms of Reference were approved by the EAO on 23 May 2008 after the Commission released the scoping decision.)

31 On 5 November 2007, BCTC filed its application for a CPCN for the ILM Project with the Commission and provided a copy to each of the appellants and other identified First Nations and Tribal Councils. The appellants and two others (Sto:lo Nation Chiefs Council and Boston Bar First Nation) registered as intervenors. In its application, BCTC identified the alternative solutions it had considered and rejected. It also included three routing options other than that of the ILM Project.

32 At a procedural conference held 20 December 2007, the Commission established a process for deciding whether it should consider the adequacy of consultation and accommodation efforts as part of its determination whether to grant a CPCN (the "scoping issue"). That process was to include written submissions from the applicant (BCTC) and intervenors (including BC Hydro).

33 Five First Nations and Tribal Councils responded to BCTC's invitation to express their interest in making submissions regarding the scoping issue. In early 2008, the Commission received written submissions from BCTC, BC Hydro, the four appellants, and two other intervenors.

34 On 21 February 2008, four days before the scheduled Oral Phase of Argument on the scoping issue, the Commission Secretary advised BCTC and the intervenors that the oral hearing would not be held, and that the Commission agreed with BC Hydro and BCTC that it "should not consider the adequacy of consultation and accommodation efforts on the ILM Project as part of its determinations in deciding whether to grant a CPCN for the ILM Project" for reasons it expected to issue by 7 March 2008. Its reasons for the scoping decision under appeal followed on 5 March 2008.

The Scoping Decision

35 The Commission's focus in this decision was on its role in assessing the adequacy of the Crown's consultation with regard to the ILM Project it was asked to certify as necessary and convenient in the public interest. The Commission found it could and should rely on the environmental assessment process to ensure the Crown fulfilled its duties to First Nations at all stages of the ILM Project, as it had in *VITR* and *Revelstoke*.

36 The Commission Secretary explained (at p. 2-3):

In both the *VITR* Decision and the *Revelstoke* Decision, the Commission relied on the Environmental Assessment Office ("EAO") process and as concluded in the *VITR* Decision:

The government has legislated regulatory approvals that must be obtained before *VITR* proceeds. Pursuant to Section 8 of the EAA, BCTC requires an EAC for *VITR*. Given the Section 11 Procedural Order and the Terms of Reference for *VITR*, the Commission Panel is satisfied that a process is in place for consultation and, if necessary, accommodation. In the circumstances of *VITR*, the EAO approval, if

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granted, will follow some time after this decision. Through this legislation, the government has ensured that the project will not proceed until consultation and, if necessary, accommodation has also concluded. The Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government (p. 48).

In the *Revelstoke* Unit 5 Decision, the Commission Panel said:

The Provincial and Federal Governments have created legislation, the Environmental Assessment Act and the Canadian Environmental Assessment Act, which ensure that regulatory approvals must be obtained before Revelstoke Unit 5 can proceed and that the project will not proceed until consultation and, if necessary, accommodation has been completed (p.34).

In the instant case, BCTC, pursuant to the Environmental Assessment Act, requires an Environmental Assessment Certificate ("EAC") for the ILM Project. BCTC has said that it anticipates submitting its EAC application in the fall of 2008, assuming a CPCN is issued in the summer of 2008. Given the Section 11 Procedural Order ... and the draft Terms of Reference ... the Commission Panel is also satisfied that a process is in place for consultation and, if necessary, accommodation.

Prior to issuing an EAC, Provincial Ministers must consider whether the Crown has fulfilled legal obligations to First Nations (Guide to Environmental Assessment Process, Step 8 and Environmental Assessment Act, Section 17.) Given the statutory requirement for an EAC and the process established by the Section 11 Procedural Order, the Commission Panel concludes that it should not look beyond, and can rely on, this regulatory scheme established by the government. Accordingly, the Commission Panel does not intend to conduct a separate inquiry into the adequacy of consultation and accommodation in this proceeding.

37 In support of its position, the Commission relied on the following passage from *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at para. 51 (also quoted at p. 47 of the *VITR* decision):

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.

38 To the appellants' submissions that consultation and accommodation were continuing obligations that might arise throughout a series of decisions, and therefore, should start at the earliest possible stage and not be anticipated or deferred, the Commission responded (at p. 4):

The Commission Panel believes that a distinction needs to be drawn between circumstances such as those in the *Gitksan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 (S.C.) and the *Haida* cases where a decision or a series of decisions are made each having their own impacts, and the circumstances in the instant case where a single project requires at least two different regulatory approvals before there are impacts on Aboriginal rights and title. ... [T]he EAC requirement ensures that if the duty to consult has not been met and, where necessary, adequate accommodation has not been provided, then the project will not proceed, and there will be no impacts on Aboriginal rights and title. In this manner, meaningful consultation is ensured, and the honour of the Crown will be upheld. In other words, the honour of the Crown does not require consultation on every step of a regulatory scheme, provided, as in the instant case, that meaningful consultation is ensured before there are impacts on Aboriginal rights and title.

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39 The Commission summarized its analysis (at p. 5):

... The CPCN can be thought of as the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project. The first opportunity to consider the adequacy of consultation and accommodation is after the project is selected and is sufficiently defined so as to make accommodation discussions meaningful, that is, impacts need to be identified. And it is only after impacts can be identified, that consultation and accommodation can be concluded. This does not mean that BCTC and BC Hydro should begin consulting with First Nations after a CPCN has been granted and the ILM Project has been further defined; it only means that the Commission can and should rely on the EAO to now or in the future make determinations with respect to the duty to consult and, if necessary, accommodate.

40 The Commission then turned briefly to the evidence it would receive and consider in assessing potential costs and risks to the ILM Project. It noted that the potential costs of accommodation were relevant to the cost-effectiveness analysis and that First Nations were entitled to full and fair participation in the proceeding on that and other relevant issues. It refused to adjourn the proceeding until the process of consultation and accommodation was completed, anticipating (at p. 5 of the scoping decision) that an adequate record could be developed from which it could "assess cost estimates and potential risks to the project arising from the duty to consult, and where necessary, accommodate." It acknowledged that one of the risks was the possibility that the environmental process might not result in an EAC or might require changes in the ILM Project requiring BCTC to seek a new or amended CPCN.

41 After this Court granted leave to appeal the scoping decision, the Commission issued the CPCN, providing its reasons for decision on 5 August 2008: *British Columbia Transmission Corp., Re* (August 5, 2008), Doc. C-4-08, (B.C. Utilities Comm.) (the "CPCN decision"). At page 96 of those reasons, it concluded:

The Commission Panel concludes that building a new transmission line, specifically 5L83, is the preferred alternative for reinforcement of the ILM grid from the NIC [Nicola substation] side, and concludes that UEC [the upgrade option] is uneconomic when compared to building a fifth line, 5L83, that provides higher transfer capability and lower losses.

42 The CPCN decision has not been appealed. In its reasons, the Commission affirmed the scoping decision, noting at p. 32:

... although the issue of whether BCTC had met its duty to consult and accommodate First Nations was ruled out of scope, the impacts on First Nations and risks to project costs were still well within scope. The First Nations were encouraged to be active participants in the ILM proceeding, but chose not to lead or elicit evidence.

43 From comments later in its reasons, it appears the Commission may have expected that the appellants would lead evidence about the potential adverse effects of the different options on their rights despite its refusal to consider their dissatisfaction with the consultation process. That is not a conclusion that would have been readily apparent from the scoping decision.

44 On 1 October 2008, BCTC filed its application for an EAC for the ILM Project. The environmental assessment process is ongoing, although Kwikwetlem has refused to participate in it "without substantial changes to the process". In their view, the EAO has no proper statutory mandate for consultation, no appropriate budget,

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and no sufficient ability to alter the project to meet the Crown's accommodation duties.

Discussion

45 The respondents accept that the duty to consult is engaged by the ministerial decision to grant an EAC that would allow the ILM Project to proceed. This is the reason BC Hydro has consulted with First Nations since August 2006. BCTC submits it is fully committed to ensuring that consultation and, if necessary, accommodation, with First Nations is carried out in a manner that upholds the honour of the Crown. They also acknowledge the ministers have a constitutional duty to assess the adequacy of the Crown's consultation and accommodation efforts in their review of the ILM Project under the *Environmental Assessment Act*, and have the authority to deny the EAC and thereby terminate the project if they determine the honour of the Crown was not maintained in the process leading to the application and the grant of the EAC. Their point is that the Commission had no comparable duty to consider and decide whether the Crown's duty to consult was fulfilled at the CPCN stage of the regulatory approval process for the ILM Project.

46 The respondents limit their submission to the factual circumstances of this case, where neither the proponent nor an intervenor suggested an alternative solution to the public need identified by BCTC. They acknowledge that the Commission may receive information about alternatives as part of its cost-effectiveness analysis and in some cases, may consider alternative proposed projects (see, for example, *BC Gas Utility Ltd., Re*, (May 21, 1999), Doc. G-51-99, (B.C. Utilities Comm.)). Nevertheless, in BC Hydro's view, in this case, the CPCN represents only the Commission's opinion that the ILM Project is "suitable for inclusion in the plant or system of the public utility with the result that costs of the proposed facilities may be recovered in rates." Thus, it argues, by itself, the Commission's grant of a CPCN can have no effect on Aboriginal interests.

47 At the core of this dispute are different understandings of the regulatory processes and their interplay. In particular, the parties disagree on whether the CPCN "fixes" the essential structure of the project such that, practically speaking, BCTC's preferred option cannot be revisited, whatever consultation may occur in the EAC process. In support of their argument that the CPCN has this effect, the appellants point first, to the Commission's own words that the CPCN process is "the regulatory step that selects the most cost-effective project amongst alternatives, and also approves the scope, design, and cost estimates of the most cost-effective project" (scoping decision at p. 5, affirmed in the CPCN decision); second, to the advice given to First Nations by BC Hydro in its letter of 6 June 2007; and third, to the *Concurrent Approval Regulation* B.C. Reg. 371/2002, s. 3(2)(a), which makes a CPCN ineligible for concurrent review with an EAC.

48 BCTC responded that the Commission's statement was "a poor choice of language", on an application presenting only one project for approval, albeit one with huge flexibility, but one the Commission had no power to modify without being asked to do so by its proponent. It also acknowledged that BC Hydro's letter could have expressed the intention and effect of its application more clearly. In BCTC's view, its application was for certification of a new transmission line from Merritt to Coquitlam with a range of potential routing options for the Commission to consider in deciding cost-effect issues, but not a specific configuration because those details might be influenced by the ongoing EAC consultation process.

49 On this issue, I agree with the appellants and accept the Commission's stated understanding of its role as applicable not only generally on CPCN applications but on this particular application. In this case, the Commission reviewed the alternatives BCTC had considered and affirmed its choice as preferable. The gist of the scoping decision was that, in this case, the certified project could have no effect on Aboriginal interests until it re-

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ceived an EAC. Thus, the EAC process could test the adequacy of the Crown's consultation efforts on the ILM Project. Because the EAC process required the ministers to assess those efforts, the Commission was under no such obligation before issuing a CPCN for that project.

50 The appellants dispute this reasoning. In their view, the current EAC process was not designed to meet the requirements of the duty to consult and accommodate Aboriginal interests and cannot be so adapted.

51 Functionally, the environmental assessment process is not the same process considered in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.). The legislation analyzed in *Taku River* was repealed in 2002 and replaced with the current statutory regime. According to Kwikwetlem, the repeal resulted in a "systemic stripping out" of First Nations participation in the EAC process. The only explicit mentions of "first nations" in the current *Environmental Assessment Act* are found in s. 11(2)(f) and s. 50(2)(e); the latter authorizes a regulation listing those required to be consulted under the former. To date no regulation has been established.

52 BCTC responds that the EAC process can be, and in this case has been, adapted to include the nature of the project itself and alternatives to it in the ministerial review.

53 The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC, and the absence of provisions mandating participation of First Nations. The notion that the interests of First Nations are entitled to special protection does not arise in the current *Act*. As well, the word "cultural" has been omitted from the list of effects to be considered in the assessment process. Perhaps most importantly, the EAO is no longer required to establish a project committee. Under the former *Act*, both the formation of such a committee and First Nations participation in it were mandated. Chief Justice McLachlin wrote in *Taku River*, at para. 8, that "[t]he project committee becomes the primary engine driving the assessment process."

54 It may be that First Nations' interests are left to be dealt with under the government's *Provincial Policy for Consultation with First Nations*, which directs the terms of the operational guidelines of government actors. McLachlin C.J.C. referred to this policy in *Haida*, noting at para. 51, it "may guard against unstructured discretion and provide a guide for decision-makers." Those directions are not before this Court and were not mentioned by any counsel. I do not know to what extent the EAC process complies with them. If they are relevant to an environmental assessment process, they are also relevant to the CPCN process. The Commission did not mention them in the scoping decision.

55 As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

56 Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult

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with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.

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 rights and title are undoubtedly included, although not identified in the current *Act*.

58 Where the activity being considered is a Crown project with the potential to affect Aboriginal interests, as it is in this case, because the responsible ministers are constitutionally required to consider whether the proponent has maintained the Crown's honour, all counsel assert they may refuse the EAC, not only by reason of any listed adverse effect, but also for failure of the Crown to meet its consultation and accommodation duty. The procedural order issued under s. 11 of the *Act* acknowledges this aspect of the ministerial responsibility with respect to the ILM Project.

59 By contrast, certification under s. 45 of the *Utilities Commission Act* is the vital first step toward the building of the transmission line across territory to which First Nations assert title and stewardship rights, one that, for practical reasons, BCTC, BC Hydro and the Commission consider necessarily precedes acceptance of an application for the required ministers' EAC. The legislature has delegated the discretion to opine as to the need and desirability for the construction of additional power transmission capacity to the Commission. Only the Commission can grant permission to enhance a power transmission line.

60 In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.

61 This is not to say the Commission, in formulating its opinion as to whether to grant a CPCN, will decide BC Hydro's efforts did not maintain the honour of the Crown. It is to say that the Commission is required to assess those efforts to determine whether the Crown's honour was maintained in its dealings with First Nations regarding the potential effects of the proposed project.

62 The Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests. In my view, once the Commission accepted that BCTC had a duty to consult First Nations regarding the project it was being asked to certify, it was incumbent on the Commission to hear the appellants' complaints about the Crown's consultation efforts during the process leading to BCTC's selection of its preferred option, and to assess the adequacy of those efforts. Their failure to determine whether the Crown's honour had been maintained up to that

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stage of the Crown's activity was an error in law.

63 The certification decision is the first important decision in the process of constructing a power transmission line. It is the formulation of the opinion as to whether a line should be built to satisfy an anticipated need, rather than to upgrade an existing facility, find or develop alternative local power sources, or reduce demand by price increases or other means of rationing scarce resources.

64 If, as BCTC submits, the Commission's decision is to be read as having acknowledged its constitutional obligation by determining the existence of a duty to consult, the scope of that duty, and its fulfillment up to that stage of the ILM Project, it was unreasonable.

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.

Summary

66 BC Hydro's duty to consult and, where necessary, accommodate First Nations' interests arose when BCTC became aware that the means it was considering to maintain an adequate supply of power to consumers in the lower mainland had the potential to affect Aboriginal rights and title. BC Hydro acknowledged that duty by initiating contact with First Nations in August 2006. The duty continued while several alternative solutions were considered. The process was given substance by the holding of information meetings over the following months and some structure by the s. 11 procedural order issued by the EAO in May 2007.

67 When BCTC settled on the ILM Project in May 2007 and applied for a CPCN for that project in November of that year, it effectively gave the Commission two choices — accept or reject its application. As BCTC argued, supported by BC Hydro as an intervenor, it effectively ended its own consideration of alternatives and foreclosed any consideration by the Commission of alternative solutions to the anticipated energy supply problem. The decision to certify a new line as necessary in the public interest has the potential to profoundly affect the appellants' Aboriginal interests. Like the existing line (installed without consent or consultation), the new line will pass over land to which the appellants claim stewardship rights and Aboriginal title. (For an understanding of that concept see *Osoyoos Indian Band v. Oliver (Town)*, 2001 SCC 85, [2001] 3 S.C.R. 746 (S.C.C.), at paras. 41 to 46.) To suggest, as the respondents now do, that the appellants were free to put forward evidence during the s. 45 proceeding as to the adverse impacts of the ILM Project on their interests, and to have BC Hydro's consultation efforts with regard to those impacts evaluated by the ministers a year or two later, is to miss the point of the duty to consult.

68 Consultation requires an interactive process with efforts by both the Crown actor and the potentially affected First Nations to reconcile what may be competing interests. It is not just a process of gathering and exchanging information. It may require the Crown to make changes to its proposed action based on information obtained through consultations. It may require accommodation: *Haida*, at paras. 46-47.

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69 The crucial question is whether conduct that may result in adverse effects on Aboriginal rights or title will be considered during the CPCN process and not during the EAC process. That is the case here; the duty to consult with regard to the CPCN process is acknowledged. It follows that the Commission has the obligation to inquire into the adequacy of consultation before granting a CPCN. Even if the EAC process could theoretically be adapted to ensure the ministerial review includes a consideration of the adequacy of the consultation at the CPCN application stage, practically-speaking, the advantage would be to the proponent who has obtained a certification of its project as necessary and in the public interest. Moreover, the Commission cannot determine whether such an adapted process meets the duty whose scope it is in the best, if not only, position to determine unless it determines the scope of that duty. A cost/benefit analysis of one or more projects does not appear in the ministers' mandate.

70 If consultation is to be meaningful, it must take place when the project is being defined and continue until the project is completed. The pre-application stage of the EAC process in this case appears to have synchronized well with BCTC's practice of first seeking a CPCN and not making formal application for an EAC until a CPCN is granted. The question the Commission must decide is whether the consultation efforts up to the point of its decision were adequate.

71 For these reasons, I would order that the Commission reconsider the scoping decision in the terms I set out above at para. 15.

Donald J.A.:

I agree.

Bauman J.A.:

I agree.

Appeal allowed.

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1999 CarswellNS 262, 177 D.L.R. (4th) 513, 246 N.R. 83, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 178 N.S.R. (2d) 201, 549 A.P.R. 201, [1999] 3 S.C.R. 456, 4 C.N.L.R. 161, 1999 CarswellNS 282, 3 S.C.R. 456, [1999] S.C.J. No. 55

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Marshall v. Canada

Donald John Marshall, Jr., Appellant v. Her Majesty The Queen, Respondent and The Attorney General for New Brunswick, the West Nova Fishermen's Coalition, the Native Council of Nova Scotia and the Union of New Brunswick Indians, Interveners

Supreme Court of Canada

Binnie J., Cory J., Gonthier J., Iacobucci J., L'Heureux-Dubé J., Lamer C.J.C., McLachlin J.

Judgment: September 17, 1999[FN*]

Heard: November 5, 1998

Docket: 26014

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Proceedings: reversing (1997), (sub nom. *R. v. Marshall*) 146 D.L.R. (4th) 257 (N.S. C.A.); refused reconsideration or rehearing (Dec. 17, 1999), Doc. 26014 (S.C.C)

Counsel: *Bruce H. Wildsmith, Q.C.* and *Eric A. Zscheile*, for Appellant.

Michael A. Paré, Ian MacRae and *Gordon Campbell*, for Respondent.

Bruce Judah, Q.C., for Intervener, Attorney General for New Brunswick.

A. William Moreira, Q.C. and *Daniel R. Pust*, for Intervener, West Nova Fishermen's Coalition.

D. Bruce Clarke, for Intervener, Native Council of Nova Scotia.

Henry J. Bear, for Intervener, Union of New Brunswick Indians.

Subject: Public

Native law --- Constitutional issues — Hunting and fishing — Fishing offences — Treaty rights

Accused was Mi'kmaq Indian who fished for eels from small boat and sold catch for \$787.10 — Accused was charged and convicted of selling eels without licence, fishing without licence and fishing during close season with illegal nets — Trial judge rejected accused's treaty rights defence and found right in trade clause in 1760 Treaty had disappeared by 1780 — Convictions were upheld on appeal — Accused appealed — Appeal allowed

1999 CarswellNS 262, 177 D.L.R. (4th) 513, 246 N.R. 83, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 178 N.S.R. (2d) 201, 549 A.P.R. 201, [1999] 3 S.C.R. 456, 4 C.N.L.R. 161, 1999 CarswellNS 282, 3 S.C.R. 456, [1999] S.C.J. No. 55

— Nothing less than allowing appeal would uphold integrity of Crown in dealings with Mi'kmaq people to secure their peace and friendship — Strict rules of interpretation not applied to treaty relationships — Treaty provision affirmed right of Mi'kmaq to continue to provide for own sustenance by taking products of hunting, fishing and gathering and trading for "necessaries" — Treaty rights limited to securing "necessaries" equivalent to moderate livelihood and does not extend to open-ended accumulation of wealth — Accused's rights were treaty rights within meaning of s. 35 of Constitution Act, 1982 and subject to regulations — Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44, s. 35 — Treaty of Peace and Friendship, 1760.

Droit autochtone --- Questions constitutionnelles — Chasse et pêche — Infractions relatives à la pêche — Droits issus de traités

Accusé est un Indien Mi'kmaq qui a pêché des anguilles à bord d'une petite embarcation et les a vendues pour 787.10 \$ — Accusé a été inculpé pour avoir vendu des anguilles sans permis, avoir pêché sans permis et avoir pêché pendant la période de fermeture au moyen de filets illégaux — Juge du procès a rejeté la défense fondée sur les droits issus de traités et a conclu que le droit issu de la clause relative au commerce du Traité de 1760 avait disparu en 1780 — Déclarations de culpabilité ont été confirmées en appel — Accusé a formé un pourvoi — Pourvoi a été accueilli — Pourvoi doit être accueilli parce que rien de moins ne saurait protéger l'honneur et l'intégrité de la Couronne dans ses rapports avec les Mi'kmaq en vue d'établir la paix avec eux et de s'assurer leur amitié — Règles d'interprétation strictes ne s'appliquent pas aux relations en vertu d'un traité — Traité confirmait le droit des Mi'kmaq de continuer à pouvoir se procurer les « biens nécessaires » en pratiquant la chasse et la pêche et en échangeant le produit de ces activités traditionnelles — Droits issus du traité se limitent au fait de pouvoir se procurer les « biens nécessaires » et ne s'étendent pas à l'accumulation de richesses illimitées — Droits de l'accusé constituaient des droits issus de traités au sens de l'art. 35 de la Loi constitutionnelle de 1982 et assujettis à la réglementation — Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11, réimprimée L.R.C. 1985, annexe II, no 44, art. 35] — Treaty of Peace and Friendship, 1760.

The accused Mi'kmaq Indian fished for eels with a companion from a small outboard motorboat. They landed 463 pounds of eels which were sold for \$787.10. The accused was charged with the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. The accused admitted catching and selling the eels. The accused was engaged in small-scale commercial activity to help support self and common-law wife. The only issue at trial was whether the accused had a treaty right to catch and sell fish under the Treaties of 1760-61. By the end of 1761 all Mi'kmaq villages had entered into separate but similar treaties. The applicable written terms were contained in a *Treaty of Peace and Friendship*. During the pre-treaty negotiations, the Mi'kmaq leaders asked the British to provide truckhouses for trading purposes. The written document contained only the promise by the Mi'kmaq not to trade with anyone other than at the truckhouses. The "trade clause" was framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals. The promised government truckhouses disappeared within a few years of establishment and the replacement regime of government licensed traders had also fallen into disuse by 1780.

The trial judge found that the "trade clause" reflected a grant to the Mi'kmaq of a positive right to bring the products of their hunting, fishing and gathering to the truckhouses to trade but that the right to bring had disappeared along with the exclusive trade obligation and the system of truckhouses and licensed traders. The accused was convicted on all three counts, and appealed. The convictions were upheld by the Court of Appeal. The Court of Appeal concluded that the "trade clause" did not grant the Mi'kmaq any rights, but instead represented a

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mechanism imposed upon them to ensure that peace between the British and the Mi'kmaq was a lasting one by removing the need of the Mi'kmaq to trade with the enemies of the British. The accused appealed.

Held: The appeal was allowed.

Per Binnie J. (Lamer C.J., L'Heureux-Dubé, Cory and Iacobucci JJ. concurring): The Mi'kmaq treaties of 1760-61 were entered into during a period in which the British were attempting to expand and secure their control over their northern possessions. The subtext of the Mi'kmaq treaties was reconciliation and mutual advantage. This appeal is allowed because nothing less would uphold the integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship. The courts have not applied strict rules of interpretation to treaty relationships. The 1760 treaty affirms the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and gathering activities, and trading for what in 1760 was termed "necessaries". In a modern context, the limitation of the treaty rights to the securing of "necessaries" limits them to a moderate livelihood and does not extend to the open-ended accumulation of wealth. The rights are treaty rights with the meaning of s. 35 of the Constitution Act, 1982 and are subject to regulations.

The Court of Appeal incorrectly took a strict approach to the use of extrinsic evidence when interpreting the treaties. Firstly, even in a modern commercial context extrinsic evidence is available to show that a written document does not include all of the general terms of an agreement. Secondly, recent Supreme Court decisions have made it clear that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. Thirdly, it would be unconscionable for the Crown to ignore the oral terms where relying on the written terms where a treaty was concluded verbally and afterwards written up by representatives of the Crown. The Indian parties did not have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making which the Court acts upon in its approach to treaty interpretation as to the existence of a treaty, the completeness of any written record and the interpretation of treaty terms once found to exist.

The treaty document does not set out any Mi'kmaq rights but merely Mi'kmaq "promises" and the Governor's acceptance. The trial judge's view that the treaty obligations were all found within the four corners of the treaty document erred in law by failing to give adequate weight to the concerns and perspectives of the Mi'kmaq people and by giving excessive weight to the concerns and perspective of the British. The limited relief which resulted from the drawing of positive implications from the negative trade clause by the trial judge was inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. The trial judge's narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement terminated in the 1780's.

The limitation to government trade came as a response by the Mi'kmaq for truckhouses, not the other way around. The cost to the public purse of supporting Mi'kmaq trade was an investment in peace and the promotion of ongoing colonial settlement. The strategy would be effective only if the Mi'kmaq had access both to trade and to the fish and wildlife resources necessary to provide them with something to trade. The trade clause would not have advanced British and Mi'kmaq objectives unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to wildlife to trade. There was no basis in the evidence presented for the trial judge to have found that the accused's claim, to the extent that it tracked the evidence given by the Crown's expert historian, was not even among the various possible interpretations of the common intention of the parties in entering into the 1760 Treaty. The judgments below erred in concluding that the only enforceable treaty obliga-

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tions were those set out in the written treaty document. The trial judge's findings of fact demonstrate that the concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi'kmaq people.

Courts will imply a contractual term on the basis of presumed intentions of parties where it is necessary to assure the efficacy of the contract. If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. The treaty rights-holder not only has the right or liberty enjoyed by other British subjects, but may enjoy special treaty protection against interference with its exercise. The fact that the content of Mi'kmaq rights under the treaty to hunt and fish was no greater than those enjoyed by other inhabitants does not detract from the higher protection they presently offer to the Mi'kmaq people.

An interpretation that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is not consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the suggestion of a trade facility by the Mi'kmaq was accepted while any treaty protection to access to those things that were to be traded were denied, even though these things were identified and priced in the treaty negotiations. The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown. The interpretation adopted by the courts below left the Mi'kmaq with an empty shell of a treaty promise. The surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to obtain necessities through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the test in a recent Supreme Court decision.

This situation, involving a constitutionally entrenched right with a trading aspect, does not open the floodgates to uncontrollable and excessive exploitation of the natural resources. The fear that the treaty right could be levered into a factory trawler gathering the available harvest in preference to all non-aboriginal commercial or recreational fishermen is based on a misunderstanding of the narrow ambit and extent of the treaty right. What is contemplated is not a right to trade generally for economic gain, but rather a right to trade for necessities. The treaty right is a regulated right and can be contained by regulations within its proper limits. Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right.

The accused caught and sold the eels to support himself and his wife. The accused's treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Nothing in the regulations gave direction to the Minister to explain how this discretionary authority should be exercised in a manner which would respect the accused's treaty rights. In the circumstances, the purported regulatory prohibitions against fishing without a licence and selling eels without a licence do prima facie infringe the accused's treaty rights under the Treaties of 1760-61 and are inoperative. The charge of fishing during the close season with improper nets was also a prima facie infringement. The close season and the imposition of a discretionary licensing system would interfere with the accused's treaty right to fish for trading purposes and the ban on sales would infringe the accused's right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the accused is entitled to an acquittal.

Per McLachlin J. (dissenting) (Gonthier J. concurring): The Treaties of 1760-61 created an exclusive trade and truckhouse regime which implicitly gave rise to a limited Mi'kmaq right to bring goods to British trade outlets so long as this regime existed. The Treaties did not grant either a freestanding right to truckhouses or a general

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right to trade outside of the exclusive trade and truckhouse regime. The system of trade exclusivity died out in the 1780s and with it, the incidental right to bring goods to trade. There is therefore no existing right to trade in the Treaties of 1760-61 that exempts the Mi'kmaq Indian from the federal fisheries legislation.

Each treaty must be considered in its unique historical and cultural context, and extrinsic evidence can be used in interpreting aboriginal treaties, absent ambiguity. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories. The goal of treaty interpretation is to choose from among the various possible interpretations of common intentions the one which best reconciles the interests of both parties at the time the treaty was signed. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties. The words of the treaty must be given the sense which they would normally have held for the parties at the time. Any technical or contractual interpretation of treaty wording should be avoided. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what is possible on the language. Treaty rights of aboriginal people must not be interpreted in a static or rigid way but must be updated by the court to provide for their modern exercise.

The interpretation of a treaty should be approached in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. Second, the meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. The trial judge's approach to the interpretations of the Treaties of 1760-61 was in keeping with the principles governing treaty interpretation. The words contained in the treaty trade clause do not, on their face, confer a general right to trade. The trial judge was justified in concluding that the Mi'kmaq understood the treaty process as well as the particular terms of the treaty they were signing. Nothing in the linguistic or cultural differences suggests that the words of the trade clause were not fully understood or appreciated by the Mi'kmaq. The trial judge's conclusion that a general right to trade was not within the common intention of the parties was based on four conclusions drawn from a meticulous review of the historical evidence. The Treaties of 1760-61 were primarily peace treaties, cast against the background of a long struggle between the British and the French with their Mi'kmaq allies, and over a decade of intermittent hostilities between the British and the Mi'kmaq. The French defeat and withdrawal left the Mi'kmaq to co-exist with the British without the presence of their former ally and supplier. The Mi'kmaq were accustomed to and in some cases dependent on trade for firearms, gunpowder, food and European trade goods. The British wanted peace and a safe environment for settlers and did not feel completely secure.

During the pre-treaty negotiations, the aboriginal leaders requested truckhouses in response to their accommodation of the British desire for restricted trade. These negotiations not only highlighted the concessions made by both the aboriginal and British signatories in order to secure the mutually desired objective of peace but also indicated that both parties understood that the treaties granted a specific and limited right to bring goods to truckhouses to trade. Within a few years of signing the treaty, the Mi'kmaq treaty obligation to trade only with the British fell into disuse and with it the British obligation to supply the Mi'kmaq with trading outlets. The exclusive trade and truckhouse system was a temporary mechanism to achieve peace. To achieve this elusive peace, the parties agreed that the trading autonomy possessed by all British subjects would be taken away from the Mi'kmaq, and that compensation for the removal of this right would be provided through the provision of preferential and stable trade at truckhouses. When the restriction on the Mi'kmaq trade fell, the need for compensation for the removal of their trading autonomy fell as well. At this point, the Mi'kmaq were vested with the general

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non-treaty right to hunt, to fish and to trade possessed by all other British subjects in the region. The conditions supporting the right to bring goods to trade at truckhouses ceased to exist. The trial judge's conclusion that the treaty trade clause granted only a limited right to bring trade goods to truckhouses which ended with the obligation to trade only with the British was supported. No existing right to trade exempts the accused from the application of federal fisheries regulations.

L'accusé, un Indien Mi'kmaq, a pêché de l'anguille en compagnie d'un ami avec leur petit hors-bord. Ils ont pêché 463 livres d'anguille qu'ils ont vendu pour une somme de 787,10 \$. L'accusé a été inculpé d'avoir vendu des anguilles sans permis, d'avoir pêché sans permis et d'avoir pêché pendant la période de fermeture au moyen de filets illégaux. Il a admis avoir pêché et vendu de l'anguille. Il se livrait à des activités commerciales sur une petite échelle pour subvenir à ses besoins et à ceux de sa conjointe de fait. La seule question en litige portait sur celle de savoir si l'accusé possédait un droit de pêcher et de vendre du poisson en vertu des traités de 1760 et 1761. À la fin de l'année 1761, des traités similaires avaient été signés par tous les villages Mi'kmaq. Le *Traité de paix et d'amitié* renferme les termes applicables. Au cours des négociations ayant précédé la conclusion des traités, les chefs Mi'kmaq ont demandé aux Britanniques d'établir des maisons de troc à des fins commerciales. Les documents contenaient uniquement la promesse faite par les Mi'kmaq de ne pas commercer avec quiconque à l'exception des maisons de troc. La « clause relative au commerce » était formulée de façon négative sous forme de restriction de la capacité des Mi'kmaq de commercer avec d'autres personnes que les représentants du gouvernement. Les maisons de troc promises par le gouvernement avaient cessé d'exister quelques années après leur établissement et, en 1780, le régime de commerçants instauré par le gouvernement en remplacement de ces établissements était lui aussi tombé en désuétude.

Le juge du procès a estimé que la « clause relative au commerce » démontrait que les Mi'kmaq avaient obtenu un droit positif d'apporter le produit de leurs activités de chasse, de pêche et de cueillette aux maisons de troc pour en faire le commerce, mais que ce droit avait disparu en même temps que l'obligation de commerce exclusive et le régime des maisons de troc et des commerçants patentés. L'accusé a été déclaré coupable en regard des trois chefs et a interjeté appel. Les déclarations de culpabilité ont été maintenues par la Cour d'appel. Celle-ci a conclu que la « clause relative au commerce » n'accordait aucun droit aux Mi'kmaq et qu'elle constituait plutôt un régime qui leur était imposé en vue de l'établissement d'une paix durable entre les Britanniques et les Mi'kmaq, en éliminant leur besoin de commercer avec les ennemis des Britanniques. L'accusé a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Le juge Binnie (le juge en chef Lamer et les juges L'Heureux-Dubé, Cory et Iacobucci y souscrivant) : Les traités des Mi'kmaq de 1760 et 1761 ont été conclus au cours d'une période durant laquelle les Britanniques tentaient d'étendre et d'assurer leur emprise sur leurs possessions du nord. L'objectif sous-jacent des traités avec les Mi'kmaq consistait en la réconciliation et la reconnaissance d'avantages mutuels. Le pourvoi est accueilli parce que rien de moins ne préserverait l'intégrité de la Couronne dans ses rapports avec les Mi'kmaq en vue d'établir la paix avec eux et de s'assurer leur amitié. Les tribunaux n'ont pas appliqué des règles d'interprétation strictes aux rapports fondés sur les traités. Le traité de 1760 confirme le droit des Mi'kmaq de continuer à subvenir à leurs besoins en se servant du produit de leurs activités de chasse, de pêche et de cueillette en vue de se procurer ce qu'on appelait en 1760 les « biens nécessaires ». Dans un contexte moderne, la limitation des droits issus du traité au pouvoir de se procurer les « biens nécessaires » restreint ceux-ci à des moyens de subsistance moyens et ne s'étend pas à l'accumulation de richesses illimitées. Les droits constituent des droits issus de traité au sens de l'art. 35 de la *Loi constitutionnelle de 1982* et sont assujettis aux règlements.

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La Cour d'appel a erré en adoptant une approche restrictive en regard de l'utilisation de la preuve extrinsèque dans l'interprétation des traités. Premièrement, même dans un contexte commercial moderne, la preuve extrinsèque peut servir à démontrer qu'un document écrit ne contient pas tous les termes d'une entente. Deuxièmement, dans des décisions récentes, la Cour suprême a clairement indiqué que la preuve extrinsèque du contexte historique et culturel d'un traité peut être admise même en l'absence d'ambiguïté ressortant à la lecture du traité. Troisièmement, lorsqu'un traité a été conclu verbalement et qu'il a par la suite été consigné par écrit par les représentants de la Couronne, il serait inacceptable que celle-ci ignore les conditions conclues oralement alors qu'elle se fonde sur celles qui ont été consignées par écrit. Les Indiens n'ont pas eu la possibilité de créer leurs propres comptes-rendus écrits des négociations. Certaines présomptions sont par conséquent appliquées relativement à l'approche suivie par la Couronne dans la conclusion des traités, présomptions dont la Cour tient compte dans son approche en matière d'interprétation des traités pour statuer sur l'existence d'un traité, le caractère exhaustif de tout écrit et l'interprétation des conditions du traité, une fois qu'il a été conclu à leur existence.

Le traité n'établit aucun droit en faveur des Mi'kmaq; il fait simplement état des « promesses » faites par ces derniers et de l'acceptation de celles-ci par le gouverneur. En concluant que les obligations prévues au traité étaient toutes circonscrites dans le document du traité, le juge de première instance a erré en droit en n'accordant pas suffisamment d'importance aux préoccupations et au point de vue des Mi'kmaq, et en accordant une importance excessive aux préoccupations et au point de vue des Britanniques. La réparation limitée qui résultait des conséquences positives qu'avait inférées le juge du procès de l'existence de la clause relative au commerce libellée négativement était insuffisante lorsque le traité rédigé par les Britanniques ne concorde pas avec leur procès-verbal des séances de négociation, et lorsque l'existence de conditions plus favorables ressort clairement des autres documents et éléments de preuve que le juge du procès a considérés fiables. Son interprétation étroite de ce qui constituait « le traité » a conduit à sa conclusion de droit tout aussi étroite que le droit des Mi'kmaq de commercer s'était éteint dans les années 1780.

La limitation du commerce aux échanges avec le gouvernement a résulté de la demande des Mi'kmaq d'établissement de maisons de troc, et non de l'inverse. Les coûts assumés par le trésor public pour soutenir le commerce avec les Mi'kmaq constituaient un investissement dans la paix et dans la promotion de l'établissement continu de colonies de l'empire. La stratégie ne pouvait être efficace que si les Mi'kmaq pouvaient à la fois commercer et avoir accès aux ressources fauniques et halieutiques nécessaires pour leur procurer des biens à échanger. La clause relative au commerce n'aurait pas favorisé les objectifs des Britanniques ni ceux des Mi'kmaq si ces derniers n'avaient pas été assurés, implicitement ou explicitement, d'avoir un accès continu aux ressources de la faune pour en faire le commerce. Rien dans la preuve ne justifiait le juge du procès de conclure que la prétention de l'accusé, dans la mesure où elle était conforme au témoignage de l'historien que le ministère public a fait entendre à titre d'expert, ne figurait même pas parmi les interprétations possibles de l'intention commune des parties lorsqu'elles ont conclu le Traité de 1760. Les juridictions inférieures ont erré en concluant que les seules obligations issues du traité qui étaient exécutoires étaient celles énoncées dans le document du traité. Les conclusions de fait du juge du procès démontrent que l'idée qu'un droit issu d'un traité se serait éteint ne rend justice ni à l'honneur de la Couronne ni aux attentes raisonnables des Mi'kmaq.

Les tribunaux tiennent pour avérée l'existence d'une condition contractuelle à la lumière de l'intention présumée des parties lorsque cela est nécessaire pour donner plein effet au contrat. Si le droit est disposé à suppléer aux lacunes de contrats écrits préparés par des parties bien informées et par leurs conseillers juridiques afin d'en dégager un résultat sensé et conforme à l'intention des deux parties, il ne saurait demander moins de l'honneur et de la dignité de la Couronne dans ses rapports avec les Premières nations. Le titulaire de droits issus de traité a

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non seulement le droit ou la liberté dont jouissent les autres sujets britanniques, mais il peut également jouir de la protection spéciale accordée par le traité contre toute atteinte à l'exercice du droit ou de la liberté en question. Le fait que le contenu des droits de chasse et de pêche conférés aux Mi'kmaq par le traité n'était pas plus large que les droits dont jouissaient les autres habitants n'affecte en rien la protection plus grande qu'ils offrent actuellement aux peuples mi'kmaq.

Une interprétation ayant pour effet de transformer une demande positive des Mi'kmaq pour que soit prise une mesure commerciale en un engagement par ces derniers de ne pas faire quelque chose est incompatible avec l'honneur et l'intégrité de la Couronne. Il n'est pas non plus logique de conclure que la proposition des Mi'kmaq de mettre sur pied un établissement commercial a été acceptée, mais que la protection du traité relativement à l'accès aux choses qui devaient faire l'objet du commerce a été refusée, même si l'identité et le prix de ces choses avaient été déterminés lors de la négociation du traité. L'arrangement commercial doit être interprété de manière à donner sens et substance aux promesses faites par la Couronne. L'interprétation adoptée par les juridictions inférieures ne laisse aux Mi'kmaq qu'une promesse issue de traité vide de contenu. L'aspect du traité qui survit n'est pas la promesse littérale d'établir des maisons de troc, mais un droit issu de ce traité qui permet de se procurer les biens nécessaires en pratiquant la chasse et la pêche et en échangeant le produit de ces activités traditionnelles, sous réserve des restrictions qui peuvent être justifiées suivant le critère établi par la Cour suprême dans une décision récente.

Cette situation, qui implique l'existence d'un droit constitutionnalisé comportant un aspect commercial, ne donne pas lieu à une exploitation incontrôlable et excessive des ressources naturelles. La crainte que l'étendue du droit issu du traité soit élargie à l'utilisation d'un chalutier usine pour récolter la ressource disponible, au détriment de tous les pêcheurs non autochtones et sportifs, est fondée sur une mauvaise compréhension de la portée étroite du droit issu du traité. Ce qui est envisagé, ce n'est pas un droit de commercer de façon générale pour réaliser des gains financiers, mais plutôt un droit de commercer pour pouvoir se procurer des biens nécessaires. Le droit issu du traité est un droit réglementé qui peut être circonscrit par règlement à ses limites appropriées. Des limites de prises, dont il serait raisonnable de s'attendre à ce qu'elles permettent aux familles mi'kmaq de s'assurer une subsistance convenable selon les normes d'aujourd'hui, peuvent être établies par règlement et appliquées sans porter atteinte au droit issu du traité.

L'accusé a pris et vendu les anguilles pour subvenir à ses besoins et à ceux de son épouse. L'accusé ne pouvait exercer son droit issu de traité de pêcher et de commercer à des fins de subsistance qu'à l'entière discrétion du ministre. Rien dans les règlements n'indiquait au ministre comment il devait exercer ce pouvoir discrétionnaire de façon à respecter les droits issus du traité de l'accusé. Par conséquent, les prohibitions censément établies par les règlements, c'est-à-dire l'interdiction de pêcher sans permis et l'interdiction de vendre des anguilles sans permis, portent à première vue atteinte aux droits conférés à l'accusé par les traités de 1760 et 1761 et sont inopérantes. L'accusation d'avoir pêché pendant la période de fermeture au moyen de filets illégaux portait également à première vue atteinte à ces droits. La période de fermeture et le régime discrétionnaire de délivrance de permis porteraient atteinte au droit de pêcher à des fins commerciales conféré par le traité à l'accusé, et l'interdiction de vendre le produit de sa pêche porterait atteinte à son droit de commercer à des fins de subsistance. En l'absence de justification des prohibitions réglementaires, l'accusé a droit à l'acquiescement.

La juge McLachlin (dissidente) (le juge Gonthier y souscrivant) : Les traités de 1760 et 1761 ont créé un régime de commerce exclusif et de maisons de troc qui a tacitement donné naissance, en faveur des Mi'kmaq, à un droit limité d'apporter des biens à ces établissements britanniques tant et aussi longtemps que ce régime a existé. Les traités n'ont accordé ni droit autonome d'accès aux magasins de troc ni droit général de commercer hors du

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régime de commerce exclusif et de maisons de troc. Ce régime de commerce exclusif, et les maisons de troc britanniques en découlant, a pris fin au cours des années 1780 et, avec lui, le droit correspondant d'apporter des marchandises à ces établissements pour en faire le commerce. Il n'y a donc pas, dans les traités de 1760 et 1761, de droit existant ayant pour effet d'exempter l'appelant de l'application de la législation fédérale sur les pêches.

Chaque traité doit être analysé à la lumière de son contexte historique et culturel particulier, et la preuve extrinsèque peut servir à interpréter les traités conclus avec les autochtones, même en l'absence d'ambiguïté. Les traités conclus par les Autochtones constituent un type d'accord unique qui commande l'application de principes d'interprétation spéciaux. Ces traités devraient s'interpréter de façon libérale et les ambiguïtés ou expressions douteuses devraient profiter aux signataires autochtones. L'interprétation des traités a pour objet de choisir, parmi les interprétations possibles de l'intention commune, celle qui concilie le mieux les intérêts des deux parties à l'époque de leur signature. Dans la recherche de l'intention commune des parties, l'intégrité et l'honneur de la Couronne sont présumées. Dans l'appréciation de la compréhension et de l'intention respectives des signataires, le tribunal doit être attentif aux différences particulières d'ordre culturel et linguistique qui existaient entre les parties. Il faut donner au texte du traité le sens que lui auraient normalement donné les parties à l'époque. Il faudrait éviter de donner aux traités une interprétation formaliste ou inspirée du droit contractuel. Tout en donnant une interprétation généreuse du texte du traité, les tribunaux ne peuvent en modifier les conditions en allant au-delà de ce que le langage utilisé permet. Les droits issus de traités des peuples autochtones ne doivent pas être interprétés de façon statique ou rigide et les tribunaux doivent les interpréter de manière à permettre leur exercice dans le monde moderne.

L'interprétation d'un traité devrait se faire en deux étapes. Dans un premier temps, il convient d'examiner le texte de la clause litigieuse pour en déterminer le sens apparent, en soulignant toute ambiguïté et tout malentendu manifestes pouvant résulter de différences linguistiques et culturelles. Dans un deuxième temps, les sens dégagés du texte du droit issu de traité doivent être examinés sur la toile de fond historique et culturelle du traité. L'approche suivie par le juge du procès pour interpréter les traités de 1760 et 1761 était conforme aux principes qui régissent l'interprétation des traités. Les mots figurant dans la clause du traité relative au commerce ne confèrent pas, à première vue, un droit général de commercer. Le juge du procès était parfaitement justifié de conclure que les Mi'kmaq avaient compris le processus de négociation ainsi que les conditions particulières du traité qu'ils signaient. Rien dans les différences linguistiques ou culturelles ne tend à indiquer que les Mi'kmaq n'ont pas bien compris le texte de la clause relative au commerce ou saisi pleinement sa portée. La conclusion du juge du procès selon laquelle l'intention commune des parties n'était pas de conférer un droit général de commercer s'appuyait sur quatre conclusions qu'il avait tirées à partir d'une analyse minutieuse de la preuve historique. Les traités de 1760 et 1761 étaient avant tout des traités de paix, ayant pour toile de fond la longue lutte ayant opposé les Britanniques et les Français, dont les Mi'kmaq étaient les alliés, et plus d'une décennie d'hostilités intermittentes entre les Britanniques et les Mi'kmaq. La défaite des Français et leur retrait ont fait en sorte que les Mi'kmaq ont dû coexister avec les Britanniques, sans la présence de leurs anciens alliés et fournisseurs. Les Mi'kmaq avaient l'habitude de commercer pour se procurer des armes à feu, de la poudre, de la nourriture et des marchandises européennes et dans certains cas, dépendaient de ce commerce. Les Britanniques désiraient assurer la paix et un environnement sécuritaire pour les colons et ne se sentaient pas totalement en sécurité.

Au cours des négociations qui ont précédé la conclusion du traité, les chefs autochtones ont demandé l'établissement de maisons de troc en contrepartie de leur acquiescement à la limitation du commerce souhaitée par les Britanniques. Ces négociations faisaient non seulement ressortir les concessions que les signataires autochtones et britanniques ont faites en vue de la réalisation de l'objectif commun des parties, soit l'instauration

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de la paix, mais elles indiquaient également que les deux parties comprenaient que les traités accordaient le droit précis et limité d'apporter des marchandises aux maisons de troc pour en faire le commerce. Quelques années après la signature du traité, l'obligation des Mi'kmaq de ne commercer qu'avec les Britanniques est tombée en désuétude, tout comme l'obligation corrélatrice des Britanniques d'établir des postes de traite à l'intention des Mi'kmaq. Le régime exclusif de commerce et de maisons de troc était une mesure temporaire qui visait à instaurer la paix. Pour réaliser cette paix évasive, les parties ont convenu que les Mi'kmaq seraient privés de l'autonomie commerciale dont jouissent tous les sujets britanniques, mais que, en contrepartie de la perte de ce droit, on leur accorderait la possibilité de commercer avec des maisons de troc sur une base stable et préférentielle. Lorsque la restriction aux activités commerciales des Mi'kmaq a cessé d'exister, la nécessité de compenser le retrait de leur autonomie commerciale a disparu également. Les Mi'kmaq ont dès lors acquis le droit général, non issu de traité, de chasser, de pêcher et de commercer que possédaient tous les sujets britanniques de la région. Les conditions justifiant le droit d'apporter des marchandises aux maisons de troc pour en faire le commerce, dont avaient convenu les parties, avaient cessé d'exister. La conclusion du juge du procès selon laquelle la clause du traité relative au commerce n'accordait qu'un droit limité d'apporter des marchandises à échanger aux maisons de troc, droit qui avait cessé d'exister en même temps que l'obligation de commercer uniquement avec les Britanniques était étayée. Aucun droit existant n'exemptait l'accusé de l'application de la législation fédérale sur les pêches.

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M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., 170 D.L.R. (4th) 577, 237 N.R. 334, 44 C.L.R. (2d) 163, 232 A.R. 360, 195 W.A.C. 360, [1999] 1 S.C.R. 619, [1999] 7 W.W.R. 681, 69 Alta. L.R. (3d) 341 (S.C.C.) — considered

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R. v. Denny, 94 N.S.R. (2d) 253, [1990] 2 C.N.L.R. 115, 247 A.P.R. 253, 55 C.C.C. (3d) 322 (N.S. C.A.) — considered

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R. v. Gladstone, [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65 (S.C.C.) — referred to

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R. v. Horseman, [1990] 4 W.W.R. 97, [1990] 1 S.C.R. 901, 108 N.R. 1, 73 Alta. L.R. (2d) 193, 108 A.R. 1, 55 C.C.C. (3d) 353, [1990] 3 C.N.L.R. 95 (S.C.C.) — referred to

R. v. Isaac (1975), 13 N.S.R. (2d) 460, 9 A.P.R. 460 (N.S. C.A.) — referred to

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R. v. Simon, [1985] 2 S.C.R. 387, 62 N.R. 366, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 23 C.C.C. (3d) 238, 171 A.P.R. 15 (S.C.C.) — considered

R. v. Sparrow, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — applied

R. v. Sundown, 132 C.C.C. (3d) 353, 236 N.R. 251, 170 D.L.R. (4th) 385, [1999] 2 C.N.L.R. 289, [1999] 6 W.W.R. 278, 177 Sask. R. 1, 199 W.A.C. 1, [1999] 1 S.C.R. 393 (S.C.C.) — considered

1999 CarswellNS 262, 177 D.L.R. (4th) 513, 246 N.R. 83, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 178 N.S.R. (2d) 201, 549 A.P.R. 201, [1999] 3 S.C.R. 456, 4 C.N.L.R. 161, 1999 CarswellNS 282, 3 S.C.R. 456, [1999] S.C.J. No. 55

R. v. Taylor, [1981] 3 C.N.L.R. 114, 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (Ont. C.A.) — considered

R. v. Taylor, [1981] 2 S.C.R. xi (S.C.C.) — referred to

R. v. Vanderpeet, 80 B.C.L.R. (2d) 75, (sub nom. *R. v. Van der Peet*) 83 C.C.C. (3d) 289, (sub nom. *R. v. Van der Peet*) 29 B.C.A.C. 209, (sub nom. *R. v. Van der Peet*) 48 W.A.C. 209, [1993] 4 C.N.L.R. 221, [1993] 5 W.W.R. 459 (B.C. C.A.) — referred to

R. v. Vanderpeet, 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177 (S.C.C.) — considered

Rutland's (Earl) Case (1608), 8 Co. Rep. 55a, 77 E.R. 555 (Eng. K.B.) — referred to

Sioui v. Quebec (Attorney General), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427, 109 N.R. 22, (sub nom. *R. c. Sioui*) 30 Q.A.C. 280, 56 C.C.C. (3d) 225, [1990] 3 C.N.L.R. 127 (S.C.C.) — considered

St. Saviour in Southwark (Churchwardens case) (1613), 77 E.R. 1025, 10 Co. Rep. 66b (Eng. K.B.) — considered

Cases considered by *McLachlin J.*:

Nowegijick v. R., (sub nom. *Nowegijick v. Canada*) [1983] 1 S.C.R. 29, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193 (S.C.C.) — considered

R. v. Badger, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321 (S.C.C.) — considered

R. v. Horse, [1988] 2 W.W.R. 289, [1988] 1 S.C.R. 187, [1988] 2 C.N.L.R. 112, 47 D.L.R. (4th) 526, 82 N.R. 206, 65 Sask. R. 176, 39 C.C.C. (3d) 97 (S.C.C.) — considered

R. v. Horseman, [1990] 4 W.W.R. 97, [1990] 1 S.C.R. 901, 108 N.R. 1, 73 Alta. L.R. (2d) 193, 108 A.R. 1, 55 C.C.C. (3d) 353, [1990] 3 C.N.L.R. 95 (S.C.C.) — considered

R. v. Simon, [1985] 2 S.C.R. 387, 62 N.R. 366, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 23 C.C.C. (3d) 238, 171 A.P.R. 15 (S.C.C.) — considered

R. v. Sundown, 132 C.C.C. (3d) 353, 236 N.R. 251, 170 D.L.R. (4th) 385, [1999] 2 C.N.L.R. 289, [1999] 6 W.W.R. 278, 177 Sask. R. 1, 199 W.A.C. 1, [1999] 1 S.C.R. 393 (S.C.C.) — considered

Sioui v. Quebec (Attorney General), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427, 109 N.R. 22, (sub nom. *R. c. Sioui*) 30 Q.A.C. 280, 56 C.C.C. (3d) 225, [1990] 3 C.N.L.R. 127 (S.C.C.) — considered

Statutes considered by/Législation citée par *Binnie J.*:

1999 CarswellNS 262, 177 D.L.R. (4th) 513, 246 N.R. 83, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 178 N.S.R. (2d) 201, 549 A.P.R. 201, [1999] 3 S.C.R. 456, 4 C.N.L.R. 161, 1999 CarswellNS 282, 3 S.C.R. 456, [1999] S.C.J. No. 55

Constitution Act, 1982/Loi constitutionnelle de 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44/constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11, réimprimée L.R.C. 1985, annexe II, no44

Generally/en général — referred to

s. 35 — considered

s. 35(1) — considered

Criminal Code/Code criminel, R.S.C./L.R.C. 1985, c. C-46

s. 830 — referred to

Fisheries Act/Pêches, Loi sur les, R.S.C./L.R.C. 1985, c. F-14

s. 7(1) — considered

Statutes considered/Législation citée par *McLachlin J. J.*:

Constitution Act, 1982/Loi constitutionnelle de 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44/constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11, réimprimée L.R.C. 1985, annexe II, no44

s. 35 — referred to

s. 35(1) — considered

Treaties considered by/Traités cités par *Binnie J.*:

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

Generally — referred to

Treaties of 1760-61

Generally — considered

Treaty No. 6, 1876 (Between Her Majesty the Queen and the Plains and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River)

Generally — referred to

Treaty of Paris, 1763, 42 C.T.S. 279

Generally — referred to

Treaty of Peace and Friendship, 1760

Generally — considered

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Treaty of Peace with the Eastern Micmac Tribes, 1752

Article 4 — considered

Treaties considered by/Traités cités par *McLachlin J.*:

Treaties of 1760-61

Generally — considered

Treaty of Peace with the Eastern Micmac Tribes, 1752

Generally — considered

Article 4 — considered

Regulations considered by *Binnie J.*:

Fisheries Act, R.S.C. 1985, c. F-14

Aboriginal Communal Fishing Licences Regulations, SOR/93-332

Generally

s. 4

Fishery (General) Regulations, SOR/92-53

Generally

s. 35(2)

Maritime Provinces Fishery Regulations, SOR/93-55

Generally

s. 4(1)(a)

s. 5

s. 20

Words and phrases considered

moderate livelihood

A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth [*R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 165]. It addresses day-to-day needs.

SUBSISTANCE CONVENABLE

1999 CarswellNS 262, 177 D.L.R. (4th) 513, 246 N.R. 83, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 178 N.S.R. (2d) 201, 549 A.P.R. 201, [1999] 3 S.C.R. 456, 4 C.N.L.R. 161, 1999 CarswellNS 282, 3 S.C.R. 456, [1999] S.C.J. No. 55

La notion de « subsistance convenable » s'entend des choses essentielles comme « la nourriture, le vêtement et le logement, complétées par quelques commodités de la vie », mais non de l'accumulation de richesses [*R. c. Gladstone*, [1996] 2 R.C.S. 723 au par. 165]. Elle vise les besoins courants.

APPEAL by accused from judgment reported at (1997), (sub nom. *R. v. Marshall*) 146 D.L.R. (4th) 257 dismissing appeal from conviction of accused.

POURVOI de l'accusé à l'encontre de l'arrêt publié à (1997), (sub nom. *R. c. Marshall*) 146 D.L.R. (4th) 257 rejetant l'appel des déclarations de culpabilités prononcées contre l'accusé.

Binnie J.:

1 On an August morning six years ago the appellant and a companion, both Mi'kmaq Indians, slipped their small outboard motorboat into the coastal waters of Pomquet Harbour, Antigonish County, Nova Scotia to fish for eels. They landed 463 pounds, which they sold for \$787.10, and for which the appellant was arrested and prosecuted.

2 On an earlier August morning, some 235 years previously, the Reverend John Seycombe of Chester, Nova Scotia, a missionary and sometime dining companion of the Governor, noted with satisfaction in his diary, "Two Indian squaws brought seal skins and eels to sell". That transaction was apparently completed without arrest or other incident. The thread of continuity between these events, it seems, is that the Mi'kmaq people have sustained themselves in part by harvesting and trading fish (including eels) since Europeans first visited the coasts of what is now Nova Scotia in the 16th century. The appellant says that they are entitled to continue to do so now by virtue of a treaty right agreed to by the British Crown in 1760. As noted by my colleague, Justice McLachlin, the appellant is guilty as charged unless his activities were protected by an existing aboriginal or treaty right. No reliance was placed on any aboriginal right; the appellant chooses to rest his case entirely on the Mi'kmaq treaties of 1760-61.

3 The trial judge ([1996] N.S.J. No. 246 (QL) (Prov. Ct.)) accepted as applicable the terms of a Treaty of Peace and Friendship signed on March 10, 1760 at Halifax. The parties disagree about the existence of alleged oral terms, as well as the implications of the "trade clause" written into that document. From this distance, across more than two centuries, events are necessarily seen "as through a glass, darkly". The parties were negotiating in March 1760 in the shadow of the great military and political turmoil following the fall of the French fortresses at Louisbourg, Cape Breton (June 1759) and Quebec (September 1759). The Mi'kmaq signatories had been allies of the French king, and Montreal would continue to be part of New France until it subsequently fell in June 1760. The British had almost completed the process of expelling the Acadians from southern Nova Scotia. Both the Treaty of Paris, ending hostilities, and the Royal Proclamation of 1763 were still three years in the future. Only six years prior to the signing of the treaties, the British Governor of Nova Scotia had issued a Proclamation (May 14, 1756) offering rewards for the killing and capturing of Mi'kmaq throughout Nova Scotia, which then included New Brunswick. The treaties were entered into in a period where the British were attempting to expand and secure their control over their northern possessions. The subtext of the Mi'kmaq treaties was reconciliation and mutual advantage.

4 I would allow this appeal because 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, as best the content of those treaty promises can now be ascertained. In reaching this conclusion, I recognize that if the present dispute had arisen out of a modern commercial transaction between two parties of relatively equal bargaining power, or if, as held by the

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courts below, the short document prepared at Halifax under the direction of Governor Charles Lawrence on March 10, 1760 was to be taken as being the "entire agreement" between the parties, it would have to be concluded that the Mi'kmaq had inadequately protected their interests. However, the courts have not applied strict rules of interpretation to treaty relationships. In *R. v. Denny* (1990), 55 C.C.C. (3d) 322 (N.S. C.A.), and earlier decisions cited therein, the Nova Scotia Court of Appeal has affirmed the Mi'kmaq aboriginal right to fish for food. The appellant says the treaty allows him to fish for trade. In my view, the 1760 treaty does affirm the right of the Mi'kmaq people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was termed "necessaries". This right was always subject to regulation. The Crown does not suggest that the regulations in question accommodate the treaty right. The Crown's case is that no such treaty right exists. Further, no argument was made that the treaty right was extinguished prior to 1982, and no justification was offered by the Crown for the several prohibitions at issue in this case. Accordingly, in my view, the appellant is entitled to an acquittal.

Analysis

5 The starting point for the analysis of the alleged treaty right must be an examination of the specific words used in any written memorandum of its terms. In this case, the task is complicated by the fact the British signed a series of agreements with individual Mi'kmaq communities in 1760 and 1761 intending to have them consolidated into a comprehensive Mi'kmaq treaty that was never in fact brought into existence. The trial judge, Embree Prov. Ct. J., found that by the end of 1761 all of the Mi'kmaq villages in Nova Scotia had entered into separate but similar treaties. Some of these documents are missing. Despite some variations among some of the documents, Embree Prov. Ct. J. was satisfied that the written terms applicable to this dispute were contained in a Treaty of Peace and Friendship entered into by Governor Charles Lawrence on March 10, 1760, which in its entirety provides as follows:

Treaty of Peace and Friendship concluded by [His Excellency Charles Lawrence] Esq. Govr and Comr. in Chief in and over his Majesty's Province of Nova Scotia or Accadia with Paul Laurent chief of the LaHave tribe of Indians at Halifax in the Province of N.S. or Acadia.

I, Paul Laurent do for myself and the tribe of LaHave Indians of which I am Chief do acknowledge the jurisdiction and Dominion of His Majesty George the Second over the Territories of Nova Scotia or Accadia and we do make submission to His Majesty in the most perfect, ample and solemn manner.

And I do promise for myself and my tribe that I nor they shall not molest any of His Majesty's subjects or their dependents, in their settlements already made or to be hereafter made or in carrying on their Commerce or in any thing whatever within the Province of His said Majesty or elsewhere and if any insult, robbery or outrage shall happen to be committed by any of my tribe satisfaction and restitution shall be made to the person or persons injured.

That neither I nor any of my tribe shall in any manner entice any of his said Majesty's troops or soldiers to desert, nor in any manner assist in conveying them away but on the contrary will do our utmost endeavours to bring them back to the Company, Regiment, Fort or Garrison to which they shall belong.

That if any Quarrel or Misunderstanding shall happen between myself and the English or between them and any of my tribe, neither I, nor they shall take any private satisfaction or Revenge, but we will apply for redress according to the Laws established in His said Majesty's Dominions.

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That all English prisoners made by myself or my tribe shall be sett at Liberty and that we will use our utmost endeavours to prevail on the other tribes to do the same, if any prisoners shall happen to be in their hands.

And I do further promise for myself and my tribe that we will not either directly nor indirectly assist any of the enemies of His most sacred Majesty King George the Second, his heirs or Successors, nor hold any manner of Commerce traffick nor intercourse with them, but on the contrary will as much as may be in our power discover and make known to His Majesty's Governor, any ill designs which may be formed or contrived against His Majesty's subjects. And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at Lunenburg or Elsewhere in Nova Scotia or Accadia.

And for the more effectual security of the due performance of this Treaty and every part thereof I do promise and Engage that a certain number of persons of my tribe which shall not be less in number than two prisoners shall on or before September next reside as Hostages at Lunenburg or at such other place or places in this Province of Nova Scotia or Accadia as shall be appointed for that purpose by His Majesty's Governor of said Province which Hostages shall be exchanged for a like number of my tribe when requested.

And all these foregoing articles and every one of them made with His Excellency C.L., His Majesty's Governor I do promise for myself and on of sd part - behalf of my tribe that we will most strictly keep and observe in the most solemn manner.

In witness whereof I have hereunto putt my mark and seal at Halifax in Nova Scotia this day of March one thousand

Paul Laurent

I do accept and agree to all the articles of the forgoing treaty in Faith and Testimony whereof I have signed these present I have caused my seal to be hereunto affixed this day of march in the 33 year of His Majesty's Reign and in the year of Our lord - 1760

Chas Lawrence [Emphasis added.]

6 The underlined portion of the document, the so-called "trade clause", is framed in negative terms as a restraint on the ability of the Mi'kmaq to trade with non-government individuals. A "truckhouse" was a type of trading post. The evidence showed that the promised government truckhouses disappeared from Nova Scotia within a few years and by 1780 a replacement regime of government licensed traders had also fallen into disuse while the British Crown was attending to the American Revolution. The trial judge, Embree Prov. Ct. J., rejected the Crown's argument that the trade clause amounted to nothing more than a negative covenant. He found, at para. 116, that it reflected a grant to the Mi'kmaq of the positive right to "bring the products of their hunting, fishing and gathering to a truckhouse to trade". [The Court of Appeal \(1997\), 159 N.S.R. \(2d\) 186 \(N.S. C.A.\)](#) found that the trial judge misspoke when he used the word "right". It held that the trade clause does not grant the Mi'kmaq any rights. Instead, the trade clause represented a "mechanism imposed upon them to help ensure that the peace was a lasting one, by obviating their need to trade with enemies of the British" (p. 208). When the truckhouses disappeared, said the court, so did any vestiges of the restriction or entitlement, and that was the end of it.

1999 CarswellNS 262, 177 D.L.R. (4th) 513, 246 N.R. 83, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 178 N.S.R. (2d) 201, 549 A.P.R. 201, [1999] 3 S.C.R. 456, 4 C.N.L.R. 161, 1999 CarswellNS 282, 3 S.C.R. 456, [1999] S.C.J. No. 55

7 The appellant's position is that the truckhouse provision not only incorporated the alleged right to trade, but also the right to pursue traditional hunting, fishing and gathering activities in support of that trade. It seems clear that the words of the March 10, 1760 document, standing in isolation, do not support the appellant's argument. The question is whether the underlying negotiations produced a broader agreement between the British and the Mi'kmaq, memorialized only in part by the Treaty of Peace and Friendship, that would protect the appellant's activities that are the subject of the prosecution. I should say at the outset that the appellant overstates his case. In my view, the treaty rights are limited to securing "necessaries" (Which I construe in the modern context, as equivalent to a moderate livelihood), and do not extend to the open-ended accumulation of wealth. The rights thus construed, however, are, in my opinion, treaty rights within the meaning of s. 35 of the *Constitution Act, 1982*, and are subject to regulations that can be justified under the *Badger* test (*R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.)).

8 Although the Agreed Statement of Facts does not state explicitly that the appellant was exercising his rights for the purpose of necessaries, the Court was advised in the course of oral argument that the appellant "was engaged in a small-scale commercial activity to help subsidize or support himself and his common-law spouse". The Crown did not dispute this characterization and it is consistent with the scale of the operation, the amount of money involved, and the other surrounding facts. If at some point the appellant's trade and related fishing activities were to extend beyond what is reasonably required for necessaries, as hereinafter defined, he would be outside treaty protection, and can expect to be dealt with accordingly.

Evidentiary Sources

9 The Court of Appeal took a strict approach to the use of extrinsic evidence when interpreting the Treaties of 1760-61. *Roscoe and Bateman JJ.A.* stated at p. 194: "While treaties must be interpreted in their historical context, extrinsic evidence cannot be used as an aid to interpretation, in the absence of ambiguity". I think this approach should be rejected for at least three reasons.

10 Firstly, even in a modern commercial context, extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. Rules of interpretation in contract law are in general more strict than those applicable to treaties, yet Professor Waddams states in *The Law of Contracts* (3rd ed. 1993), at para. 316:

The parol evidence rule does not purport to exclude evidence designed to show whether or not the agreement has been "reduced to writing", or whether it was, or was not, the intention of the parties that it should be the exclusive record of their agreement. Proof of this question is a pre-condition to the operation of the rule, and all relevant evidence is admissible on it. This is the view taken by Corbin and other writers, and followed in the Second Restatement.

See also *International Casualty Co. & Van Hummell v. Thomson* (1913), 48 S.C.R. 167 (S.C.C.), per Idington J., at p. 191, and G. H. Treitel, *The Law of Contract* (9th ed. 1995), at p. 177. For an example of a treaty only partly reduced to writing, see *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.); (leave to appeal dismissed, [1981] 2 S.C.R. xi (S.C.C.)).

11 Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. MacKinnon A.C.J.O. laid down the principle in *Taylor* supra, at p. 236:

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... if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.

The proposition is cited with approval in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 87, and *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.) at p. 1045.

12 Thirdly, where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms, *per* Dickson J. (as he then was) in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.). Dickson J. stated for the majority, at p. 388:

Nonetheless, the Crown, in my view, was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations form the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion within which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown simply to ignore those terms.

The *Guerin* case is a strong authority in this respect because the surrender there could only be accepted by the Governor in Council, who was not made aware of any oral terms. The surrender could *not* have been accepted by the departmental officials who were present when the Musqueam made known their conditions. Nevertheless, the Governor in Council was held bound by the oral terms which "the Band understood would be embodied in the lease". In this case, unlike *Guerin*, the Governor did have authority to bind the Crown and was present when the aboriginal leaders made known their terms.

13 The narrow approach applied by the Court of Appeal to the use of extrinsic evidence apparently derives from the comments of Estey J. in *R. v. Horse*, [1988] 1 S.C.R. 187 (S.C.C.) where, at p. 201, he expressed some reservations about the use of extrinsic materials, such as the transcript of negotiations surrounding the signing of Treaty No. 6, except in the case of ambiguity. (Estey J. went on to consider the extrinsic evidence anyway, at p. 203.) Lamer J., as he then was, mentioned this aspect of *Horse* in *Quebec (Attorney General)*, *supra*, at p. 1049, but advocated a more flexible approach when determining the existence of treaties. Lamer J. stated, at p. 1068, that "[t]he historical context, which has been used to demonstrate the existence of the treaty, may equally assist us in interpreting the extent of the rights contained in it".

14 Subsequent cases have distanced themselves from a "strict" rule of treaty interpretation, as more recently discussed by Cory J., in *Badger*, *supra*, at para. 52:

... when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880), at pp. 338-42; *Sioui*, *supra*, at p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *Grant me Wherewith to Make my Living* (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well

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settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. [Emphasis added.]

"Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (*Quebec (Attorney General)*, *supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *R. v. Simon*, [1985] 2 S.C.R. 387 (S.C.C.), and *R. v. Sundown*, [1999] 1 S.C.R. 393 (S.C.C.)), and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (emphasis added) (*Sioui*, *per* Lamer J., at p. 1069). In *Taylor* *supra*, the Crown conceded that points of oral agreement recorded in contemporaneous minutes were included in the treaty (p. 230) and the court concluded that their effect was to "preserve the historic right of these Indians to hunt and fish on Crown lands" (p. 236). The historical record in the present case is admittedly less clear-cut, and there is no parallel concession by the Crown.

The 1752 Mi'kmaq Treaty

15 In 1749, following one of the continuing wars between Britain and France, the British Governor at Halifax had issued what was apparently the first of the Proclamations "authorizing the military and all British subjects to kill or capture any Mi'kmaq found, and offering a reward." This prompted what the Crown's expert witness at trial referred to as a "British-Mi'kmaq war". By 1751 relations had eased to the point where the 1749 Proclamation was revoked, and in November 1752 the Shubenacadie Mi'kmaq entered into the 1752 Treaty which was the subject of this Court's decision in *Simon*, *supra*. This treaty stated in Article 4 that:

It is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of Hunting and Fishing as usual and if they shall think a Truckhouse needful at the River Chibenaccadie or any other place of their resort, they shall have the same built and proper Merchandize lodged therein, to be exchanged for what the Indians shall have to dispose of, and that in the mean time the said Indians shall have free liberty to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have liberty to dispose thereof to the best Advantage. [Emphasis added.]

16 It will be noted that unlike the March 10, 1760 document, the earlier 1752 Treaty contains both a treaty right to hunt and fish "as usual" as well as a more elaborate trade clause. The appellant here initially relied on the 1752 Treaty as the source of his treaty entitlement. In *Simon*, Dickson C.J., at p. 404, concluded that on the basis of the evidence adduced in that case, "[t]he Crown has failed to prove that the Treaty of 1752 was terminated by subsequent hostilities" and left the termination issue open (at pp. 406-7). The Crown led more detailed evidence of hostilities in this case. It appears that while the British had hoped that by entering the 1752 Treaty other Mi'kmaq communities would come forward to make peace, skirmishing commenced again in 1753 with the Mi'kmaq. France and Britain themselves went to war in 1754 in North America. In 1756, as stated, another Proclamation was issued by the British authorizing the killing and capturing of Mi'kmaq throughout Nova Scotia. According to the trial judge, at para. 63, during the 1750s the "French were relying on Mi'kmaq assistance in

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almost every aspect of their military plans including scouting and reconnaissance, and guarding the Cape Breton coast line". This evidence apparently persuaded the appellant at trial to abandon his reliance on the 1752 Peace and Friendship Treaty. The Court is thus not called upon to consider the 1752 Treaty in the present appeal.

17 It should be pointed out that the Mi'kmaq were a considerable fighting force in the 18th century. Not only were their raiding parties effective on land, Mi'kmaq were accomplished sailors. Dr. William Wicken, for the defence, spoke of "the Maritime coastal adaptation of the Micmac":

They are fishing people who live along the coastline who encounter countless fishermen, traders, on a regular basis off their coastline.

The Mi'kmaq, according to the evidence, had seized in the order of 100 European sailing vessels in the years prior to 1760. There are recorded Mi'kmaq sailings in the 18th century between Nova Scotia, St. Pierre and Miquelon and Newfoundland. They were not people to be trifled with. However, by 1760, the British and Mi'kmaq had a mutual self-interest in terminating hostilities and establishing the basis for a stable peace.

Findings of Fact by the Trial Judge

18 The appellant admitted that he did what he was alleged to have done on August 24, 1993. The only contentious issues arose on the historical record and with respect to the conclusions and inferences drawn by Embee Prov. Ct. J. from the documents, as explained by the expert witnesses. The permissible scope of appellate review in these circumstances was outlined by Lamer C.J. in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.) at para. 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".

19 In the present case, the trial judge, after a careful and detailed review of the evidence, concluded at para. 116:

I accept as inherent in these treaties that the British recognized and accepted the existing Mi'kmaq way of life. Moreover, it's my conclusion that the British would have wanted the Mi'kmaq to continue their hunting, fishing and gathering lifestyle. The British did not want the Mi'kmaq to become a long-term burden on the public treasury although they did seem prepared to tolerate certain losses in their trade with the Mi'kmaq for the purpose of securing and maintaining their friendship and discouraging their future trade with the French. I am satisfied that this trade clause in the 1760-61 Treaties gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade. [Emphasis added.]

The treaty document of March 10, 1760 sets out a restrictive covenant and does not say anything about a positive Mi'kmaq right to trade. In fact, the written document does not set out any Mi'kmaq rights at all, merely Mi'kmaq "promises" and the Governor's acceptance. I cannot reconcile the trial judge's conclusion, at para. 116,

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that the treaties "gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse to trade", with his conclusion at para. 112 that:

The written treaties with the Mi'kmaq in 1760 and 1761 which are before me contain, and fairly represent, all the promises made and all the terms and conditions mutually agreed to.

It was, after all, the aboriginal leaders who asked for truckhouses "for the furnishing them with necessaries, in Exchange for their Peltry" in response to the Governor's inquiry "Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this Time". It cannot be supposed that the Mi'kmaq raised the subject of trade concessions merely for the purpose of subjecting themselves to a trade restriction. As the Crown acknowledges in its factum, "The restrictive nature of the truckhouse clause was British in origin". The trial judge's view that the treaty obligations are all found within the four corners of the March 10, 1760 document, albeit generously interpreted, erred in law by failing to give adequate weight to the concerns and perspective of the Mi'kmaq people, despite the recorded history of the negotiations, and by giving excessive weight to the concerns and perspective of the British, who held the pen. (See *Badger*, at para. 41, and *Quebec (Attorney General)*, at p. 1036.) The need to give balanced weight to the aboriginal perspective is equally applied in aboriginal rights cases: *Van der Peet*, at paras. 49-50; *Delgamuukw*, at para. 81.

20 While the trial judge drew positive implications from the negative trade clause (reversed on this point by the Court of Appeal), such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiating sessions and more favourable terms are evident from the other documents and evidence the trial judge regarded as reliable. Such an overly deferential attitude to the March 10, 1760 document was inconsistent with a proper recognition of the difficulties of proof confronted by aboriginal people, a principle emphasized in the treaty context by *Simon*, at p. 408, and *Badger*, at para. 4, and in the aboriginal rights context in *Van der Peet*, at para. 68, and *Delgamuukw*, at paras. 80-82. The trial judge interrogated himself on the scope of the March 10, 1760 text. He thus asked himself the wrong question. His narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. Had the trial judge not given undue weight to the March 10, 1760 document, his conclusions might have been very different.

21 The Court of Appeal, with respect, compounded the errors of law. It not only read the Mi'kmaq "right", such as it was, out of the trial judgment, it also took the view, at p. 204, that the principles of interpretation of Indian treaties developed in connection with land cessions are of "limited specific assistance" to treaties of peace and friendship where "the significant 'commodity' exchanged was mutual promises of peace". While it is true that there is no applicable land cession treaty in Nova Scotia, it is also true that the Mi'kmaq were largely dispossessed of their lands in any event, and (as elsewhere) assigned to reserves to accommodate the wave of European settlement which the Treaty of 1760 was designed to facilitate. It seems harsh to put aboriginal people in a worse legal position where land has been taken without their formal cession than where they have agreed to terms of cession. A deal is a deal. The same rules of interpretation should apply. If, as I believe, the courts below erred as a matter of law in these respects, it is open to an appellate court to correct the errors in an appeal under s. 830 of the *Criminal Code*, R.S.C., 1985, c. C-46.

The 1760 Negotiations

22 I propose to review briefly the documentary record to emphasize and amplify certain aspects of the trial judge's findings. He accepted in general the evidence of the Crown's only expert witness, Dr. Stephen Patterson,

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a Professor of History at the University of New Brunswick, who testified at length about what the trial judge referred to (at para. 116) as British encouragement of the Mi'kmaq "hunting, fishing and gathering lifestyle". That evidence puts the trade clause in context, and answers the question whether there was something more to the treaty entitlement than merely the right to bring fish and wildlife to truckhouses.

(i) The Documentary Record

23 I take the following points from the matters particularly emphasized by the trial judge at para. 90 following his thorough review of the historical background:

1. The 1760-61 treaties were the **culmination** of more than a **decade** of intermittent hostilities between the British and the Mi'kmaq. Hostilities with the French were also prevalent in Nova Scotia throughout the 1750's, and the Mi'kmaq were constantly allied with the French against the British .
2. The use of firearms for hunting had an important impact on Mi'kmaq society. The Mi'kmaq remained dependant on others for gun powder and the primary sources of that were the French, Acadians and the British.
3. The French frequently supplied the Mi'kmaq with food and European trade goods. By the mid-18th century, the Mi'kmaq were accustomed to, and in some cases relied on, receiving various European trade goods [including shot, gun powder, metal tools, clothing cloth, blankets and many other things].
6. The British wanted peace and a safe environment for their current and future settlers. Despite their recent victories, they did not feel completely secure in Nova Scotia. [Emphasis in original.]

24 Shortly after the fall of Louisburg in June, 1758, the British commander sent emissaries to the Mi'kmaq, through the French missionary, Father Maillard (who served as translator at the subsequent negotiations), holding out an offer of the enjoyment of peace, liberty, property, possessions and religion:

... my Reverend Father, It is necessary that I make known to you that your Capital Quebec has fallen to the arms of the King, my master, your armies are in flight, thus if you and your people are so reckless to continue [this war] without justification, it is certain that you will perish by starvation since you have no other assistance.

So you, My Reverend Father, would do well to accept the olive branches that I send to you and to put me in possession of the vessels that your people took from me and return them all to me, I am commanded to assure you by His Majesty that you will enjoy all your possessions, your liberty, property with the free exercise of your religion as you can see by the declaration that I have the honour of sending you. [Emphasis added.]

25 In the harsh winter of 1759-1760, so many Mi'kmaq turned up at Louisbourg seeking sustenance that the British Commander expressed concern that unless their demand for necessaries was met, they would become "very troublesome" and "entirely put a stop to any settling or fishing all along the Coast" or indeed "the settlement of Nova Scotia" generally. This is stated in the dispatch from the Governor at Louisbourg, Brigadier-General Edward Whitmore to General Jeffrey Amherst, based in New York, who commanded the British forces in North America:

I acquainted you in some of my Letters in December [1759] and January [1760] last that the Indians were Come in, and that they had agreed to live with us upon a footing of Friendship. Accordingly Several of their

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Chiefs came in here and articles were agreed on and Signed by Them and Me in Form. On which Occassion as They pleaded they were Naked and Starving I Cloathed Them and gave Them Some Presents of Provisions etc. Afterwards Several Others came in to whom I was Obliged to do the like. And at this time the Chief of the Island is here who beside some Cloathing makes a demand of Powder, Shott, and Arms for four men, which if I would Remain in Peace with Them I find I must Comply with. They Say the French always Supplied Them with these Things and They expect that we will do the Same. I can fore See that this will be a Constant annual Expence, and therefore I should be glad to have Your Directions both for my own Satisfaction and as a Rule to whoever may be left to Command here when I am Called away. Its Certain unless They are keep'd Quiet They might be very Troublesome to this Town with only a Small Garrison in it, and would entirely putt a Stop to any Settling or fishing all along the Coast, and which is yet of greater Consequence might much disturb and hinder the Settlement of Nova Scotia as They are so near to the back Settlements of that Province. [Dispatch dated November 14, 1760.]

It is apparent that the British saw the Mi'kmaq trade issue in terms of peace (as the Crown expert Dr. Stephen Patterson testified, "people who trade together do not fight, that was the theory". Peace was bound up with the ability of the Mi'kmaq people to sustain themselves economically. Starvation breeds discontent. The British certainly did not want the Mi'kmaq to become an unnecessary drain on the public purse of the colony of Nova Scotia or of the Imperial purse in London, as the trial judge found. To avoid such a result, it became necessary to protect the traditional Mi'kmaq economy, including hunting, gathering and fishing. A comparable policy was pursued at a later date on the west coast where, as Dickson J. commented in *R. v. Jack* (1979), [1980] 1 S.C.R. 294 (S.C.C.) at p. 311:

What is plain from the pre-Confederation period is that the Indian fishermen were encouraged to engage in their occupation and to do so for both food and barter purposes.

The same strategy of economic aboriginal self-sufficiency was pursued across the prairies in terms of hunting: see *R. v. Horseman*, [1990] 1 S.C.R. 901 (S.C.C.), *per* Wilson J., at p. 919, and Cory J. at p. 928.

26 The trial judge concluded that in 1760 the British Crown entered into a series of negotiations with communities of first nations spread across what is now Nova Scotia and New Brunswick. These treaties were essentially "adhesions" by different Mi'kmaq communities to identical terms because, as stated, it was contemplated that they would be consolidated in a more comprehensive and all-inclusive document at a later date, which never happened. The trial judge considered that the key negotiations took place not with the Mi'kmaq people directly, but with the St. John's River Indians, part of the Maliseet First Nation, and the Passamaquody First Nation, who lived in present-day New Brunswick.

27 The trial judge found as a fact, at para. 108, that the relevant Mi'kmaq treaty did "'make peace upon the same conditions'" as the Maliseet and Passamaquody. Meetings took place between the Crown and the Maliseet and the Passamaquody on February 11, 1760, twelve days before these bands signed their treaty with the British and eighteen days prior to the meeting between the Governor and the Mi'kmaq representatives, Paul Laurent of LaHave and Michel Augustine of the Richebucto region, where the terms of the Maliseet and Passamaquody treaties were "communicated" and accepted.

28 The trial judge found (at para. 101) that on February 29, 1760, at a meeting between the Governor in Council and the Mi'kmaq chiefs, the following exchange occurred:

His Excellency then Ordered the Several Articles of the Treaty made with the Indians of St. John's River

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and Passamaquody to be Communicated to the said Paul Laurent and Michel Augustine who expressed their satisfaction therewith, and declar'd that all the Tribe of the Mickmacks would be glad to make peace upon the same Conditions. [Emphasis added.]

Governor Lawrence afterwards confirmed, in his May 11, 1760 report to the Board of Trade, that he had treated with the Mi'kmaq Indians on "the same terms".

29 The genesis of the Mi'kmaq trade clause is therefore found in the Governor's earlier negotiations with the Maliseet and Passamaquody First Nations. In that regard, the appellant places great reliance on a meeting between the Governor and their chiefs on February 11, 1760 for the purpose of reviewing various aspects of the proposed treaty. The following exchange is recorded in contemporaneous minutes of the meeting prepared by the British Governor's Secretary:

His Excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this time. To which they replied that their Tribes had not directed them to propose anything further than that there might be a Truckhouse established for the furnishing them with necessaries, in Exchange for their Peltry, and that it might, at present, be at Fort Frederick.

Upon which His Excellency acquainted them that in case of their now executing a Treaty in the manner proposed, and its being ratified at the next General Meeting of their Tribes the next Spring, a Truckhouse should be established at Fort Frederick, agreeable to their desire, and likewise at other Places if it should be found necessary for furnishing them with such Commodities as shall be necessary for them, in Exchange for their Peltry & and that great care should be taken, that the Commerce at the said Truckhouses should be managed by Persons on whose Justice and good Treatment, they might always depend; and that it would be expected that the said Tribes should not Traffic or Barter and Exchange any Commodities at any other Place, nor with any other Persons. Of all which the Chiefs expressed their entire Approbation. [Emphasis added.]

30 It is true, as my colleague points out at para. 97, that the British made it clear from the outset that the Mi'kmaq were not to have any commerce with "any of His Majesty's Enemies". A Treaty of Peace and Friendship could not be otherwise. The subject of trading with the British government as distinguished from British settlers, however, did not arise until after the Indians had first requested truckhouses. The limitation to government trade came as a response to the request for truckhouses, not the other way around.

31 At a meeting of the Governor's Council on February 16, 1760 (less than a week later), the Council and the representatives of the Indians proceeded to settle the prices of various articles of merchandise including beaver, marten, otter, mink, fox, moose, deer, ermine and bird feathers, etc. Prices of "necessaries" for purchase at the truckhouse were also agreed, e.g., one pound of spring beaver could purchase 30 pounds of flour or 14 pounds of pork. The British took a liberal view of "necessaries". Two gallons of rum cost one pound of spring beaver pelts. The oral agreement on a price list was reflected in an Order in Council dated February 23, 1760, which provided "[t]hat the Prizes of all other kinds of Merchandize not mention'd herein be Regulated according to the Rates of the Foregoing articles". At trial the Crown expert and the defence experts agreed that fish could be among the items that the Mi'kmaq would trade.

32 In furtherance of this trade arrangement, the British established six truckhouses following the signing of the treaties in 1760 and 1761, including Chignecto, Lunenburg, St. John, Windsor, Annapolis and "the Eastern Battery" along the coast from Halifax. The existence of advantageous terms at the truckhouses was part of an imperial peace strategy. As Governor Lawrence wrote to the Board of Trade on May 11, 1760, "the greatest ad-

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vantage from this [trade] Article ... is the friendship of these Indians". The British were concerned that matters might again become "troublesome" if the Mi'kmaq were subjected to the "pernicious practices" of "unscrupulous traders". The cost to the public purse of Nova Scotia of supporting Mi'kmaq trade was an investment in peace and the promotion of ongoing colonial settlement. The strategy would be effective only if the Mi'kmaq had access *both* to trade *and* to the fish and wildlife resources necessary to provide them with something to trade.

33 Accordingly, on March 21, 1760, the Nova Scotia House of Assembly passed *An Act to prevent any Private Trade or Commerce with Indians*, S.N.S. 1760, 34 Geo. II, c. 11. In July 1761, however, the "Lords of Trade and Plantation" (the Board of Trade) in London objected and the King disallowed the Act as a restraint on trade that disadvantaged British merchants. This coincided with exposure of venality by the local truckhouse merchants. As Dr. Patterson testified:

... the first Indian commissary, Halifax merchant, Benjamin Garrish, managed the system so that it was the Government which lost money while he profited usuriously.

34 By 1762, Garrish was removed and the number of truckhouses was reduced to three. By 1764, the system itself was replaced by the impartial licensing of private traders approved by the London Board of Trade's "Plan for the Future Management of Indian Affairs", but that eventually died out as well, as mentioned earlier.

35 In my view, all of this evidence, reflected in the trial judgment, demonstrates the inadequacy and incompleteness of the written memorial of the treaty terms by selectively isolating the restrictive trade covenant. Indeed, the truckhouse system offered such advantageous terms that it hardly seems likely that Mi'kmaq traders had to be compelled to buy at lower prices and sell at higher prices. At a later date, they objected when truckhouses were abandoned. The trade clause would not have advanced British objectives (peaceful relations with a self-sufficient Mi'kmaq people) or Mi'kmaq objectives (access to the European "necessaries" on which they had come to rely) unless the Mi'kmaq were assured at the same time of continuing access, implicitly or explicitly, to wildlife to trade. This was confirmed by the expert historian called by the Crown, as set out below.

(ii) The Expert Evidence

36 The courts have attracted a certain amount of criticism from professional historians for what these historians see as an occasional tendency on the part of judges to assemble a "cut and paste" version of history: G. M. Dickinson and R. D. Gidney, "History and Advocacy: Some Reflections on the Historian's Role in Litigation," *Canadian Historical Review*, LXVIII (1987); D. J. Bourgeois, "The Role of the Historian in the Litigation Process," *Canadian Historical Review*, LXVII (1986); R. Fisher, "Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v B.C.*", *B.C. Studies*, XCV (1992); A. J. Ray, "Creating the Image of the Savage in Defense of the Crown: The Ethnohistorian in Court," *Native Studies Review*, VI (1990), 25.

37 While the tone of some of this criticism strikes the non-professional historian as intemperate, the basic objection, as I understand it, is that the judicial selection of facts and quotations is not always up to the standard demanded of the professional historian, which is said to be more nuanced. Experts, it is argued, are trained to read the various historical records together with the benefit of a protracted study of the period, and an appreciation of the frailties of the various sources. The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can. In this particular case, however, there was an unusual level of agreement amongst all of the professional historians who testified about

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the underlying expectations of the participants regarding the treaty obligations entered into by the Crown with the Mi'kmaq. I set out, in particular, the evidence of the Crown's expert, Dr. Stephen Patterson, who spent many days of testimony reviewing the minutiae of the historical record. While he generally supported the Crown's narrow approach to the interpretation of the Treaty, which I have rejected on points of law, he did make a number of important concessions to the defence in a relatively lengthy and reflective statement which should be set out in full:

Q. I guess it's fair to say that the British would have understood that the Micmac lived and survived by hunting and fishing and gathering activities.

A. Yes, of course.

Q. And that in this time period, 1760 and '61, fish would be amongst the items they would have to trade. And they would have the right under this treaty to bring fish and feathers and furs into a truckhouse in exchange for commodities that were available.

A. Well, it's not mentioned but it's not excluded. So I think it's fair to assume that it was permissible.

Q. Okay. It's fair to say that it's an assumption on which the trade truckhouse clause is based.

A. That the truckhouse clause is based on the assumption that natives will have a variety of things to trade, some of which are mentioned and some not. Yes, I think that's fair.

Q. Yes. And wouldn't be out of line to call that a right to fish and a right to bring the fish or furs or feathers or fowl or venison or whatever they might have, into the truckhouses to trade.

A. Ah, a right. I think the implication here is that there is a right to trade under a certain form of regulation -

Q. Yes.

A. - that's laid down. And if you're saying right to fish, I've assumed that in recognizing the Micmac by treaty, the British were recognizing them as the people they were. They understood how they lived and that that meant that those people had a right to live in Nova Scotia in their traditional ways. And, to me, that *implies* that the British were accepting that the Micmac would continue to be a hunting and gathering people, that they would fish, that they would hunt to support themselves. I don't see any problem with that.

It seems to me that that's implicit in the thing. Even though it doesn't say it, and I know that there seems to, in the 20th century, be some reluctance to see the value of the 1760 and 1761 treaties because they're not so explicit on these matters, but I personally don't see the hang-up. Because it strikes me that there is a recognition that the Micmac are a people and they have the right to exist. And that has - carries certain implications with it.

More than this, the very fact that there is a truckhouse and that the truckhouse does list some of the things that natives are expected to trade, implies that the British are condoning or recognizing that this is the way that natives live. They do live by hunting and, therefore, this is the produce of their hunting. They have the right to trade it.

Q. And you have, in fact, said that in your May 17th, 1994 draft article.

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A. That's correct.

Q. Yeah. And you testified to that effect in the *Pelletier* case, as well.

A. Well, my understanding of this issue, Mr. Wildsmith, has developed and grown with my close reading of the material. It's the position that I come to accept as being a reasonable interpretation of what is here in these documents. [Emphasis added.]

38 The trial judge gave effect to this evidence in finding a *right* to bring fish to the truckhouse to trade, but he declined to find a treaty right to fish and hunt to obtain the wherewithal to trade, and concluded that the right to trade expired along with the truckhouses and subsequent special arrangements. The Court of Appeal concluded, at p. 207, that Dr. Patterson used the word "right" interchangeably with the word "permissible", and that the trade clause gave rise to no "rights" at all. I think the view taken by the courts below rather underestimates Dr. Patterson. No reason is given for doubting that Dr. Patterson meant what he said about the common understanding of the parties that he considered at least implicit in this particular treaty arrangement. He initially uses the words "permissible" and "assumption", but when asked specifically by counsel about a "right" to fish and to trade fish, he says, "Ah, a *right*" (emphasis added), then, weighing his words carefully, he addresses a "right to fish" and concludes that "by treaty" the British did recognize that the Mi'kmaq "had a *right* to live in Nova Scotia in their traditional ways" (emphasis added) which included hunting and fishing and trading their catch for necessities. (Trading was traditional. The trial judge found, at para. 93, that the Mi'kmaq had already been trading with Europeans, including French and Portugese fishermen, for about 250 years prior to the making of this treaty.) Dr. Patterson said his opinion was based on the historic documents produced in evidence. He said that this was "the position that I come to accept as being a reasonable interpretation of what is here *in these documents*" (emphasis added). Dr. Patterson went on to emphasize that the understanding of the Mi'kmaq would have been that these treaty rights were subject to regulation, which I accept.

39 Dr. Patterson's evidence regarding the assumptions underlying and "implicit" in the treaty were generally agreed with by the defence experts, Dr. John Reid and Dr. William Wicken. While the trial judge was not bound to accept the whole or any particular part of Dr. Patterson's evidence, even if supported by the other experts, I do not think there was any basis in the evidence for the trial judge to find (at para. 29) that the appellant's claim, to the extent it tracked Dr. Patterson's evidence, was "not even among 'various possible interpretations of the common intention'" of the parties when they entered into the 1760 Treaty. Lamer C.J. in *Quebec (Attorney General)*, *supra*, at p. 1069, it will be recalled, said it was the Court's duty to search amongst such reasonable interpretations for the one that best accommodates the interests of the parties at the time the treaty was signed. The trial judge erred, I think, because he thought he was boxed in by the March 10, 1760 document.

40 In my view, the Nova Scotia judgments erred in concluding that the only enforceable treaty obligations were those set out in the written document of March 10, 1760, whether construed flexibly (as did the trial judge) or narrowly (as did the Nova Scotia Court of Appeal). The findings of fact made by the trial judge taken as a whole demonstrate that the concept of a disappearing treaty right does justice neither to the honour of the Crown nor to the reasonable expectations of the Mi'kmaq people. It is their common intention in 1760 - not just the terms of the March 10, 1760 document - to which effect must be given.

Ascertaining the Terms of the Treaty

41 Having concluded that the written text is incomplete, it is necessary to ascertain the treaty terms not only by reference to the fragmentary historical record, as interpreted by the expert historians, but also in light of the

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stated objectives of the British and Mi'kmaq in 1760 and the political and economic context in which those objectives were reconciled.

42 I mentioned earlier that the Nova Scotia Court of Appeal has held on several occasions that the "peace and friendship" treaties with the Mi'kmaq did not extinguish aboriginal hunting and fishing rights in Nova Scotia: *R. v. Isaac* (1975), 13 N.S.R. (2d) 460 (N.S. C.A.), *R. v. Cope* (1981), 132 D.L.R. (3d) 36 (N.S. C.A.), *Denny* supra. We are not here concerned with the exercise of such a right. The appellant asserts the right of Mi'kmaq people to catch fish and wildlife in support of trade as an *alternative* or supplementary method of obtaining necessities. The right to fish is not mentioned in the March 10, 1760 document, nor is it expressly noted elsewhere in the records of the negotiation put in evidence. This is not surprising. As Dickson J. mentioned with reference to the west coast in *Jack*, supra, at p. 311, in colonial times the perception of the fishery resource was one of "limitless proportions".

43 The law has long recognized that parties make assumptions when they enter into agreements about certain things that give their arrangements efficacy. Courts will imply a contractual term on the basis of presumed intentions of the parties where it is necessary to assure the efficacy of the contract, e.g., where it meets the "officious bystander test": *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.) at para. 30. (See also: *"Moorcock" (The)* (1889), 14 P.D. 64 (Eng. C.A.); *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.); and see generally: Waddams, supra, at para. 490; Treitel, supra, at pp. 190-94.) Here, if the ubiquitous officious bystander had said, "This talk about truckhouses is all very well, but if the Mi'kmaq are to make these promises, will they have the right to hunt and fish to catch something to trade at the truckhouses?", the answer would have to be, having regard to the honour of the Crown, "of course". If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations. The honour of the Crown was, in fact, specifically invoked by courts in the early 18th century to ensure that a Crown grant was effective to accomplish its intended purpose: *St. Saviour in Southwark (Churchwardens case)* (1613), 10 Co. Rep. 66b, 77 E.R. 1025 (Eng. K.B.) at p. 67b and p. 1026, and *Rutland's (Earl) Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555 (Eng. K.B.) at p. 56b and pp. 557-58.

44 An example of the Court's recognition of the necessity of supplying the deficiencies of aboriginal treaties is *Quebec (Attorney General)*, supra, where Lamer J. (as he then was) considered a treaty document that stated simply that the Huron tribe "are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English". Lamer J. found that, in order to give real value and meaning to these words, it was necessary that a territorial component be supplied, as follows, at p. 1067:

The treaty gives the Hurons the freedom to carry on their customs and their religion. No mention is made in the treaty itself of the territory over which these rights may be exercised. There is also no indication that the territory of what is now Jacques-Cartier park was contemplated. However, for a freedom to have real value and meaning, it must be possible to exercise it somewhere. [Emphasis added.]

Similarly, in *Sundown*, supra, the Court found that the express right to hunt included the implied right to build shelters required to carry out the hunt. See also *Simon*, supra, where the Court recognized an implied right to carry a gun and ammunition on the way to exercise the right to hunt. These cases employed the concept of implied rights to support the meaningful exercise of express rights granted to the first nations in circumstances

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where no such implication might necessarily have been made absent the *sui generis* nature of the Crown's relationship to aboriginal people. While I do not believe that in ordinary commercial situations a right to trade implies any right of access to things to trade, I think the honour of the Crown requires nothing less in attempting to make sense of the result of these 1760 negotiations.

Rights of the Other Inhabitants

45 My colleague, McLachlin J., takes the view that, subject to the negative restriction in the treaty, the Mi'kmaq possessed only the liberty to hunt, fish, gather and trade "enjoyed by other British subjects in the region" (para. 103). The Mi'kmaq were, in effect, "citizens minus" with no greater liberties but with greater restrictions. I accept that in terms of the *content* of the hunting, fishing and gathering activities, this may be true. There is of course a distinction to be made between a liberty enjoyed by all citizens and a right conferred by a specific legal authority, such as a treaty, to participate in the same activity. Even if this distinction is ignored, it is still true that a general right enjoyed by all citizens can nevertheless be made the subject of an enforceable treaty promise. In *Taylor*, *supra*, at p. 235, the treaty was found to include a term that "[t]he Rivers are open to all & you have an *equal right* to fish & hunt on them", and yet, despite the reference to equal rather than preferential rights, "the historic right of these Indians to hunt and fish" was found to be incorporated in the treaty, *per* MacKinnon A.C.J.O., at p. 236.

46 Similarly, in *Quebec (Attorney General)*, at p. 1031, as mentioned above, the treaty provided that the Hurons would be "received upon the *same terms* with the Canadians" (emphasis added), yet their religious freedom, which in terms of content was no greater than that of the non-aboriginal inhabitants in 1760, was in 1990 accorded treaty protection.

47 The Crown objects strongly to any suggestion that the treaty conferred "*preferential* trading rights". I do not think the appellant needs to show *preferential* trading rights. He only has to show *treaty* trading rights. The settlers and the military undoubtedly hunted and fished for sport or necessities as well, and traded goods with each other. The issue here is not so much the content of the rights or liberties as the level of legal protection thrown around them. A treaty could, to take a fanciful example, provide for a right of the Mi'kmaq to promenade down Barrington Street, Halifax, on each anniversary of the treaty. Barrington Street is a common thoroughfare enjoyed by all. There would be nothing "special" about the Mi'kmaq use of a common right of way. The point is that the treaty rights-holder not only has the *right* or liberty "enjoyed by other British subjects" but may enjoy special treaty *protection* against interference with its exercise. So it is with the trading arrangement. On June 25, 1761, following the signing of the Treaties of 1760-61 by the last group of Mi'kmaq villages, a ceremony was held at the farm of Lieutenant Governor Jonathan Belcher, the first Chief Justice of Nova Scotia, who was acting in the place of Governor Charles Lawrence, who had recently been drowned on his way to Boston. In reference to the treaties, including the trade clause, Lieutenant Governor Belcher proclaimed:

The Laws will be like a great Hedge about your Rights and properties, if any break this Hedge to hurt and injure you, the heavy weight of the Laws will fall upon them and punish their Disobedience.

48 Until enactment of the *Constitution Act, 1982*, the treaty rights of aboriginal peoples could be overridden by competent legislation as easily as could the rights and liberties of other inhabitants. The hedge offered no special protection, as the aboriginal people learned in earlier hunting cases such as *R. v. Sikyea*, [1964] S.C.R. 642 (S.C.C.), and *R. v. George*, [1966] S.C.R. 267 (S.C.C.). On April 17, 1982, however, this particular type of "hedge" was converted by s. 35(1) into sterner stuff that could only be broken down when justified according to

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the test laid down in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) at p. 1111 *et seq.*, as adapted to apply to treaties in *Badger* Cory J., at p. 812 *et seq.* See also *R. v. Bombay*, [1993] 1 C.N.L.R. 92 (Ont. C.A.). The fact the *content* of Mi'kmaq rights under the treaty to hunt and fish and trade was no greater than those enjoyed by other inhabitants does not, unless those rights were extinguished prior to April 17, 1982, detract from the higher *protection* they presently offer to the Mi'kmaq people.

The Honour of the Crown

49 This appeal puts to the test the principle, emphasized by this Court on several occasions, that the honour of the Crown is always at stake in its dealings with aboriginal people. This is one of the principles of interpretation set forth in *Badger*, *supra*, by Cory J., at para. 41:

... the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.

50 This principle that the Crown's honour is at stake when the Crown enters into treaties with first nations dates back at least to this Court's decision in 1895, *Canada (Attorney General) v. Ontario (Attorney General)* (1895), 25 S.C.R. 434 (S.C.C.). In that decision, Gwynne J. (dissenting) stated, at pp. 511-12:

... what is contended for and must not be lost sight of, is that the British sovereigns, ever since the acquisition of Canada, have been pleased to adopt the rule or practice of entering into agreements with the Indian nations or tribes in their province of Canada, for the cession or surrender by them of what such sovereigns have been pleased to designate the Indian title, by instruments similar to these now under consideration to which they have been pleased to give the designation of "treaties" with the Indians in possession of and claiming title to the lands expressed to be surrendered by the instruments, and further that the terms and conditions expressed in those instruments as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfilment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown. [Emphasis added.]

See also *Ontario Mining Co. v. Seybold* (1901), 32 S.C.R. 1 (S.C.C.) at p. 2

51 In more recent times, as mentioned, the principle that the honour of the Crown is always at stake was asserted by the Ontario Court of Appeal in *Taylor*, *supra*. In that case, as here, the issue was to determine the actual terms of a treaty, whose terms were partly oral and partly written. MacKinnon A.C.J.O. said for the court, at pp. 235-36:

The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted, the honour of the Crown is always involved and no appearance of "sharp dealing" should be sanctioned. Mr. Justice Cartwright emphasized this in his dissenting reasons in *R. v. George*, ... [1966] S.C.R. 267 at p. 279, where he said:

We should, I think, endeavour to construe the treaty of 1827 and those Acts of Parliament which bear upon the question before us in such a manner that the honour of the Sovereign may be upheld and Par-

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liament not made subject to the reproach of having taken away by unilateral action and without consideration the rights solemnly assured to the Indians and their posterity by treaty.

Further, if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible: *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at p. 652...(B.C.C.A.); affirmed [1965] S.C.R. vi....

This statement by MacKinnon A.C.J.O. (who had acted as counsel for the native person convicted of hunting offences in *George*, *supra*) has been adopted subsequently in numerous cases, including decisions of this Court in *Badger*, *supra*, at para. 41, and *Sparrow*, *supra*, at p. 1107-08.

52 I do not think an interpretation of events that turns a positive Mi'kmaq trade demand into a negative Mi'kmaq covenant is consistent with the honour and integrity of the Crown. Nor is it consistent to conclude that the Lieutenant Governor, seeking in good faith to address the trade demands of the Mi'kmaq, accepted the Mi'kmaq suggestion of a trading facility while denying any treaty protection to Mi'kmaq access to the things that were to be traded, even though these things were identified and priced in the treaty negotiations. This was not a commercial contract. The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown. In my view, with respect, the interpretation adopted by the courts below left the Mi'kmaq with an empty shell of a treaty promise.

Contradictory Interpretations of the Truckhouse Clause

53 The appellant argues that the Crown has been in breach of the treaty since 1762, when the truckhouses were terminated, or at least since the 1780s when the replacement system of licensed traders was abandoned. This argument suffers from the same quality of unreasonableness as does the Crown's argument that the treaty left the Mi'kmaq with nothing more than a negative covenant. It was established in *Simon*, *supra*, at p. 402, that treaty provisions should be interpreted "in a flexible way that is sensitive to the evolution of changes in normal" practice, and *Sundown*, *supra*, at para. 32, confirms that courts should not use a "frozen-in-time" approach to treaty rights. The appellant cannot, with any show of logic, claim to exercise his treaty rights using an outboard motor while at the same time insist on restoration of the peculiar 18th century institution known as truckhouses.

54 The Crown, on the other hand, argues that the truckhouse was a time-limited response to a temporary problem. As my colleague McLachlin J. sets out at para. 96, the "core" of the treaty was said to be that "[t]he Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed". My disagreement with that view, with respect, is that the aboriginal people, as found by the trial judge, relied on European powder, shot and other goods and pushed a trade agenda with the British because their alternative sources of supply had dried up; the real inhibition on trade with the French was not the treaty but the absence of the French, whose military had retreated up the St. Lawrence and whose settlers had been expelled; there is no suggestion in the negotiating records that the truckhouse system was a sort of transitional arrangement expected to be temporary, it only became temporary because the King unexpectedly disallowed the enabling legislation passed by the Nova Scotia House of Assembly; and the notion that the truckhouse was merely a response to a trade restriction overlooks the fact the truckhouse system offered very considerable financial benefits to the Mi'kmaq which they would have wanted to exploit, restriction or no restriction. The promise of ac-

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cess to "necessaries" through trade in wildlife was the key point, and where a right has been granted, there must be more than a mere disappearance of the mechanism created to facilitate the exercise of the right to warrant the conclusion that the right itself is spent or extinguished.

55 The Crown further argues that the treaty rights, if they exist at all, were "subject *ab initio* to regulations". The effect, it is argued, is that no *Badger* justification would be required. The Crown's attempt to distinguish *Badger* is not persuasive. *Badger* dealt with treaty rights which were specifically expressed in the treaty (at para. 31) to be "subject to such regulations as may from time to time be made by the Government of the country". Yet the court concluded that a *Sparrow* -type justification was required.

56 My view is that the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities subject to restrictions that can be justified under the *Badger* test.

The Limited Scope of the Treaty Right

57 The Crown expresses the concern that recognition of the existence of a constitutionally entrenched right with, as here, a trading aspect, would open the floodgates to uncontrollable and excessive exploitation of the natural resources. Whereas hunting and fishing for food naturally restricts quantities to the needs and appetites of those entitled to share in the harvest, it is argued that there is no comparable, built-in restriction associated with a trading right, short of the paramount need to conserve the resource. The Court has already addressed this issue in *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), *per* Lamer C.J., at paras. 57-63, L'Heureux-Dubé J., at para. 137, and McLachlin J., at para. 164; *Van der Peet*, *supra*, *per* L'Heureux-Dubé J., at para. 192, and *per* McLachlin J., at para. 279; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672 (S.C.C.), *per* L'Heureux-Dubé J., at para. 47; and *Horseman* Wilson J., at p. 908, and Cory J., at pp. 928-29. The ultimate fear is that the appellant, who in this case fished for eels from a small boat using a fyke net, could lever the treaty right into a factory trawler in Pomquet Harbour gathering the available harvest in preference to all non-aboriginal commercial or recreational fishermen. (This is indeed the position advanced by the intervener Union of New Brunswick Indians.) This fear (or hope) is based on a misunderstanding of the narrow ambit and extent of the treaty right.

58 The recorded note of February 11, 1760 was that "there might be a Truckhouse established for the furnishing them with *necessaries*" (emphasis added). What is contemplated therefore is not a right to trade generally for economic gain, but rather a right to trade for necessaries. The treaty right is a regulated right and can be contained by regulation within its proper limits.

59 The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Vanderpeet* (1993), 80 B.C.L.R. (2d) 75 (B.C. C.A.) at p. 126, described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth (*Gladstone*, *supra*, at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

60 The distinction between a commercial right and a right to trade for necessaries or sustenance was discussed in *Gladstone*, *supra*, where Lamer C.J., speaking for the majority, held that the Heiltsuk of British Columbia have an aboriginal right to sell herring spawn on kelp to an extent best described as commercial (at para. 28). This finding was based on the evidence that "tons" of the herring spawn on kelp was traded and that such trade was a central and defining feature of Heiltsuk society. McLachlin J., however, took a different view

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of the evidence, which she concluded supported a finding that the Heiltsuk derived only sustenance from the trade of the herring spawn on kelp. "Sustenance" provided a manageable limitation on what would otherwise be a free-standing commercial right. She wrote at para. 165:

Despite the large quantities of herring spawn on kelp traditionally traded, the evidence does not indicate that the trade of herring spawn on kelp provided for the Heiltsuk anything more than basic sustenance. There is no evidence in this case that the Heiltsuk accumulated wealth which would exceed a sustenance lifestyle from the herring spawn on kelp fishery. [Emphasis added.]

In this case, equally, it is not suggested that Mi'kmaq trade historically generated "wealth which would exceed a sustenance lifestyle". Nor would anything more have been contemplated by the parties in 1760.

61 Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right. In that case, the regulations would accommodate the treaty right. Such regulations would *not* constitute an infringement that would have to be justified under the *Badger* standard.

Application to the Facts of this Case

62 The appellant is charged with three offences: the selling of eels without a licence, fishing without a licence and fishing during the close season with illegal nets. These acts took place at Pomquet Harbour, Antigonish County. For Marshall to have satisfied the regulations, he was required to secure a licence under either the *Fishery (General) Regulations*, SOR/92-53, as am., the *Maritime Provinces Fishery Regulations*, SOR/93-55, or the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

63 All of these regulations place the issuance of licences within the absolute discretion of the Minister. Section 7(1) of the *Fisheries Act*, R.S.C., 1985, c. F-14, so provides:

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on. [Emphasis added.]

The *Maritime Provinces Fishery Regulations* provides that the Minister "may issue" a commercial fishing licence (s. 5). The *Aboriginal Communal Fishing Licences Regulations* state as well that the Minister "may issue" a communal licence to an aboriginal organization to carry on food fishing and related activities (s. 4). The licences described in the *Fishery (General) Regulations* are all discretionary as well, although none of those licences would have assisted the appellant in this situation.

64 Furthermore, there is nothing in these regulations which gives direction to the Minister to explain how she or he should exercise this discretionary authority in a manner which would respect the appellant's treaty rights. This Court has had the opportunity to review the effect of discretionary licensing schemes on aboriginal and treaty rights: *Badger*, *supra*, *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.), *R. c. Adams*, [1996] 3 S.C.R. 101 (S.C.C.), and *R. c. Côté*, [1996] 3 S.C.R. 139 (S.C.C.). The test for infringement under s. 35(1) of the *Constitution Act, 1982* was set out in *Sparrow*, *supra*, at p. 1112:

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

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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.

Lamer C.J. in *Adams*, *supra*, applied this test to licensing schemes and stated as follows at para. 54:

In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament 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. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test. [Emphasis added.]

Cory J. in *Badger*, *supra*, at para. 79, found that the test for infringement under s. 35(1) of the *Constitution Act, 1982* was the same for both aboriginal and treaty rights, and thus the words of Lamer C.J. in *Adams*, although in relation to the infringement of aboriginal rights, are equally applicable here. There was nothing at that time which provided the Crown officials with the "sufficient directives" necessary to ensure that the appellant's treaty rights would be respected. To paraphrase *Adams*, at para. 51, under the applicable regulatory regime, the appellant's exercise of his treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed. In the circumstances, the purported regulatory prohibitions against fishing without a licence (*Maritime Provinces Fishery Regulations*, s. 4(1)(a)) and of selling eels without a licence (*Fishery (General) Regulations*, s. 35(2)) do *prima facie* infringe the appellant's treaty rights under the Treaties of 1760-61 and are inoperative against the appellant unless justified under the *Badger* test.

65 Further, the appellant was charged with fishing during the close season with improper nets, contrary to s. 20 of the *Maritime Provinces Fishery Regulation*. Such a regulation is also a *prima facie* infringement, as noted by Cory J. in *Badger*, *supra*, at para. 90: "This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty", apart, I would add, from a treaty limitation to that effect.

66 The appellant caught and sold the eels to support himself and his wife. Accordingly, the close season and the imposition of a discretionary licensing system would, if enforced, interfere with the appellant's treaty right to fish for trading purposes, and the ban on sales would, if enforced, infringe his right to trade for sustenance. In the absence of any justification of the regulatory prohibitions, the appellant is entitled to an acquittal.

Disposition

67 The constitutional question stated by the Chief Justice on February 9, 1998, as follows:

Are the prohibitions on catching and retaining fish without a licence, on fishing during the close time, and on the unlicensed sale of fish, contained in ss. 4(1)(a) and 20 of the *Maritime Provinces Fishery Regulations* and s. 35(2) of the *Fishery (General) Regulations*, inconsistent with the treaty rights of the appellant

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contained in the Mi'kmaq Treaties of 1760-61 and therefore of no force or effect or application to him, by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?

should be answered in the affirmative. I would therefore allow the appeal and order an acquittal on all charges.

McLachlin J.:

I. Introduction

68 The issue in this case is whether the appellant Marshall, a Mi'kmaq Indian, possesses a treaty right that exempts him from the federal fisheries legislation under which he was charged with fishing without a licence, fishing with a prohibited net during the closed period, and selling fish caught without a licence.

69 At trial, Marshall admitted that he caught and sold 463 pounds of eels without a licence and with a prohibited net within closed times. The only issue at trial was whether he possessed a treaty right to catch and sell fish that exempted him from compliance with the federal fisheries legislation and mandated his acquittal. The trial judge held that he did not. The Court of Appeal for Nova Scotia dismissed his appeal. Marshall now appeals to this Court.

70 I conclude that the Treaties of 1760-61 created an exclusive trade and truckhouse regime which implicitly gave rise to a limited Mi'kmaq right to bring goods to British trade outlets so long as this regime was extant. The Treaties of 1760-61 granted neither a freestanding right to truckhouses nor a general underlying right to trade outside of the exclusive trade and truckhouse regime. The system of trade exclusivity and correlative British trading outlets died out in the 1780s and with it, the incidental right to bring goods to trade. There is therefore no existing right to trade in the Treaties of 1760-61 that exempts the appellant from the federal fisheries legislation. The charges against him stand.

II. Relevant Treaty and Constitutional Provisions

71

Trade Clause in Treaties of 1760-61

And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at [insert location of closest truck house] or Elsewhere in Nova Scotia or Accadia.

Constitution Act, 1982

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

III. Judgments

72 The trial judge, Embree Prov. Ct. J., concluded ([1996] N.S.J. No. 246 (QL) (Prov. Ct.)) that the trade clause in the Treaties of 1760-61 imposed an obligation on the Mi'kmaq to trade only at English truckhouses or with licensed traders. The clause gave the Mi'kmaq a limited "right to bring" their trade goods (the products of their hunting, fishing and gathering lifestyle) to such outlets or traders to trade. The trial judge found that when

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the exclusive trade obligation and the system of truckhouses and licensed traders fell into disuse, the "right to bring" disappeared. He concluded, at para. 125:

It was a pre-requisite to the Mi'kmaq being able to trade under the terms of the trade clause that the British provide truckhouses or appoint persons to trade with. When the British stopped doing that, the requirement (or if I had taken the Defence view, the option) to trade with truckhouses or licensed traders disappeared. The trade clause says nothing about that eventuality and it is my view that no further trade right arises from the trade clause.

73 The trial judge was unequivocal on the limited nature of this Treaty "right to bring" goods to truckhouses and licensed traders to trade. He concluded that the British did not intend to convey, and would not have conveyed, a trading right beyond the limited right to trade at truckhouses and with licensed traders within the exclusive trade regime, and that the Mi'kmaq appreciated and understood the position and objectives of the British. In light of these conclusions, he rejected the appellant's claim that the Treaties granted him a treaty right to catch and sell fish. He found, at para. 129, that such an interpretation was not even among the "various possible interpretations of the common intention" of the Mi'kmaq and the British.

74 [The Court of Appeal \(1997\), 159 N.S.R. \(2d\) 186 \(N.S. C.A.\)](#)), *per* Roscoe and Bateman JJ.A., affirmed the trial judge's decision that the Treaties of 1760-61 did not grant a treaty right to catch and sell fish. The court found, at p. 200, that "the mercantile nature of the British economy; the fact that the Governor had been instructed not to place any subject in a preferential trading position; and the fact that, pursuant to this *Treaty*, the Mi'kmaq were submitting to British law" (emphasis in original) all lent support to the trial judge's conclusion. Unlike the trial judge, however, the Court of Appeal concluded that the Treaties did not grant any right to trade, not even a limited "right to bring" goods to truckhouses. The court held that the mere reference to trading at truckhouses in the trade clause of the Treaties of 1760-61 could not, without more, constitute the grant of a right to trade. The Treaties of 1760-61 were peace treaties, not land cession treaties, and hence no grant of rights could be presumed. Moreover, the negative language of the clause was unlike that traditionally found in rights-granting treaties. The Court of Appeal concluded, at p. 200, that the Treaties of 1760-61 were negotiated following a long period of British-Mi'kmaq hostilities and that "[t]rade was not central to the *Treaties* but a vehicle by which the British could encourage the maintenance of a friendly relationship with the Mi'kmaq" (emphasis in original). The requirement imposed upon the Mi'kmaq to trade solely at truckhouses was characterized as a mechanism to help ensure the maintenance of peace. Thus, while the Treaties made trade at truckhouses "permissible", they did not confer a legal right on the Mi'kmaq to do so. The Court of Appeal upheld the trial judge's decision and dismissed the appeal.

IV. The Issues

75 The ultimate issue before the Court on this appeal is whether the appellant possesses a *treaty right* which exempts him from the federal fisheries legislation under which he is charged. The arguments urged in support of this position, however, are more difficult to articulate. The appellant's oral and written submissions, taken together, suggest that he contends that the Treaties of 1760-61 granted either or both of two separate rights, one unlimited, one more restricted. The appellant's arguments may be summarized as follows:

A. The Rights Claimed

1. The treaties conferred on the Mi'kmaq a general right to trade.

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2. Alternatively, or in addition, the treaties conferred on the Mi'kmaq a right to truckhouses or licensed traders.

B. Justification Arguments

1. In the event a general right to trade is established, the federal fisheries legislation governing fishing and trade in fish fails to accommodate this treaty right to trade.

2. The government has not shown that this failure is justified as required by s. 35 of the *Constitution Act*, 1982.

3. Therefore the federal fisheries legislation does not apply to the appellant and he is entitled to be acquitted.

Alternatively, or in addition:

1. In the event a right to truckhouses or licensed traders is established, the government has been in breach of its treaty obligations since the 1780s.

2. The government has not shown that this infringement is justified as required by s. 35 of the *Constitution Act*, 1982.

3. Therefore the federal fisheries legislation does not apply to the appellant and he is entitled to be acquitted.

76 I will first consider the principles of interpretation relevant to this appeal. I will then consider in turn the appellant's "general trade right" and "right to trading outlets" arguments.

77 It should be noted that the appellant does not argue for an aboriginal (as distinct from treaty) right to trade on this appeal.

V. Discussion

A. What Principles of Interpretation Apply to the Interpretation of the Treaty Trade Clause?

78 This Court has set out the principles governing treaty interpretation on many occasions. They include the following.

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R. v. Sundown*, [1999] 1 S.C.R. 393 (S.C.C.) at para. 24; *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.) at para. 78; *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.) at p. 1043; *R. v. Simon*, [1985] 2 S.C.R. 387 (S.C.C.) at p. 404. See also: J. [Sákéj] Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997), 36 *Alta. Law Rev.* 149.

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the Aboriginal signatories: *Simon*, *supra*, at p. 402; *Quebec (Attorney General)*, *supra*, at p. 1035; *Badger*, *supra*, at para. 52.

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3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Quebec (Attorney General)*, *supra*, at pp. 1068 and 1069.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger*, *supra*, at para. 41;

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, *supra*, at paras. 52-54; *R. v. Horseman*, [1990] 1 S.C.R. 901 (S.C.C.) at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger* *supra*, at para. 53 *et seq.*; *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.) at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger* *supra*; *Horseman* *supra*; *Nowegijick* *supra*.

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger* *supra*, at para. 76; *Quebec (Attorney General)* *supra*, at p. 1069; *Horseman* *supra*, at p. 908.

9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown*, *supra*, at para. 32; *Simon*, *supra*, at p. 402.

79 Two specific issues of interpretation arise on this appeal. The answer to each is found in the foregoing summary of principles.

80 The first issue of interpretation arises from the Court of Appeal's apparent suggestion that peace treaties fall in a different category from land cession treaties for purposes of interpretation, with the result that, when interpreting peace treaties, there is no "presumption" that rights were granted to the Aboriginal signatories in exchange for entering into the treaty. This raises the issue of whether it is useful to slot treaties into different categories, each with its own rules of interpretation. The principle that each treaty must be considered in its unique historical and cultural context suggests that this practice should be avoided.

81 The second issue of interpretation raised on this appeal is whether extrinsic evidence can be used in interpreting aboriginal treaties, absent ambiguity. Again, the principle that every treaty must be understood in its historical and cultural context suggests the answer must be yes. It is true that in *R. v. Horse*, [1988] 1 S.C.R. 187 (S.C.C.) at p. 201, this Court alluded with approval to the strict contract rule that extrinsic evidence is not admissible to construe a contract in the absence of ambiguity. However, subsequent decisions have made it clear that extrinsic evidence of the historic and cultural context of a treaty may be received absent ambiguity: *Sundown*, *supra*, at para 25; *Badger*, *supra*, at para. 52. As Cory J. wrote in *Badger*, *supra*, at para. 52, courts interpreting treaties "must take into account the context in which the treaties were negotiated, concluded and committed to writing".

82 The fact that both the words of the treaty and its historic and cultural context must be considered sug-

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gests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger*, *supra*, at para. 76, "the scope of treaty rights will be determined by their wording". The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

83 At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests: *Quebec (Attorney General)*, *supra*, p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon*, *supra*, at pp. 402-403; *Sundown*, *supra*, at paras. 30 and 33.

84 In the case on appeal, the trial judge heard 40 days of trial, the testimony of three expert witnesses, and was presented with over 400 documents. After a meticulous review of this evidence, the trial judge stated, at para. 92:

With the **full benefit** of the **cultural** and historical context, I now need to address the following questions. What did the Mi'kmaq and the British agree to and intend to agree to in the Treaties of 1760 and 1761? Directly related to that are the questions of Mi'kmaq understanding of these treaties' contents. Did they understand and agree to all of the written portions of the treaties before me? Were there other statements or promises made orally which the Mi'kmaq considered were part of these treaties and which have an impact on their meaning? Did the Mi'kmaq consider that previous treaties were renewed by and combined with the 1760-61 Treaties? Are there any other aspects of the historical record, whether referred to me by Counsel for the defendant or otherwise, which reflect on the contents or the proper understanding of the contents of these treaties?

[Emphasis in original.]

The trial judge's review of the historical context, the cultural differences between the parties, their different methods of communication, and the pre-treaty negotiations, led him to conclude that there was no misunderstanding or lack of agreement between the British and the Mi'kmaq that trade under the treaties was to be carried out in accordance with the terms of the trade clause. Having come to this conclusion, the trial judge turned again to the historical context to interpret the content of such terms, in accordance with the parties' common intention. In my opinion, the trial judge's approach to the interpretation of the Treaties of 1760-61 is in keeping with the principles governing treaty interpretation. With the greatest respect for the contrary view of my colleague, Justice Binnie, I find no basis for error in the trial judge's approach

B. Do the Treaties of 1760-61 Grant a General Right to Trade?

85 At trial, the appellant argued that the treaty trade clause conferred on the Mi'kmaq a general trading right. The trial judge rejected this submission, finding that the treaties conferred only a limited "right to bring"

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goods to truckhouses and licensed traders to trade. The Court of Appeal went even further, finding that the treaties conferred no trade right at all. Before this Court, the appellant once again advances the argument that the Treaties of 1760-61 conferred a general trade right on the Mi'kmaq.

86 Before addressing whether the words of the treaties, taken in their historic and cultural context support a general treaty right to trade, it is necessary to distinguish between a right to trade under the law applicable to all citizens, and a treaty right to trade. All inhabitants of the province of Nova Scotia or Acadia enjoyed a general right to trade. No treaty was required to confer such a right as it vested in all British subjects. The Mi'kmaq, upon signing the Treaties of 1760-61 and thereby acknowledging the jurisdiction of the British king over Nova Scotia, automatically inherited this general right. This public right must be distinguished from the asserted *treaty* right to trade. Treaty rights are by definition special rights conferred by treaty. They are given protection over and above rights enjoyed by the general populace. Only rights conferred by treaty are protected by s. 35 of the *Constitution Act, 1982*. I note that while rights enjoyed by the general populace can be included in treaties, where this occurs, they become separate and distinct treaty rights subject to a higher level of protection. The appellant in this case must establish a distinct treaty right if he is to succeed.

(1) The Wording of the Trade Clause

87 This brings me to the words of the treaty trade clause. It states:

And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor at [insert location of closest truck house] or Elsewhere in Nova Scotia or Accadia.

The clause is short, the words simple. The Mi'kmaq covenant that they will "*not* traffick, barter or Exchange any Commodities in any manner *but* with [British agents]" (emphasis added). The core of this clause is the obligation on the Mi'kmaq to trade only with the British. Ancillary to this is the implied promise that the British will establish truckhouses where the Mi'kmaq can trade. These words do not, on their face, confer a general right to trade.

88 The next question is whether the historic and cultural context in which the treaties were made establishes a general right to trade, having due regard for the need to interpret treaty rights generously. I will deal first with the linguistic and cultural differences between the parties, then with the historical record generally.

(2) Cultural and Linguistic Considerations

89 The trial judge found that there was no misunderstanding or lack of agreement between the British and the Mi'kmaq that trade under the treaties was to be carried out in accordance with the terms of the trade clause, and that the Mi'kmaq understood those terms. He addressed and discounted the possibility that the French-speaking Mi'kmaq might not have understood the English treaty terms. The record amply supports this conclusion. French missionaries, long allied with the Mi'kmaq, were employed by the British as interpreters in the treaty negotiations. In the course of the negotiations, the Mi'kmaq were referred to an earlier treaty entered into by the Maliseet and Passamaquody, containing a similar trade clause in French. Some of the Mi'kmaq appeared to have acquired English; the records speak of Paul Laurent of LaHave, a Mi'kmaq Sakamow and one of the first signatories, as speaking English. More generally, by the time the Treaties of 1760-61 were entered into, the record suggests that the Mi'kmaq had developed an understanding of the importance of the written word to the British in treaty-making and had a sufficiently sophisticated knowledge of the treaty-making process to compare

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and discern the differences between treaties. The trial judge was amply justified in concluding that the Mi'kmaq understood the treaty process as well as the particular terms of the treaties they were signing. There is nothing in the linguistic or cultural differences between the parties to suggest that the words of the trade clause were not fully understood or appreciated by the Mi'kmaq.

(3) The Historical Context and the Scope of the Trade Clause

90 After a meticulous review of the historical evidence, the trial judge concluded that: (1) the Treaties of 1760-61 were primarily peace treaties, cast against the background of both a long struggle between the British and the French in which the Mi'kmaq were allied with the French, and over a decade of intermittent hostilities between the British and the Mi'kmaq; (2) the French defeat and withdrawal from Nova Scotia left the Mi'kmaq to co-exist with the British without the presence of their former ally and supplier; (3) the Mi'kmaq were accustomed to and in some cases dependent on trade for firearms, gunpowder, food and European trade goods; and (4) the British wanted peace and a safe environment for settlers and, despite recent victories, did not feel completely secure in Nova Scotia.

91 Considering the wording of the trade clause in this historical context, the trial judge concluded that it was not within the common intention of the parties that the treaties granted a general right to trade. He found that at the time of entering the treaties, the Mi'kmaq wanted to secure peace and continuing access to European trade goods. He described the Mi'kmaq concerns at the time as very focussed and immediate. The British, for their part, wanted peace in the region to ensure the safety of their settlers. While the British were willing to support the costly truckhouse system to secure peace, they did not want the Mi'kmaq to become a long-term burden on the public treasury. To this end, the trial judge found that the British wanted the Mi'kmaq to continue their traditional way of life. The trial judge found that the interpretation of the treaty trade clause which best reconciled the intentions of both parties was that the trade clause imposed an obligation on the Mi'kmaq to trade only at British truckhouses or with licensed traders, as well as a correlative obligation on the British to provide the Mi'kmaq with such trading outlets so long as this restriction on Mi'kmaq trade existed. This correlative obligation on the British gave rise to a limited Mi'kmaq "right to bring" goods to trade at these outlets. When the British ceased to provide trading outlets to the Mi'kmaq, the restriction on their trade fell as did the limited "right to bring" which arose out of the system of mutual obligations.

92 Although trade was central to the Treaties of 1760-61, it cannot be doubted that achieving and securing peace was the preeminent objective of both parties in entering into the treaties. See: *"As Long as the Sun and Moon Shall Endure": A Brief History of the Maritime First Nations Treaties, 1675 to 1793* (1986), at pp. 101-102; The MAWIW District Council and Indian and Northern Affairs Canada, *"We Should Walk in the Tract Mr. Dummer Made": A Written Joint Assessment of Historical Materials ... Relative to Dummer's Treaty of 1725 and All Other Related or Relevant Maritime Treaties and Treaty Negotiations* (1992), at pp. 23-24, 31-34, and 90; and L. F. S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (1979), at p. 63.

93 The desire to establish a secure and successful peace lead each party to make significant concessions. The Mi'kmaq accepted that forging a peaceful relationship with the British was essential to ensuring continued access to European trade goods and to their continued security in the region. To this end, the Mi'kmaq agreed to limit their autonomy by trading only with the British and ceasing all trading relations with the French. Agreeing to restricted trade at truckhouses made the limit on Mi'kmaq autonomy more palatable as truckhouses were recognized as vehicles for stable trade at guaranteed and favourable terms. See: O. P. Dickason, "Amerindians

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Between French and English in Nova Scotia, 1713-1763", *American Indian Culture and Research Journal*, X (1986), 46; and MAWIW District Council and Indian and Northern Affairs Canada, *supra*, at pp. 23, and 31-32.

94 The British, for their part, saw continued relations between the Mi'kmaq and the French as a threat to British dominance in the region and to British-Mi'kmaq relations. Although the fall of the French in 1760 established British power in the region, the trial judge concluded, at para. 90, that the British "did not feel completely secure in Nova Scotia". Evidence submitted at trial indicated that the British feared the possibility of a renewed military alliance between the Mi'kmaq and the French as late as 1793. These concerns of the British are reflected in the Treaties of 1760-61, which, in addition to restricting Mi'kmaq trade, prevent the Mi'kmaq from attacking British settlers and from assisting any of the Crown's enemies. The British were also acutely aware that trading between unregulated private traders and the Mi'kmaq was often unfair and the cause of many disruptions of the peace. Preventing such disruptive practices was a central concern of the Nova Scotia governors and the British Board of Trade who hoped to cement the fragile peace in the region.

95 To secure the peace, the British therefore required the Mi'kmaq to trade only at truckhouses, even though truckhouses ran counter to the British policy not to place the Crown in a monopolistic trading position and imposed a significant financial burden on the public purse. The Nova Scotia government in "Remarks on the Indian Commerce carried on by the Government of Nova Scotia 1760, 1761 and part of 1762", expressed the view that the benefits of "settling [of] the Province and securing of the Peace of the New Settlers" were "much more than an Equivalent for any exceedings" in cost, (see: R. O. MacFarlane, "Indian Trade in Nova Scotia to 1764", *Canadian Historical Association Report*, XL (1934), at pp. 59-60; Upton, *supra*, at p. 63; J. Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (1981), at p. 278; W. Daugherty, *Maritime Indian Treaties in Historical Perspective* (1983); and "We Should Walk in the Tract Mr. Dummer Made ...", *supra*, at p. 90. On British policy see: Letter from the British Board of Trade to Lieutenant Governor Belcher, March 3, 1761, and June 23, 1761; Board of Trade and Privy Council Minutes, June 23 and July 2, 1761).

96 To achieve the mutually desired objective of peace, both parties agreed to make certain concessions. The Mi'kmaq agreed to forgo their trading autonomy and the general trading rights they possessed as British subjects, and to abide by the treaty trade regime. The British, in exchange, undertook to provide the Mi'kmaq with stable trading outlets where European goods were provided at favourable terms while the exclusive trade regime existed. This is the core of what the parties intended. The wording of the trade clause, taken in its linguistic, cultural and historical context, permits no other conclusion. Both the Mi'kmaq and the British understood that the "right to bring" goods to trade was a limited right contingent on the existence of a system of exclusive trade and truckhouses. On the historical record, neither the Mi'kmaq nor the British intended or understood the treaty trade clause as creating a general right to trade.

97 The parties' pre-treaty negotiations and post-treaty conduct point to the same conclusion. I turn first to the pre-treaty negotiations. British negotiations with the Mi'kmaq took place against the background of earlier negotiations with the Maliseet and Passamaquody on February 11, 1760. These negotiations led to the treaty of February 23, 1760, the first of the 1760-61 Treaties. When Mi'kmaq representatives came to negotiate peace with the British eighteen days later on February 29, 1760, they were informed of the treaty entered into by the Maliseet and Passamaquody and agreed to make peace on the same conditions. The minutes record that at the *very outset* of the February 11, 1760, meeting, the Maliseet and Passamaquody representatives were informed:

... that it was now expected that they should engage in behalf of their Tribes, that they will not aid or assist

1999 CarswellNS 262, 177 D.L.R. (4th) 513, 246 N.R. 83, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 178 N.S.R. (2d) 201, 549 A.P.R. 201, [1999] 3 S.C.R. 456, 4 C.N.L.R. 161, 1999 CarswellNS 282, 3 S.C.R. 456, [1999] S.C.J. No. 55

any of His Majesty's Enemies, nor hold any Correspondence or Commerce with them.

The Maliseet and Passamaquody consented to this term of trade exclusivity. After some discussion about "host-ages" the following exchange took place:

His Excellency then demanded of them, Whether they were directed by their Tribes, to propose any other particulars to be Treated upon at this Time. To which they replied that their Tribes had not directed them to propose any thing further than that there might be a Truckhouse established, for the furnishing them with necessaries, in Exchange for their Peltry, and that it might, at present, be at Fort Frederick.

Upon which His Excellency acquainted them that in case of their now executing a Treaty in the manner proposed, and its being ratified at the next General Meeting of their Tribes the next Spring, a Truckhouse should be established at Fort Frederick, agreeable to their desire, and likewise at other Places if it should be found necessary, for furnishing them with such Commodities as shall be necessary for them, in Exchange for their Peltry & and that great care should be taken, that the Commerce at the said Truckhouses should be managed by Persons on whose Justice and good Treatment, they might always depend; and that it would be expected that the said Tribes should not Traffic or Barter and Exchange any Commodities at any other Place, nor with any other Persons. Of all which the Chief expressed their entire Approbation. [Nova Scotia Executive Council Minutes, February 11, 1760].

98 The pre-treaty negotiations between the British and the Maliseet and the Passamaquody, indicate that the aboriginal leaders requested truckhouses in response to their accommodation of the British desire for restricted trade. The negotiations also indicate that the British agreed to furnish truckhouses where necessary to ensure that the Maliseet and the Passamaquody could continue to acquire commodities and necessities through trade. The negotiations highlight the concessions that both the aboriginal and the British signatories made in order to secure the mutually desired objective of peace. The negotiations also indicate that both parties understood that the treaties granted a specific, and limited, right to bring goods to truckhouses to trade.

99 This finding is confirmed by the post-treaty conduct of the Mi'kmaq and the British. Neither party's conduct is consistent with an expectation that the treaty granted the Mi'kmaq any trade right except the implied "right to bring" incidental to their obligation to trade exclusively with the British. Soon after the treaties were entered into, the British stopped insisting that the Mi'kmaq trade only with them. The British replaced the expensive truckhouses with licensed traders in 1762. The system of licensed traders, in turn, died out by the 1780s. Mi'kmaq adherence to the exclusive trade and truckhouse regime was also ambiguous. Records exist of Mi'kmaq trade with the French on the islands of St. Pierre and Miquelon in 1763 and again in 1767: Upton, *supra*, at pp. 64-65.

100 The fall of the licensed trading system, marked the fall of the trading regime established under the Treaties. This left the Mi'kmaq free to trade with whomever they wished, like all other inhabitants of the colonies. The British expressly confirmed that the obligation on the aboriginal signatories to trade exclusively with the British fell with the demise of the truckhouse and licensed trader system at a meeting between two Maliseet Sakamows and the Lieutenant Governor of Nova Scotia on July 18, 1768:

Chiefs 9.

We shall be glad that the Prices of Goods were regulated, as formerly, for Beaver skins were Sold at a better price than some people will now give for them.

1999 CarswellNS 262, 177 D.L.R. (4th) 513, 246 N.R. 83, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 178 N.S.R. (2d) 201, 549 A.P.R. 201, [1999] 3 S.C.R. 456, 4 C.N.L.R. 161, 1999 CarswellNS 282, 3 S.C.R. 456, [1999] S.C.J. No. 55

Answer

There is no Restriction on your Trade you may Traffic with those who sell Cheapest, which will be more for your Interest than limitting the Price of Beaver. [Nova Scotia Executive Council Minutes, July 18, 1768].

101 The record thus shows that within a few years of the signing of the Treaty, the Mi'kmaq treaty obligation to trade only with the British fell into disuse and with it the correlative British obligation to supply the Mi'kmaq with trading outlets. Both parties contributed to the demise of the system of mutual obligations and, apart from a lament that prices were better regulated under the truckhouse system, neither seems to have mourned it. The exclusive trade and truckhouse system was a temporary mechanism to achieve peace in a troubled region between parties with a long history of hostilities. To achieve this elusive peace, the parties agreed that the trading autonomy possessed by all British subjects would be taken away from the Mi'kmaq, and that compensation for the removal of this right would be provided through the provision of preferential and stable trade at truckhouses. When the restriction on the Mi'kmaq trade fell, the need for compensation for the removal of their trading autonomy fell as well. At this point, the Mi'kmaq were vested with the general non-treaty right to hunt, to fish and to trade possessed by all other British subjects in the region. The conditions supporting the right to bring goods to trade at truckhouses, as agreed to by both parties, ceased to exist.

102 The historical context, as the trial judge points out, supports the view that the British wanted the Mi'kmaq to maintain their traditional way of life and that trade was important to the Mi'kmaq. From this, Binnie J. suggests that the purpose of the treaty trading regime was to promote the self-sufficiency of the Mi'kmaq, and finds a treaty right to hunt, to fish, and to trade for sustenance. Yet, with respect, the historical record does not support this inference. The dominant purpose of the treaties was to prevent the Mi'kmaq from maintaining alliances with the French. To this end, the British insisted on a treaty term that the Mi'kmaq trade exclusively with British agents, at British trading outlets — the truckhouses. Implicit in this is the expectation that the Mi'kmaq would continue to trade. But it does not support the inference that the treaty clause conveyed a general right to trade and to sustenance. The treaty reference to the right to bring goods to truckhouses was required by and incidental to the obligation of the Mi'kmaq to trade with the British, and cannot be stretched to embrace a general treaty right to trade surviving the exclusive trade and truckhouse regime. To do so is to transform a specific right agreed to by both parties into an unintended right of broad and undefined scope.

103 The importance of trade to the Mi'kmaq was recognized in two ways. First, as discussed above, so long as the Mi'kmaq were bound to an exclusive covenant of trade with the British, the British promised to provide the Mi'kmaq with truckhouses at which they could trade on favourable terms and obtain the European products they desired. Second, as noted, upon entering into a treaty with the British and acknowledging the sovereignty of the British king, the Mi'kmaq automatically acquired all rights enjoyed by other British subjects in the region. Although these rights were supplanted by the exclusive trade and truckhouse regime while it was extant, when this regime came to an end, the Mi'kmaq trading interest continued to be protected by the general laws of the province under which the Mi'kmaq were free to trade with whomever they wished.

104 I conclude that the trial judge did not err - indeed was manifestly correct - in his interpretation of the historical record and the limited nature of the treaty right that this suggests.

(4) The Argument on the Treaty of 1752

105 The appellant suggests that when the Treaties of 1760-61 are considered together with the earlier Treaty of 1752, the inference arises that the parties understood the trade clause of the later treaties to confer a general

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trade right on the Mi'kmaq. The Treaty of 1752 stated that "the Indians shall have *free liberty* to bring for Sale to Halifax or any other Settlement within this Province, Skins, feathers, fowl, fish or any other thing they shall have to sell, where they shall have free liberty to dispose thereof to the best Advantage" (emphasis added). These words, unlike the words of the Treaties of 1760-61, arguably confer a positive right to trade. The appellant admits that this broad right, if that is what it was, was supplanted by the quite different negative wording of the Treaties of 1760-61. However, he suggests that when the exclusive trade-truckhouse regime of the Treaties of 1760-61 fell into disuse, the more general trade right of the Treaty of 1752 was revived. The difficulty with this argument is that the Treaty of 1752 was completely displaced by the new Treaties of 1760-61, which pointedly made no reference to a general right to trade. Moreover, the different wording of the two treaties cannot be supposed to have gone unperceived by the parties. To conclude that the parties would have understood that a general right to trade would be revived in the event that the exclusive trade and truckhouse regime fell into disuse is not supportable on the historical record and is to "exceed what is possible on the language", to paraphrase from *Quebec (Attorney General)*, *supra*.

106 In summary, a review of the wording, the historical record, the pre-treaty negotiations between the British and the Maliseet and Passamaquody, as well as the post-treaty conduct of the British and the Mi'kmaq, support the trial judge's conclusion that the treaty trade clause granted only a limited "right to bring" trade goods to truckhouses, a right that ended with the obligation to trade only with the British on which it was premised. The trial judge's conclusion that the treaties granted no general trade right must be confirmed.

C. Do the Treaties of 1760-61 Grant a Right to Government Trading Outlets?

107 The appellant suggests both in the alternative and in addition, that the trial judge's decision makes it clear that the Treaties of 1760-61 granted a right to truckhouses or licensed traders which was breached by the government's failure to provide such outlets after the 1780s. In the absence of government outlets and any justification for the failure to provide them, the appellant suggests that the federal fisheries regulations are inconsistent with his right to a Mi'kmaq trade vehicle and therefore are null and void in their application to him and other treaty beneficiaries. This argument rests on one aspect of the trial judge's finding, while ignoring the other. Specifically, it asserts the right to truckhouses as an independent freestanding treaty right, while ignoring the finding that this was a dependent right to bring goods to truckhouses collateral to the obligation to trade exclusively with the British. It follows from the trial judge's finding that the "right to bring" goods to trade at truckhouses died with the exclusive trade obligation upon which it was premised, that the treaties did not grant an independent right to truckhouses which survived the demise of the exclusive trade system. This right therefore cannot be relied on in support of an argument of a trade right in the modern context which would exempt the appellant from the application of the fisheries regulations.

108 Even if the appellant surmounted the trial judge's finding that the "right to bring" died with the exclusive trade obligation upon which it was premised, he has failed to establish how a breach of the obligation to provide trading outlets would exempt him from the federal fisheries regulations and, specifically, acquit him of illegally catching fish and illegally selling them to a private party. In my opinion, it is difficult to see how a government obligation to provide trading outlets could be stretched to include a treaty right to fish and a treaty right to trade the product of such fishing with private individuals. Even a broad conception of a right to government trading outlets does not take us to the quite different proposition of a general treaty right to take goods from the land and the sea and sell them to whomever one wishes.

109 This brings me to a variation on the appellant's argument of a right to trading outlets. When pressed on

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the exact nature and scope of the trade right asserted, the appellant at times seemed to suggest that this did not matter. A finding that the treaties granted a right to truckhouses or licensed traders, undefined as it might be in scope and modern counterpart, would shift the onus to the government to justify its failure to provide such trading outlets, he suggested. The absence of any justification would put the government in breach and preclude it from applying its regulations against the appellant.

110 The appeal of this argument cannot be denied. It engages, at a superficial glance, many of the concerns that underlie the principles of interpretation addressed at the outset of these reasons. The treaty rights of aboriginal peoples should be interpreted in a generous manner. The honour of the Crown is presumed and must be upheld. Ambiguities must be resolved in favour of the aboriginal signatories. Yet the argument, in my opinion, cannot succeed.

111 A claimant seeking to rely on a treaty right to defeat a charge of violating Canadian law must first establish *a treaty right that protects, expressly or by inference, the activities in question*, see: *Siou, supra*, at pp.1066-67. Only then does the onus shift to the government to show that it has accommodated the right or that its limitations of the right are justified.

112 To proceed from a right undefined in scope or modern counterpart to the question of justification would be to render treaty rights inchoate and the justification of limitations impossible. How can one meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope? How is the government, in the absence of such definition, to know how far it may justifiably trench on the right in the collective interest of Canadians? How are courts to judge whether the government that attempts to do so has drawn the line at the right point? Referring to the "right" in the generalized abstraction risks both circumventing the parties' common intention at the time the treaty was signed, and functioning illegitimately to create, in effect, an unintended right of broad and undefined scope.

113 Instead of positing an undefined right and then requiring justification, a claim for breach of a treaty right should begin by defining the core of that right and seeking its modern counterpart. Then the question of whether the law at issue derogates from that right can be explored, and any justification for such derogation examined, in a meaningful way.

114 Based on the wording of the treaties and an extensive review of the historical evidence, the trial judge concluded that the only trade right conferred by the treaties was a "right to bring" goods to truckhouses that terminated with the demise of the exclusive trading and truckhouse regime. This led to the conclusion that no Crown breach was established and therefore no accommodation or justification required. The record amply supports this conclusion, and the trial judge made no error of legal principle. I see no basis upon which this Court can interfere.

VI. Justification

115 Having concluded that the Treaties of 1760-61 confer no general trade right, I need not consider the arguments specifically relating to justification.

VII. Conclusion

116 There is no existing right to trade in the Treaties of 1760-61 that exempts the appellant from the federal fisheries regulations. It follows that I would dismiss the appeal.

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Appeal allowed.

Pourvoi accueilli.

[FN*](#) On November 8, 1999, the court issues a corrigendum. The changes have been incorporated herein.

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2005 CarswellNat 3756, 2005 SCC 69, 259 D.L.R. (4th) 610, [2006] 1 C.N.L.R. 78, 21 C.P.C. (6th) 205, 37 Admin. L.R. (4th) 223, [2005] 3 S.C.R. 388, 342 N.R. 82

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Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)

Mikisew Cree First Nation (Appellant) v. Sheila Copps, Minister of Canadian Heritage and Thebacha Road Society (Respondents) and Attorney General for Saskatchewan, Attorney General of Alberta, Big Island Lake Cree Nation, Lesser Slave Lake Indian Regional Council, Treaty 8 First Nations of Alberta, Treaty 8 Tribal Association, Blueberry River First Nations and Assembly of First Nations (Interveners)

Supreme Court of Canada

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: March 14, 2005

Judgment: November 24, 2005

Docket: 30246

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Proceedings: reversing *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2004), 2004 CarswellNat 762, 2004 CAF 66, 2004 CarswellNat 418, 2004 FCA 66, [2004] 2 C.N.L.R. 74, 317 N.R. 258, 236 D.L.R. (4th) 648, 247 F.T.R. 317 (note), [2004] F.C.J. No. 277, [2004] 3 F.C.R. 436 (F.C.A.) [Federal]; reversing *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2001), 2001 CarswellNat 3747, 2001 CFPI 1426, 214 F.T.R. 48, [2001] F.C.J. No. 187, [2002] 1 C.N.L.R. 169, 2001 CarswellNat 2902, 2001 FCT 1426 (Fed. T.D.) [Federal]

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Thomas R. Berger, Q.C., Gary A. Nelson for Intervener, Blueberry River First Nation

Jack R. London, Q.C., Bryan P. Schwartz for Intervener, Assembly of First Nations

Subject: Public; Constitutional; Property; Civil Practice and Procedure

Aboriginal law --- Aboriginal rights to natural resources — Aboriginal rights — Hunting

Crown planned to build winter road through First Nation land reserve — Crown held open house sessions inviting public comment, in which First Nation did not participate — First Nation Chief notified Crown that Nation did not support road — Crown wrote to First Nation Chief apologizing for how consultation process unfolded, but approved 200-metre wide, 23 square kilometre road corridor prohibiting use of firearms for road that tracked reserve boundary — First Nation brought application before Federal Court to set aside Crown's road approval on ground that it violated its hunting, fishing, and trapping rights assigned by land treaty — Application was granted — Crown appealed — Appeal was allowed — First Nation appealed to Supreme Court — Appeal allowed — Land treaty contemplated that land portions would periodically be "taken up" by Crown, but historical context and tensions underlying treaty implementation demanded process by which lands could be transferred — Content of process arose out of Crown's obligation to act honourably — Content of duty was variable, but turned on degree to which conduct contemplated by the Crown would adversely affect rights in question — Proposed road would reduce territory over which First Nation was entitled to exercise treaty rights, abolish hunting rights within corridor, and injuriously affect exercise of rights in surrounding bush — Crown therefore had duty to consult First Nation — Meaningful right to hunt was not ascertained on treaty-wide basis but in relation to territories over which First Nation traditionally and currently hunted, fished, and trapped — Unilateral Crown action ignored treaty promise to sustain hunting, fishing, and trapping rights, and was antithesis of reconciliation and mutual respect — Crown did not have to consult with all signatory First Nations each time it "took up" land no matter how remote its impact, but impacts of proposed road on First Nation were clear, established, and demonstrably adverse to continued exercise of rights — Crown did not discharge duty to engage directly with First Nation or to minimize adverse impacts on First Nation rights — While First Nation had some reciprocal onus to make their concerns known and reach some mutually satisfactory solution, consultation never got off ground to permit reaching that stage — Consultation would not have given First Nation veto over road, but may have permitted road changes that substantially satisfied First Nation concerns.

Aboriginal law --- Constitutional issues — Reserves and real property — Land surrendered to Crown

Crown planned to build winter road through First Nation land reserve — Crown held open house sessions inviting public comment, in which First Nation did not participate — First Nation Chief notified Crown that Nation did not support road — Crown wrote to First Nation Chief apologizing for how consultation process unfolded, but approved 200-metre wide, 23 square kilometre road corridor prohibiting use of firearms for road that tracked reserve boundary — First Nation brought application before Federal Court to set aside Crown's road approval on ground that it violated its hunting, fishing, and trapping rights assigned by land treaty — Application was granted — Crown appealed — Appeal was allowed — First Nation appealed to Supreme Court — Appeal allowed — Land treaty contemplated that land portions would periodically be "taken up" by Crown, but historical context and tensions underlying treaty implementation demanded process by which lands could be transferred — Content of process arose out of Crown's obligation to act honourably — Content of duty was variable, but turned on degree to which conduct contemplated by the Crown would adversely affect rights in question — Proposed

2005 CarswellNat 3756, 2005 SCC 69, 259 D.L.R. (4th) 610, [2006] 1 C.N.L.R. 78, 21 C.P.C. (6th) 205, 37 Admin. L.R. (4th) 223, [2005] 3 S.C.R. 388, 342 N.R. 82

road would reduce territory over which First Nation was entitled to exercise treaty rights, abolish hunting rights within corridor, and injuriously affect exercise of rights in surrounding bush — Crown therefore had duty to consult First Nation — Meaningful right to hunt was not ascertained on treaty-wide basis but in relation to territories over which First Nation traditionally and currently hunted, fished, and trapped — Unilateral Crown action ignored treaty promise to sustain hunting, fishing, and trapping rights, and was antithesis of reconciliation and mutual respect — Crown did not have to consult with all signatory First Nations each time it "took up" land no matter how remote its impact, but impacts of proposed road on First Nation were clear, established, and demonstrably adverse to continued exercise of rights — Crown did not discharge duty to engage directly with First Nation or to minimize adverse impacts on First Nation rights — While First Nation had some reciprocal onus to make their concerns known and reach some mutually satisfactory solution, consultation never got off ground to permit reaching that stage — Consultation would not have given First Nation veto over road, but may have permitted road changes that substantially satisfied First Nation concerns.

Civil practice and procedure --- Practice on appeal — Appeal to Supreme Court of Canada — Parties — Intervenors on appeal

Crown planned to build winter road through First Nation land reserve — Crown held open house sessions inviting public comment, in which First Nation did not participate — First Nation Chief notified Crown Minister that Nation did not support road — Crown Minister wrote to First Nation Chief apologizing for how consultation process unfolded, but approved 200-metre wide road corridor prohibiting use of firearms for road that tracked reserve boundary — First Nation brought application before Federal Court to set aside road approval on ground that it violated its hunting, fishing, and trapping rights assigned by land treaty — Application was granted — Crown appealed — Attorney General of Alberta acted as intervenor and raised fresh argument on central issue — Appeal was allowed on ground raised by intervenor — First Nation appealed to Supreme Court — Issue arose as to right of intervenor to widen or add to points in issue on appeal, and of Federal Court of Appeal or Supreme Court to decide case on that basis — Intervenor permitted to raise issue; appeal allowed on other grounds — Intervenors were always permitted to put forward legal arguments in support of legal conclusions on issues before court, provided that arguments did not require additional facts, or raise arguments unfair to either party — First Nation suffered no prejudice as no further light could be thrown on intervenor's argument by additional evidence — Issue was one of treaty interpretation rules, not evidence — Issue raised was central to case, and was not one that should have taken First Nation by surprise — For court to refrain from giving effect to correct legal analysis just because it came later rather than sooner, and from intervenor rather than party, would be intolerable and risked injustice.

Droit autochtone --- Droits ancestraux à l'égard des ressources naturelles — Droits ancestraux — Chasse

Couronne planifiait de construire une route d'hiver passant à travers les terres de la réserve de la première nation — Couronne a tenu des séances de portes ouvertes pour obtenir l'opinion du public, mais la première nation n'y a pas participé — Chef de la première nation a avisé la Couronne que la première nation n'était pas en faveur de la route — Couronne a envoyé une lettre d'excuses au chef de la première nation pour la façon dont s'était déroulée le processus de consultation, mais a quand même approuvé un corridor de 200 mètres de large longeant la limite de la réserve, d'une superficie total de 23 kilomètres carrés, à l'intérieur duquel il serait interdit d'utiliser des armes à feu — Première nation a présenté une demande en Cour fédérale afin que soit cassée l'approbation par la Couronne de la route, au motif que cette approbation contrevenait à ses droits de chasser, pêcher et piéger que lui avait cédé le traité sur les terres — Demande a été accueillie — Couronne a interjeté appel — Pourvoi a été accueilli — Première nation a interjeté appel à la Cour suprême — Pourvoi accueilli —

2005 CarswellNat 3756, 2005 SCC 69, 259 D.L.R. (4th) 610, [2006] 1 C.N.L.R. 78, 21 C.P.C. (6th) 205, 37 Admin. L.R. (4th) 223, [2005] 3 S.C.R. 388, 342 N.R. 82

Traité envisageait que des portions des terres pourraient périodiquement être prises par la Couronne, mais le contexte historique et les tensions sous-jacentes à la mise en oeuvre du traité commandaient un processus de transfert des terres — Contenu du processus découlait de l'obligation qu'a la Couronne d'agir honorablement — Contenu de l'obligation variait, mais dépendait de la mesure dans laquelle les dispositions envisagées par la Couronne auraient un effet préjudiciable sur les droits en question — Route proposée réduirait le territoire sur lequel la première nation avait des droits, abolirait les droits de chasse à l'intérieur du corridor et aurait un effet préjudiciable sur l'exercice des droits dans le terrain boisé environnant — Couronne avait donc l'obligation de consulter la première nation — Droit réel de chasse n'est pas établi en fonction de toutes les terres visées par le traité, mais plutôt par rapport aux territoires sur lesquels les premières nations avaient l'habitude de chasser, de pêcher et de piéger — Action unilatérale de la Couronne ignorait la promesse comprise dans le traité d'assurer les droits de chasser, de pêcher et de piéger et constituait l'antithèse de la réconciliation et du respect mutuel — Couronne n'avait pas à consulter les premières nations à chaque fois qu'elle prenait des terres peu importe l'importance de l'effet, sauf que, en l'espèce, l'impact de la route proposée était clair, établi et manifestement préjudiciable à l'exercice continu des droits — Couronne n'a pas rempli son obligation de discuter directement avec la première nation ou de minimiser l'impact préjudiciable sur les droits de celle-ci — Même si la première nation avait aussi l'obligation réciproque d'exprimer ses préoccupations et de trouver une solution mutuellement satisfaisante, la consultation pouvant permettre d'atteindre cette étape n'a jamais pris son envol — Consultation n'aurait jamais donné à la première nation un droit de veto, mais elle aurait néanmoins pu permettre d'apporter des modifications au tracé qui auraient répondu aux préoccupations de la première nation.

Droit autochtone --- Questions constitutionnelles — Réserves et biens-fonds — Terres remises à la Couronne

Couronne planifiait de construire une route d'hiver passant à travers les terres de la réserve de la première nation — Couronne a tenu des séances de portes ouvertes pour obtenir l'opinion du public, mais la première nation n'y a pas participé — Chef de la première nation a avisé la Couronne que la première nation n'était pas en faveur de la route — Couronne a envoyé une lettre d'excuses au chef de la première nation pour la façon dont s'était déroulée le processus de consultation, mais a quand même approuvé un corridor de 200 mètres de large longeant la limite de la réserve, d'une superficie total de 23 kilomètres carrés, à l'intérieur duquel il serait interdit d'utiliser des armes à feu — Première nation a présenté une demande en Cour fédérale afin que soit cassée l'approbation par la Couronne de la route, au motif que cette approbation contrevenait à ses droits de chasser, pêcher et piéger que lui avait cédé le traité sur les terres — Demande a été accueillie — Couronne a interjeté appel — Pourvoi a été accueilli — Première nation a interjeté appel à la Cour suprême — Pourvoi accueilli — Traité envisageait que des portions des terres pourraient périodiquement être prises par la Couronne, mais le contexte historique et les tensions sous-jacentes à la mise en oeuvre du traité commandaient un processus de transfert des terres — Contenu du processus découlait de l'obligation qu'a la Couronne d'agir honorablement — Contenu de l'obligation variait, mais dépendait de la mesure dans laquelle les dispositions envisagées par la Couronne auraient un effet préjudiciable sur les droits en question — Route proposée réduirait le territoire sur lequel la première nation avait des droits, abolirait les droits de chasse à l'intérieur du corridor et aurait un effet préjudiciable sur l'exercice des droits dans le terrain boisé environnant — Couronne avait donc l'obligation de consulter la première nation — Droit réel de chasse n'est pas établi en fonction de toutes les terres visées par le traité, mais plutôt par rapport aux territoires sur lesquels les premières nations avaient l'habitude de chasser, de pêcher et de piéger — Action unilatérale de la Couronne ignorait la promesse comprise dans le traité d'assurer les droits de chasser, de pêcher et de piéger et constituait l'antithèse de la réconciliation et du respect mutuel — Couronne n'avait pas à consulter les premières nations à chaque fois qu'elle prenait des terres peu importe l'importance de l'effet, sauf que, en l'espèce, l'impact de la route proposée était clair, établi et manifestement

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préjudiciable à l'exercice continu des droits — Couronne n'a pas rempli son obligation de discuter directement avec la première nation ou de minimiser l'impact préjudiciable sur les droits de celle-ci — Même si la première nation avait aussi l'obligation réciproque d'exprimer ses préoccupations et de trouver une solution mutuellement satisfaisante, la consultation pouvant permettre d'atteindre cette étape n'a jamais pris son envol — Consultation n'aurait jamais donné à la première nation un droit de veto, mais elle aurait néanmoins pu permettre d'apporter des modifications au tracé qui auraient répondu aux préoccupations de la première nation.

Procédure civile --- Procédure en appel — Appel à la Cour suprême du Canada — Parties — Intervenants en appel

Couronne planifiait de construire une route d'hiver passant à travers les terres de la réserve de la première nation — Couronne a tenu des séances de portes ouvertes pour obtenir l'opinion du public, mais la première nation n'y a pas participé — Chef de la première nation a avisé la Couronne que la première nation n'était pas en faveur de la route — Couronne a envoyé une lettre d'excuses au chef de la première nation pour la façon dont s'était déroulé le processus de consultation, mais a quand même approuvé un corridor de 200 mètres de large longeant la limite de la réserve, d'une superficie totale de 23 kilomètres carrés, à l'intérieur duquel il serait interdit d'utiliser des armes à feu — Première nation a présenté une demande en Cour fédérale afin que soit cassée l'approbation par la Couronne de la route, au motif que cette approbation contrevenait à ses droits de chasser, pêcher et piéger que lui avait cédé le traité sur les terres — Demande a été accueillie — Couronne a interjeté appel — Procureur général de l'Alberta a agi comme intervenant et a soulevé un nouvel argument à l'égard de la question principale — Pourvoi a été accueilli au motif soulevé par l'intervenant — Première nation a interjeté appel à la Cour suprême — Question a été soulevée quant au droit de l'intervenant d'élargir la portée des questions en appel ou d'en ajouter et au droit de la Cour d'appel fédérale ou de la Cour suprême de trancher l'affaire en se fondant sur cet argument — Intervenant a été autorisé à soulever la question; le pourvoi a été accueilli pour d'autres motifs — Intervenants sont toujours autorisés à soumettre aux tribunaux des arguments juridiques à l'appui de leurs conclusions juridiques, pour autant que les arguments ne nécessitent pas la preuve de faits additionnels ou ne soulèvent pas des arguments injustes pour les parties — Première nation n'a subi aucun préjudice étant donné qu'aucune preuve additionnelle n'était nécessaire pour éclaircir l'argument de l'intervenant — Question était relative aux règles d'interprétation des traités et non à la preuve — Question soulevée se situait au coeur de l'affaire et n'était pas de nature à prendre par surprise la première nation — Il serait intolérable et certainement injuste que le tribunal s'empêche de donner effet à une analyse juridique correcte simplement parce qu'elle a été présentée tardivement.

The applicant was a First Nation signatory to an 1899 land treaty surrendering 840,000 square kilometres of land to the Crown, in exchange for reserve land and the right to hunt, trap, and fish therein. The treaty was subject to the limitation that the Crown could occasionally "take up" land for settlement, trading, resource, or similar purposes. In 2000, the respondent Crown approved the construction of a winter road through the First Nation reserve. It did not consult the applicant directly, and instead held open house sessions inviting public comment. The applicant did not participate in the public forum, but wrote to the Crown protesting the road proposal. The Crown wrote to the First Nation Chief apologizing for how the consultation process unfolded, but ultimately approved a 200-metre wide, 23 square kilometre road corridor that tracked the reserve boundary and prohibited the use of firearms.

The applicant successfully applied to the Federal Court to set aside the Crown's decision on the ground that it violated the hunting, fishing, and trapping rights accorded to it by treaty. The trial judge held that the lands in question, which were within a national park, were not "taken up" by the Crown within the meaning of the treaty

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because the use of the lands as a park did not constitute a visible use incompatible with the existing rights to hunt and trap. The trial judge found that the proposed road corridor would adversely impact the applicant's treaty rights, and that the standard public notices and open houses proposed by the Crown were not sufficient as the applicant was entitled to a direct consultation process. Accordingly, the trial judge quashed the Crown's approval order for the road.

The Crown successfully appealed the reversal, and approval for the road was restored. The Court of Appeal based its grounds for the reversal on a fresh argument pertaining to the central issue that was brought forth by the Attorney General of Alberta as an intervenor on the appeal. The argument was that the treaty expressly contemplated the taking up of surrendered lands for various purposes, including roads. The winter road was more a "taking up" pursuant to the treaty, rather than an infringement. The court also held that there was no Crown obligation to consult with the applicant about the road, although to do so would be good practice. The applicant appealed to the Supreme Court of Canada. In addition to arguing the points on appeal, the applicant also objected that the Attorney General of Alberta had overstepped its proper role as an intervenor in widening or adding to the points at issue on appeal, and that neither the Federal Court of Appeal nor the Supreme Court could decide the case on that basis.

Held: The appeal was allowed. The Attorney General of Alberta did not overstep its role as intervenor. The Crown's approval order for winter road was quashed on other grounds.

Per Binnie J. (McLachlin C.J., Major, Bastarache, LeBel, Deschamps, Fish, Abella, and Charron JJ. concurring): The Attorney General of Alberta did not overstep its role as intervenor. Intervenors were always permitted to put forward legal arguments in support of legal conclusions on issues before the court, provided that the arguments did not require additional facts, or raise arguments that were unfair to either party. Additionally, the applicant did not identify prejudice caused by the fresh argument. Had the argument been similarly formulated at trial, no further light could have been thrown on it by additional evidence. The historical record of the treaty was fully explored at trial. The issue was one concerning rules of treaty interpretation, not of evidence. It had also always been central to the case, and was not one that should have taken the applicant by surprise. It would be intolerable if the courts were precluded from giving effect to a correct legal analysis just because it came later rather than sooner, and from an intervenor rather than a party. For the court to close its eyes to the argument would be to risk an injustice.

However, the Crown did not discharge its duty to engage directly with the applicant in consultation, or to minimize the adverse impacts or the winter road on its hunting, fishing, and trapping rights. The fundamental objective of the modern law of aboriginal and treaty rights was the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests, and ambitions. The treaty in question was one of the most important post-Confederation treaties. The principle of consultation in advance of interference with existing treaty rights was a matter of broad general importance, and failure on the Crown's part to engage in advance consultation undermined the process of reconciliation. The approval order was to be quashed, and the matter returned to the Crown for further consultation and consideration.

The land treaty contemplated that land portions would periodically be "taken up" by the Crown, but the historical context and tensions underlying the treaty implementation demanded a process by which lands could be transferred from a land category permitting the applicant to hunt, fish, and trap, to another in which the applicant could not. The content of this process was dictated by the Crown's duty to act honourably. Once triggered, the content of this duty was variable, but turned on the degree to which the conduct contemplated by the Crown

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would adversely affect the rights in question.

The proposed winter road would reduce territory over which the applicant was entitled to exercise treaty rights, remove hunting within the road corridor, and injuriously affect the applicant's exercise of rights in the surrounding bush. The Crown's suggestion that the test ought to be whether it was reasonably practicable for the applicant to hunt, fish, and trap within the province "as a whole" after the taking up of the land was incorrect, as it would imply acceptable prohibitions on hunting so long as it was still available 800 kilometres across the province. Nor was the position by the Attorney General that the 23 square kilometre area was de minimis tenable; a meaningful right to hunt was not ascertained on a treaty-wide basis, but in relation to territories over which the applicant traditionally and currently hunted, fished, and trapped.

The unilateral action by the Crown ignored its oral and written promise to sustain hunting and fishing rights after the treaty in the fashion they existed before it, and was the antithesis of reconciliation and mutual respect. The Crown did not have to consult with all signatory First Nations each time it "took up" land however remote its impact, but the impact on the applicant of the proposed winter road in this case was clear, established, and demonstrably adverse to its continued exercise of hunting and fishing rights. In the context of the treaty framework for managing continuing changes in land use already foreseen in 1899, consultation was key to achieving the overall objective of the modern law of treaty and aboriginal rights. Hence, while the winter road was a permissible purpose for "taking up" lands, the Crown was required to provide notice to the applicant and engage directly with them, not merely through public consultation. While the applicant had some reciprocal onus to make its concerns known and to try reaching some mutually satisfactory solution, consultation did not get off the ground and so did not reach that stage. Consultation would not have given the applicant a veto power over the road, but it might have permitted changes that substantially satisfied its concerns.

La demanderesse était une première nation signataire d'un traité de 1899 cédant 840 000 kilomètres carrés de terres à la Couronne, en échange de terres de réserve et du droit d'y chasser, pêcher et piéger. Le traité était assujéti à la restriction que la Couronne pourrait occasionnellement prendre des terres à des fins de peuplement, de commerce, d'exploitation de ressources ou d'autres raisons similaires. En l'an 2000, la Couronne intimée a approuvé la construction d'une route d'hiver passant à travers la réserve de la demanderesse. Elle n'a pas consulté cette dernière directement, mais a plutôt tenu des séances portes ouvertes afin d'obtenir les commentaires du public. La demanderesse n'a pas participé au forum public, mais a écrit à la Couronne pour protester contre la route proposée. Même si la Couronne s'est excusée par écrit auprès du chef de la demanderesse pour la façon dont s'était déroulé le processus de consultation, elle a ultimement approuvé un corridor de 200 mètres de large et d'une superficie de 23 kilomètres carrés qui longeait les limites de la réserve, et à l'intérieur duquel l'usage des armes à feu était interdit.

La demanderesse s'est adressée avec succès à la Cour fédérale, afin d'obtenir l'annulation de la décision de la Couronne, au motif qu'elle violait les droits de chasser, pêcher et piéger qui lui avaient été accordés par traité. Le premier juge a statué que les terres en question, qui faisaient partie d'un parc national, n'avaient pas été prises par la Couronne au sens du traité, étant donné que l'utilisation des terres comme parc ne constituait pas un usage visiblement incompatible avec les droits existants de chasser et piéger. Le juge a conclu que le corridor proposé aurait un effet préjudiciable sur les droits de traité de la demanderesse, et que les avis publics et portes ouvertes standards proposés par la Couronne ne suffisaient pas, car la demanderesse avait droit à un processus de consultation direct. Par conséquent, le premier juge a cassé la décision de la Couronne approuvant la route.

La Couronne a interjeté appel avec succès et l'approbation de la route a été rétablie. La Cour d'appel a fondé ses

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motifs sur un nouvel argument relatif à la question principale, lequel a été présenté par le Procureur général de l'Alberta à titre d'intervenant en appel. Cet argument était que le traité envisageait expressément la prise des terres cédées pour divers usages, y compris des routes. La route d'hiver constituait une prise faite en conformité avec le traité plutôt qu'une violation. Le tribunal a aussi statué qu'il n'existait aucune obligation pour la Couronne de consulter la demanderesse relativement à la route, même si le faire aurait constitué une bonne pratique. La demanderesse a interjeté appel à la Cour suprême du Canada. En plus de faire des observations quant aux questions en appel, la demanderesse a aussi allégué que le Procureur général de l'Alberta avait excédé son rôle à titre d'intervenant en élargissant les questions en litige en appel ou en ajoutant des questions, et que ni la Cour d'appel fédérale ni la Cour suprême ne pouvait trancher l'affaire en se fondant sur ces arguments.

Arrêt: Le pourvoi a été accueilli. Le Procureur général de l'Alberta n'a pas excédé son rôle à titre d'intervenant. La décision approuvant la route d'hiver a été cassée pour d'autres motifs.

Binnie J. (McLachlin, J.C.C., Major, Bastarache, LeBel, Deschamps, Fish, Abella et Charron, JJ., souscrivant à son opinion): Le Procureur général de l'Alberta n'a pas excédé son rôle à titre d'intervenant. Les intervenants sont toujours autorisés à soumettre des arguments juridiques pour appuyer des conclusions juridiques à l'égard des questions dont est saisi le tribunal, pour autant que ces arguments ne nécessitent pas la preuve de faits additionnels ou qu'ils ne soient pas injustes pour les parties. De plus, la demanderesse n'a pas indiqué quel était le préjudice causé par le nouvel argument. Même si l'argument avait été soumis au procès, aucune preuve additionnelle n'aurait pu lui apporter plus d'éclairage. L'historique du traité a été pleinement examiné au procès. La question portait sur les règles d'interprétation des traités, et non sur la preuve. Elle a toujours été au coeur de l'affaire et n'était pas de nature à pouvoir prendre la demanderesse par surprise. Il serait intolérable d'empêcher les tribunaux de donner effet à une analyse juridique correcte pour la simple raison qu'elle a été invoquée tardivement et par un intervenant plutôt que par une partie. Si le tribunal ignorait l'argument, il pourrait en résulter une injustice.

Cependant, la Couronne n'a pas rempli son obligation de consulter directement la demanderesse ou de minimiser les effets préjudiciables de la route d'hiver sur les droits de chasser, de pêcher et de piéger de la demanderesse. L'objectif fondamental du droit moderne en matière de droits ancestraux et droits de traité était de réconcilier les peuples autochtones et non autochtones ainsi que les réclamations, intérêts et ambitions de ces deux peuples. Le traité en question était l'un des plus importants de ceux datant de l'après-Confédération. Le principe de la consultation préalable à la modification de droits de traité existants était une matière d'importance générale, et le défaut de la Couronne d'avoir procédé à des consultations préalables minait le processus de réconciliation. La décision approuvant la route devait être cassée et l'affaire renvoyée à la Couronne pour qu'elle procède à une nouvelle consultation et un nouvel examen.

Le traité prévoyait que des portions de terres seraient périodiquement prises par la Couronne, mais le contexte historique et les tensions sous-jacentes à la mise en oeuvre du traité exigeaient un processus par lequel les terres pourraient être transférées d'une catégorie permettant à la demanderesse d'y chasser, pêcher et piéger, à une autre catégorie ne le permettant pas. Le contenu de ce processus était dicté par l'obligation de la Couronne d'agir honorablement. Une fois l'obligation déclenchée, son contenu variait en fonction du degré de l'effet préjudiciable qu'aurait sur les droits en question la conduite envisagée par la Couronne.

La route d'hiver proposée réduirait le territoire à l'égard duquel la demanderesse pouvait exercer ses droits de traité, empêcherait la chasse à l'intérieur du corridor et aurait un effet préjudiciable sur l'exercice par la demanderesse de ses droits dans le boisé environnant. La Couronne avait tort de suggérer que le test devrait être

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celui de savoir si, après la prise des terres, il était raisonnablement possible pour la demanderesse de chasser, pêcher et piéger « dans l'ensemble de la province ». Cela impliquerait que l'interdiction de chasser serait acceptable tant que la chasse serait possible dans 800 kilomètres à travers la province. Était également inacceptable la position du procureur général que le territoire de 23 kilomètres carrés était insignifiant; un droit réel de chasser n'est pas établi en fonction de toutes les terres visées par le traité, mais en fonction des territoires sur lesquels la demanderesse chassait, pêchait et piégeait traditionnellement et actuellement.

L'action unilatérale par la Couronne faisait abstraction de sa promesse orale et écrite de maintenir tels quels les droits de chasser et de pêcher après le traité, et était ainsi l'antithèse de la réconciliation et du respect mutuel. La Couronne n'avait pas à consulter toutes les premières nations signataires chaque fois qu'elle prenait des terres peu importe l'importance de l'effet, sauf que, en l'espèce, l'effet de la route d'hiver proposée sur la demanderesse était clair, établi et manifestement préjudiciable à l'exercice continu des droits de chasse et de pêche. Selon le cadre établi par le traité pour gérer les changements continus à l'usage des terres entrevus en 1899, la consultation était la clé pour atteindre l'objectif général du droit moderne en matière de traités et de droits ancestraux. Par conséquent, même si la route d'hiver constituait un objectif autorisé aux fins de la prise de terres, la Couronne avait cependant l'obligation d'avertir la demanderesse et de s'adresser à elle directement, et non pas seulement à travers une seule consultation publique. Même si la demanderesse avait l'obligation réciproque de faire connaître ses préoccupations et de tenter de trouver une solution mutuellement satisfaisante, la consultation dans ce cas-ci n'a jamais pris son envol et n'a donc jamais atteint ce stade. La consultation n'aurait pas donné un droit de veto à la demanderesse quant à la route, mais elle aurait probablement permis d'apporter des changements qui auraient répondu à l'essentiel de ses préoccupations.

Cases considered by Binnie J.:

Athey v. Leonati (1996), [1997] 1 W.W.R. 97, 140 D.L.R. (4th) 235, 81 B.C.A.C. 243, 132 W.A.C. 243, 31 C.C.L.T. (2d) 113, 203 N.R. 36, [1996] 3 S.C.R. 458, 1996 CarswellBC 2295, 1996 CarswellBC 2296 (S.C.C.) — referred to

Canada (Attorney General) v. Ontario (Attorney General) (1895), 25 S.C.R. 434, 1895 CarswellNat 46 (S.C.C.) — considered

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered

Haida Nation v. British Columbia (Minister of Forests) (2004), 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, [2005] 3 W.W.R. 419, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 327 N.R. 53, 206 B.C.A.C. 52, 338 W.A.C. 52, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73 (S.C.C.) — considered

Halfway River First Nation v. British Columbia (Ministry of Forests) (1999), 1999 CarswellBC 1821, 64 B.C.L.R. (3d) 206, [1999] 9 W.W.R. 645, 1999 BCCA 470, [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 129 B.C.A.C. 32, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 210 W.A.C. 32 (B.C. C.A.) — followed

Lamb v. Kincaid (1907), 38 S.C.R. 516, 1907 CarswellYukon 51, 27 C.L.T. 489 (S.C.C.) — considered

2005 CarswellNat 3756, 2005 SCC 69, 259 D.L.R. (4th) 610, [2006] 1 C.N.L.R. 78, 21 C.P.C. (6th) 205, 37 Admin. L.R. (4th) 223, [2005] 3 S.C.R. 388, 342 N.R. 82

Marshall v. Canada (1999), (sub nom. *R. v. Marshall*) [1999] 3 S.C.R. 456, 1999 CarswellINS 262, 1999 CarswellINS 282, (sub nom. *R. v. Marshall*) 177 D.L.R. (4th) 513, (sub nom. *R. v. Marshall*) 246 N.R. 83, (sub nom. *R. v. Marshall*) 138 C.C.C. (3d) 97, (sub nom. *R. v. Marshall*) [1999] 4 C.N.L.R. 161, (sub nom. *R. v. Marshall*) 178 N.S.R. (2d) 201, (sub nom. *R. v. Marshall*) 549 A.P.R. 201 (S.C.C.) — considered

R. v. Badger (1996), [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, 1996 CarswellAlta 365F, 1996 CarswellAlta 587 (S.C.C.) — followed

R. v. Bernard (2005), 15 C.E.L.R. (3d) 163, [2005] 3 C.N.L.R. 214, 198 C.C.C. (3d) 29, 255 D.L.R. (4th) 1, 2005 SCC 43, 2005 CarswellINS 317, 2005 CarswellINS 318, 336 N.R. 22 (S.C.C.) — referred to

R. v. Morgentaler (1993), [1993] 1 S.C.R. 462, 1993 CarswellINS 429, 1993 CarswellINS 429F (S.C.C.) — referred to

R. v. Smith (1935), [1935] 2 W.W.R. 433, 64 C.C.C. 131, [1935] 3 D.L.R. 703, 1935 CarswellSask 34 (Sask. C.A.) — considered

R. v. Sparrow (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — distinguished

Sioui v. Quebec (Attorney General) (1990), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427, 109 N.R. 22, (sub nom. *R. c. Sioui*) 30 Q.A.C. 280, 56 C.C.C. (3d) 225, [1990] 3 C.N.L.R. 127, 1990 CarswellQue 103, 1990 CarswellQue 103F (S.C.C.) — considered

Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd. (2002), 2002 SCC 19, 2002 CarswellAlta 186, 2002 CarswellAlta 187, 20 B.L.R. (3d) 1, 209 D.L.R. (4th) 318, [2002] 5 W.W.R. 193, 98 Alta. L.R. (3d) 1, 283 N.R. 233, 299 A.R. 201, 266 W.A.C. 201, 50 R.P.R. (3d) 212, (sub nom. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*) [2002] 1 S.C.R. 678 (S.C.C.) — considered

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74 (S.C.C.) — considered

Statutes considered by Binnie J.:

Constitution Act, 1930, (U.K.), 20 & 21 Geo. 5, c. 26, reprinted R.S.C. 1985, App. II, No. 26

Sched. 2 — referred to

Sched. 2, s. 10 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

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Generally — referred to

s. 35 — referred to

s. 35(1) — considered

1986 Treaty Land Entitlement Agreement, S.C. 1988, c. 39

Generally — referred to

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

Generally — referred to

Treaties considered by Binnie J.:

Treaty No. 8, 1899

Generally — referred to

Regulations considered by Binnie J.:

Canada National Parks Act, S.C. 2000, c. 32

Wood Buffalo National Park Game Regulations, SOR/78-830

s. 36(5) — referred to

APPEAL by First Nation from judgment reported at *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2004), 2004 CarswellNat 762, 2004 CAF 66, 2004 CarswellNat 418, 2004 FCA 66, [2004] 2 C.N.L.R. 74, 317 N.R. 258, 236 D.L.R. (4th) 648, 247 F.T.R. 317 (note), [2004] F.C.J. No. 277, [2004] 3 F.C.R. 436 (F.C.A.), regarding Court of Appeal reversal of Federal Court decision to set aside Crown decision to build road on First Nation reserve.

POURVOI de la première nation à l'encontre de l'arrêt de la Cour d'appel fédérale publié à *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2004), 2004 CarswellNat 762, 2004 CAF 66, 2004 CarswellNat 418, 2004 FCA 66, [2004] 2 C.N.L.R. 74, 317 N.R. 258, 236 D.L.R. (4th) 648, 247 F.T.R. 317 (note), [2004] F.C.J. No. 277, [2004] 3 F.C.R. 436 (C.A.F.), qui a infirmé la décision de la Cour fédérale, 1^{re} instance qui avait annulé la décision de la Couronne de construire une route passant à travers la réserve de la première nation.

Binnie J.:

1 The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

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2 Treaty 8 is one of the most important of the post-Confederation treaties. Made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories. Some idea of the size of this surrender is given by the fact that it dwarfs France (543,998 square kilometres), exceeds the size of Manitoba (650,087 square kilometres), Saskatchewan (651,900 square kilometres) and Alberta (661,185 square kilometres) and approaches the size of British Columbia (948,596 square kilometres). In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the following rights of hunting, trapping, and fishing:

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

(*Report of Commissioners for Treaty No. 8* (1899), at p. 12)

3 In fact, for various reasons (including lack of interest on the part of First Nations), sufficient land was not set aside for reserves for the Mikisew Cree First Nation (the "Mikisew") until the *1986 Treaty Lands Entitlement Agreement*, 87 years after Treaty 8 was made. Less than 15 years later, the federal government approved a 118-kilometre winter road that, as originally conceived, ran through the new Mikisew First Nation Reserve at Peace Point. The government did not think it necessary to engage in consultation directly with the Mikisew before making this decision. After the Mikisew protested, the winter road alignment was changed to track the boundary of the Peace Point reserve instead of running through it, again without consultation with the Mikisew. The modified road alignment traversed the traplines of approximately 14 Mikisew families who reside in the area near the proposed road, and others who may trap in that area although they do not live there, and the hunting grounds of as many as 100 Mikisew people whose hunt (mainly of moose), the Mikisew say, would be adversely affected. The fact the proposed winter road directly affects only about 14 Mikisew trappers and perhaps 100 hunters may not seem very dramatic (unless you happen to be one of the trappers or hunters in question) but, in the context of a remote northern community of relatively few families, it is significant. Beyond that, however, the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.

4 In this case, the relationship was not properly managed. Adequate consultation in advance of the Minister's approval did not take place. The government's approach did not advance the process of reconciliation but undermined it. The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the *Constitution Act, 1982*), was breached. The Mikisew appeal should be allowed, the Minister's approval quashed, and the matter returned to the Minister for further consultation and consideration.

I. Facts

5 About 5 percent of the territory surrendered under Treaty 8 was set aside in 1922 as Wood Buffalo National Park. The Park was created principally to protect the last remaining herds of wood bison (or buffalo) in northern Canada and covers 44,807 square kilometres of land straddling the boundary between northern Alberta

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and southerly parts of the Northwest Territories. It is designated a UNESCO World Heritage Site. The Park itself is larger than Switzerland.

6 At present, it contains the largest free-roaming, self-regulating bison herd in the world, the last remaining natural nesting area for the endangered whooping crane, and vast undisturbed natural boreal forests. More to the point, it was been inhabited by First Nation peoples for more than over 8,000 years, some of whom still earn a subsistence living hunting, fishing and commercial trapping within the Park boundaries. The Park includes the traditional lands of the Mikisew. As a result of the *Treaty Land Entitlement Agreement*, the Peace Point Reserve was formally excluded from the Park in 1988 but of course is surrounded by it.

7 The members of the Mikisew Cree First Nation are descendants of the Crees of Fort Chipewyan who signed Treaty 8 on June 21, 1899. It is common ground that its members are entitled to the benefits of Treaty 8.

A. The Winter Road Project

8 The proponent of the winter road is the respondent Thebacha Road Society, whose members include the Town of Fort Smith (located in the Northwest Territories on the northeastern boundary of Wood Buffalo National Park, where the Park headquarters is located), the Fort Smith Métis Council, the Salt River First Nation, and Little Red River Cree First Nation. The advantage of the winter road for these people is that it would provide direct winter access among a number of isolated northern communities and to the Alberta highway system to the south. The trial judge accepted that the government's objective was to meet "regional transportation needs": (2001), 214 F.T.R. 48, 2001 FCT 1426 (Fed. T.D.), at para. 115.

B. The Consultation Process

9 According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested stakeholders. Thus Parks Canada acting for the Minister, provided the Mikisew with the Terms of Reference for the environmental assessment on January 19, 2000. The Mikisew were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the Mikisew did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the Mikisew did not formally participate in the open houses, because "...an open house is not a forum for us to be consulted adequately".

10 Apparently, Parks Canada left the proponent Thebacha Road Society out of the information loop as well. At the end of January 2001, it advised Chief Poitras that it had just been informed that the Mikisew did not support the road. Up to that point, Thebacha had been led to believe that the Mikisew had no objection to the road's going through the reserve. Chief Poitras wrote a further letter to the Minister on January 29, 2001 and received a standard-form response letter from the Minister's office stating that the correspondence "will be given every consideration".

11 Eventually, after several more miscommunications, Parks Canada wrote Chief Poitras on April 30, 2001, stating in part: "I apologize to you and your people for the way in which the consultation process unfolded concerning the proposed winter road and any resulting negative public perception of the [Mikisew Cree First Nation]". At that point, in fact, the decision to approve the road with a modified alignment had already been taken.

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12 On May 25, 2001, the Minister announced on the Parks Canada website that the Thebacha Road Society was authorised to build a winter road 10 metres wide with posted speed limits ranging from 10 to 40 kilometres per hour. The approval was said to be in accordance with "Parks Canada plans and policy" and "other federal laws and regulations". No reference was made to any obligations to the Mikisew.

13 The Minister now says the Mikisew ought not to be heard to complain, about the process of consultation because they declined to participate in the public process that took place. Consultation is a two-way street, she says. It was up to the Mikisew to take advantage of what was on offer. They failed to do so. In the Minister's view, she did her duty.

14 The proposed winter road is wide enough to allow two vehicles to pass. Pursuant to s. 36(5) of the *Wood Buffalo National Park Game Regulations*, SOR/78-830, creation of the road would trigger a 200-metre wide corridor within which the use of firearms would be prohibited. The total area of this corridor would be approximately 23 square kilometres.

15 The Mikisew objection goes beyond the direct impact of closure of the area covered by the winter road to hunting and trapping. The surrounding area would be, the trial judge found, injuriously affected. Maintaining a traditional lifestyle, which the Mikisew say is central to their culture, depends on keeping the land around the Peace Point reserve in its natural condition and this, they contend, is essential to allow them to pass their culture and skills onto the next generation of Mikisew. The detrimental impact of the road on hunting and trapping, they argue, may simply prove to be one more incentive for their young people to abandon a traditional lifestyle and turn to other modes of living in the south.

16 The Mikisew applied to the Federal Court to set aside the Minister's approval based on their view of the Crown's fiduciary duty, claiming that the Minister owes "a fiduciary and constitutional duty to adequately consult with Mikisew Cree First Nation with regard to the construction of the road" (trial judge, para. 26).

17 An interlocutory injunction against construction of the winter road was issued by the Federal Court, Trial Division on August 27, 2001.

II. Relevant Enactments

18 *Constitution Act, 1982*

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

III. Judicial History

A. Federal Court, Trial Division ((2001), 214 F.T.R. 48, 2001 FCT 1426 (Fed. T.D.))

19 Hansen J. held that the lands included in Wood Buffalo National Park were not "taken up" by the Crown within the meaning of Treaty 8 because the use of the lands as a national park did not constitute a "visible use" incompatible with the existing rights to hunt and trap (*R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.); *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.)). The proposed winter road and its 200-metre "[no] fire-arm" corridor would adversely impact the Mikisew's treaty rights. These rights received constitutional protection in 1982, and any infringements must be justified in accordance with the test in *R. v. Sparrow*, [1990] 1 S.C.R.

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1075 (S.C.C.). In Hansen J.'s view, the Minister's decision to approve the road infringed the Mikisew's Treaty 8 rights and could not be justified under the *R. v. Sparrow* test.

20 In particular, the trial judge held that the standard public notices and open houses which were given were not sufficient. The Mikisew were entitled to a distinct consultation process. She stated at paras. 170-71:

The applicant complains that the mitigation measures attached to the Minister's decision were not developed in consultation with Mikisew and were not designed to minimize impacts on Mikisew's rights. I agree. Even the realignment, apparently adopted in response to Mikisew's objections, was not developed in consultation with Mikisew. The evidence does not establish that any consideration was given to whether the new route would minimize impacts on Mikisew's treaty rights. The evidence of Chief George Poitras highlighted an air of secrecy surrounding the realignment, a process that should have included a transparent consideration of Mikisew's concerns.

Parks Canada admitted it did not consult with Mikisew about the route for the realignment, nor did it consider the impacts of the realignment on Mikisew trappers' rights.

21 Accordingly, the trial judge allowed the application for judicial review and quashed the Minister's approval.

B. Federal Court of Appeal ([2004] 3 F.C.R. 436, 2004 FCA 66 (F.C.A.))

22 Rothstein J.A., with whom Sexton J.A. agreed, allowed the appeal and restored the Minister's approval. He did so on the basis of an argument brought forward by the Attorney General of Alberta as an intervener on the appeal. The argument was that Treaty 8 expressly contemplated the "taking up" of surrendered lands for various purposes, including roads. The winter road was more properly seen as a "taking up" pursuant to the Treaty rather than an infringement of it. As Rothstein J.A. held:

Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of section 35. This is to be contrasted with the case where the limitations provided by the treaty do not apply but the government nevertheless seeks to limit the treaty right. In such a case, the *Sparrow* test must be satisfied in order for the infringement to be constitutionally permissible. [para. 21]

Rothstein J.A. also held that there was no obligation on the Minister to consult with the Mikisew about the road, although to do so would be "good practice" (para. 24). (This opinion was delivered before the release of this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.), and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74 (S.C.C.).)

23 Sharlow J.A., in dissenting reasons, agreed with the trial judge that the winter road approval was itself a *prima facie* infringement of the Treaty 8 rights and that the infringement had not been justified under the *Sparrow* test. The Crown's obligation as a fiduciary must be considered. The failure of the Minister's staff at Parks Canada to engage in meaningful consultation was fatal to the Crown's attempt at justification. She wrote:

In this case, there is no evidence of any good faith effort on the part of the Minister to understand or address the concerns of Mikisew Cree First Nation about the possible effect of the road on the exercise of their Treaty 8 hunting and trapping rights. It is significant, in my view, that Mikisew Cree First Nation was not

even told about the realignment of the road corridor to avoid the Peace Point Reserve until after it had been determined that the realignment was possible and reasonable, in terms of environmental impact, and after the road was approved. That invites the inference that the responsible Crown officials believed that as long as the winter road did not cross the Peace Point Reserve, any further objections of the Mikisew Cree First Nation could be disregarded. Far from meaningful consultation, that indicates a complete disregard for the concerns of Mikisew Cree First Nation about the breach of their Treaty 8 rights. [para. 152]

Sharlow J.A. would have dismissed the appeal.

IV. Analysis

24 The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The "other purposes" would be at least as broad as the purposes listed in the recital, mentioned above, including "travel".

25 There was thus from the outset an uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:

The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.

(C. Mair, *Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899*, at p. 61).

As Cory J. explained in *Badger*, at para. 57, "[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings".

26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown's interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899 (at p. 5):

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them.

27 Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction "and thus to prevent any trouble" (Mair, at p. 61).

A. Interpretation of the Treaty

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28 The interpretation of the treaty "must be realistic and reflect the intentions of both parties, not just that of the [First Nation]" (*Sioui*, at p. 1069). As a majority of the Court stated in *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.), at para. 14:

The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty ... the completeness of any written record ... and the interpretation of treaty terms once found to exist. The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the [First Nation] interests and those of the Crown. [Citations omitted.]

See also *R. v. Bernard*, 2005 SCC 43 (S.C.C.), per McLachlin C.J. at paras. 22-24, and per LeBel J. at para. 115.

29 The Minister is therefore correct to insist that the clause governing hunting, fishing and trapping cannot be isolated from the treaty as a whole, but must be read in the context of its underlying purpose, as intended by both the Crown and the First Nations peoples. Within that framework, as Cory J. pointed out in *Badger*

...the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. [p. 799]

30 In the case of Treaty 8, it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not. Treaty 8 lands lie to the north of Canada and are largely unsuitable for agriculture. The Commissioners who negotiated Treaty 8 could therefore express confidence to the First Nations that, as previously mentioned, "the same means of earning a livelihood would continue after the treaty as existed before it" (p. 5).

31 I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up *from time to time* for settlement, mining, lumbering, trading or other purposes". (Emphasis added.) The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

32 It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470 (B.C. C.A.). In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982*" (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River First Nation* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I

cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.

B. The Process of Treaty Implementation

33 Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. Although *Haida Nation* was not a treaty case, McLachlin C.J. pointed out, at paras. 19 and 35:

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

.

But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River Tlingit First Nation* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation*, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

C. The Mikisew Legal Submission

35 The appellant, the Mikisew, essentially reminded the Court of what was said in *Haida Nation* and *Taku River Tlingit First Nation*. This case, the Mikisew say, is stronger. In those cases, unlike here, the aboriginal interest to the lands was asserted but not yet proven. In this case, the aboriginal interests are protected by Treaty 8. They are established legal facts. As in *Haida Nation*, the trial judge found the aboriginal interest was threatened by the proposed development. If a duty to consult was found to exist in *Haida Nation* and *Taku River Tlingit First Nation* then *a fortiori*, the Mikisew argue, it must arise here and the majority judgment of the Federal Court of Appeal was quite wrong to characterise consultation between governments and aboriginal peoples as nothing more than a "good practice" (para. 24).

D. The Minister's Response

36 The respondent Minister seeks to distinguish *Haida Nation* and *Taku River Tlingit First Nation*. Her

counsel advances three broad propositions in support of the Minister's approval of the proposed winter road.

1. In "taking up" the 23 square kilometres for the winter road the Crown was doing no more than Treaty 8 entitled it to do. The Crown as well as First Nations have rights under Treaty 8. The exercise by the Crown of *its* Treaty right to "take up" land is not an infringement of the Treaty but the performance of it.
2. The Crown went through extensive consultations with First Nations in 1899 at the time Treaty 8 was negotiated. Whatever duty of accommodation was owed to First Nations was discharged at that time. The terms of the Treaty do not contemplate further consultations whenever a "taking up" occurs.
3. In the event further consultation was required, the process followed by the Minister through Parks Canada in this case was sufficient.

37 For the reasons that follow, I believe that each of these propositions must be rejected.

(1) In "taking up" Land for the Winter Road the Crown Was Doing No More Than It Was Entitled To Do Under the Treaty

38 The majority judgment in the Federal Court of Appeal held that "[w]ith the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt" (para. 19).

39 The "Crown rights" argument was initially put forward in the Federal Court of Appeal by the Attorney General of Alberta as an intervener. The respondent Minister advised the Federal Court of Appeal that, while she did not dispute the argument, "[she] was simply not relying on it" (para. 3). As a preliminary objection, the Mikisew say that an intervener is not permitted "to widen or add to the points in issue": *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.), at p. 463. Therefore it was not open to the Federal Court of Appeal (or this Court) to decide the case on this basis.

(a) Preliminary Objection: Did the Attorney General of Alberta Overstep the Proper Role of an Intervener?

40 This branch of the Mikisew argument is, with respect, misconceived. In their application for judicial review the Mikisew argued that the Minister's approval of the winter road infringed Treaty 8. The infringement issue has been central to the proceedings. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the Court, provided that in doing so its legal argument does not require additional facts, not proven in evidence at trial or raise an argument that is otherwise unfair to one of the parties. An intervener is in no worse a position than a party who belatedly discovers some legal argument that it ought to have raised earlier in the proceedings but did not, as in *Lamb v. Kincaid* (1907), 38 S.C.R. 516 (S.C.C.), where Duff J. stated, at p. 539:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

See also *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), at paras. 51-52.

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41 Even granting that the Mikisew can fairly say the Attorney General of Alberta frames the non-infringement argument differently than was done by the federal Minister at trial, the Mikisew have still not identified any prejudice. Had the argument been similarly formulated at trial, how could "further light" have been thrown on it by additional evidence? The historical record was fully explored at trial. At this point the issue is one of the rules of treaty interpretation, not evidence. It thus comes within the rule stated in *Sylvan Lake Golf & Tennis Club Ltd. v. Performance Industries Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19 (S.C.C.), that "the Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice" (para. 33). Here the Attorney General of Alberta took the factual record as he found it. The issue of treaty infringement has always been central to the case. Alberta's legal argument is not one that should have taken the Mikisew by surprise. In these circumstances it would be intolerable if the courts were precluded from giving effect to a correct legal analysis just because it came later rather than sooner and from an intervener rather than a party. To close our eyes to the argument would be to "risk an injustice".

(b) *The Content of Treaty 8*

42 The "hunting, trapping and fishing clause" of Treaty 8 was extensively reviewed by this Court in *Badger*. In that case Cory J. pointed out that "even by the terms of Treaty No. 8 the Indians' right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation" (para. 37). The members of the First Nations, he continued, "would have understood that land had been 'required or taken up' when it was being put to a [visible] use which was incompatible with the exercise of the right to hunt" (para. 53).

[T]he oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis. (para. 58)

43 While *Badger* noted the "geographic limitation" to hunting, fishing and trapping rights, it did not (as it did not need to) discuss the process by which "from time to time" land would be "taken up" and thereby excluded from the exercise of those rights. The actual holding in *Badger* was that the Alberta licensing regime sought to be imposed on all aboriginal hunters within the Alberta portion of Treaty 8 lands infringed Treaty 8, even though the treaty right was expressly made subject to "regulations as may from time to time be made by the government". The Alberta licensing scheme denied to "holders of treaty rights as modified by the [*Natural Resources Transfer Agreement, 1930*] the very means of exercising those rights" (para. 94). It was thus an attempted exercise of regulatory power that went beyond what was reasonably within the contemplation of the parties to the treaty in 1899. (I note parenthetically that the *Natural Resources Transfer Agreement* (NRTA) is not at issue in this case as the Mikisew reserve is vested in Her Majesty in Right of Canada. Section 10 of the NRTA provides that after-created reserves "shall thereafter be administered by Canada in the same way in all respects as if they had never passed to the Province under the provisions hereof".)

44 The Federal Court of Appeal purported to follow *Badger* in holding that the hunting, fishing and trapping rights would be infringed only "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains" (para. 18). With respect, I cannot agree with this implied rejection of the Mikisew procedural rights. At this stage the winter road is no more than a contemplated change of use. The

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proposed use would, if carried into execution, reduce the territory over which the Mikisew would be entitled to exercise their Treaty 8 rights. Apart from everything else, there would be no hunting at all within the 200-metre road corridor. More broadly, as found by the trial judge, the road would injuriously affect the exercise of these rights in the surrounding bush. As the Parks Canada witness, Josie Weninger, acknowledged in cross-examination:

Q: But roads, in effect, change the pattern of moose and other wildlife within the Park and that's been what Parks Canada observed in the past with regards to other roads, correct?

A: It is documented that roads do impact. I would be foolish if I said they didn't.

The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the "trigger" to the duty to consult identified in *Haida Nation* is satisfied.

45 The Minister seeks to extend the *dictum* of Rothstein J.A. by asserting, at para. 96 of her factum, that the test ought to be "whether, after the taking up, it still remains reasonably practicable, *within the Province as a whole*, for the Indians to hunt, fish and trap for food [to] the extent that they choose to do so" (emphasis added). This cannot be correct. It suggests that a prohibition on hunting at Peace Point would be acceptable so long as decent hunting was still available in the Treaty 8 area north of Jasper, about 800 kilometres distant across the province, equivalent to a commute between Toronto and Quebec City (809 kilometres) or Edmonton and Regina (785 kilometres). One might as plausibly invite the truffle diggers of southern France to try their luck in the Austrian Alps, about the same distance as the journey across Alberta deemed by the Minister to be an acceptable fulfilment of the promises of Treaty 8.

46 The Attorney General of Alberta tries a slightly different argument, at para. 49 of his factum, adding a *de minimus* element to the treaty-wide approach:

In this case the amount of land to be taken up to construct the winter road is 23 square kilometres out of 44,807 square kilometres of Wood Buffalo National Park and out of 840,000 square kilometres encompassed by Treaty No. 8. As Rothstein J.A. found, this is not a case where a meaningful right to hunt no longer remains.

47 The arguments of the federal and Alberta Crowns simply ignore the significance and practicalities of a First Nation's traditional territory. Alberta's 23 square kilometre argument flies in the face of the injurious affection of surrounding lands as found by the trial judge. More significantly for aboriginal people, as for non-aboriginal people, location is important. Twenty-three square kilometres alone is serious if it includes the claimants' hunting ground or trap line. While the Mikisew may have rights under Treaty 8 to hunt, fish and trap throughout the Treaty 8 area, it makes no sense from a practical point of view to tell the Mikisew hunters and trappers that, while their own hunting territory and traplines would now be compromised, they are entitled to invade the traditional territories of other First Nations distant from their home turf (a suggestion that would have

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been all the more impractical in 1899). The Chipewyan negotiators in 1899 were intensely practical people, as the Treaty 8 Commissioners noted in their report (at p. 5):

The Chipewyans confined themselves to asking questions and making brief arguments. They appeared to be more adept at cross-examination than at speech-making, and the Chief at Fort Chipewyan displayed considerable keenness of intellect and much practical sense in pressing the claims of his band.

Badger recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

48 What Rothstein J.A. actually said at para. 18 is as follows:

With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt. [Emphasis added.]

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

(c) *Unilateral Crown Action*

49 There is in the Minister's argument a strong advocacy of unilateral Crown action (a sort of "this is surrendered land and we can do with it what we like" approach) which not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect. It is all the more extraordinary given the Minister's acknowledgment at para. 41 of her factum that "[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians' exercise of hunting, fishing and trapping rights without consultation".

50 The Attorney General of Alberta denies that a duty of consultation can be an implied term of Treaty 8. He argues:

Given that a consultation obligation would mean that the Crown would be required to engage in meaningful consultations with any and all affected Indians, being nomadic individuals scattered across a vast expanse of land, every time it wished to utilize an individual plot of land or change the use of the plot, such a requirement would not be within the range of possibilities of the common intention of the parties. [para. 27]

The parties *did* in fact contemplate a difficult period of transition and sought to soften its impact as much as possible, and any administrative inconvenience incidental to managing the process was rejected as a defence in *Haida Nation* and *Taku River Tlingit First Nation*. There is no need to repeat here what was said in those cases

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about the overarching objective of reconciliation rather than confrontation.

(d) Honour of the Crown

51 The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court *as a treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Canada (Attorney General) v. Ontario (Attorney General)* (1895), 25 S.C.R. 434 (S.C.C.), at pp. 511-12 *per* Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation of 1763*, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow, Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), *Haida Nation* and *Taku River Tlingit First Nation*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

52 It is not as though the Treaty 8 First Nations did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price.

(2) Did the Extensive Consultations with First Nations Undertaken in 1899 at the Time Treaty 8 Was Negotiated Discharge the Crown's Duty of Consultation and Accommodation?

53 The Crown's second broad answer to the Mikisew claim is that whatever had to be done was done in 1899. The Minister contends:

While the government should consider the impact on the treaty right, there is no duty to accommodate in this context. The treaty itself constitutes the accommodation of the aboriginal interest; taking up lands, as defined above, leaves intact the essential ability of the Indians to continue to hunt, fish and trap. As long as that promise is honoured, the treaty is not breached and no separate duty to accommodate arises. [Emphasis added.]

54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

55 The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, estab-

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lished and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

56 In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon. Viewed in light of the facts of this case, we should qualify *Badger*'s identification of two inherent limitations on Indian hunting, fishing and trapping rights under Treaty 8 (geographical limits and specific forms of government regulation) by a third, namely the Crown's right to take up lands under the treaty, which itself is subject to its duty to consult and, if appropriate, accommodate First Nations' interests before reducing the area over which their members may continue to pursue their hunting, trapping and fishing rights. Such a third qualification (not at issue in *Badger*) is fully justified by the history of the negotiations leading to Treaty 8, as well as by the honour of the Crown as previously discussed.

57 As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

58 *Sparrow* holds not only that rights protected by s. 35 of the *Constitution Act, 1982* are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances. The Mikisew rights under Treaty 8 are protected by s. 35. The Crown does not seek to justify in *Sparrow* -terms shortcomings in its consultation in this case. The question that remains, therefore, is whether what the Crown did here complied with its obligation to consult honourably with the Mikisew First Nation.

(3) Was the Process Followed by the Minister Through Parks Canada in this Case Sufficient?

59 Where, as here, the Court is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.

60 I should state at the outset that the winter road proposed by the Minister was a permissible purpose for "taking up" lands under Treaty 8. It is obvious that the listed purposes of "settlement, mining, lumbering" and "trading" all require suitable transportation. The treaty does not spell out permissible "other purposes" but the term should not be read restrictively: *R. v. Smith*, [1935] 2 W.W.R. 433 (Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to "travel".

61 The question is whether the Minister and her staff pursued the permitted purpose of regional transportation needs in accordance with the Crown's duty to consult. The answer turns on the particulars of that duty shaped by the circumstances here. In *Delgamuukw*, the Court considered the duty to consult and accommodate in the context of an infringement of aboriginal title (at para. 168):

In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course,

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even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. [Emphasis added.]

62 In *Haida Nation*, the Court pursued the kinds of duties that may arise in pre-proof claim situations, and McLachlin C.J. used the concept of a spectrum to frame her analysis (at paras. 43-45):

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice...

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

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake... [Emphasis added.]

63 The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This

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engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-160.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

65 It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.

66 Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections. We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

67 The trial judge's findings of fact make it clear that the Crown failed to demonstrate an "intention of substantially addressing [Aboriginal] concerns' ... through a meaningful process of consultation" (*Haida Nation*, para 42). On the contrary, the trial judge held that

[i]n the present case, at the very least, this [duty to consult] would have entailed a response to Mikisew's October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting could not have been conducted with the genuine intention of allowing Mikisew's concerns to be integrated with the proposal. [para. 154]

The trial judge also wrote (at para. 157):

it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation prior to making a decision that infringes on constitutionally protected treaty rights.

68 I agree, as did Sharlow J.A., dissenting in the Federal Court of Appeal. She declared that the mitigation measures were adopted through a process that was "fundamentally flawed" (para. 153).

69 In the result I would allow the appeal, quash the Minister's approval order, and remit the winter road project to the Minister to be dealt with in accordance with these reasons.

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V. Conclusion

70 Costs are sought by the Mikisew on a solicitor and client basis but there are no exceptional circumstances to justify such an award. The appeal is therefore allowed and the decision of the Court of Appeal is set aside, all with costs against the respondent Minister in this Court and in the Federal Court of Appeal on a party and party basis. The costs in the Trial Division remain as ordered by the trial judge.

Appeal allowed.

Pourvoi accueilli.

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R. v. Badger

WAYNE CLARENCE BADGER v. R.; LEROY STEVEN KIYAWASEW v. R.; ERNEST CLARENCE OM-INAYAK v. R.; ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL FOR SASKATCHEWAN, FEDERATION OF SASKATCHEWAN INDIAN NATIONS, LESSER SLAVE LAKE INDIAN REGIONAL COUNCIL, TREATY 7 TRIBAL COUNCIL, CONFEDERACY OF TREATY SIX FIRST NATIONS, ASSEMBLY OF FIRST NATIONS and ASSEMBLY OF MANITOBA CHIEFS (Intervenors)

Supreme Court of Canada

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

Heard: May 1 and 2, 1995

Judgment: April 3, 1996

Docket: Doc. 23603

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1996 CarswellAlta 587, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, EYB 1996-66856, [1996] A.W.L.D. 454

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Subject: Public; Constitutional; Criminal

Native Law --- Constitutional issues — Treaty rights generally.

Native Law --- Constitutional issues — Hunting and fishing — Hunting offences — Treaty rights.

Native Law --- Constitutional issues — Hunting and fishing — Hunting offences — Application of provincial statutes.

Native law — Aboriginal rights — Hunting, trapping and fishing — Three Indians having status under Treaty 8 to hunt for food on private lands originally surrendered to Canada by treaty — Two accused hunting on visibly used land but third accused hunting on uncleared muskeg with no signs of development — All three accused charged with hunting offences under Wildlife Act — Supreme Court of Canada ruling that National Resources Transfer Agreement, 1930 only modifying treaty hunting rights — Test for geographical limitation on Indians' hunting rights consisting of whether land hunted on put to visible use incompatible with exercise of hunting right — Court dismissing appeals of first two accused — Crown having power to restrict third accused's hunting rights for safety or conservation purposes — Existing licensing system unduly restricting that accused's hunting rights — Section 26(1) of Wildlife Act prima facie infringing treaty hunting rights — Court ordering new trial to consider issue of whether that infringement justified.

Three Indians having status under Treaty 8 were charged with offences under the *Wildlife Act*. All three were hunting for food on privately owned lands originally surrendered to Canada by the treaty. The first accused was charged with shooting a moose outside the permitted hunting season under s. 27(1). He was hunting on land covered with second growth willow and scrub. Although there were no fences or signs posted on the land, a farm house was located a quarter mile away. The second and third accused were each charged with hunting without a licence under s. 26(1). The second was hunting on a snow-covered field. Although there was no fence, there were run-down barns nearby, signs were posted on the land and a crop had been harvested from the field that fall. The third accused was hunting on uncleared muskeg with no fences, signs or building in the area. The accused were all convicted in Provincial Court. They appealed, challenging the *Wildlife Act's* constitutionality insofar as it affected them as treaty Indians. The Court of Queen's Bench affirmed the convictions and the Alberta Court of Appeal dismissed the accused's appeals. Accused appealed to the Supreme Court of Canada.

Held:

First two accused's appeals dismissed; third accused's appeal allowed.

Per Cory J. (La Forest, L'heureux-Dubé, Gonthier and Iacobucci JJ. concurring)

The essential element for Treaty 8 Indians when they signed the treaty was the guarantee of continued hunting, fishing and trapping rights. The *National Resources Transfer Agreement, 1930* ("N.R.T.A.") did not extinguish and replace the treaty right to hunt for food. Paragraph 12 of the N.R.T.A. clearly intended both to limit and expand that right. Hunting rights were at large under the treaty, but were limited to the tracts surrendered by Treaty

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8 bands. Hunting rights under the N.R.T.A. extend to the whole province, but are limited to food hunting. Under s. 1 of the *Constitution Act, 1930*, para. 12 of the N.R.T.A. is binding law governing the Indian right to hunt. However, para. 12 has not deprived Treaty 8 of legal significance. Treaties are sacred promises and the Crown's honour requires the court to assume that the Crown intended to fulfil its promises. Treaty rights can only be amended where that effect is clearly intended. While the N.R.T.A. partially amended the scope of the treaty hunting right, of equal importance was the desire to reassure treaty Indians of their continued enjoyment of the right to hunt and fish for food. The N.R.T.A. has only modified the treaty right to hunt to the extent that it evinces a clear intention to effect such a modification. N.R.T.A. language outlining the right to hunt for food must be read in light of continuing treaty hunting rights.

Under the N.R.T.A., Indians may hunt for food on all unoccupied Crown land and on any other lands to which they may have a right of access for hunting purposes. Under the treaty, the right to hunt for food may be exercised throughout the tract surrendered to the Crown excepting such tracts as may be required or taken up from time to time for settlement or other purposes. Thus if private land is not required or taken up in the manner the treaty describes, it is land to which the Indians have a right of access to hunt for food. The treaty's words must be interpreted in the sense that the Indians would naturally have understood them when signing. In 1899 the Treaty 8 Indians would have understood that land had been required or taken up when it was being put to a use incompatible with the exercise of the hunting right. The geographical limitation on the Indians' existing hunting right should thus be based on a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians when they signed the treaty, with the oral history of the Treaty 8 Indians, with earlier case law and with the provisions of the *Alberta Wildlife Act*. The geographical limitation on the right to hunt for food provided by Treaty 8 has not been modified by para. 12 of the N.R.T.A. Where lands are privately owned, the court must use the "visible, incompatible use" approach to determine on a case-by-case basis whether they are lands to which Indians had a right of access under the treaty. Here the lands upon which the first two accused were hunting were visibly being used. Since the accused did not have a right of access to those lands, their treaty right to hunt for food did not extend there. The limitations on hunting set out in the *Wildlife Act* did not infringe on their existing rights, and their appeals should be dismissed. The third accused was hunting on private land not being put to any visible use incompatible with the Indian right to hunt for food. Thus the geographical limits on the treaty right to hunt for food did not preclude him from hunting on that land.

Treaty 8 provided that the right to hunt would be subject to such regulations as the government might make. In light of conservation laws existing before the Indians signed the treaty, they would have understood that by the treaty's terms the government could pass conservation regulations. Paragraph 12 of the N.R.T.A. explicitly provides for provincial regulatory authority over conservation. Thus under both the treaty and the N.R.T.A., provincial game laws apply to Indians so long as they aim at conserving the game supply. While the *Wildlife Act's* licensing provisions are partly directed toward conservation, that does not automatically make s. 26(1) permissible regulation. The court must still determine whether the administration of the licensing scheme infringes treaty hunting rights as modified by the N.R.T.A. That modified treaty right pertains to the right to hunt for food, which before the treaty was an aboriginal right. Section 35(1) of the *Constitution Act, 1982* supports a common approach to infringement of aboriginal and treaty rights. The Crown must justify a statute or regulation prima facie infringing aboriginal rights by showing that it so advances general public objectives that it should prevail. Such rights are an integral part of the consideration Indians received for surrendering their lands. Standing on its own, the regulatory requirement that all hunters take gun safety courses and pass hunting competency tests does not infringe Indian hunting rights. Aboriginal or treaty rights must be exercised with due concern for public safety. However, under the licensing scheme, an Indian who has passed the approved safety courses may

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still not be able to hunt without breaching the conservation restrictions on hunting method, kind and numbers of game, season and permissible hunting area. Moreover, there is no provision for food hunting licences, no guarantee of Indians' preferential access to the limited number of licences and no exemption of Indians from the licence fee. The licensing system denies holders of treaty hunting rights, as modified by the N.R.T.A., the means of exercising those rights. Section 26(1) of the *Wildlife Act* thus prima facie breaches the treaty right to hunt for food. In deciding whether an infringement of aboriginal or treaty rights can be justified, the court's first question is whether there is a valid legislative objective. If so, the court must consider the special trust relationship and Crown responsibility regarding Indians. Finally, the court must consider such circumstances as whether the infringement has been as minimal as possible and whether the Indians were consulted about the conservation measures implemented. As the Crown led no evidence justifying infringement of the third accused's treaty hunting rights, there should be a new trial to address the issue.

Per Sopinka J. (concurring in result) (Lamer C.J.C. concurring)

Paragraph 12 of the N.R.T.A. merges and consolidates Indian treaty rights in the N.R.T.A., preserving those rights by placing them in a constitutional instrument. The sole source for a claim involving Indian food hunting rights is the N.R.T.A., and the treaty's only legal significance is to help interpret the N.R.T.A. The key interpretive principles applying both to the treaties and the N.R.T.A. are that any ambiguity will be resolved in the Indians' favour, and that the Crown's integrity and its fiduciary obligation toward aboriginal peoples should be maintained.

Paragraph 12 of the N.R.T.A. grants legislative power over gaming subject to Indian food hunting rights. Both when the original treaties were signed and when the N.R.T.A. was agreed to, it would have been understood that Indian rights were subject to governmental conservation regulation. N.R.T.A. rights are thus not absolute constitutional rights for which governmental regulation is prohibited. Section 35(1) of the *Constitution Act, 1982* is inapplicable to para. 12 of the N.R.T.A. protecting aboriginal food hunting rights, because para. 12 is itself a constitutional provision. However, the N.R.T.A. does require a balancing of rights. The provincial right to legislate respecting conservation must be balanced against Indian food hunting rights. The court should apply the test in *R. v. Sparrow* to the N.R.T.A. so that it can decide whether the provincial exercise of its legislative power is justified, which power is made subject to the food hunting right. In the absence of evidence as to justification, there should be a new trial.

Cases considered:

Considered by Cory J.

Calder v. British Columbia (Attorney General), [1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 — *considered*

Cardinal v. Alberta (Attorney General), [1974] S.C.R. 695, [1973] 6 W.W.R. 205, 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553 — *referred to*

Frank v. R. (1977), [1978] 1 S.C.R. 95, [1977] 4 W.W.R. 294, 34 C.C.C. (2d) 209, 4 A.R. 271, 15 N.R. 487, 75 D.L.R. (3d) 481 — *considered*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, 59 B.C.L.R. 301, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, (sub nom. *Guerin v. Canada*) 55 N.R. 161, 13 D.L.R. (4th) 321 — *referred to*

1996 CarswellAlta 587, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, EYB 1996-66856, [1996] A.W.L.D. 454

Mitchell v. Sandy Bay Indian Band, [1990] 2 S.C.R. 85, (sub nom. *Mitchell v. Peguis Indian Band*) [1990] 5 W.W.R. 97, 71 D.L.R. (4th) 193, [1990] 3 C.N.L.R. 46, 3 T.C.T. 5219, 110 N.R. 241, 67 Man. R. (2d) 81 — *considered*

Nowegijick v. R., [1983] 1 S.C.R. 29, [1983] 2 C.N.L.R. 89, 144 D.L.R. (3d) 193, 46 N.R. 41, [1983] C.T.C. 20, 83 D.T.C. 5042 — *referred to*

Prince v. R. (1963), [1964] S.C.R. 81, 41 C.R. 403, 46 W.W.R. 121, [1964] 3 C.C.C. 2 — *referred to*

R. v. Agawa, 28 O.A.C. 201, [1988] 3 C.N.L.R. 73, 65 O.R. (2d) 505, 43 C.C.C. (3d) 266, 53 D.L.R. (4th) 101 [leave to appeal to S.C.C. refused (1990), 41 O.A.C. 320, 118 N.R. 399, 58 C.C.C. (3d) vi, [1991] 1 C.N.L.R. vi] — *considered*

R. v. Bartleman (1984), 55 B.C.L.R. 78, 13 C.C.C. (3d) 488, 12 D.L.R. (4th) 73, [1984] 3 C.N.L.R. 114 (C.A.) — *considered*

R. v. Cardinal (1977), 3 Alta. L.R. (2d) 108, 4 A.R. 1, 36 C.C.C. (2d) 369 (C.A.) — *referred to*

R. v. Eninew, [1984] 2 C.N.L.R. 126, (sub nom. *R. v. Bear*) 32 Sask. R. 237, 11 C.R.R. 189, 12 C.C.C. (3d) 365, 10 D.L.R. (4th) 137 (C.A.) — *referred to*

R. v. Fox, 71 O.A.C. 50, [1994] 3 C.N.L.R. 132 (C.A.) — *referred to*

R. v. Horse, [1988] 1 S.C.R. 187, [1988] 2 W.W.R. 289, 39 C.C.C. (3d) 97, [1988] 2 C.N.L.R. 112, 47 D.L.R. (4th) 526, (sub nom. *R. v. Horse*; *R. v. Standingwater*) 82 N.R. 206, 65 Sask. R. 176 — *considered*

R. v. Horseman, [1990] 1 S.C.R. 901, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 55 C.C.C. (3d) 353, 108 N.R. 1, 108 A.R. 1, [1990] 3 C.N.L.R. 95 — *considered*

R. v. Kruger, [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 14 N.R. 495, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434 — *referred to*

R. v. Mirasty, [1942] 1 W.W.R. 343 (Sask. Pol. Ct.) — *referred to*

R. v. Moosehunter, [1981] 1 S.C.R. 282, 9 Sask. R. 149, 36 N.R. 437, 59 C.C.C. (2d) 193, 123 D.L.R. (3d) 95 — *referred to*

R. v. Mousseau, [1980] 2 S.C.R. 89, [1980] 4 W.W.R. 24, 31 N.R. 620, 3 Man. R. (2d) 338, 111 D.L.R. (3d) 443, 52 C.C.C. (2d) 140, [1980] 3 C.N.L.R. 63 — *considered*

R. v. Myran (1975), [1976] 2 S.C.R. 137, [1976] 1 W.W.R. 196, 5 N.R. 551, 23 C.C.C. (2d) 73, 58 D.L.R. (3d) 1*considered*

R. v. Napoleon (1985), [1985] 6 W.W.R. 302, 21 C.C.C. (3d) 515, [1986] C.N.L.R. 86 (B.C.C.A.) [leave to appeal to S.C.C. refused (1985), 21 C.C.C. (3d) 515n, 63 N.R. 319] — *referred to*

R. v. Ominayak (1990), 108 A.R. 239, [1991] 1 C.N.L.R. 177 (C.A.) — *referred to*

R. v. Simon, [1985] 2 S.C.R. 387, 62 N.R. 366, 23 C.C.C. (3d) 238, 71 N.S.R. (2d) 15, 171 A.P.R. 15,

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[1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390 — *considered*

R. v. Smith, [1935] 2 W.W.R. 433, 64 C.C.C. 131, [1935] 3 D.L.R. 703 (Sask. C.A.) — *referred to*

R. v. Sparrow, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 3 C.N.L.R. 160 — *applied*

R. v. Sutherland, [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 7 Man. R. (2d) 359, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, 35 N.R. 361, [1980] 3 C.N.L.R. 71 — *referred to*

R. v. Taylor (1981), 34 O.R. (2d) 360, 62 C.C.C. (2d) 227 (C.A.) — *referred to*

R. v. Wesley, [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, 58 C.C.C. 269, [1932] 4 D.L.R. 774 (C.A.) — *referred to*

Sikyea v. R., 46 W.W.R. 65, 43 C.R. 83, [1964] 2 C.C.C. 325, 43 D.L.R. (2d) 150, affirmed [1964] S.C.R. 642, 49 W.W.R. 306, 44 C.R. 266, [1965] 2 C.C.C. 129, 50 D.L.R. (2d) 80 — *referred to*

Sioui v. Quebec (Attorney General), (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, 109 N.R. 22, 56 C.C.C. (3d) 225, 70 D.L.R. (4th) 427, [1990] 3 C.N.L.R. 127, 30 Q.A.C. 280 — *referred to*

Considered by Sopinka J.

Frank v. R. (1977), [1978] 1 S.C.R. 95, [1977] 4 W.W.R. 294, 34 C.C.C. (2d) 209, 4 A.R. 271, 15 N.R. 487, 75 D.L.R. (3d) 481 — *considered*

R. v. Horseman, [1990] 1 S.C.R. 901, [1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193, 55 C.C.C. (3d) 353, 108 N.R. 1, 108 A.R. 1, [1990] 3 C.N.L.R. 95 — *considered*

R. v. Moosehunter, [1981] 1 S.C.R. 282, 9 Sask. R. 149, 36 N.R. 437, 59 C.C.C. (2d) 193, 123 D.L.R. (3d) 95 — *referred to*

R. v. Sparrow, [1990] 1 S.C.R. 1075, [1990] 4 W.W.R. 410, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 3 C.N.L.R. 160 — *applied*

R. v. Sutherland, [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 7 Man. R. (2d) 359, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, 35 N.R. 361, [1980] 3 C.N.L.R. 71 — *considered*

Reference re Roman Catholic Separate High Schools Funding, (sub nom. *Reference re Bill 30, an Act to Amend the Education Act*) [1987] 1 S.C.R. 1148, 77 N.R. 241, 22 O.A.C. 321, (sub nom. *Reference re an Act to Amend the Education Act (Ontario)*) 40 D.L.R. (4th) 18, 36 C.R.R. 305 — *considered*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11

s. 15 *referred to*

1996 CarswellAlta 587, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, EYB 1996-66856, [1996] A.W.L.D. 454

Constitution Act, 1867

s. 93 *referred to*

Constitution Act, 1930

s. 1 *considered*

Sched. (Natural Resources Transfer Agreement), para. 12 *considered*

Constitution Act, 1982, being Schedule B of the Canada Act (U.K.), 1982, c. 11

s. 35(1) *considered*

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

s. 88 *considered*

Manitoba Natural Resources Act, R.S.M. 1970, c. N30 — *referred to*

Migratory Birds Convention Act, R.S.C. 1970, c. M-12 — *referred to*

Wildlife Act, S.A. 1984, c. W-9.1

s. 15(1)(c) *considered*

s. 26(1) *considered*

s. 27(1) *considered*

Wildlife Act, R.S.M. 1970, c. W140 — *referred to*

Regulations considered:

Wildlife Act, S.A. 1984, c. W-9.1

General Wildlife Regulation, Alta. Reg. 50/87

s. 2(2)

s. 25

Wildlife (Ministerial) Regulation, Alta. Reg. 95/87

s. 7

Treaties and conventions considered:

Treaty 1

1996 CarswellAlta 587, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, EYB 1996-66856, [1996] A.W.L.D. 454

Treaty 4

Treaty 6

Treaty 8

Treaty 10

1852 North Saanich Indian Treaty

Words and phrases considered:

aboriginal rights

treaty rights

required or taken up

[Appeals by accused from judgment of Alberta Court of Appeal, \[1993\] 5 W.W.R. 7, 8 Alta. L.R. \(3d\) 354, 135 A.R. 286, 33 W.A.C. 286, \[1993\] 3 C.N.L.R. 143](#), affirming judgment of Foster J. dismissing appeals from judgment of Provincial Court convicting accused of unlawful hunting under Alberta *Wildlife Act*.

Sopinka J. (concurring) (Lamer C.J.C. concurring):

1 I have had the benefit of reading the reasons for judgment prepared in this appeal by my colleague, Justice Cory, and I am in agreement with his disposition of the appeal and with his reasons with the exception of his exposition of the relationship between Treaty No. 8, the *Natural Resources Transfer Agreement (NRTA)*, and s. 35 of the *Constitution Act, 1982*.

2 In my view, the rights of Indians to hunt for food provided in Treaty No. 8 were merged in the *NRTA* which is the sole source of those rights. While I agree that the impugned provision of the *Wildlife Act*, S.A. 1984, c. W-9.1, infringes the constitutional right of Indians to hunt for food, I disagree that this constitutional right is one covered by s. 35(1) of the *Constitution Act, 1982*. I agree, however, that the constitutional right to hunt for food must be balanced against the right of the province to pass laws for the purpose of conservation and that this balancing may be carried out on the basis of the principles set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [[1990] 4 W.W.R. 410].

3 There is no disagreement that the *NRTA*:

- (a) duplicated the right of Indians to hunt for food which was contained in Treaty No. 8;
- (b) widely extended the geographical area to include the whole of the province rather than being limited to the tract of land surrendered;
- (c) shifted responsibility for passing game laws from the federal government to the provinces;
- (d) eliminated the right to hunt for commercial purposes;
- (e) is a constitutional document and the Treaty is not, although the Treaty receives constitutional protection

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by virtue of s. 35(1) of the *Constitution Act, 1982*.

4 In these circumstances, I am of the view that it was clearly the intention of the framers to merge the rights in the Treaty in the *NRTA*. To characterize the *NRTA* as modifying the Treaty is to treat it as an amending document to the Treaty. This clearly was not the intent of the *NRTA*. In enlarging the area in which hunting for food was permitted to extend to the whole of the province, it could not be suggested that the *NRTA* extended the Treaty to all of the province. Rather, the right to hunt for food was extended by the *NRTA* to the whole of the province, including the area covered by the Treaty. An Indian hunting on land outside the Treaty lands could not claim to be covered by the Treaty. If the *NRTA* merely modified the Treaty, an Indian hunting on Treaty lands could claim the right under the Treaty while an Indian hunting in other parts of the province could claim only under the *NRTA*. This would invite bifurcation of the rights of Indians hunting for food in the province.

5 Similarly, the provisions which transferred to the province the power to pass gaming laws for the purpose of conservation could not have been intended simply to amend the Treaty. As an amendment to the Treaty, this provision would have no constitutional force and could not alter the constitutionally entrenched division of powers. It might be suggested that the *NRTA* both amended the Treaty and, as an independent constitutional document, amended the Constitution. If this were the intent, it is difficult to understand why all the terms of the Treaty relating to the right to hunt for food were replicated in *NRTA*. It must have been the intention to merge these rights in the *NRTA* so that they could be balanced with the power of the provinces to legislate for conservation purposes. In order to achieve a reasonable balance between them, it was important that they both appear in one document having constitutional status.

6 I can suggest no reason why the framers of the *NRTA* would have wanted to maintain any aspects of the Treaty except as an interpretative tool. They surely did not do so in order to allow these rights to be recognized under s. 35(1) of the *Constitution Act, 1982* which appears to be the sole present justification for preserving the Treaty. However, even that justification loses any force when considered in light of the fact that the *NRTA* is itself a constitutional document and recognition under s. 35(1) is unnecessary for the protection of these important Indian rights.

7 From the foregoing, I conclude that it was the intention of the framers of para. 12 of the *NRTA* to effectuate a merger and consolidation of the Treaty rights. This was the view of Dickson J. (as he then was), speaking for the Court, in *Frank v. R.*, [1978] 1 S.C.R. 95, at p. 100 [[1977] 4 W.W.R. 294]:

It would appear that the overall purpose of para. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food.

As pointed out, these rights were restated in the *NRTA* and their preservation was assured by being placed in a constitutional instrument.

8 If this was the intention, and I conclude that it was, then the proper characterization of the relationship between the *NRTA* and the Treaty rights is that the sole source for a claim involving the right to hunt for food is the *NRTA*. The Treaty rights have been subsumed in a document of a higher order. The Treaty may be relied on for the purpose of assisting in the interpretation of the *NRTA*, but it has no other legal significance.

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9 The fact that the source of the appellants' rights to hunt and fish for sustenance is found within the provisions of the *NRTA* does not alter the analysis that has previously been employed in the interpretation of treaty rights. The key interpretive principles which apply to treaties are first, that any ambiguity in the treaty will be resolved in favour of the Indians and, second, that treaties should be interpreted in a manner that maintains the integrity of the Crown, particularly the Crown's fiduciary obligation toward aboriginal peoples. These principles apply equally to the rights protected by the *NRTA*; the principles arise out of the nature of the relationship between the Crown and aboriginal peoples with the result that, whatever the document in which that relationship has been articulated, the principles should apply to the interpretation of that document. I find support for this reasoning in the prior decisions of this Court concerning the interpretation of the *NRTA*. In *R. v. Sutherland*, [1980] 2 S.C.R. 451 [[1980] 5 W.W.R. 456], for example, this Court specifically stated, at p. 461, that the *NRTA* should be given a "broad and liberal construction", and, at p. 464, that any ambiguity should be "interpreted so as to resolve any doubts in favour of the Indians". Moreover, this position is compatible with the concept that the *NRTA* constitutes a merger and consolidation of treaty rights, and with the view that it was through the enactment of the *NRTA* that the "federal government attempted to fulfil their treaty obligations" (see *R. v. Moosehunter*, [1981] 1 S.C.R. 282, at p. 293).

Validity of the provisions of the Wildlife Act

10 In light of my conclusion that the right of Indian persons to hunt for food is constitutional in nature, the issue remaining for determination is whether the provisions of the *Wildlife Act* under which the appellants were convicted are constitutionally permissible. On the bare wording of para. 12 of the *NRTA*, it appears as though such an issue could never arise. The *NRTA* grants legislative power over "gaming" *subject to* the Indians' right to hunt for food, apparently suggesting that the province has no jurisdiction to legislate in relation to those rights. This interpretation arises out of the mandatory language used in para. 12, wherein the legislative power is granted to the province, but qualified by the statement that the power exists "*provided, however*, that the said Indians *shall* have the right. ..."

11 The reasoning in *R. v. Horseman*, [1990] 1 S.C.R. 901 [[1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193], informs us that such a formalistic interpretation of the language of the *NRTA* is incorrect. At the time the treaties that preceded the *NRTA* were signed, there was already in place legislation enacted for conservation purposes which affected the Indians' rights. Indeed, there existed total bans on the hunting of certain species. As a result, at the time the treaties were signed and, even more so, at the time that the *NRTA* was agreed to by the provinces and the federal government, it would have been clearly understood that the rights of Indians pursuant to either document would be subject to governmental regulation for conservation purposes. The rights protected by the *NRTA* thus cannot be viewed as being constitutional rights of an absolute nature for which governmental regulation is prohibited.

12 How, then, is the governmental regulation permitted by the *NRTA*, and the extent of the protection of the appellants' rights in the face of such regulation, to be assessed? Cory J. has taken the position that the standard against which the validity of the *Wildlife Act* is to be assessed is s. 35(1) of the *Constitution Act, 1982*, and the test set out in *Sparrow, supra*. I am unable to agree with my colleague on this point. Section 35(1) was intended to provide constitutional protection for aboriginal rights and treaty rights that did not enjoy such protection. It cannot have been intended to be redundant and provide constitutional protection for rights that already enjoyed constitutional protection. Moreover, para. 12 of the *NRTA* is a constitutional provision and, as such, s. 35(1) has no direct application to it. Infringements of constitutional rights cannot be remedied by the application of a different constitutional provision. As Estey J. stated in *Reference re Roman Catholic Separate High Schools Fund-*

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ing, (sub nom. *Reference Re Bill 30, An Act to Amend the Education Act*) [1987] 1 S.C.R. 1148, at p. 1207, the *Canadian Charter of Rights and Freedoms* "cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the *Constitution Act, 1867*". That case concerned the application of s. 15 of the *Charter* to s. 93 of the *Constitution Act, 1867*. Although the case is not directly on point with the issues arising in this appeal, in my view, Estey J.'s comment provides support for the position that constitutional provisions enacted later in time are not to be read as impliedly amending the earlier enacted provisions. (See Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed., at p. 1183.) Nor are later provisions of the constitution applicable in terms of the interpretation of earlier provisions. On that reasoning, s. 35(1) is inapplicable to the provision of the *NRTA* that protects the right of aboriginal persons to hunt for food.

13 That is not to say, however, that the principles underlying the interpretation of s. 35(1) have no relevance to the determination of whether a particular legislative enactment has an acceptable purpose and whether it constitutes an acceptable limitation on the rights granted by the *NRTA*. There is no method provided in the *NRTA* whereby government measures that may impinge upon the rights the same document grants to Indians can be scrutinized. It is clear, however, that the *NRTA* does require a balancing of rights. The right of the province to legislate with respect to conservation must be balanced against the right granted to the Indians to hunt for food. Thus, it falls to the Court to develop a test through which this task can be accomplished. In *Sparrow*, this Court developed principles for balancing the constitutionally protected right to fish for food against the federal government's power to pass laws for conservation. Although the *Sparrow* test was developed in the context of s. 35(1), the basic thrust of the test, to protect aboriginal rights but also to permit governments to legislate for legitimate purposes where the legislation is a justifiable infringement on those protected rights, applies equally well to the regulatory authority granted to the provinces under para. 12 of the *NRTA* as to federal power to legislate in respect of Indians.

14 In this way, the *Sparrow* test is applied to the *NRTA* by analogy, with the result that the Court will have a means by which to ensure that the rights in the *NRTA* are protected, but that provincial governments are also provided with some flexibility in terms of their ability to affect those rights for the purpose of legislating in relation to conservation. As Cory J. points out, the criteria set out in *Sparrow* do not purport to be exhaustive and are to be applied flexibly. In applying them in this context, it is important to bear in mind that what is being justified is the exercise of a power granted to the provinces, which power is made subject to the right to hunt for food. Both are contained in a constitutional document. The application of the *Sparrow* criteria should be consonant with the intention of the framers as to the reconciliation of these competing provisions.

15 I agree with Cory J. that, in the absence of evidence with respect to justification, there must be a new trial and I would dispose of the appeal as suggested by him.

16 The constitutional question and answers are as follows:

If Treaty 8 confirmed to the Indians of the Treaty 8 Territory the right to hunt throughout the tract surrendered, does the right continue to exist or was it extinguished and replaced by paragraph 12 of the Natural Resources Transfer Agreement (*Constitution Act, 1930*, 20-21 George V, c. 26 (U.K.)), and if the right continues to exist, could that right be exercised on the lands in question and, if so, was the right impermissibly infringed upon by s. 26(1) or s. 27(1) of the *Wildlife Act*, S.A. 1984, c. W-9.1, given Treaty 8 and s. 35(1) of the *Constitution Act, 1982*?

17 The right to hunt for food referred to in Treaty 8 was merged in the *NRTA* which is the sole source of the

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right.

18 Sections 26(1) and 27(1) of the *Wildlife Act* did not infringe the constitutional rights of Mr. Badger or Mr. Kiyawasew to hunt for food.

19 Mr. Ominayak was exercising his constitutional right to hunt for food. Section 26(1) of the *Wildlife Act* is a *prima facie* infringement of his right to hunt for food under *NRTA* and is invalid unless justified.

Cory J. (La Forest, L'heureux-Dubé, Gonthier and Iacobucci JJ. concurring):

20 Three questions must be answered on this appeal. First, do Indians who have status under Treaty No. 8 have the right to hunt for food on privately owned land which lies within the territory surrendered under that Treaty? Secondly, have the hunting rights set out in Treaty No. 8 been extinguished or modified as a result of the provisions of para. 12 of the 1930 *Natural Resources Transfer Agreement, 1930 (Constitution Act, 1930, Schedule 2)*? Thirdly, to what extent, if any, do s. 26(1) and s. 27(1) of the *Wildlife Act*, S.A. 1984, c. W-9.1, apply to the appellants?

Factual Background

21 Each of the three appellants was charged with an offence under the *Wildlife Act*. Their trials and appeals have proceeded together.

22 The facts are straightforward and undisputed. The appellant Wayne Clarence Badger was charged with shooting a moose outside the permitted hunting season contrary to s. 27(1) of the *Wildlife Act*. The appellants Leroy Steven Kiyawasew and Ernest Clarence Ominayak, who had also shot moose, were charged, under s. 26(1) of the same statute, with hunting without a licence. All three appellants, Cree Indians with status under Treaty No. 8, were hunting for food upon lands falling within the tracts surrendered to Canada by the Treaty.

23 The lands in question were all privately owned. Mr. Badger shot a moose on brush land with willow re-growth and scrub. There were no fences or signs posted on the land, but a farm house was located a quarter mile from the place where the moose was shot. Mr. Kiyawasew was hunting on a snow-covered field. There was no fence, but Mr. Kiyawasew testified that he had passed old run-down barns shortly before he stopped to shoot the moose. He had seen signs which were posted on the land but he was unable to read them from the road. Mr. Ominayak was hunting on uncleared muskeg. There were no fences, signs or buildings in the vicinity.

24 The appellants were all convicted in the Provincial Court of Alberta. They appealed their summary convictions to the Court of Queen's Bench, challenging the constitutionality of the *Wildlife Act* in so far as it might affect them as Crees with status under Treaty No. 8. The Court of Queen's Bench affirmed the convictions. The appellants' appeals to the Alberta Court of Appeal were also dismissed.

Judgments Below

Alberta Court of Queen's Bench

25 Foster J., in brief reasons, held that *R. v. Horseman*, [1990] 1 S.C.R. 901 [[1990] 4 W.W.R. 97, 73 Alta. L.R. (2d) 193], decided that Treaty No. 8 had been modified by the *Natural Resources Transfer Agreement, 1930* (hereinafter "*NRTA*"). Accordingly, an individual who comes within the ambit of Treaty No. 8 may hunt in

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order to obtain food on unoccupied Crown lands or on other lands to which he or she may have a right of access. This is the existing hunting right which is protected by s. 35(1) of the *Constitution Act, 1982*. Foster J. also relied upon *R. v. Cardinal* (1977), 36 C.C.C. (2d) 369 [3 Alta. L.R. (2d) 108] (Alta. C.A.), and *R. v. Ominayak* (1990), 108 A.R. 239 (Alta. C.A.), to hold that an individual does not, without more, have a right of access to private lands. As a result, hunting on those lands was not protected under s. 35(1). Accordingly, she dismissed the appeals.

Court of Appeal (1993), 135 A.R. 236 [[1993] 5 W.W.R. 7, 8 Alta. L.R. (3d) 354]

26 Although all three judges of the Court of Appeal agreed that the appellants' appeals should be dismissed, they travelled by different routes to reach that conclusion.

Per Kerans J.A.

27 Kerans J.A. concluded that it was not necessary to decide either if the hunting in question was protected under Treaty No. 8 or if Alberta could make laws that derogated from treaty rights. Rather, he held that pursuant to *Horseman, supra*, any treaty right to hunt other than on Crown lands had been extinguished by the *NRTA*. The "merger and consolidation" theory applied in *Horseman, supra*, was effectively a theory of "extinguishment and replacement". Because the Treaty No. 8 hunting right had been extinguished by the *NRTA*, reference could not be made to the Treaty to determine the scope of the "right of access" to hunt on the "other lands" referred to in the *NRTA*. As a result of this finding, he dismissed the appeals.

Per Lieberman J.A.

28 Lieberman J.A. held that *Horseman, supra*, defeated the appellants' position in this case. He determined, at p. 357, that the "entrenchment of treaty rights in s. 35(1) of the *Constitution Act, 1982*, has no application to the hunting rights conferred by Treaty No. 8" which he found had been extinguished by the *NRTA*. Thus, he concluded that the terms of the *Wildlife Act* prevailed and the appeals must be dismissed.

Per Conrad J.A.

29 Conrad J.A. held that since *Horseman, supra*, dealt with the right to hunt commercially on Crown lands, it was not binding on the issue as to whether a treaty right to hunt on private lands had been extinguished. Conrad J.A. observed that the question of whether Treaty No. 8 gave the appellants the right to hunt on privately owned lands required that consideration be given to the meaning of "unoccupied" Crown lands in the *NRTA* and of "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" in Treaty No. 8. Conrad J.A. concluded that Crown lands would not be "unoccupied" merely because they were not put to some visible use. She found that the words "required or taken up" for "other purposes" were critical. She held that if the Crown's interest was alienated or transferred to a private owner, the Crown had "required or taken up" the land under the Treaty and the land was no longer "unoccupied" under the *NRTA*. She concluded that even if "occupied" as defined in *R. v. Horse*, [1988] 1 S.C.R. 187 [[1988] 2 W.W.R. 289], refers only to private lands visibly in use, she would extend the ratio of *Horse, supra*, and find that there is no treaty right to hunt on private land, regardless of whether or not it is in visible use. Therefore, she concluded that Treaty No. 8 did not reserve to the appellants the right to hunt on the privately owned lands in question and that the *Wildlife Act* did not infringe the right protected under s. 35(1).

30 In the event that she was wrong on that issue, Conrad J.A. went on to hold that if the Treaty did give the

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appellants the right to hunt on private lands, those rights had not been extinguished by the *NRTA*. The *NRTA* did not contain a clear intention to extinguish all treaty hunting rights, but only to extinguish commercial hunting rights on Crown lands. However, the hunting rights granted by the Treaty were not unlimited. They were subject to regulation and it would be necessary to determine if the regulations enacted in the Alberta *Wildlife Act* were a justifiable infringement on s. 35(1). Ultimately, she found that it was unnecessary to undertake an analysis of the justification in light of the fact that she had concluded that the treaty did not confer a right to hunt on private lands. She dismissed the appeals.

Relevant Treaty and Statutory Provisions

31 The relevant part of *Treaty No. 8*, made 21 June 1899, provides:

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

32 The *Constitution Act, 1930*, s. 1 provides:

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the Constitution Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

33 The *Natural Resources Transfer Agreement, 1930* is the Schedule referred to in s. 1. Paragraph 12 of the *NRTA* provides:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

34 Section 35(1) of the *Constitution Act, 1982* provides:

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

35 Sections 26(1) and 27(1) of the *Wildlife Act* provide:

26 (1) A person shall not hunt wildlife unless he holds a licence authorizing him, or is authorized by or under a licence, to hunt wildlife of that kind.

27 (1) A person shall not hunt wildlife outside an open season or if there is no open season for that wildlife.

Constitutional Question

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36 The constitutional question stated by this Court on May 2, 1994 is as follows:

If Treaty 8 confirmed to the Indians of the Treaty 8 Territory the right to hunt throughout the tract surrendered, does the right continue to exist or was it extinguished and replaced by paragraph 12 of the Natural Resources Transfer Agreement (*Constitution Act, 1930*, 20-21 George V, c. 26 (U.K.)), and if the right continues to exist, could that right be exercised on the lands in question and, if so, was the right impermissibly infringed upon by s. 26(1) or s. 27(1) of the *Wildlife Act*, S.A. 1984, c. W-9.1, given Treaty 8 and s. 35(1) of the *Constitution Act, 1982*?

Analysis

37 On this appeal, the extent of the existing right to hunt for food possessed by Indians who are members of bands which were parties to Treaty No. 8 must be determined. The analysis should proceed through three stages. First, it is necessary to decide what effect para. 12 of the *NRTA* had upon the rights enunciated in Treaty No. 8. After resolving which instrument sets out the right to hunt for food, it is necessary to examine the limitations which are inherent in that right. It must be remembered that, even by the terms of Treaty No. 8, the Indians' right to hunt for food was circumscribed by both geographical limitations and by specific forms of government regulation. Second, consideration must then be given to the question of whether the existing right to hunt for food can be exercised on privately owned land. Third, it is necessary to determine whether the impugned sections of the provincial *Wildlife Act* come within the specific types of regulation which have, since 1899, limited and defined the scope of the right to hunt for food. If they do, those sections do not infringe upon an existing treaty right and will be constitutional. If not, the sections may constitute an infringement of the Treaty rights guaranteed by Treaty 8, as modified by the *NRTA*. In this case the impugned provisions should be considered in accordance with the principles set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [[1990] 4 W.W.R. 410], to determine whether they constitute a *prima facie* infringement of the Treaty rights as modified, and if so, whether the infringement can be justified.

38 It is now appropriate to consider the source of the existing right to hunt for food.

The Existing Right to Hunt for Food

The Hunting Right Provided by Treaty No. 8

39 Treaty No. 8 is one of eleven numbered treaties concluded between the federal government and various Indian bands between 1871 and 1923. Their objective was to facilitate the settlement of the West. Treaty No. 8, made on June 21, 1899, involved the surrender of vast tracts of land in what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and part of the Northwest Territories. In exchange for the land, the Crown made a number of commitments, for example, to provide the bands with reserves, education, annuities, farm equipment, ammunition, and relief in times of famine or pestilence. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the Commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. ...

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.....

We pointed out ... that the *same means of earning a livelihood would continue after the Treaty as existed before it*, and that the Indians would be expected to make use of them. ...

.....

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, *we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.* [Emphasis added.]

40 Treaty No. 8, then, guaranteed that the Indians "shall have the right to pursue their usual vocations of hunting, trapping and fishing". The Treaty, however, imposed two limitations on the right to hunt. First, there was a geographic limitation. The right to hunt could be exercised "throughout the tract surrendered ... saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". Second, the right could be limited by government regulations passed for conservation purposes.

Impact of Paragraph 12 of the NRTA

Principles of Interpretation

41 At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. See *Sioui v. Quebec (Attorney General)*, (sub nom. *R. v. Sioui*) [1990] 1 S.C.R. 1025, at p. 1063; *R. v. Simon*, [1985] 2 S.C.R. 387, at p. 401. Second, the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. See *Sparrow*, *supra*, at pp. 1107-08 and 1114; *R. v. Taylor* (1981), 34 O.R. (2d) 360 (C.A.), at p. 367. Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. See *Nowegijick v. R.*, [1983] 1 S.C.R. 29, at p. 36; *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; and *Mitchell v. Sandy Bay Indian Band*, (sub nom. *Mitchell v. Peguis Indian Band*) [1990] 2 S.C.R. 85, at pp. 142-43 [[1990] 5 W.W.R. 97]. Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights. See *Simon*, *supra*, at pp. 405-06; *Sioui*, *supra*, at p. 1061; *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, at p. 404 [[1973] 4 W.W.R. 1].

42 These principles of interpretation must now be applied to this case.

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Interpreting the NRTA

43 The issue at this stage is whether the *NRTA* extinguished and replaced the Treaty No. 8 right to hunt for food. It is my conclusion that it did not.

44 For ease of reference, para. 12 of the *NRTA* provides:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

45 It has been held that the *NRTA* had the clear intention of both limiting and expanding the treaty right to hunt. In *Frank v. R.* (1977), [1978] 1 S.C.R. 95 [[1977] 4 W.W.R. 294], consideration was given to the differences between Treaty No. 6 (which, for this purpose, has a hunting rights clause similar to that in Treaty No. 8) and para. 12 of the *NRTA*. Dickson J., as he then was, held at p. 100:

The essential differences, for present purposes, between the Treaty and the Agreement are (i) under the former the hunting rights were at large while under the latter the right is limited to hunting for food and (ii) under the former the rights were limited to about one-third of the Province of Alberta, while under the latter they extend to the entire province.

And at page 101, he stated:

The Appellate Division ... held that para. 12 of the Natural Resources Transfer Agreements of Alberta and Saskatchewan did two things: (i) it enlarged the areas in which Alberta and Saskatchewan Indians could respectively hunt and fish for food; (ii) it limited their rights to hunt and fish otherwise than for food by making those rights subject to provincial game laws. I would agree that such is the effect of para. 12.

To the same effect, see *R. v. Wesley*, [1932] 2 W.W.R. 337 [26 Alta. L.R. 433] (Alta. C.A.), at p. 344, as adopted in *Prince v. R.* (1963), [1964] S.C.R. 81, at p. 84 [46 W.W.R. 121].

46 This Court most recently considered the effect the *NRTA* had upon treaty rights in *Horseman, supra*. There, it was held that para. 12 of the *NRTA* evidenced a clear intention to extinguish the treaty protection of the right to hunt *commercially*. However, it was emphasized that the right to hunt *for food* continued to be protected and had in fact been expanded by the *NRTA*. At page 933, this appears:

Although the Agreement did take away the right to hunt commercially, *the nature of the right to hunt for food was substantially enlarged. The geographical areas in which the Indian people could hunt was widely extended. Further, the means employed by them in hunting for their food was placed beyond the reach of provincial governments.* For example, they may hunt deer with night lights and with dogs, methods which are or may be prohibited for others. *Nor are the Indians subject to seasonal limitations as are all other hunters.* That is to say, they can hunt ducks and geese in the spring as well as the fall, just as they may hunt deer at any time of the year. *Indians are not limited with regard to the type of game they may kill.* That is to say, while others may be restricted as to the species or sex of the game they may kill, the Indians may kill

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for food both does and bucks; cock pheasants and hen pheasants; drakes and hen ducks. [Emphasis added.]

See also *Cardinal v. Alberta (Attorney General)*, [1974] S.C.R. 695, at p. 722 [[1973] 6 W.W.R. 205]; and *R. v. Myran* (1975), [1976] 2 S.C.R. 137, at p. 141 [[1976] 1 W.W.R. 196]. I might add that *Horseman, supra*, is a recent decision which should be accepted as resolving the issues which it considered. The decisions of this Court confirm that para. 12 of the *NRTA* did, to the extent that its intent is clear, modify and alter the right to hunt for food provided in Treaty No. 8.

47 Pursuant to s. 1 of the *Constitution Act, 1930*, there can be no doubt that para. 12 of the *NRTA* is binding law. It is the legal instrument which currently sets out and governs the Indian right to hunt. However, the existence of the *NRTA* has not deprived Treaty No. 8 of legal significance. Treaties are sacred promises and the Crown's honour requires the Court to assume that the Crown intended to fulfil its promises. Treaty rights can only be amended where it is clear that effect was intended. It is helpful to recall that Dickson J. in *Frank, supra*, observed at p. 100 that, while the *NRTA* had partially amended the scope of the Treaty hunting right, "*of equal importance* was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food" (emphasis added). I believe that these words support my conclusion that the Treaty No. 8 right to hunt has *only* been altered or modified by the *NRTA to the extent that* the *NRTA* evinces a clear intention to effect such a modification. This position has been repeatedly confirmed in the decisions referred to earlier. Unless there is a direct conflict between the *NRTA* and a treaty, the *NRTA* will not have modified the treaty rights. Therefore, the *NRTA* language which outlines the right to hunt for food must be read in light of the fact that this aspect of the treaty right continues in force and effect.

48 Like Treaty No. 8, the *NRTA* circumscribes the right to hunt for food with respect to both the geographical area within which this right may be exercised as well as the regulations which may properly be imposed by the government. The geographical limitations must now be considered.

Geographical Limitations on the Right to Hunt for Food

49 Under the *NRTA*, Indians may exercise a right to hunt for food "on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." In the present appeals, the hunting occurred on lands which had been included in the 1899 surrender but were now privately owned. Therefore, it must be determined whether these privately owned lands were "other lands" to which the Indians had a "right of access" under the Treaty.

50 At this stage, three preliminary points should be made. First, the "right of access" in the *NRTA* does not refer to a *general* right of access but, rather, it is limited to a right of access *for the purposes of hunting*: *R. v. Mousseau*, [1980] 2 S.C.R. 89, at p. 97 [[1980] 4 W.W.R. 24]; *R. v. Sutherland*, [1980] 2 S.C.R. 451, at p. 459 [[1980] 5 W.W.R. 456]. For example, everyone can travel on public highways, but this general right of access cannot be read as conferring upon Indians a right to hunt on public highways.

51 Second, because the various treaties affected by the *NRTA* contain different wording, the extent of the treaty right to hunt on privately owned land may well differ from one treaty to another. While some treaties contain express provisions with respect to hunting on private land, others, such as Treaty No. 8, do not. Under Treaty No. 8, the right to hunt for food could be exercised "throughout the tract surrendered" to the Crown "saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." Accordingly, if the privately owned land is not "required or taken up" in the manner described in Treaty No. 8, it will be land to which the Indians had a right of access to hunt for food.

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52 Third, the applicable interpretive principles must be borne in mind. Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement: see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1880), at pp. 338-42; *Sioui*, *supra*, at p. 1068; *Report of the Aboriginal Justice Inquiry of Manitoba* (1991); Jean Friesen, *Grant Me Wherewith To Make My Living* (1985). The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted. See *Nowegijick*, *supra*, at p. 36; *Sioui*, *supra*, at pp. 1035-36 and 1044; *Sparrow*, *supra*, at p. 1107; and *Mitchell*, *supra*, where La Forest J. noted the significant difference that exists between the interpretation of treaties and statutes which pertain to Indians.

53 The evidence led at trial indicated that in 1899 the Treaty No. 8 Indians would have understood that land had been "required or taken up" when it was being put to a use which was incompatible with the exercise of the right to hunt. Historian John Foster gave expert evidence in this case. His testimony indicated that, in 1899, Treaty No. 8 Indians would not have understood the concept of private and exclusive property ownership separate from actual land use. They understood land to be required or taken up for settlement when buildings or fences were erected, land was put into crops, or farm or domestic animals were present. Enduring church missions would also be understood to constitute settlement. These physical signs shaped the Indians' understanding of settlement because they were the manifestations of exclusionary land use which the Indians had witnessed as new settlers moved into the West. The Indians' experience with the Hudson's Bay Company was also relevant. Although that company had title to vast tracts of land, the Indians were not excluded from and in fact continued hunting on these lands. In the course of their trading, the Hudson's Bay Company and the Northwest Company had set up numerous posts that were subsequently abandoned. The presence of abandoned buildings, then, would not necessarily signify to the Indians that land was taken up in a way which precluded hunting on them. Yet, it is dangerous to pursue this line of thinking too far. The abandonment of land may be temporary. Owners may return to reoccupy the land, to undertake maintenance, to inspect it or simply to enjoy it. How "unoccupied" the land was at the relevant time will have to be explored on a case-by-case basis.

54 An interpretation of the Treaty properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the Treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the Alberta *Wildlife Act* itself.

55 The Indian people made their agreements orally and recorded their history orally. Thus, the verbal promises made on behalf of the federal government at the times the treaties were concluded are of great significance in their interpretation. Treaty No. 8 was initially concluded with the Indians at Lesser Slave Lake. The Commissioners then travelled to many other bands in the region and sought their adhesion to the Treaty. Oral promises

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were made with the Lesser Slave Lake band and with the other Treaty signatories and these promises have been recorded in the Treaty Commissioners' Reports and in contemporary affidavits and diaries of interpreters and other government officials who participated in the negotiations. See in particular: Richard Daniel, "The Spirit and Terms of Treaty Eight", in *The Spirit of the Alberta Indian Treaties*, Richard Price, ed. (1979), at pp. 47-100; and René Fumoleau, O.M.I., *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939*, at pp. 73-100. The Indians' primary fear was that the treaty would curtail their ability to pursue their livelihood as hunters, trappers and fishers. Commissioner David Laird, as cited in Daniel, "The Spirit and Terms of Treaty Eight", at p. 76, told the Lesser Slave Lake Indians in 1899:

Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. *Indians who take treaty will be just as free to hunt and fish all over as they now are.*

In return for this the Government expects that the Indians will not interfere with or molest any miner, traveller or settler. [Emphasis added.]

Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap." The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one commissioner, cited in René Fumoleau, O.M.I., *As Long As This Land Shall Last*, at p. 90, stated:

We are just making peace between Whites and Indians — for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.

56 Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices. See, for example, Alexander Morris, *The Treaties of Canada with The Indians of Manitoba and the North-West Territories* (1880). In negotiating Treaty No. 1, the Lieutenant Governor of Manitoba, A. G. Archibald, made the following statement to the Indians, at p. 29:

When you have made your treaty you will still be free to hunt over much of the land included in the treaty. Much of it is rocky and unfit for cultivation, much of it that is wooded is beyond the places where the white man will require to go, at all events for some time to come. *Till these lands are needed for use you will be free to hunt over them, and make all the use of them which you have made in the past. But when lands are needed to be tilled or occupied, you must not go on them any more. There will still be plenty of land that is neither tilled nor occupied where you can go and roam and hunt as you have always done*, and, if you wish to farm, you will go to your own reserve where you will find a place ready for you to live on and cultivate.

[Emphasis added.]

With respect to Treaty 4, Lt. Gov. Morris made the following statement to the Indians, at p. 96:

We have come through the country for many days and we have seen hills and but little wood and in

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many places little water, and it may be a long time before there are many white men settled upon this land, and you will have the right of hunting and fishing just as you have now *until the land is actually taken up*.

[Emphasis added.]

With respect to Treaty 6, Lt. Gov. Morris stated at p. 218:

You want to be at liberty to hunt as before. I told you we did not want to take that means of living from you, you have it the same as before, on this, *if a man, whether Indian or Half-breed, has a good field of grain, you would not destroy it with your hunt*.

[Emphasis added.]

57 The oral history of the Treaty No. 8 Indians reveals a similar understanding of the treaty promises. Dan McLean, an elder from the Sturgeon Lake Indian Reserve, gave evidence in this trial. He indicated that the understanding of the treaty promise was that Indians were allowed to hunt anytime for food to feed their families. They could hunt on unoccupied Crown land and on abandoned land. If there was no fence on the land, they could hunt, but if there was a fence, they could not hunt there. This testimony is consistent with the oral histories presented by other Treaty No. 8 elders whose stories have been recorded by historians. The Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings. No doubt the Indians believed that most of the Treaty No. 8 land would remain unoccupied and so would be available to them for hunting, fishing and trapping. See *Spirit of the Alberta Indian Treaties, supra*, at pp. 92-100.

58 Accordingly, the oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis.

59 Most of the cases which have considered the geographical limitations on the right to hunt have been concerned with situations where the hunting took place on *Crown* land. In those cases, it was held that Crown lands were only "occupied" or "taken up" when they were actually put to an active use which was incompatible with hunting. For example, *R. v. Smith*, [1935] 2 W.W.R. 433 (Sask. C.A.), considered whether Indians had a right to hunt for food on a game preserve located on Crown land. There, in my view, it was correctly observed at p. 436 that "it is proper to consult th[e] treaty in order to glean from it whatever may throw some light on the meaning to be given to the words" in the *NRTA*. It was sensibly held at p. 437 that the Indians did not have a right of access to hunt on the game preserve because to do so would be incompatible with the fundamental purpose of establishing a preserve: "a game preserve would be one in name only if the Indians, or any other class of people, were entitled to shoot in it." See also *R. v. Mirasty*, [1942] 1 W.W.R. 343 (Sask. Pol. Ct.), in which Crown land was taken up for a forest and game preserve; and *Mousseau, supra*, in which Crown land was taken up for a public road. However, the courts have recognized an existing treaty right to hunt on Crown land taken up as a forest because hunting for food is not incompatible with that particular land use: *R. v. Strongquill* (1953), 8 W.W.R. (N.S.) 247 (Sask. C.A.). Finally, where limited hunting by non-Indians is permitted on Crown land taken up as a wildlife management area or a fur conservation area, the courts have held that Indians continue to have an unlimited right of access for the purposes of hunting for food: *Strongquill, supra*, at pp. 267 and 271; *Sutherland*,

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supra, at pp. 460 and 464-65; and *R. v. Moosehunter*, [1981] 1 S.C.R. 282, at p. 292.

60 A second but shorter line of cases has considered whether Indians have a treaty right of access to hunt on privately owned lands. While various factual situations have been considered, the courts have not settled the question as to whether the Treaty No. 8 right to hunt for food extends to privately owned land which is not put to visible use. This Court has considered hunting on private land in two cases.

61 In *Myran, supra*, the accused were charged with hunting without due regard for the safety of others. In *obiter*, it was stated that the accused persons did not have a right of access to the lands on which they had hunted. In an earlier case, the Manitoba Court of Appeal had held that, unless privately owned lands were posted with signs explicitly prohibiting hunting, both Indians and non-Indians could hunt there. *Myran, supra*, overturned that line of reasoning, holding that, in and of itself, the absence of signs did not establish a right of access for hunting purposes. That position was adopted in *Horse, supra*, at p. 195. However, *Myran, supra*, did not explore in any detail the extent of the right of access. Accordingly, the full scope of the treaty right to hunt on private land remains to be considered. In addition, because the right of access is a question of fact, the particular facts arising in *Myran, supra*, are significant. In that case, the accused persons were hunting for food in an alfalfa field belonging to a farmer who had been awakened by the sound of the accused's rifle shots and by the accused's hunting light flashing through his bedroom window. The rifles had a range of nearly two miles and there were farm houses, highways, pastures, a town and a breeding station within their range. On those facts, there is no doubt that the land was put to an active and visible use which was incompatible with hunting.

62 In *Horse, supra*, the accused persons were hunting on privately owned land without the owner's permission. This Court stated repeatedly that Treaty No. 6 did not afford the accused a right of access to hunt on "occupied private lands" (see pp. 198, 204 and 209-10). In *Horse, supra*, the private lands were not posted, but they were sown to hay and grain and, thus, were visibly and actively used for farming. In light of these facts, there was no need to consider what was encompassed by the term "occupied private land". The use of the land was so readily apparent that it clearly fell within the category of occupied land. Similarly, in *Mousseau, supra*, at p. 97, this Court indicated that Indians had a right to hunt on: (a) all unoccupied Crown lands; (b) any occupied Crown land to which they had a right of access by statute, common law or otherwise; and (c) "any occupied private lands to which the Indians have a right of access by custom, usage, or consent of the owner or occupier, for the purpose of hunting, trapping, or fishing". However, that case involved hunting on a public highway which was clearly occupied Crown land. Although *Mousseau, supra*, summarized this Court's position on that point, the question of hunting on unoccupied private land was neither then, nor previously, before the Court. As a result, in both *Horse, supra*, and *Mousseau, supra*, the question of whether the Treaty protected a right of access to unoccupied private lands — private lands which had not been taken up for settlement or other purposes — was left unresolved.

63 One case which has specifically considered the treaty right to hunt on unoccupied private land is *R. v. Bartleman* (1984), 55 B.C.L.R. 78 (C.A.). There, the accused was charged with using ammunition which was prohibited under the provincial *Wildlife Act*. He had been hunting on uncultivated bush land. No livestock or buildings were present, no fence surrounded the land, and no signs had been posted. He claimed that, on the basis of his Treaty hunting right, the provincial legislation did not apply to him. His hunting rights were set out in the 1852 North Saanich Indian Treaty (quoted in *Bartleman*, at p. 87) which provided that the Indians "are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly". The B.C. Court of Appeal held that it was necessary to interpret the right on the basis of what the Indians would have understood in 1852 by the words of the Treaty. It held that the Treaty right to hunt could be exercised where to do so would not in-

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terfere with the actual use being made of the privately owned land. At page 97 this was written:

... the hunting must take place on land that is unoccupied in the sense that the particular form of hunting that is being undertaken does not interfere with the actual use and enjoyment of the land by the owner or occupier.

64 The Court of Appeal found that hunting was not incompatible with the minimal level of use to which the land was being put.

65 The "visible, incompatible use" approach, which focuses upon the use being made of the land, is appropriate and correct. Although it requires that the particular land use be considered in each case, this standard is neither unduly vague nor unworkable.

66 In summary, then, the geographical limitation on the right to hunt for food is derived from the terms of the particular treaty if they have not been modified or altered by the provisions of paragraph 12 of the *NRTA*. In this case, the geographical limitation on the right to hunt for food provided by Treaty No. 8 has not been modified by para. 12 of the *NRTA*. Where lands are privately owned, it must be determined on a case-by-case basis whether they are "other lands" to which Indians had a "right of access" under the Treaty. If the lands are occupied, that is, put to visible use which is incompatible with hunting, Indians will not have a right of access. Conversely, if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No. 8, will have a right of access in order to hunt for food. The facts presented in each of these appeals must now be considered.

67 The first is Mr. Badger. He was hunting on land covered with second growth willow and scrub. Although there were no fences or signs posted on the land, a farm house was located only one quarter of a mile from the place the moose was killed. The residence did not appear to have been abandoned. Second, Mr. Kiyawasew was hunting on a snow-covered field. Although there was no fence, there were run-down barns nearby and signs were posted on the land. Most importantly, the evidence indicated that in the fall, a crop had been harvested from the field. In the situations presented in both cases, it seems clear that the land was visibly being used. Since the appellants did not have a right of access to these particular tracts of land, their treaty right to hunt for food did not extend to hunting there. As a result, the limitations on hunting set out in the *Wildlife Act* did not infringe upon their existing right and were properly applied to these two appellants. The appeals of Mr. Badger and Mr. Kiyawasew must, therefore, be dismissed.

68 However, Mr. Ominayak's appeal presents a different situation. He was hunting on uncleared muskeg. No fences or signs were present. Nor were there any buildings located near the site of the kill. Although it was privately owned, it is apparent that this land was not being put to any visible use which would be incompatible with the Indian right to hunt for food. Accordingly, the geographical limitations upon the Treaty right to hunt for food did not preclude Mr. Ominayak from hunting upon this parcel of land. This, however, does not dispose of his appeal. It remains to be seen whether the existing right to hunt was in any other manner circumscribed by a form of government regulation which is permitted under the Treaty.

Permissible Regulatory Limitations on the Right to Hunt for Food

69 Pursuant to the provisions of s. 88 of the *Indian Act*, provincial laws of general application will apply to Indians. This is so except where they conflict with aboriginal or treaty rights, in which case the latter must prevail: *R. v. Kruger*, [1978] 1 S.C.R. 104, at pp. 114-15 [[1977] 4 W.W.R. 300]; *Simon*, *supra*, at pp. 411-14;

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Sparrow, *supra*, at p. 1109. In any event, the regulation of Indian hunting rights would ordinarily come within the jurisdiction of the Federal government and not the Province. However, the issue does not arise in this case since we are dealing with the right to hunt provided by Treaty 8 as modified by the *NRTA*. Both the Treaty and the *NRTA* specifically provided that the right would be subject to regulation pertaining to conservation.

70 Treaty No. 8 provided that the right to hunt would be "subject to such regulations as may from time to time be made by the Government of the country". In the West, a wide range of legislation aimed at conserving game had been enacted by the government beginning as early as the 1880s. Acts and regulations pertaining to conservation measures continued to be passed throughout the entire period during which the numbered treaties were concluded. In *Horseman*, *supra*, the aim and intent of the regulations was recognized. At p. 935, I noted:

Before the turn of the century the federal game laws of the Unorganized Territories provided for a total ban on hunting certain species (bison and musk oxen) in order to preserve both the species and the supply of game for Indians in the future. See *The Unorganized Territories' Game Preservation Act, 1894*, S.C. 1894, c. 31, ss. 2, 4 to 8 and 26. Even then the advances in firearms and trapping, coupled with the habitat loss and the over-exploitation of game, (undoubtedly by Europeans more than by Indians), had made it essential to impose conservation measures to preserve species and to provide for hunting for future generations. Moreover, beginning in 1890, provision was made in the federal *Indian Act* for the Superintendent General to make the game laws of Manitoba and the Unorganized Territories applicable to Indians. See *An Act further to amend "The Indian Act" chapter forty-three of the Revised Statutes*, S.C. 1890, c. 29, s. 10. A similar provision was in force in 1930. See *Indian Act*, R.S.C. 1927, c. 98, s. 69.

In light of the existence of these conservation laws prior to signing the Treaty, the Indians would have understood that, by the terms of the Treaty, the government would be permitted to pass regulations with respect to conservation. This concept was explicitly incorporated into the *NRTA* in a modified form providing for Provincial regulatory authority in the field of conservation. Paragraph 12 of the *NRTA* begins by stating its purpose:

12. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the *laws respecting game in force in the Province from time to time shall apply to the Indians* [Emphasis added.]

It follows that by the terms of both the Treaty and the *NRTA*, provincial game laws would be applicable to Indians so long as they were aimed at conserving the supply of game. However, the provincial government's regulatory authority under the Treaty and the *NRTA* did not extend beyond the realm of conservation. It is the constitutional provisions of s. 12 of the *NRTA* authorizing provincial regulations which make it unnecessary to consider s. 88 of the *Indian Act* and the general application of provincial regulations to Indians.

71 The licensing provisions contained in the *Wildlife Act* are in part, but not wholly, directed towards questions of conservation. At first blush, then, they may seem to form part of the permissible government regulation which can establish the boundaries of the existing right to hunt for food. However, the partial concern with conservation does not automatically lead to the conclusion that s. 26(1) is permissible regulation. It must still be determined whether the manner in which the licensing scheme is administered conflicts with the hunting right provided under Treaty No. 8 as modified by the *NRTA*.

72 This analysis should take into account the wording of the treaty and the *NRTA*. I believe this to be appropriate since the object will be to determine first whether there has been a *prima facie* infringement of the Treaty 8 right to hunt as modified by the *NRTA* and secondly if there is such an infringement whether it can be justified.

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In essence, we are dealing with a modified treaty right. This, I believe, follows from the principle referred to earlier that treaty rights should only be considered to be modified if a clear intention to do so has been manifested, in this case, by the *NRTA*. Further, the solemn promises made in the treaty should be altered or modified as little as possible. The *NRTA* clearly intended to modify the right to hunt. It did so by eliminating the right to hunt commercially and by preserving and extending the right to hunt for food. The Treaty right thus modified pertains to the right to hunt for food which prior to the Treaty was an aboriginal right.

73 For reasons that I will amplify later, it seems logical and appropriate to apply the recently formulated *Sparrow* test in these circumstances. I would add that it can properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test. It follows that this concept should be taken into account in the consideration of the justification of an infringement. As a general rule the criteria set out in *Sparrow, supra*, should be applied. However, the reasons in *Sparrow, supra*, make it clear that the suggested criteria are neither exclusive nor exhaustive. It follows that additional criteria may be helpful and applicable in the particular situation presented.

Conflict Between the Wildlife Act and Rights Under Treaty No. 8

74 It has been recognized that aboriginal and treaty rights are not absolute. The reasons in *Sparrow, supra*, made it clear that aboriginal rights may be overridden if the government is able to justify the infringement.

75 In *Sparrow, supra*, certain criteria were set out pertaining to justification at pp. 1111 and following. While that case dealt with the infringement of aboriginal rights, I am of the view that these criteria should, in most cases, apply equally to the infringement of treaty rights.

76 There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in *Calder, supra*, at p. 328, they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.

77 This said, there are also significant aspects of similarity between aboriginal and treaty rights. Although treaty rights are the result of mutual agreement, they, like aboriginal rights, may be unilaterally abridged. See *Horseman, supra*, at p. 936; *Sikyey v. R.*, [1964] 2 C.C.C. 325, at p. 330 [46 W.W.R. 65], affirmed [1964] S.C.R. 642 [49 W.W.R. 306]; and *Moosehunter, supra*, at p. 293. It follows that limitations on treaty rights, like breaches of aboriginal rights, should be justified.

78 In addition, both aboriginal and treaty rights possess in common a unique, *sui generis* nature. See *Guerin v. R.*, [1984] 2 S.C.R. 335, at p. 382 [[1984] 6 W.W.R. 481]; *Simon, supra*, at p. 404. In each case, the honour of the Crown is engaged through its relationship with the native people. As Dickson C.J. and La Forest J. stated at p. 1110 in *Sparrow, supra*:

By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. *The way in which a legislative objective is to be attained must uphold the honour of the*

1996 CarswellAlta 587, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, EYB 1996-66856, [1996] A.W.L.D. 454

Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. [Emphasis added.]

79 The wording of s. 35(1) of the *Constitution Act, 1982* supports a common approach to infringements of aboriginal and treaty rights. It provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". In *Sparrow, supra*, Dickson C.J. and La Forest J. appeared to acknowledge the need for justification in the treaty context. They said this at pp. 1118-1119 in relation to *R. v. Eninew* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), a case which considered the effect of the *Migratory Birds Convention Act* on rights guaranteed under Treaty No. 10:

As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. *Rather, the regulations enforced pursuant to a conservation or management objective may be scrutinized according to the justificatory standard outlined above.* [Emphasis added.]

80 This standard of scrutiny requires that the Crown demonstrate that the legislation in question advances important general public objectives in such a manner that it ought to prevail. In *R. v. Agawa* (1988), 65 O.R. (2d) 505 (Ont. C.A.), at p. 524, Blair J.A. recognized the need for a balanced approach to limitations on treaty rights, stating:

... Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.

81 Dickson C.J. and La Forest J. arrived at a similar conclusion in *Sparrow, supra*, at pp. 1108-1109.

82 In summary, it is clear that a statute or regulation which constitutes a *prima facie* infringement of aboriginal rights must be justified. In my view, it is equally if not more important to justify *prima facie* infringements of treaty rights. The rights granted to Indians by treaties usually form an integral part of the consideration for the surrender of their lands. For example, it is clear that the maintenance of as much of their hunting rights as possible was of paramount concern to the Indians who signed Treaty No. 8. This was, in effect, an aboriginal right recognized in a somewhat limited form by the treaty and later modified by the *NRTA*. To the Indians, it was an essential element of this solemn agreement.

83 It will be remembered that the *NRTA* modified the Treaty right to hunt. It did so by eliminating the right to hunt commercially but enlarged the geographical areas in which the Indian people might hunt in all seasons. The area was to include all unoccupied Crown land in the province together with any other lands to which the Indians may have a right of access. Lastly, the province was authorized to make laws for conservation. Specifically:

In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall

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have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

84 The *NRTA* only modifies the Treaty 8 right. Treaty 8 represents a solemn promise of the Crown. For the reasons set out earlier, it can only be modified or altered to the extent that the *NRTA* clearly intended to modify or alter those rights. The Federal government, as it was empowered to do, unilaterally enacted the *NRTA*. It is unlikely that it would proceed in that manner today. The manner in which the *NRTA* was unilaterally enacted strengthens the conclusion that the right to hunt which it provides should be construed in light of the provisions of Treaty 8.

85 It follows that any *prima facie* infringement of the rights guaranteed under Treaty 8 or the *NRTA* must be justified. How should the infringement of a treaty right be justified? Obviously, the challenged limitation must be considered within the context of the treaty itself. Yet, the recognized principles to be considered and applied in justification should generally be those set out in *Sparrow, supra*. There may well be other factors that should influence the result. The *Sparrow* decision itself recognized that it was not setting a complete catalogue of factors. Nevertheless, these factors may serve as a rough guide when considering the infringement of treaty rights.

Prima Facie Infringement of the Treaty Right to hunt as modified by the NRTA

86 The licensing provisions of the *Wildlife Act* address two objectives: public safety and conservation. These objectives, in and of themselves, are not unconstitutional. However, it is evident from the wording of the Act and its regulations that the manner in which the licensing scheme is set up results in a *prima facie* infringement of the Treaty No. 8 right to hunt as modified by the *NRTA*. The statutory scheme establishes a two-step licensing process. The public safety component is the first one that is engaged.

87 Under s. 15(1)(c) of the *Wildlife Act*, the Lieutenant Governor in Council may pass regulations which "specify training and testing qualifications required for the obtaining and holding of a licence or permit". The regulations passed pursuant to this section are found in Alta. Reg. 50/87, s. 2(2) which reads as follows:

2 ...

(2) Subject to the *General Wildlife (Ministerial) Regulation*, a person is not eligible to obtain or hold a recreational licence unless

(a) prior to the date of his application for a recreational licence, he has

- (i) achieved a mark, as determined by the Minister, on an examination approved by the Minister,
- (ii) held a licence authorizing recreational hunting in Alberta or elsewhere, or
- (iii) passed a test approved by the Minister respecting hunting competency,

and

(b) if his right to hold a recreational licence has been suspended in accordance with the Act or its predecessor, he has passed the examination referred to in clause (a)(I) subsequent to the beginning of his

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period of suspension.

88 Standing on its own, the requirement that all hunters take gun safety courses and pass hunting competency tests makes eminently good sense. This protects the safety of everyone who hunts, including Indians. It has been held on a number of occasions that aboriginal or treaty rights must be exercised with due concern for public safety. *Myran, supra*, dealt with two Indians charged with hunting without due regard for the safety of others, contrary to the provisions of the Manitoba *Wildlife Act*. The accused argued that they were immune from the Act on the basis of their right to hunt for food guaranteed under the *Manitoba Natural Resources Act* (parallel to the *NRTA*). Dickson J. (as he then was) for the Court found at p. 141 that:

I think that it is clear from *Prince and Myron* that an Indian of the Province is freed to hunt or trap game in such numbers, at such times of the year, by such means or methods and with such contrivances, as he may wish, provided he is doing so in order to obtain food for his own use and on unoccupied Crown lands or other lands to which he may have a right of access. *But that is not to say that he has the right to hunt dangerously and without regard for the safety of other persons in the vicinity.* [Emphasis added.]

He went on at page 142 to state that:

In my opinion there is no irreconcilable conflict or inconsistency in principle between the right to hunt for food assured under para. 13 of the Memorandum of Agreement approved under The Manitoba Natural Resources Act and the requirement of s. 10(1) of the Wildlife Act that such right be exercised in a manner so as not to endanger the lives of others. The first is concerned with conservation of game to secure a continuing supply of food for the Indians of the Province and protect the right of the Indians to hunt for food at all seasons of the year; the second is concerned with the risk of death or serious injury omnipresent when hunters fail to have due regard for the presence of others in the vicinity. [Emphasis added.]

89 That decision was subsequently affirmed by this Court in *Sutherland, supra*, and *Moosehunter, supra*. See to the same effect *R. v. Napoleon (1985)*, [1986] 1 C.N.L.R. 86 [[1985] 6 W.W.R. 302] (B.C.C.A.), and *R. v. Fox*, [1994] 3 C.N.L.R. 132 (Ont. C.A.). Accordingly, it can be seen that reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food. Similarly these regulations do not infringe the hunting rights guaranteed by Treaty 8 as modified by the *NRTA*.

90 While the general safety component of the licensing provisions may not constitute a *prima facie* infringement, the conservation component appears to present just such an infringement. Provincial regulations for conservation purposes are authorized pursuant to the provisions of the *NRTA*. However, the routine imposition upon Indians of the specific limitations that appear on the face of the hunting licence may not be permissible if they erode an important aspect of the Indian hunting rights. This Court has held on numerous occasions that there can be no limitation on the method, timing and extent of Indian hunting under a Treaty. I would add that a Treaty as amended by the *NRTA* should be considered in the same manner. *Horseman, supra*, clearly indicated that such restrictions conflicted with the treaty right. Moreover, in *Simon, supra*, this appears at p. 413:

The section clearly places seasonal limitations and licensing requirements, for the purposes of wildlife conservation, on the right to possess a rifle and ammunition for the purposes of hunting. The restrictions imposed in this case conflict, therefore, with the appellant's right to possess a firearm and ammunition in order to exercise his free liberty to hunt over the lands covered by the Treaty. As noted, it is clear that under s. 88 of the *Indian Act* provincial legislation cannot restrict native treaty rights. If conflict arises, the terms of the treaty prevail.

1996 CarswellAlta 587, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, EYB 1996-66856, [1996] A.W.L.D. 454

91 The *Simon* case dealt with Provincial regulations which the government attempted to justify under s. 88 of the *Indian Act*. By contrast, in this case, s. 12 of the *NRTA* specifically provides that the provincial government may make regulations for conservation purposes, which affect the Treaty rights to hunt. Accordingly, Provincial regulations pertaining to conservation will be valid so long as they are not clearly unreasonable in their application to aboriginal people.

92 Under the present licensing scheme, an Indian who has successfully passed the approved gun safety and hunting competency courses would not be able to exercise the right to hunt without being in breach of the conservation restrictions imposed with respect to the hunting method, the kind and numbers of game, the season and the permissible hunting area, all of which appear on the face of the licence. Moreover, while the Minister may determine how many licences will be made available and what class of licence these will be, no provisions currently exist for "hunting for food" licences.

93 At present, only sport and commercial hunting are licensed. It is true that the regulations do provide for a subsistence hunting licence. See Alta. Reg. 50/87, s. 25; Alta. Reg. 95/87, s. 7. However, its provisions are so minimal and so restricted that it could never be considered a licence to hunt for food as that term is used in Treaty No. 8 and as it is understood by the Indians. Accordingly, there is no provision for a licence which does not contain the facial restrictions set out earlier. Finally, there is no provision which would guarantee to Indians preferential access to the limited number of licences, nor is there a provision that would exempt them from the licence fee. As a result, Indians, like all other Albertans, would have to apply for a hunting licence from the same limited pool of licences. Further, if they were fortunate enough to be issued a licence, they would have to pay a licensing fee, effectively paying for the privilege of exercising a treaty right. This is clearly in conflict with both the treaty and *NRTA* provisions.

94 The present licensing system denies to holders of treaty rights as modified by the *NRTA* the very means of exercising those rights. Limitations of this nature are in direct conflict with the treaty right. Therefore, it must be concluded that s. 26(1) of the *Wildlife Act* conflicts with the hunting right set out in Treaty No. 8 as modified by the *NRTA*.

95 Accordingly, it is my conclusion that the appellant, Mr. Ominayak, has established the existence of a *prima facie* breach of his treaty right. It now falls to the government to justify that infringement.

Justification

96 In my view justification of provincial regulations enacted pursuant to the *NRTA* should meet the same test for justification of treaty rights that was set out in *Sparrow, supra*. The reason for this is obvious. The effect of s. 12 of the *NRTA* is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied. Thus the Provincial government has the same duty not to infringe unjustifiably the hunting right provided by Treaty 8 as modified by the *NRTA*. Paragraph 12 of the *NRTA* provides that the province may make laws for a conservation purpose, subject to the Indian right to hunt and fish for food. Accordingly, there is a need for a means to assess which conservation laws will if they infringe that right, nevertheless be justifiable. The *Sparrow* analysis provides a reasonable, flexible and current method of assessing conservation regulations and enactments.

97 In *Sparrow*, at p. 1113, it was held that in considering whether an infringement of aboriginal or treaty rights could be justified, the following questions should be addressed sequentially:

1996 CarswellAlta 587, [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, EYB 1996-66856, [1996] A.W.L.D. 454

First, is there a *valid legislative objective*? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. [Emphasis added.]

At page 1114, the next step was set out in this way:

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The *special trust relationship and the responsibility of the government vis-à-vis aboriginals* must be the first consideration in determining whether the legislation or action in question can be justified. [Emphasis added.]

Finally, at p. 1119, it was noted that further questions might also arise 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.

We would *not wish to set out an exhaustive list of the factors to be considered in the assessment of justification*. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians. [Emphasis added.]

98 In the present case, the government has not led any evidence with respect to justification. In the absence of such evidence, it is not open to this Court to supply its own justification. Section 26(1) of the *Wildlife Act* constitutes a *prima facie* infringement of the appellant Mr. Ominayak's treaty right to hunt. Yet, the issue of conservation is of such importance that a new trial must be ordered so that the question of justification may be addressed.

Conclusion

99 The constitutional question posed before this Court was:

If Treaty 8 confirmed to the Indians of the Treaty 8 Territory the right to hunt throughout the tract surrendered, does the right continue to exist or was it extinguished and replaced by paragraph 12 of the Natural Resources Transfer Agreement (*Constitution Act, 1930*, 20-21 George V, c. 26 (U.K.)), and if the right continues to exist, could that right be exercised on the lands in question and, if so, was the right impermissibly infringed upon by s. 26(1) or s. 27(1) of the *Wildlife Act*, S.A. 1984, c. W-9.1, given Treaty 8 and s. 35(1) of the *Constitution Act, 1982*?

100 It is evident from these reasons that the constitutional question should be answered as follows. The hunting rights confirmed by Treaty No. 8 were modified by para. 12 of the *NRTA* to the extent indicated in these reasons. Paragraph 12 of the *NRTA* provided for a continuing right to hunt for food on unoccupied land.

101 Mr. Badger and Mr. Kiyawasew were hunting on occupied land to which they had no right of access

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under Treaty No. 8 or the *NRTA*. Accordingly, ss. 26(1) and 27(1) of the *Wildlife Act* do not infringe their constitutional right to hunt for food.

102 However, Mr. Ominyak was exercising his constitutional right on land which was unoccupied for the purposes of this case. Section 26(1) of the *Wildlife Act* constitutes a *prima facie* infringement of his Treaty right to hunt for food. As a result of their conclusions, the issue of justification was not considered by the courts below. Therefore, in his case, a new trial must be ordered so that the issue of justification may be addressed.

Disposition

103 The appeals of Mr. Badger and Mr. Kiyawasew are dismissed.

104 The appeal of Mr. Ominyak is allowed and a new trial directed so that the issue of the justification of the infringement created by s. 26(1) of the *Wildlife Act* and any regulations passed pursuant to that section may be addressed.

Order accordingly.

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2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)

Norm Ringstad, in his capacity as the Project Assessment Director of the Tulsequah Chief Mine Project, Sheila Wynn, in her capacity as the Executive Director, Environmental Assessment Office, the Minister of Environment, Lands and Parks, and the Minister of Energy and Mines and Minister Responsible for Northern Development (Appellants) v. Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation, Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd. (Respondents) and Attorney General of Canada, Attorney General of Quebec, Attorney General of Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia and Aggregate Producers Association of British Columbia, Doig River First Nation, First Nations Summit and Union of British Columbia Indian Chiefs (Interveners)

Supreme Court of Canada

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

Heard: March 24, 2004

Judgment: November 18, 2004

Docket: 29146

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Proceedings: reversing *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 211 D.L.R. (4th) 89, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 163 B.C.A.C. 164, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.); varying *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 2000 BCSC 1001, 2000 CarswellBC 1346, 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C. S.C. [In Chambers])

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Randy J. Kaardal, Lisa Hynes for Respondents, Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

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Kurt J.W. Sandstrom, Stan Rutwind for Intervener, Attorney General of Alberta

Charles F. Willms, Kevin G. O'Callaghan for Interveners, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Court of Forest Industries, Mining Association of British Columbia and Aggregate Producers Association of British Columbia

Jeffrey R.W. Rath, Allisun Rana for Intervener, Doig River First Nation

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

Robert J.M. Janes, Dominique Nouvet for Intervener, Union of British Columbia Indian Chiefs

Subject: Environmental; Public; Property; Constitutional

Environmental law --- Statutory protection of environment — Environmental assessment — Aboriginal interests

Provincial Crown fulfilled its obligation to consult with Indian band with respect to review of request to reopen mine under Environmental Assessment Act.

Aboriginal law --- Reserves and real property — Rights and title — General principles

Provincial Crown fulfilled its obligation to consult with Indian band with respect to review of request to reopen mine under Environmental Assessment Act.

Crown --- Crown property — Miscellaneous issues

Provincial Crown fulfilled its obligation to consult with Indian band with respect to review of request to reopen mine under Environmental Assessment Act.

Droit de l'environnement --- Protection accordée par la loi à l'environnement — Évaluation environnementale — Intérêts autochtones

Couronne provinciale s'est acquittée de son obligation de consulter la bande indienne relativement à une demande pour rouvrir une mine qui avait été présentée en vertu de l'Environmental Assessment Act.

Droit autochtone --- Réserves et biens-fonds — Droits et titres — Principes généraux

Couronne provinciale s'est acquittée de son obligation de consulter la bande indienne relativement à une demande pour rouvrir une mine qui avait été présentée en vertu de l'Environmental Assessment Act.

Couronne --- Biens de la Couronne — Questions diverses

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

Couronne provinciale s'est acquittée de son obligation de consulter la bande indienne relativement à une demande pour rouvrir une mine qui avait été présentée en vertu de l'Environmental Assessment Act.

R Ltd. sought permission from the British Columbia government to reopen an old mine. R Ltd.'s proposal was accepted for review under the former Mine Development Assessment Act, and a project committee was established in November 1994. Invited to participate was an Indian band, which objected to R Ltd.'s plan to build a 160-km road from the mine to a town through a portion of the band's traditional territory. When the Environmental Assessment Act was instituted in 1995, the project committee was formally constituted under s. 9 with the band as one of its members. After a three-and-one-half-year assessment process, project approval was granted on March 19, 1998, by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines. The Indian band successfully brought a petition in February 1999 under the Judicial Review Procedure Act to quash the Ministers' decision. The Crown's appeal was dismissed. The Crown appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

The process engaged in by the Crown under the Environmental Assessment Act fulfilled the requirements of its duty. The band was part of the project committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Crown was under a duty to consult. It did so, and proceeded to make accommodations. The Crown was not under a duty to reach agreement with the band, and its failure to do so did not breach the obligations of good faith that it owed the band.

R Ltd. a demandé au gouvernement de la Colombie-Britannique l'autorisation de rouvrir une ancienne mine. On a accepté d'examiner sa proposition présentée en vertu de la Mine Development Assessment Act, et un comité responsable du projet a été mis sur pied en novembre 1994. Une bande indienne, qui avait été invitée à participer au processus, s'est objectée au projet de R Ltd. consistant en la construction, sur une partie de son territoire traditionnel, d'une route de 160 km entre la mine et une ville. Lorsque l'Environmental Assessment Act a été promulguée en 1995, le comité responsable du projet a été formellement constitué en vertu de l'art. 9, la bande étant un de ses membres. Le processus d'évaluation a duré trois ans et demie, au terme duquel le projet a été approuvé le 19 mars 1998 par le ministre de l'Environnement, des Terres et des Parcs et par le ministre de l'Énergie et des Mines. En février 1999, la bande indienne a présenté avec succès une demande en vertu de la Judicial Review Procedure Act afin d'obtenir l'annulation de la décision des ministres. Le pourvoi de la Couronne a été rejeté. Celle-ci a interjeté appel devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

La Couronne s'est acquittée de son obligation en engageant le processus prévu à l'Environmental Assessment Act. La bande a fait partie du comité responsable du projet, ce qui lui a permis de participer pleinement au processus d'évaluation environnementale. Elle a été déçue lorsque, après trois ans et demie, le processus a pris fin sur ordre du Bureau des évaluations environnementales. Elle a cependant eu l'opportunité de faire valoir son point de vue devant les ministres, et le certificat d'approbation du projet final contenait des mesures visant à répondre à ses préoccupations, à court comme à long terme. La Couronne avait l'obligation de consulter. Elle l'a fait et elle a pris des mesures d'accommodement. Elle n'avait pas l'obligation de s'entendre avec la bande; le fait qu'elle n'y soit pas parvenue ne constituait pas un manquement à son obligation d'agir de bonne foi avec la

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

bande.

Cases considered by *McLachlin C.J.C.*:

Delgamuukw v. British Columbia (1997), 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — referred to

Haida Nation v. British Columbia (Minister of Forests) (2004), 245 D.L.R. (4th) 33, 19 Admin. L.R. (4th) 195, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, [2005] 3 W.W.R. 419, 2004 SCC 73 (S.C.C.)

R. v. Gladstone (1996), [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65, 1996 CarswellBC 2305, 1996 CarswellBC 2306 (S.C.C.) — referred to

R. v. Nikal (1996), [1996] 5 W.W.R. 305, 19 B.C.L.R. (3d) 201, 105 C.C.C. (3d) 481, 196 N.R. 1, 133 D.L.R. (4th) 658, 74 B.C.A.C. 161, 121 W.A.C. 161, [1996] 1 S.C.R. 1013, (sub nom. *Canada v. Nikal*) 35 C.R.R. (2d) 189, [1996] 3 C.N.L.R. 178, 1996 CarswellBC 950, 1996 CarswellBC 950F (S.C.C.) — referred to

R. v. Sparrow (1990), 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410, 1990 CarswellBC 105, 1990 CarswellBC 756 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 35(1) — considered

Environmental Assessment Act, R.S.B.C. 1996, c. 119

Generally — considered

s. 2(a) — considered

s. 2(b) — considered

s. 2(c) — considered

s. 2(d)(i) — considered

s. 2(e) — considered

s. 7 — referred to

s. 9 — considered

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

s. 9(1) — considered

s. 9(2)(d) — considered

s. 9(6) — considered

s. 10 — considered

ss. 14-18 — considered

s. 19(1) — considered

s. 21(a) — considered

s. 21(b) — considered

s. 22 — considered

s. 23 — considered

s. 29 — considered

s. 29(1) — considered

s. 29(4) — considered

s. 30(1)(a) — considered

s. 30(1)(b) — considered

s. 30(1)(c) — considered

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Generally — referred to

Mine Development Assessment Act, S.B.C. 1990, c. 55

Generally — referred to

APPEAL by provincial Crown from judgment reported at *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 211 D.L.R. (4th) 89, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 163 B.C.A.C. 164, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.), varying *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 2000 BCSC 1001, 2000 CarswellBC 1346, 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C. S.C. [In Chambers]), which allowed Indian band's application for judicial review with respect to Crown approval of project under *Environmental Assessment Act*.

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

POURVOI de la Couronne provinciale à l'encontre de l'arrêt publié à *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2002), 2002 BCCA 59, 2002 CarswellBC 95, 98 B.C.L.R. (3d) 16, [2002] 4 W.W.R. 19, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 211 D.L.R. (4th) 89, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 163 B.C.A.C. 164, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 267 W.A.C. 164, 91 C.R.R. (2d) 260 (B.C. C.A.), qui a modifié le jugement publié à *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* (2000), 2000 BCSC 1001, 2000 CarswellBC 1346, 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209 (B.C. S.C. [In Chambers]), qui avait accueilli la demande de la bande indienne visant à obtenir le contrôle judiciaire de la décision de la Couronne approuvant un projet en vertu de l'*Environmental Assessment Act*.

McLachlin C.J.C.:

I. Introduction

1 This case raises the issue of the limits of the Crown's duty to consult with and accommodate Aboriginal peoples when making decisions that may adversely affect as yet unproven Aboriginal rights and title claims. The Taku River Tlingit First Nation ("TRTFN") participated in a three and a half year environmental assessment process related to the efforts of Redfern Resources Ltd. ("Redfern") to reopen an old mine. Ultimately, the TRTFN found itself disappointed in the process and in the result.

2 I conclude that the Province was required to consult meaningfully with the TRTFN in the decision-making process surrounding Redfern's project approval application. The TRTFN's role in the environmental assessment was, however, sufficient to uphold the Province's honour and meet the requirements of its duty. Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process. In this case, the Province accommodated TRTFN concerns by adapting the environmental assessment process and the requirements made of Redfern in order to gain project approval. I find, therefore, that the Province met the requirements of its duty toward the TRTFN.

II. Facts and Decisions Below

3 The Tulsequah Chief Mine, operated in the 1950s by Cominco Ltd., lies in a remote and pristine area of northwestern British Columbia, at the confluence of the Taku and Tulsequah Rivers. Since 1994, Redfern has sought permission from the British Columbia government to reopen the mine, first under the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, and then, following its enactment in 1995, under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. During the environmental assessment process, access to the mine emerged as a point of contention. The members of the TRTFN, who participated in the assessment as Project Committee members, objected to Redfern's plan to build a 160-km road from the mine to the town of Atlin through a portion of their traditional territory. However, after a lengthy process, project approval was granted on March 19, 1998 by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines ("Ministers").

4 The Redfern proposal was assessed in accordance with British Columbia's *Environmental Assessment Act*. The environmental assessment process is distinct from both the land use planning process and the treaty negotiation process, although these latter processes may necessarily have an impact on the assessment of individual

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proposals. The following provisions are relevant to this matter.

5 Section 2 sets out the purposes of the Act, which are:

- (a) to promote sustainability by protecting the environment and fostering a sound economy and social well-being,
- (b) to provide for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
- (c) to prevent or mitigate adverse effects of reviewable projects,
- (d) to provide an open, accountable and neutrally administered process for the assessment
 - (i) of reviewable projects, and

.....

- (e) to provide for participation, in an assessment under this Act, by the public, proponents, first nations, municipalities and regional districts, the government and its agencies, the government of Canada and its agencies and British Columbia's neighbouring jurisdictions.

6 "The proponent of a reviewable project may apply for a project approval certificate" under s. 7 of the Act, providing a "preliminary overview of the reviewable project, including" potential effects and proposed mitigation measures. If the project is accepted for review, "the executive director must establish a project committee" for the project (s. 9(1)). The executive director must invite a number of groups to nominate members to the committee, including "any first nation whose traditional territory includes the site of the project or is in the vicinity of the project" (s. 9(2)(d)). Under s. 9(6), the committee "may determine its own procedure, and provide for the conduct of its meetings".

7 Redfern's proposal was accepted for review under the former *Mine Development Assessment Act*, and a project committee was established in November 1994. Invited to participate were the TRTFN, the British Columbia, federal, Yukon, United States, and Alaskan governments, as well as the Atlin Advisory Planning Commission. When the *Environmental Assessment Act* was instituted, the Project Committee was formally constituted under s. 9. Working groups and technical sub-committees were formed, including a group to deal with Aboriginal concerns and a group to deal with issues around transportation options. The TRTFN participated in both of these groups. A number of studies were commissioned and provided to the Project Committee during the assessment process.

8 The project committee becomes the primary engine driving the assessment process. It must act in accordance with the purposes of a project committee, set out in s. 10 as:

- (a) to provide to the executive director, the minister and the responsible minister expertise, advice, analysis and recommendations, and
- (b) to analyze and advise the executive director, the minister and the responsible minister as to,

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- (i) the comments received in response to an invitation for comments under this Act,
- (ii) the advice and recommendations of the public advisory committee, if any, established for that reviewable project,
- (iii) the potential effects, and
- (iv) the prevention or mitigation of adverse effects.

9 The proponent of the project is required to engage in public consultation and distribution of information about the proposal (ss. 14-18). After the period for receipt of comments has expired, the executive director must either "refer the application to the [Ministers] ... for a decision ... or order that a project report be prepared ... and that the project undergo further review" (s. 19(1)). If a project report is to be prepared, the executive director must prepare draft project report specifications indicating what information, analysis, plans or other records are relevant to an effective assessment, on the recommendation of the project committee (s. 21(a)). Sections 22 and 23 set out a non-exhaustive list of what matters may be included in a project report. These specifications are provided to the proponent (s. 21(b)).

10 In this case, Redfern was required to produce a project report, and draft project report specifications were provided to it. Additional time was granted to allow the executive director and Project Committee to prepare specifications.

11 When the proponent submits a project report, the project committee makes a recommendation to the executive director, whether to accept the report for review or to withhold acceptance if the report does not meet the specifications. Redfern submitted a multiple volume project report in November 1996. A time limit extension was granted to allow extra time to complete the review of the report. In January 1997, the Project Committee concluded that the report was deficient in certain areas, and Redfern was required to address the deficiencies.

12 Through the environmental assessment process, the TRTFN's concerns with the road proposal became apparent. Its concerns crystallized around the potential effect on wildlife and traditional land use, as well as the lack of adequate baseline information by which to measure subsequent effects. It was the TRTFN's position that the road ought not to be approved in the absence of a land use planning strategy and away from the treaty negotiation table. The environmental assessment process was unable to address these broader concerns directly, but the project assessment director facilitated the TRTFN's access to other provincial agencies and decision makers. For example, the Province approved funding for wildlife monitoring programs as desired by the TRTFN (the Grizzly Bear Long-term Cumulative Effects Assessment and Ungulate Monitoring Program). The TRTFN also expressed interest in TRTFN jurisdiction to approve permits for the project, revenue sharing, and TRTFN control of the use of the access road by third parties. It was informed that these issues were outside the ambit of the certification process and could only be the subject of later negotiation with the government.

13 While Redfern undertook to address other deficiencies, the Environmental Assessment Office's project assessment director engaged a consultant acceptable to the TRTFN, Mr. Lindsay Staples, to perform traditional land use studies and address issues raised by the TRTFN. Redfern submitted its upgraded report in July 1997, but was requested to await receipt of the Staples Report. The Staples Report, prepared by August 1997, was provided for inclusion in the Project Report. The Project Report was distributed for review in September 1997, with public comments received for a 60-day period thereafter. However, the TRTFN, upon reviewing the Staples

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Report, voiced additional concerns. In response, the Environmental Assessment Office engaged Staples to prepare an addendum to his report, which was completed in December 1997 and also included in the Project Report from that time forward.

14 Under the Act, the executive director, upon accepting a project report, may refer the application for a project approval certificate to the Ministers for a decision (s. 29). "In making a referral ... the executive director must take into account the application, the project report and any comments received about them" (s. 29(1)). "A referral ... may be accompanied by recommendations of the project committee" (s. 29(4)). There is no requirement under the Act that a project committee prepare a written recommendations report.

15 In this case, the staff of the Environmental Assessment Office prepared a written Project Committee Recommendations Report, the major part of which was provided to committee members for review in early January 1998. The final 18 pages were provided as part of a complete draft on March 3, 1998. The majority of the committee members agreed to refer the application to the Ministers and to recommend approval for the project subject to certain recommendations and conditions. The TRTFN did not agree with the Recommendations Report, and instead prepared a minority report stating their concerns with the process and the proposal.

16 After a referral under s. 29 is made, "the ministers must consider the application and any recommendations of the project committee" (s. 30(1)(a)), in order to either "issue a project approval certificate", "refuse to issue the ... certificate", or "refer the application to the Environmental Assessment Board for [a] public hearing" (s. 30(1)(b)). Written reasons are required (s. 30(1)(c)).

17 The executive director referred Redfern's application to the Ministers on March 12, 1998. The referral included the Project Committee Recommendations Report, the Project Approval Certificate in the form that it was ultimately signed, and the TRTFN Report (A.R., Vol. V, p. 858). In addition, the Recommendations Report explicitly identified TRTFN concerns and points of disagreement throughout, as well as suggested mitigation measures. The Ministers issued the Project Approval Certificate on March 19, 1998, approving the proposal subject to detailed terms and conditions.

18 Issuance of project approval certification does not constitute a comprehensive "go-ahead" for all aspects of a project. An extensive "permitting" process precedes each aspect of construction, which may involve more detailed substantive and information requirements being placed on the developer. Part 6 of the Project Committee's Recommendations Report summarized the requirements for licences, permits and approvals that would follow project approval in this case. In addition, the Recommendations Report made prospective recommendations about what ought to happen at the permit stage, as a condition of certification. The Report stated that Redfern would develop more detailed baseline information and analysis at the permit stage, with continued TRTFN participation, and that adjustments might be required to the road route in response. The majority also recommended creation of a resource management zone along the access corridor, to be in place until completion of a future land use plan; the use of regulations to control access to the road; and creation of a Joint Management Committee for the road with the TRTFN. It recommended that Redfern's future Special Use Permit application for the road be referred to the proposed Joint Management Committee.

19 The TRTFN brought a petition in February 1999 under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, to quash the Ministers' decision to issue the Project Approval Certificate on administrative law grounds and on grounds based on its Aboriginal rights and title. Determination of its rights and title was severed from the judicial review proceedings and referred to the trial list, on the Province's application. The chambers

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judge on the judicial review proceedings, Kirkpatrick J., concluded that the Ministers should have been mindful of the possibility that their decision might infringe Aboriginal rights, and that they had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns ((2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001 (B.C. S.C. [In Chambers])). She also found in the TRTFN's favour on administrative law grounds. She set aside the decision to issue the Project Approval Certificate and directed a reconsideration, for which she later issued directions.

20 The majority of the British Columbia Court of Appeal dismissed the Province's appeal, finding (*per* Rowles J.A.) that the Province had failed to meet its duty to consult with and accommodate the TRTFN ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59 (B.C. C.A.)). Southin J.A., dissenting, would have found that the consultation undertaken was adequate on the facts. Both the majority and the dissent appear to conclude that the decision complied with administrative law principles. The Province has appealed to this Court, arguing that no duty to consult exists outside common law administrative principles, prior to proof of an Aboriginal claim. If such a duty does exist, the Province argues, it was met on the facts of this case.

III. Analysis

21 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.), heard concurrently with this case, this Court has confirmed the existence of the Crown's duty to consult and, where indicated, to accommodate Aboriginal peoples prior to proof of rights or title claims. The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's claims through its involvement in the treaty negotiation process, and knew that the decision to reopen the Tulsequah Mine had the potential to adversely affect the substance of the TRTFN's claims.

22 On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

A. Did the Province Have a Duty to Consult and if Indicated Accommodate the TRTFN?

23 The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law "duty of fair dealing" to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a "justificatory fiduciary duty". Alternatively, it submits, a fiduciary duty may arise where the Crown has undertaken to act only in the best interests of an Aboriginal people. The Province submits that it owes the TRTFN no duty outside of these specific situations.

24 The Province's submissions present an impoverished vision of the honour of the Crown and all that it implies. As discussed in the companion case of *Haida, supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Abori-

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

ginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

25 As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), at p. 1119, *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.); *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 168. The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.

26 The federal government announced a comprehensive land claims policy in 1981, under which Aboriginal land claims were to be negotiated. The TRTFN submitted its land claim to the Minister of Indian Affairs in 1983. The claim was accepted for negotiation in 1984, based on the TRTFN's traditional use and occupancy of the land. No negotiation ever took place under the federal policy; however, the TRTFN later began negotiation of its land claim under the treaty process established by the B.C. Treaty Commission in 1993. As of 1999, the TRTFN had signed a Protocol Agreement and a Framework Agreement, and was working towards an Agreement in Principle. The Province clearly had knowledge of the TRTFN's title and rights claims.

27 When Redfern applied for project approval, in its efforts to reopen the Tulsequah Mine, it was apparent that the decision could adversely affect the TRTFN's asserted rights and title. The TRTFN claim Aboriginal title over a large portion of northwestern British Columbia, including the territory covered by the access road considered during the approval process. It also claims Aboriginal hunting, fishing, gathering, and other traditional land use activity rights which stood to be affected by a road through an area in which these rights are exercised. The contemplated decision thus had the potential to impact adversely the rights and title asserted by the TRTFN.

28 The Province was aware of the claims, and contemplated a decision with the potential to affect the TRTFN's asserted rights and title negatively. It follows that the honour of the Crown required it to consult and if indicated accommodate the TRTFN in making the decision whether to grant project approval to Redfern, and on what terms.

B. What was the Scope and Extent of the Province's Duty to Consult and Accommodate the TRTFN?

29 The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Haida, supra*, at para. 39). It will vary with the circumstances, but always requires mean-

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

ingful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.

30 There is sufficient evidence to conclude that the TRTFN have *prima facie* Aboriginal rights and title over at least some of the area that they claim. Their land claim underwent an extensive validation process in order to be accepted into the federal land claims policy in 1984. The Department of Indian Affairs hired a researcher to report on the claim, and her report was reviewed at several stages before the Minister validated the claim based on the TRTFN's traditional use and occupancy of the land and resources in question. In order to participate in treaty negotiations under the B.C. Treaty Commission, the TRTFN were required to file a statement of intent setting out their asserted territory and the basis for their claim. An Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. Nonetheless, the TRTFN's claim was accepted for negotiation on the basis of a preliminary decision as to its validity. In contrast to the *Haida* case, the courts below did not engage in a detailed preliminary assessment of the various aspects of the TRTFN's claims, which are broad in scope. However, acceptance of its title claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

31 The potentially adverse effect of the Ministers' decision on the TRTFN's claims appears to be relatively serious. The chambers judge found that all of the experts who prepared reports for the review recognized the TRTFN's reliance on its system of land use to support its domestic economy and its social and cultural life (at para. 70). The proposed access road was only 160 km long, a geographically small intrusion on the 32,000-km² area claimed by the TRTFN. However, experts reported that the proposed road would pass through an area critical to the TRTFN's domestic economy: see, for example, Dewhirst Report, R.R., Vol. I, at pp. 175, 187, 190 and 200; Staples Addendum Report, A.R., Vol. IV, at pp. 595-600, 604-5 and 629. The TRTFN was also concerned that the road could act as a magnet for future development. The proposed road could therefore have an impact on the TRTFN's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim.

32 In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion. While it is impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.

C. Did the Crown Fulfill its Duty to Consult and Accommodate the TRTFN?

33 The process of granting project approval to Redfern took three and a half years, and was conducted largely under the *Environmental Assessment Act*. As discussed above, the Act sets out a process of information gathering and consultation. The Act requires that Aboriginal peoples whose traditional territory includes the site of a reviewable project be invited to participate on a project committee.

34 The question is whether this duty was fulfilled in this case. A useful framework of events up to August 1st, 2000 is provided by Southin J.A. at para. 28 of her dissent in this case at the Court of Appeal. Members of the TRTFN were invited to participate in the Project Committee to coordinate review of the project proposal in

2004 CarswellBC 2654, 2004 SCC 74, [2004] B.C.W.L.D. 1304, 245 D.L.R. (4th) 193, 19 Admin. L.R. (4th) 165, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, [2005] 3 W.W.R. 403, [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 327 N.R. 133, 206 B.C.A.C. 132, 338 W.A.C. 132, REJB 2004-80382, J.E. 2004-2155

November 1994 and were given the original two-volume submission for review and comment: Southin J.A., at para. 39. They participated fully as Project Committee members, with the exception of a period of time from February to August of 1995, when they opted out of the process, wishing instead to address the issue through treaty talks and development of a land use policy.

35 The Final Project Report Specifications (the "Specifications") detail a number of meetings between the TRTFN, review agency staff and company representatives in TRTFN communities prior to February 1996: Southin J.A., at para. 41. Redfern and TRTFN met directly several times between June 1993 and February 1995 to discuss Redfern's exploration activities and TRTFN's concerns and information requirements. Redfern also contracted an independent consultant to conduct archaeological and ethnographic studies with input from the TRTFN to identify possible effects of the proposed project on the TRTFN's traditional way of life: Southin J.A., at para. 41. The Specifications document TRTFN's written and oral requirements for information from Redfern concerning effects on wildlife, fisheries, terrain sensitivity, and the impact of the proposed access road, of barging and of mine development activities: Southin J.A., at para. 41.

36 The TRTFN declined to participate in the Road Access Subcommittee until January 26, 1998. The Environmental Assessment Office appreciated the dilemma faced by the TRTFN, which wished to have its concerns addressed on a broader scale than that which is provided for under the Act. The TRTFN was informed that not all of its concerns could be dealt with at the certification stage or through the environmental assessment process, and assistance was provided to it in liaising with relevant decision makers and politicians.

37 With financial assistance the TRTFN participated in many Project Committee meetings. Its concerns with the level of information provided by Redfern about impacts on Aboriginal land use led the Environmental Assessment Office to commission a study on traditional land use by an expert approved by the TRTFN, under the auspices of an Aboriginal study steering group. When the first Staples Report failed to allay the TRTFN's concerns, the Environmental Assessment Office commissioned an addendum. The TRTFN notes that the Staples Addendum Report was not specifically referred to in the Recommendations Report eventually submitted to the Ministers. However, it did form part of Redfern's Project Report.

38 While acknowledging its participation in the consultation process, the TRTFN argues that the rapid conclusion to the assessment deprived it of meaningful consultation. After more than three years, numerous studies and meetings, and extensions of statutory time periods, the assessment process was brought to a close in early 1998. The Environmental Assessment Office stated on February 26 that consultation must end by March 4, citing its work load. The Project Committee was directed to review and sign off on the Recommendations Report on March 3, the same day that it received the last 18 pages of the report. Appendix C to the Recommendations Report notes that the TRTFN disagreed with the Recommendations Report because of certain "information deficiencies": Southin J.A., at para. 46. Thus, the TRTFN prepared a minority report that was submitted with the majority report to the Ministers on March 12. Shortly thereafter, the project approval certification was issued.

39 It is clear that the process of project approval ended more hastily than it began. But was the consultation provided by the Province nonetheless adequate? On the findings of the courts below, I conclude that it was.

40 The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the TRTFN were full participants in the assessment process (at para. 132). I would agree. The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required

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consultation with affected Aboriginal peoples.

41 The Act permitted the Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report. The TRTFN was at the heart of decisions to set up a steering group to deal with Aboriginal issues and a subcommittee on the road access proposal. The information and analysis required of Redfern were clearly shaped by TRTFN's concerns. By the time that the assessment was concluded, more than one extension of statutory time limits had been granted, and in the opinion of the project assessment director, "the positions of all of the Project Committee members, including the TRTFN had crystallized" (Affidavit of Norman Ringstad, at para. 82 (quoted at para. 57 of the Court of Appeal's judgment)). The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult.

42 As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982*, is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. 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.

43 The TRTFN in this case disputes the adequacy of the accommodation ultimately provided by the terms of the Project Approval Certificate. It argues that the Certificate should not have been issued until its concerns were addressed to its satisfaction, particularly with regard to the establishment of baseline information.

44 With respect, I disagree. Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road.

45 Project approval certification is simply one stage in the process by which a development moves forward. In *Haida*, the Province argued that although no consultation occurred at all at the disputed, "strategic" stage, opportunities existed for Haida input at a future "operational" level. That can be distinguished from the situation in this case, in which the TRTFN was consulted throughout the certification process and its concerns accommodated.

46 The Project Committee concluded that some outstanding TRTFN concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course. Further socio-economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers,

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therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if indicated, accommodate the TRTFN.

IV. Conclusion

47 In summary, I conclude that the consultation and accommodation engaged in by the Province prior to issuing the Project Approval Certificate for the Tulsequah Chief Mine were adequate to satisfy the honour of the Crown. The appeal is allowed. Leave to appeal was granted on terms that the appellants pay the party and party costs of the respondents TRTFN and Melvin Jack for the application for leave to appeal and for the appeal in any event of the cause. There will be no order as to costs with respect to the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd.

Appeal allowed.

Pourvoi accueilli.

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Wii'litswx v. British Columbia (Minister of Forests)

Wii'litswx, also known as Morris Derrick, Luuxhon, also known as Don Russell, Gwass Hlaam, also known as George Phillip Daniels, Malii, also known as Glen Williams, Haizimsque, also known as Edger Good, Watakhayetsxw, also known as Agatha Bright, on behalf of themselves and in their capacity as the Gitanyow Hereditary Chiefs and on behalf of all Gitanyow persons (Petitioners) and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Forests, the Ministers of Forests and W.I. (Bill) Warner (Respondents)

British Columbia Supreme Court

K. Neilson J.

Heard: January 14-18, 2008

Judgment: August 22, 2008

Docket: Vancouver S076420

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Counsel: Peter R. Grant, Jeff Huberman, Michael L. Ross for Petitioners

Paul J. Pearlman, Q.C., Erin K. Christie for Respondents

Subject: Public; Natural Resources; Civil Practice and Procedure; Constitutional; Property

Aboriginal law --- Aboriginal rights to natural resources — Aboriginal rights — Timber rights — Miscellaneous

Petitioners, who were Hereditary Chiefs of First Nation, sought judicial review of decision of Regional Director of Minister of Forests — Decision approved six forest licence (FL) replacements pursuant to s. 15 of Forest Act, which covered portions of First Nation's traditional territory — Petitioners alleged that Crown failed to adequately perform its duty to consult First Nation and accommodate its Aboriginal interests — Petitioners sought relief in nature of certiorari, mandamus and prohibition, as well as extensive declaratory relief — It was determined that overall offer of accommodation was not reasonable; relief sought could not be granted without further submissions — Scope of duty to consult and reach appropriate interim accommodation was broad, given strong claim to Aboriginal rights and title, and decision presented serious potential adverse effects on First Nation's interests — Crown failed to make proper preliminary assessment of scope and extent of its duty to accommodate — Crown chose to rely on inappropriate measures as accommodation — In particular, it misapprehended import of forestry accommodation agreement, erroneously viewing it as encompassing accommodation for decision to replace FLs — Crown failed to recognize that honour of Crown and s. 35 of Constitution Act, 1982 imposed constitutional duty to meaningfully consult and reach accommodation with respect to recognition of

2008 CarswellBC 1764, 2008 BCSC 1139, [2008] B.C.W.L.D. 6009, [2008] B.C.W.L.D. 6015, [2008] B.C.W.L.D. 6010, [2008] B.C.W.L.D. 6016, [2008] B.C.W.L.D. 6137, 38 C.E.L.R. (3d) 189, [2008] 4 C.N.L.R. 315, 80 Admin. L.R. (4th) 217, 171 A.C.W.S. (3d) 501

matrilineal units and their boundaries in strategic decision to replace FLs — Dismissing such recognition without discussion or explanation fell well below Crown's obligation to recognize and acknowledge distinctive features of First Nation's Aboriginal society, and reconcile those with Crown sovereignty.

Natural resources --- Timber — Timber licences — Judicial review

Petitioners, who were Hereditary Chiefs of First Nation, sought judicial review of decision of Regional Director of Minister of Forests — Decision approved six forest licence (FL) replacements pursuant to s. 15 of Forest Act, which covered portions of First Nation's traditional territory — Petitioners alleged that Crown failed to adequately perform its duty to consult First Nation and accommodate its Aboriginal interests — Petitioners sought relief in nature of certiorari, mandamus and prohibition, as well as extensive declaratory relief — It was determined that overall offer of accommodation was not reasonable; relief sought could not be granted without further submissions — Scope of duty to consult and reach appropriate interim accommodation was broad, given strong claim to Aboriginal rights and title, and decision presented serious potential adverse effects on First Nation's interests — Crown failed to make proper preliminary assessment of scope and extent of its duty to accommodate — Crown chose to rely on inappropriate measures as accommodation — In particular, it misapprehended import of forestry accommodation agreement, erroneously viewing it as encompassing accommodation for decision to replace FLs — Crown failed to recognize that honour of Crown and s. 35 of Constitution Act, 1982 imposed constitutional duty to meaningfully consult and reach accommodation with respect to recognition of matrilineal units and their boundaries in strategic decision to replace FLs — Dismissing such recognition without discussion or explanation fell well below Crown's obligation to recognize and acknowledge distinctive features of First Nation's Aboriginal society, and reconcile those with Crown sovereignty.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter

Petitioners, who were Hereditary Chiefs of First Nation, sought judicial review of decision of Regional Director of Minister of Forests — Decision approved six forest licence replacements pursuant to s. 15 of Forest Act, which covered portions of First Nation's traditional territory — Petitioners alleged that Crown failed to adequately perform its duty to consult First Nation and accommodate its Aboriginal interests — Petitioners sought relief in nature of certiorari, mandamus and prohibition, as well as extensive declaratory relief — It was determined that overall offer of accommodation was not reasonable; relief sought could not be granted without further submissions — Question of whether Crown properly assessed scope of its duty to consult and accommodate involved issues of both law and fact — Standard of review was reasonableness — Assessment of whether process of consultation was reasonable involved two aspects, first of which was procedural adequacy — Second aspect involved examination of whether consultation was meaningful — This was judged by standard of review of reasonableness.

Administrative law --- Practice and procedure — Miscellaneous

Petitioners, who were Hereditary Chiefs of First Nation, sought judicial review of decision of Regional Director of Minister of Forests — Decision approved six forest licence (FL) replacements pursuant to s. 15 of Forest Act, which covered portions of First Nation's traditional territory — Petitioners alleged that Crown failed to adequately perform its duty to consult First Nation and accommodate its Aboriginal interests — Petitioners sought relief in nature of certiorari, mandamus and prohibition, as well as extensive declaratory relief — It was determined that overall offer of accommodation was not reasonable; relief sought could not be granted without further submissions — It was not clear that orders sought for certiorari and prohibition could be granted without infringing agreement reached between First Nation and licensees, and affecting rights of third parties not involved in proceeding — If First Nation intended to pursue its claims for certiorari and prohibition, further submissions were wanted, to clarify impact of such orders on replacement FLs in view of

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agreement made by First Nation with licensees — As to claim for mandamus, submissions were wanted regarding what such relief would add to Crown's constitutional duty to consult and accommodate — It would be helpful to have submissions that were directed to declaratory relief sought, in context of findings made in this proceeding.

Aboriginal law --- Constitutional issues — Constitution Act, 1982.

The petitioners were the Hereditary Chiefs of a First Nation in British Columbia. The petitioners sought judicial review of a decision of the Regional Director of the Minister of Forests. The decision approved six forest licence (FL) replacements pursuant to s. 15 of the Forest Act, which covered portions of the First Nation's traditional territory. An FL was a contract between a licensee and the Crown giving the licensee the right to harvest timber from and build roads in public forests over a specified term, in exchange for meeting the Crown's forest management objectives and paying stumpage fees. The petitioners alleged that the Crown failed to adequately perform its duty to consult the First Nation and accommodate its Aboriginal interests. The petitioners sought relief in the nature of certiorari, mandamus and prohibition, as well as extensive declaratory relief.

Held: The overall offer of accommodation with respect to replacement of the FLs was not reasonable. The relief sought could not be granted without further submissions from the parties.

The question of whether the Crown properly assessed the scope of its duty to consult and accommodate involved issues of both law and fact. The standard of review was reasonableness. The assessment of whether the process of consultation was reasonable involved two aspects, the first of which was procedural adequacy. The second aspect involved an examination of whether the consultation was meaningful. This was judged by a standard of review of reasonableness.

The scope of the Crown's duty to consult and reach appropriate interim accommodation was broad, given the First Nation's strong claim to Aboriginal rights and title. The decision to replace the FLs presented serious potential adverse effects on the First Nation's interests. Apart from concessions made with respect to the First Nation's rights under a recent decision of the Supreme Court of Canada, there was essentially no change in the Crown's position between the Regional Director's proposal of August 2006 and his decision in March 2007.

The Crown failed to make a proper preliminary assessment of the scope and extent of its duty to accommodate. Nothing indicated that it attempted to make that assessment at the outset of the consultation. The Regional Director's assessment at the end of the process unreasonably minimized the strength of the First Nation's claim and the potential adverse impact of the FL replacement decision on its interests. This led the Crown to underestimate its obligation to understand and address the First Nation's concerns in the course of the consultation.

The Crown chose to rely on inappropriate measures as accommodation. In particular, it misapprehended the import of a forestry accommodation agreement, erroneously viewing it as encompassing accommodation for the decision to replace the FLs. The Crown conducted the consultation process under the mistaken impression that adequate accommodation for the decision to replace the FLs was already in place. There was premature foreclosure of meaningful discussion of the First Nation's concerns.

The Crown failed to recognize that the honour of the Crown and s. 35 of the Constitution Act, 1982 imposed a constitutional duty to meaningfully consult and reach accommodation with respect to the recognition of matrilineal units and their boundaries in the strategic decision to replace the FLs. Dismissing such recognition without discussion or explanation fell well below the Crown's obligation to recognize and acknowledge the distinctive features of the First Nation's Aboriginal society, and reconcile those with Crown sovereignty. The Crown's treatment of the First Nation's silviculture demonstrated a similar failure to understand the scope of what was required by the honour of the Crown.

2008 CarswellBC 1764, 2008 BCSC 1139, [2008] B.C.W.L.D. 6009, [2008] B.C.W.L.D. 6015, [2008] B.C.W.L.D. 6010, [2008] B.C.W.L.D. 6016, [2008] B.C.W.L.D. 6137, 38 C.E.L.R. (3d) 189, [2008] 4 C.N.L.R. 315, 80 Admin. L.R. (4th) 217, 171 A.C.W.S. (3d) 501

It was not clear that the orders sought for certiorari and prohibition could be granted without infringing an agreement reached between the First Nation and the licensees, and affecting the rights of third parties not involved in this proceeding. If the First Nation intended to pursue its claims for certiorari and prohibition, further submissions were wanted, to clarify the impact of such orders on the replacement FLs in view of the agreement made by the First Nation with the licensees. As to the claim for mandamus, submissions were wanted regarding what such relief would add to Crown's constitutional duty to consult and accommodate. It would be helpful to have submissions that were directed to the declaratory relief sought, in the context of the findings made in this proceeding.

Cases considered by *K. Neilson J.*:

Delgamuukw v. British Columbia (1997), 220 N.R. 161, 153 D.L.R. (4th) 193, [1997] 3 S.C.R. 1010, 99 B.C.A.C. 161, 162 W.A.C. 161, 1997 CarswellBC 2358, 1997 CarswellBC 2359, [1998] 1 C.N.L.R. 14, [1999] 10 W.W.R. 34, 66 B.C.L.R. (3d) 285 (S.C.C.) — considered

Gitanyow First Nation v. British Columbia (Minister of Forests) (2004), 2004 BCSC 1734, 38 B.C.L.R. (4th) 57, 2004 CarswellBC 3064 (B.C. S.C.) — considered

Gitksan Houses v. British Columbia (Minister of Forests) (2002), 2002 BCSC 1701, 10 B.C.L.R. (4th) 126, 2002 CarswellBC 2928, 48 Admin. L.R. (3d) 225, (sub nom. *Gitksan First Nation v. British Columbia (Minister of Forests)*) [2003] 2 C.N.L.R. 142 (B.C. S.C.) — considered

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — followed

Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests) (2005), 2005 BCSC 697, 2005 CarswellBC 1121, [2005] 3 C.N.L.R. 74, 33 Admin. L.R. (4th) 123 (B.C. S.C.) — considered

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) — referred to

Mitchell v. Minister of National Revenue (2001), 2001 SCC 33, 2001 CarswellNat 873, 2001 CarswellNat 874, (sub nom. *Mitchell v. M.N.R.*) 83 C.R.R. (2d) 1, 269 N.R. 207, (sub nom. *Mitchell v. M.N.R.*) 199 D.L.R. (4th) 385, (sub nom. *Mitchell v. M.N.R.*) [2001] 3 C.N.L.R. 122, 206 F.T.R. 160 (note), (sub nom. *Mitchell v. M.N.R.*) [2001] 1 S.C.R. 911, [2002] 3 C.T.C. 359 (S.C.C.) — considered

Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management) (2005), 28 R.P.R. (4th) 165, 37 B.C.L.R. (4th) 309, 209 B.C.A.C. 219, 345 W.A.C. 219, 2005 BCCA 128, 2005 CarswellBC 472, [2005] 6 W.W.R. 429, [2005] 2 C.N.L.R. 212, 251 D.L.R. (4th) 717 (B.C. C.A.) — considered

R. v. Bernard (2005), 15 C.E.L.R. (3d) 163, (sub nom. *R. v. Marshall*) 235 N.S.R. (2d) 151, (sub nom. *R. v. Marshall*) 747 A.P.R. 151, (sub nom. *R. v. Marshall*) [2005] 2 S.C.R. 220, 255 D.L.R. (4th) 1, [2005] 3 C.N.L.R. 214, 198 C.C.C. (3d) 29, (sub nom. *R. v. Marshall*) 287 N.B.R. (2d) 206, (sub nom. *R. v. Marshall*) 750 A.P.R. 206, 2005 CarswellINS 317, 2005 CarswellINS 318, 2005 SCC 43, 336 N.R. 22 (S.C.C.) — considered

R. v. Sappier (2006), 355 N.R. 1, 274 D.L.R. (4th) 75, 2006 SCC 54, 2006 CarswellNB 676, 2006 CarswellNB 677,

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[2006] 2 S.C.R. 686, 50 R.P.R. (4th) 1, [2007] 1 C.N.L.R. 359, 799 A.P.R. 199, 214 C.C.C. (3d) 161, 309 N.B.R. (2d) 199 (S.C.C.) — followed

R. v. Vanderpeet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — considered

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91(24) — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

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

Generally — referred to

s. 7 — referred to

s. 8 — referred to

s. 14 — referred to

s. 15 — referred to

s. 15(1.1) [en. 2003, c. 31, s. 6(a)] — considered

s. 15(1.2) [en. 2003, c. 31, s. 6(a)] — considered

s. 15(2) — referred to

s. 15(2)(c) — considered

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s. 15(2)(d) — considered

s. 15(6) — referred to

s. 35 — referred to

Forest and Range Practices Act, S.B.C. 2002, c. 69

Generally — referred to

s. 3 — referred to

Land Act, R.S.B.C. 1996, c. 245

Generally — referred to

Regulations considered:

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

Forest Regions and Districts Regulation, B.C. Reg. 123/2003

Generally — referred to

Forest and Range Practices Act, S.B.C. 2002, c. 69

Forest Planning and Practices Regulation, B.C. Reg. 14/2004

Generally — referred to

s. 4 — referred to

s. 10 — referred to

Government Actions Regulation, B.C. Reg. 582/2004

Generally — referred to

Land Act, R.S.B.C. 1996, c. 245

Land Use Objectives Regulation, B.C. Reg. 357/2005

Generally — referred to

PETITION by Hereditary Chiefs of First Nation for judicial review of decision approving forest licence replacements.

K. Neilson J.:

Introduction

1 The petitioners are the Hereditary Chiefs of the Gitanyow Nation ("Gitanyow"). They bring this petition on behalf

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of Gitanyow for judicial review of the decision of the respondent Mr. W.I. (Bill) Warner, Regional Director of the respondent Minister of Forests ("MoF"), approving six forest licence ("FL") replacements pursuant to s. 15 of the *Forest Act*, R.S.B.C. 1996, c. 157, which cover portions of Gitanyow traditional territory. The petitioners allege that, in the course of making that decision, the respondent Crown failed to adequately perform its duty to consult with Gitanyow and accommodate its aboriginal interests, as mandated by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) [*Haida*], and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.) [*Taku*]. They accordingly seek relief in the nature of *certiorari*, *mandamus*, and prohibition, as well as related declaratory relief.

2 The Crown acknowledges that it had a constitutional duty to meaningfully consult with Gitanyow in good faith, and to seek to accommodate its asserted aboriginal rights and title, in the course of the decision to replace the FLs. The Crown says that Mr. Warner and the MoF, on its behalf, engaged in a reasonable process of consultation, and provided interim accommodations appropriate to Gitanyow's interests. They argue that the petition should accordingly be dismissed.

3 There is no dispute between the parties as to the applicable law, and little disagreement about the facts. The sole issue is the adequacy of the consultation and the accommodations reached in the course of the Crown's decision to replace the FLs.

The Applicable Law and the Issues in This Case

4 The law governing the Crown's duty to consult and accommodate, and the standard for judicial review of that duty, define the issues in this case.

The Duty to Consult and Accommodate

5 In *Haida*, at para. 25, Chief Justice McLachlin summarized the historical foundation for this duty:

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.

6 Section 35 of the *Constitution Act* recognizes and affirms the constitutional character of aboriginal rights. In *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.) at para. 31, (1996), 23 B.C.L.R. (3d) 1 (S.C.C.) [*Vanderpeet*], Chief Justice Lamer described the import of s. 35:

31 More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

7 Thus, the court's approach to the Crown's s. 35 obligations is informed by the unique nature of the constitutional rights that this provision is designed to protect. As Lamer C.J.C. explained in *Vanderpeet*, s. 35 rights are different from

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Charter rights as they are held solely by aboriginal members of Canadian society. They arise from the existence of distinctive aboriginal communities that occupied the land for centuries before the arrival of Europeans (paras. 19 and 33). Aboriginal rights arise not only from the prior occupation of land, but also from the prior social organization and distinctive cultures of aboriginal peoples who occupied that land (para. 74). The process of consultation and accommodation is directed toward the ultimate goal of reconciliation of those aboriginal rights with Crown sovereignty. In that process, the honour of the Crown requires it to recognize and acknowledge the distinctive features of aboriginal societies, since it is those features that must be reconciled with Crown sovereignty (para. 57). The Court expressed similar views in *Mitchell v. Minister of National Revenue*, 2001 SCC 33 (S.C.C.) at para. 12, [2001] 1 S.C.R. 911 (S.C.C.):

Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies.

8 The duty to engage in meaningful consultation arises when the Crown has knowledge, real or constructive, of the potential existence of aboriginal rights or aboriginal title, and contemplates conduct that may adversely affect them. The scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the case for the existence of the rights or title, and the seriousness of the potentially adverse effect upon those rights or title. Exactly what the honour of the Crown may require falls within a spectrum defined by that assessment. Where the potential claims to aboriginal rights and title have not yet been proven, the honour of the Crown nevertheless requires it to respect these interests and, depending on the circumstances, to consult and reasonably accommodate them pending resolution of the claim. Each case must be approached individually and flexibly, with the focal question being what is required to maintain the honour of the Crown and to effect reconciliation with respect to the interests at stake (*Haida*, at paras. 35, 38-39, 43-45).

9 Good faith on both sides is required. There is no duty to agree. The process does not give aboriginal groups a veto over what can be done with the land pending final proof of their claim. The Crown may continue to manage the resource in question pending claims resolution, but within the bounds of maintaining the honour of the Crown. The commitment is to a meaningful and reasonable process of consultation (*Haida*, at paras. 27, 42, and 48).

10 Meaningful consultation may reveal a duty to accommodate aboriginal interests through an amendment to Crown policy or practice, in an attempt to resolve conflicting interests and move toward the ultimate goal of reconciliation. Where the aboriginal claim is strong and the potential adverse consequences of government action are significant to the claimed right or title, the honour of the Crown may require accommodation to avoid irreparable harm or to minimize the infringement, pending final resolution of the claims. Inherent in this process is a need to reasonably balance aboriginal concerns over the potential impact of the decision with other societal interests (*Haida*, at paras. 47, 49-50). Responsiveness is a key requirement of both consultation and accommodation (*Taku*, at para. 25).

The Standard of Review

11 In *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 (B.C. S.C.) at para. 94, (2005), 33 Admin. L.R. (4th) 123 (B.C. S.C.) [*Huu-Ay-Aht First Nation*], Madam Justice Dillon described the court's role in a judicial review of the Crown's duty to consult and accommodate:

94 *Haida* ... and *Taku River* ... established that the principle of the honour of the Crown requires the Crown to consult and, if necessary, accommodate Aboriginal peoples prior to proof of asserted Aboriginal rights and title. This is a corollary of s. 35 of the *Constitution Act, 1982*, in which reconciliation of Aboriginal and Crown sovereignty implies a continuing process of negotiation which is different from the administrative duty of fairness that is triggered

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by an administrative decision that affects rights, privileges, or interests (*Haida* at paras. 28-32). The obligation is a free standing enforceable legal and equitable duty (*Haida Nation v. British Columbia (Minister of Forests)* (2002), 99 B.C.L.R. (3d) 209 at para. 55, 2002 BCCA 147 [*Haida Nation* (2002)]; (2004), 34 B.C.L.R. (4th) 280, 2004 BCSC 1320 at para. 73 [*Squamish*]). The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution (*Haida* at para. 60). In its review, the court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process (*Taku* at para. 24). It is not a question, therefore, of review of a decision but whether a constitutional duty has been fulfilled (*Gitxsan* [*infra*, at para. 65]...).

12 In *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 (B.C. C.A.) at paras. 17-19, (2005), 37 B.C.L.R. (4th) 309 (B.C. C.A.), Southin J.A. expressed a similar view, observing that claims alleging that the Crown has failed to consult and accommodate aboriginal interests are "upstream" of the statutes under which ministerial powers are exercised, and address not the lawful exercise of powers conferred by statute, but an overarching constitutional imperative.

13 Thus, in this case, it is not Mr. Warner's decision to replace the FLs that is the subject of judicial review. It is the Crown's conduct with respect to fulfillment of its duty to consult Gitanyow and to accommodate its interests in the course of making that decision.

14 In *Haida*, at paras. 60-63, the Court discussed the applicable standard of review where the challenge to government conduct is based on allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, and provided the following guidelines.

15 The existence or extent of the duty to consult or accommodate is a question of law, in the sense that it defines a legal duty. As set out above, it is based on the Crown's assessments of the strength of the claim, and the potential seriousness of the impact of the infringement. Those assessments are questions of law to be judged on the standard of correctness. However, in that they are typically premised on an assessment of the facts, a degree of deference to the findings of fact of the decision maker may be appropriate. Thus, to the extent that this issue is one of pure law and can be isolated from issues of fact, the standard of review is correctness. However, where the two are inextricably entwined, the standard of review will likely be reasonableness.

16 The adequacy of the consultation process is governed by a standard of reasonableness. There is some inconsistency in the authorities, however, as to the proper focus of that analysis. In *Haida*, at para. 63, the Court indicated that the focus should not be on the outcome, but on the process of consultation and accommodation. However, in *Gitanyow First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734 (B.C. S.C.) at para. 63, (2004), 38 B.C.L.R. (4th) 57 (B.C. S.C.) [*Gitxsan No. 2*] Tysse J., in applying the principles from *Haida* and *Taku*, took what appears to be an opposing view, holding that the focus must be on the overall result:

63 In assessing the adequacy of the Crown's efforts to fulfil its duty to consult and accommodate, the court will usually look at the overall offer of accommodation made by the Crown and weigh it against the potential impact of the infringement on the asserted Aboriginal interests having regard to the strength of those asserted interests. The court will not normally focus on one aspect of the negotiations because the process of give and take requires giving in some areas and taking in other areas. It is the overall result which must be assessed.

17 In my view, this apparent conflict is reconciled by the approach set out at paras. 39-44 of *Taku*. There, the Court followed a two stage analysis, each stage being governed by a standard of reasonableness. First, it addressed the adequacy of the process of consultation. Second, having found it to be reasonable, it examined the end result by considering

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whether that consultation had identified a duty to accommodate aboriginal concerns, and the adequacy of any resulting accommodations.

The issues in this case

18 Based on the legal principles set out above, the following issues must be determined here:

a) did the Crown correctly or reasonably assess the extent of its duty to consult and accommodate Gitanyow interests in the course of the FL replacements by:

i) correctly or reasonably assessing the strength of Gitanyow's claim to aboriginal title and rights; and

ii) correctly or reasonably assessing the potential seriousness of the impact of the FL replacements on Gitanyow's aboriginal title and rights?

b) was the consultation process reasonable?

c) did the Crown reasonably accommodate Gitanyow's aboriginal interests?

19 I will set out the background of the parties and the chronology of their dealings in the course of the FL replacement decisions before returning to these issues.

The Parties — Background, Statutory Context, and Earlier Litigation

Gitanyow

20 The Gitanyow people are "Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*, and are aboriginal people of Canada within the meaning of s. 35 of the *Constitution Act*. Gitanyow asserts aboriginal rights, title, and governance to approximately 6,500 square miles of territory in north-western British Columbia on the basis that it has traditionally owned, occupied, and used that territory.

21 Gitanyow provided this historical background, which was not challenged by the Crown. Gitanyow is organized into eight matrilineal units, collectively called the Huwilp, and individually called Wilps, or Houses. Each Wilp has its own territory, and these collectively form Gitanyow traditional territory. The Huwilp are the social, political, and governing units of Gitanyow. They hold and exercise rights and title to the Gitanyow traditional territory on behalf of the Gitanyow people. Every Gitanyow person belongs to a Wilp. By virtue of this membership, each person has rights to the territory and resources owned by his or her Wilp, under the direction of the Hereditary Chiefs of each Wilp.

22 Each Wilp is identified in part by a unique Ayuuk, or crest, and Getimgan, or totem poles. These crests and totem poles demonstrate each Wilp's relationship to its territories. Each Wilp has a Hereditary Chief, who holds daxgyet, or power and authority of the Wilp, over its territories. The Hereditary Chiefs traditionally exercised their daxgyet through the management of their Wilp's lands and resources, and demonstrated their power and authority in feasting, gift-giving, and maintenance of their crests through the raising of totem poles.

23 There is evidence of Gitanyow occupation and use of resources on Gitanyow traditional territory since well before the arrival of the Europeans. This has been documented by the Gitanyow Adaawk, or oral histories, as well as anthropological papers based on information from Gitanyow Chiefs and Elders, and other authoritative research. Gitanyow's traditional uses of its territory have included fishing, hunting, habitation, trapping, worship and gathering re-

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sources for food, medicinal, cultural and ceremonial purposes. Each Wilp traditionally built cabins throughout its territory to facilitate access to its lands and resources.

24 Gitanyow was accepted into the Federal Treaty Negotiation Process in 1980. It has participated in the British Columbia Treaty Process since 1994, but since 1996 the process has been stalled at stage four, which is the negotiation of an agreement in principle.

25 The Crown, through the MoF and its predecessors, has permitted logging on Gitanyow traditional territory for many years under varying regimes. Gitanyow's rights to the timber resources on its traditional territory has been a long-standing source of contention between the parties. The precise amount of timber that has been removed from the areas covered by Gitanyow traditional territory is disputed. Nevertheless, there is no question that substantial logging and road building have occurred on those lands, and that these activities have had a significant impact on the sustainability of timber resources, and on other aspects of Gitanyow tradition and culture. A Landscape Unit Plan developed for Gitanyow traditional territory in 2005 described this:

In the past several decades, clearcut timber harvesting operations have impacted much of Gitanyow lands, resulting in a loss of numerous traditional use sites, damaging or altering many areas where traditional uses were conducted, and converting structurally diverse mature and old growth forests to structurally simple young forests. As a result of the conversion from mature and old growth forests to young growth forest, large areas of habitats required to support plants, birds, fish, animals that Gitanyow Huwilp members traditionally used for sustenance and cultural purposes have been lost to Gitanyow use for many decades into the future. Therefore, on those lands, the traditional use can no longer be conducted.

Gitanyow Huwilp members are concerned that timber harvesting will continue to alter the forest and stream habitats, thereby changing forest conditions required to produce the plants, animals, birds, and fish that are necessary for Gitanyow traditional uses.

26 Logging activity has impacted other aspects of Gitanyow culture as well. It has destroyed the Wilp cabins. Removal of resources has prevented the Hereditary Chiefs from carrying out their duties under Gitanyow Ayookxw, or law, to manage their Wilp territories and resources to ensure future sustainability. As well, they have been unable to draw on these resources to maintain their Wilp culture and traditional activities, and instead must use personal funds for these purposes. Gitanyow say that this has caused not only financial hardship, but pain and shame among its people.

The Legislative Framework and the Crown

27 When the present dispute between the parties arose, the forest industry in British Columbia was governed by the *Forest Act*, R.S.B.C. 1996, c. 31 and the *Forest and Range Practices Act*, S.B.C. 2003, c. 53 ("*FRPA*"). The former dealt with forest use and administration, including licence issue and replacement. The latter dealt with operational aspects of the industry, including logging practices, planning and protection. Both were initially administered by the MoF and, since March 30, 2006, by the Ministry of Forests and Range. Since the named respondent in this proceeding is the Minister of Forests, I have referred to both Ministries collectively as the MoF throughout these reasons.

28 The *Forest Regions and Districts Regulation*, B.C. Reg. 123/2003, enacted under the *Forest Act*, divides the province geographically into three forest regions. Gitanyow traditional territory is located in the Northern Interior Forest Region, which is managed by the respondent, Mr. Warner, as the Regional Director. Each region is in turn divided into a number of forest districts. Gitanyow traditional territory lies in the Skeena Stikine District, which is managed by a District Manager.

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29 The forest resources in each district are in turn divided into timber supply areas ("TSAs") under s. 7 of the *Forest Act*, and tree farm licence areas ("TFLAs") under s. 35 of that *Act*. Gitanyow traditional territory, and the FLs that are the focus of this case, are situated within the Cranberry/Kispiox and Nass TSAs.

30 The difference between a TSA and a TFLA is exclusivity of harvest. A holder of a tree farm licence ("TFL") has the exclusive right to harvest timber from the associated TFLA in accordance with the annual allowable cut ("AAC") attached to the licence. Holders of other AAC-based licences, including FLs, must share the total AAC for the TSA identified in their licences. The AAC is set by the Chief Forester at least every five years through a process called the timber supply review ("TSR"), pursuant to s. 8 of the *Forest Act*. In the case of FLs, the District Manager apportioned the AAC for the TSA among the licensees.

31 An FL is a contract between a licensee and the Crown that gives the licensee the right to harvest timber from and build roads in public forests over a specified term, in exchange for meeting the Crown's forest management objectives and paying stumpage fees. Its terms are largely dictated by s. 14 of the *Forest Act*. An FL is issued for a specific TSA or TFLA for up to 20 years, and must specify an AAC.

32 Section 15 of the *Forest Act* provides a procedure for offering replacement FLs to licensees for a term of 15 years. Sections 15(1.1) and (1.2) impose a time frame for the replacement process. In years four through eight of a licence, a replacement offer may be made during the first six months of each licence year after first giving at least six months' notice of intent. If no replacement offer has been made during the first eight years of an FL, it must be made in the first half of the ninth licence year.

33 Mr. Warner was the MoF employee in charge of FL replacements in the Northern Interior Forest Region. The focus of this case is the process of consultation and accommodation that preceded his decision of February 28, 2007 to replace six FLs that overlapped Gitanyow traditional territory. The licensees, licence numbers, TSA location, and deadlines for replacement under s. 15(1.1) of the *Forest Act* were:

Licence date	Forest Licence Number	Licensee	Timber Supply Area	Deadline for Offer under s. 15(1.1)	Effective Date of the Replaced FL
Sept. 1, 1998	A16831	Gitxsan Forest Enterprises Inc.	Kispiox	February 28, 2007	September 1, 2007
Sept. 1, 1998	A16832	Bell Pole Canada Inc.	Kispiox	February 28, 2007	September 1, 2007
Nov. 30, 1999	A16833	Kitwanga Mills Ltd.	Kispiox	May 31, 2007	December 1, 2007
Nov. 15, 2000	A16882	West Fraser Mills Ltd.	Nass	May 14, 2007	November 15, 2007
Nov. 15, 2000	A16884	Canada Resurgence Developments Ltd.	Nass	May 14, 2007	November 15, 2007
Oct. 1, 1998	A16886	Sim Gam Forest Corporation	Nass	March 31, 2007	October 1, 2007

34 FL A16831, held by Gitxsan Forest Enterprises Inc., became the subject of another proceeding and will not be

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considered further here. A seventh FL that overlapped Gitanyow traditional territory was surrendered and not offered for a replacement.

35 While an FL gives the licensee a right to harvest an annual volume of timber in accordance with its allocated portion of the AAC for its TSA, the licensee cannot log until it has complied with two operational requirements overseen by the District Manager. First, the licensee must prepare and receive approval for a forest stewardship plan ("FSP") under s. 3 of the *FRPA*. The FSP specifies how the licensee will meet various objectives established by the government under the *FRPA* and the *Forest Planning and Practices Regulations*, B.C. 14/2004 ("*FPPR*"). Sections 4 and 10 of the *FPPR* include guidelines to be used in evaluating objectives related to aboriginal rights. I will return to those later in these Reasons. Second, once the FSP has been approved, the licensee must apply to the District Manager to be issued cutting permits. These specify the exact area and volume of permitted harvest.

36 A licensee must also meet silviculture obligations in accord with the requirements of the *FRPA*, applicable regulations, and its approved FSP. Failure to do so may result in a variety of sanctions, including substantial fines, criminal penalties, and/or a suspension of harvesting rights. Moreover, under s. 15(2) of the *Forest Act*, if a licensee fails to perform these obligations, the MoF may decline to offer a replacement FL until the obligations are performed, or may offer an FL replacement with special conditions.

Litigation History between the Parties

37 In the years preceding these FL replacements, logging on Gitanyow traditional territory had a troubled history. There were numerous changes and difficulties among the companies that held the FLs. In the last 15 years, five companies had held the principal FLs, and each had encountered financial difficulties, resulting in receivership or dependency on government assistance. As a result, some licensees overharvested timber and failed to fulfill their silviculture obligations. These events led to litigation between the parties on two previous occasions, in 2002 and 2004.

38 In 2002, Gitanyow and two other First Nations with traditional territories in the northwest of this province brought a judicial review application challenging the decision of the MoF to consent to the change of control of Skeena Cellulose Inc. ("Skeena"), a forest company that held TFLs and FLs covering lands over which the petitioners asserted aboriginal title and aboriginal rights. The change of control was brought about by Skeena's financial difficulties. The petitioners alleged that the Crown had failed to conduct meaningful consultation, or attempt to accommodate their concerns. The petition was heard by Tysoe J. whose reasons are found at *Gitxsan Houses v. British Columbia (Minister of Forests)*, 2002 BCSC 1701, 10 B.C.L.R. (4th) 126 (B.C. S.C.), ["*Gitxsan No. 1*"].

39 At paras. 49-53, Tysoe J. assessed the evidence put forward by Gitanyow in support of its claim of aboriginal title and rights, which appears to have been essentially the same material as that before me. At paras. 69-75, he provided what he described as a "preliminary general assessment" of the strength of the petitioners' claims on the affidavits before him, but made it clear that a final determination of their claims for aboriginal title and rights should be left for trial. In that context, he found that Gitanyow had a good *prima facie* claim of aboriginal title, which he equated with reasonable probability, and a strong *prima facie* claim of aboriginal rights, which he equated with substantial probability, with respect to at least part of the areas claimed by it that fell within the land covered by Skeena's TFLs and FLs. His limitation to "at least part of the areas claimed" was based solely on the fact that there were overlapping claims among the petitioners to parts of the same territories.

40 *Gitxsan No. 1* preceded the decisions of the Supreme Court of Canada in *Haida* and *Taku*. Relying primarily on the decisions of the B.C. Court of Appeal in those cases, Tysoe J. found at paras. 86 and 87 that each of the petitioning First Nations had established a *prima facie* infringement of aboriginal title or rights giving rise to a duty on the MoF to

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consult them before agreeing to the change of control of Skeena, and that the MoF had failed to engage in meaningful consultation, or attempt to accommodate the First Nations' concerns. While he declined to set aside the MoF's decision, he granted declaratory relief with respect to the failure to consult, to allow the parties to undertake a proper process of consultation and accommodation, with liberty to bring the matter back before the court for further directions or declarations.

41 The Crown says that since *Gitxsan No. 1* it has recognized its duty to consult with Gitanyow and reach appropriate accommodation with respect to forest operations conducted in Gitanyow traditional territory. Gitanyow, however, was not satisfied with the level of consultation and accommodation from the Crown and, in 2004, brought a second application before Mr. Justice Tysoe, again seeking to quash the decision that permitted a change in control of Skeena Cellulose Inc.: *Gitxsan No. 2*.

42 Tysoe J. reviewed the course of dealings between the parties since his first decision, including their negotiations, related legislative initiatives, and an unsuccessful attempt to negotiate a five-year Forest and Range Agreement under the *FRPA*. Such agreements are typically intended to provide interim economic and other accommodation while treaty negotiations are ongoing, in exchange for the First Nation's agreement that the Crown had fulfilled its duty to consult and seek interim accommodation for the term of the agreement. He outlined four major areas of disagreement between the parties: revenue sharing, consultation in advance, forest tenure, and joint planning.

43 With respect to revenue sharing, Mr. Justice Tysoe observed that under the proposed Forest and Range Agreement, the Crown was offering an economic benefit based on \$500 a year for each Gitanyow person registered with the Department of Indian and Northern Affairs. This would provide an annual payment of \$340,000 to Gitanyow. Gitanyow took the position that economic accommodation should instead be based on volume of timber harvested from the Gitanyow traditional territory, or Wilp membership, as in treaty negotiations.

44 With respect to joint planning, Mr. Justice Tysoe noted that Gitanyow wanted to be involved in joint planning of strategic higher level decisions. While the Crown expressed interest in this, and there was a draft Memorandum of Understanding that gave some suggestion that joint preparation of a sustainable resource management plan ("SRMP") might be undertaken, the Crown said it presently had no funds to support a planning initiative in Gitanyow traditional territory. It did, however, invite Gitanyow to participate in a less formal joint planning exercise in the Cranberry/Kispiox TSA. Gitanyow rejected this as not meaningful.

45 Tysoe J. also noted particular problems with respect to the failure of Buffalo Head Resources Ltd., originally a subsidiary of Skeena, to honour its silviculture obligations. Buffalo Head and its successors hold FL A16884, one of the FLs replaced by Mr. Warner and at issue in this case.

46 Tysoe J. examined these circumstances in the context of the recent decisions of the Supreme Court of Canada in *Haida* and *Taku*. At para. 57, he offered several non-binding observations to assist the parties if they chose to continue negotiation of a Forest and Range Agreement. At para. 65, he concluded that although significant progress had been made since his earlier decision, the Crown had not yet fulfilled its duty of consultation and accommodation. He again declined to quash or set aside the MoF's consent to the change of control of Skeena, however, as the Crown had demonstrated a willingness to consult with Gitanyow and accommodate their interests. He granted further declaratory relief that confirmed that the Crown had not yet provided meaningful and adequate consultation and accommodation, with liberty to apply to the court with respect to further questions or relief.

Chronology of Consultation Over the Replacement Forest Licences

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47 After the decision in *Gitxsan No. 2*, negotiations continued between Gitanyow and MoF representatives in an attempt to reach some form of a forestry accommodation agreement. Gitanyow's chief negotiator in these discussions was the petitioner Malii, who is the Hereditary Chief of Malii Wilp, and is also known as Glen Williams.

48 These discussions centred on four main concerns put forward by Gitanyow: recognition of Gitanyow aboriginal rights and title; sustainability of forest resources within Gitanyow traditional territory, including reforestation and silviculture; implementation of joint land use planning; and economic accommodation through revenue sharing or other means. While negotiations continued, the Crown undertook several new initiatives in an effort to respond to these concerns.

49 First, the joint land use planning initiative progressed. In late 2004, the MoF invited Gitanyow to participate in a joint landscape level planning exercise in the Cranberry/Kispiox TSA as a means of accommodating its interests through joint resource planning for its traditional territory. The stated goal was to integrate Gitanyow cultural heritage values and traditional uses with other values on the lands, and use that information in planning for future timber harvesting.

50 Representatives of the MoF and Gitanyow participated in the plans to develop a landscape unit plan ("LUP") for the Cranberry/Kispiox TSA. The MoF retained a consultant to prepare a draft LUP, which was completed in the summer of 2005. This draft described the intent of the LUP as follows:

- To provide long-term sustainability of ecological resources.
- To accommodate Gitanyow cultural and heritage values and Gitanyow interests and plans for their future use of their territories.
- To provide for continued resource use and extraction in locations and at a rate that will sustain all forest resources at the landscape level.

51 This draft LUP considered the individual Wilp territories to be planning subunits. It documented and mapped the interests, knowledge, cultural and heritage sites, and practices for each individual Wilp. It envisaged developing management objectives for Gitanyow cultural heritage resources and uses of the land, and for forestry resources, and ultimately designing a forest eco-system network that could compliment Gitanyow cultural values and achieve integrated management objectives.

52 The draft LUP also promoted the creation of a joint resources council, comprising representatives from Gitanyow and the provincial ministries, to administer and implement the plan once it was completed. The MoF and Gitanyow agreed to the creation of such a council and commenced negotiations over its mandate and terms in mid 2005.

53 As the development of the LUP progressed, Gitanyow indicated that it wished to expand the joint planning initiative to cover all of its traditional territories. As a result, the MoF encouraged the Integrated Land Management Bureau ("ILMB") of the Ministry of Agriculture and Lands ("MoAL") to undertake development of an SRMP for the Nass TSA.

54 In late 2005, the draft LUP was reviewed with licensees in the Cranberry/Kispiox TSA. Since then, the licensees and the District Manager of the Skeena Stikine Forest District have been using the LUP on a voluntary basis in their planning processes, and in the development of FSPs.

55 As the planning process has evolved, the MoF and Gitanyow have endorsed a long-term plan to use the LUP as a foundation for the development of an SRMP for the Cranberry/Kispiox TSA by integrating values and interests beyond the MoF's mandate, and undertaking broader consultation and review under the guidance of the ILMB. The intention is

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that ultimately, the SRMPs for both the Cranberry/Kispiox and the Nass TSAs will be given legislative force. The process for that is obscure, as neither party provided material that adequately explained the legislative underpinning for these land use planning processes. Nevertheless, the implementation of this plan, and the enforcement of the LUP objectives in the meantime, has been a continuing theme in the consultations between Gitanyow and the MoF.

56 In the spring of 2005, the MoF established the Northwest Forest Restoration and Enhancement Program ("NWFREP") to respond to both Gitanyow and Gitxsan reforestation and silviculture concerns in their traditional territories. Its aim was to identify and address areas harvested prior to 1987 that were not free-growing, to deal with forest restoration and forest enhancement priorities, and to provide aboriginal employment opportunities in the forest industry. The MoF made an initial commitment to Gitanyow under the NWFREP for \$1 million over four years.

57 There were also broader initiatives that had the potential to advance Gitanyow's aboriginal interests. In March 2005, the governments of British Columbia and Canada began discussions with First Nations leaders that culminated in a document entitled "The New Relationship". Among other things, this document affirmed a "new government-to-government relationship based on respect, recognition and accommodation of aboriginal title and rights, and a commitment to reconciliation of Aboriginal and Crown titles and jurisdictions." The New Relationship was affirmed by the Transformative Change Accord reached by the governments of British Columbia and Canada and the Leadership Council representing the First Nations of British Columbia at the Kelowna Accord on November 25, 2005.

58 On September 29, 2005, Mr. Warner raised the pending replacement of the FLs on Gitanyow traditional territory with Gitanyow for the first time. He wrote to Mr. Williams advising that while negotiations toward an interim Gitanyow forestry agreement continued, the MoF wished to complete the consultation process for the pending FL replacements by November 30, 2005, in a manner consistent with *Haida* and *Taku*. Mr. Warner's letter listed the FLs in Gitanyow's "asserted traditional territory", and explained the process and effect of replacing them. It indicated that the replacement term for each licence would be 15 years, and advised Gitanyow that once an FL was replaced, their next opportunity for consultation would be at the operational level when the licensee's FSPs were considered for approval or amendment. The letter invited input with respect to aboriginal interests and concerns in writing or through meetings.

59 On November 25, 2005, Mr. Williams responded to Mr. Warner's letter. He acknowledged the MoF's intention to conduct consultation, and reiterated the findings of Mr. Justice Tysoe with respect to the strength of Gitanyow's claims to aboriginal rights and title. He identified the licences that overlapped Gitanyow Wilp territories, and Gitanyow's cultural, heritage and economic interests. He described the impact of the FL replacements on Gitanyow's aboriginal interests, including heavy logging, remediation that had not kept pace with timber extraction, and lack of Gitanyow control over how much of each licensee's AAC was extracted from its traditional territories. Mr. Williams expressed the view that the strength of Gitanyow's claim and the seriousness of the potential impact mandated that Gitanyow be included in the FL replacement decision, and in setting the conditions of the replacement FLs. He indicated concern about the extended replacement period, and the need to protect Gitanyow's aboriginal rights and title in the Gitanyow Wilp territories when making the FL replacement decision. Mr. Williams then set out a number of ongoing but unfinished initiatives, including the LUP and the establishment of a joint resources council, which he said represented Gitanyow's attempt to build a proper framework for consultation and accommodation. He complained that despite these initiatives, the MoF continued to "run rough-shod" over Gitanyow rights and title. He stated that while Gitanyow was prepared to meet and discuss the matter further, it wanted the replacement decision to be postponed until the LUP process was complete and a joint resource committee was in place.

60 In response, the MoF extended the deadline for consultation with respect to the replacements of the FLs. On January 9, 2006, Mr. Warner wrote to Mr. Williams, affirming that Gitanyow had significant interests with respect to the FL

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replacements and that these needed to be addressed through further discussion. He agreed to convene a special meeting of what he referred to as the "joint forestry council", to share information with respect to forest tenures within Gitanyow territory, and to gain a clear understanding of its concerns and proposals. He also indicated that further discussion should take place to determine how the LUP may or may not relate to the FL replacements. While he acknowledged that there was some flexibility in the timing of the replacements, it was clear that he wished to get on with the process.

61 On February 21, 2006, the Gitanyow Joint Resources Council ("JRC") met for the first time. Representatives of Gitanyow and the MoF attended and discussed the FL replacements. Gitanyow identified four interests that needed to be addressed in that process:

- (1) acknowledgement of Wilp territories affected and recognition of aboriginal rights and title;
- (2) outstanding silviculture obligations;
- (3) acknowledgement of the LUP that was being developed; and
- (4) an economic component.

62 Discussion covered suggestions to address these issues by adding clauses to the licence document, particularly in the "WHEREAS" preamble, or to a cover letter issued with the replacement FL offer. Inclusion of a silviculture deposit as a condition of the FL was also raised as a possibility. It was agreed that Linda Robertson, the Regional Aboriginal Affairs Manager for the Northern Interior Forest Region, would draft clauses to be included in the FL for discussion, and that Mr. Williams would provide a summary of issues that Gitanyow wished to have addressed.

63 On February 24, 2006, Mr. Warner issued the Notices of Intent to offer replacements of the FLs required under s. 15(1.1) of the *Forest Act*. These were not copied to Gitanyow. This meant that the FL replacement offers could be made to the licensees after August 24, 2006 pursuant to s. 15(1.1) of the *Forest Act*. The final deadline for replacements under s. 15(1.2) was 9.5 years after the date the FL was issued, which ranged from February 28, 2008 to April 15, 2010.

64 On March 10, 2006, the JRC met again. They discussed a replacement schedule that suggested consultation should be complete by September. Ms. Robertson produced a proposed recognition clause for inclusion in the FLs that referenced Gitanyow's aboriginal rights and title in a manner consistent with Mr. Justice Tysoe's judgment in *Gitxsan No. 1*. Mr. Williams indicated that this would be a significant start. Ms. Robertson advised that the MoF was unable to put Wilp recognition in the FLs. She offered no explanation for this, but suggested that recognition could be achieved if the MoF committed to send the licensees a letter during the preparation of their FSPs that advised them of the Wilp territories that overlapped their licence areas. The MoF representatives also cautioned that the FL replacement process may not have sufficient flexibility to address all of Gitanyow's concerns, such as silviculture obligations and economic benefits. Mr. Williams expressed Gitanyow's concern over the uncertainty of who would be responsible for the outstanding silviculture obligations, and Ms. Robertson suggested that this issue be flagged for the FL replacement consultation process. Further discussion took place with respect to the ongoing LUP/SRMP process, and using it to incorporate Gitanyow's interests in FSPs.

65 On March 14, 2006, Gitanyow received funds of \$145,000 through the ILMB to finance its ongoing participation in the development of the Nass SRMP.

66 In mid-2006, the NWFREP committed a further \$1 million over the next four years for reforestation and silviculture projects in the Nass TSA in response to Gitanyow's concerns about reforestation in that area.

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67 In August 2006, the MoF and Gitanyow successfully concluded negotiation of the Gitanyow Forestry Agreement (the "GFA"), a forestry accommodation agreement with a five year term. Its preamble reads:

Whereas:

A. British Columbia and Gitanyow have interests in forestry and economic development with the Traditional Territory.

B. British Columbia acknowledges that Justice Tysoe of British Columbia Supreme Court has held that British Columbia has a duty to consult with Gitanyow and to seek to accommodate their interests within the Traditional Territory.

C. The Parties wish to address the outstanding obligations of British Columbia to consult and accommodate Gitanyow interests as required by Justice Tysoe in *Yal et al v. Minister of Forests, Skeena Cellulose Inc. and NW-BC Timber and Pulp Ltd.* 2002 BCSC 1701 [*Gitxsan No. 1*] and *Gitanyow First Nation v. British Columbia (Minister of Forests)* 2004 BCSC 1734 [*Gitxsan No. 1*] and Gitanyow acknowledges that British Columbia has done so.

D. Gitanyow has a relationship to the land that is important to its culture and the maintenance of its community, governance and economy.

E. Gitanyow has Aboriginal Interests within the Traditional Territory.

F. British Columbia and the First Nations Leadership Council, representing the Assembly of First Nations — BC Region, First Nations Summit and the Union of BC Indian Chiefs (the "Leadership Council") have entered into a New Relationship in which they are committed to reconciliation of Aboriginal and Crown titles and jurisdiction and have agreed to implement a government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights.

G. This Agreement is in the spirit and vision of the New Relationship.

H. Work is underway regarding the implementation of the New Relationship and this Agreement may need to be amended in the future to reflect the outcomes of that work.

I. References in this Agreement to Crown lands are without prejudice to Gitanyow's Aboriginal title and/or rights claims over those lands.

J. British Columbia intends to consult and to seek an Interim Accommodation with Gitanyow on forest and/or range resource development activities proposed within the Traditional Territory that may lead to the infringement of Gitanyow's Aboriginal Interests.

K. Gitanyow intend to participate in any consultation with British Columbia or a Licensee in relation to forest and/or range resource development activities proposed within the Traditional Territory that may lead to an infringement of Gitanyow's Aboriginal Interests.

L. British Columbia and Gitanyow wish to resolve issues relating to forest resource development where possible through negotiation as opposed to litigation.

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68 Section 1 of the GFA deals with recognition of Gitanyow's interests and rights and states in part:

1.1 British Columbia acknowledges that Justice Tysoe of British Columbia Supreme Court has found that Gitanyow have a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights to at least part of the Traditional Territory.

1.2 British Columbia recognizes that Gitanyow's Aboriginal Interests are linked to Gitanyow's good *prima facie* claim of aboriginal title and strong *prima facie* claim of aboriginal rights.

1.3 British Columbia recognizes that the historic and contemporary use and stewardship of land and resources by Gitanyow are integral to the maintenance of Gitanyow society, governance and economy within the Traditional Territory.

1.4 British Columbia recognizes that in the absence of a treaty that defines the responsibilities and rights of the Parties, its duty to consult and to seek workable accommodation of Gitanyow's Aboriginal Interests within the Traditional Territory is an ongoing duty.

1.5 British Columbia acknowledges that the Gitanyow Simgigyet represent the Huwilp.

69 Section 2 sets out definitions. The following have relevance here:

2.1.5 "Gitanyow " means the eight Gitanyow Houses collectively referred to as the Huwilp being Gitanyow houses of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Luux Hon, Haitsimsxw, Wataxyhetsxw and Wii Litsxw.

2.1.6 "Interim Accommodation" means an accommodation, including an Interim Economic Accommodation, provided in this Agreement intended to further the reconciliation of Gitanyow's Aboriginal Interests with those of British Columbia in the interim prior to the reconciliation of these respective interests in a treaty. Any monetary payments made under this Agreement, including the accommodations provided in sections 4 through 8 reflect the present budget limitations of the Minister of the Forests and Range. It is acknowledged that other accommodations, including economic accommodations, may be jointly developed by the Parties during the term of this Agreement.

2.1.7 "Interim Economic Accommodation" means an Interim Accommodation of the economic component only of Gitanyow's Aboriginal Interests.

...

2.1.9 "Operational Decision " means a decision that is made by a person with respect to the statutory approval of an Operational Plan that has a potential effect in the Traditional Territory.

2.1.10 "Operation Plan" means a Forest Development Plan, Woodlot Licence Plan, Forest Stewardship Plan, Range Use Plan or a Range Stewardship Plan that has a potential effect in the Traditional Territory.

...

2.1.13 "Traditional Territory" means Gitanyow Traditional Territory as shown on the map attached to this Agreement as Appendix A.

70 The purposes of the GFA are set out in Section 3.1:

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(a) implement the order of the British Columbia Supreme Court as set out in the judgement of Tysoe, J. in *Yal et al v. Minister of Forests Skeena Cellulose Inc. and NWBC Timber and Pulp Ltd.*, 2002 BCSC 1701;

(b) set out measures to address Gitanyow's Aboriginal Interests in the context of forestry decisions that are made during the term of this Agreement and the forest development that occurs as a result of those decisions within the Traditional Territory during the term of this Agreement;

(c) create viable economic opportunities and to assist in the improvement of social conditions of Gitanyow through economic diversification;

(d) address consultation and provide Interim Accommodations related to forest resources development; and

(e) provide a period of stability to forest and range resource development on Crown lands within the Traditional Territory during the term of this Agreement, while longer term interests are addressed through other agreements or processes.

71 Section 4 deals with "Forest Planning", and sets out a commitment by the parties to collaborate in implementing the LUP in the Cranberry/Kispiox TSA as a basis for developing integrated management objectives for the area, and to then work with the ILMB to merge those objectives with the Nass SRMP, with the ultimate aim of enabling the SRMP objectives through legislation once the parties have reached a consensus on them. It states that, as an interim step, the Crown and Gitanyow agree to encourage licensees to develop operational plans consistent with the "joint landscape level plans", which encompass the LUP and SRMP. Finally, it confirms that the Crown has provided funding of \$237,500 to date for these endeavours.

72 Section 5 deals with "Forest Restoration", and includes an acknowledgement by the Crown that it is important for Gitanyow to participate in reforestation and enhancement within its traditional territory. It affirms the two \$1 million commitments made earlier by the NWFREP for these purposes, as well as provision of \$50,000 for 2005 — 2007, and \$25,000 for 2008, to support Gitanyow's participation in planning and implementation of the NWFREP activities. It also requires the Crown to provide Gitanyow, through the JRC, with updates and reports on the progress of Timber Baron in meeting its backlog of silviculture obligations. Timber Baron was the successor to Buffalo Head, the holder of FL No. A16884, whose silviculture delinquency was the subject of comment by Tysoe J. in *Gitxsan No. 2*.

73 Section 6 establishes the JRC, and acknowledges that the Crown has provided \$10,000 to support its establishment in 2006-2007. Section 6.1 sets out its purposes:

British Columbia and Gitanyow agree to establish and operate a Joint Resources Council for the purpose of facilitating:

(a) cooperative planning to address Gitanyow's Aboriginal Interests at the appropriate level of Crown land use planning;

(b) consultative processes and provision of a forum for identifying and resolving issues of strategic importance to Gitanyow and British Columbia early in the forest planning cycle; and

(c) completion and administration of the Gitanyow Kispiox-Cranberry Landscape Unit Plan and the Gitanyow Nass Strategic Resource Management Plan,

as per the Joint Resources Council terms of reference attached to this Agreement as Appendix C.

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74 Appendix C stipulates that Gitanyow and the Crown will each appoint two members to the JRC, and that staff members from both parties may serve in an *ex officio* capacity to provide support or serve on sub-committees as required. Appendix C includes this further statement of purpose:

To implement a joint process that ensures the meaningful, effective and efficient consultation and accommodation of Gitanyow's Aboriginal Interests that are impacted, or have the potential to be impacted, by forest and/or range resource development activities within the Traditional Territory.

The Gitanyow Joint Resources Council (GJRC) will achieve this by:

- (a) facilitating cooperative planning to address Gitanyow's Aboriginal Interests at the appropriate level of Crown land use planning; and
- (b) facilitating consultation processes and providing a forum for identifying issues of strategic importance to Gitanyow early in the forest planning cycle.

75 Among the JRC's responsibilities listed in Appendix C is to "Coordinate the communication, information sharing and consultation processes with respect to [MoF] proposed Administrative Decisions and activities that have potential to impact Gitanyow's Aboriginal Interests". The FL replacements are defined as "Administrative Decisions" under the GFA.

76 Section 7 deals with economic opportunities. Section 7.1 grants Gitanyow the right to apply for a five year non-replaceable forest licence in the Traditional Territories for up to 430,000 cubic meters over five years, and grants \$35,000 for capacity development in connection with this licence.

77 Section 7.2 provides for an interim annual payment to Gitanyow of \$357,000 throughout the term of the Agreement. It also sets out a commitment by the Crown, through the MoF and the Ministry of Aboriginal Relations and Reconciliation ("MARR"), to establish a working group in which Gitanyow and other First Nations may participate, to examine alternative benefit and revenue sharing options.

78 Section 8 provides for capacity funding of \$275,000 upon execution of the GFA to support Gitanyow's ongoing participation in the JRC and the LUP and SRMP initiatives for 2006/07, as well as a process to establish a budget for similar expenses during each year of the GFA.

79 Section 9 deals with "Consultation and Accommodation Respecting Administrative and Operational Decisions and Plans". It sets out a specific commitment to consult and seek workable accommodations of Gitanyow's aboriginal interests with respect to these decisions and plans through participation in "strategic level planning and policy development processes". Section 9.3 states:

Subject to section 9.4, Gitanyow is entitled to full consultation with respect to all potential infringements of their Aboriginal Interests arising from any Operational Decision, Administrative Decision or Operational Plan affecting Gitanyow's Aboriginal Interests, regardless of benefits provided under this Agreement.

80 In Section 9.4, Gitanyow affirms that in consideration of the accommodation outlined in Section 7 of the GFA, it agrees that the Crown has fulfilled its duties to consult and seek workable interim accommodation with Gitanyow with respect to five specific MoF decisions. Importantly, these do not include the FL replacement decisions.

81 Other parts of Section 9 relevant to this proceeding are these:

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9.5 During the term of this Agreement, and subject to the terms and intent of this Agreement being met and adherence by British Columbia, Gitanyow agrees that British Columbia has provided an Interim Economic Accommodation of Gitanyow's Aboriginal Interests and other Interim Accommodations serving to further the reconciliation of Gitanyow's Aboriginal Interests with respect to forest activity within the Traditional Territory with those of British Columbia.

9.6 British Columbia acknowledges that any timber opportunities and funding provided through this Agreement are an Interim Accommodation and that broader processes are underway that will assist in determining the appropriate accommodation in respect of impacts of Gitanyow's Aboriginal Interests as a result of forestry activities occurring within the Traditional Territory.

9.7 Nothing in this Agreement restricts the ability of Gitanyow to seek additional accommodation for impacts on its Aboriginal Interests within the Traditional Territory from forest resource development during the term of this Agreement.

9.8 The Parties agree to consult in accordance with the Consultation Protocol attached to this Agreement as Appendix B.

82 The Consultation Protocol states that Mr. Justice Tysoe's findings of a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights to at least part of the areas of the traditional territory will be used as a starting point in determining the level of consultation required. It states that consultation is to take place through the JRC and that it will involve a four-step process:

Step 1: Information Sharing — the Crown is to advise Gitanyow in writing of the decision required and the response period, provide Gitanyow with all relevant and reasonably available information necessary to enable assessment of the impact of the proposed activity on Gitanyow interests, offer meetings with appropriate personnel to explain this information, and provide all relevant information requested by Gitanyow which is reasonably required for adequate consultation and accommodation;

Step 2: Identification of Gitanyow Interests — Gitanyow are to provide all reasonably available information that identifies the potential impact of the proposed plan or decision on Gitanyow aboriginal interests within 60 days;

Step 3: Further Consultation — Either party may request further consultations to address Gitanyow aboriginal interests and measures for accommodating those;

Step 4: Decision — The statutory decision maker is required to do the following: identify Gitanyow aboriginal Interests in relation to the contemplated decision; make a determination of whether the contemplated action potentially adversely affects Gitanyow's aboriginal interests as those have been expressed by the B.C. Supreme Court; if there are potential adverse affects, determine how serious they are and what accommodation, if any, is appropriate; set out any recommendations provided by the JRC or Gitanyow for mitigation of the potentially adverse impacts, and the reasons why any such recommendations have been rejected; and inform Gitanyow in writing of the decision, setting out how aboriginal interests were addressed, any accommodation or mitigation measures taken, or reasons for not fully accommodating Gitanyow aboriginal interests.

83 Section 10 provides a process for resolution of disputes between the Crown and Gitanyow over interpretation of the GFA.

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84 Sections 16.3 and 16.4 acknowledge that the specific nature, scope or extent of Gitanyow's aboriginal interests have not yet been determined:

16.3 This Agreement will not limit the positions that a Party may take in future negotiations or court actions.

16.4 British Columbia acknowledges and enters into this Agreement on the basis that Gitanyow has Aboriginal Interests within their Traditional Territory and further that the specific nature, scope or geographic extent of Gitanyow's Aboriginal Interests have not yet been determined. Broader processes engaged in to bring about reconciliation will result in a common understanding of the nature, scope and geographic extent of Gitanyow's Aboriginal Interests.

85 Section 17 endorses the New Relationship and the ability of the parties, at the request of Gitanyow, to negotiate additional interim agreements in relation to forestry and range matters that give effect to the New Relationship. The parties acknowledge that there are broader processes underway with respect to the New Relationship that may assist in such negotiations.

86 On August 28, 2006, Mr. Warner wrote to Mr. Williams with respect to the ongoing consultation process regarding the FL replacement decision. This letter set out the four concerns consistently identified by Gitanyow, and the manner in which the MoF proposed to address them.

87 With respect to recognition, Mr. Warner acknowledged that Gitanyow wanted recognition of its aboriginal rights and title, as well as its traditional system of governance, in particular the Wilp system and territories. He proposed to address this by including what I will refer to as the "WHEREAS clause" in the preamble to each replacement FL, which read:

WHEREAS

The Government of British Columbia acknowledges that Justice Tysoe of the British Columbia Supreme Court has found that the Gitanyow and Gitxsan each have a good prima facie claim of aboriginal title and a strong prima facie claim of aboriginal rights to at least part of the areas included within the lands covered by the Forest Licence.

Mr. Warner then stated that "for practical reasons" the MoF was unable to include acknowledgement of the Wilp territories in the replacement FL itself, but would commit to advising the licensees about the Wilp territory boundaries for their use and information during preparation of their FSPs. No explanation as to why the acknowledgment was not practical was provided.

88 With respect to the LUP process, Mr. Warner acknowledged that Gitanyow sought assurances that the FLs would be subject to the plan that was being developed, and that this planning process had been undertaken as a key means for accommodating Gitanyow's interests. He affirmed that the MoF remained committed to completing the LUP to be used as "an information base for operational planning undertaken by licensees and to assist in the consultation process for those operational plans". However, he stated that the LUP objectives and strategies could not be empowered through legislation until consensus had been reached among government agencies, Gitanyow, and licensees. Mr. Warner stated that until that point, licensees may choose to voluntarily comply with the LUP, and it would be used by the MoF in the consultation process with the licensees regarding their operational plans. He also advised that upon issuing an FL replacement, he would consider including a statement in the cover letter to the licensees stating that a LUP was being developed in that part of the TSA that overlaps Gitanyow territory, and that this would be considered by the statutory decision maker in making operational decisions under the FL.

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89 With respect to outstanding silviculture obligations, Mr. Warner acknowledged Gitanyow's wish to have some means in the FL replacement process to address the failure of licensees to fulfill their silviculture obligations. He expressed the view that compliance and enforcement procedures under the *Forest Act* provided the necessary means to ensure that these obligations were met. Mr. Warner advised that Timber Baron, the holder of FL A16884, was the only licensee presently in breach of its obligations, and that enforcement action had been taken against it. He maintained that while that process unfolded, he was not in a position to deal with the issue through the FL replacement process. Mr. Warner also pointed out that the funding provided under the NWFREP was intended to address the historic backlog silviculture obligations, including those related to Orenda, whose FL had been surrendered. Although this FL is not a subject of these proceedings, Orenda's outstanding silviculture obligations formed part of the factual matrix in the consultation between the parties.

90 With respect to economic accommodation, Mr. Warner took the position that the GFA provided appropriate interim economic accommodation of Gitanyow's interests with respect to forest activities during its five year term.

91 Mr. Warner concluded his letter with this statement:

In my view, these measures, in addition to the specific accommodation measures I have offered here in respect to the replacement of the seven Forest Licences, are sufficient for meeting the ministry's legal obligations in respect to the replacement of the Forest Licences within Gitanyow territories. Further consultation with Gitanyow with respect to actual forest operations under these Forest Licences will occur through the JRC in accordance with the terms of the Agreement.

He indicated that he intended to issue the FL replacements by October 15, 2006.

92 On September 18, 2006, Mr. Williams replied to Mr. Warner, advising that Gitanyow disputed both the MoF's assumption that consultation had been completed, and its view that the accommodation proposed in his letter of August 28, 2006 represented an adequate fulfillment of the Crown's obligations.

93 First, Mr. Williams requested that all relevant information on the terms and conditions of the proposed FL replacements, in particular the location and volume of timber to be taken under each, be provided to Gitanyow so that the impact on its aboriginal interests could be properly assessed. Second, he stated that the FL replacement decision was specifically excluded from the GFA as the process of consultation and accommodation was still ongoing when the GFA had been concluded. He acknowledged the consultation protocol established by the GFA, but pointed out that the JRC had not met since March to complete the consultation and agree on appropriate accommodation and protection of Gitanyow's aboriginal interests in the context of the FL replacements.

94 With respect to recognition, Mr. Williams advised that the proposed WHEREAS clause in the preamble of the FL replacements was not a sufficient accommodation of Gitanyow's interests. Moreover, Mr. Warner's explanation that it was impractical to go further in recognizing the Wilp system was inadequate. He reiterated that Gitanyow required recognition of the Wilp in the body of the replacement FLs, including a map and description of the Wilp territories.

95 With respect to the LUP, Mr. Williams advised that Gitanyow was confident that the necessary consensus would be reached to enable the LUP through legislation. In the interim, Gitanyow expected the licensees to comply with the LUP. He acknowledged that the licensees were presently using the LUP to develop their FSPs, but said that compliance was not a matter to be left to voluntary participation, and a statement and a cover letter delivered with each replacement FL were insufficient. Compliance with the LUP had to be built into the replacement FLs to ensure that Gitanyow's aboriginal interests would be accommodated. If that was not possible, he again requested that the FL replacements be post-

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poned until the LUP had been given legislative force.

96 With respect to outstanding silviculture obligations, Mr. Williams advised that the Crown's position, and its reliance on compliance and enforcement measures, was unacceptable. He said that Gitanyow had insufficient information on the current status of licensees' outstanding obligations, and the cost of those outstanding in Orenda's areas alone far exceeded the funds committed under the NWFREP for reforestation.

97 With respect to economic accommodation, Mr. Williams again pointed out that the GFA did not cover economic accommodation for the FL replacements, and that Gitanyow was entitled to full consultation and accommodation with respect to that decision.

98 He concluded by pointing out that Step 1 and Step 2 of the Consultation Protocol established by the GFA were still incomplete. He stated that Gitanyow required further information, and the MoF did not yet have a clear understanding of Gitanyow's aboriginal interests that would be impacted by the decision to replace the FLs. He reiterated that Gitanyow required completion of the consultation and accommodation process before the FLs were replaced, including convening a meeting of the JRC to review the issues and options for accommodation, and provision of the information he had requested. He advised that Gitanyow would prepare a draft accommodation agreement with respect to the FL replacements for the JRC's review.

99 On October 4, 2006, the JRC met and reviewed Mr. Williams' letter of September 18, 2006, and the issues related to the FL replacements. Gitanyow expressed concerns about the volume of timber being harvested in its traditional territory and the long-term sustainability of the forests. The MoF representatives replied that the FL replacement process did not determine the AAC, and the JRC could conduct an analysis of the planned harvest volume during the TSR process. As well, they noted that Gitanyow land use planning concerns would be considered by the licensees and the MoF during the FSP approval process. There was also discussion about silviculture liabilities, identification of Gitanyow's traditional use sites, and development of a cedar management strategy to determine if there was a sufficient supply for traditional use.

100 At this meeting, Mr. Williams tabled a draft Forest Licence Replacement Accommodation Agreement (the "Accommodation Agreement"). Section 1 of this stated that the intent of the Accommodation Agreement was to address shared decision-making regarding land and resources, and their protection, and to address "the legal obligation of the economic component of Gitanyow aboriginal title on an interim basis". It stipulated that each of the replacement FLs shall identify and provide a map of the Wilp territories overlapped by the FL. It required the Crown to inform Gitanyow of any notices of intent to dispose of the FLs covered by the Accommodation Agreement, and any amendments to the FLs. It contemplated that, as an accommodation of the economic component of Gitanyow rights, Gitanyow would receive 50 percent of all stumpage fees for volume of timber harvested under the FL replacements within Gitanyow traditional territory, and 50 percent of the annual rent paid by the licensees based on a pro-rated portion of the AAC coming from Gitanyow traditional territory. It envisaged the establishment of a Gitanyow/BC Revenue Sharing Working Group to address past infringements of Gitanyow interests. It also required the Regional Manager to give notice to the licensees that they may only submit applications for cutting permits for areas in Gitanyow traditional territory that meet the requirements of the draft LUP and SRMP.

101 On November 9, 2006, the JRC met again to discuss issues related to the FL replacements. The MoF representatives provided accurate AAC numbers and a draft of the proposed replacement FL. Timelines were discussed, in particular, the fact that two of the FLs had a replacement deadline of February 28, 2007 pursuant to ss. 15(1.1) of the *Forest Act*. Gitanyow again raised concerns regarding the volume to be logged, sustainability, and outstanding silviculture ob-

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ligations. With respect to economic accommodation and revenue sharing, the MoF representatives advised that there was "no appetite within government to revenue share nation by nation, licence by licence", but a meeting could be scheduled with Gitanyow to discuss potential models on a without prejudice basis. With respect to consultation at the stage of FSP approval, Gitanyow expressed concern that the Crown's obligation to consult should not be off-loaded onto the licensees.

102 After this JRC meeting, on November 28, 2006, representatives of the MoF, MARR, and Gitanyow met to develop draft terms of reference for what became the Forest Benefit Sharing Working Group ("FBSWG"). The FBSWG fulfilled the Crown's commitment under Section 7.2.7 of the GFA to establish a working group to examine alternate benefit and revenue sharing options in which Gitanyow and other First Nations could participate.

103 On November 16, 2006, Mr. Warner responded to Mr. Williams' letter of September 18, 2006. He provided current information with respect to the FL holders and the AAC under each of the FLs up for replacement. He described the process, and set out the legislated schedule for replacement, which indicated that the decision for two of the FLs had a deadline of February 28, 2007. Mr. Warner acknowledged Gitanyow's concern that the proposed WHEREAS clause and the cover letter would be insufficient to compel the licensees to acknowledge Gitanyow's aboriginal interests, but pointed out that the duty of consultation and accommodation rested with the Crown and not the licensees, and reiterated that the LUP would be considered by the MoF when the statutory decision-makers considered the approval of operational plans required under each FL. He suggested that his proposal would facilitate a greater level of voluntary compliance by the licensees. The letter reviewed the status of outstanding silviculture obligations of the licensees, and advised that the MoF staff would try to provide an estimate of timber volume under each licence that may be attributed to Gitanyow traditional territory in response to Gitanyow's concern that a sustainable level of cut be ensured. Mr. Warner closed by stating that it remained his view that the accommodation measures outlined in his letter of August 28, 2006 met the Crown's legal obligations toward Gitanyow, but that he was prepared to postpone his decision to offer replacement licences until early 2007 to allow for further JRC consultation due to the concerns raised by Gitanyow. He requested that the JRC complete consultation with respect to the FL replacements by January 31, 2007, so that replacement offers could be made by the legislated deadline of February 28, 2007.

104 The JRC met again on December 15, 2006, and Mr. Williams raised the recent decision in *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) [*Sappier*], which established an aboriginal right to harvest wood on Crown lands for domestic uses. There was further discussion of economic accommodation with respect to the FL replacements. The MoF representatives indicated that this must be coordinated with work being done by the New Relationship Leadership Council, and that the MoF would respond directly to these issues. Gitanyow acknowledged that the MoF had provided the timber harvesting land base information requested. Ian Smith, the B.C. Timber Sales Planning Officer, gave a presentation on the FSP planning process in Gitanyow's traditional territories, including the role of the LUP and opportunities for Gitanyow involvement. The deadline of January 31, 2007 for completion of the consultation process was noted.

105 On January 11, 2007, the first and only meeting of the FBSWG took place, attended by representatives of Gitanyow and other First Nations, the MoF, and the MARR. The First Nations' representatives questioned how revenue sharing might work at the forest district level, instead of a province-wide model, and the MARR representative agreed to provide some revenue and cost data analysis on this.

106 On January 24, 2007, Mr. Warner wrote to Mr. Williams indicating that he wished to conclude consultation on the FL replacements. His letter listed five issues that Gitanyow had identified for consideration in the FL replacement process:

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- 1) Recognition of Gitanyow aboriginal rights and title and acknowledgement of Wilp territories;
- 2) Licensee compliance with LUP;
- 3) Means to address outstanding silviculture obligations;
- 4) Economic accommodation; and
- 5) Achieving a sustainable level of cut within Gitanyow Traditional Territory.

107 Mr. Warner referred to the proposals to address these issues that he had outlined in his letter of August 28, 2006, and Gitanyow's responses, and stated that he would take the latter into consideration. He said, however, that Gitanyow's proposal in the Accommodation Agreement for a 50 percent share of revenue was outside the scope of the FL replacement decision, and advised that the government was attempting to address revenue sharing more broadly through the New Relationship and initiatives such as the FBSWG. He stated that he anticipated one more JRC meeting to review Gitanyow's interests and whether any further "mitigation measures" were possible, and encouraged the JRC to examine how to address Gitanyow's interests in subsequent forest management decisions related to the FLs. He affirmed his expectation that he would have all relevant information by early February in order to make a decision before the deadline of February 28, 2007.

108 On January 29, 2007, the JRC met again to consider the FL replacements. Three Gitanyow representatives were present, including Mr. Williams. Each of Gitanyow's interests was identified, and the proposed accommodations reviewed. Mr. Williams raised a number of concerns as to the sufficiency of the accommodations. The minutes of this meeting record that in the course of this discussion, however, he indicated that while Gitanyow had earlier wanted their house and clan system recognized in the licences, this was of less concern now as the licensees had been respecting the LUP. With respect to sustainability of harvesting, Ms. Robertson indicated that this could best be addressed through the TSR. Jane Lloyd-Smith, the Regional Staff Manager for the Northern Interior Forest Region, acknowledged that there was presently an over-allocation of volume in Gitanyow traditional territory, but reiterated that this could be addressed through the TSR. It was agreed that Ms. Robertson and Ms. Lloyd-Smith would develop a draft submission for Mr. Warner's consideration of the commitments that were needed to proceed with replacement of the FLs, the measures offered to date, and other proposed measures, and that they would meet with Mr. Williams, as the Gitanyow representative, on February 8, 2007, to review this.

109 On February 8, 2007, Mr. Williams, Ms. Robertson, and Ms. Lloyd-Smith met to develop the submission to Mr. Warner. That meeting produced a draft of "JRC Recommendations" that was circulated to JRC members and discussed further among Mr. Williams, Ms. Robertson and Ms. Lloyd-Smith following the meeting. This led to a further draft being prepared, circulated, and discussed in a conference call between Mr. Williams and the MoF representatives on February 16, 2007. The MoF says that during that call they discussed a final list of JRC Recommendations. These were sent to Mr. Warner on February 19, 2007 for his consideration in making the FL replacement decisions. However, they included a note stating that they were still undergoing internal review by Gitanyow.

110 The JRC Recommendations were organized under four headings: Recognition, Sustainability/Land Use Planning, Forest Restoration, and Economic Interests. In summary, they provided the following.

111 With respect to recognition, they noted that Gitanyow sought formal recognition of its aboriginal rights and title and acknowledgement of the Wilp system and boundaries. They recommended the inclusion of the WHEREAS clause in the FLs, and an instruction to forest districts to communicate Wilp territory boundaries to licensees before operational

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plans were prepared. They also supported the JRC as an effective forum for consultation and input into the decision-making processes.

112 Under the heading Sustainability/Land Use Planning, the JRC Recommendations recognized the common interest of the MoF and Gitanyow in ensuring sustainable forest management, and stated that the joint planning processes, such as the LUP, were a powerful tool for addressing those common interests. They observed that the completed LUP had been well received and respected by the licensees and created a more efficient consultation process at the operational level. They viewed the next step as incorporating the LUP into the TSR for the TSAs within Gitanyow traditional territory, but acknowledged that achieving an agreement on a sustainable harvest for the long term would be a multi-year process. They recommended that the MoF continue to provide staff and resources necessary to support ongoing joint planning, and to work with the ILMB in this process. They supported inclusion of a statement in the FL replacement offer letters to licensees advising them of the LUP, and encouraging them to consider it and work with Gitanyow in preparing operational plans. They recommended that the MoF continue to respect and use the LUP in evaluating operational plans and facilitating consultation at that level. They also included a strategy for moving the joint land use planning process ahead by merging the LUP and SRMP processes, and having both declared higher level plans with legislated objectives for forestry practices within five years. They also recommended that the planning objectives be incorporated in future TSRs.

113 With respect to forest restoration, the JRC Recommendations advocated that Gitanyow receive a written explanation of how Mr. Warner considered silviculture liabilities in his FL replacement decisions, including an update on their current status. They also recommended that he consider seeking silviculture deposits from the licensees, and that the MoF continue to support and fund the NWFREP. They acknowledged the need to protect Gitanyow's right to harvest wood for domestic use, as defined in *Sappier*, and recommended that the MoF support and expand an ongoing JRC project to identify Gitanyow cedar needs to include the *Sappier* issue.

114 With respect to economic interests, the JRC Recommendations acknowledged that Gitanyow was interested in a model of revenue sharing that was tied to the harvested resources rather than population, and recommended that this be explored through the continuing work of the FBSWG.

115 On February 20, 2007, MoF staff prepared a briefing note for Mr. Warner for his consideration in making the FL replacement decision. This included a copy of the JRC Recommendations. It reviewed the consultation process with Gitanyow, describing it as "protracted and intense". It offered the view that the opportunities provided to Gitanyow to identify its interests and any infringement of them had been sufficient, and further consultation was unnecessary. It set out two options. The first was to offer replacement FLs for all licences, although only two had a deadline of February 28, 2007 under s. 15(1.1) of the *Forest Act*. The discussion of this option stated that consultation with Gitanyow had been exhaustive, and there were no further gains to be made by delaying the decisions on the basis of Gitanyow's interests, despite its continuing expression of concern. It acknowledged that Gitanyow may challenge the decision as a result. The second option suggested delaying the offer to replace the FLs falling within Gitanyow traditional territories for a year, placing them under the time frame in s. 15(1.2) of the *Forest Act*, but the writer did not endorse this, stating:

We have done everything in our power to address Gitanyow's concerns around the replacement of these licences, but the outstanding issues are beyond the scope of this process and need to be resolved through government to government negotiations. Delaying a decision further will not change this situation and will potentially lead us down a path that is at odds with the processes and policies being developed through "New Relationship."

116 On February 21, 2007, Mr. Williams wrote to Ms. Robertson taking issue with her description of the JRC Recommendations as "final". He reminded her that he had advised the JRC that he must bring them to the Hereditary Chiefs

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for their review and decision, and that this meeting could not take place until February 26, 2007 at the earliest. He expressed concern that the rush to complete consultation was compromising Gitanyow's interests, and observed that the recommendations with respect to recognition of Gitanyow's rights and title had not changed since August 2006 and remained inadequate. He reiterated Gitanyow's concern about over-harvesting, particularly in view of its constitutional rights to domestic wood as confirmed in *Sappier*.

117 Mr. Williams noted that Gitanyow had received no response to the draft Accommodation Agreement. He enclosed a revised draft of that document as indicative of Gitanyow's position, as well as a report on forest revenue historically generated from Gitanyow traditional territory, for consideration by Mr. Warner. He reiterated Gitanyow's view that the FL replacements presented a significant infringement of Gitanyow rights and title, and asked that the MoF not proceed with the FL replacement decision until the consultation process had been completed.

118 The revised draft Accommodation Agreement added several new terms. Paragraph 7 stipulated a payment of over \$19 million to Gitanyow, representing 51 percent of stumpage fees collected between December 31, 1995 and January 1, 2005 from timber cut in Gitanyow traditional territory. Paragraph 12 introduced a format for Gitanyow participation in applications for cutting permits on Gitanyow traditional territory.

119 Ms. Robertson forwarded the material from Mr. Williams to Mr. Warner on February 21, 2007. She advised him that the MoF staff had made it clear to Gitanyow that the development of the JRC Recommendations represented the final stage of the consultation process, but that Gitanyow was taking the position that they were only at step two of the GFA Consultation Protocol. It was her view that the accommodation measures put forward by Gitanyow went well beyond the MoF's current mandates. She nevertheless suggested a third option to those in the Briefing Note: to delay the replacement of the two FLs with a February 28, 2007 replacement deadline and deal with them under s. 15(1.2) instead, as this would provide more time for Mr. Warner to fully consider the JRC Recommendations and the late submission by Gitanyow.

120 On February 26, 2007, Mr. Warner wrote to Mr. Williams reminding him that his earlier correspondence had indicated that any final submissions should be provided by early February, and acknowledging receipt of his memorandum of February 21, 2007 and the draft Accommodation Agreement. He stated that he considered that they were now at step four of the GFA Consultation Protocol, and that he intended to proceed with his deliberations based on all information received to date.

121 On February 27, 2007, Mr. Williams wrote to Mr. Warner in reply. He stated that the JRC meetings had failed to resolve substantial concerns with respect to significant infringements of Gitanyow's aboriginal rights, and the accommodation offered was inadequate. He set out five topics that had to be addressed if adequate accommodation was to be provided:

1. Recognition and scope of Gitanyow Aboriginal Rights and Title, including the *inescapable* economic component of our title, and an allocation of timber that respects the rights to harvest timber for domestic use as per the *Sappier* decision;
2. Assurances that licensees will fulfil their legal obligations with respect to reforestation on Gitanyow territories, instead of the '*cut and run*' practices of the past;
3. Sustainable and planned timber harvesting on Gitanyow territories;
4. A commitment that the joint land use plans will be used when planning harvesting activities on our territories;

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and

5. Administrative issues with respect to any timber harvesting on Gitanyow territories.

[italics in original]

Mr. Williams then stated that it was Gitanyow's view that they had not yet completed steps two and three of the Consultation Protocol. He invited a further meeting to address these issues.

122 On February 28, 2007, Mr. Warner decided to replace the FLs. On the same day, he sent an offer of replacement with a cover letter to each licensee. The letter included this statement:

It should be noted that paragraph F in the "Where As" section of the document was included in response to input received during First Nations consultation regarding forest licence replacement in the Nass and Kispiox Timber Supply Areas (TSA).

123 The cover letters to the licensees holding FLs in the Cranberry/Kispiox TSA also included this statement:

In addition, during consultation with Gitanyow regarding the replacement of this licence, Gitanyow expressed a concern that licensees needed to be made aware that a land use plan (LUP) has been developed with Gitanyow covering those portions of the Kispiox and Cranberry TSAs lying within the Gitanyow traditional territory. It is recommended that you work with Gitanyow and consider the guidance within the LUP when preparing operational plans falling within Gitanyow traditional territories.

124 Mr. Warner wrote to Mr. Williams on March 8, 2007 to explain the rationale for his decision, as was required by the GFA Consultation Protocol. He set out the material he has considered, including the JRC Recommendations, the recent Gitanyow submission, and the most recent draft Accommodation Agreement. He indicated that consultation had been conducted through the JRC in accordance with the Consultation Protocol, and stated that he was satisfied that this process had provided ample opportunity for Gitanyow to identify any interests impacted by the decision, and that further consultation was not necessary.

125 He then set out his assessment of the nature and scope of Gitanyow's aboriginal interests in relation to the FL replacement decision, and of the adverse impact of the replacements on Gitanyow's aboriginal interests. I set this out in full:

What is the nature and scope of Gitanyow aboriginal interests in relation to FL replacement decision?

- Justice Tysoe's finding that Gitanyow have a good prima facie claim of aboriginal title and a strong prima facie claim of aboriginal rights to at least part of the traditional territory.
- Skii Km Lax Ha Preliminary Ethnohistorical Assessment indicates Gitanyow claim is likely stronger than that of Skii Km Lax Ha in the portion of Gitanyow traditional territory within the Nass TSA.
- Gitanyow assert title over the whole of the traditional territory and describe which of their eight house territories overlap with each FL.
- While it is likely that Gitanyow aboriginal title exists, it is unclear where within the traditional territory, particularly when considered in light of the recent judgment of the Supreme Court of Canada in *Bernard and Marshall*

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- Gitanyow's interests expressed through the consultation process apply to all of the seven Forest Licences. In my view, they can be grouped into four themes: recognition, land use planning/sustainability; forest restoration; and economic interests.

Does the replacement of seven FLs within Gitanyow's traditional territory adversely affect Gitanyow Aboriginal Interests?

- Unlikely to affect potential aboriginal rights which are site specific and can be more effectively accommodated through subsequent operational decisions that will occur under each FL. [For example, under the *Forest and Range Practices Act*, a licensee is required to prepare a Forest Stewardship Plan (FSP) which includes proposed results and strategies "to conserve, or if necessary, protect, cultural heritage resources that are the focus of a traditional use by an aboriginal people that are of continuing importance to that people." Examples of cultural heritage resources could include, culturally modified trees, non-timber resources such as medicinal plants, traditional use sites such as fishing sites. Consultation that occurs at the operational level could result in spatial or temporal changes or adoption of different forest practices to address specific cultural heritage resources or aboriginal interests. It would be useful to give an example or two here of how that might be done.]
- Replacing the FLs could impact claims of aboriginal title, assuming it exists somewhere within the traditional territory.

How serious are the adverse effects?

- Effects on Gitanyow's on-the-ground interests are minimal and will be addressed through other processes designed to protect Gitanyow's on-the-ground interests (ie., joint land use planning, Forest Stewardship Plannings and consultation on operational decisions, such as FSP approval, through the Joint Resources Council). [**You may also wish to refer here to consultations through the Joint Resources Council process.**]
- Gitanyow's interests in revenue sharing, land use planning and forest management decision making are being addressed through other processes (eg., Gitanyow-Gitxsan Forest Benefit Sharing Working Group, Timber Supply Review, Nass SRMP,) so the impact of the forest licence replacements is minimal in that regard.
- A full suite of accommodations have already been agreed to under the Gitanyow Forestry Accommodation Agreement which serves to minimize or accommodate the impact of the FL replacements. These accommodations include: language recognizing the nature of Gitanyow's aboriginal interests; commitments to engage in joint forest management planning initiatives; commitment of over \$1 million for reforestation/enhancement activities within Gitanyow traditional territory; establishment of a Joint Forestry Council to facilitate joint planning efforts and consultation; capacity funding to participate in Joint Forestry Council; a consultation protocol; \$1.78 million in revenue over 5 years; and a forest tenure offer of 430 000m³ over five years. [**Refer here to the particular accommodations to which you are referring.**]

[italics and bold emphasis in the original]

What accommodations may be appropriate?

- Establishment of the Joint Resource Council and Consultation Protocol under the Forestry Accommodation Agreement are important tools for accommodating Gitanyow's interests in having a say in decision making with

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respect to forestry.

- The recommendations put forward by the JRC in respect to the FL replacements are addressed below.

He then proceeded through the JRC Recommendations.

126 He supported each of the JRC Recommendations related to the issue of recognition.

127 He also supported those related to sustainability/land use planning. He acknowledged that mentioning the LUP in the cover letter to licensees fell short of Gitanyow's position that compliance with the LUP should be a requirement of the FL itself, but stated that inclusion in the letter was sufficient as the LUP had not been enabled through legislation. He supported the JRC strategy to have the LUP designated as a higher level plan and included in future TSRs, but cautioned that he was not the decision maker responsible for the TSRs and the determination of the AAC. He did indicate that he would advise the Chief Forester of the JRC strategy.

128 With respect to forest restoration and silviculture obligations, in response to the JRC Recommendation that he provide an explanation of how he considered silviculture liabilities in his decision, he indicated that the current state of silviculture liabilities on a number of the licences was in question, that the forest districts had been working with licensees to remedy this, and that he was satisfied with their efforts to engage licensees in developing plans to remedy their specific situations. He said that if these remedial actions were not effective, further compliance and enforcement actions would be carried out that could ultimately result in the suspension and cancellation of these FLs. He noted the JRC Recommendation to require silviculture deposits from licensees, but said that this could not be carried out as it would require legislative amendments. He indicated that he would refer this to the MoF executive for consideration. He otherwise supported the JRC Recommendations. With respect to domestic use of wood, he indicated that the MoF intended to accommodate Gitanyow's aboriginal right to harvest wood for domestic purposes in accordance with the *Sappier* decision.

129 Finally, with respect to economic interests, Mr. Warner stated that he supported the JRC Recommendation to continue to work through the FBSWG to identify alternative models for sharing forest benefits, but acknowledged that this fell well short of Gitanyow's position.

130 Mr. Warner then indicated that although the most recent Gitanyow submissions from Mr. Williams were received very late in the consultation process, he had reviewed them. He offered the view that the revenue sharing provisions in the draft Accommodation Agreement raised issues that were a key component of the negotiations leading to the GFA, and reiterated that any changes to the Crown's approach to revenue sharing would have to be addressed at a province-wide level. He said that in the meantime the FBSWG established under the GFA was a compromise to which Gitanyow agreed.

131 Mr. Warner concluded by reiterating his view that the accommodation measures already provided through the GFA, and those agreed to in this letter, were more than sufficient to meet the MoF's legal obligations to Gitanyow with respect to the FL replacement decision.

132 On March 21, 2007, Mr. Williams sent a lengthy letter to Mr. Warner expressing Gitanyow's disappointment with his decision to replace the FLs, and stating that the MoF had failed to address its legal obligation of consultation and accommodation with respect to Gitanyow. The letter took issue with Mr. Warner's assessment of both the strength of Gitanyow's claim, and the adverse impact of his decision on Gitanyow's aboriginal interests. Mr. Williams observed that the JRC decision-making was to be done by consensus, but said that Mr. Warner had relied on JRC Recommendations that were not approved by Gitanyow. Mr. Williams then provided a critique of Mr. Warner's written decision, setting out

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many of the points that have been made in argument at this hearing, and with which I deal later in these Reasons. He invoked the dispute resolution process under Section 10 of the GFA, and proposed a meeting to address Gitanyow's interests that were not sufficiently addressed in making the decision to replace the FLs.

133 The parties disagreed as to whether the GFA dispute resolution process applied in these circumstances, but on April 12, 2007 Mr. Warner wrote to Mr. Williams and agreed to schedule a meeting for April 20, 2007. He stated that it had not been his intent to minimize Gitanyow's aboriginal rights and title in making his decision, and affirmed the findings of Mr. Justice Tysoe as well as the acknowledgements of aboriginal interests in the GFA. He stated that he had understood that the JRC Recommendations had the support of the Gitanyow members of the JRC, although he knew that Gitanyow was unable to commit to the JRC Recommendations until Mr. Williams had had an opportunity to review them with the Hereditary Chiefs. He further stated:

Many of the recommendations of the JRC were proposed earlier in the consultation process in response to proposals initially put forward by Gitanyow. They have been the subject of discussions through the JRC throughout the fall and correspondence with myself. My understanding was and is that the JRC recommendations dated February 19th were developed collaboratively among all JRC members, and that they had the support of the Gitanyow members, although you were unable to commit to those recommendations until you had an opportunity to review them with the Gitanyow hereditary chiefs.

...

As I have explained previously, I was under no misconception as to what the JRC recommendations represented when I accepted them as part of my rationale. The fact was that they, along with the previous submissions I had received directly from Gitanyow, were the best information I had and was required to consider under the terms of the Gitanyow Forestry Agreement. I was fully aware and acknowledged that the recommendations fell short of Gitanyow's requests for accommodations in some regards. However, I had hoped that the good faith discussions that had occurred through the JRC process had resulted in the finding at least some middle ground.

134 On April 20, 2007, Mr. Robert Friesen, the Assistant Deputy Minister of the MoF, Mr. Warner, and other MoF representatives met with Mr. Williams and other Gitanyow representatives in Victoria. Gitanyow reiterated their concerns related to the replacement of the FLs. Mr. Friesen indicated that the MoF was not in a position to reverse Mr. Warner's decision on the licence replacements, but told Gitanyow that the MoF required some time to address each of the issues they had raised.

135 On May 7, 2007, Mr. Williams wrote to Mr. Robb of the MARR, seeking data that had been promised to Gitanyow at the only meeting of the FBSWG on January 24, 2007. Mr. Robb responded on May 29, 2007 by sending information, but indicated that this work was still in progress. He also advised that there had been no further meetings of the FBSWG, and its work had been overtaken by a new committee, the Aboriginal Forest Strategy Working Group ("AFSWG"), formed in cooperation with the First Nations Forest Council. The material filed in this proceeding indicates that the AFSWG has focused on ways and means of improving the viability of forest tenures issued to First Nations, and on addressing the implementation of the *Sappier* decision as priorities. A sub-working group on tenure viability has identified revenue sharing as an issue that will require work and consideration by the AFSWG.

136 The parties continued to discuss areas of contention. As the formal FL documents were prepared, Gitanyow reiterated its request that they include a reference to Mr. Justice Tysoe's findings in the body of the licence as well as in the preamble. Gitanyow also noted that only the licensees in the Cranberry/Kispiox TSA had received a cover letter advising them of the LUP and its role in the preparation of operational plans. They asked that a similar letter be sent to licensees

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in the Nass TSA. The MoF replied that they would have considered and addressed these requests if they had been timely, but they had come too late and they had a statutory obligation to proceed.

137 Ultimately, the licensees received replacement FLs for 15-year terms, commencing September 1, 2007. The preamble in each FL document included the WHEREAS clause. The total AAC allocated under the six replacement licences was 1,031,059 cubic metres. Paragraph 5.00 of the FL document dealt with applications for cutting permits. Paragraph 5.01 indicated that an approved FSP was a precondition to obtaining a cutting permit. Other parts of Paragraph 5 dealt with the role of aboriginal interests in the process:

5.06 The District Manager may consult aboriginal group(s) who may be exercising or claiming to hold an aboriginal interest(s) or proven aboriginal right(s), including aboriginal title, or treaty right(s) if in the opinion of the District Manager, issuance of the cutting permit or an amendment to a cutting permit as submitted and/or operations under the cutting permit may result in:

- (a) an impact to an aboriginal interest(s) that may require consideration of accommodation, or
- (b) an infringement of a proven aboriginal right(s), including aboriginal title, or treaty right(s) that may require justification.

5.07 The District Manager may impose conditions in a cutting permit to address an aboriginal interest(s), or proven aboriginal right, including aboriginal title, or a treaty right(s) if in the opinion of the District Manager, issuance of the cutting permit as submitted would result in:

- (a) an impact to an aboriginal interest(s) that would require consideration of accommodation, or
- (b) an infringement of a proven aboriginal right(s), including aboriginal title, or treaty right(s) that would require justification.

5.08 The District Manager may refuse to issue a cutting permit or to amend a cutting permit if in the opinion of the District Manager issuance of the cutting permit or an amendment to a cutting permit would result in:

- (a) an impact to an aboriginal interest(s) or treaty right(s) that could not be reasonably accommodated, or
- (b) an impact to a proven aboriginal right(s), including aboriginal title, or a treaty right(s) that could not be justified.

5.09 If the District Manager:

- (a) determines that a cutting permit may not be issued because the requirements of paragraph 5.05 have not been met;
- (b) is carrying out consultations under paragraph 5.06; or
- (c) refuses to issue a cutting permit under paragraph 5.08;

the District Manager will notify the Licensee within 45 days of the date on which the application for the cutting permit, or an amendment to the cutting permit, was received.

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138 There was further correspondence between the parties, and a meeting on July 20, 2007. Their positions did not change substantially. The parties did, however, negotiate a Contribution Agreement under which the MoF made a funding commitment of \$200,000 to Gitanyow to facilitate planning initiatives and further consultation through the JRC, and to implement the *Sappier* decision through a pilot project. The JRC efforts were to specifically address Gitanyow's sustainability interests and participation in the FSP process.

139 Gitanyow and the MoF continue to participate in several ongoing initiatives. The JRC continues as a forum to develop additional means for Gitanyow input into issues of concern. The NWFREP remains active with respect to silviculture issues. The MoF continues to support the SRMP/LUP planning exercises. The Crown continues to provide capacity funding to assist Gitanyow's participation in these initiatives.

140 Gitanyow has also been invited to give input to operational decisions. For example, on September 10, 2007, Mr. Williams met with the Chief Forester to provide information on Gitanyow's values and interests for consideration in determination of the AAC for the Kispiox TSA.

Analysis

141 The respondents concede that the FL replacement decision created a duty to meaningfully consult with Gitanyow in good faith, and to reasonably accommodate its concerns and interests in accord with the principles established in *Haida* and *Taku*. The Crown clearly had knowledge of Gitanyow's claim to aboriginal title and rights over land in the Cranberry/Kispiox and Nass TSAs, and it was common ground that removal of timber from that land could adversely affect Gitanyow's interests. Consultation did take place between the parties. The issue is whether that consultation process was reasonable, and whether any resulting accommodation was adequate.

142 The Crown says that it carried out a reasonable and extensive process of consultation and accommodation that complied with the guidelines established in *Haida*. It points to the LUP and the SRMP initiatives, the GFA, the creation of the JRC and the Consultation Protocol, establishment of the NWFREP and FBSWG, and the significant funding that the Crown has provided for these initiatives, and for facilitating Gitanyow's participation in them. It says that a number of these are multi-year programs that will provide ongoing consultation and joint planning processes as vehicles for future accommodation. The Crown maintains that these represent a reasonable outcome of a genuine and protracted effort on its part to harmonize conflicting interests, find workable compromises, and advance the process of reconciliation. It says that when the parties were unable to reach agreement on all aspects of accommodation, having made good faith efforts to address Gitanyow's interests, Mr. Warner was entitled to decide to replace the FLs in accord with the Crown's right to manage forest resources.

143 The steps to be followed in determining the validity of the Crown's position are set out at paras. [15] to [19] of these Reasons. The starting point is an examination of whether the Crown properly assessed the scope of its duty to consult and accommodate. This is dependent on a preliminary assessment of the strength of the claim of aboriginal rights or title, and the seriousness of the potential adverse effect on those interests that may arise from the contemplated government action. In this case, I find that assessment was premised on issues of both law and fact. The standard for review is accordingly reasonableness.

144 The next step involves an assessment of whether the process of consultation was reasonable. In my view, this issue has two aspects. The first is procedural adequacy.

145 The second is more subtle, and involves an examination of whether the consultation was meaningful, in the sense that the Crown made genuine efforts to understand Gitanyow's position, and to attempt to address it, with the ulti-

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mate goal of reconciliation in mind. Meaningful consultation is thus necessarily linked to an assessment of whether interim accommodation was required, and if so, whether it was provided. This is judged by a standard of reasonableness.

146 My analysis will follow those steps.

Did the Crown reasonably assess the scope of its duty to consult and accommodate?

147 The Crown's preliminary assessment of the strength of the claim and the potential adverse effect of government action on aboriginal interests must be made at the outset of the proposed consultation, if it is to inform the scope and extent of that process. In this case, there is nothing to indicate that the Crown made such an assessment before embarking on the consultation with Gitanyow with respect to the FL replacements.

148 In his initial letter of September 29, 2005 to Mr. Williams, Mr. Warner did invite Gitanyow to advise on the scope and nature of its aboriginal interests, and how the FL replacements might affect them. In his response of November 25, 2005, Mr. Williams provided a detailed account of Gitanyow's interests and concerns surrounding the FL replacements, and their anticipated negative impact. In his reply of January 9, 2006, Mr. Warner acknowledged that Gitanyow had "significant interests" with respect to the FL replacements, and that there should be further consultation about this decision. There is no indication, however, that he addressed the nature of Gitanyow's interests and the potential adverse impact of the FL replacements in a manner that produced a considered determination of the scope of the Crown's duty to consult and accommodate at the outset of that process.

149 Instead, the only assessment of these factors appears at the end of the process in Mr. Warner's written decision of March 8, 2007. That assessment is set out at para. [125] of these Reasons. Perhaps because it was expressed at the end of the process, Mr. Warner's assessment was intertwined with what he viewed as the accommodations that had been provided. As a result, it is difficult to extract what his initial assessment of these factors was, and how that informed his determination of the required scope of consultation and accommodation. I proceed on the basis that it is reasonable to infer that Mr. Warner's views at the outset of the consultation with respect to the scope of Gitanyow's claim, and the potential adverse impact of his decision on Gitanyow's interests, were the same as those he expressed on March 8, 2007.

150 With respect to the strength of Gitanyow's claim, Mr. Warner was clearly aware of Mr. Justice Tysoe's finding that Gitanyow had a good *prima facie* claim of aboriginal title and a strong *prima facie* claim of aboriginal rights to at least part of its traditional territory. Although he did not specifically refer to it in his decision, I find that he was also aware of the Crown's affirmation of that finding in the GFA, and the recognition in s. 1.3 and Appendix A of that agreement that Gitanyow traditional territory was identifiable and mapped, and that historic and contemporary use and stewardship of that land and its resources by Gitanyow were integral to the maintenance of its society, governance and economy.

151 In his letter of March 8, 2007, however, while Mr. Warner acknowledged that it was "likely" that Gitanyow aboriginal title exists, he stated that it was unclear where it lies "in light of the recent judgment of the Supreme Court of Canada in *Bernard and Marshall*". Later, he stated that the replacement FLs could impact Gitanyow's claim of aboriginal title "assuming it exists somewhere within the traditional territory".

152 The judgment to which he refers is *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220 (S.C.C.) [*Bernard*], a case in which the Court provided guidance on the standard of proof in establishing aboriginal title. It found that in the context of alleged unlawful commercial logging by First Nations, the claimants must establish that they had enjoyed exclusive occupation of the lands in question.

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153 It is unclear why Mr. Warner found it necessary to refer to that decision in his assessment. All parties understood that Mr. Justice Tysoe had provided only a "preliminary general assessment" of the strength of Gitanyow's claims, and that a final determination had to be left for a trial or treaty negotiations. The primary focus of the Crown's duty to consult is the *interim* accommodation of *asserted* rights while awaiting that final determination. In *Haida*, at para. 66, the Court was clear that the consideration of the duty to consult and accommodate prior to proof of a claim does not amount to a prior determination of the case on its merits. In this context, and in the absence of some explanation, I find that Mr. Warner's comments to the effect that Gitanyow's claim had not yet been proven were statements of an obvious but irrelevant fact.

154 Nor is it clear why Mr. Warner was only prepared to "assume" that Gitanyow title existed somewhere in its traditional territory. Tysoe J. equated his finding of a good *prima facie* claim of aboriginal title with a reasonable probability of establishing title. The only bar to Gitanyow's claim to aboriginal title raised in *Gitxsan No. 1*, or at this hearing, was an overlapping claim by Gitxsan to some part of Gitanyow traditional territory. There is nothing to suggest that this overlapping claim played a role in the consultation between the parties here.

155 Moreover, while overlapping claims between First Nations may have some impact on their claims to aboriginal title, they do not preclude a successful claim for aboriginal rights. Non-exclusive occupation may establish aboriginal rights short of title: *Gitxsan No. 1*, at para. 74; *Bernard*, at para. 58. Mr. Warner's assessment fails to recognize this.

156 I conclude that Mr. Warner unreasonably minimized the strength of Gitanyow's claim by placing too much weight on the fact that its claim of aboriginal title had not been formally proven, instead of recognizing that the context for his assessment was the strength of asserted, rather than established, claims. Nor did his assessment acknowledge the strength of Gitanyow's independent claim to aboriginal rights.

157 Turning to the assessment of the seriousness of the potential adverse effect of the FL replacements on Gitanyow's interests, objectively, the replacement of the FLs was a strategic administrative decision that represented the first step in permitting the continuing removal of a claimed resource in limited supply from Gitanyow traditional territory for the next 15 years. The potential AAC assigned to the six licences under consideration was 1,031,059 cubic metres, compared to the 86,000 cubic metres that s. 7.1 of the GFA permitted Gitanyow to harvest annually under a non-replaceable FL. The proposed replacement FLs were superimposed on a long and troubled history of over-logging and unfulfilled silviculture obligations on Gitanyow traditional territory. These activities, and Gitanyow's inability to control them, had led Gitanyow to commence two earlier proceedings against the Crown in an effort to achieve some accommodation for the harm to Gitanyow's interests. On November 25, 2005, early in the FL replacement discussions, Mr. Williams had written to Mr. Warner outlining many of these concerns.

158 These factors, however, do not appear to have played a significant role in Mr. Warner's assessment of the potential adverse effects of replacing the FLs. Instead, he stated that the replacement of the FLs was unlikely to affect Gitanyow's site specific potential aboriginal rights, as they would be accommodated through later operational decisions. As noted above, he did acknowledge that the replacement FLs could affect Gitanyow's claim of aboriginal title "assuming it exists". However, he viewed the effect of his decision on Gitanyow's interests as "minimal" since these interests would be addressed through other processes, including the LUP, consultation on the FSPs and other operational decisions, the JRC, the FBSWG, the NFWRP, and the "full suite of accommodations" agreed to under the GFA.

159 The Crown argues that this was a reasonable view, as the decision to replace the FLs did not give the licensees a right to cut timber. It says that operational decisions made later in the process, such as the approval of FSPs and cutting permits, will have a more significant impact on how much timber will be cut.

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160 I do not accept that these later operational steps significantly reduce the potential impact on Gitanyow's interests of the strategic decision to replace the FLs. A similar argument failed in *Haida*. At paras. 75-76, the Court noted that the TFL replacement under consideration there did not itself authorize timber harvesting, which would be controlled by future operational steps. The Court nevertheless found that the Crown had a duty to consult and perhaps accommodate with respect to the decision to replace the TFL, as decisions made during strategic planning may have potentially serious impacts on aboriginal interests.

161 Mr. Warner does not play a role in these future operational decisions, which are left to other MoF employees. The measures to protect aboriginal interests at the operational level are largely discretionary, or may be supplanted by competing interests. For example, the process of preparing and approving an FSP engages a complex legislative interaction between the *FRPA*, *FPPR*, the *Land Act*, R.S.B.C. 1996, c. 245, the *Land Use Objectives Regulation*, BC Reg. 357/2005, and the *Government Actions Regulation*, BC Reg. 582/2004. While ss. 4 and 10 of the *FPPR* require consideration of conserving or protecting cultural heritage resources that are the focus of a traditional use by an aboriginal people and of continuing importance, the balance of the legislation provides no guidance with respect to the weight to be given to these interests in the context of competing legislative objectives. Effectively, the process engages a balancing of societal interests as described in *Haida*, with no certainty that Gitanyow's interests will be paramount.

162 Paragraph 5 of the FL document, which deals with consideration of aboriginal interests by the District Manager in applications for cutting permits, is also discretionary.

163 Moreover, while consultation at the operational level is desirable, the troubled history of logging on Gitanyow traditional territory strongly suggests that operational decisions have not been successful in minimizing the effect of logging on Gitanyow's interests in the past.

164 With respect to the other initiatives relied on by Mr. Warner, while I find it was reasonable to consider these in assessing the impact of his decision to replace the FLs in March 2007, it is necessary to observe that a number of them, notably the accommodations provided by the GFA, did not exist in September 2005 when the consultation process began, and when Mr. Warner should have made his preliminary assessment of the potential adverse impact of his decision to replace the FLs on Gitanyow's interests. His reliance on them *ex post facto* does not assist the Crown in establishing what its assessment of the scope of its duty to consult was at the outset of the process.

165 Moreover, while I do not wish to minimize the efforts made by the Crown in establishing initiatives such as the GFA, the JRC, the LUP/SRMP process, and the NWFREP, it is not clear that these necessarily lessened the impact of the replacement FL decision on Gitanyow. While the GFA provided a framework for consultation, it did not directly address that decision. Compliance with the LUP by licensees was voluntary. The NWFREP was directed primarily at past silviculture delinquency, rather than at measures to ensure future compliance by the replacement licensees.

166 I find that Mr. Warner unreasonably minimized the potential impact of the FL replacements on Gitanyow's aboriginal interests.

167 In summary, to the extent that it is possible to discern the Crown's preliminary assessment of the strength of Gitanyow's claim and the potential adverse effect of the FL replacement decision on Gitanyow's interests from Mr. Warner's *ex post facto* assessment in his letter of March 8, 2007, I conclude that this assessment was unreasonable. I find that the result was an underestimation of the extent and scope of the Crown's duty to consult and accommodate Gitanyow's interests in the course of the FL replacements.

168 I am satisfied that Mr. Justice Tysoe's assessment of the strength of Gitanyow's claim, and the Crown's affirma-

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tion of that finding in the GFA, gave Gitanyow a strong claim to aboriginal rights and title. As well, I find that the strategic decision to replace the FLs, and the associated likelihood of ongoing extraction of limited resources from Gitanyow traditional territory without compensation, represented a potential significant infringement of Gitanyow's interests.

169 Those findings lead me to conclude that the honour of the Crown required it to conduct what the Court at para. 44 of *Haida* described as "deep consultation aimed at finding a satisfactory interim solution" to avoid irreparable harm and to minimize the impact of the decision to replace the FLs on Gitanyow's interests until its claims were finally resolved. I proceed to consider whether the Crown met that obligation through reasonable consultation and accommodation, despite its failure to properly assess the scope of its duty.

Was the consultation process reasonable?

170 The Crown is obliged to conduct consultation that is both procedurally and substantively adequate. The standard for judging both aspects of the consultation is reasonableness. This section examines procedural adequacy.

171 In *Haida*, at para. 44, the Court observed that while the precise requirements of consultation will vary from case to case, "deep consultation" may involve the opportunity to make submissions, formally participate in the decision-making process, and receive written reasons from the decision-maker that demonstrates that aboriginal concerns were considered, and advises what impact they had on the decision.

172 There is no question that since the decision in *Gitxsan No. 2*, the Crown and Gitanyow have established an impressive format for consultation in an effort to address Gitanyow's forestry interests. From a procedural perspective, I find that the four-step Consultation Protocol set out in the GFA provided a satisfactory framework for reasonable consultation that complied with the guidelines in *Haida*. I am also satisfied that both parties made a good faith effort to conduct their discussions within that framework.

173 Step one dealt with information sharing. I am satisfied that there was an extensive exchange of information between the parties, both through correspondence and meetings of the JRC. The sufficiency of the information provided is dealt with in the next section.

174 Step two dealt with identification of Gitanyow's interests, and required the Hereditary Chiefs to provide information that showed the potential impact of the government's decision on Gitanyow's aboriginal interests. I find that this was satisfactorily carried out. From the outset, the Crown and Gitanyow proceeded on the basis that Gitanyow had four primary concerns: recognition of Gitanyow's aboriginal rights and title, and of the Wilp as integral to those interests; integration of the LUP in the replacement FLs; assurance that outstanding and future silviculture obligations would be performed by the Crown or the licensees; and economic accommodation through revenue sharing. Later in the process, the parties added Gitanyow's interest in harvesting wood for domestic use, in response to the Court's decision in *Sappier* in December 2006.

175 Step three involved consultation to address the interests identified in step two, and potential measures for accommodating those. I am satisfied that the parties consulted extensively from a procedural perspective. There were many written exchanges, as well as meetings of the JRC, the NWFREP, the FBSWG, and in the course of the LUP/SRMP process. The substance of those communications is addressed in the next section.

176 Step four was the decision. The Consultation Protocol provided a list of points that the statutory decision maker should cover in writing his decision and providing it to Gitanyow. I find that Mr. Warner wrote his letter of March 8, 2007 with these guidelines in mind.

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177 I am satisfied that the consultation was conducted within a reasonable procedural framework.

Did meaningful consultation produce reasonable accommodation?

178 The Crown's obligation to reasonably consult is not fulfilled simply by providing a process within which to exchange and discuss information. The consultation must be meaningful. Meaningful consultation is characterized by good faith and an attempt by both parties to understand each other's concerns, and move to address them in the context of the ultimate goal of reconciliation of the Crown's sovereignty with the aboriginal rights enshrined in s. 35 of the *Constitution Act*. The Crown is not under a duty to reach an agreement, and must balance aboriginal interests against other societal interests. Nevertheless, where there is a strong aboriginal claim that may be significantly and adversely affected by the proposed Crown action, meaningful consultation may require the Crown to modify its proposed course to avoid or minimize infringement of aboriginal interests pending their final resolution. Ultimately, the adequacy of the Crown's approach will be judged by whether its actions, viewed as a whole, provided reasonable interim accommodation for the asserted aboriginal interests, given the context of balance and compromise that is required: *Haida*, at paras. 41-42, 45-50; *Gitxsan No. 2*, at para. 50; *Huu-Ay-Aht First Nation*, at para. 95; *Taku*, at para. 29; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (S.C.C.) at para. 54, [2005] 3 S.C.R. 388 (S.C.C.).

179 An assessment of whether consultation was meaningful inevitably leads to an examination of what accommodations were reached. I therefore find it useful to begin by discussing the measures on which Mr. Warner relied as accommodation of Gitanyow's interests. His letter of March 8, 2007 indicated that he relied on three things as providing adequate accommodation to Gitanyow in relation to his decision to replace the FLs: the JRC Recommendations, consideration of Gitanyow's interests in subsequent operational decisions, and the "full suite of accommodations" agreed to under the GFA. The latter included interim economic accommodation, the JRC, the FBSWG, the NWFREP, the LUP/SRMP process, and the funding to support those initiatives.

180 I am not satisfied that any of those represented reasonable accommodation of Gitanyow's interests in the decision to replace the FLs for the following reasons.

181 Dealing first with the GFA, the Crown argues that s. 9.5 of that agreement is clear that it was intended to cover economic and other interim accommodation for Gitanyow with respect to all forest activity in its traditional territory for the next five years. It says that includes the decision to replace the FLs, and the GFA must therefore be interpreted as having provided reasonable accommodation for that decision.

182 I am unable to agree. I find that Paragraph C of the preamble and s. 9.4 of the GFA are clear that the interim accommodation provided by that agreement is related to the five specific forestry decisions listed in s. 9.4 that arose from the proceedings in *Gitxsan No. 1* and *Gitxsan No. 2*. Section 9.4 makes no mention of the decision to replace the FLs.

183 Moreover, the definition of "Interim Accommodation" in s. 2.1.6, as well as ss. 9.3 and 9.7 of the GFA, clearly give Gitanyow the right to seek additional accommodation for forest resource development that impacts its aboriginal interests in its traditional territories during the term of the GFA. As well, paragraphs J, K and L of the preamble, as well as s. 9.8 and Appendix B, all envision further consultation between the Crown and Gitanyow with respect to future forestry decisions during the term of the GFA.

184 I accept that the measures provided in the GFA can be considered in assessing the impact of later forestry decisions, such as the replacement of the FLs, on Gitanyow's interests. I have also found that the GFA provides a useful framework for future consultation about such decisions. I do not agree, however, that the GFA, read as a whole, provided accommodation to Gitanyow for the replacement of the FLs. Consultation surrounding that decision was ongoing when

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the GFA was executed, and its terms clearly left it open to Gitanyow to seek further accommodation with respect to future forestry decisions that were not listed in s. 9.4.

185 I conclude that it was not reasonable for the Crown to rely on the GFA as accommodation for the decision to replace the FLs.

186 Mr. Warner also relied on subsequent operational decisions to accommodate Gitanyow's interests with respect to logging activities on its traditional territory. I earlier dealt with the role of such decisions in assessing the potential impact of the replacement of the FLs, and the scope of the duty to consult. Many of the same considerations apply in the context of accommodation. While consultation at the operational level is desirable, I am not satisfied that reliance on future discretionary decisions, over which Mr. Warner has no control, can be viewed as reasonable accommodation for the decision to replace the FLs. That decision was the first step, and the only strategic step, in the process that would ultimately permit logging on Gitanyow traditional territory. The Supreme Court of Canada in *Haida* and *Taku* has made it clear that meaningful consultation and accommodation at the strategic level has an important role to play in achieving the ultimate constitutional goal of reconciliation, and should not be supplanted by delegation to operational levels.

187 Turning to the JRC Recommendations, Mr. Warner relied heavily on these as measures of accommodation. He referred to them as "...recommendations regarding ways and means to seek to mitigate any impact ... on Gitanyow's aboriginal interests", and stated that he viewed them as "appropriate responses to the interests raised by Gitanyow through the consultation process".

188 Later, in his letter of April 12, 2007 to Mr. Williams, Mr. Warner expanded on his understanding of the JRC Recommendations, saying that he believed they were developed collaboratively among the JRC members, and that they had the support of Gitanyow's representatives, although Gitanyow could not commit to them until they had been reviewed by the Hereditary Chiefs. He described them as the best information he had, although he recognized that they fell short of Gitanyow's requests for accommodation in some respects. He nevertheless expressed the hope that the JRC discussions had resulted in finding at least some middle ground.

189 I find that this overstates the extent of Gitanyow's support for the JRC Recommendations. Mr. Williams was the main Gitanyow representative who participated in their development. The extent to which he endorsed them is obscure. His otherwise comprehensive affidavit is silent as to his role in their preparation. Ms. Lloyd-Robertson, the MoF representative, says that the JRC Recommendations were "thoroughly discussed" with Gitanyow's representatives, but does not say that Gitanyow supported them.

190 Whether or not Mr. Williams, or other Gitanyow representatives on the JRC, endorsed the JRC Recommendations, it was clear that the draft of the Recommendations sent to Mr. Warner on February 19, 2007 was still undergoing internal review by Gitanyow. Moreover, Mr. Williams' correspondence of February 21, 2007 and February 27, 2007, with the accompanying revised draft of the Accommodation Agreement, left no doubt that Gitanyow did not view the JRC Recommendations as satisfactory accommodation.

191 The Crown's deadline of February 28, 2007 under s. 15(1.1) of the *Forest Act* was imminent, and Mr. Warner had two options. The first was to proceed with his decision on the information available. The second was to postpone his decision and proceed with the FL replacements later under s. 15(1.2) of the *Forest Act* to permit further consultation. This would have allowed him to clarify Gitanyow's position with respect to the JRC Recommendations, and to address the issues raised in Mr. Williams' most recent correspondence, including the draft Accommodation Agreement.

192 Mr. Warner chose the first option, apparently because it was the Crown's view that positions were entrenched

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and nothing would be accomplished by further delay. He was entitled to do so. Consultation had been protracted, and he had given clear deadlines to Gitanyow. However, given the disagreement over the import of the JRC Recommendations, I find that they could not properly be viewed by the Crown as a "middle ground" endorsed by Gitanyow. At the least, it appears that there was a fundamental disagreement between the parties as to process: could the JRC Recommendations be treated as a final product of collaborative consultation, or was ratification by Gitanyow Hereditary Chiefs, and consideration of Gitanyow's objections to them required? I find that those outstanding issues limited Mr. Warner's ability to rely on the JRC Recommendations as a basis for accommodation arising from meaningful consultation.

193 Further, a review of the JRC Recommendations reveals that the accommodation that they purported to provide was essentially the same as that offered in the MoF's initial proposal of August 28, 2006, and depended heavily on the measures in the GFA. It is accordingly difficult to accept that Gitanyow's representatives on the JRC would endorse the JRC Recommendations, given that throughout the consultation Gitanyow had taken the position that the proposal of August 28, 2006 and the GFA did not represent adequate accommodation.

194 A review of the accommodation recommended with respect to each of Gitanyow's concerns demonstrates that, despite the extensive consultation between the parties, the Crown had not modified its position to accommodate Gitanyow's interests.

195 The first concern was recognition. Gitanyow sought to have recognition of not only its aboriginal rights and title, but also of the Wilp system and territories, to ensure balanced forest planning.

196 In his decision of March 8, 2007, Mr. Warner dealt with recognition by adopting three JRC Recommendations. The first was to include the WHEREAS clause in the preamble of the licence documents. The second was to have MoF representatives advise licensees of the Wilp territory boundaries in the course of operational planning. These two Recommendations reiterated proposals made by Mr. Warner in his letter of August 28, 2006.

197 The third was to support the JRC as a continuing forum for consultation. This endorsement of the JRC simply affirmed the terms of the GFA that established the JRC and the Consultation Protocol.

198 I find that there was no change in the Crown's position with respect to accommodating Gitanyow's concern regarding recognition.

199 Gitanyow's second concern was incorporation of the LUP in the FL documents. It initially took the position that the FL replacement decision should be postponed until this planning process was complete. When the MoF rejected that, it sought assurance that the FL documents would be "subject to" the LUP.

200 Mr. Warner's decision of March 8, 2007 adopted six JRC Recommendations with respect to sustainability/land use planning. Three of these essentially recommended continued support for the implementation of the joint planning process set out in s. 4 of the GFA. Two dealt with the use of the LUP in preparing operational plans. One of those recommended including a statement in the FL replacement offer letter to licensees that would advise them of the LUP for the Cranberry/Kispiox TSA and encourage them to work with Gitanyow. Mr. Warner acknowledged that this fell short of Gitanyow's expectation that the plan should be a requirement within the FL document itself, but stated that inclusion of the LUP in the licence was not appropriate as it had not been enabled through relevant legislation. The sixth JRC Recommendation affirmed the use of the JRC as a vehicle to implement the LUP process and to develop strategy for ensuring sustainability of forest resources within Gitanyow traditional territory.

201 While the LUP/SRMP process had evolved since August 2006, I find that the adoption of those six JRC Recom-

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mendations added nothing substantial to the Crown's pre-existing commitments in s. 4 of the GFA, and the proposals set out in Mr. Warner's letter of August 28, 2006.

202 The third concern was silviculture liabilities. This concern was set against the backdrop of long-term problems with earlier licensees who had defaulted on reforestation obligations in Gitanyow traditional territory. It was the subject of comment in *Gitxsan No. 1* and *Gitxsan No. 2*, and remained a problem throughout the consultation leading to the replacement of the FLs.

203 Mr. Warner attached reports with respect to the silviculture liabilities of each replacement licensee to his decision of March 8, 2007, and considered three JRC Recommendations with respect to silviculture. The first required him to provide a written explanation to Gitanyow as to how he had considered silviculture liabilities in his decision to replace the FLs. In response, Mr. Warner acknowledged that "the current state of silviculture liabilities on a number of the licences is in question". However, he said that he was satisfied with the efforts of the forest districts that were working with the licensees to develop remedial action plans. He provided no details of those plans, but stated that if they were not effective, further compliance and enforcement action would be carried out, and could lead to suspension or cancellation of the replacement FLs.

204 The second JRC Recommendation was to seek silviculture deposits from the licensees. Mr. Warner rejected this, indicating that it could not be done because it would require amendments to the current legislation. He acknowledged that such a practice might assist in alleviating the situation, however, and said that he would refer it to the ministry executive for consideration.

205 Mr. Warner adopted the third JRC Recommendation, which simply endorsed continued support for the NWFREP.

206 I find that the Crown did not provide any accommodation with respect to Gitanyow's silviculture concerns beyond the initiatives previously established in s. 5 of the GFA with respect to the NWFREP, and described in Mr. Warner's proposal of August 28, 2006.

207 Gitanyow's fourth concern was revenue sharing. This was a major and longstanding point of contention between the parties, and it is necessary to provide some background. Gitanyow relied on the views of the Court in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 169, (1997), 220 N.R. 161 (S.C.C.), which acknowledged that aboriginal title has "an inescapably economic aspect", and that the honour of the Crown will ordinarily require fair compensation when aboriginal title is infringed. Gitanyow argued that a revenue sharing scheme was an essential component of interim accommodation where limited resources were being extracted from its traditional territory, particularly since the Crown's position in treaty negotiations was that treaty terms would be forward looking, and were unlikely to provide compensation for past losses.

208 While the Crown recognized an economic component in accommodating aboriginal interests, it consistently took the position that this was best addressed on a broader province-wide level, through initiatives such as the New Relationship or the FBSWG. It was not prepared to consider revenue sharing in the forestry context on an individualized licence-by-licence basis. At the time of these events, it appears that the Crown's policy was to provide interim economic accommodation of aboriginal interests in forestry through a population-based approach, generally by negotiating interim accommodation agreements with First Nations: *Huu-Ay-Aht First Nation*; *Gitxsan No. 2*, at paras. 24-27, 57.

209 In *Gitxsan No. 2*, and subsequently, Gitanyow had taken the position that revenue sharing should more properly be based on the volume of timber harvested from its traditional territory. Nevertheless, Gitanyow did agree to the interim

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economic accommodation set out in s. 7.2 of the GFA, which appears to be based on a *per capita* formula, and resulted in annual payments to it of \$357,000. Section 7.2.6 indicated that this would be recalculated if other mutually acceptable processes were adopted, and s. 7.2.7 led to the establishment of FBSWG in late 2006 to examine alternative benefit and revenue sharing options. The definitions of Interim Accommodation and Interim Economic Accommodation in s. 2 of the GFA made it clear that the payments agreed to in that agreement reflected the present budget limitations of the MoF, although they acknowledged that other economic accommodations may be jointly developed by the parties.

210 In his letter of August 28, 2006, Mr. Warner expressed the view that the interim economic accommodation provided by the GFA was sufficient financial accommodation for Gitanyow's interests with respect to forest activity during the term of the agreement, including the decision to replace the FLs.

211 Gitanyow disagreed, and revenue sharing thus continued to be a topic in the consultation over the FL replacements. Gitanyow put forward its position in its two draft accommodation agreements. The first, presented in October 2006, stipulated payment to Gitanyow of 50 percent of stumpage fees and annual rent received from forest activities on Gitanyow traditional territory under the replacement FLs. The second, presented by Mr. Williams late in the day with his memorandum of February 21, 2007, added a claim for \$19 million, representing 51 percent of stumpage fees collected from timber cut in Gitanyow traditional territory between December 31, 1995 and January 1, 2005.

212 Mr. Warner addressed revenue sharing in his decision of March 8, 2007 by adopting the JRC Recommendation that the parties continue to work through the FBSWG to identify alternative models for sharing forest benefits. He acknowledged that this fell far short of Gitanyow's expectations. It was his view that the accommodation measures set out in Gitanyow's draft Accommodation Agreements raised revenue sharing issues that had been a key component in negotiating the GFA. He reiterated the MoF's position that any fundamental changes to revenue sharing with First Nations needed to be addressed at a province-wide level.

213 Consultation thus produced no economic accommodation for Gitanyow beyond the payments previously negotiated in the GFA.

214 The fifth and final Gitanyow concern was the right to harvest wood for domestic purposes. This arose late in the consultation, following the decision in *Sappier* in December 2006.

215 The JRC was quick to recognize the potential impact of that decision on Gitanyow's rights. There was already a JRC project in progress to identify Gitanyow's cedar needs for cultural purposes, and JRC discussions in December and January led to a consensus to expand this to include other species and domestic use of wood, in view of the *Sappier* decision.

216 In his decision of March 8, 2007, Mr. Warner considered two JRC Recommendations with respect to the domestic use of wood. The first was to support completion of the cedar project and expand it to include the *Sappier* considerations. Mr. Warner gave this qualified support, indicating that while he supported quantifying Gitanyow's domestic needs for wood, the cedar project should be completed and evaluated before it was expanded. The second JRC Recommendation asked for assurance that replacing the FLs would not "trump" Gitanyow's right to wood for domestic use. Mr. Warner declined to give a clear assurance, but stated that the Court's decision would be respected, and that Gitanyow's right to domestic wood would be addressed collaboratively through the JRC.

217 Consultation continued on this topic after the replacement decision, and on July 30, 2007, Gitanyow agreed to the terms of the Contribution Agreement, which included a pilot project identifying Gitanyow's need with respect to the domestic use of timber as identified in *Sappier*.

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218 Thus the Crown did provide accommodation beyond its initial proposal on the issue of harvesting domestic wood.

219 To summarize, apart from the measures related to the *Sappier* decision, at the end of the extensive consultation between the parties, it remained the Crown's view that the proposal set out in Mr. Warner's letter of August 28, 2006 represented reasonable accommodation of Gitanyow's interests in the FL replacement decision. That proposal was comprised chiefly of the measures previously agreed to in the GFA, as well as the WHEREAS clause, and an offer to provide direction to the licensees about the Wilp boundaries and the LUP in the course of operational planning.

220 Did that represent reasonable accommodation attained through meaningful consultation? The Crown correctly points out that the honour of the Crown did not require it to agree to the accommodations sought by Gitanyow. The test is reasonableness, not whether more could have been done. Nevertheless, the Crown must demonstrate that, in balancing the competing interests at work in the decision to replace the FLs, it listened to Gitanyow's concerns with an open mind, and made a good faith effort to understand and address them, with a view to minimizing the adverse effect of that decision on Gitanyow's interests and providing reasonable interim accommodation.

221 In considering that question, I must look at the overall offer of accommodation, and weigh it against the potential impact of the infringement on the asserted aboriginal interests, having regard to the strength of the aboriginal claims: *Gitxsan No. 2*, at para. 63. I have earlier expressed my view that Gitanyow's claims are strong, and that the potential impact of the decision to replace the FLs on their interests is significant. While it is necessary to assess the overall position of the Crown with that in mind, both parties approached the process in this case on the basis that they were dealing with five discrete concerns. I accordingly intend to examine the adequacy of the accommodation provided for each of those, before considering the whole.

222 With respect to recognition of the Wilp system and boundaries, I find that the adoption of three JRC Recommendations by the Crown did not provide reasonable accommodation of this concern. I am satisfied on the material before me that the Wilp are an integral and defining feature of Gitanyow's society. As such, the Wilp system and the related aboriginal rights attract the protection of s. 35 of the *Constitution Act*, and the honour of the Crown required that they be reconciled with Crown sovereignty by being reasonably accommodated.

223 The replacement of the FLs clearly had the potential to detrimentally affect Gitanyow's aboriginal rights. In particular, the harvesting of timber from Gitanyow traditional territory without reference to Wilp boundaries could result in the effective destruction of individual Wilps in terms of both territorial and social considerations. Gitanyow accordingly sought to have recognition of not only its aboriginal rights and title in the replacement FLs, but also acknowledgement of the Wilp territories to ensure balanced forest planning.

224 The Crown did not dispute the significance of the Huwilp in Gitanyow history and culture. This was affirmed in the GFA, which defines "Gitanyow" by reference to the eight Wilps, and attaches a map of Gitanyow traditional territory comprised of the Wilp areas. As well, the LUP has mapped the territory of each Wilp, and related cultural sites. Section 1.3 of the GFA recognizes that the historic and contemporary use of land and resources by the Huwilp is integral to the maintenance of Gitanyow society, governance and economy within the traditional territory. Mr. Friesen reaffirmed this after the FL replacement decision in his letter of July 30, 2007.

225 However, the Crown's position with respect to recognition of Gitanyow aboriginal rights and title, and the Huwilp, remained unchanged throughout the consultation. Mr. Warner, in his letter of August 28, 2006, offered the WHEREAS clause in the licence document, and a statement about Wilp boundaries, to the licensees during the preparation of their FSPs. He also stated that the MoF was unable to acknowledge the Wilp territories in the FL document "for

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practical reasons". Despite Gitanyow's request for further discussion on that point, that statement was never explained.

226 Nor did Mr. Warner explain the impracticality of Gitanyow's position in his affidavit filed in this proceeding. During argument, counsel for the Crown postulated several explanations. First, he said that it may have been that acknowledgement of the Huwilp would not fit within the largely statutory terms of the FLs, which are dictated by s. 14 of the *Forest Act*. Second, he said that the Crown may have been concerned about the precedential value of including reference to Wilp boundaries in the FL documents, since other First Nations also have house-based systems of governance. Finally, he suggested that adding a term or a map to the licence with respect to Wilp boundaries would have no practical value, and it was better left to the District Managers to deal with these at the operational level on the theory that persuasion rather than imposition would more effectively introduce the Wilps' concerns to the licensees.

227 There is nothing in the affidavit material to confirm that these arguments accurately represented the views of the Crown at the time. Even if they did, these are matters that should have been raised in the course of consultation, so they could be fully understood and addressed in the interests of reaching reasonable interim accommodation.

228 I conclude that the WHEREAS clause, and advising licensees of the Wilp boundaries at the operational level, did not represent reasonable accommodation reached through meaningful consultation with respect to Gitanyow's concern that the Wilp system be recognized at a strategic level in replacing the FLs.

229 The next issue is whether there was adequate consultation and accommodation with respect to Gitanyow's concern that the LUP be recognized in the replacement FLs. I acknowledge at the outset that this joint planning process has come a long way since it was a focus of contention in *Gitxsan No. 2*. The Crown has given significant funding to it, and is clearly engaged and committed to working with Gitanyow in seeing it through to completion.

230 The parties did not explain the framework or legislative underpinning of the LUP/SRMP process in any detail. Nor did my own research reveal the process by which the LUP could ultimately obtain statutory force. I accordingly find it difficult to assess the reasonableness of the Crown's position that the LUP should not be recognized in the replacement FLs until it had legislative status.

231 As well, it is evident that this joint planning process is evolutionary and long-term, and it is not clear to me in what form Gitanyow proposes that the LUP could be incorporated into the FL document. The only plan before me is a draft LUP dated Summer 2005, which is 133 pages with many interlineations. It is evident that the joint planning process has progressed since 2005. I find it difficult to understand how a developing plan could usefully be incorporated into the replacement FLs.

232 On the other hand, 15 years is a long time to rely on voluntary compliance with the LUP by the licensees. From that perspective, it appears to me that, as in the case of recognition of the Wilps, there could have been useful discussion about whether clearer endorsement of the LUP at the strategic level would assist in promoting its use, instead of leaving that to operational measures.

233 Given the uncertainties surrounding this issue, and the Crown's commitment to the ongoing process, I am not prepared to find that this is a concern that was insufficiently accommodated.

234 Turning to Gitanyow's concerns with respect to silviculture, these concerns were longstanding, and arose primarily from the Crown's historical tolerance of destruction of a limited resource on Gitanyow traditional territory by earlier licensees. The proposed replacement decision involved offering FLs to some of those same licensees. Others were inheriting problems caused by their predecessors. In *Gitxsan No. 2*, Mr. Justice Tysoe found that the Crown had failed to

2008 CarswellBC 1764, 2008 BCSC 1139, [2008] B.C.W.L.D. 6009, [2008] B.C.W.L.D. 6015, [2008] B.C.W.L.D. 6010, [2008] B.C.W.L.D. 6016, [2008] B.C.W.L.D. 6137, 38 C.E.L.R. (3d) 189, [2008] 4 C.N.L.R. 315, 80 Admin. L.R. (4th) 217, 171 A.C.W.S. (3d) 501

adequately address the unfulfilled silviculture obligations of Buffalo Head, the predecessor to Timber Baron, on FL A16884, one of the replaced FLs. He concluded that the Crown had not yet fulfilled its duty of consultation and accommodation with respect to this. The Crown ultimately fulfilled that obligation by agreeing to s. 5.7 of the GFA, which provided that Gitanyow would receive reports through the JRC on Timber Baron's progress in meeting its backlog of silviculture obligations.

235 Despite that history, Mr. Warner's explanations of the outstanding liabilities in both his letter of August 28, 2006, and his decision, were sparse. He identified ongoing problems and uncertain solutions, but provided no details of these. In his letter of August 28, 2006, Mr. Warner took the view that compliance and enforcement measures in the legislation provided the necessary safeguards to ensure that silviculture obligations were met. He noted that the MoF had taken enforcement action against Timber Baron, and said that this legal process precluded him from dealing with the issue through the FL replacement process. He provided no details of what measures were being taken. Nor did he explain how they precluded consultation about ongoing silviculture obligations with respect to FL A16884 during the replacement process. In March, 2007, his letter and the silviculture reports attached to it suggested that the situation had deteriorated since August 2006, but provided few details of the proposed solutions.

236 The Crown's position was that silviculture liabilities would be adequately dealt with by the NWFREP. I appreciate that significant funds were committed to that programme. However, it appears that its focus has been on silviculture backlog that precedes 1987, and on areas logged previously by Orenda. I am not satisfied that those initiatives, directed to historical defaults, adequately addressed securing performance of silviculture obligations under the replacement FLs.

237 Given the mutual interest of the parties in ensuring that silviculture obligations were honoured in the future and past liabilities remediated, the Crown's historical reluctance to enforce these obligations, and the lessons learned from *Gitxsan No. 2*, it is difficult to understand why the Crown was not more forthcoming in discussing the outstanding and future liabilities and solutions with Gitanyow. The legislation apparently provides many possible remedies, including ss. 15(2)(c) and (d) of the *Forest Act*, which permitted the Crown to decline to offer a replacement FL until a licensee's obligations were performed, or to offer an FL replacement with special conditions related to outstanding obligations, but these options were never discussed. Nor did Mr. Warner explain his view that licensees could not be asked for silviculture deposits without legislative changes. The findings of Tysoe J. in *Gitxsan No. 2* resulted in s. 5.7 in the GFA, which required the Crown to provide silviculture reports to Gitanyow with respect to Timber Baron. Section 13 of Gitanyow's revised draft Accommodation Agreement similarly proposed annual reporting to Gitanyow about licensees' performance of their obligations on Gitanyow traditional territory, including those related to silviculture. Yet the prospect of regular reporting by the replacement licensees was not discussed.

238 I agree with Gitanyow that the Crown's position with respect to silviculture liabilities associated with the replacement FLs essentially amounted to "trust us". The honour of the Crown, and the importance of the sustainability of the resource to Gitanyow, clearly required more. Meaningful consultation should have included discussion of a process by which Gitanyow would regularly receive information regarding the performance of silviculture obligations on its traditional territory, and assurances from the Crown that silviculture obligations under the replaced FLs will be strictly enforced.

239 Turning to Gitanyow's interest in revenue sharing, the economic component of aboriginal interests is clearly a significant issue, with wide-ranging repercussions for all citizens of British Columbia. In my view, in the course of balancing Gitanyow's interests against other societal interests, the Crown may be justifiably wary of dealing with revenue sharing on an individualized basis. For example, I do not find it unreasonable for the Crown to decline to consider Gitanyow's claim for substantial sums as its share of past and future logging revenue until the ramifications of such an ap-

2008 CarswellBC 1764, 2008 BCSC 1139, [2008] B.C.W.L.D. 6009, [2008] B.C.W.L.D. 6015, [2008] B.C.W.L.D. 6010, [2008] B.C.W.L.D. 6016, [2008] B.C.W.L.D. 6137, 38 C.E.L.R. (3d) 189, [2008] 4 C.N.L.R. 315, 80 Admin. L.R. (4th) 217, 171 A.C.W.S. (3d) 501

proach can be considered at a broader level. I am satisfied that, in the interim, the periodic payments made by the Crown to support ongoing initiatives, and the development of a consultation framework to consider alternative means of accommodating the economic aspects of aboriginal interests, suggest good faith ongoing consultation and accommodation on the part of the Crown to advance this process. It is regrettable that this initiative appears to be moving at such a slow pace, but at present it apparently has the blessing of both the Crown and the First Nations Forest Council.

240 I conclude that the Crown's obligation to consult and attempt to reach economic accommodation with respect to forestry decisions generally is ongoing. I decline to find that its efforts in this area related to the decision to replace the FLs were inadequate.

241 I have already found that the Crown reasonably consulted and accommodated Gitanyow's interests in the harvest of wood for domestic use.

Conclusion

242 Was the overall offer of accommodation with respect to replacement of the FLs reasonable? I have concluded that it was not.

243 Gitanyow had a strong claim to aboriginal rights and title, and the decision to replace the FLs presented serious potential adverse effects on Gitanyow's interests. The scope of the Crown's duty to consult and reach appropriate interim accommodation was accordingly broad. While the Crown had no duty to agree to Gitanyow's proposed measures, the strength of Gitanyow's position suggested that if the Crown did not make reasonable concessions, it is open to infer that it did not conduct meaningful consultation: *Gitxsan No. 2*, para. 50.

244 Apart from the concessions made with respect to Gitanyow's rights under *Sappier*, there was essentially no change in the Crown's position between Mr. Warner's proposal of August 28, 2006 and his decision of March 8, 2007.

245 In my view, that was due primarily to two things. First, the Crown failed to make a proper preliminary assessment of the scope and extent of its duty to consult and accommodate. There is nothing to indicate that it attempted to make that assessment at the outset of the consultation, so that it could inform the process. Further, Mr. Warner's assessment at the end of the process unreasonably minimized both the strength of Gitanyow's claim and the potential adverse impact of the FL replacement decision on its interests. The inevitable conclusion is that this led the Crown to underestimate its obligation to understand and address Gitanyow's concerns in the course of the consultation about the FL replacement decision.

246 Second, the Crown chose to rely on inappropriate measures as accommodation. In particular, it misapprehended the import of the GFA, erroneously viewing it as encompassing accommodation for the decision to replace the FLs. As a result, the Crown conducted the consultation process under the mistaken impression that adequate accommodation for the decision to replace the FLs was already in place. The result was the premature foreclosure of meaningful discussion of Gitanyow's concerns related to that decision.

247 The clearest example of this lies in the Crown's failure to recognize that the honour of the Crown and s. 35 of the *Constitution Act* imposed a constitutional duty to meaningfully consult and reach accommodation with respect to the recognition of the Wilps and Wilp boundaries in the strategic decision to replace the FLs. Dismissing such recognition as impractical, without discussion or explanation, fell well below the Crown's obligation to recognize and acknowledge the distinctive features of Gitanyow's aboriginal society, and reconcile those with Crown sovereignty.

2008 CarswellBC 1764, 2008 BCSC 1139, [2008] B.C.W.L.D. 6009, [2008] B.C.W.L.D. 6015, [2008] B.C.W.L.D. 6010, [2008] B.C.W.L.D. 6016, [2008] B.C.W.L.D. 6137, 38 C.E.L.R. (3d) 189, [2008] 4 C.N.L.R. 315, 80 Admin. L.R. (4th) 217, 171 A.C.W.S. (3d) 501

248 The Crown's treatment of Gitanyow's silviculture concerns demonstrates a similar failure to understand the scope of what was required by the honour of the Crown. The goal of reconciliation necessarily imports recognition of aboriginal rights to limited resources on claimed territory, and the importance of sustaining those resources while claims are pending. If they are destroyed, there is nothing left to reconcile.

249 While I appreciate that the Crown's efforts to accommodate other Gitanyow concerns were adequate, on the whole, I find that the two fundamental errors I have described, and the failure to uphold the honour of the Crown in dealing with recognition and silviculture, lead to a conclusion that the Crown failed to fulfill its duty to meaningfully consult and adequately accommodate Gitanyow's aboriginal interests in the course of the decision to replace the FLs.

Relief Sought

250 Gitanyow seek the following relief:

1. Declaratory Relief

A. A Declaration that the Respondent, W.I. (Bill) Warner, Regional Executive Director, Northern Interior Forest Region, ["Director"], had a legal duty to meaningfully consult with the Gitanyow Petitioners in good faith and to seek to accommodate Gitanyow aboriginal rights and title with the objectives of the Crown to replace seven Forest Licences which would authorize third parties to log within Gitanyow Territory for a term of fifteen years commencing at the time of the replacement ['Forest Licence Replacements'];

B. A Declaration that the Director, when he approved the Forest Licence Renewals, acted contrary to the honour of the Crown in right of British Columbia ["the Crown"] in its dealings with the Gitanyow;

C. A Declaration that the Director approved the Forest Licence Renewals in March, 2007 ["Decision"] without fulfilling his constitutional duty to meaningfully consult with the Gitanyow;

D. A Declaration that the Decision potentially adversely affected the aboriginal title and aboriginal rights of the Gitanyow with respect to the Gitanyow Territory and resources;

E. A Declaration that Gitanyow possess a strong *prima facie* case for their claim that their Wilp system is integral to the Gitanyow way of life.

F. A Declaration that Gitanyow are entitled to have their Wilp System effectively recognized through meaningful consultation as part of the reconciliation of Gitanyow pre-existing sovereignty with Crown sovereignty.

G. A Declaration that Gitanyow are entitled to have their Wilp System effectively and meaningfully accommodated in the interim prior to the reconciliation of Gitanyow pre-existing sovereignty with Crown sovereignty.

H. A Declaration that the Director has failed to effectively recognize the Gitanyow Wilp System prior to making the Decision and has thereby failed to meaningfully consult with the Gitanyow.

I. A Declaration that the Director has failed to effectively and meaningfully accommodate the Gitanyow Wilp System prior to making the Decision.

J. A Declaration that Gitanyow's strong *prima facie* case for aboriginal rights and good *prima facie* case for aboriginal title entitles it to have those rights and title effectively and meaningfully recognized and affirmed in the

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interim prior to the reconciliation of Gitanyow pre-existing sovereignty with the Crown's sovereignty.

K. A Declaration that Gitanyow are entitled to have the Wilp System meaningfully recognized and given meaningful effect in the Approval Decision.

L. A Declaration that effective and meaningful recognition and affirmation of Gitanyow's rights and title in the consultation process includes the recognition of the right of the Gitanyow:

- a. to renew and carry on their relationship to the land through the Wilp System;
- b. to participate through Joint Planning with the Minister and the Crown in deciding how the lands and resources within their Territory will be used; and
- c. to share in the wealth generated from the resources on Gitanyow Territory.

M. A Declaration that Gitanyow are entitled to a fair share in the revenue generated by the exploitation of forest resources on Gitanyow Territory in the interim.

N. A Declaration that Gitanyow are entitled to share in the decision making in regard to the management and exploitation of forest resources within their territory, including at the strategic planning level as an interim step in the right of the Gitanyow to determine to which uses their Territory should be put.

O. A Declaration that Gitanyow are entitled to have the results of their shared strategic planning given meaningful effect, including meaningful effect in the Forest Licence Replacements.

2. Certiorari Mandamus and Prohibition

P. Relief in the nature of *certiorari* to quash the Decision to the extent that the Decision is with respect to forest resources within the Gitanyow Territory.

Q. Relief in the nature of *mandamus* to direct the Director to meaningfully consult and seek accommodations with the Gitanyow;

R. Relief in the nature of *mandamus* directing the Director to take into account through meaningful consultation the following factors:

- i. the good *prima facie* case of the Gitanyow to aboriginal title in the Gitanyow Territory, including the areas covered by the Forest Licence Forest Licence Replacements;
- ii. the strong *prima facie* case of the Gitanyow to aboriginal rights to the resources, including forest resources within Gitanyow Territory, including the areas covered by the Forest Licence Replacements; and
- iii. the Gitanyow system of the exercise of their aboriginal rights and aboriginal title through the management of the lands and resources by the Wilp System.

S. Relief in the nature of *prohibition* prohibiting the Director from further implementing the Approval Decision with respect to any forest resources within Gitanyow Territory until he has fulfilled his constitutional obligation to effectively and meaningfully consult and accommodate Gitanyow aboriginal rights and title.

2008 CarswellBC 1764, 2008 BCSC 1139, [2008] B.C.W.L.D. 6009, [2008] B.C.W.L.D. 6015, [2008] B.C.W.L.D. 6010, [2008] B.C.W.L.D. 6016, [2008] B.C.W.L.D. 6137, 38 C.E.L.R. (3d) 189, [2008] 4 C.N.L.R. 315, 80 Admin. L.R. (4th) 217, 171 A.C.W.S. (3d) 501

251 I am not prepared to grant the relief sought without further submissions from the parties for the following reasons.

252 First, it is not clear to me that the orders sought for *certiorari* and prohibition could be granted without infringing an agreement reached between Gitanyow and the licensees, and affecting the rights of third parties who played no part in this proceeding. The licensees were served with the petition, but did not participate in the hearing as the petitioners agreed they would not seek an order to quash the replacement FLs themselves, or to amend their terms, or to direct the licensees to participate in any future consultation.

253 Gitanyow initially argued that if I quashed the decision to replace the FLs, the licences will nevertheless remain in place as they represent a contract between the Crown and the licensees that would not be affected by my order.

254 In its reply argument, however, Gitanyow described a somewhat different scenario flowing from an order for *certiorari*:

The parties would all be back in the position they were in as though no decision had been made. The Director would be required to address the consultation properly and seek proper accommodation prior to making those decisions. The licensees would be able to operate on their existing licences which they had in place prior to these forest licence replacements. In short, if the licence replacement decision had not taken place, there would not be forest licence replacements and the former licences would remain in force.

255 In my view, this flies in the face of the agreement that Gitanyow would not seek an order amending the terms of the licences.

256 The Crown points out additional uncertainties arising from Gitanyow's position. Section 15(6) of the *Forest Act* states that once the offer to replace a forest licence is accepted, the forest licence formerly in force "expires" on the commencement of the replacement licence. It is therefore unclear that the licensees could revert to operating under their former licences. Further, four of the six licences that preceded the replacement FLs passed their ninth anniversary in the fall of 2007. Those licensees would therefore lose the opportunity to obtain a replacement FL by virtue of the timelines in s. 15 if, as Gitanyow claims, an order for *certiorari* would place the parties in their pre-decision positions.

257 While the impact of the relief sought by Gitanyow on the licensees was raised at the hearing, neither party addressed it to my satisfaction. If Gitanyow intends to pursue its claim for *certiorari* and prohibition, I wish to have further submissions that clarify the impact of such orders on the replacement FLs in view of the agreement made by Gitanyow with the licensees.

258 With respect to Gitanyow's claim for *mandamus*, I wish to have submissions on what such relief would add to the Crown's constitutional duty to consult and accommodate.

259 Finally, Gitanyow seeks extensive declaratory relief. I would find it helpful to have submissions that are directed to that relief in the context of the findings that I have made.

260 I wish to make it clear that my request for further submissions on the relief sought is not an invitation to raise new issues. Counsel may schedule an appropriate time with the Registry for those submissions.

Order accordingly.

2008 CarswellBC 1764, 2008 BCSC 1139, [2008] B.C.W.L.D. 6009, [2008] B.C.W.L.D. 6015, [2008] B.C.W.L.D. 6010, [2008] B.C.W.L.D. 6016, [2008] B.C.W.L.D. 6137, 38 C.E.L.R. (3d) 189, [2008] 4 C.N.L.R. 315, 80 Admin. L.R. (4th) 217, 171 A.C.W.S. (3d) 501

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West Moberly First Nations v. British Columbia (Chief Inspector of Mines)

Chief Roland Willson on his own behalf and on behalf of the members of the West Moberly First Nations and the West Moberly First Nations (Petitioners) and Her Majesty the Queen in Right of British Columbia as a represented by Al Hoffman, Chief Inspector of Mines, Victor Koyanagi, Inspector of Mines, and Dale Morgan, District Manager, Peace Forest District, and First Coal Corporation (Respondents)

British Columbia Supreme Court

Williamson J.

Heard: February 1-4, 2010

Judgment: March 19, 2010

Docket: Victoria 09-4823

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Counsel: C. Devlin, T. Thielmann for Petitioners

K.J. Phillips, E.K. Christie for Respondent, Her Majesty the Queen in Right of the Province of British Columbia

K.E. Clark for Respondent, First Coal Corporation

Subject: Public; Constitutional; Civil Practice and Procedure; Natural Resources

Aboriginal law --- Aboriginal rights to natural resources — Aboriginal rights — Hunting

Applicants were First Nations — Two amendments were issued to existing permit, allowing coal company to obtain bulk coal sample from lands subject to applicants' treaty right to hunt caribou and approving advanced exploration program on same lands — District manager for Ministry of Forest and Ranges issued licence to cut, permitting company to clear lands for exploration — Applicants applied for judicial review of all three decisions — Application granted — Crown's consultation prior to issuing amendments and licence was not meaningful — Crown was very slow in providing applicants with initial assessment of potential adverse effects on treaty rights — Applicants' main concern was real potential for extirpation of caribou herd — Since applicants presented detailed report of danger to herd and its relationship to their treaty-protected right to hunt, Crown's failure to put in place plan for herd's protection and rehabilitation was failure to accommodate reasonably — Crown delegated its duty towards applicants to officials without giving them authority to fully consider or accommodate applicants' concerns — Decision to adopt less destructive mining method was taken before consultation and was not

2010 CarswellBC 651, 2010 BCSC 359, [2010] B.C.W.L.D. 3852, [2010] B.C.W.L.D. 3853, [2010] B.C.W.L.D. 3854, [2010] B.C.W.L.D. 3856, [2010] 2 C.N.L.R. 354, 6 B.C.L.R. (5th) 94, [2010] 11 W.W.R. 752

accommodation measure — Treaty-protected right to hunt meant right to hunt caribou in traditional lands, so possibility of hunting other herds elsewhere was not accommodation — Rationale set out for issuing permits and licence did not manifest reasonable accommodation — Pragmatic and reasonable step was to stay effect of amendment permitting exploration program and of licence to cut for 90 days, to permit and mandate proper accommodation.

Aboriginal law --- Constitutional issues — Fiduciary duty of Crown

Applicants were First Nations — Two amendments were issued to existing permit, allowing coal company to obtain bulk coal sample from lands subject to applicants' treaty right to hunt caribou and approving advanced exploration program on same lands — District manager for Ministry of Forest and Ranges issued licence to cut, permitting company to clear lands for exploration — Applicants applied for judicial review of all three decisions — Application granted — Crown's consultation prior to issuing amendments and licence was not meaningful — Crown was very slow in providing applicants with initial assessment of potential adverse effects on treaty rights — Applicants' main concern was real potential for extirpation of caribou herd — Since applicants presented detailed report of danger to herd and its relationship to their treaty-protected right to hunt, Crown's failure to put in place plan for herd's protection and rehabilitation was failure to accommodate reasonably — Crown delegated its duty towards applicants to officials without giving them authority to fully consider or accommodate applicants' concerns — Decision to adopt less destructive mining method was taken before consultation and was not accommodation measure — Treaty-protected right to hunt meant right to hunt caribou in traditional lands, so possibility of hunting other herds elsewhere was not accommodation — Rationale set out for issuing permits and licence did not manifest reasonable accommodation — Pragmatic and reasonable step was to stay effect of amendment permitting exploration program and of licence to cut for 90 days, to permit and mandate proper accommodation.

Administrative law --- Discretion of tribunal under review — Fettered discretion

Applicants were First Nations who were beneficiaries of Treaty No. 8 — Two amendments were issued to existing permit, allowing coal company to obtain bulk coal sample from lands subject to applicants' treaty right to hunt caribou and approving advanced exploration program on same lands — District manager for Ministry of Forest and Ranges issued licence to cut, permitting coal company to clear up to 41 hectares of lands for that exploration — Applicants applied for judicial review of all three decisions — Application granted — Crown's consultation was not meaningful in circumstances — District Manager did not improperly fetter discretion, given language of Coal Act entitling company to licence to cut — While district manager had discretion whether or not to approve licences to cut pursuant to Forest Act, Coal Act limited his discretion with respect to coal licences, such as company, to deciding whether or not to impose conditions on licence.

Administrative law --- Prerogative remedies — Certiorari — Discretion of court to refuse certiorari — Miscellaneous

Applicants were First Nations who were beneficiaries of Treaty No. 8 — Two amendments were issued to existing permit, allowing coal company to obtain bulk coal sample from lands subject to applicants' treaty right to hunt caribou and approving advanced exploration program on same lands — District manager for Ministry of Forest and Ranges issued licence to cut, permitting coal company to clear up to 41 hectares of lands for that exploration — Applicants applied for judicial review of all three decisions — Application granted — Crown's consultation was not meaningful in circumstances — Crown's failure to put in place plan for caribou herd's protec-

2010 CarswellBC 651, 2010 BCSC 359, [2010] B.C.W.L.D. 3852, [2010] B.C.W.L.D. 3853, [2010] B.C.W.L.D. 3854, [2010] B.C.W.L.D. 3856, [2010] 2 C.N.L.R. 354, 6 B.C.L.R. (5th) 94, [2010] 11 W.W.R. 752

tion and rehabilitation was failure to accommodate reasonably — Fashioning remedy was difficult, given that bulk sample program under first decision was complete — Pragmatic and reasonable step was to stay effect of amendment permitting exploration program and of licence to cut, for determined period to permit and mandate proper accommodation of applicants' concerns — Accommodation should be expeditious implementation of reasonable, active, program for protection and augmentation of caribou herd — While this had potential impact on coal company, Crown had argued that future economic impacts of potential coal mine were irrelevant to permit amendment decisions — Coal company refused applicants' request to voluntarily cease operations until this matter was determined — Stay should be in effect for 90 days.

Cases considered by *Williamson J.*:

Brown v. Sunshine Coast Forest District (District Manager) (2008), (sub nom. *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*) [2009] 1 C.N.L.R. 110, 2008 BCSC 1642, 2008 CarswellBC 2587 (B.C. S.C.) — referred to

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — considered

Kwikwetlem First Nation v. British Columbia Transmission Corp. (2009), [2009] 2 C.N.L.R. 212, 266 B.C.A.C. 250, 449 W.A.C. 250, 76 R.P.R. (4th) 213, 89 B.C.L.R. (4th) 273, 41 C.E.L.R. (3d) 159, 308 D.L.R. (4th) 285, [2009] 9 W.W.R. 92, 2009 BCCA 68, 2009 CarswellBC 341 (B.C. C.A.) — referred to

Lax Kw'alaams Indian Band v. Canada (Attorney General) (2009), 2009 BCCA 593, 2009 CarswellBC 3479, [2010] 1 C.N.L.R. 278 (B.C. C.A.) — considered

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) — considered

Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation (2006), 272 D.L.R. (4th) 727, 2006 CarswellOnt 4758, [2006] 4 C.N.L.R. 152 (Ont. S.C.J.) — referred to

R. v. Badger (1996), [1996] 4 W.W.R. 457, 37 Alta. L.R. (3d) 153, 195 N.R. 1, 105 C.C.C. (3d) 289, 133 D.L.R. (4th) 324, [1996] 2 C.N.L.R. 77, [1996] 1 S.C.R. 771, 181 A.R. 321, 116 W.A.C. 321, 1996 CarswellAlta 365F, 1996 CarswellAlta 587 (S.C.C.) — considered

R. v. Powley (2003), 2003 CarswellOnt 3502, 2003 CarswellOnt 3503, 2003 SCC 43, 308 N.R. 201, 177 O.A.C. 201, 68 O.R. (3d) 255 (note), 230 D.L.R. (4th) 1, 177 C.C.C. (3d) 193, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321, 5 C.E.L.R. (3d) 1, 110 C.R.R. (2d) 92 (S.C.C.) — referred to

Statutes considered:

Coal Act, S.B.C. 2004, c. 15

Generally — referred to

2010 CarswellBC 651, 2010 BCSC 359, [2010] B.C.W.L.D. 3852, [2010] B.C.W.L.D. 3853, [2010] B.C.W.L.D. 3854, [2010] B.C.W.L.D. 3856, [2010] 2 C.N.L.R. 354, 6 B.C.L.R. (5th) 94, [2010] 11 W.W.R. 752

s. 9 — considered

s. 9(2) — considered

s. 9(3) — considered

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

Generally — referred to

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

Generally — pursuant to

Mines Act, R.S.B.C. 1996, c. 293

Generally — referred to

Species at Risk Act, S.C. 2002, c. 29

Generally — referred to

Treaties considered:

Treaty No. 8, 1899

Generally — referred to

APPLICATION by First Nations applicants for judicial review of issuance of permit amendments, allowing coal company to obtain bulk coal sample and carry out exploration program in lands, and of licence to cut for lands.

Williamson J.:

1 This application is brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. The petitioners, West Moberly First Nations ("West Moberly"), beneficiaries of Treaty No. 8, apply to quash three decisions of individuals appointed as statutory decision makers for the Crown.

2 On September 1, 2009, Al Hoffman, Chief Inspector of Mines with the Ministry of Energy, Mines and Petroleum Resources, issued an amendment to an existing permit pursuant to the *Mines Act*, R.S.B.C. 1996, c. 293 [*Mines Act*] permitting the respondent, First Coal Corporation ("First Coal"), to obtain a 50,000 ton bulk sample of coal from lands referred to as the Goodrich Properties.

3 On September 14, 2009, the Inspector of Mines, Victor Koyanagi, issued an amendment to an existing permit approving a 173 drill hole, five trench advanced exploration program on the same land, also pursuant to the *Mines Act*. This has been referred to as the advanced exploration program.

4 On October 8, 2009, Dale Morgan, the District Manager for the Ministry of Forests and Range, issued a licence to cut permitting First Coal to cut and clear up to 41 hectares of the land to facilitate the advanced exploration.

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5 The land affected by these three decisions is territory the petitioners claim is subject to their Treaty No. 8 guaranteed traditional right to hunt caribou.

6 The petitioners say that these officers of the Crown failed to consult adequately and meaningfully with the petitioner West Moberly concerning their Treaty No. 8 hunting rights. Further, they say that these officers of the Crown failed to accommodate reasonably West Moberly's rights when they issued the permit amendments and the licence to cut. They submit, therefore, that these three decisions should be declared invalid and set aside.

7 Finally, the petitioners say the District Manager for the Ministry of Forests and Range breached his administrative law obligations when issuing the licence to cut by wrongly fettering his discretion.

8 It is not disputed by the respondents that in these circumstances there is a duty upon the Crown to consult with representatives of West Moberly. The Crown says it has discharged that duty.

9 Similarly, First Coal concedes that the Crown has such a duty, but says that duty is to balance First Nations' rights and societal interests when making decisions that may impact upon treaty rights. It submits the Crown has done so.

Standard of Review

10 The appropriate standard of review for the Crown's assessment of the extent of its duty to consult is correctness. The appropriate standard of review for assessing the consultation process, including any accommodation measures, is that of reasonableness. The parties do not differ on these standards of review.

Treaty No. 8

11 Treaty No. 8 is dated September 22, 1899. It includes the following:

... and Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping, and fishing throughout the track surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the Country acting under the authority of Her Majesty, and saving excepting such tracks as made be required or taken up from time to time for settlement, mining, lumbering, trading, or other purposes.

12 It can be seen, therefore, that the Treaty contemplated that portions of the surrendered land would be "taken up" for purposes such as mining.

13 Although the Treaty contemplates the taking up of land for activities such as mining, the Supreme Court of Canada has stated that the interpretation of such treaties must take into account the fact that the Native people at the time they entered into these agreements recorded their history orally and, importantly, received oral promises from the Crown's negotiators. The material filed discloses that the commissioners who negotiated these treaties on behalf of the Crown made oral promises to the Native peoples. These officers of the Crown recorded many of these oral promises. Their reports survive and have been considered by the Supreme Court of Canada.

14 With respect to Treaty No. 8, the Supreme Court of Canada stated in *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] 4 W.W.R. 457 (S.C.C.), at para. 55 and 56:

55. Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little set-

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tlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap." The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one commissioner, cited in René Furmoleau, O.M.I., *As Long As This Land Shall Last*, at p. 90, stated:

We are just making peace between Whites and Indians - for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.

56. Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices.

15 Further, in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), the Court held that given the Crown's oral promises, Treaty No. 8 protects the right to exercise meaningfully traditional hunting practices. The unanimous Court stated at para. 48:

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

[Emphasis in original.]

Background Facts

16 Here, the affidavit evidence discloses that West Moberly's harvesting practice included a traditional seasonal round, which meant that hunters travelled to particular preferred areas within the treaty territory during specific times of the year, including the area impacted by the First Coal mining operation.

17 The evidence discloses that the caribou were a source of food, and that caribou hide, bone, and antlers were important to the manufacturing of a number of items both for cultural and practical reasons. However, the evidence also discloses that due to the decline in the caribou population, which the petitioners claim is the result of incremental development in the area, including the construction of the WAC Bennett and Peace Cannon Dams in the 1960s and 1970s, and the creation of large lakes behind those dams, West Moberly's right to carry on their traditional harvesting practice has been diminished.

18 In particular, the petitioners say that the population of caribou in the area of First Coal's operations has been decimated. They point to the fact that the relevant southern mountain population of caribou has been listed, pursuant to the *Species at Risk Act*, S.C. 2002, c. 29, as "threatened". The material filed shows the specific herd, the Burnt Pine herd, has been reduced to a population of 11.

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The Petitioners' Submissions

19 The petitioners submit that not only has the Crown failed to consult adequately, it has failed to accommodate reasonably their hunting rights guaranteed by Treaty No. 8.

20 The petitioners say that from 2005 to 2008 they regularly communicated with various Crown officials raising concerns about their hunting rights and in particular the need to put in place a plan to protect and increase the Burnt Pine caribou herd. I conclude that the diminished state of the Burnt Pine caribou herd is at the heart of the West Moberly concerns. They submit the Crown was unresponsive, or that responses were mere "standard form referral letters" devoid of any meaningful content.

21 The petitioners say that other employees of the Crown have also raised concerns about the Burnt Pine caribou herd, given First Coal's activities, but that these concerns were ignored by the decision makers in this instance.

22 The petitioners point to the comments of Dr. Dale Seip, a wildlife ecologist with the Crown's Northern Interior Forest Region. On September 25, 2008, commenting on First Coal's planned operations, he noted:

The proposed activities occur directly on core winter range of this Threatened caribou herd and will result in the destruction of critical caribou habitat. The total amount of core habitat that will be destroyed by the Bulk Sampling Program may be relatively small, but the impacts could be more widespread. Activity in the sampling area may deter caribou movement along the ridge and preclude their use of the large block of core habitat on the northern end of the ridge. The disturbance may also deter caribou from using much of the core habitat further south on the ridge. Caribou have been found to avoid areas up to 6 km away from mining activity (Weir et al. 2007).

It is also necessary to understand what the longer term implications are for these caribou. The Goodrich property encompasses most of the core caribou habitat on Mt. Stephenson. Mining over this entire area would destroy a major portion of the core winter range for this caribou herd. It is short-sighted and misleading to evaluate this proposal for bulk sampling without also considering the longer term consequences of more widespread mining activity occurring over the entire property.

23 On December 16, 2008, Pierre Johnstone, an eco-system biologist with the Ministry of Environment, wrote to the respondent Victor Koyanagi, raising specific concerns about the First Coal project. Among other things, Mr. Johnstone wrote:

The proposed window for work is given as of November 15 2008 to December 31 2009. This time period includes the high risk periods of winter, late winter, and calving for Caribou, as well as the high risk window for vegetation clearing for songbirds. More detail in the proposed work is necessary to determine whether potential impacts can be mitigated.

In past correspondence, we have requested that applications include any measures the proponent can propose to avoid, mitigate, or compensate any potential negative impacts of their activities, such as avoiding the use of high elevation ponds, planning for lichen re-establishing on disturbed areas, avoiding clearing pockets of older lichen-bearing spruce, specifying discrete work windows for discrete aspects of exploration, etc. For example, when are the trenches planned to be dug? Will this include the use of explosives?

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These are important questions with respect to disturbance of wintering Caribou.

24 In June 2009 the West Moberly forwarded to the Crown a 98 page document entitled "I Want to Eat Caribou Before I Die". This document was the initial extensively researched and written submission of the West Moberly people concerning First Coal's Goodrich property. A principle concern in that document was that there was no recovery plan for the caribou which they described as a species at risk. At page 71, the petitioners noted:

With respect to species considered to be "threatened", such as the Burnt Pine herd, under the federal *Species at Risk Act* ("SARA") the development of a proposed recovery strategy was required no later than June 5, 2007. Yet the Crown (federal and provincial) to date has developed no such recovery plan which includes the Burnt Pine caribou herd or for the other caribou herds in our traditional territory. In point of fact, the Province suspended the governmental process that was initiated and thus responsible for upholding its obligations under the Accord. A website maintained by the Recovery Initiatives for Caribou of British Columbia, which relates directly to the caribou in our traditional territory reads:

This Recovery Implementation Group (RIG) met informally once during the spring of 2003. Shortly thereafter most caribou RIGs were temporarily suspended pending direction from the provincial Species at Risk Coordination Office (SARCO). The herds that will be addressed by this RIG include: Moberly, Burnt Pine, Kennedy Siding, Quintette, Graham, Belcourt, and Narraway. (RICBC, 2009)

On March 25, 2009, we sent a letter to the Minister of Environment Barry Penner with respect to the suspension. The Minister has not responded to our enquiries into this matter; thus, we have yet to be provided with a justification for the suspension. Given the state of affairs with respect to caribou herd populations, we consider the suspension itself to be unreasonable and unacceptable on the part of British Columbia.

Response to Proposed Accommodations

25 West Moberly proposed a number of accommodations. These include the implementation of a recovery strategy for the Burt Pine and other caribou herds within their preferred treaty territory, the development of information regarding cumulative impacts on caribou in the territory, and other matters including a request that the Crown reject First Coal's amended bulk sample and advanced exploration programs.

26 On July 20, 2009, the acting manager for the aboriginal relations branch of the Ministry of Energy, Mines and Petroleum Resources, sent to the petitioner, Chief Roland Willson, a document entitled "Considerations to Date". He stated that this document represented the information the Ministry was considering currently with respect to the First Coal operation. A meeting was set for August 5, 2009, to discuss this document and the acting manager requested that West Moberly respond to the "Considerations to Date" document before or at that meeting. This gave West Moberly a maximum of 15 days to respond.

27 The document notes, at paragraph 6.2.3, that maintaining or increasing the population of the Burnt Pine caribou herd is not currently planned.

28 Referring to the petitioners Treaty No. 8 rights as expressed in the written Treaty, the document quotes the "take up" provisions without referring to the Supreme Court of Canada's comments, noted above, concerning the impact of the oral promises made to the Native signatories of that Treaty by Crown representatives.

29 In this "Considerations" document, the Ministry takes the position that as the Burnt Pine caribou herd

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constitutes a very small portion of the total population of nine caribou herds in the territory, the opportunity for the petitioners to hunt caribou in their traditional territory will "not be significantly reduced".

30 Further, the document notes that the issue of the cumulative impacts of Crown approved development on the caribou herds is "beyond the scope of the review of this project to fully assess".

31 At page 15, the report states:

It is generally recognized that even without further development, in order the Burnt-Pine Caribou Herd to maintain or increase its current numbers, a recovery plan is required. Recovery plans typically include some of the following measures: closure of access roads, predator control such as killing of wolves, and re-location of viable caribou from neighbouring populations. However, as Pierre Johnstone explains in his June 19, 2009 letter, maintaining or increasing the population of the Burnt-Pine Caribou Herd is currently not planned: While northern ecotype herds within the Southern Mountain National Ecological Area require a recovery plan and associated action plans, there are currently no recovery or action plans in place for the recovery of this herd.

32 At the August 5, 2009, meeting mentioned above, representatives of the Ministry of Energy, Mines and Petroleum Resources met with members of the petitioners. Chief Willson, who attended the meeting, deposed that the Crown representatives would not discuss the accommodation measures purposed earlier because it was their view that the petitioners were able to hunt other animals besides caribou and that the First Coal project posed minimal adverse effects to the harvesting rights provided by Treaty No. 8.

33 The petitioner Chief Willson deposes that at the end of the meeting the petitioners were informed that the decision whether to grant the permit would be made the following week. The bulk sample permit was issued September 1st.

34 The petitioners were particularly troubled by a letter dated August 8, 2009, in which the Ministry said further stages of development would not be considered in the permit amendment decisions. It is the submission of the petitioners that while the Crown refers to further economic benefits as justification for this activity, in considering whether the amended permit should be granted, the Crown takes the expressed position that only the circumstances existing at the present time are to be considered. The Petitioners submit that position precludes consideration of the future impacts of the project upon their Treaty rights, a factor they say should be taken in to account.

The Crown's Submission

35 The Crown accepts the existence of a duty to consult meaningfully with West Moberly and accepts that it is required to accommodate the interests of West Moberly in a reasonable manner after balancing the interests of West Moberly with the interests of other First Nations and of the public. The Crown further submits that the mining decision makers considered the issues raised during the consultation with West Moberly and as a result of this consultation made various changes to the project which would mitigate the impacts of it upon the Burnt Pine herd.

36 The Crown accepts that it delegated some of the procedural aspects of the consultation to First Coal. It points to the Supreme Court of Canada decision in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at para. 53 for support for this delegation. The propriety of that delega-

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tion not contested significantly by the petitioners. However, they point to the statement in the same paragraph that "the ultimate legal responsibility for consultation and accommodation rests with the Crown".

37 The Crown submits that what the petitioners are attempting to do in this matter is convert a right to hunt for meat in the area subject to Treaty No. 8 into a specific right to hunt for caribou in the smaller area impacted by the First Coal operations. It relies upon *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593 (B.C. C.A.). In that case, the court stated at para. 33, quoting *R. v. Powley*, 2003 SCC 43 (S.C.C.), para. 20, that:

the periodic scarcity of moose does not in itself undermine the respondents' claim. The relevant right is not to hunt moose but to hunt for food in the designated territory.

[Emphasis in original.]

38 Accepting their duty to consult, the Crown submits that it identified those Treaty No. 8 First Nations who might be affected and commenced a consultative process with each of them.

39 In this case, the Crown originally thought that a lower level of consultation was adequate because the impact of the First Coal operation was limited to a small area of West Moberly's traditional territory. The Crown's affidavit material discloses that after discussing the matter with West Moberly's representatives, it concluded it would be more appropriate to engage with West Moberly at the higher, or deeper, as that word is used in the authorities, end of the spectrum. The Crown submits that its characterization of the right of the West Moberly to hunt is subject to the Crown's right to "take up" for the purposes specified in the Treaty itself.

40 Further, they submit that with respect to the first permit at issue, the bulk sample amendment, the Chief Inspector of Mines considered a number of documents before making his decision. These included letters and memorandums from Dale Seip and Pierre Johnstone mentioned above, the submission of West Moberly, mentioned in para. 25 above, and other documents. The Chief Inspector, along with the Inspector of Mines, attended a meeting with West Moberly by teleconference on August 12, 2009. The Inspector of Mines also considered a similar list of documents.

41 Both decision makers had before them an analysis of the West Moberly submission prepared by employees of the Ministry of Energy, Mines and Petroleum Resources.

42 The affidavit material filed by the Crown notes that because of the concern with respect to caribou raised by West Moberly, consultation was increased. The material also shows that the decision makers knew West Moberly was opposed to the First Coal project because of their concerns with the Burnt Pine herd, and as a result the Crown accepted certain accommodation measures. These included taking into account a study commissioned by First Coal entitled "Caribou Mitigation and Monitoring Plan for the Bulk Sample and Advanced Exploration 2009/2010 Program at the Central South Property".

43 The Crown also notes that the bulk sample was reduced from 100,000 tons to 50,000, that a controversial access road, the Spine Road, which the Crown concedes was constructed in a place that would interfere significantly with the Burnt Pine herd, was closed and rehabilitated, and finally that First Coal adopted a different mining system, the ADDCAR system, said to be less disruptive to the environment.

44 With respect to the Ministry of Forestry and Range granting of a permit to First Coal to cut timber in the

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area, the Crown disputes the suggestion that the district manager fettered his discretion. The Crown takes the position that s. 9 of the *Coal Act*, S.B.C. 2004 c. 15 ("*Coal Act*") provides that a holder of a coal licence is entitled, subject to entering into an agreement in the form of a licence to cut under the *Forest Act*, R.S.B.C. 1996, c. 157 [*Forest Act*] to use and remove timber at the location.

First Coal's Submission

45 First Coal agrees with the submissions of the Crown. However, First Coal emphasizes, relying upon *Haida Nation*, that while the Crown may delegate procedural aspects of the consultation process to industry proponents of a particular project, the duty to consult and accommodate remains with the Crown. That duty is characterized by First Coal as a duty to balance treaty rights and societal interests.

46 First Coal submits that the Crown discharged its duties to consult and to accommodate. It also submits that while it may be under no legal duty to consult with West Moberly, it in fact did so to a considerable extent and as a result took several steps to assuage West Moberly's concerns. These included retaining consultants, providing funds to assist in monitoring caribou, and retaining a wildlife biologist to develop a plan to restore altered landscapes and to monitor the caribou population.

47 First Coal agreed to close the Spine Road mentioned above, and participated in a number of meetings with provincial wildlife biologists and First Nations groups to discuss the caribou population. It took steps to inform its employees and visitors to the area about procedures and practices that would ensure the impact upon the caribou was as minimal as possible.

48 I need not review all of the steps taken by First Coal in detail, as I am satisfied, subject to some comments below, that First Coal has taken reasonable steps to meet West Moberly's concerns.

Analysis

49 I am satisfied that the Crown recognized that it had a duty to consult with West Moberly before issuing the two permits and the licence to cut. I am satisfied that it did consult. I am not satisfied, however, that the consultation was meaningful in the circumstances.

50 First, I note the Crown was extremely slow in providing West Moberly with its initial assessment of the potential adverse effects of the project upon West Moberly's treaty rights. While the Crown submits consultation commenced in 2005, a substantial assessment was not provided until August of 2009, shortly before the first permit issued.

51 Second, the submission of the petitioners that the Crown issued "standard form referral letters", while perhaps an exaggeration, has some merit. The prime concern of the West Moberly is the real potential for the extirpation of the Burnt Pine caribou herd. I conclude that at least since June of 2009, when the West Moberly presented a detailed report of the danger to that herd and its relationship to their treaty protected right to hunt, the Crown's failure to put in place an active plan for the protection and rehabilitation of the Burnt Pine herd is a failure to accommodate reasonably.

52 While First Coal's "Mitigation and Monitoring Plan" is a step in the direction of protecting critical caribou habitats, as the Crown itself stated in the "Considerations to Date" document of July 20, 2009, there is currently no rehabilitation program in effect for the Burnt Pine herd.

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53 I conclude that a balancing of the treaty rights of Native peoples with the rights of the public generally, including the development of resources for the benefit of the community as a whole, is not achieved if caribou herds in the affected territories are extirpated.

54 Further, here the Crown has delegated its duty towards First Nations peoples to departmental officials. But in so doing it has not given those officials the authority to consider fully the First Nations concerns, nor the power to accommodate those concerns. The same July 20, 2009, document which states that the Ministry of Energy, Mines and Petroleum Resources recognizes that the cumulative impacts of First Coal's project upon West Moberly's traditional territory have been raised by both West Moberly and the Ministry of the Environment, states that it is "beyond the scope of this project to fully assess" those impacts.

55 The honour of the Crown is not satisfied if the Crown delegates its responsibilities to officials who respond to First Nations' concerns by saying the necessary assessment of proposed "taking up" of areas subject to treaty rights is beyond the scope of their authority.

56 The Crown's September 4, 2009, "rationale for decision" forwarded to West Moberly outlined four measures said to respond to West Moberly's concerns. One was the reduction of the Bulk Sampling program from 100,000 tons to 50,000 tons. The evidence demonstrates, however, as West Moberly representatives were told at a meeting on April 30, 2009, that a key reason for that reduction was the current economic downturn.

57 The second expressed justification was the implementation of First Coal's Caribou Mitigation and Monitoring Plan. A government wildlife ecologist with the Northern Interior Forest Region, Dale Seip, considered that plan. In a report dated March 9, 2009, he wrote:

The mitigation plan does an excellent job of attempting to reduce the environmental impacts of the bulk sampling and exploration program on caribou. However, the program will still destroy or compromise substantial amounts of core winter and summer habitat for a small threatened caribou herd. It will also compromise previous management actions by the Ministry of Forests and Range to protect habitat for this caribou herd.

If the government intends to conserve and recover the Burnt Pine caribou herd, habitat conditions need to be maintained or improved. Allowing additional habitat destruction is incompatible with efforts to recover the populations.

58 The plan was also reviewed by Pierre Johnstone, a biologist with the Ministry of the Environment. On June 19, 2009, he wrote to the Inspector of Mines stating that if the project proceeds "...core winter and summer habitat will be directly and indirectly negatively impacted". He also noted that there are no action plans in place for the recovery of the herd. He concluded:

Though the current draft plans provide significant measures for avoiding and minimizing impacts to the Burnt Pine Caribou, mine development in this [Ungulate Winter Range] and [Wildlife habitat area] would be inconsistent with maintaining or increasing Woodland Caribou numbers and distribution in the South Peace, which require that habitat be conserved and/or improved.

59 Because, as the Crown concedes, no recovery plan for the caribou is in place, I conclude this cannot be seen as a reasonable accommodation of West Moberly's concerns.

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60 The third accommodation measure claimed in the rationale was the closure of the "Spine Road", an access road to the site. However, that road was built in 2006 before concerns raised by the Ministry of the Environment and West Moberly about the impact upon caribou. Once these concerns were raised, First Coal agreed to abandon the road and reclaim the area. While this reconsideration of steps taken after they were executed is a recognition of a mistaken action, even if it can be regarded as a response to West Moberley's proposed accommodations, it was not implemented as part of a concerted rehabilitative plan for the threatened caribou herd.

61 The fourth accommodation was said to be the adoption of a less destructive method of mining, described as the ADDCAR system. However the material indicates the decision to move to this method of mining was taken in 2007, before significant consultation with West Moberly had taken place. It is not a response to West Moberly's concerns.

62 Nor can the suggestion that the Burnt Pine herd constitutes only a minor part of the hunting potential for the West Moberly prevail. As noted in para. 15 above, the Supreme Court of Canada has stated that a meaningful right to hunt means a right to hunt in "its" (here West Moberly's) traditional territories. The area impacted by the First Coal project includes a portion of West Moberly's traditional seasonal round of hunting caribou, and impacts not only hunting for food, but upon the use of caribou for other cultural and practical reasons. It is not an accommodation to say "hunt elsewhere".

63 In *Lax Kw'alaams Indian Band*, the Court of Appeal observed, at para. 35, that each case "will determine the nature and breadth of the practice, custom or tradition in question and at the end of the analysis, of the right to be accorded constitutional status". Thus, in the case at bar, the Court is required to take into account West Moberly's treaty protected right to hunt, including the traditional seasonal round, and the impact of these decisions upon that right. Here, I conclude that treaty protected right is the right is to hunt caribou in the traditional seasonal round in the territory effected by the First Coal Operation.

64 I conclude that the rationale set out for the issuing of the permits and the licence to cut does not manifest reasonable accommodation to West Moberly's prime concern about the violation of its treaty right to hunt caribou.

Fettering Discretion

65 The petitioners submit that the District Manager for the Ministry of Forest and Range improperly fettered his discretion when he decided to issue the occupants licence to cut on October 8, 2009. They say that in issuing this permit, the District Manager misinterpreted s. 9 of the *Coal Act* when he concluded that that section removed the discretion which was exercised pursuant to the *Forest Act* with respect to such licences.

66 It is the *Forest Act* which gives the District Manager the power to issue a licence to cut. However, s. 9 of the *Coal Act* states the following:

(2) A licensee is entitled to explore for and develop only the coal that is inside the boundaries, continued vertically downward, of the licence location.

(3) The holder of a licence is entitled

(a) to enter, occupy and use the surface area of the location for the purpose of exploring for and developing coal on the location,

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(b) subject to entering into an agreement in the form of a free use permit under the Forest Act or a licence to cut under that Act, to use and remove timber that, at the time the holder of the licence enters into the agreement, is on the location, and

(c) to the non-exclusive right to use sand, gravel and rock from the location for use on the location for a construction purpose approved under the Mines Act, without the necessity of obtaining under the Land Act a licence, lease, permit or other authorization.

67 I am not persuaded that the District Manager fettered his discretion. It is apparent upon a reading of the above subsections that the object of this particular piece of legislation is to ensure that those who hold permits for the purpose of exploring for and developing a coal mine are entitled to remove timber subject to conditions set out in an occupant's licence to cut. The subsection requires that would be miners obtain such a licence before cutting timber necessary for their exploration or development.

68 It is not disputed here that First Coal was a licensee pursuant to the *Coal Act*, nor that First Coal entered into an agreement in the form of a licence to cut under the *Forest Act*. The District Manager recognized that pursuant to the *Forest Act* he has a discretion whether to approve licences to cut. However, he noted, in para. 8 of a memorandum prepared October 8, 2009, that:

Because this is a coal tenure holder, the *Coal Act* entitles FCC to an OLTC [Occupiers Licence to Cut] and limits my decision to whether or not to add conditions to the OLTC.

69 He went on to determine that there was a need for conditions. In issuing the licence to cut, he required that First Coal adhere to their Caribou and Mitigation Monitoring Program during operations and that, to the extent practicable, they limit their harvesting of timber to that required to conduct operations safely.

70 In the result, I am unable to conclude that the District Manager improperly fettered his discretion.

Remedy

71 I have found that although the Crown undertook consultation, the consultation was not sufficiently meaningful, and the accommodation put in place was not reasonable.

72 West Moberly seeks a declaration that the two permit amendments and the licence to cut are invalid and should be set aside because the Crown failed to consult West Moberly adequately and meaningfully, and failed to accommodate reasonably West Moberly's articulated concerns. Alternatively, West Moberly seeks an order staying the permits and licence to cut until adequate consultation and accommodation has occurred.

73 As set out above, the Crown says that it has not breached its duty to West Moberly, that it has consulted adequately and accommodated West Moberly's concerns reasonably, and has balanced the rights of West Moberly with the interests of other First Nations and the public at large, including First Coal.

74 First Coal submits that the consultation was extensive and reasonable in the circumstances. It further submits that even if the Crown did meet a duty to accommodate, any remedy should not prejudice First Coal or impair its ability to continue with the project.

75 I am satisfied that the Crown recognized that it had a duty to consult with and accommodate reasonably,

2010 CarswellBC 651, 2010 BCSC 359, [2010] B.C.W.L.D. 3852, [2010] B.C.W.L.D. 3853, [2010] B.C.W.L.D. 3854, [2010] B.C.W.L.D. 3856, [2010] 2 C.N.L.R. 354, 6 B.C.L.R. (5th) 94, [2010] 11 W.W.R. 752

the concerns of West Moberly. I am not satisfied however, that in the circumstances the Crown consulted meaningfully, nor that the Crown reasonably accommodated West Moberly's concerns about their traditional seasonal round of hunting caribou for food, for cultural reasons, and for the manufacture of practical items.

76 I observe that the fashioning of an appropriate remedy in these circumstances is most difficult. It is not appropriate to ignore the fact that the Bulk Sample Program subject to the first decision has in effect been completed. The Advanced Exploration Program, subject of the second decision, is not to begin until sometime this spring. With respect to the licence to cut, I am informed that although some land has been cleared, not all of the clearing permitted by that licence has been completed.

77 I also observe that while the Caribou Mitigation and Monitoring Plan put in place by First Coal is a step in the right direction, it is not an active plan for the preservation and augmentation of the Burnt Pine herd.

78 The Court may quash a decision should it be found there has not been appropriate consultation or accommodation: *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110 (B.C. S.C.), *Kwikwetlem First Nation v. British Columbia Transmission Corp.*, 2009 BCCA 68, [2009] 9 W.W.R. 92 (B.C. C.A.). However, I conclude such an order in this case would not constitute a proper balancing of the rights of the petitioners with other First Nations, and the public, including First Coal.

79 Rather, I conclude that a pragmatic and reasonable step is to stay the effect of the issuing of the amendment of September 14, 2009 permitting the Advanced Exploration Program, and to suspend the effect of the licence to cut, for a determined period to permit and to mandate a proper accommodation of West Moberly's concerns with respect to the Burnt Pine herd.

80 This accommodation should be the expeditious implementation of a reasonable, active, program for the protection and augmentation of the Burnt Pine herd. Given the research and information available, it would appear that such a program could be in place within a period of months.

81 In attempting to balance the various rights, I am aware of the potential economic impact upon First Coal, its employees and contractors, of this decision. However, I also note that the material discloses that the Ministry of Energy, Mines and Petroleum Resources has argued that the future economic impacts of a potential coal mine were not relevant to the permit amendment decisions. Further, First Coal was asked by the petitioner to cease voluntarily its operations until this matter was determined. It declined to interrupt its operations. I note also that when it declined to suspend operations, First Coal took the position that the advanced exploration portion of their work would not commence before the second quarter of 2010.

82 When considering a constitutional right, it is open to the court rather than to stay the effect of the decisions pending proper accommodation, to stay the impugned decisions for a determined period and to give directions as to the accommodation which should be put in place within that time: see *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 272 D.L.R. (4th) 727, [2006] 4 C.N.L.R. 152 (Ont. S.C.J.).

83 In the circumstances, I conclude that the stay which I have ordered should be in effect for 90 days from the date of these reasons. The Crown, in consultation with West Moberly, should proceed expeditiously to put in place within that period a reasonable, active plan for the protection and augmentation of the Burnt Pine herd, a plan that takes into account the views of West Moberly, including the reports of the Crown's wildlife ecologists and biologists with the Ministry of Environment referred to by West Moberly.

2010 CarswellBC 651, 2010 BCSC 359, [2010] B.C.W.L.D. 3852, [2010] B.C.W.L.D. 3853, [2010] B.C.W.L.D. 3854, [2010] B.C.W.L.D. 3856, [2010] 2 C.N.L.R. 354, 6 B.C.L.R. (5th) 94, [2010] 11 W.W.R. 752

Costs

84 Given this result, I am inclined to award costs to the petitioners against the Crown respondent, and make no order of costs with respect to First Coal. The parties will have liberty to apply with respect to costs.

Application granted.

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2011 CarswellBC 1238, 2011 BCCA 247, [2011] B.C.W.L.D. 5189, [2011] B.C.W.L.D. 5362, [2011] B.C.W.L.D. 5356, [2011] B.C.W.L.D. 5352, 18 B.C.L.R. (5th) 234, [2011] 9 W.W.R. 34, 333 D.L.R. (4th) 31, [2011] 3 C.N.L.R. 343, 306 B.C.A.C. 212, 316 W.A.C. 212, 26 Admin. L.R. (5th) 283

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West Moberly First Nations v. British Columbia (Chief Inspector of Mines)

Chief Roland Willson on his own behalf and on behalf of the members of the West Moberly First Nations and the West Moberly First Nations (Respondents / Petitioners) and Her Majesty the Queen in Right of The Province of British Columbia as represented by Al Hoffman, Chief Inspector of Mines, Victor Koyanagi, Inspector of Mines, and Dale Morgan, District Manager, Peace Forest District (Appellants / Respondents) and First Coal Corporation (Respondent / Respondent) and Treaty 8 First Nations of Alberta, Grand Council of Treaty #3, and Attorney General of Alberta (Intervenors)

British Columbia Court of Appeal

Finch C.J.B.C., Garson, Hinkson J.J.A.

Heard: January 4-6, 2011

Judgment: May 25, 2011

Docket: Vancouver CA038048

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Proceedings: reversing in part *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)* (2010), 6 B.C.L.R. (5th) 94, [2010] 2 C.N.L.R. 354, [2010] 11 W.W.R. 752, 2010 BCSC 359, 2010 CarswellBC 651 (B.C. S.C.)

Counsel: K.J. Phillips, E.K. Christie for Appellant, Province of British Columbia

K.E. Clark, R. Robertson for Respondent, First Coal Corporation

C.G. Devlin, T.H. Thielmann for Respondent, West Moberly First Nations

R.M. Kyle for Intervenor, Treaty 8 First Nations of Alberta

K.M. Brooks for Intervenor, Grand Council of Treaty #3

Attorney General of Alberta, Intervenor — Written Submissions Only

Subject: Public; Constitutional; Civil Practice and Procedure

Aboriginal law --- Aboriginal rights to natural resources — Aboriginal rights — Hunting

2011 CarswellBC 1238, 2011 BCCA 247, [2011] B.C.W.L.D. 5189, [2011] B.C.W.L.D. 5362, [2011] B.C.W.L.D. 5356, [2011] B.C.W.L.D. 5352, 18 B.C.L.R. (5th) 234, [2011] 9 W.W.R. 34, 333 D.L.R. (4th) 31, [2011] 3 C.N.L.R. 343, 306 B.C.A.C. 212, 316 W.A.C. 212, 26 Admin. L.R. (5th) 283

Applicants were First Nations who were beneficiaries of treaty 8, which provided them with right to hunt — Two amendments were issued to existing permit, allowing coal company to obtain bulk coal sample from lands, and approving advanced exploration program on same lands — Licence to cut was also issued — Applicants successfully applied for judicial review of all three decisions, and Crown was declared to be in breach of its duties to consult and accommodate — Province appealed — Appeal allowed in part — Judge did not err in considering specific location and species of applicants' hunting practices — Question to be answered was whether proposed activity would adversely affect existing hunting rights — It was clear that applicants had historically hunted caribou in area affected by bulk sampling and advanced exploration programs — Bulk sampling and advanced exploration programs would have had adverse impact on caribou in area and, consequently, on applicants' ability to hunt.

Aboriginal law --- Constitutional issues — Fiduciary duty of Crown

Applicants were First Nations who were beneficiaries of treaty 8, which provided them with right to hunt — Two amendments were issued to existing permit, as was license to cut — Applicants successfully applied for judicial review of all three decisions, and Crown was declared to be in breach of its duties to consult and accommodate — Province appealed — Appeal allowed in part — Judge did not err in holding that Crown failed to act honourably by delegating duty to consult and accommodate to ministry officials — In exercising its powers, ministry was bound by treaty and its true interpretation — Judge also did not attempt to redress past wrongs, nor did he err in considering future events — Historical context was essential to understanding seriousness of potential impacts on applicants' right to hunt, and whole thrust of applicants' position was forward looking — Judge was also correct to consider that consultation was not reasonable, but accommodation directed in paragraph 3 of order was set aside — There was no reasoned basis for rejecting applicants' position — Consultation process was entered into without understanding of what treaty meant.

Administrative law --- Prerogative remedies — Certiorari — Discretion of court to refuse certiorari — Miscellaneous

Applicants were First Nations who were beneficiaries of treaty 8, which provided them with right to hunt — Two amendments were issued to existing permit, allowing coal company to obtain bulk coal sample from lands, and approving advanced exploration program on same lands — Licence to cut was also issued — Applicants successfully applied for judicial review of all three decisions, and Crown was declared to be in breach of its duties to consult and accommodate — Province appealed — Appeal allowed in part — There was no merit in argument that judicial review was inappropriate procedure for resolving issues — There was no question in this case about whether applicants' rights were proven, as treaty declared right to hunt — While there remained issues as to scope of right, that could have been largely decided by interpreting treaty, in its historical context, as matter of law.

The applicants were First Nations who were the beneficiaries of treaty 8, which provided them with the right to hunt. Two amendments were issued to the existing permit, which allowed a coal company to obtain bulk coal sample from the lands, and approved an advanced exploration program. In addition to the two amendments, a licence to cut was also issued.

The applicants successfully applied for judicial review of all three decisions. The Crown was declared to be in breach of its duties to consult and to accommodate. The province appealed.

Held: The appeal was allowed in part.

2011 CarswellBC 1238, 2011 BCCA 247, [2011] B.C.W.L.D. 5189, [2011] B.C.W.L.D. 5362, [2011] B.C.W.L.D. 5356, [2011] B.C.W.L.D. 5352, 18 B.C.L.R. (5th) 234, [2011] 9 W.W.R. 34, 333 D.L.R. (4th) 31, [2011] 3 C.N.L.R. 343, 306 B.C.A.C. 212, 316 W.A.C. 212, 26 Admin. L.R. (5th) 283

Per Finch C.J.B.C.: The judge did not err in considering the specific location and species of the applicants' hunting practices. It was clear that the applicants had historically hunted caribou in the area affected by the bulk sampling and advanced exploration programs. The bulk sampling and advanced exploration programs would have had an adverse impact on the caribou in the area and, consequently, on the applicants' ability to hunt.

The judge did not err in holding that the Crown failed to act honourably by delegating the duty to consult and accommodate to the ministry officials. In exercising its powers, the ministry was bound by the treaty and its true interpretation.

The judge did not attempt to redress past wrongs, nor did he err in considering future events. The historical context was essential to understanding the seriousness of the potential impacts on the applicants' right to hunt, and the whole thrust of the applicants' position was forward looking.

The judge was also correct to consider that the consultation was not reasonable, but the accommodation directed in paragraph 3 of the order was set aside. There was no reasoned basis for rejecting the applicants' position. The consultation process was entered into without an understanding of what the treaty meant.

There was no merit in the argument that judicial review was an inappropriate procedure for resolving the issues. There was no question about whether the applicants' rights were proven, as the treaty declared the right to hunt.

Per Hinkson J.A. (concurring): The duty to accommodate should have only been concerned with addressing the potential adverse effects of the proposed Crown conduct, and not with remedying the harm caused by past events. The duty to accommodate did not oblige the Crown to accommodate the effects of prior impacts upon the treaty rights of the applicants. The emphasis placed by the judge upon the need for the rehabilitation of the caribou could not be considered as an accommodation that arose from the project proposed by the coal company. The judge erred in law by conflating his consideration of the Crown's duty to consult, with what he considered to be a reasonable accommodation of the applicants' rights.

Per Garson J.A. (dissenting): The judge erred when he characterized the treaty protected right as the right to hunt caribou. The treaty right in question was not a specific right to hunt the caribou herd, but rather, it afforded protection to the activity of hunting. The narrow characterization of the right led the judge to incorrectly find that the impact of the immediate permit approvals was significant and required more in the way of accommodation.

The judge erred in construing the Crown's duty to consult and accommodate so broadly. Implicit in the judge's conclusion about the scope and extent of the duty to consult and accommodate was a finding that the decision makers were bound to consider past wrongs, cumulative effects, and future development.

The judge also erred in finding that consultation was inadequate and that a specific form of accommodation was required. The decision makers acted reasonably and the consultation was more than adequate in fulfilling the Crown's duties. The consultation process was directly responsive to the concerns raised by the applicants, and significant accommodations were made to protect the existing caribou herd. The outcome was not unreasonable.

Cases considered by *Finch C.J.B.C.*:

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (2010), 325 D.L.R. (4th) 1, 406 N.R. 333, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council*) [2010] 4 C.N.L.R. 250, (sub

2011 CarswellBC 1238, 2011 BCCA 247, [2011] B.C.W.L.D. 5189, [2011] B.C.W.L.D. 5362, [2011] B.C.W.L.D. 5356, [2011] B.C.W.L.D. 5352, 18 B.C.L.R. (5th) 234, [2011] 9 W.W.R. 34, 333 D.L.R. (4th) 31, [2011] 3 C.N.L.R. 343, 306 B.C.A.C. 212, 316 W.A.C. 212, 26 Admin. L.R. (5th) 283

nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council*) [2010] 2 S.C.R. 650, 2010 CarswellBC 2867, 2010 CarswellBC 2868, 2010 SCC 43, 11 Admin. L.R. (5th) 246, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 9 B.C.L.R. (5th) 205, 54 C.E.L.R. (3d) 1, 293 B.C.A.C. 175, 496 W.A.C. 175 (S.C.C.) — distinguished

Haida Nation v. British Columbia (Minister of Forests) (2004), 19 Admin. L.R. (4th) 195, 327 N.R. 53, [2004] 3 S.C.R. 511, 36 B.C.L.R. (4th) 282, 206 B.C.A.C. 52, 338 W.A.C. 52, 11 C.E.L.R. (3d) 1, [2005] 1 C.N.L.R. 72, 26 R.P.R. (4th) 1, 2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 245 D.L.R. (4th) 33, [2005] 3 W.W.R. 419 (S.C.C.) — distinguished

Halfway River First Nation v. British Columbia (Ministry of Forests) (1999), [1999] 4 C.N.L.R. 1, 178 D.L.R. (4th) 666, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 129 B.C.A.C. 32, (sub nom. *Halfway River First Nation v. British Columbia (Minister of Forests)*) 210 W.A.C. 32, 1999 CarswellBC 1821, 1999 BCCA 470, [1999] 9 W.W.R. 645, 64 B.C.L.R. (3d) 206 (B.C. C.A.) — referred to

Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources) (2010), 10 Admin. L.R. (5th) 163, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman*) 501 W.A.C. 1, (sub nom. *Beckman v. Little Salmon/Carmacks*) [2010] 3 S.C.R. 103, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman*) 295 B.C.A.C. 1, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman*) 408 N.R. 281, 55 C.E.L.R. (3d) 1, 2010 SCC 53, 2010 CarswellYukon 140, 2010 CarswellYukon 141, 97 R.P.R. (4th) 1, 326 D.L.R. (4th) 385, (sub nom. *Beckman v. Little Salmon/Carmacks First Nation*) [2011] 1 C.N.L.R. 12 (S.C.C.) — referred to

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005), 2005 SCC 69, 2005 CarswellNat 3756, 2005 CarswellNat 3757, [2006] 1 C.N.L.R. 78, 342 N.R. 82, [2005] 3 S.C.R. 388, 21 C.P.C. (6th) 205, 259 D.L.R. (4th) 610, 37 Admin. L.R. (4th) 223 (S.C.C.) — followed

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Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) — distinguished

Cases considered by *Hinkson J.A.*:

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (2010), 325 D.L.R. (4th) 1, 406 N.R. 333, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council*) [2010] 4 C.N.L.R. 250, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council*) [2010] 2 S.C.R. 650, 2010 CarswellBC 2867, 2010 CarswellBC 2868, 2010 SCC 43, 11 Admin. L.R. (5th) 246, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 9 B.C.L.R. (5th) 205, 54 C.E.L.R. (3d) 1, 293 B.C.A.C. 175, 496 W.A.C. 175 (S.C.C.) — considered

Cases considered by *Garson J.A.* (dissenting):

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Brown v. Sunshine Coast Forest District (District Manager) (2008), (sub nom. *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*) [2009] 1 C.N.L.R. 110, 2008 BCSC 1642, 2008 CarswellBC 2587 (B.C. S.C.) — considered

Carrier Sekani Tribal Council v. British Columbia (Utilities Commission) (2010), 325 D.L.R. (4th) 1, 406 N.R. 333, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council*) [2010] 4 C.N.L.R. 250, (sub nom. *Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council*) [2010] 2 S.C.R. 650, 2010 CarswellBC 2867, 2010 CarswellBC 2868, 2010 SCC 43, 11 Admin. L.R. (5th) 246, 96 R.P.R. (4th) 1, [2010] 11 W.W.R. 577, 9 B.C.L.R. (5th) 205, 54 C.E.L.R. (3d) 1, 293 B.C.A.C. 175, 496 W.A.C. 175 (S.C.C.) — considered

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Lax Kw'alaams Indian Band v. Canada (Attorney General) (2009), 281 B.C.A.C. 88, 475 W.A.C. 88, 314 D.L.R. (4th) 385, 2009 BCCA 593, 2009 CarswellBC 3479, [2010] 1 C.N.L.R. 278 (B.C. C.A.) — considered

Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources) (2010), 10 Admin. L.R. (5th) 163, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman*) 501 W.A.C. 1, (sub nom. *Beckman v. Little Salmon/Carmacks*) [2010] 3 S.C.R. 103, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman*) 295 B.C.A.C. 1, (sub nom. *Little Salmon/Carmacks First Nation v. Beckman*) 408 N.R. 281, 55 C.E.L.R. (3d) 1, 2010 SCC 53, 2010 CarswellYukon 140, 2010 CarswellYukon 141, 97 R.P.R. (4th) 1, 326 D.L.R. (4th) 385, (sub nom. *Beckman v. Little Salmon/Carmacks First Nation*) [2011] 1 C.N.L.R. 12 (S.C.C.) — considered

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Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management) (2005), 28 R.P.R. (4th) 165, 37 B.C.L.R. (4th) 309, 209 B.C.A.C. 219, 345 W.A.C. 219, 2005 BCCA 128, 2005 CarswellBC 472, [2005] 6 W.W.R. 429, [2005] 2 C.N.L.R. 212, 251 D.L.R. (4th) 717 (B.C. C.A.) — referred to

New Brunswick (Board of Management) v. Dunsmuir (2008), 372 N.R. 1, 69 Admin. L.R. (4th) 1, 69 Imm. L.R. (3d) 1, (sub nom. *Dunsmuir v. New Brunswick*) [2008] 1 S.C.R. 190, 844 A.P.R. 1, (sub nom. *Dunsmuir v. New Brunswick*) 2008 C.L.L.C. 220-020, D.T.E. 2008T-223, 329 N.B.R. (2d) 1, (sub nom. *Dunsmuir v. New Brunswick*) 170 L.A.C. (4th) 1, (sub nom. *Dunsmuir v. New Brunswick*) 291 D.L.R. (4th) 577, 2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 64 C.C.E.L. (3d) 1, (sub nom. *Dunsmuir v. New*

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Brunswick) 95 L.C.R. 65 (S.C.C.) — considered

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R. v. Gladstone (1996), [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65, 1996 CarswellBC 2305, 1996 CarswellBC 2306 (S.C.C.) — considered

R. v. Lefthand (2007), 2007 CarswellAlta 850, 2007 ABCA 206, [2007] 4 C.N.L.R. 281, 222 C.C.C. (3d) 129, [2007] 10 W.W.R. 1, 77 Alta. L.R. (4th) 203 (Alta. C.A.) — considered

R. v. Lefthand (2008), [2008] 1 S.C.R. x (note), 2008 CarswellAlta 195, 2008 CarswellAlta 196, (sub nom. *R. v. Eagle Child*) 454 A.R. 176 (note), (sub nom. *R. v. Eagle Child*) 385 N.R. 392 (note) (S.C.C.) — referred to

R. v. Powley (2003), 2003 CarswellOnt 3502, 2003 CarswellOnt 3503, 2003 SCC 43, 308 N.R. 201, 177 O.A.C. 201, 68 O.R. (3d) 255 (note), 230 D.L.R. (4th) 1, 177 C.C.C. (3d) 193, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321, 5 C.E.L.R. (3d) 1, 110 C.R.R. (2d) 92 (S.C.C.) — considered

R. v. Sappier (2006), 355 N.R. 1, 274 D.L.R. (4th) 75, 2006 SCC 54, 2006 CarswellNB 676, 2006 CarswellNB 677, [2006] 2 S.C.R. 686, 50 R.P.R. (4th) 1, [2007] 1 C.N.L.R. 359, 799 A.P.R. 199, 214 C.C.C. (3d) 161, 309 N.B.R. (2d) 199 (S.C.C.) — considered

R. v. Vanderpeet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — referred to

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director) (2004), 19 Admin. L.R. (4th) 165, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) 327 N.R. 133, 36 B.C.L.R. (4th) 370, 206 B.C.A.C. 132, 338 W.A.C. 132, 11 C.E.L.R. (3d) 49, [2005] 1 C.N.L.R. 366, 26 R.P.R. (4th) 50, 2004 CarswellBC 2654, 2004 CarswellBC 2655, 2004 SCC 74, 245 D.L.R. (4th) 193, (sub nom. *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project (Project Assessment Director)*) [2004] 3 S.C.R. 550, [2005] 3 W.W.R. 403 (S.C.C.) — considered

Wii'litswx v. British Columbia (Minister of Forests) (2008), 2008 BCSC 1620, [2009] 1 C.N.L.R. 359, 88 Admin. L.R. (4th) 109, 2008 CarswellBC 2530 (B.C. S.C.) — referred to

Xeni Gwet'in First Nations v. British Columbia (2007), (sub nom. *Tsilhqot'in Nation v. British Columbia*) [2008] 1 C.N.L.R. 112, 65 R.P.R. (4th) 1, 2007 BCSC 1700, 2007 CarswellBC 2741 (B.C. S.C.) — referred to

Statutes considered by *Finch C.J.B.C.*:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II,

2011 CarswellBC 1238, 2011 BCCA 247, [2011] B.C.W.L.D. 5189, [2011] B.C.W.L.D. 5362, [2011] B.C.W.L.D. 5356, [2011] B.C.W.L.D. 5352, 18 B.C.L.R. (5th) 234, [2011] 9 W.W.R. 34, 333 D.L.R. (4th) 31, [2011] 3 C.N.L.R. 343, 306 B.C.A.C. 212, 316 W.A.C. 212, 26 Admin. L.R. (5th) 283

No. 44

Generally — referred to

Forest and Range Practices Act, S.B.C. 2002, c. 69

Generally — referred to

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241

s. 5 — considered

s. 6 — considered

Mines Act, R.S.B.C. 1996, c. 293

Generally — referred to

Statutes considered by *Garson J.A.* (dissenting):

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 35 — considered

s. 35(1) — considered

Environmental Assessment Act, S.B.C. 2002, c. 43

s. 8 — referred to

Treaties considered by *Finch C.J.B.C.*:

Treaty No. 3, 1873 (Between Her Majesty the Queen and the Saulteaux Tribe of the Ojibeway Indians), 1873

Generally — considered

Treaty No. 8, 1899

Generally — considered

Treaties considered by *Hinkson J.A.*:

Treaty No. 8, 1899

Generally — considered

Treaties considered by *Garson J.A.* (dissenting):

Treaty No. 8, 1899

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Generally — considered

Regulations considered by *Garson J.A.* (dissenting):

Environmental Assessment Act, S.B.C. 2002, c. 43

Reviewable Projects Regulation, B.C. Reg. 370/2002

Pt. 3 — referred to

APPEAL by province from judgment reported at *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)* (2010), 6 B.C.L.R. (5th) 94, [2010] 2 C.N.L.R. 354, [2010] 11 W.W.R. 752, 2010 BCSC 359, 2010 CarswellBC 651 (B.C. S.C.), respecting finding that Crown was in breach of its duties to consult and accommodate.

Finch C.J.B.C.:

I. Introduction

1 The Province of British Columbia ("B.C.") appeals from the order of the Supreme Court of British Columbia pronounced 19 March 2010 declaring the Crown to be in breach of its duties to consult and accommodate the petitioners, West Moberly First Nations, who are Treaty 8 First Nations, concerning decisions made by government officials at the request of the respondent First Coal Corporation. Two of those decisions, made by officials in the Ministry of Energy, Mines and Petroleum Resources ("MEMPR") on 1 September 2009, and 14 September 2009, amended existing permits to allow First Coal to obtain a 50,000 tonne bulk sample of coal, and to engage in a 173 drill hole, five trench Advanced Exploration Program.

2 The petitioners say those two decisions were made without proper consideration of their right to hunt caribou in the affected area as part of their traditional seasonal round, and without making adequate provision for the protection and restoration of those caribou, described as the Burnt Pine caribou herd.

3 The order granted by the chambers judge is in the following terms:

THIS COURT DECLARES THAT:

1. The Respondent, Her Majesty the Queen in right of the Province of British Columbia, as represented by Al Hoffman, Chief Inspector of Mines, Victor Koyanagi, Inspector of Mines and Dale Morgan, District Manager, Peace Forest District ("British Columbia") failed to consult adequately and meaningfully and failed to accommodate reasonably the Petitioners' hunting rights provided by Treaty No. 8 with respect to the Bulk Sample amendments and Advanced Exploration amendments to mining permit CX-9-022 and with respect to Occupant Licences to Cut L48261 and L48269.

THIS COURT ORDERS THAT:

2. The effect of the issuing of the amendment of September 14, 2009 permitting the Advanced Exploration Program is stayed and the effect of the Occupant Licenses to Cut is suspended for 90 days from March 19, 2010;

3. Within the said 90 day period, British Columbia, in consultation with the Petitioners, will proceed

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expeditiously to put in place a reasonable, active plan for the protection and augmentation of the Burnt Pine caribou herd, taking into account the views of the Petitioners, as well as the reports of British Columbia's wildlife ecologists and biologists Dr. Dale Seip and Pierre Johnstone; ...

[Emphasis added.]

4 No stay was ordered in respect of the amended Bulk Sample Permit of 1 September 2009 but, as will appear below, it has not been acted upon.

5 The third decision challenged by the petitioners in the court below, made on 8 October 2009 by the Deputy Minister of the Ministry of Forests and Range ("MOFR"), permitted First Coal to cut and clear up to 41 hectares of woodlands to facilitate the Advanced Exploration Program. The learned chambers judge held that the Deputy Minister's decision was made in accordance with the relevant statutory powers granted to him (paras. 65-70 of the reasons), but he stayed action under that permit for 90 days as well. This aspect of his ruling is not in issue on appeal, and we need not address that decision further in these reasons.

6 On this appeal, as in the court below, B.C. acknowledges its duty to consult, and says that it was fulfilled. The Province says the learned chambers judge erred in interpreting the petitioners' Treaty 8 right to hunt as a "species specific right", and in holding that the petitioners' interests could only be accommodated in one specific way. It says the chambers judge also erred in holding the departmental officials to an unreasonable standard with regard to the scope of their delegated authority. They were not authorized to address all Aboriginal issues and concerns.

7 As a result, B.C. says the chambers judge erred in holding that the Crown's consultation and accommodation was unreasonable.

8 First Coal supports B.C.'s appeal against the judge's order. First Coal says the chambers judge erred in holding that the scope of the Crown's duty to consult included consideration of the cumulative effect of "past wrongs", and potential future developments, instead of focusing on the potential impact of the challenged permits. First Coal says further that the learned chambers judge erred in law by rejecting the plan put forward by First Coal, the Caribou Mitigation and Monitoring Plan ("CMMP"), as a reasonable form of accommodation.

9 Alternatively, First Coal says the chambers judge erred by imposing a "sanction" upon it, in the form of the 90-day stay directed by paragraph 2 of the order, when it had done nothing wrong.

10 B.C.'s appeal is also supported by the intervenor, the Attorney General of Alberta. It says the chambers judge misinterpreted the Treaty 8 right to hunt as species specific, and erred in deciding a public policy question, restoration of caribou, a matter within the authority of the other branches of government.

11 In response, the petitioners say the learned chambers judge made no reversible error. He correctly determined the nature and scope of the petitioners' Treaty 8 right to hunt. He correctly determined the seriousness of the impact that the mining exploration would have on that right. And he correctly held that the consultation process was unreasonable, and that the proposed accommodation did not honourably balance the rights and interests at stake.

12 The petitioners' position on this appeal is supported by two intervenors, Treaty 8 First Nations of Alberta, and Grand Council of Treaty #3.

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13 The notice of appeal was filed in these proceedings on 16 April 2010. The 90-day period stipulated by the chambers judge's order for putting in place a plan for the protection and augmentation of the Burnt Pine caribou herd ended on 19 June 2010.

14 The Court was advised that during the 90-day period following the order there were discussions between the parties. B.C. and the petitioners agreed on the formation of a "knowledge team" and a "planning team" who were to recommend measures necessary to protect and augment the Burnt Pine caribou herd, and to restore the petitioners' treaty right to harvest caribou.

15 On 18 June 2010, B.C. adopted one option of the planning team's report, which, we were told, did not meet the petitioners' objectives.

16 On 25 June 2010, the petitioners issued a new petition (No. 10-2786 Victoria Registry) seeking a declaration that B.C. is in breach of the order made on 19 March 2010, the subject of this appeal, as well as various other relief including orders quashing the Bulk Sample Permit and Advanced Exploration Amending Permit, and an interim injunction against First Coal.

17 That petition was amended on 23 July 2010.

18 We are advised by counsel that they have agreed to hold proceedings under the new petition in abeyance pending the outcome of this appeal. Since the expiration of the 90-day stay period, the parties have conducted themselves by agreement, rather than by the terms of the order.

II. Background

A. The Petitioners

19 The West Moberly First Nations people are descendants of the Mountain Dunne-Za, also known as the Beaver Indians. The West Moberly First Nations' reserve is located at the westerly end of Moberly Lake. This area lies to the west of what is now Fort St. John, and roughly midway between Hudson's Hope and Chetwynd, B.C. To the southwest lies the town of Mackenzie, situated near the W.A.C. Bennett Dam at the southerly end of the Williston Reservoir (Lake).

20 The Beaver Indians of Fort St. John adhered to Treaty 8 in 1900. The Hudson Hope Band of Beaver Indians adhered in 1914. The Hudson Hope Band separated into the West Moberly First Nations and the Halfway River First Nation in 1977.

21 First Coal's proposed coal exploration activities are located at the Goodrich Central South property area, which lies about 50 kilometres southwest of the West Moberly Lake 168A Reserve, and within what the petitioners consider to be a preferred traditional hunting area.

22 Historically, the Mountain Dunne-Za were hunters who followed game's seasonal migrations and redistributions based on their knowledge and understanding of animal behaviour. In their seasonal round, the Dunne-Za hunted ungulate species, including moose, deer, elk and caribou, in addition to birds and fish. Moose appears to have been the most important food source, but caribou hunting was important, especially in the spring. The animals were taken in large numbers when available, and the meat was preserved by drying. Dry meat was an important food source for the Mountain Dunne-Za year round.

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23 The Mountain Dunne-Za utilized all parts of the caribou, including the hide, internal organs, and bones. They used these materials to make clothing, bags, and a variety of tools and utensils.

24 It appears that after the Bennett Dam and Williston Reservoir were created the caribou population of this region declined significantly. The petitioners' people hold the view that the reservoir cut off traditional migration routes for the caribou, depriving them of what had formerly been important habitat.

25 The Mountain Dunne-Za valued the existence of all species, including caribou, and treated them and their habitat with respect. They knew where the caribou's calving grounds were, and where the winter and summer feeding grounds were located. The people felt and feel a deep connection to the land and all its resources, a connection they describe as spiritual. They regard the depopulation of the species they hunt as a serious threat to their culture, their identity and their way of life.

26 Since about the 1970s, the West Moberly elders have imposed a ban on their people's hunting of caribou. Where the caribou once existed in abundance, the Burnt Pine caribou herd, of concern in these proceedings, is said now to consist of 11 animals. The petitioners' people recognize that unless the herd is protected and restored it is no longer possible to hunt these animals without risk of its extirpation.

B. First Coal Corporation

27 First Coal is a federally incorporated company holding several provincial licences or tenures to explore for coal in an area near Chetwynd. The first *Mines Act*, R.S.B.C. 1996, c. 293, permit was issued to First Coal in June 2005. The exploration and sampling projects which are the subject of these proceedings are located within the petitioners' preferred traditional hunting ground.

28 The original Bulk Sample Permit authorized First Coal to extract 100,000 tonnes of coal. The original Exploration Permit authorized construction of the "Spine Road" which traversed the high ground in the exploration area, and passed through important winter caribou habitat.

29 The high ground is important winter caribou habitat because the ridges are windswept, reducing the depth of snow that caribou must dig through in order to uncover the ground lichen which is their source of food.

30 In May 2008, First Coal applied to amend the Bulk Sample Permit from 100,000 tonnes to 50,000 tonnes. The judge found that the main reason for seeking this reduction was economic. The amendment would cut in half the time required to obtain the sample, and thus reduce the associated cost accordingly.

31 In November 2008, First Coal applied to amend its Advanced Exploration Permit. The amendment would eliminate use of, and provide restoration of, the Spine Road. It would also allow for the drilling of 173 test holes, and the construction of a network of roads to provide access to the test hole sites.

32 The taking of the proposed bulk sample had two purposes. The first purpose was to test the quality and economic viability of the coal in the proposed mining area. A second purpose was to test a new technology for the mining of coal known as the "Addcar System".

33 The Addcar System is designed to replace both open pit mining, and underground mining by men. In the Addcar System, a series of trenches are dug at right angles to the coal seams on the mountainside. A "launch vehicle" is then positioned over the trench. The dimensions of the launch vehicle are not in evidence, but from the photographs it appears to be a large portable structure that contains a control room, a crew cabin, and a plat-

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form on which coal cars are placed and then "launched". A drilling machine also launched from the platform extracts coal from the underground tunnels it digs, and loads the coal into a car which follows the drilling machine into the tunnel. As each coal car is filled, a new car is added to the underground coal train, hence the name "Ad-dcar".

34 As this is new technology for First Coal, it wished to test it by removing the bulk sample.

35 At the time of the hearing below, it was anticipated that the bulk sample of 50,000 tonnes would have been completed by the time judgment was delivered, no interim injunction having been sought or granted. However, the new technology did not work as expected, the cutting head was returned to the United States, and the bulk sampling was deferred.

36 At the time of the hearing in this Court, the trenches have been dug but the bulk sample has not been extracted.

37 When First Coal became aware of the petitioners' opposition to the bulk sampling and exploration projects in June 2008, First Coal began developing plans to mitigate harm from the project and to monitor its effects upon the caribou. From 27 October 2008 to 1 May 2009, First Coal's Caribou Mitigation and Monitoring Plan went through five versions.

38 The CMMP is a report prepared by Aecom Canada Limited, a firm providing consulting services on wildlife biology and ecology. The plan provides information and opinion on the potential effects of First Coal's amended Bulk Sample and Advanced Exploration Programs. It provides background information on the Burnt Pine caribou herd and its seasonal habitats, and it addresses the potential impacts of First Coal's proposed activities on direct habitat loss, indirect habitat loss, and habitat fragmentation effects. The CMMP also provides advice on potential mitigation measures, and a plan for monitoring the effects of the sampling and exploration programs on the caribou herd.

39 The CMMP refers to (and may be regarded in part as a response to) the advice of two government experts: Dr. Dale Seip, a wildlife ecologist with the Province's Northern Interior Forest Region, and Pierre Johnstone, an ecosystem biologist employed by the Province's Ministry of the Environment ("MOE"). They are referred to in para. 3 of the judge's order, and parts of their reports are referred to at paras. 22 and 23 of the reasons for judgment. Dr. Seip's report of 25 September 2008 included this:

It is also necessary to understand what the longer term implications are for these caribou. The Goodrich property encompasses most of the core caribou habitat on Mt. Stephenson. Mining over this entire area would destroy a major portion of the core winter range for this caribou herd. It is short-sighted and misleading to evaluate this proposal for bulk sampling without also considering the longer term consequences of more widespread mining activity occurring over the entire property.

[Emphasis added.]

C. The Consultation Process

40 The Aboriginal Relations Branch of MEMPR prepared a document reviewing developments and representations by various persons up to 20 July 2009. The document is titled "Considerations To Date". An appendix to that document is a "Consultation Log" which records a summary of communications among the four Treaty 8

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First Nations in the area, First Coal, and the three government ministries engaged in the process, MEMPR, MOFR and MOE.

41 The "Considerations" document records that "MEMPR has proceeded with consultation towards the deeper end of the consultation spectrum". It records West Moberly First Nations' opposition to the Bulk Sample and Exploration Project. The Considerations document records that "operational mine activities are not under current consideration":

6.1.2 Operational Mine Activities Not Under Current Consideration

Pierre Johnstone, R.P.Bio. Ecosystem Biologist, MOE, provided comments on the CMMP on February 13, 2009 as follows:

It is reasonable to expect that mining beyond the Bulk Sample will occur in the future. Given this, assessment of impacts should include the full use scenario, where all available coal is mined; the additional assessments and/or mitigation that "may be required" (p.1) should be described. Furthermore, to more accurately characterize potential impacts to Caribou, FCC should consider potential impacts that could be expected if all their tenured property was developed, in the context of existing and proposed development in the region.

(see APPENDIX VI for complete comments)

A decision on the present application does not authorize full scale mining activity on the Central South Property. Any proposal to move towards an operating mine by FCC will be subject to further assessment and review through the Environmental Assessment (EA) process. Further mitigation and accommodation activities may be considered if the Central South Property is considered under the EA process for authorization to mine. The impacts of mining exploration and bulk sample activities are measured on the merits and impacts of the proposed activity alone and not potential future activities of greater impact. It is only through completion of the Bulk Sample process that FCC will be able to undertake their appropriate due diligence and consider whether to apply for further mine development.

[Italic emphasis in original.]

42 With respect to the cumulative effects of prior events, the Considerations document states:

Cumulative Impacts

WMFN links the decline of the caribou to a number of cumulative factors including habitat loss and fragmentation of habitat due to logging, industrial development and other impacts and in particular the construction of the WAC Bennett Dam and the creation and flooding of the Williston Reservoir.

MOE's Pierre Johnstone in his June 19, 2009 letter states, "*the cumulative effects of any incremental increase to habitat alienation have not been analyzed to fully appreciate potential impacts.*"

MEMPR recognizes that the issue of cumulative impacts has been raised by WMFN and MOE, but it is beyond the scope of the review of this Project to fully assess cumulative impacts in the WMFN traditional territory. This Project has a relatively small footprint relative to other activities, and potentially impacts 0.69% of the caribou in the WMFN traditional territory. However, MEMPR is committed to facilitating and/or par-

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icipating in land use planning and cumulative impact assessments through the Economic Benefits Completed Agreements.

[Italic emphasis in original.]

43 The Considerations document records the petitioners' submissions, and the Crown's obligations flowing from the *Constitution Act, 1982*, and from Treaty 8. It refers to the petitioners' cultural connection to caribou, and the risk of potential extirpation of the Burnt Pine caribou herd.

44 The document ends with a summary of the accommodation measures proposed respectively by West Moberly First Nations and by MEMPR:

Accommodation Measures proposed by WMFN

The following are drawn from statements from the Initial Submissions that could be considered as proposed accommodation measures.

- Accommodation should include rejection of FCC application;
- WMFN should be given the opportunity to participate in the decision making process;
- Consultation as a form of accommodation;
- Recovery of the Burnt-Pine Caribou herd; and
- Re-location of FCC activities.

Accommodation Measures Taken or Proposed by MEMPR

- Consultation at the higher end of the spectrum;
- Application of CMMP;
- Reduction of the Bulk Sample permit by 50%;
- Closures of the Spine Road;
- Use of ADDCAR system;
- Consideration of WMFN's extensive input including the Initial Submissions in the decision making process;
- Through promotion, facilitation and participation in planning processes flowing from the EBA [Economic Benefits Agreement] as well as through the Caribou Task Force, MEMPR will work towards addressing the issues of:
 - cumulative impacts;
 - a Caribou Recovery Plan;

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- land use planning; and
- the location of FCC and other companies' activities.

D. Rationale for MEMPR's Decisions

45 On 1 September 2009, the Chief Inspector of Mines, Al Hoffman, issued the amendment to Permit CX-9-022, permitting First Coal to obtain the 50,000 tonne bulk sample from the "Goodrich Properties". On 14 September the Inspector of Mines, Victor Koyanagi, issued an amendment to the Exploration Permit authorizing First Coal's proposed drilling program.

46 The rationale for these amending decisions was dated 4 September 2009, and was sent to the petitioners by e-mail on 9 September 2009. The rationale records that in addition to West Moberly First Nations, other interested First Nations were Halfway River First Nation (HRFN), Sauteau First Nation (SFN) and Macleod Lake Indian Band (MLIB). The rationale includes the following:

3.0 Assessment of degree of impact

In assessing any potential impacts to aboriginal interests associated with the proposed activity, we have considered the following relevant factors:

- the project is located on a coal lease on Crown land;
- the project is located within core caribou habitat reorganized under the Forests and Range Act;
- the project is located within the Treaty 8 area;
- the availability of caribou and other ungulate species in the project area; and
- the project involves significant additional disturbance on a previously modified site.

The key concern expressed by First Nations, and WMFN in particular, was impacts to the Burnt-Pine Caribou Herd.

4.0 Approach to Consultation

In consideration of the legal framework set out in the *Mikisew* decision regarding consultation with Treaty First Nations and the degree of impact to Treaty rights, MEMPR has proceeded generally with consultation towards the low end of the consultation spectrum set out in the *Haida* decision. However, due to WMFN's level of concern regarding the potential impacts on the Burnt-Pine Caribou Herd, MEMPR has proceeded with consultation with WMFN on the issue of impacts to caribou towards the deeper end of the consultation spectrum.

5.0 Consultation and Accommodation Summary

MEMPR has been engaged with the four T8 FNs in discussions on the proposed project for over four years. The level of concern among the four T8 FNs has been mixed. The WMFN have voiced their opposition to the proposed project, primarily due to the potential impacts to the Burnt-Pine Caribou Herd. Both the MLIB

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and HRFN have a positive work relationship with FCC and have signed MOUs in support of the Project. Likewise, SFN has a positive work relationship with FCC and has entered into MOU negotiations with FCC.

...

5.3 Response to West Moberly First Nations' "Initial Submission"

In June 2009, MEMPR received a 90+ page confidential document from WMFN entitled "Initial Submission: I want to eat Caribou before I die". WMFN identified issues with MEMPR's consultation process and requested that MEMPR respond to the Initial Submission in writing. MEMPR provided its response to WMFN on July 20, 2009 and met with WMFN on August 5 and 12, 2009 to discuss issues raised in the Initial Submission.

Specifically, WMFN raised the crown's obligation to consult and the nature and constitutional protection of their rights under Treaty 8 (1899) with a focus on their defined right around hunting, trapping and fishing. MEMPR has recognized its obligations and carried out meaningful consultation towards the deeper end of the spectrum with WMFN on the issue of impacts to the Burnt-Pine Caribou Herd.

5.4 Accommodation Measures

The key interest related to this Project is the impact on the Burnt-Pine Caribou Herd. The following accommodation measures have been taken to reduce the impact of the Project on the Burnt-Pine Caribou Herd.

Caribou Mitigation and Monitoring Plan

FCC hired a wildlife consultant to prepare a Caribou Mitigation and Monitoring Plan (the CMMP) in response to concerns of the four T8 FNs. The purpose of the CMMP is to minimize the impact of the mining activities on the Burnt-Pine Caribou Herd during the advanced exploration and Bulk Sample programs. The CMMP also outlines mitigation measures to avoid or limit effects and monitoring programs designed to ensure that mining activities do not have a significant impact on the Burnt-Pine Caribou Herd, and to increase understanding of habitat use, distribution, movements and population dynamics of the Burnt-Pine Caribou Herd.

FCC presented the CMMP to the four T8 FNs and staff at MEMPR, MOFR, and MOE on January 20th, 2009. At that time FCC requested that the four T8 FNs and government staff review the CMMP and provide FCC with their comments.

...

As part of the CMMP, FCC established a Burnt-Pine Caribou Task Force. The purpose of the Task Force is to review monitoring results in the context of past and ongoing research on the Burnt-Pine Caribou Herd, and to discuss other ways in which FCC can assist in the recovery of the population. Membership on the Task Force has been offered to the four T8 FNs, MEMPR, MOE and MOFR.

Since January 20, 2009, the four T8 FNs and government staff have provided FCC with comments on the CMMP and it is currently in its 5th revision. The CMMP will continue to be reviewed based on comments by the four T8 FNs, MEMPR, MOE, MOFR.

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On April 30, 2009 a meeting was held in Fort St. John facilitated by FCC to explain the revisions to the CMMP and the Reclamation Plan. This meeting was attended by MEMPR, MOE, MOFR and the representatives from the four First Nations.

Amendment to Bulk Sample Permit Application

FCC initially applied for a 100,000 tonne Bulk Sample permit. To reduce the impact on the Burnt-Pine Caribou Herd, FCC has reduced their Bulk Sample permit to 50,000 tonnes. This will result in reduced impact by limiting the number of trenches to one instead of two, will result in approximately 50% waste rock and will reduce the traffic required to move the Bulk Sample.

Closure of Spine Road

Through discussions with MOE and MOFR, FCC recognized the significance of the wind-swept ridge to caribou. As the spine road is located on the wind-swept ridge, to minimize and limit impacts to the caribou, FCC agreed to discontinue use of and prohibit activities on the spine road (excepting reclamation as outlined in the CMMP).

47 Thus, the "rationale" expresses MEMPR's reasons for granting the amended Bulk Sample and Advanced Exploration Permits. This is the decision that was subjected to judicial review in the court below.

III. Reasons for Judgment

48 The learned chambers judge held that the consultation provided was not meaningful (para. 49). He held the petitioners were not given sufficient time to consider First Coal's project, and the CMMP.

49 He also held the Crown had failed to accommodate reasonably:

[51] ... I conclude that at least since June of 2009, when the West Moberly presented a detailed report of the danger to that herd and its relationship to their treaty protected right to hunt, the Crown's failure to put in place an active plan for the protection and rehabilitation of the Burnt Pine herd is a failure to accommodate reasonably.

[52] While First Coal's "Mitigation and Monitoring Plan" is a step in the direction of protecting critical caribou habitats, as the Crown itself stated in the "Considerations to Date" document of July 20, 2009, there is currently no rehabilitation program in effect for the Burnt Pine herd.

[53] I conclude that a balancing of the treaty rights of Native peoples with the rights of the public generally, including the development of resources for the benefit of the community as a whole, is not achieved if caribou herds in the affected territories are extirpated.

[54] Further, here the Crown has delegated its duty towards First Nations peoples to departmental officials. But in so doing it has not given those officials the authority to consider fully the First Nations concerns, nor the power to accommodate those concerns. The same July 20, 2009, document which states that the Ministry of Energy, Mines and Petroleum Resources recognizes that the cumulative impacts of First Coal's project upon West Moberly's traditional territory have been raised by both West Moberly and the Ministry of the Environment, states that it is "beyond the scope of this project to fully assess" those impacts.

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[55] The honour of the Crown is not satisfied if the Crown delegates its responsibilities to officials who respond to First Nations' concerns by saying the necessary assessment of proposed "taking up" of areas subject to treaty rights is beyond the scope of their authority.

[Emphasis added.]

50 The judge considered in some detail the CMMP and comments on it by the government experts, Dr. Seip and Mr. Johnstone. He concluded that because there was no recovery plan for the Burnt Pine caribou herd, as the Crown conceded, the CMMP could not be seen as a reasonable accommodation (para. 59).

51 The judge said the right to hunt had to be "meaningful", which included a right to hunt in its traditional territories:

[62] Nor can the suggestion that the Burnt Pine herd constitutes only a minor part of the hunting potential for the West Moberly prevail. As noted in para. 15 above, the Supreme Court of Canada has stated that a meaningful right to hunt means a right to hunt in "its" (here West Moberly's) traditional territories. The area impacted by the First Coal project includes a portion of West Moberly's traditional seasonal round of hunting caribou, and impacts not only hunting for food, but upon the use of caribou for other cultural and practical reasons. It is not an accommodation to say "hunt elsewhere".

[63] ... Thus, in the case at bar, the Court is required to take into account West Moberly's treaty protected right to hunt, including the traditional seasonal round, and the impact of these decisions upon that right. Here, I conclude that treaty protected right is the right is *[sic]* to hunt caribou in the traditional seasonal round in the territory effected *[sic]* by the First Coal Operation.

52 As to remedy, the judge held that quashing the amended permits would not strike the proper balance (para. 78). He held:

[78] The Court may quash a decision should it be found there has not been appropriate consultation or accommodation: *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110, *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, [2009] 9 W.W.R. 92. However, I conclude such an order in this case would not constitute a proper balancing of the rights of the petitioners with other First Nations, and the public, including First Coal.

[79] Rather, I conclude that a pragmatic and reasonable step is to stay the effect of the issuing of the amendment of September 14, 2009 permitting the Advanced Exploration Program, and to suspend the effect of the licence to cut, for a determined period to permit and to mandate a proper accommodation of West Moberly's concerns with respect to the Burnt Pine herd.

...

[82] When considering a constitutional right, it is open to the court rather than to stay the effect of the decisions pending proper accommodation, to stay the impugned decisions for a determined period and to give directions as to the accommodation which should be put in place within that time: see *Platinex Inc. v. Kit-chenuhmaykoosib Inninuwig First Nation* (2006), 272 D.L.R. (4th) 727, [2006] 4 C.N.L.R. 152, (Ont. S.C.J.), (Ont. S.C.J.).

[83] In the circumstances, I conclude that the stay which I have ordered should be in effect for 90 days from

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the date of these reasons.

IV. Treaty 8

53 The relevant provision of Treaty 8 is as follows:

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

[Emphasis added.]

54 With this text must be read the report of the Treaty Commissioners submitted to the Superintendent General of Indian Affairs on 22 September 1899. The following extracts of the Commissioner's report are relevant:

There was expressed [by the Indians] at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges ...

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them...

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make the hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.

We assured them that the treaty would not lead to any forced interference with their mode of life.

[Emphasis added.]

V. Issues on Appeal

55 The parties' submissions give rise to a number of issues.

A. Whether judicial review is the appropriate procedure in which to allege, and to seek a remedy for, the Crown's failure to consult and accommodate (the procedural issue).

B. Whether the judge erred in holding that the Crown failed to act honourably by delegating to Ministerial officials the duty to consult, without also providing those officials with the power to consider fully, and to accommodate reasonably, the petitioners' concerns (the delegation issue).

C. Whether the judge erred in considering "past wrongs", or the cumulative effects of past events, that

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led to the depleted population of caribou in the Burnt Pine herd, and whether the judge erred in considering future events, namely the impact of a full mining operation in the area, rather than the exploration for which the amended permits were granted (the scope of consultation issue).

D. Whether the judge mischaracterized or misconstrued the petitioners' Treaty 8 right to hunt (the interpretation issue).

E. Whether, considering the results of the issues above, the learned chambers judge erred in holding that the Crown had failed to consult meaningfully and to accommodate reasonably, the petitioners' Treaty 8 right to hunt. This is the fundamental issue on appeal (the consultation issue).

F. Whether the judge erred in holding that only one method of accommodation was reasonable in the circumstances, namely, a plan to protect and augment the Burnt Pine caribou herd (the accommodation issue).

VI. The Parties' Positions

A. British Columbia

56 B.C. says the chambers judge erred in interpreting the petitioners' Treaty 8 hunting rights as a "species specific" right. B.C. says the error appears in this sentence in the judge's reasons at para. 63: "Here, I conclude that treaty protected right is the right is [*sic*] to hunt caribou in the traditional seasonal round in the territory effected [*sic*] by the First Coal Operation".

57 That is to say, B.C. says the judge erred in holding that the petitioners had a specific treaty right to hunt and harvest the Burnt Pine caribou herd. The court should not have had such a narrow focus. It will result in the "balkanization" of treaty rights. The hunting right in Treaty 8 is not so confined. It is a right to hunt anywhere in the petitioners' traditional Treaty 8 territories, and for such species as may be available. The treaty rights should not be restricted to a single species, nor to an unreasonably limited area of land.

58 Moreover, B.C. says the hunting right is subject to the Crown's right to *take up* such tracts of land as may be required for, *inter alia*, mining. So the hunting right does not exclude other land uses as provided for in the Treaty. The Province points out that the petitioners' people have not hunted caribou in the area of concern for almost 40 years.

59 The Province further contends that the chambers judge erred in holding that only a single specific accommodation was the appropriate outcome, and in evaluating the Crown's consultation process from that perspective. B.C. says that, if the consultation process is found to be insufficient, the question of accommodation should be referred back to the decision maker. B.C. says it was an error of law to order a specific accommodation, a matter in which the courts should not be involved.

60 Next, B.C. says the chambers judge erred by misapprehending the proper role of the court in reviewing the exercise of a statutory power of decision. B.C. says the chambers judge erred (at paras. 54 and 55 of the reasons) in saying that the Crown failed to provide its officials with authority sufficient to consider fully and to accommodate all concerns that might arise in the consultation process. B.C. says it is not reasonable to expect that a statutory decision maker, such as MEMPR, should have authority to address all Aboriginal concerns raised, even if those concerns raise issues outside the scope of the consultation process. Here MEMPR author-

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ized the amendment of two permits for sampling and exploration. B.C. says it is not realistic to expect Ministry officials to engage in an environmental review process, or an assessment of what was necessary to protect and restore this particular herd of caribou.

61 So B.C. says the judge erred in holding that its consultation and accommodation with the petitioners was unreasonable. The subject of the consultation was the impact of the permit amendments, and not a review of the petitioners' Treaty 8 rights generally, nor the historic decline of caribou.

62 B.C. asks that the order of 19 March 2010 be set aside in its entirety.

B. First Coal

63 First Coal supports B.C.'s position on the appeal.

64 In addition, First Coal says the chambers judge erred in assessing the scope of the Crown's duty to consult. First Coal says the judge erred in treating the scope of the duty to consult as including the cumulative effect of past wrongs suffered by the petitioners' people, and in considering the potential impact of a fully operational coal mine. Rather, the scope of the duty to consult was limited to the impact of the amended Sampling and Exploration Permits that were challenged on this judicial review.

65 First Coal placed emphasis on the decision of the Supreme Court of Canada in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), a judgment pronounced on 28 October 2010, well after the chambers judge gave his reasons in this case.

66 First Coal says the chambers judge also erred in his decision as to what would constitute reasonable accommodation in the circumstances of this case. In particular, it says the chambers judge erred (at para. 51 of his reasons), by holding the Crown in breach of its duty to accommodate by failing to put in place "an active plan for the protection and rehabilitation of the Burnt Pine caribou herd". It says whether the Crown was in breach of its treaty obligations is a different question from whether it was in breach of its duty to consult and accommodate concerning the amended permits.

67 First Coal says the judge erred in law, and applied an unsupported standard, in rejecting First Coal's CM-MP and its other initiatives as a reasonable form of accommodation. The potential impacts of the sampling and exploration projects are limited, and the mitigation proposed was reasonable. MEMPR's decision (the "rationale") to grant the amended permits was reasonable, and the judge should not have substituted his view of the matter for that of the decision maker.

68 Finally, First Coal says the judge erred by ordering a 90-day stay of any activity under the two amended permits. First Coal says this amounted to a sanction upon it, with no logical connection to the rest of the remedy granted, and in spite of the fact that First Coal had acted reasonably throughout, and done everything that was expected of it.

C. The Intervenor - The Attorney General of Alberta

69 Alberta also supports B.C.'s position on this appeal. In its factum, Alberta agrees with the errors in the judgment identified by B.C. Alberta affirms that the judge erred in adopting a narrow characterization of the petitioners' Treaty 8 right to hunt, as one to hunt a specific species in a specific geographical area. It says judicial review is not the appropriate forum for addressing such an issue, which should be considered in the context of a

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trial.

70 Alberta says treaty interpretation is inappropriate in this case because the parties to the treaty, and in particular Canada, are not before the court.

71 Alberta says the focus should be on the reasonableness of the consultation process, rather than upon its outcome.

72 Alberta says B.C. was entitled to rely on the steps taken by First Coal, the proponent of the sampling and exploration projects, to mitigate and address the specific concerns raised by the petitioners.

73 Alberta further says that whether positive steps should be taken to implement a recovery plan for the Burnt Pine caribou herd is a public policy choice to be made by government, and is well beyond any remedy available to the petitioners on judicial review of the decision to amend the permits. Alberta says it is up to the Crown, and to the statutory decision makers with delegated authority, to determine where the appropriate balance is to be struck. Courts should show a high degree of deference to the Crown when it has followed a reasonable process in balancing competing considerations.

74 Here Alberta says B.C. made a difficult policy decision with respect to the Burnt Pine caribou herd and that if the public does not like the policy decision, the appropriate remedy is the "ballot box" not judicial review.

D. West Moberly First Nations

75 The petitioners say there are two over-arching issues. The first is the nature and scope of the Treaty 8 hunting right guaranteed to the First Nations. The second is the reasonableness of the relief ordered by the chambers judge.

76 As to the nature and scope of the treaty right to hunt, the petitioners say the statutory decision maker was wrong. The petitioners' right to harvest caribou and other game is rooted in the "traditional seasonal round" of the Mountain Dunne-Za. To ignore this as the petitioners say MEMPR did, was to misapprehend the nature and scope of the duty to consult.

77 The standard of review as to the nature and scope of the duty to consult is correctness. The statutory decision maker got it wrong, and the chambers judge got it right. The judge had proper regard for the text of Treaty 8 and for the Crown's oral promises to the First Nations peoples.

78 The petitioners say the appropriate standard of review for assessing the consultation process actually engaged in by the Crown, and the results of that process, is reasonableness. Here the petitioners say the consultation process engaged in by MEMPR, and the mitigation and accommodation measures it adopted from the CMMP, were unreasonable. The petitioners rely on the opinions of the experts in the MOFR and the MOE. Both said that the proposed exploration activity, even with the mitigation proposed in the CMMP, will result in unacceptable adverse impacts to the caribou. It will destroy core winter habitat for caribou, and that is incompatible with recovery of the Burnt Pine herd.

79 The petitioners maintain the preservation of a resource is necessary for the continuing treaty rights to exploit that resource. It is appropriate to consider the cumulative impacts. The petitioners say this case is distinguishable from *Rio Tinto*.

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80 MEMPR's decision to issue the amended permits failed to consider the petitioners' right to hunt caribou according to the traditional seasonal round. B.C., and MEMPR, have mistakenly miscategorized the petitioners' *existing* treaty right, as an *asserted* but unproven and potential Aboriginal right. The treaty right exists, and includes the right to its meaningful exercise.

81 It was an error of law for MEMPR to so mischaracterize the treaty right, and the consultation and accommodation were therefore unreasonable.

82 As to the content of the duty to consult and accommodate, the petitioners say that MEMPR did not, but the chambers judge did, adequately assess the seriousness of the potential adverse effects of MEMPR's decisions on the affected treaty right.

83 The seriousness of the impact must take into account its effects on the First Nations peoples. One cannot assess those effects without considering the history of the relationship between the Crown and the First Nations. The historic decline of the caribou is also a relevant concern, because the impact of the proposed exploration will be felt on the herd in its depleted condition. The new adverse impacts distinguish this case from *Rio Tinto*.

84 The consultation process was not reasonable, nor was the proposed accommodation. The judge was right to exercise his discretion as he did in ordering a specific form of accommodation.

E. The Intervenor - Treaty 8 First Nations of Alberta

85 This organization represents 24 Treaty 8 First Nations in Alberta. Each member of those First Nations is a descendant from the original signatories to Treaty 8, or adherents thereto.

86 Treaty 8 First Nations of Alberta supports the position of the West Moberly First Nations on this appeal. It says that consultation and accommodation must be meaningful. It says the statutory powers conferred on the decision maker, such as MEMPR, cannot limit the scope of consultation which the Crown has a duty to afford. If the officials in question do not have requisite authority, the Crown must engage other government representatives who do have capacity to address all issues arising in the consultation process. The duty to consult and accommodate is not based on statute, but is rather a constitutional imperative.

F. The Intervenor - Grand Council of Treaty #3

87 The Grand Council of Treaty #3 ("GCT3") represents the Anishinaabe Nation, an Aboriginal signatory to Treaty #3.

88 The GCT3 also supports the position of the petitioners on this appeal. It says the harvesting rights promised in the 11 numbered treaties across Canada must be interpreted in the context of the circumstances of each First Nation having regard to the unique cultural, political, historical and geographical context of each numbered treaty and each Aboriginal people. In this case, GCT3 says the court below properly held the duty to consult and accommodate had to be informed by these considerations.

89 GCT3 also says the courts have broad remedial powers in cases where the duty to consult and accommodate is called into question, including the power to make orders that provide a reasonable level of specificity as to how the consultation and accommodation is to be carried out. This approach to remedies is consistent with upholding the rule of law and allows for the orderly and informed development of the law of consultation and accommodation. It is also consistent with the balanced approach to remedies encouraged by courts in other duty

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to consult cases.

90 GCT3 points out the framework for judicial supervision of statutory decision makers is set out in the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, and referred specifically to sections 5 and 6 of that *Act*.

91 GCT3 affirms that consideration of cumulative impacts is important. It says First Coal confuses the question of consultation with respect to past infringements with the assessment of past land uses in order fully to appreciate the significance and effect of proposed land use. It says that if half the land had already been appropriated, the impact of new development on what remained would be much greater than if there had been no previous development. The extent of past land use renders the impact of the proposed land use more significant. It says this approach is consistent with *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, [2010] 3 S.C.R. 103 (S.C.C.).

VII. Analysis

A. The Procedural Issue

92 The appellants and intervenor Attorney General for Alberta have raised the question whether judicial review is the appropriate procedure in which to allege, and remedy, the Crown's failure to consult and accommodate.

93 In oral submissions, B.C. suggested that judicial review was not the correct means by which to determine the scope of the treaty right to hunt. Counsel for the Province said that because the petition for judicial review was to be decided on affidavit evidence, the process provided too limited a basis on which to assess or define the scope of the treaty right. Counsel said that procedure was inappropriate for a specific finding on the scope of the treaty right, because the evidence was insufficient, and there was no cross-examination on any of the affidavits.

94 The intervenor Attorney General of Alberta supports this position, but adds to it. Alberta says that "[q]uestions about asserted rights are best left to be dealt with in the context of a trial where full evidence is comprehensively reviewed and considered" (intervenor's factum at para. 5). Alberta points to both *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.), as cases where issues of asserted rights were severed from judicial review applications and referred to the trial list.

95 Moreover, Alberta says that for a decision on whether the Treaty is to be interpreted as ensuring a First Nations' right to hunt a specific species "into the future", there would have to be a "full trial of the historical issues, based on a fulsome evidentiary record" (intervenor's factum at para. 12). Here, not all the proper parties were before the Court. In particular, Canada was not a party to the process, and since it was a party to Treaty 8, it should be heard in any case involving the treaty's interpretation.

96 I see no merit in the argument that judicial review was an inappropriate procedure for resolving the issues in this case. I note at the outset that no party took this position in the court below, and no party below suggested that Canada should be added as a party.

97 In any event, the matter has now been put beyond question by the decision of the Supreme Court of Canada in *Beckman* where the Court said:

[47] The parties in this case proceeded by way of an ordinary application for judicial review. Such a proced-

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

98 In my respectful view, Alberta's reliance on *Haida* and *Taku* is misplaced. Those were both cases about the existence of Aboriginal rights asserted by First Nations, but as yet unproven. There is no such question in this case, because Treaty 8 declares the right. While there remain issues as to the scope of the right, that is to be largely decided by interpreting the Treaty, in its historical context, as a matter of law.

99 I would not give effect to the assertion that judicial review was not the proper way of proceeding to resolve the questions in issue in this case.

B. The Delegation Issue

100 The appellants assert that the judge erred in holding that the Crown failed to act honourably by delegating to ministry officials the duty to consult and accommodate, without also providing those officials with the necessary powers to consider fully, and to accommodate reasonably, the petitioners' concerns.

101 This issue arises from what the chambers judge said at paras. 54 and 55 of his reasons, which I repeat here for convenience:

[54] Further, here the Crown has delegated its duty towards First Nations peoples to departmental officials. But in so doing it has not given those officials the authority to consider fully the First Nations concerns, nor the power to accommodate those concerns. The same July 20, 2009, document which states that the Ministry of Energy, Mines and Petroleum Resources recognizes that the cumulative impacts of First Coal's project upon West Moberly's traditional territory have been raised by both West Moberly and the Ministry of the Environment, states that it is "beyond the scope of this project to fully assess" those impacts.

[55] The honour of the Crown is not satisfied if the Crown delegates its responsibilities to officials who respond to First Nations' concerns by saying the necessary assessment of proposed "taking up" of areas subject to treaty rights is beyond the scope of their authority.

102 The "cumulative impacts of First Coal's project" referred to in para. 54 is a reference to the passage in the "Considerations" document under the heading "Cumulative Impacts" quoted above at para. 42.

103 B.C. contends that in so holding the chambers judge was effectively saying that a statutory decision maker, such as MEMPR, must be empowered to address all concerns raised by First Nations, or else the honour of the Crown will not be upheld. B.C. says that to demand such authority in a statutory decision maker would compel it to go beyond its statutory mandate. It points to *Taku* and says that the petitioners' Treaty 8 concerns lay outside the ambit of the consultation process required for the approval of the amended Bulk Sampling and Advanced Exploration Permits. B.C. says such concerns "could only be the subject of later negotiations with the government", and that it was unreasonable to expect MEMPR to address them.

104 The Attorney General for Alberta supports B.C. in this position. Alberta expresses the argument in its

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factum in this way:

33. The Justice erred in finding that it is not sufficient for a statutory decision maker to focus on mitigation efforts that are within his or her statutory authority. It is not dishonourable for a statutory decision maker to decline to address concerns that are "out of scope" or beyond the decision maker's statutory mandate. His approach effectively requires a Crown decision maker to enlist other Crown ministries and decision makers if the concerns of the First Nation are beyond his or her statutory authority and power to consider or address. This approach is contrary to *Carrier Sekani*, and to administrative principles generally.

34. With respect, the Justice went beyond reviewing the specific decisions before him and, instead, considered broader wildlife management issues that were the responsibility of other government decision makers, despite a court proceeding that was limited to the judicial review of specific administrative decisions.

105 And further:

37. Statutory decision makers have no inherent jurisdiction. When broad concerns are raised, that require remedial powers that fall outside the confines of their statutory authorities and jurisdiction, they are simply not the proper forum for such concerns to be raised or considered. In this case, the Ministries charged with making the challenged decisions were not the proper forum to raise broad wildlife management concerns related to overall caribou management policy.

106 With respect, I do not consider this position to be tenable. MEMPR was not limited by its statutory mandate, so far as its duty and power to consult were concerned. It is a well established principle that statutory decision makers are required to respect legal and constitutional limits. The Crown's duty to consult lies upstream of the statutory mandate of decision makers: see *Beckman* at para. 48 and *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 64 B.C.L.R. (3d) 206 (B.C. C.A.) at para. 177.

107 In other words, in exercising its powers in this case, MEMPR was bound by, and had to take cognizance of, Treaty 8 and its true interpretation. B.C. says that such a view of the decision maker's position is unreasonable. With respect, I disagree. There is nothing in the legislation creating and governing MEMPR that would prevent that body from consulting whatever resources were required in order to make a properly informed decision. A statutory decision maker may well require the assistance or advice of others with relevant expertise, whether from other government ministries, or from outside consultants.

108 In this case, MEMPR appears to have relied, at least in large part, on the CMMP prepared by Aecom, the consultant retained by First Coal. MEMPR was entitled to consider the opinions of First Coal's consultant, but it was not limited to so doing. I would not give effect to this ground of appeal.

C. The Scope of the Duty to Consult

109 The appellants, and First Coal in particular, assert that the judge erred in considering "past wrongs", or the cumulative effect of past events, that led to the depleted population of the Burnt Pine caribou herd; and erred as well in considering future events, namely the potential impact of a full mining operation, rather than simply the exploration programs authorized by the amended permits.

110 First Coal submits that the chambers judge erred in determining the scope of the Crown's duty to con-

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sult. It says the consultation should have been limited, as it was by MEMPR, to the immediate adverse impacts of the two Amended Permits for the Bulk Sampling and Advanced Exploration Programs, and whatever steps might be necessary to address and accommodate those impacts.

111 Instead, First Coal says the chambers judge embarked on a consideration of the historical decline of the Burnt Pine caribou herd, and in so doing purported to redress "past wrongs". In particular, First Coal says the chambers judge erred in considering the petitioners' submissions concerning the construction of the W.A.C. Bennett and Peace Canyon Dams in the 1960s and 1970s, and the creation of the Williston Reservoir.

112 First Coal says the effect of these considerations on the chambers judge's decision is evident from his holding that the Crown failed to put in place a plan for the protection and *rehabilitation* of the Burnt Pine herd.

113 Such focus on, and attempts to remedy, events in the past is, in First Coal's submission, contrary to the decision of the Supreme Court of Canada in *Rio Tinto* (at paras. 45 to 54). First Coal says that the order to rehabilitate or augment the Burnt Pine caribou herd is a remedy for prior events, which have no causal connection to any adverse impacts that the Amended Exploration Permits might give rise to.

114 First Coal also contends that the chambers judge erred in holding that the duty to consult included an obligation to consider the potential adverse impacts of a full mining operation that might follow the exploration programs. The "longer term implications ... [of mining] over this entire area" are referred to in Dr. Seip's comments of 25 September 2008, quoted at para. 22 of the reasons for judgment, and in the petitioners' response to a letter from MEMPR of 8 August 2009 in which the Ministry said "further stages of development would not be considered in the permit amendment decisions", referred to at para. 34 of the reasons.

115 In his analysis, the chambers judge referred again to the reports of Dr. Seip and Pierre Johnstone in which Dr. Seip expressed a view that the Bulk Sampling and Exploration Programs would cause habitat destruction "incompatible with efforts to recover the populations" (reasons para. 57), and Pierre Johnstone is quoted as saying that "mine development" in the habitat area would be inconsistent with maintaining or increasing the number of caribou (reasons para. 58).

116 To deal first with the "past wrongs" submission, and the requirement that a causal relationship be shown between the government's decision and the risk of an adverse impact, I consider that *Rio Tinto* is distinguishable on its facts from the present case. There the Court addressed an argument that energy purchase agreements (EPAs) made in 2007 between Alcan and B.C. Hydro would trigger the duty to consult, because the EPAs were part of a larger hydroelectric project initiated some 40 or 50 years earlier on which the First Nations peoples had not been consulted. The Utilities Commission found that the 2007 EPA would not have *any adverse* effect on the Nechako River and its fishery (see *Rio Tinto* at para. 77). The First Nations peoples argued that even if the 2007 EPA would have no impact, or inconsequential effects, the duty to consult was nevertheless triggered. The Court rejected this argument. It said in part:

[45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

...

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[49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right....

...

[53] I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

...

[83] In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult.

[Italic emphasis in original; underline emphasis added.]

117 I do not understand *Rio Tinto* to be authority for saying that when the "current decision under consideration" *will have* an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.

118 The amended permits authorized activity in an area of fragile caribou habitat. Caribou have been an important part of the petitioners' ancestors' way of life and cultural identity, and the petitioners' people would like to preserve them. There remain only 11 animals in the Burnt Pine herd, but experts consider there to be at least the possibility of the herd's restoration and rehabilitation. The petitioners' people have done what they could on their own to preserve the herd, by banning their people from hunting caribou for the last 40 years.

119 To take those matters into consideration as within the scope of the duty to consult, is not to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from pursuit of the exploration programs.

120 I would not give effect to this branch of First Coal's submission.

121 First Coal's second contention on the scope of the duty to consult is that it must be limited to the impact of the amended exploration permits, and must exclude consideration of whatever effects a full mining operation might have.

122 It is correct that the consultation in this case must be directed at the Bulk Sampling and Advanced Exploration Permits and their impact. However, the result of this consultation will necessarily determine not only what constitutes reasonable accommodation for the exploration permits, but will also affect subsequent events if the exploration proceeds.

123 On my reading of the chambers judge's reasons, it does not appear that he gave much, if any, weight to

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the potential impact of a full mining operation as a relevant factor in the Crown's duty to consult. However, the whole thrust of the petitioners' position was forward looking. It wanted to preserve not only those few animals remaining in the Burnt Pine caribou herd, but to augment and restore the herd to a condition in which it might once again be hunted. If that position were to be given meaningful consideration in the consultation process, I do not see how one could ignore at least the possibility of a full mining operation, if it were shown to be justified by the exploration programs. That was the whole object of the Bulk Sampling and Advanced Exploration Programs.

124 There does not appear to be any evidence contrary to the opinion of Pierre Johnstone that mine development in this area "would be inconsistent with maintaining or increasing Woodland Caribou numbers". Similarly Dr. Seip's view that "it is short-sighted and misleading to evaluate this proposal for bulk sampling without also considering the longer term consequences of more widespread mining activity occurring over the entire property" (quoted above at para. 39), is not contradicted by the evidence.

125 I am therefore respectfully of the view that to the extent the chambers judge considered future impacts, beyond the immediate consequences of the exploration permits, as coming within the scope of the duty to consult, he committed no error. And, to the extent that MEMPR failed to consider the impact of a full mining operation in the area of concern, it failed to provide meaningful consultation.

126 I would not give effect to these grounds of appeal.

D. The Interpretation Issue (The Petitioners' Treaty 8 Right to Hunt)

127 B.C. accepts that the statutory decision maker was obliged to consider the nature and scope of the petitioners' treaty right to hunt in the consultation process, but B.C. says that due consideration was given to that right. B.C. says the chambers judge erred in interpreting that right as a specific right to hunt caribou in its traditional area as part of its seasonal round.

128 The nature and scope of the petitioners' right to hunt must be understood as the petitioners' ancestors, and as the Crown's treaty makers, would have understood that right when the treaty was made or adhered to. That understanding is to be derived from the language used in the treaty, informed by the report of the Commissioners, quoted above at para. 54.

129 In examining the nature and scope of the petitioners' right to hunt, it must be remembered that it is not merely a right asserted and as yet unproven, as in cases of Aboriginal rights claims in non-treaty cases. Here the right relied on is an existing right agreed to by the Crown and recorded in a Treaty. While there may be disagreement over the limits on or the scope of the right, consultation must begin from the premise that the First Nations are entitled to what they have been granted by the Treaty.

130 The Treaty 8 right to hunt is not merely a right to hunt for food. The Crown's promises included representations that:

- (a) the same means of earning a livelihood would continue after the Treaty as existed before it, and that the Indians would be expected to continue to make use of them;
- (b) they would be as free to hunt and fish after the Treaty as they would be if they never entered into it; and
- (c) the Treaty would not lead to "forced interference with their mode of life" (see *R. v. Badger*, [1996] 1

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[S.C.R. 771](#) (S.C.C.) at para. 39).

131 These promises have been affirmed in previous Treaty 8 cases.

132 In *Badger*, the Supreme Court of Canada held at para. 52 that treaties relating to indigenous peoples should be construed liberally, "... and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians ... the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid, modern rules of construction".

133 On this appeal, B.C. relies on the words in the Treaty that limit the right to pursue hunting, et cetera, "... saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading, or other purposes".

134 Just as the right to hunt must be understood as the treaty makers would have understood it, so too must "taking up" and "mining" be understood in the same way. As the Supreme Court of Canada said in *Badger* at para. 55:

Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap". The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one commissioner, cited in René Fumoleau, O.M.I., *As Long as this Land Shall Last*, at p. 90, stated:

We are just making peace between Whites and Indians — for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.

[Emphasis added.]

135 I interject to point out that "some white prospectors [who] might stake claims", to the understanding of those making the Treaty, would have been prospectors using pack animals and working with hand tools. That understanding of mining bears no resemblance whatever to the Exploration and Bulk Sampling Projects at issue here, involving as they do road building, excavations, tunnelling, and the use of large vehicles, equipment and structures.

136 In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), the Supreme Court of Canada expanded upon what it had said in *Badger*:

47 . . .

Badger recorded that a large element of the Treaty 8 negotiations were the assurances of *continuity* in traditional patterns of economic activity. Continuity respects traditional patterns of activity and occupation. The Crown promised that the Indians' rights to hunt, fish and trap would continue "after the treaty as existed before it" (p. 5). This promise is not honoured by dispatching the Mikisew to territories far from their traditional hunting grounds and traplines.

48 . . .

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The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.

[Italic emphasis in original; underline emphasis added.]

137 It is clear from the above passages that, while specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a "continuity in traditional patterns of economic activity" and respect for "traditional patterns of activity and occupation". The focus of the analysis then is those traditional patterns.

138 The result in *Mikisew* is instructive on this point. That case involved the construction of a winter road in Wood Buffalo National Park that ran through the Mikisew First Nation Reserve. The road corridor occupied approximately 23 square kilometres and traversed the traplines of approximately 14 Mikisew families that resided in the area. The federal and provincial Crowns argued that while 23 square kilometres were "taken up" there remained a meaningful right to hunt in the 840,000 square kilometres covered by Treaty 8. The Federal Court of Appeal in the decision below held that rights to hunt, fish and trap were only infringed "where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains". In rejecting these arguments Mr. Justice Binnie said the following at para. 44:

The Draft Environmental Assessment Report acknowledged the road could potentially result in a diminution in quantity of the Mikisew harvest of wildlife, as fewer furbearers (including fisher, muskrat, marten, wolverine and lynx) will be caught in their traps. Second, in qualitative terms, the more lucrative or rare species of furbearers may decline in population. Other potential impacts include fragmentation of wildlife habitat, disruption of migration patterns, loss of vegetation, increased poaching because of easier motor vehicle access to the area and increased wildlife mortality due to motor vehicle collisions. While *Haida Nation* was decided after the release of the Federal Court of Appeal reasons in this case, it is apparent that the proposed road will adversely affect the existing Mikisew hunting and trapping rights, and therefore that the "trigger" to the duty to consult identified in *Haida Nation* is satisfied.

139 The question to be answered is whether the proposed activity will adversely affect existing hunting rights. In this case it is clear that the petitioners have historically hunted caribou in the area affected by the Bulk Sampling and Advanced Exploration Programs. Since the 1970s West Moberly elders have imposed a ban on hunting caribou because of diminishing numbers, but it is hoped that hunting may resume in the future. It is also clear from the evidence of Pierre Johnstone and Dr. Seip that the Bulk Sampling and Advanced Exploration Programs as well as any full mining operation will have an adverse impact on caribou in the area and consequently the petitioners' ability to hunt. Therefore, the duty to consult has been engaged.

140 The chambers judge did not err in considering the specific location and species of the petitioners' hunting practices.

E. The Consultation Issue

141 The question then is whether the consultation process was reasonable. A reasonable process is one that

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recognizes and gives full consideration to the rights of Aboriginal peoples, and also recognizes and respects the rights and interests of the broader community.

142 The record of the consultation process in this case, summarized in the document "Considerations To Date" prepared by MEMPR as of 20 July 2009, the appended Consultation Log (para. 40 above), and in MEMPR's "Rationale" dated 4 September 2009, details the consideration given to the concerns raised by the petitioners.

143 The essence of the petitioners' position (see para. 44 above) was that First Coal's application for the Bulk Sampling and Advanced Exploration Permits should be rejected, and their proposed mining activities relocated to another area where the habitat for the Burnt Pine caribou herd would not be affected; and, further that a plan should be put in place for the recovery of the Burnt Pine caribou herd.

144 This position is, of course, completely irreconcilable with the projects proposed by First Coal. To be considered reasonable, I think the consultation process, and hence the "Rationale", would have to provide an explanation to the petitioners that, not only had their position been fully considered, but that there were persuasive reasons why the course of action the petitioners proposed was either not necessary, was impractical, or was otherwise unreasonable. Without a reasoned basis for rejecting the petitioners' position, there cannot be said to have been a meaningful consultation.

145 In *Mikisew*, the Court said:

54 This is not correct. Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

...

64 The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation* at paras. 159-60.

The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal

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peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.]

[Italic and underline emphasis in original.]

146 In my respectful view, the Considerations document and the Rationale do not meet this test. MEMPR effectively accepted First Coal's CMMP as a satisfactory response to the petitioners' position. However, the CMMP does not explain why the petitioners' position that the Exploration Permits should be cancelled, First Coal's activities relocated, and the Burnt Pine caribou herd restored, was rejected. It does not address why the petitioners' position was unnecessary, impractical, or otherwise unreasonable. Rather, the CMMP proceeds on the footing that the Bulk Sampling and Advanced Exploration Programs should proceed, and then proposes measures to minimize or mitigate whatever adverse effects those programs will have. It contains proposals to monitor the impact of the projects on the Burnt Pine caribou herd and to "discuss" ways in which First Coal can assist in recovery of the caribou population.

147 The decision reached by MEMPR based on the CMMP and the position put forward by the petitioners are as two ships passing in the night. There was no real engagement of the petitioners' position. It was not a position that could be dismissed out of hand, supported as it was by the expert opinions of the government's own biologists, Dr. Seip and Pierre Johnstone.

148 If the petitioners' position were to be addressed head on, and a careful consideration given to whether the exploration programs should be cancelled, First Coal's activities relocated, and the Burnt Pine caribou herd restored, it may be that MEMPR could give a persuasive explanation as to why such steps were unnecessary, impractical, or otherwise unreasonable. The consultation process does not mandate success for the First Nations interest. It should, however, provide a satisfactory, reasoned explanation as to why their position was not accepted.

149 The consultation in this case does not do that. I think the reason is apparent. MEMPR never considered the possibility that the petitioners' position might have to be preferred. It based its concept of consultation on the premise that the exploration projects should proceed and that some sort of mitigation plan would suffice. However, to commence consultation on that basis does not recognize the full range of possible outcomes, and amounts to nothing more than an opportunity for the First Nations "to blow off steam".

150 Effectively, MEMPR regarded the petitioners' Treaty 8 right to hunt as subject to, or inferior to, the Crown's right to take up land for mining or other purposes. There are at least two problems with this approach. First, it is inconsistent with what First Nations peoples were told when the Treaty was signed or adhered to. They were given to understand that they would be as free to make their livelihood by hunting and fishing after the Treaty as before, and that the Treaty would not lead to "forced interference with their mode of life". Second, the concept of mining, as understood by the treaty makers would never have included the possibility that areas of important ungulate habitat would be destroyed by road building, excavations, trenching, the transport of heavy equipment and excavated materials, and the installation of an "Addcar system".

151 When MEMPR entered into the consultation process without a full and clear understanding of what the Treaty meant, the process could not be either reasonable or meaningful. A consultation that proceeds on a misunderstanding of the Treaty, or a mischaracterization of the rights that the Treaty protects, is a consultation based on an error of law, and cannot therefore be considered reasonable.

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152 These are different reasons than those given by the chambers judge for holding that the consultation was not meaningful. He gave two reasons for reaching his conclusion. He said first that the Crown was too slow to advise the petitioners as to the potential adverse effects of the exploration program, by not providing them with a "substantial assessment" until August 2009, about only one month before the rationale was settled upon (reasons at para. 50). Second, the judge said MEMPR responded to the petitioners' concerns about potential extirpation of the Burnt Pine caribou herd with something approaching "standard form referral letters" (reasons at para. 51).

153 I consider that both of these reasons are correct, but the underlying explanation for MEMPR's slow and superficial response is, as I have attempted to explain above, a failure to understand or appreciate the basis of the petitioners' objection, grounded in a constitutionally protected treaty right.

154 I am therefore of the opinion that the chambers judge was correct to consider that the consultation was not meaningful and was therefore not reasonable.

F. The Accommodation Issue

155 The appellants assert that the judge erred in holding that only one method of accommodation was reasonable in the circumstances, namely a plan to protect and augment the Burnt Pine caribou herd.

156 This ground of appeal challenges para. 3 of the judge's order which, to repeat, was:

3. Within the said 90 day period, British Columbia, in consultation with the Petitioners, will proceed expeditiously to put in place a reasonable, active plan for the protection and augmentation of the Burnt Pine caribou herd, taking into account the views of the Petitioners, as well as the reports of British Columbia's wildlife ecologists and biologists Dr. Dale Seip and Pierre Johnstone ...

157 This part of the order is supported specifically by this sentence in the judge's reasons for judgment at para. 63:

Here, I conclude that treaty protected right is the right is [*sic*] to hunt caribou in the traditional seasonal round in the territory effected [*sic*] by the First Coal Operation.

158 B.C. says the chambers judge erred in restricting the petitioners' treaty right to hunt to a single species, caribou, or to a specific geographical location. It says an order directing a specific accommodation is contrary to earlier decisions in this Court. It says the predetermination of the only acceptable accommodation coloured the judge's consideration of whether the consultation was meaningful and reasonable.

159 B.C. says the judge's focus on a single herd of caribou, as opposed to restoration of caribou generally, will result in the "balkanization" of treaty rights, or the "micro-application" of the treaty right. It says this is not a remedy sought in the petition.

160 First Coal supports B.C.'s position on this issue. Alberta says whether steps should be taken to implement a recovery plan for the Burnt Pine caribou herd is a public policy issue for decision by government, and not the courts.

161 The petitioners say the accommodation directed by the judge was within his discretion, and it is supported in this by the intervenor, Grand Council of Treaty #3. Counsel referred us to the *Judicial Review Procedure*

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Act, and the remedial powers granted by ss. 5 and 6:

Powers to direct tribunal to reconsider

5 (1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.

(2) In giving a direction under subsection (1), the court must

(a) advise the tribunal of its reasons, and

(b) give it any directions that the court thinks appropriate for the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

Effect of direction

6 In reconsidering a matter referred back to it under section 5, the tribunal must have regard to the court's reasons for giving the direction and to the court's directions.

162 I must say I would not interpret the judge's statement in the sentence quoted from para. 63 of his reasons as the appellants do. I do not understand the judge to be saying that the petitioners' right to hunt is the right to hunt caribou, and only caribou, in the affected area. Such an interpretation ignores the rest of the judge's reasons. I understand the sentence to mean simply that the petitioners' Treaty 8 right to hunt *includes* the right to hunt caribou as part of the seasonal round, and that it is that part of the Treaty 8 right that is in issue in this case.

163 Having said that, it is not in my respectful view necessary to reach a final conclusion on whether the judge erred in declaring a specific form of accommodation. The *Judicial Review Procedure Act* would appear to grant a sufficiently broad discretion to make such an order but this, and other courts, have shown a reluctance to do so, so as not to impair further consultation.

164 For the reasons expressed above, I have concluded that the judge was correct in holding that the consultation process was not meaningful, although for somewhat more expansive reasons than he gave on that issue. For that reason, it seems to me the proper remedy is to remit the matter for further consultation between the parties, having regard for what the scope of the consultation ought properly to include.

165 I make no further comment on the ambit of a judge's discretion to give specific directions as provided for in ss. 5 and 6 of the *Judicial Review Procedure Act*. However, it is preferable in this case that the specific direction be set aside so that the parties may resume consultation as indicated, and unfettered.

VIII. Conclusion

166 I would affirm the judge's declaration in para. 1 of the order that the Crown failed to consult adequately and meaningfully, and failed to accommodate reasonably the petitioners' hunting rights as provided by Treaty 8.

167 I would direct that implementation of, or action under the Amended Bulk Sampling Permit and the Advanced Exploration Permit be stayed pending meaningful consultation conducted in accordance with these reas-

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ons.

168 I would set aside the accommodation directed in para. 3 of the order, without prejudice to the giving of such directions for accommodation following further consultation between the parties, as may appear appropriate.

Hinkson J.A.:

169 I have had the privilege of reading the draft reasons for judgment of Chief Justice Finch, and agree with his disposition of the issues on this appeal described at para. 55 of those draft reasons, and with his reasons for that disposition with one exception regarding the last ground of appeal. While I agree with Chief Justice Finch that the accommodation directed in para. 3 of the order below should be set aside; my reasons for setting aside that paragraph of the order differ from his, with respect to what was described in that paragraph as "the protection and augmentation of the Burnt Pine caribou herd".

170 The chambers judge found that the respondent West Moberly's harvesting practice included a traditional seasonal round, which meant that hunters travelled to particular preferred areas within the treaty territory during specific times of the year, including the area impacted by the First Coal mining operation. The West Moberly traditionally hunted for bison, moose, deer, mountain sheep, and caribou. The bison in the Treaty 8 areas became extinct in the nineteenth century.

171 The population of caribou in the area of First Coal's operations has been decimated. In his affidavit of October 19, 2009, Chief Willson swore:

Caribou numbers have been reduced to such as [sic] extent in West Moberly preferred Treaty territory that the woodland caribou are a threatened species under the federal *Species at Risk Act*. Ever since I came of age to hunt, I have never been able to hunt caribou in West Moberly's preferred Treaty area. West Moberly members have not hunted caribou since the 1970's, when caribou became scarce, as our Elders put a moratorium on all our members, including myself, hunting caribou because their numbers are so few.

172 Not unlike the bison before them, the Burnt Pine caribou herd, is now approaching extirpation, having been reduced to an estimated population of only 11.

Discussion

173 At paras. 14-15 of his reasons, the chambers judge made reference to two decisions of the Supreme Court of Canada that have particular relevance to the rights of the West Moberly that are in issue:

With respect to Treaty No. 8, the Supreme Court of Canada stated in *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] 4 W.W.R. 457, at para. 55 and 56:

Since the Treaty No. 8 lands were not well suited to agriculture, the government expected little settlement in the area. The Commissioners, cited in Daniel, at p. 81, indicated that "it is safe to say that so long as the fur-bearing animals remain, the great bulk of the Indians will continue to hunt and to trap." The promise that this livelihood would not be affected was repeated to all the bands who signed the Treaty. Although it was expected that some white prospectors might stake claims in the north, this was not expected to have an impact on the Indians' hunting rights. For example, one commissioner, cited in

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René Furmoleau, O.M.I., *As Long As This Land Shall Last*, at p. 90, stated:

We are just making peace between Whites and Indians - for them to treat each other well. And we do not want to change your hunting. If Whites should prospect, stake claims, that will not harm anyone.

Commissioner Laird told the Indians that the promises made to them were to be similar to those made with other Indians who had agreed to a treaty. Accordingly, it is significant that the earlier promises also contemplated a limited interference with Indians' hunting and fishing practices.

Further, in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, the Court held that given the Crown's oral promises, Treaty No. 8 protects the right to exercise meaningfully traditional hunting practices. The unanimous Court stated at para. 48:

The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response. [Emphasis in original.]

174 I accept, as did the chambers judge, the submission of the West Moberly that the appropriate standard of review in consultation cases for the Crown's assessment of the extent of its duty to consult is correctness, and that the appropriate standard of review for assessing the process adopted for a particular consultation and the results of that process is that of reasonableness.

175 The Crown properly conceded that in the circumstances it had a duty to consult meaningfully with West Moberly and accepted that it was required to accommodate the interests of West Moberly in a reasonable manner after balancing the interests of West Moberly with the interests of other First Nations and of the public. The scope of the required consultation must be considered before the extent of the necessary accommodation can be addressed.

176 Here, there was consultation between First Coal and West Moberly respecting the concerns raised by West Moberly, the MOE and the MOFR about the Burnt Pine caribou herd. At paras. 51 and 52 of his reasons, the chambers judge found:

... The prime concern of the West Moberly is the real potential for the extirpation of the Burnt Pine caribou herd. I conclude that at least since June of 2009, when the West Moberly presented a detailed report of the danger to that herd and its relationship to their treaty protected right to hunt, the Crown's failure to put in place an active plan for the protection and rehabilitation of the Burnt Pine herd is a failure to accommodate reasonably.

While First Coal's "Mitigation and Monitoring Plan" is a step in the direction of protecting critical caribou habitats, as the Crown itself stated in the "Considerations to Date" document of July 20, 2009, there is currently no rehabilitation program in effect for the Burnt Pine herd.

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[Emphasis added.]

177 As I have indicated above, the Burnt Pine caribou herd has been so decimated that the West Moberly have refrained from hunting its members for some 40 years. The project proposed by First Coal has been pursued only since June of 2005. In *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), at para. 79, the Supreme Court of Canada confirmed that a duty to consult a First Nation arises when there is:

- (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right,
- (b) contemplated Crown conduct, and
- (c) the potential that the contemplated conduct may adversely affect the Aboriginal claim or right.

178 In explaining factor (c) above, the Court stated that the potential adverse effect on an Aboriginal right must be causally linked to current Crown conduct, and not past events. At para. 49 the Court stated:

The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation - the matter which is here at issue - a contemplated Crown action must put current claims and rights in jeopardy.

[Italic emphasis in original; underline emphasis added.]

179 In applying these factors, the Court went on to state at para. 83:

In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past.

180 What these passages demonstrate is that for the duty to consult to be triggered, the Crown's current proposed conduct must itself be causally linked to the potential adverse consequence affecting the Aboriginal right. It follows that where this test is met, the duty to accommodate should only be concerned with addressing the potential adverse affects of the current proposed Crown conduct, and not with remedying harm caused by past events. That is not to say, as the Court in *Rio Tinto* noted at para. 49 above, that past harms are without remedy, only that those harms are not properly addressed by way of consultation and accommodation undertaken in con-

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nection with current Crown conduct.

181 While I fully agree with the Chief Justice that "the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt", I do not understand that the duty to accommodate, as explained in *Rio Tinto*, obliges the Crown to accommodate the effects of prior impacts upon the treaty rights of the West Moberly. Accommodation with respect to the prior decimation of the Burnt Pine caribou herd from events prior to the First Coal project is not required *vis a vis* the First Coal Project. Certainly the loss of the large numbers of caribou in the area in general, and the decimation of the Burnt Pine caribou herd in particular should inform the scope of the necessary consultation process, but cannot, in my view, justify an obligation on the part of the Crown to restore or augment the number of ungulates that have been reduced as a result of activities or events prior to 2005 when First Coal began seeking approval for its project.

182 The need for the rehabilitation of the Burnt Pine caribou herd arose from events prior to the 1970s when the herd was all but extirpated. The emphasis placed by the chambers judge upon the need for the rehabilitation of the Burnt Pine caribou herd cannot, in my view, be considered as an accommodation that arises from the project proposed by First Coal, and thus cannot be the basis for the order granted by the chambers judge. The protection of what remains of the Burnt Pine caribou herd is an appropriate matter to be considered when the accommodation of the treaty rights of the West Moberly is addressed.

183 At para. 59, the chambers judge concluded:

Because, as the Crown concedes, no recovery plan for the caribou is in place, I conclude this cannot be seen as a reasonable accommodation of West Moberly's concerns.

184 In my view, the chambers judge erred in law by conflating his consideration of the Crown's duty to consult with the West Moberly with what he considered to be a reasonable accommodation of the rights of the West Moberly. In terms of the Burnt Pine caribou herd, the consultation that the Crown needed to engage in with the West Moberly could properly include an historic perspective recognizing the depletion of the Burnt Pine caribou herd, but the need for rehabilitation and the increase of the herd were not appropriate accommodations arising from First Coal's proposed project.

185 I would therefore set aside the accommodation directed in para. 3 of the order of the chambers judge, as would the Chief Justice, but would do so because the requirement that the Crown put in place a reasonable, active plan for more than the protection of the Burnt Pine caribou herd goes beyond the scope of the duty of reasonable accommodation.

Garson J.A. (dissenting):

186 I have had the privilege of reading in draft form the reasons for judgment of the Chief Justice and the concurring reasons of Justice Hinkson. For the reasons that follow, and with the greatest respect, I reach a somewhat different conclusion than my colleagues and I would allow the appeal and dismiss the petition.

187 In his reasons for judgment, the Chief Justice has set out the facts and issues under appeal. I agree with the Chief Justice's reasons in respect to the first and second issues namely, whether judicial review is the appropriate procedure and whether the Crown improperly delegated duties to Ministerial assistants.

188 The Chief Justice described the fundamental issue on this appeal, as whether the Crown adequately

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consulted with the petitioners. I adopt for my analysis of this issue the framework generally set out in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.):

- Did the Crown have a duty to consult, and if indicated, to accommodate West Moberly First Nations' ("WMFN") interests in hunting caribou?
- What was the scope and extent of that duty to consult and to accommodate WMFN?
- Did the Crown fulfill its duty to consult and to accommodate in this case?

Standard of Review

189 Before turning to the substantive analysis, I will briefly describe the standard by which the court should review the decisions of the statutory decision makers.

190 At para. 10 of his reasons, the chambers judge described the standard of review to be applied to his review of the statutory decision makers' decisions:

The appropriate standard of review for the Crown's assessment of the extent of its duty to consult is correctness. The appropriate standard of review for assessing the consultation process, including any accommodation measures, is that of reasonableness. The parties do not differ on these standards of review.

191 WMFN submits that the chambers judge correctly articulated the applicable standards of review. The First Nation says that both the consultation process and the result of that process were unreasonable in this case. I do not understand the other parties to disagree with the position of WMFN as to the applicability of the reasonableness standard. As this question is an important one to my analysis, I will elaborate on the application of this standard.

192 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at paras. 61-63, the Court explained the bifurcated standard to be applied to consultation decisions:

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.

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

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

[Emphasis added.]

193 I agree with the *dicta* of Grauer J. in *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110 (B.C. S.C.), where he summarized and applied *Haida Nation* at para. 34:

As mandated in the *Haida* case, *supra*, the *extent* of the duty to consult or accommodate is a question of law to be judged on the standard of correctness, although it is capable of becoming an issue of mixed law and fact to the extent that the appropriate standard becomes that of reasonableness. The *adequacy* of the consultation process is governed by a standard of reasonableness.

[Italic emphasis in original; underline emphasis added.]

194 In *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2010 SCC 53, [2010] 3 S.C.R. 103 (S.C.C.), the Court appeared to adopt a higher standard of review in assessing the adequacy of consultation (at para. 48):

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

[Emphasis added.]

195 In my view, *Beckman's* adoption of a higher standard was attributable to the fact that the case concerned the construction of a modern, comprehensive treaty; a precise document negotiated by sophisticated and well resourced parties. In that case, the Crown argued that the treaty was a complete code and there was no obligation to consult beyond the treaty itself. I would therefore distinguish *Beckman*.

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196 Thus, I would apply a reasonableness standard to the question of the adequacy of the consultation where the historical treaty does not provide the degree of specificity necessary to ascertain the "correct" process.

197 As was held in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), at para. 74, "[c]onsultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests". Compromise is a difficult, if not impossible, thing to assess on a correctness standard.

198 In summary, the Crown's determination of the scope and extent of its duty to consult must be assessed on a correctness standard. But the third *Taku* question, as to the adequacy of the consultation and the outcome of the process, must be assessed on a reasonableness standard as those questions are either questions of fact or mixed fact and law. The consultation process must also meet the administrative law standards of procedural fairness.

Did the Crown have a duty to consult and, if indicated, to accommodate WMFN's interests in hunting caribou?

199 Chief Justice McLachlin said in *Taku* at para. 25, "The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them."

200 McLachlin C.J. went on to describe the constituent elements of this test in *Rio Tinto* at para. 31: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.

201 In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.) at para. 34, Binnie J., speaking for the Court, applied the *Taku* test to a treaty right. He framed the question of the adequacy of consultation in slightly different language when he said:

In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. ...

[Emphasis added.]

202 Under s. 35 of the *Constitution Act, 1982*, treaty rights have the same constitutional status as Aboriginal rights: *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470, 64 B.C.L.R. (3d) 206 (B.C. C.A.), at para. 127.

203 In this case, the Crown accepted that it had a duty to consult arising from the applications for mining permits made by First Coal. In the July 20, 2009, "Considerations to Date" document, prepared by the Ministry of Energy Mines and Petroleum Resources (MEMPR) as part of its consultation with WMFN, the statutory decision maker described the "Impact of the Project on Aboriginal Interests" in the following way:

The four T8 FNs have treaty rights within the Central South Property. More specifically they have the right to use the land to support their way of life and their usual vocations of hunting, trapping and fishing. The potential habitat destruction, displacement from core ranges, and increased access leading to disturbance,

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poaching and excessive predation could potentially impact the Burnt-Pine Caribou Herd. However, there is no projected impact on the four T8 FNs hunting rights of other species such as moose, elk and deer.

204 In the same document the statutory decision maker recorded that MEMPR had proceeded with consultation towards the deeper end of the consultation spectrum in recognition of WMFN's stated interest in hunting caribou.

205 Thus, the first of the *Taku* questions may be answered affirmatively. The treaty right at issue, the right to use the land to support WMFN's way of life and usual vocation of hunting, was assumed by the Crown, for the purposes of consultation, to include the Burnt Pine caribou herd.

What was the scope and extent of the duty to consult and to accommodate WMFN?

206 In this case, the second *Taku* question involves an examination of the following:

(i) the degree to which the treaty right to hunt would be adversely affected by the impact on the *specific* herd;

(ii) in assessing the degree to which the treaty right to hunt would be impacted, are past wrongs, cumulative effects and potential future impacts of an operational mine (if developed) relevant, or should the consultation be confined to adverse impacts directly attributable to the permits in question; and,

(iii) in assessing the degree to which the treaty right to hunt would be impacted, should the Treaty be interpreted in its historical context only, or should the correct interpretation include a modern context.

207 In responding to issues raised by WMFN in the consultation process, the statutory decision makers considered these questions either implicitly or explicitly. In their decisions they described their interpretation of the treaty right in question in relation to the permits being applied for.

(i) The degree to which the treaty right to hunt would be adversely affected by the impact on the specific herd

208 The chambers judge found at para. 63 that the "Treaty protected right is the right ... to hunt caribou in the traditional seasonal round in the territory [affected] by the First Coal Operation".

209 The Crown argues that the "right" is a general right to hunt. The Crown maintains that this right is not species nor herd specific.

210 Treaty 8 describes the right in general terms. It provides:

And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered ...

211 The Crown argues that the judge erred in narrowly focussing his analysis on this one herd of caribou. In its factum, the Crown submits that it is an error to declare a treaty right to "a microcosm of hunting rights". Rather the Crown says a proper interpretation of treaty rights should involve a "macro-level" analysis. In support of this argument the Crown says that the following facts are important:

a) WMFN is a sub-group of the original collective that adhered to Treaty 8 in 1910;

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- b) WMFN's ancestors hunted a wide variety of ungulates, including bison, moose and caribou, when and where available;
- c) WMFN do not now and have not, since at least the early 1970s hunted caribou at all;
- d) WMFN do not follow a traditional seasonal round due to participation in the regional economy;
- d) WMFN wish to hunt in a location that is convenient to their current lifestyle, given their participation in the regional economy; and
- e) WMFN are only one of several Treaty 8 First Nations with interests in the area in question.

212 The Crown argues in this appeal that all the consultation between the Crown, First Coal and WMFN was "for nought, as the only accommodation, in the Court's eyes, at the chambers hearing, that could make the outcome, and therefore the process itself, reasonable, was a Burnt Pine caribou herd augmentation plan". The Crown contends that the chambers judge erred in focussing on the result rather than the process.

213 WMFN says, in reliance on *Mikisew*, that the Court must look not only at the broad contours of the treaty right, the "right to pursue their usual vocation of hunting" but also the rights necessarily included for its meaningful exercise. They argue that the chambers judge "did not find that Treaty No. 8 provides a blanket of protection over any and every species within the Treaty territory. Instead, he found that for [WMFN's] harvesting rights to be meaningful, they must necessarily include the right to hunt according to the traditional seasonal round".

214 There has been some judicial commentary, in both treaty rights cases and Aboriginal rights cases, on this question of whether hunting, fishing, and trapping rights pertain to a specific species. I recognize that in this case the asserted treaty right is alleged to include a specific *herd*, as there are other caribou herds which would be unaffected by the granting of approval for First Coal's applications for mining permits, but it is convenient to compare the analysis of cases concerning alleged "*species specific*" rights to the rights asserted here by WMFN.

215 In *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207 (S.C.C.), the accused, a Metis, was charged with hunting a moose without a license. He claimed that he had an Aboriginal right to hunt for food. At para. 20, the Court characterized the relevant right not as the right "...to hunt *moose* but to hunt for *food* in the designated territory" (emphasis in original).

216 In *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) at para. 21, Aboriginal rights were described as generally founded upon practices, customs, or traditions rather than a right to a particular species or resource. Although in some cases the practice, by its very nature, will refer only to one species as was found in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593, [2010] 1 C.N.L.R. 278 (B.C. C.A.), at paras. 35 and 38 (trade in eulachon grease) and in *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.) (sale of herring spawn on kelp).

217 In the context of treaty rights, *R. v. Lefthand*, 2007 ABCA 206, [2007] 4 C.N.L.R. 281 (Alta. C.A.), leave to appeal ref'd [2008] 1 S.C.R. x (note) (S.C.C.), Slatter J.A. proposed a functional approach to the right to hunt at para. 88:

... A rule that no longer protects its very objective is obsolete. The modern test should be functional: it should focus on the "for food" aspect of the "right to hunt". The focus should be on (a) ensuring that there is

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some suitable, ample, and reasonably accessible source of food available at all times of the year, especially at, but not limited to, a subsistence level, and (b) recognizing that the right to hunt for food is a communal, multi-generational right that must be protected in the long term, and thus must be managed.

And at para. 91:

Likewise, seasonal and species limitations may be justified, depending on the extent of the precise aboriginal right in question... Being able to hunt and fish "year round" just means that there will always be food available, not that there is a right to harvest every species at all times. Many aboriginal people had seasonal diets: fish at some times, eggs at others, berries at others, mammals at others, birds at others, etc... For example, a ban on hunting mountain goats is justified if there is evidence that there are ample mule deer around to meet the aboriginal need for food.

218 I conclude from these authorities, and from the language of the Treaty itself, quoted above, that the treaty right in question is not a specific right to hunt the Burnt Pine caribou herd, but rather that it affords protection to the activity of hunting. Thus, in my respectful opinion, the chambers judge erred when he characterized the treaty protected right as the right to hunt caribou.

219 In this case, one of the statutory decision makers, Mr. Hans Anderssen, of MEMPR, in correspondence that predated his September 4, 2009 Rationale for Decision, characterized WMFN's right as the right "to maintain a meaningful right to hunt wildlife generally within their traditional territory". In his August 8, 2009 letter, he provided a thorough explanation of the basis for his conclusion that the treaty right in question was not species specific. After referring to the cases of *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112 (B.C. S.C.) [*William*], *Powley*, *Sappier*, *Gray* and *Mikisew* he concluded that:

As set out in the *Mikisew* case, when there are established Treaty rights, the content of the Crown's duty to consult is to be determined by "*the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult*" (at para. 34). In accordance with our understanding of the nature of the Treaty 8 right to hunt, and the Crown's right to take up lands for mining purposes, we have assessed the potential impact of the proposed activity on the treaty right by considering whether the WMFN will have a meaningful right to hunt wildlife generally within WMFN's traditional territory, which may include any caribou that occur in that area. We acknowledge that the exploration and bulk sample activities as originally proposed had the potential to significantly impact the Burnt-Pine Caribou herd, a herd which has been identified as threatened under the federal *Species at Risk Act*. However, in light of the fact that the WMFN are able to maintain a meaningful right to hunt wildlife generally within their traditional territory such as deer, moose and elk, and the fact that there are nine other herds of Caribou within WMFN's traditional territory (totalling 1599 animals), we do not consider that WMFN's treaty right to hunt will be infringed by the approval of the proposed mining activity. The scope of consultation required in these circumstances would appear to be in the low to moderate range.

However, given the significance of this herd, WMFN's concerns regarding this herd and the impacts to its established treaty right to hunt, and the information received from biologists within MOE and MOFR regarding the severity of the potential impacts to the herd, MEMPR has engaged at the deeper end of the *Haida* consultation spectrum. MEMPR has worked closely with the proponent, First Coal Corporation, in making significant changes to the original proposed activity to impact the Burnt-Pine Caribou habitat as little as possible.

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[Emphasis in original.]

220 In his October 8, 2009, Rationale for Approval for Occupant Licenses to Cut, the statutory decision maker, Mr. Dale Morgan of the Ministry of Forests and Range (MOFR) described the treaty right in question in a similar way. He wrote, "I would summarize my opinion; on the right to hunt as the right is 'global' in nature and does not imply that there is a right to a specific animal or species."

221 There is undisputed evidence of the importance to WMFN of caribou, for a variety of purposes.

222 According to *Mikisew* at para. 34, the statutory decision makers were obliged to consider the degree to which the conduct contemplated by the Crown might adversely affect WMFN's treaty right to hunt. As I concluded above, the right in question is a general right to hunt. That bundle of rights includes the right to participate in various hunting activities and the right to hunt many species. The impact of the contemplated Crown permits on this treaty right may have been minor, modest, significant, serious, or none at all. In assessing the degree to which the permits, if granted, might impact the general right to hunt, it was entirely appropriate for the statutory decision makers to have taken into account, as they did, the abundance of other ungulates, the proportion of caribou territory impacted by the contemplated permits, and the presence of other larger herds of caribou in the area.

223 The chambers judge concluded that the Crown failed to reasonably accommodate WMFN's "prime concern about the violation of its treaty right to hunt caribou" (reasons at para. 64). This narrow characterization of the right in question led the chambers judge to find that the impact of the immediate permit approvals was significant and required more in the way of accommodation. In my view, inclusion of rights to a particular species or herd within the right to hunt does not translate into an absolute guarantee to hunt that species or herd. The statutory decision makers properly considered the impact of First Coal's proposed activities on the Burnt Pine caribou herd within the broader context of the Treaty 8 right to hunt.

(ii) Past wrongs, cumulative effects, and future impacts

224 Is it appropriate to consider past wrongs, cumulative effects, or future impacts on the Aboriginal right in question or should the consultation focus only on the effect of the particular decision?

225 The chambers judge described the threatened state of the Burnt Pine caribou herd in the following passage:

[17] The evidence discloses that the caribou were a source of food, and that caribou hide, bone, and antlers were important to the manufacturing of a number of items both for cultural and practical reasons. However, the evidence also discloses that due to the decline in the caribou population, which the petitioners claim is the result of incremental development in the area, including the construction of the WAC Bennett and Peace Cannon Dams in the 1960s and 1970s, and the creation of large lakes behind those dams, West Moberly's right to carry on their traditional harvesting practice has been diminished.

[18] In particular, the petitioners say that the population of caribou in the area of First Coal's operations has been decimated. They point to the fact that the relevant southern mountain population of caribou has been listed, pursuant to the *Species at Risk Act*, S.C. 2002, c. 29, as "threatened". The material filed shows the specific herd, the Burnt-Pine herd, has been reduced to a population of 11.

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226 And at para. 22 of his reasons for judgment, the chambers judge considered the comments of a wildlife ecologist, Dr. Dale Seip, who noted the potential for the complete eradication of the Burnt Pine herd if the project one day became an operational mine. In a September 25, 2008 letter, Dr. Seip said:

It is also necessary to understand what the longer term implications are for these caribou. The Goodrich property encompasses most of the core caribou habitat on Mt. Stephenson. Mining over this entire area would destroy a major portion of the core winter range for this caribou herd. It is short-sighted and misleading to evaluate this proposal for bulk sampling without also considering the longer term consequences of more widespread mining activity occurring over the entire property.

227 There were three decisions under review by the chambers judge: the amendment to the existing permit to reduce the bulk sample from 100,000 to 50,000; the amendment to the existing permit approving a 173 drill hole, five trench, advanced exploration program; and the associated licences to cut and clear up to 41 hectares of land to facilitate the advanced exploration (and to replace the "spine road" that was being reclaimed).

228 First Coal notes in its factum that "[w]hile there are many permits and stages a proponent such as First Coal must go through before advancing to the stage of an operating mine, the current decisions ... are the only decisions for which the potential adverse impact can be considered." The thrust of First Coal's submission is that the remedy ordered by the chambers judge responds to WMFN's demand that the Crown implement a plan to both preserve and augment the herd, but that that remedy is essentially redressing past wrongs and cumulative impacts. Similarly any consideration of the impact of a future mine are, according to First Coal, outside the scope of considerations of these statutory decision makers. First Coal notes that before a permit is granted for an operational mine there will be a full environmental review: see *Environmental Assessment Act*, S.B.C. 2002, c. 43, s. 8 and *Reviewable Project Regulations*, B.C. Reg. 370/2002, Part 3 - Mine Mine Projects. First Coal emphasizes that the decision makers were mandated to consider three very limited permit applications, one of which actually reduced the impact of First Coal's activities from what was first contemplated under the application.

229 Mr. Devlin for WMFN contended in oral argument that the statutory decision makers erred in holding that cumulative impacts were not relevant. He argues that the cumulative impacts of development in WMFN's treaty protected hunting areas have resulted in fragmentation and decimation of the Burnt Pine caribou herd. He says that the present state of the herd was a proper consideration for the decision makers. In other words, as I understand the First Nations' argument, the permits are part of an incremental process that has resulted in the present, threatened state of the herd, and that incremental context was something the statutory decision makers were obliged to consider. The grant of these permits, it is argued, might be the tipping point in terms of the life of the herd and possible extirpation of the herd is a *new* adverse impact which expands the scope of the duty to consult.

230 The decision makers and their advisors responded to WMFN's concerns regarding a possible full mining operation and cumulative impacts to the herd.

231 In his August 8, 2009 letter to WMFN, Mr. Anderssen of MEMPR stated:

It is only if the exploration stage is successful in delineating an economic resource that a decision is made by the company to proceed to a *Mines Act* mine application (and if the project exceeds a certain threshold an Environmental Assessment Certificate would be required). MEMPR is committed to consulting with the WMFN should that occur and accommodate where appropriate.

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232 In the "Considerations to Date" document dated July 20, 2009, Mr. Anderssen responded to WMFN's initial submission titled "I Want To Eat Caribou Before I Die". He noted:

A decision on the present application does not authorize full scale mining activity on the Central South Property. Any proposal to move towards an operating mine by [First Coal] will be subject to further assessment and review through the Environmental Assessment (EA) process. ... The impacts of the mining exploration and bulk sample activities are measured on the merits and impacts of the proposed activity alone and not potential future activities of greater impact.

233 Mr. Anderssen recognized the fragile state of the Burnt Pine caribou herd in the same document where he commented that even without further development, and quite apart from further development, the herd required a recovery plan.

234 While he acknowledged that the issue of cumulative impacts had been raised by WMFN, Mr. Anderssen declined to consider such impacts. He noted that cumulative impacts were "beyond the scope of the review" he was conducting, that the project had a "relatively small footprint" when compared to other activities in WMFN's traditional territory, and that WMFN's right to hunt caribou would "not be significantly reduced" by First Coal's proposed activities. Finally, Mr. Anderssen stated that the appropriate venue for assessing cumulative impacts was the Economic Benefits Agreement ("EBA") process, which MEMPR was "committed to facilitating and/or participating in".

235 In *Rio Tinto* the question of past wrongs and cumulative impacts was considered by the Court under the rubric of the first *Taku* question - whether a duty to consult arises. (Because in this case the appellants acknowledge that a duty to consult does arise, this question becomes more relevant to the second *Taku* question concerning the scope and extent of the duty.)

236 *Rio Tinto* involved an application for approval of the sale of excess power generated by a hydro electric dam. The dam, which was constructed in the 1950s had diverted water from the Nechako River. The diversion impacted the First Nations' fishery in that river. The First Nations were not consulted at the time. Those same First Nations sought consultation within the 2007 process to approve the sale of excess power produced by the dam. The Chief Justice speaking for the Supreme Court of Canada held at para. 49:

The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. [Emphasis in original.]

And at paras. 53-54 she continued:

... [*Haida Nation*] confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue - not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree - an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the

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resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

237 *Rio Tinto* is distinguishable from this case because in *Rio Tinto* there was a finding that the sale of excess power would have no adverse effect on the Nechako River fishery. Here, there is a link between the adverse impacts under review and the "past wrongs". However, *Rio Tinto* is applicable for the more general proposition that *there must be a causative relationship between the proposed government conduct and the alleged threat to the species from that conduct*. It is fair to say that decisions, such as those under review in this case, are not made in a vacuum. Their impact on Aboriginal rights will necessarily depend on what happened in the past and what will likely happen in the future. Here it could not be ignored that this caribou herd was fragile and vulnerable to any further incursions by development in its habitat. Thus, although past impacts were not specifically "reeled" into the consultation process, neither could the result of past incursions into caribou habitat be ignored.

238 However, Mr. Devlin, for WMFN, noted in his oral submissions that this is not a "taking up" case because the land had already been taken up for mining purposes. As I understood his submissions, he meant that the taking up occurred when the original mining permits were granted in 2005. He said that WMFN were not contesting the original permits. This statement belies the contention that the statutory decision makers ought to have taken into account the fact that earlier Crown authorized activity had, at least in part, caused the present decimated state of the Burnt Pine caribou herd, thus the need for an augmentation or recovery plan to restore the health of the herd. The need for a recovery plan arose from past development and, thus, would not be a consequence of the permits under consideration.

239 In my view the statutory decision makers could not, and did not, ignore the fragile threatened state of the Burnt Pine caribou herd in defining the scope and extent of consultations. Those consultations proceeded on the basis that further incursions into the habitat of the caribou might result in extirpation of the herd. The decision makers drew the line at implementing a recovery plan because the need for recovery did not emanate from, or was not causally related to, the permits sought. I am of the view that the decision makers were correct in their understanding of this aspect of the scope and extent of the Crown's consultation obligations. Similarly, consideration of the impact of a possible full-scale mining operation on the herd would be the subject of a full environmental review, and was beyond the scope of these decision makers' mandate (*Rio Tinto* at para. 53).

240 Practically speaking the decision makers did not have an application for a full mining operation before them. Since its inception in 2005, the project scope had shifted from a small, open-pit concept to a combined, trenching/underground system. Subsequent exploration would utilize an experimental technology that might or might not prove viable. Based on this background, it was certainly possible that the nature of the project would change once again, or that development might not proceed beyond the exploration phase at all. It was not wrong for the decision makers to limit their inquiry to the adverse effects of the permits under review, and decline to consider possible future scenarios on a hypothetical basis.

(iii) Historical or modern Treaty interpretation and taking up provisions of the Treaty

241 I conclude from my review of the authorities on this point that the promises made under Treaty 8 must be interpreted within their historical context. But it is only logical to consider the degree to which government action adversely impacts those promises in light of modern realities. The manner in which the First Nations

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treaty rights are exercised is not frozen in time: *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.) at para. 132. Nor can an assessment of the degree to which government conduct impacts the exercise of those rights ignore the modern day economic and cultural environment.

242 The objective of the numbered treaties, and Treaty 8 specifically, was to facilitate the settlement and development of the West. However, it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing: *R. v. Badger* [1996 CarswellAlta 587 (S.C.C.)] at para. 39.

243 In recognition of this objective, Treaty 8 recites: "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other purposes as to Her Majesty may seem meet". The First Nations own oral histories indicate their understanding that some land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting: *R. v. Badger* at para. 58.

244 In *Mikisew*, Binnie J. describes an "uneasy tension between the First Nations essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-Aboriginal people moving into the surrendered territory" (at para. 25).

245 While the treaty guaranteed certain rights, it did not promise continuity of nineteenth century patterns of land use (*Mikisew* at para. 27):

... none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction "and thus prevent any trouble"...

246 The actual balancing of these competing interests, informed by a correct understanding of the interpretation of the Treaty, is part of the task of the statutory decision makers.

247 In the "Considerations to Date" document, Mr. Anderssen provided his interpretation of Treaty 8. He said:

Treaty 8 sets out the right of the signatory First Nations "to pursue their usual vocation of hunting, trapping and fishing through the tract surrendered ..." Aboriginal rights and title to lands were surrendered in exchange for these Treaty rights and other benefits set out in the treaty (such as entitlement to specified quantum of land for reserves). Treaty 8 rights to hunt, trap and fish are subject to express limitations set out in Treaty 8. Specifically, these rights are "subject to such regulations as may from time to time be made by the government of the country...". In addition, the Crown maintained the authority to take up land "from time to time for settlement, mining, lumbering, trading or other purposes." [Emphasis in original.]

248 In *Mikisew*, the Crown took an unreasonable position that express limitations to the Treaty 8 right to hunt removed its duty to consult as it related to a particular taking up. Here, the statutory decision makers acknowledged the importance of caribou to WMFN and, in light of this, they approached consultation toward the deeper end of the spectrum. The fact that the "taking up" had already occurred and the decimated state of the Burnt Pine caribou herd was not causally related to the permits under consideration did not prevent MEMPR from engaging directly with WMFN to address their concerns.

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249 The statutory decision makers were entitled to, and did, balance the competing interests in the context of a modern culture and environment. In my view this is a correct interpretation of the Treaty in question. This interpretation informed the consultations and the statutory decision makers' assessment of the adequacy of consultation.

iv. Conclusion on the second Taku question

250 The second *Taku* question - as to the scope and extent of the duty to consult and to accommodate WM-FN - was in my view considered correctly by the statutory decision makers. They correctly interpreted the Treaty in respect to the important factors: the contours of the right to hunt; the context in which the Treaty was signed and in which it operates today; and the relevance of past Crown conduct and future potential development.

251 In his review of the decisions of the statutory decision makers, the chambers judge found, as noted above, that the treaty protected right was the right to hunt caribou in the territory affected by First Coal's operation. He did not otherwise explicitly address the question of the scope and extent of the duty to consult, and if indicated, accommodate. That is, he did not explicitly discuss the questions of whether past wrongs, cumulative effects and future impacts were matters that factored into the scope and extent of the duty to consult. But implicit in his conclusion, that the Crown's refusal to put in place a rehabilitation plan for the Burnt Pine caribou herd amounted to a failure to reasonably accommodate, is a finding that the statutory decision makers were bound to consider past wrongs, cumulative effects and future development, because the near extirpation of the herd that had occurred could not have been caused by the prospective granting of the permits in issue in this case. In my view, the chambers judge erred in construing the Crown's duty to consult and accommodate so broadly.

Did the Crown fulfill its duty to consult and accommodate in this case?

252 As noted at the outset of these reasons, the third question - whether the consultation and accommodation measures were adequate - should be reviewed on a standard of reasonableness. The reasonableness standard was defined in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) at para. 47. Bastarache and LeBel JJ. speaking for the majority held that the decision under review must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law":

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

253 The chambers judge determined that the consultation in this case was not sufficiently meaningful and that the Crown's failure to put in place a protection and rehabilitation plan for the Burnt Pine caribou herd rendered the accommodation unreasonable.

254 Section 35(1) of the *Constitution Act, 1982* dictates that "the Crown must act honourably, in accordance

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with its historical and future relationship with the Aboriginal peoples in question": *Taku* at para. 24.

255 The judgment in *Mikisew* reminds us that, "[t]he fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions" (at para. 1).

256 In *Taku*, the Chief Justice said (at para. 2):

... Where consultation is meaningful, there is no ultimate duty to reach agreement. Rather, accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process...

[See also *Haida Nation* at para. 50.]

257 And as Binnie J. noted in *Beckman*, at para. 84: "*Somebody* has to bring consultation to an end and to weigh up the respective interests ... The Director is the person with the delegated authority to make the decision whether to approve a grant ... The purpose of the consultation was to ensure that the Director's decision was properly informed" (emphasis in original).

258 In *Taku* the Supreme Court of Canada reviewed the consultation that had occurred in that case and found it adequate. I find it helpful to compare the consultation in *Taku* to that in the case at bar. (Recognizing that the Aboriginal right in that case was asserted, but yet unproven; I consider that this distinguishing feature is not particularly important because the Aboriginal rights claim in *Taku* was relatively strong and the potential negative impact of the contemplated Crown conduct was significant.)

259 The consultation process in *Taku* took place over three and one-half years. The First Nation was invited to, and did, participate in a committee to review the project at issue, the reopening of an abandoned mine. The project sponsor, Redfern, met several times with the First Nation to discuss the project and its concerns about the impact of the project. Redfern engaged an independent consultant to conduct archaeological and ethnographic studies to identify possible effects of the project. Financial assistance was provided to the First Nation to enable it to participate in meetings.

260 I note the following features of the consultation which took place in *Taku*:

- The process of project approval ended more hastily than it began. Nonetheless, the Court concluded that the consultation provided by the Province was adequate (para. 39);
- In the opinion of the decision maker, by the time the assessment was concluded, the positions of all the Project Committee members, including the affected First Nation, had crystallized (para. 41);
- The concerns of the First Nation were well understood and reflected in the Recommendations Report (para. 41);
- Mitigation strategies were adopted in the terms and conditions of certification (para. 44);
- Project approval certification was simply one stage in the process by which development moved forward. The First Nation would have further opportunity for input and accommodation at subsequent stages (paras.

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45-46);

- The Project Committee concluded that some outstanding First Nation concerns could be more effectively considered at later stages or at the broader stage of land use strategy planning (para. 46).

261 In my view, the consultation in the present case was comparable to that undertaken in *Taku* in all of the above-mentioned respects.

262 I turn now to examine the consultation that took place in this case in order to determine if that consultation was adequate, bearing in mind that it is not the task of this Court nor the court below to substitute its own view for that of the decision makers.

263 The evidentiary record that was before the chambers judge discloses an extensive record of consultation. As the chambers judge found, the Crown was entitled to delegate some of the procedural aspects of consultation to First Coal; however, the "ultimate legal responsibility for consultation and accommodation rests with the Crown" (*Haida Nation* at para. 53).

264 The consultation process was managed on behalf of First Coal by Debra Stokes, Director of Environment for First Coal. Since about January 2008, she has devoted a "significant amount of [her] time" to working with First Nations in connection with the consultation process related to these applications. She consulted all Treaty 8 First Nations including WMFN. Ultimately she identified four First Nations with an interest in consultation concerning First Coal's applications. She deposed that of those four, two entered into memoranda of understanding to govern their ongoing relationship with First Coal and a third First Nation was engaged in negotiations in connection with such a memorandum. Those agreements included economic opportunities for the First Nations. Ms. Stokes indicated that to date WMFN had declined to enter into a memorandum. She said that she became aware of WMFN's opposition to the First Coal project because of concerns related to caribou on June 13, 2008. She noted that she was aware that caribou had much earlier been identified by First Coal as requiring special attention as it developed the project.

265 First Coal provided funding in Sept 2008 to purchase radio collars to help with the long term monitoring of the caribou. First Coal also retained an independent wildlife biologist to develop a detailed plan to address the concerns raised by WMFN over the potential impact of the project on the caribou. The first iteration of the Caribou Mitigation and Monitoring Plan ("CMMP") was developed in October 2008 and that document was subject to several revisions to address concerns of the Crown and WMFN before it was finalized on May 1, 2009. Ms. Stokes recounted the numerous meetings with WMFN. She also deposed to the fact that environmental site managers were on site 24 hours a day, 7 days a week during construction to monitor implementation of the CMMP.

266 The mitigation and monitoring requirements under the CMMP include, but are not limited to the following:

- short term monitoring including an incidental observation program, a winter monthly aerial survey program, a series of ground tracking surveys, noise level monitoring, and monitoring of reclamation efforts;
- long-term caribou monitoring and research using GPS radio collars;
- reclamation of the areas affected by First Coal's mining activities with a particular focus on maximizing

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caribou foraging habitat and minimizing habitat for predators;

- avoidance of work in core range areas during seasons when caribou are present;
- immediate cessation of activities upon sight of caribou;
- increased security as well as access, use, and speed restrictions;
- education and awareness programs for employees and visitors; and
- establishment of a "Burnt-Pine Caribou Task Force" in conjunction with the local First Nations and reporting of results and suggestions to regulators.

267 The consultation record discloses that WMFN has been involved in consultation since about 2005 on the earlier First Coal Notices of Work related to the same project, not the subject of this judicial review. Of relevance to these particular permits, the Crown consultation record documents communications commencing on May 14, 2008, onward, involving all stakeholders, including WMFN, the Crown, and First Coal. In July 2008, the proposed ADDCAR system was explained to those interested stakeholders at a meeting. Wildlife biologists were an integral part of all the significant consultations. The reports of the Crown biologists were provided to WMFN, throughout the consultation process. In October 2008, First Coal committed to modifying the project to avoid the windswept areas so critical to the caribou. The Spine Road reclamation plan was discussed at numerous meetings. The Spine Road had been built in an area that was windswept.

268 In December 2008, WMFN complained about the lack of meaningful consultation.

269 In January 2009, a meeting was attended by representative of WMFN to discuss the first Draft CMMP.

270 In February 2009, WMFN expressed concerns about the lack of time they had been given to respond to the CMMP. Their legal counsel became involved on February 4, 2009. He explained WMFN's concerns about caribou habitat. In subsequent correspondence WMFN also expressed concern about the Spine Road work, done without permits.

271 In the ensuing months, numerous meetings were conducted and information was exchanged. On June 23, 2009, WMFN submitted their document "I want to Eat Caribou Before I Die", detailing the historical importance of caribou to the First Nations as well as the threat to the caribou posed by the First Coal project.

272 On July 20, 2009, MEMPR released its "Considerations to Date" document. In the covering letter to WMFN, Mr. Anderssen explained that the purpose of the document was to "provide ... the 'Considerations to Date' that represent the information that [MEMPR] is currently considering in regards to ... [the] proposed 50,000 tonne Bulk Sample application and the proposed 173 drill hole advanced exploration application ...". He also noted that Section 7.0 of the document responded to the issues raised by WMFN's initial submissions contained in the document, "I want to Eat Caribou Before I Die". Lastly he noted that a meeting was scheduled for August 5, 2009.

273 The document notes that MEMPR had been engaged in consultations with the four affected Treaty 8 First Nations for over four years. Six face-to-face consultation meetings had taken place between Sept 2008 and July 2009. After summarizing MEMPR's understanding of the importance of caribou as gleaned from WMFN's initial submissions, the document attempts to quantify the adverse effects of First Coal's applications on caribou

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generally and on WMFN's treaty right specifically. It notes that there are nine herds of caribou in WMFN's traditional territory, totalling approximately 1599 animals. The affected Burnt Pine Herd consists of 11 animals and represents 0.69% of the caribou population in WMFN's traditional territory. Based on this, the document concludes that "the opportunity for WMFN to hunt and trap caribou in their traditional territory will not be significantly reduced".

274 The document notes the possible extirpation of the Burnt Pine caribou herd, relying on the comments of Mr. Pierre Johnstone of the Ministry of Environment. Until recently, the Burnt Pine herd was considered to be part of the larger, Moberly Herd. In Mr. Johnstone's opinion, fragmentation of this sort "may be an early sign of extirpation". One of the accommodation measures sought by WMFN was a recovery plan for the Burnt Pine caribou herd. The "Considerations to Date" document states that it is generally recognized that even without further development, and regardless of whether mining activity occurs in the area, a recovery plan would be necessary to maintain or increase herd numbers. However, presumably for fiscally-related reasons, the Crown did not currently have a recovery plan in place for the Burnt Pine herd.

275 WMFN also requested that the Crown engage in land use planning. The document states that this request is met by the Economic Benefits Agreement, to which WMFN is a party, and for which extensive funding had been provided to WMFN. MEMPR's understanding was that the EBA provided a mechanism for addressing WMFN's concerns regarding cumulative impacts and efforts to recover caribou populations. First Coal's proposed "Caribou Task Force" was seen as another venue in which these issues could be addressed on an ongoing basis.

276 The document goes on to list the accommodation measures proposed by WMFN and the measures taken or proposed by MEMPR:

Accommodation Measures proposed by WMFN

The following are drawn from statements from the Initial Submissions that could be considered as proposed accommodation measures.

- Accommodation should include rejection of First Coal's application;
- WMFN should be given the opportunity to participate in the decision making process;
- Consultation as a form of accommodation;
- Recovery of the Burnt-Pine Caribou Herd; and
- Re-location of First Coal's activities.

Accommodation Measures Taken or Proposed by MEMPR

- Consultation at the higher end of the spectrum;
- Application of the CMMP;
- Reduction of the Bulk Sample permit by 50%;
- Closure of the Spine Road;

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- Use of ADDCAR system;
- Consideration of WMFN's extensive input including the Initial Submissions in the decision making process;
- Through promotion, facilitation and participation in planning processes flowing from the EBA as well as through the Caribou Task Force, MEMPR will work towards addressing the issues of:
 - cumulative impacts;
 - a Caribou Recovery Plan;
 - land use planning; and
 - the location of First Coal and other companies activities.

277 The "Considerations to Date" document contains no decisions by the lead Ministry, MEMPR, but it chronicles the consultation process, the technical information, and the positions so far taken by the Ministry and the First Nations in respect to the approval process and accommodations. It notes that WMFN proposed that First Coal's applications be rejected and that WMFN's input would be considered in the decision making process.

278 Meetings took place on August 5 and 12, 2009. A lengthy letter hand-delivered to the Ministry representatives, expresses the frustration of WMFN at what they saw as intransigence in the position of the Ministries involved. The letter illustrates that the consultation had come to the point where the positions of the parties had crystallized. On the one hand, the WMFN characterized their treaty right as specifically protecting the right to hunt the Burnt Pine caribou herd; they complained that the Ministry failed to examine impacts from prior activities; and, they expressed concern that, despite the Crown's recognition that the herd may face extirpation, there was no recovery plan in place. WMFN concluded that First Coal's applications should be rejected and its operation re-located, and that "a real recovery plan" should be implemented, as well as legal protection for the Burnt Pine caribou herd. On the other hand, the Ministry maintained that the scope and extent of consultations were limited and that WMFN's treaty right to hunt was not significantly impacted, as I have previously discussed.

279 In his affidavit, Chief Roland Willson describes the final consultation meeting of August 12, 2009:

94. We also voiced concerns that MEMPR had not told us how they would weigh our interests with the competing interest of others when making decisions on First Coal's proposed activities. We told them that they should give our interests and rights a lot of weight, given the fact that we have Treaty rights and First Coal has only interests. We also said that they were not giving proper weight to the honour of the Crown and the goal of reconciliation. We also asked MEMPR to think about the fact that the broader public interest supported preserving the habitat of endangered species such as caribou.

95. At this meeting of August 12, 2009, West Moberly representatives including myself encouraged MEMPR to look at the bigger picture. We said that we were worried about the cumulative impacts of industrial development on our Treaty rights which had prevented us from hunting caribou in our preferred Treaty territory. We explained that the impacts of the proposed mining activities on our right were serious because of how few caribou were now left within our preferred Treaty territory.

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280 It was evident that by this time a decision had to be made. Dr. Dale Seip had described the CMMP as doing "an excellent job of attempting to reduce the environmental impacts of the bulk sample and exploration program on caribou". But he also concluded that "...if the government intended to conserve and rehabilitate this small caribou herd" granting the permits was "incompatible with efforts to recover the population". The statutory decision makers were thus faced with two incompatible positions. After years of consultation, in which the competing interests were fully explored, "[s]omebody [had] to bring consultation to an end and weigh up the respective interests" (*Beckman* at para. 84). The statutory decision makers did just that. They made their decisions to approve the permits on the basis of the generality of the treaty right in question, the limited impact of the proposed permits on that right, and the incorporation of accommodation and mitigation measures into the project.

281 The permits were issued shortly thereafter: the Bulk Sample permit, on September 1, 2009, the Advanced Exploration Permit on September 14, 2009 and the Licences to Cut on October 13, 2009.

282 The Rationale for Decision on the first two permits was issued by Mr. Al Hoffman of MEMPR on Sept 4, 2009, and a Rationale for the Licences to Cut was issued by Mr. Dale Morgan of MOFR, on October 8, 2009.

283 The mining permit contained the following conditions:

Environmental Management Programs

(a) Caribou Mitigation and Monitoring Plan

(i) The Permittee shall implement and ensure all activities on the mine site adhere to, the AECOM Canada Ltd. report "First Coal Corporation, Caribou Mitigation and Monitoring Plan for the Bulk Sample and Advance Exploration 2009 / 2010 Program at the Central South Property", dated May 1, 2009 and the AECOM Canada Ltd. report "First Coal Corporation, Reclamation Plan for Existing Disturbance at the Central South Project Site", dated May 2009.

(ii) The Permittee shall continue to participate in the Peace Region Shared Stewardship Working Group.

(iii) If a species recovery plan for woodland caribou is developed and approved through the Committee on the Status of Endangered Wildlife in Canada, the conditions of this permit will be reviewed and revised as necessary to ensure compliance with the recovery plan.

284 Undoubtedly it would have been preferable for the MEMPR Rationale to do more than chronicle the background and considerations by explicitly describing the basis of the opinion. But notwithstanding the absence of an explicit explanation for the decision, it is apparent that MEMPR rejected the main accommodations requested by WMFN (rejection of the permits, implementation of a caribou recovery plan, and re-location of First Coal's activities) and, when read in conjunction with the "Considerations to Date" document, the reasons for rejecting the requested accommodations are clear - that the accommodation measures proposed by MEMPR were an adequate compromise, which attempted to balance the competing interests of WMFN, First Coal, and society at large.

285 The Ministry of Forests and Range Rationale provided a fuller explanation for the decision of Mr. Morgan, for that Ministry. Mr. Morgan noted that his authority was limited to adding (or not) conditions to the license to cut timber. He reviewed the question of the adequacy of consultation and accommodation. He reviewed the consultation record and concluded that consultation had been adequate to address WMFN's concerns. He

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noted that WMFN disputed the adequacy of consultation and objected to the project. In approving the permit he added the following conditions:

1. FCC must adhere to the Caribou Mitigation and Monitoring Plan during operations.
2. FCC must, to the extent practicable, limit their harvesting of timber to the amount required to safely conduct operations.

286 Overall, the consultation process was directly responsive to the concerns raised by WMFN, insofar as those concerns related to the permits under consideration. In light of WMFN's treaty protected right and particular interest in hunting caribou, significant accommodations were made to protect the existing caribou herd. It is true that the outcome of the consultation process was not that which WMFN desired. But it cannot be said that the outcome, given all the factors listed by the decision makers, was unreasonable.

287 It is not for a court on judicial review to mandate specific accommodation measures (*Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, 37 B.C.L.R. (4th) 309 (B.C. C.A.) at paras. 99-100, 104-105; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1620, [2009] 1 C.N.L.R. 359 (B.C. S.C.) at para. 23) nor specific outcomes to the process. Provided that the Crown proceeds on a correct understanding of the scope and extent of the treaty rights and its duty to consult (as I say it did), and provided that consultation proceeds in a reasonably thorough, responsive fashion, a court ought not to interfere. In my view the decision makers acted reasonably and, as the foregoing description of the extent of the consultation illustrates, the consultation was more than adequate in fulfilling the Crown's duties. The consultation appears broadly similar to that which was found adequate in *Taku*. What is required is not perfection but reasonableness (*Haida Nation* at para. 62). I therefore conclude that the Crown has discharged its duty and that the chambers judge erred in finding that consultation was inadequate and that a specific form of accommodation was required.

288 I would allow the appeal and dismiss the petition.

Appeal allowed in part.

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Xeni Gwet'in First Nations v. British Columbia

Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation (Plaintiff) and Her Majesty the Queen in Right of the Province of British Columbia, the Regional Manager of the Cariboo Forest Region and The Attorney General of Canada (Defendants)

British Columbia Supreme Court

D.H. Vickers J.

Heard: November 18, 2002 - April 11, 2007

Judgment: November 20, 2007

Docket: Victoria 90-0913

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Subject: Public; Civil Practice and Procedure; Constitutional; Property

Civil practice and procedure --- Judgments and orders — For relief other than relief claimed

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — In reply arguments, plaintiff took position that court had jurisdiction to find that portions of claim area qualified for declaration of Aboriginal title — Action allowed in part — Declaration of Aboriginal title to smaller areas included within whole claim area could not be made because they were not separately pleaded — Plain reading of pleadings showed plaintiff claimed Aboriginal title over all of lands — In prayer for relief, plaintiff

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did not seek declaration that Tsilhqot'in people had existing Aboriginal title to claim area "or any portions thereof" — Plaintiff had to set out in his pleadings exactly what declaration he sought — To allow plaintiff to seek declarations over portions of claim area would be prejudicial to defendants — While much of claim area was not occupied to extent required to ground declaration of Aboriginal title, there were areas inside and outside claim area that qualified for finding of Aboriginal title — This view of Aboriginal title was not binding on parties but was expressed to assist parties to achieve fair and lasting resolution of issues — Declaration of Aboriginal rights and title could not be made in relation to private lands in claim area since only infringements pleaded were those infringements raised by forestry legislation, which does not regulate activities on private land.

Aboriginal law --- Practice and procedure — Pleadings — General principles

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — In reply arguments, plaintiff took position that court had jurisdiction to find that portions of claim area qualified for declaration of Aboriginal title — Action allowed in part — Declaration of Aboriginal title to smaller areas included within whole claim area could not be made because they were not separately pleaded — Plain reading of pleadings showed plaintiff claimed Aboriginal title over all of lands — In prayer for relief, plaintiff did not seek declaration that Tsilhqot'in people had existing Aboriginal title to claim area "or any portions thereof" — Plaintiff had to set out in his pleadings exactly what declaration he sought — To allow plaintiff to seek declarations over portions of claim area would be prejudicial to defendants — While much of claim area was not occupied to extent required to ground declaration of Aboriginal title, there were areas inside and outside claim area that qualified for finding of Aboriginal title — This view of Aboriginal title was not binding on parties but was expressed to assist parties to achieve fair and lasting resolution of issues — Declaration of Aboriginal rights and title could not be made in relation to private lands in claim area since only infringements pleaded were those infringements raised by forestry legislation, which does not regulate activities on private land.

Aboriginal law --- Practice and procedure — Evidence — General principles

Oral tradition evidence consists of verbal messages from past beyond present generation — Rejecting oral tradition evidence because of absence of corroboration from outside sources offends directions of Supreme Court of Canada — Oral tradition evidence, where appropriate, can be given independent weight.

Aboriginal law --- Practice and procedure — Parties — General principles

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Action allowed in part — Proper rights holder of Aboriginal title and rights was community of Tsilhqot'in people, not band — Aboriginal rights of individuals or subgroups within First Nation were derived from collective actions, shared language, traditions and shared historical experiences of members of First Nation — Individual community members identified as Tsilhqot'in people first, rather than as band members — Members of band were viewed amongst Tsilhqot'in people as caretakers of land in and about reserve, but any Tsilhqot'in person could hunt or fish anywhere inside Tsilhqot'in territory — Creation of bands did not alter true identity of people.

Aboriginal law --- Constitutional issues — Reserves and real property — Rights and title — Miscellaneous issues

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Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Action allowed in part — There were areas inside and outside claim area where use and occupation by Tsilhqot'in people at time of sovereignty assertion was sufficient to warrant finding of Aboriginal title — Much of claim area was not occupied to extent required to ground declaration of Aboriginal title — Declaration of Aboriginal title to smaller areas included within whole claim area could not be made because they were not separately pleaded — While view of Aboriginal title was not binding on parties, it was expressed to assist parties to achieve fair and lasting resolution of issues — Tsilhqot'in people were present in claim area at time of sovereignty assertion, in 1846, date of Oregon Boundary Treaty — As semi-nomadic people, Tsilhqot'in people derived subsistence from every quarter of claim area — Village, hunting, fishing and gathering sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in to extent sufficient to warrant finding of Aboriginal title — At time of sovereignty assertion, Tsilhqot'in people had exclusive control over those lands which they used regularly and continuously occupied — Province's forest development activities unjustifiably infringed Aboriginal title — Provincial Forest Act did not apply to those areas that met test for Aboriginal title — If provincial forestry scheme applied to Aboriginal title land, then such application constituted prima facie infringement or denial of Aboriginal title triggering need for justification — There was potential for substantial interference with Aboriginal title at every stage of government land use planning with respect to Aboriginal title lands — Province failed to establish that it had compelling and substantial legislative objective for forestry activities in claim area because there was no evidence that logging in area was viable, or that it was necessary to deter spread of mountain pine beetle infestation — Province did not consider how its proposed forestry activities might result in infringement of Aboriginal title and rights — Although considerable effort was made to engage Tsilhqot'in people in forestry proposals and land use planning in claim area, province failed in its obligation to consult by failing to recognize and accommodate claims for Aboriginal title and rights.

Aboriginal law --- Constitutional issues — Reserves and real property — Application of provincial or territorial statutes

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized timber harvesting in Tsilhqot'in traditional territory under authority of Forest Act — Plaintiff brought action for declaration of Tsilhqot'in Aboriginal rights and title relating to land in central region of BC — Issues arose as to whether or not provincial Forest Act and Limitation Act applied — Action allowed in part — Forest Act did not apply to those areas that met test for Aboriginal title because, under Forest Act, granting of rights to harvest timber was limited to Crown timber on Crown land — Where Aboriginal title lands have been clearly defined, those lands are not "Crown lands" as defined by Forest Act — Even if definition of "Crown timber" includes timber situated on Aboriginal title lands, provisions of Forest Act do not apply to Aboriginal title land under doctrine of interjurisdictional immunity — Aboriginal rights are part of core of federal jurisdiction under s. 91 ¶ 24 of Constitution Act, 1867, such that provincial legislation cannot extinguish them — While exercise of provisions of Forest Act do not extinguish Aboriginal title, their exercise goes to core of Aboriginal title — Legislation that authorizes granting of rights to harvest timber to third parties strikes at very core of Aboriginal title — Section 88 of Indian Act does not invigorate provincial legislation in its application to Aboriginal title lands because it is directed only to "Indians" — Provisions of Forest Act did not go to core of Tsilhqot'in Aboriginal rights other than Aboriginal title, but any infringement of these rights had to be justified by province — Pursuant to s. 88 of Indian Act, Limitation Act applied to claims of unjustified infringement of Aboriginal rights other than Aboriginal title — To conclude that Limitation Act applied to claim for Aboriginal title would mean that with passage of time

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and application of provisions of Act, province could effectively extinguish Aboriginal title.

Aboriginal law --- Constitutional issues — Aboriginal rights to natural resources — General principles

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Defendants admitted existence of Aboriginal right to hunt and trap birds and animals throughout claim area, but not right to capture horses or right to trade in skins and pelts — Action allowed in part — Proper rights holder for purposes of Aboriginal rights was Tsilhqot'in Nation, not band, since all Tsilhqot'in were entitled to utilize entire Tsilhqot'in territory — Date of contact with Europeans in New Caledonia was 1793, when Alexander Mackenzie and Captain George Vancouver completed journeys through mainland BC — Aboriginal right included use of wild horses, since Tsilhqot'in people used wild horses in pre-contact times — Even if wild horses were not in claim area in pre-contact times, their capture and use was contemporary extension of pre-contact right to use plants and hunt and trap animals for subsistence and livelihood — Aboriginal right existed to trade skins and pelts as means to secure moderate livelihood — Traditional Tsilhqot'in pattern of survival included trading skins and pelts with Aboriginal neighbours for salmon resources, particularly during years when salmon fishery failed — Trading practice at time of first contact and continuing into twentieth century was more than sufficient to meet tests of cultural integrity — Province's forestry legislation was constitutionally applicable to land over which Tsilhqot'in people had Aboriginal rights to hunt, trap and trade, but application of that legislation infringed those rights — Forest harvesting activities reduced diversity and abundance of wildlife species through direct mortality, imposition of roads and destruction of habitat — In absence of information to allow proper assessment of impact on wildlife in area, forestry activities were unjustified infringement of Tsilhqot'in Aboriginal rights in claim area — Consultation did not justify infringement of those rights because province did not acknowledge Aboriginal rights during consultation.

Aboriginal law --- Constitutional issues — Fiduciary duty

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Appeal allowed in part — Issue of breach of fiduciary duty not considered — It was sufficient to go no further than consideration of duty to consult, grounded in honour of Crown — In pre-proof stage, where Aboriginal rights and title were not yet proven, Aboriginal interest in question was insufficiently specific for honour of Crown to mandate that Crown act in Aboriginal group's best interest as fiduciary.

Aboriginal law --- Practice and procedure — Miscellaneous issues

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to two areas of land in central region of BC — Action allowed in part — Provincial Limitation Act applied to claims of unjustified infringement of Aboriginal rights other than Aboriginal title — Provincial laws that affect Aboriginal title lands go to core of Indianness and do not apply to those lands — To conclude that Limitation Act applied to claim for Aboriginal title would mean that with passage of time and application of provisions of Act, province could effectively extinguish Aboriginal title — Pursuant to s. 88 of Indian Act, Limitation Act applied to claims of unjustified infringement of Aboriginal rights

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other than Aboriginal title — Limitation period of six years began to run from date of Supreme Court of Canada's decision in *R. v. Sparrow*, May 31, 1990, when party would have become aware of cause of action — Claims advanced in relation to one area of land were not statute barred because action was brought before expiration of limitation period — Since action regarding second area of land was commenced on December 18, 1998, any claim for unjustified infringement of Aboriginal rights in that area that arose prior to December 17, 1992 were statute barred — Province's plea of laches could not succeed — Plaintiff did not engage in prolonged, inordinate or inexcusable delay, acquiesce in abandonment of Aboriginal title, or give any grounds for belief that Aboriginal title was abandoned — There was no evidence of prejudice to province occasioned by anything said or done by plaintiff in relation to Aboriginal title.

Civil practice and procedure --- Limitation of actions — Actions involving Crown — Miscellaneous actions

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to two areas of land in central region of BC — Action allowed in part — Provincial Limitation Act applied to claims of unjustified infringement of Aboriginal rights other than Aboriginal title — Provincial laws that affect Aboriginal title lands go to core of Indianness and do not apply to those lands — To conclude that Limitation Act applied to claim for Aboriginal title would mean that with passage of time and application of provisions of Act, province could effectively extinguish Aboriginal title — Pursuant to s. 88 of Indian Act, Limitation Act applied to claims of unjustified infringement of Aboriginal rights other than Aboriginal title — Limitation period of six years began to run from date of Supreme Court of Canada's decision in *R. v. Sparrow*, May 31, 1990, when party would have become aware of cause of action — Claims advanced in relation to one area of land were not statute barred because action was brought before expiration of limitation period — Since action regarding second area of land was commenced on December 18, 1998, any claim for unjustified infringement of Aboriginal rights in that area that arose prior to December 17, 1992 were statute barred.

Civil practice and procedure --- Limitation of actions — Actions involving Crown — Laches and acquiescence

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Action allowed in part — Province's plea of laches could not succeed — Plaintiff did not engage in prolonged, inordinate or inexcusable delay, acquiesce in abandonment of Aboriginal title, or give any grounds for belief that Aboriginal title was abandoned — There was no evidence of prejudice to province occasioned by anything said or done by plaintiff in relation to Aboriginal title.

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2007 CarswellBC 2741, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, [2008] B.C.W.L.D. 216, [2008] B.C.W.L.D. 213, [2008] B.C.W.L.D. 215, [2008] B.C.W.L.D. 212, [2008] B.C.W.L.D. 211, [2008] B.C.W.L.D. 209, [2008] B.C.W.L.D. 210, [2008] B.C.W.L.D. 214, [2008] B.C.W.L.D. 237, [2008] B.C.W.L.D. 240, [2008] B.C.W.L.D. 241, 65 R.P.R. (4th) 1

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2007 CarswellBC 2741, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, [2008] B.C.W.L.D. 216, [2008] B.C.W.L.D. 213, [2008] B.C.W.L.D. 215, [2008] B.C.W.L.D. 212, [2008] B.C.W.L.D. 211, [2008] B.C.W.L.D. 209, [2008] B.C.W.L.D. 210, [2008] B.C.W.L.D. 214, [2008] B.C.W.L.D. 237, [2008] B.C.W.L.D. 240, [2008] B.C.W.L.D. 241, 65 R.P.R. (4th) 1

1993 CarswellQue 470 (Que. C.A.) — considered

R. v. Deneault (2007), 2007 BCPC 307, 2007 CarswellBC 2334 (B.C. Prov. Ct.) — considered

R. v. Gladstone (1996), [1996] 9 W.W.R. 149, 23 B.C.L.R. (3d) 155, 50 C.R. (4th) 111, 200 N.R. 189, 137 D.L.R. (4th) 648, 109 C.C.C. (3d) 193, 79 B.C.A.C. 161, 129 W.A.C. 161, [1996] 2 S.C.R. 723, [1996] 4 C.N.L.R. 65, 1996 CarswellBC 2305, 1996 CarswellBC 2306 (S.C.C.) — considered

R. v. Marshall (2001), [2001] 2 C.N.L.R. 256, 2001 NSPC 2, 2001 CarswellNS 105, 191 N.S.R. (2d) 323, 596 A.P.R. 323 (N.S. Prov. Ct.) — considered

R. v. Marshall (2002), 202 N.S.R. (2d) 42, 632 A.P.R. 42, 2002 NSSC 57, 2002 CarswellNS 86, [2002] 3 C.N.L.R. 176 (N.S. S.C.) — considered

R. v. Marshall (2003), 2003 NSCA 105, 218 N.S.R. (2d) 78, 687 A.P.R. 78, 2003 CarswellNS 533, [2004] 1 C.N.L.R. 211 (N.S. C.A.) — considered

R. v. Morris (2006), 2006 CarswellBC 3120, 2006 CarswellBC 3121, 2006 SCC 59, 355 N.R. 86, 215 C.C.C. (3d) 289, 274 D.L.R. (4th) 193, 62 B.C.L.R. (4th) 1, [2006] 2 S.C.R. 915, [2007] 1 C.N.L.R. 303, [2007] 3 W.W.R. 34, 234 B.C.A.C. 1, 387 W.A.C. 1 (S.C.C.) — followed

R. v. N.T.C. Smokehouse Ltd. (1996), [1996] 9 W.W.R. 114, 50 C.R. (4th) 181, 109 C.C.C. (3d) 129, 200 N.R. 321, [1996] 4 C.N.L.R. 130, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528, 1996 CarswellBC 2307, 130 W.A.C. 269, 1996 CarswellBC 2308, 23 B.C.L.R. (3d) 114, 80 B.C.A.C. 269 (S.C.C.) — considered

R. v. Powley (2003), 2003 CarswellOnt 3502, 2003 CarswellOnt 3503, 2003 SCC 43, 308 N.R. 201, 177 O.A.C. 201, 68 O.R. (3d) 255 (note), 230 D.L.R. (4th) 1, 177 C.C.C. (3d) 193, [2003] 2 S.C.R. 207, [2003] 4 C.N.L.R. 321, 5 C.E.L.R. (3d) 1, 110 C.R.R. (2d) 92 (S.C.C.) — considered

R. v. Sampson (1995), 1995 CarswellBC 1070, 16 B.C.L.R. (3d) 226, 103 C.C.C. (3d) 411, 131 D.L.R. (4th) 192, [1996] 5 W.W.R. 18, 67 B.C.A.C. 180, 111 W.A.C. 180, [1996] 2 C.N.L.R. 184 (B.C. C.A.) — considered

R. v. Sappier (2004), 2004 CarswellNB 403, 242 D.L.R. (4th) 433, [2004] 4 C.N.L.R. 252, 2004 CarswellNB 369, 2004 NBCA 56, 273 N.B.R. (2d) 93, 717 A.P.R. 93 (N.B. C.A.) — considered

R. v. Sappier (2006), 355 N.R. 1, 274 D.L.R. (4th) 75, 2006 SCC 54, 2006 CarswellNB 676, 2006 CarswellNB 677, [2006] 2 S.C.R. 686, 50 R.P.R. (4th) 1, [2007] 1 C.N.L.R. 359, 799 A.P.R. 199, 214 C.C.C. (3d) 161, 309 N.B.R. (2d) 199 (S.C.C.) — considered

R. v. Simon (1985), 171 A.P.R. 15, 1985 CarswellNS 226F, [1985] 2 S.C.R. 387, 62 N.R. 366, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 23 C.C.C. (3d) 238, 1985 CarswellNS 226 (S.C.C.) — referred to

R. v. Smith (1983), 47 N.R. 132, 147 D.L.R. (3d) 237, 1983 CarswellNat 534F, [1983] 1 S.C.R. 554, 1983 CarswellNat 534, [1983] 3 C.N.L.R. 161 (S.C.C.) — considered

R. v. Sparrow (1986), 1986 CarswellBC 412, 9 B.C.L.R. (2d) 300, 36 D.L.R. (4th) 246, 32 C.C.C. (3d) 65,

2007 CarswellBC 2741, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, [2008] B.C.W.L.D. 216, [2008] B.C.W.L.D. 213, [2008] B.C.W.L.D. 215, [2008] B.C.W.L.D. 212, [2008] B.C.W.L.D. 211, [2008] B.C.W.L.D. 209, [2008] B.C.W.L.D. 210, [2008] B.C.W.L.D. 214, [2008] B.C.W.L.D. 237, [2008] B.C.W.L.D. 240, [2008] B.C.W.L.D. 241, 65 R.P.R. (4th) 1

[1987] 2 W.W.R. 577, [1987] 1 C.N.L.R. 145 (B.C. C.A.) — distinguished

R. v. Sparrow (1990), 1990 CarswellBC 105, 1990 CarswellBC 756, 70 D.L.R. (4th) 385, 111 N.R. 241, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, [1990] 4 W.W.R. 410 (S.C.C.) — considered

R. v. Tenale (1985), 1985 CarswellBC 399, 1985 CarswellBC 814, [1985] 2 S.C.R. 309, [1985] 4 C.N.L.R. 55, [1986] 1 W.W.R. 1, 23 D.L.R. (4th) 33, (sub nom. *R. v. Dick*) 62 N.R. 1, 69 B.C.L.R. 184, 22 C.C.C. (3d) 129 (S.C.C.) — considered

R. v. Vanderpeet (1996), [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, 50 C.R. (4th) 1, (sub nom. *R. v. Van der Peet*) 137 D.L.R. (4th) 289, (sub nom. *R. v. Van der Peet*) 109 C.C.C. (3d) 1, (sub nom. *R. v. Van der Peet*) 200 N.R. 1, (sub nom. *R. v. Van der Peet*) 80 B.C.A.C. 81, (sub nom. *R. v. Van der Peet*) [1996] 2 S.C.R. 507, (sub nom. *R. v. Van der Peet*) [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet*) 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — followed

R. v. White (1964), 50 D.L.R. (2d) 613, 1964 CarswellBC 212, 52 W.W.R. 193 (B.C. C.A.) — considered

Roberts v. R. (1999), (sub nom. *Wewayakum Indian Band v. Canada*) 171 F.T.R. 320 (note), 27 R.P.R. (3d) 157, (sub nom. *Wewayakum Indian Band v. Canada*) 247 N.R. 350, (sub nom. *Roberts v. Canada*) [2000] 3 C.N.L.R. 303, 1999 CarswellNat 2064 (Fed. C.A.) — considered

Roberts v. R. (2002), 2002 CarswellNat 3438, 2002 CarswellNat 3439, (sub nom. *Wewayakum Indian Band v. Canada*) 2002 SCC 79, (sub nom. *Wewayakum Indian Band v. Canada*) [2003] 1 C.N.L.R. 341, (sub nom. *Wewayakum Indian Band v. Canada*) 220 D.L.R. (4th) 1, (sub nom. *Wewayakum Indian Band v. Canada*) 297 N.R. 1, (sub nom. *Wewayakum Indian Band v. Canada*) [2002] 4 S.C.R. 245, (sub nom. *Wewayakum Indian Band v. Canada*) 236 F.T.R. 147 (note) (S.C.C.) — considered

St. Catharines Milling & Lumber Co. v. R. (1888), 1888 CarswellOnt 22, 4 Cart. B.N.A. 107, (1889) L.R. 14 App. Cas. 46, 58 L.J.P.C. 54, 6 L.T. 197, C.R. [10] A.C. 13 (Ontario P.C.) — considered

Stoney Creek Indian Band v. British Columbia (1998), 1998 CarswellBC 2260, 61 B.C.L.R. (3d) 131, [1999] 1 C.N.L.R. 192, [1999] 8 W.W.R. 709 (B.C. S.C.) — considered

Stoney Creek Indian Band v. British Columbia (1999), 1999 BCCA 527, 69 B.C.L.R. (3d) 1, 129 B.C.A.C. 106, 210 W.A.C. 106, 179 D.L.R. (4th) 57, 36 C.P.C. (4th) 222, 1999 CarswellBC 2166, (sub nom. *Stoney Creek Indian Band v. Alcan Aluminum Ltd.*) [2000] 2 C.N.L.R. 345 (B.C. C.A.) — referred to

Stoney Tribal Council v. PanCanadian Petroleum Ltd. (2000), 12 B.L.R. (3d) 228, [2001] 3 C.N.L.R. 347, 261 A.R. 289, 225 W.A.C. 289, 2000 ABCA 209, 2000 CarswellAlta 760, [2001] 2 W.W.R. 442, 86 Alta. L.R. (3d) 147 (Alta. C.A.) — considered

William v. British Columbia (2002), 2002 BCSC 1904, 2002 CarswellBC 3856 (B.C. S.C.) — referred to

William v. British Columbia (2003), 2003 BCSC 2036, 2003 CarswellBC 3824 (B.C. S.C.) — referred to

Xeni Gwet'in First Nations v. British Columbia (2003), 2003 BCSC 249, 2003 CarswellBC 354 (B.C. S.C.) — referred to

2007 CarswellBC 2741, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, [2008] B.C.W.L.D. 216, [2008] B.C.W.L.D. 213, [2008] B.C.W.L.D. 215, [2008] B.C.W.L.D. 212, [2008] B.C.W.L.D. 211, [2008] B.C.W.L.D. 209, [2008] B.C.W.L.D. 210, [2008] B.C.W.L.D. 214, [2008] B.C.W.L.D. 237, [2008] B.C.W.L.D. 240, [2008] B.C.W.L.D. 241, 65 R.P.R. (4th) 1

Xeni Gwet'in First Nations v. British Columbia (2004), 2004 BCSC 148, 2004 CarswellBC 254, [2004] 5 W.W.R. 320, 24 B.C.L.R. (4th) 296, (sub nom. *William v. British Columbia*) [2004] 2 C.N.L.R. 380 (B.C. S.C.) — referred to

Xeni Gwet'in First Nations v. British Columbia (2004), 30 B.C.L.R. (4th) 382, [2004] 4 C.N.L.R. 360, 2 C.P.C. (6th) 193, 2004 BCSC 964, 2004 CarswellBC 1743 (B.C. S.C.) — referred to

Xeni Gwet'in First Nations v. British Columbia (2005), 2005 CarswellBC 216, 2005 BCSC 131 (B.C. S.C.) — referred to

Xeni Gwet'in First Nations v. British Columbia (2006), 2006 BCSC 399, 2006 CarswellBC 1916 (B.C. S.C.) — referred to

Xeni Gwet'in First Nations v. Riverside Forest Products Ltd. (2002), 22 C.P.C. (5th) 97, [2002] 10 W.W.R. 486, 2002 BCSC 1199, 2002 CarswellBC 1923, (sub nom. *Xeni Gwet'in First Nations v. British Columbia*) [2002] 4 C.N.L.R. 356, 4 B.C.L.R. (4th) 379 (B.C. S.C.) — referred to

Statutes considered:

British Columbia Terms of Union (U.K.), (May 16, 1871), reprinted R.S.C. 1985, App. II, No. 10

s. 10 — referred to

Canada Corporations Act, R.S.C. 1970, c. C-32

Generally — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 1 — referred to

Charter of Virginia, 1606

Generally — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

s. 91 — considered

s. 91 ¶ 24 — considered

s. 92 — considered

s. 92 ¶ 5 — referred to

s. 92 ¶ 13 — considered

2007 CarswellBC 2741, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, [2008] B.C.W.L.D. 216, [2008] B.C.W.L.D. 213, [2008] B.C.W.L.D. 215, [2008] B.C.W.L.D. 212, [2008] B.C.W.L.D. 211, [2008] B.C.W.L.D. 209, [2008] B.C.W.L.D. 210, [2008] B.C.W.L.D. 214, [2008] B.C.W.L.D. 237, [2008] B.C.W.L.D. 240, [2008] B.C.W.L.D. 241, 65 R.P.R. (4th) 1

s. 92A1(b) [en. (U.K.), 1982, c. 11, Sched. B, s. 50, reprinted R.S.C. 1985, App. II, No. 44] — considered

s. 109 — referred to

s. 129 — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

s. 35 — considered

s. 35(1) — considered

Courts of Justice (Canada) Act, 1803 (43 Geo. 3), c. 138

Generally — referred to

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

s. 23(1) — referred to

Crown Procedure Act, R.S.B.C. 1960, c. 89

Generally — referred to

English Law Ordinance, 1867, S.B.C. 1867, No. 70

s. 2 — referred to

Federal Courts Act, R.S.C. 1985, c. F-7

s. 39 — considered

s. 39(1) — considered

Fisheries Act, R.S.C. 1970, c. F-14

Generally — referred to

Forest Act, R.S.B.C. 1936, c. 102

Generally — referred to

s. 2 "Crown timber" — considered

s. 17(1) — considered

Forest Act, S.B.C. 1978, c. 23

2007 CarswellBC 2741, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, [2008] B.C.W.L.D. 216, [2008] B.C.W.L.D. 213, [2008] B.C.W.L.D. 215, [2008] B.C.W.L.D. 212, [2008] B.C.W.L.D. 211, [2008] B.C.W.L.D. 209, [2008] B.C.W.L.D. 210, [2008] B.C.W.L.D. 214, [2008] B.C.W.L.D. 237, [2008] B.C.W.L.D. 240, [2008] B.C.W.L.D. 241, 65 R.P.R. (4th) 1

Generally — referred to

s. 1 "Crown land" — considered

s. 1 "Crown timber" — considered

s. 1 "Crown timber" [am. 1979, c. 11, s. 1] — considered

s. 1 "private land" — considered

Forest Act, R.S.B.C. 1979, c. 140

Generally — referred to

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

Generally — referred to

ss. 11-12 — referred to

s. 35(1)(b) — referred to

s. 35(1)(e) — referred to

s. 45(1)(b) — referred to

s. 45(1)(c) — referred to

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159

Generally — referred to

Fur Trade and establishing a Criminal and Civil Jurisdiction with certain Parts of North America, Act for regulating the, 1821 (1 & 2 Geo. 4), c. 66

Generally — referred to

Heritage Conservation Act, R.S.B.C. 1996, c. 187

Generally — referred to

Indian Act, R.S.C. 1952, c. 149

s. 87 — referred to

Indian Act, R.S.C. 1970, c. I-6

s. 88 — referred to

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

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s. 2(1) "band" — referred to

s. 88 — referred to

Land Act, R.S.B.C. 1979, c. 214

s. 1 "Crown land" — considered

Law and Equity Act, R.S.B.C. 1996, c. 253

s. 10 — considered

Limitation Act, R.S.B.C. 1979, c. 236

s. 3 — referred to

s. 3(5) — considered

s. 14 — referred to

Limitation Act, R.S.B.C. 1996, c. 266

Generally — referred to

s. 3 — referred to

s. 3(5) — considered

s. 14 — referred to

Limitation Act, 1623 (21 Ja. 1), c. 16

s. 3 — referred to

Limitations Act, S.B.C. 1975, c. 37

s. 3 — referred to

s. 14 — referred to

s. 18 — referred to

Ministry of Forests Act, R.S.B.C. 1996, c. 300

Generally — referred to

s. 4 — considered

s. 4(c) — considered

Navigable Waters Protection Act, R.S.C. 1985, c. N-22

2007 CarswellBC 2741, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, [2008] B.C.W.L.D. 216, [2008] B.C.W.L.D. 213, [2008] B.C.W.L.D. 215, [2008] B.C.W.L.D. 212, [2008] B.C.W.L.D. 211, [2008] B.C.W.L.D. 209, [2008] B.C.W.L.D. 210, [2008] B.C.W.L.D. 214, [2008] B.C.W.L.D. 237, [2008] B.C.W.L.D. 240, [2008] B.C.W.L.D. 241, 65 R.P.R. (4th) 1

Generally — referred to

Park Act, R.S.B.C. 1979, c. 309

Generally — referred to

Real Property Limitation Act, 1833 (3 & 4 Will. 4), c. 27

s. 2 — referred to

s. 17 — referred to

s. 34 — referred to

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

Generally — referred to

Statute of Limitations, R.S.B.C. 1960, c. 370

s. 3 — referred to

s. 16 — referred to

s. 30 — referred to

s. 41 — referred to

Wildlife Act, S.B.C. 1982, c. 57

Generally — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 18A — referred to

R. 33 — referred to

Treaties considered:

Anglo-American Convention of 1818, 1818

Generally — referred to

Oregon Boundary Treaty, 1846

Generally — referred to

Treaty No. 3, 1873 (Between Her Majesty the Queen and the Saulteaux Tribe of the Ojibeway Indians)

2007 CarswellBC 2741, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, [2008] B.C.W.L.D. 216, [2008] B.C.W.L.D. 213, [2008] B.C.W.L.D. 215, [2008] B.C.W.L.D. 212, [2008] B.C.W.L.D. 211, [2008] B.C.W.L.D. 209, [2008] B.C.W.L.D. 210, [2008] B.C.W.L.D. 214, [2008] B.C.W.L.D. 237, [2008] B.C.W.L.D. 240, [2008] B.C.W.L.D. 241, 65 R.P.R. (4th) 1

Generally — referred to

Treaty No. 8, 1899

Generally — referred to

Treaty of Paris, 1763, 42 C.T.S. 279

Generally — referred to

Regulations considered:

Fisheries Act, R.S.C. 1970, c. F-14

British Columbia Fishery (General) Regulations, SOR/84-248

Generally — referred to

Words and phrases considered:

oral tradition evidence

The oral tradition evidence consists of verbal messages from the past beyond the present generation.

First Nation

Aboriginal nations are characterized as such in the same way that French speaking Canadians are viewed as a nation. Nations in this sense are a group of people sharing a common language, culture and historical experience. They are a culturally homogeneous collective of people, larger than a clan, tribe or band. A nation state is a self-governing political entity that has sovereignty and external recognition. First Nations are not nation states; they are nations or culturally homogeneous groups of people within the larger nation state of Canada, sharing a common language, traditions, customs and historical experience.

Crown lands

[. . .] where Aboriginal title lands have been clearly defined, those lands are not "Crown lands" as defined by the *Forest Act* [R.S.B.C. 1979, c. 140].

Crown timber

The definition of "Crown timber" [in the *Forest Act*, R.S.B.C. 1979, c. 140] does not capture the forest resources located on Aboriginal title lands. [. . .] Aboriginal title lands must be treated in the same manner as "private lands" under that Act.

ACTION for declaration of Aboriginal title and rights.

D.H. Vickers J.:

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1. Preface

1 Canada's multi-cultural society did not begin when various European nations colonized North America. Rather, multiculturalism on this continent had its genesis thousands of years ago with the receding of the last great ice age. Waves of Aboriginal people swept across North America, establishing themselves in diverse communities across the entire continent. While the lives of Aboriginal people were not without conflict, there are many examples of different Aboriginal cultures living side by side in peace and harmony. Today's modern, multi-cultural communities seldom, if ever, look back at the Aboriginal roots of Canadian diversity. The evidence in this case has provided me with the opportunity to acknowledge the multi-cultural roots of our Canadian culture; roots to be honoured and respected.

2 Every Canadian should have the good fortune I have experienced over the past several years. These proceedings provided me with a unique opportunity to learn about one of Canada's vibrant Aboriginal communities. I also had the opportunity to learn more of the history of this province and to appreciate the role of Aboriginal people in that history.

3 About two hundred years ago, Tsilhqot'in people were presented with life altering challenges. The arrival of fur traders encouraged trade in items that, up to that point in time, had provided Tsilhqot'in people with subsistence and survival. In return, Tsilhqot'in people received European goods that would forever change their lives. Their new trading partners also encouraged them to abandon their usual trading habits with neighbouring Aboriginal groups.

4 With the arrival of the Christian missionaries, Tsilhqot'in people faced another challenge. They were invited to accept a new spirituality in place of that which had served them for generations.

5 Smallpox and other diseases were introduced by European colonizers, leaving Tsilhqot'in people decimated in their numbers. Shortly thereafter, Tsilhqot'in people were directed by the federal and provincial governments to stop their migratory movements, to stay in one place and to become farmers and ranchers. The Tsilhqot'in language and culture were placed under severe stress as children were taken from their homes and required to live in residential schools.

6 All of these life altering changes came without the benefits of a modern social support system to assist Tsilhqot'in people through the transition that was demanded of them.

7 The present Canadian community is now faced with the challenge of acknowledging past wrongs and of building a consensual and lasting reconciliation with Aboriginal people. Trials in a courtroom have the inevitable downside of producing winners and losers. My hope is that this judgment will shine new light on the path of reconciliation that lies ahead.

8 I want to express my gratitude to those who provided assistance to me throughout this long trial. I am greatly indebted to counsel for their assistance. Each of the many lawyers who played a role in this case made an important contribution and I thank them for all of their efforts. A trial judge relies heavily on the assistance of counsel in the course of every trial. Aboriginal law is a field that has grown and developed rapidly in the past 25 years. Counsel were of great assistance to me in my understanding of the legal principles and issues that arose throughout the trial.

9 Of equal importance to a trial judge is the cooperation demonstrated by counsel throughout the trial. There

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were many differences of opinion but counsel never failed to respect each other and to reach accommodations whenever possible, lightening the burden on me as the trial judge. Each one of them brings great credit to the legal profession.

10 I was assisted throughout the trial by several Interpreters and Word Spellers. In that regard, I want to express my appreciation to Ms. Susie Lulua, Word Speller for the deposition evidence of Martin Quilt; Ms. Bella Alphonse, Word Speller; Mr. William Myers, Word Speller and Interpreter; Ms. Beverly M. Quilt, Interpreter; Ms. Agnes Haller, Interpreter; Mr. Orrie Charleyboy, Interpreter and Ms. Margaret Lulua, Word Speller.

11 In the late fall and early winter of 2003, the court convened at the Naghtaneged School at Tl'ebayi in Xení (Nemiah Valley). I want to express my appreciation to all who made this sitting possible. I reserve a special thank you for the children of the school who allowed us the use of their language resource classroom for this historic sitting of the Court.

12 I also had the benefit of an excellent court staff. The first clerk assigned to the case was Ms. Lisa Wickens. With her departure to another court, Ms. Jean Lystar became our court clerk and registrar. These two women provided exceptional assistance as court clerks, registrars and keepers of the many exhibits. I am grateful to all court staff who provided assistance throughout this trial but I do reserve special thanks for the work of Ms. Wickens and Ms. Lystar.

13 Each year, throughout the course of this trial, I was assisted by law clerks and Judicial Administration staff. These people are the unsung heroes, working tirelessly behind the scenes. They provided support and assistance to me whenever it was needed. I thank each of them for their contributions and for their many hours of dedicated service.

14 The trial was recorded each day by a court reporter. I believe all counsel would join me when I express our collective gratitude to Ms. Christie L. Pratt who was "our court reporter". She provided an outstanding service to the Court and now has the foundation of a Tsilhqot'in language dictionary buried in the software of her computer. I would be remiss if I did not acknowledge the work of Ms. Pauline S. Cziraky who joined us on those few days that Ms. Pratt was unavailable. Her role as a substitute for Ms. Pratt was not easy as much of the evidence in this case was unfamiliar and complex.

15 Ms. Kathleen Lush was our Court Cartographer and I want to express my appreciation to her for her excellent cartographic assistance.

16 This was a trial that took advantage of the latest technology available. I want to express my appreciation to all those people who made it possible to view the documents in electronic form. Various disks containing place names referred to by witnesses were provided from time to time and this too was of great assistance.

17 From September 2004 to the end of term in 2005, Ms. Becky Black provided assistance as my law clerk. In September 2006, after her call to the Bar, she returned as a Law Officer of the Court, assigned to assist me in the work that was to lie ahead. I want to express my gratitude to Ms. Black for all the assistance she has provided to me throughout the past year. Ms. Black's outstanding work has made the task of writing this judgment much less daunting than I first imagined.

18 It is not usual in the writing of judgments to provide a preface. This is not a usual judgment but, rather, part of a larger process of reconciliation between Tsilhqot'in people and the broader Canadian society. A reader

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will find the usual recitation of facts, the legal principles and the conclusions I have drawn. In the writing of a judgment, a court does not normally decide an issue if that decision is only to become unnecessary *obiter dicta* of the court. Because the Court is engaged in the broader process of reconciliation, I have departed from the usual practice and expressed my views on some issues that might not have been addressed but for the nature of these proceedings.

19 I have also considered it helpful to include a rather lengthy historical section with relevant and interesting extracts from historical documents.

20 More importantly, this judgment features Tsilhqot'in people as they strive to assert their place as First Peoples within the fabric of Canada's multi-cultural society. The richness of their language, the story of their long history on this continent, the wisdom of their oral traditions and the strength and depth of their characters are a significant contribution to our society. Tsilhqot'in people have survived despite centuries of colonization. The central question is whether Canadians can meet the challenges of decolonization.

21 Important work lies ahead for the provincial and federal governments and Tsilhqot'in people. In that regard, there will have to be compromises on all sides if a just and lasting reconciliation is to be achieved.

2. Introduction

a. Tislagh Season

22 It was the season for tislagh (steelhead salmon). According to their oral history and traditions, Tsilhqot'in people have gathered at this time of year in the custom of the ?Esggidam (ancestors) since the time of sadanx (legendary period of time long ago). Tislagh returned to the Tsilhqox (Chilko River) and, as they had for generations, Tsilhqot'in people returned to the river crossing at Biny Gwetsel and to Tsi T'is Gunlin, just south of Henry's Crossing, to gaff tislagh. They left Xeni (Nemiah Valley) and other parts of Tsilhqot'in territory and travelled the ancient trails set by the ?Esggidam, passing Tsuniah Biny (Tsuniah Lake), onto the crossing of the Tsilhqox at Biny Gwetsel, making their way further down river past Tsi T'is Gunlin and onto Henry's Crossing.

23 In May of 1992, during the season for tislagh, approximately 100 Tsilhqot'in people returned, not to gaff tislagh at Tsi T'is Gunlin and Biny Gwetsel but to establish a blockade at Henry's Crossing. Their purpose was clear. There would be no improvements to the bridge at this important crossing over the Tsilhqox that would allow clear cut logging to occur in Tachelach'ed (Brittany Triangle).

24 Xeni Gwet'in people (people of the Nemiah Valley) are charged with the sacred duty to protect the nen (land) of Tachelach'ed and the surrounding nen on behalf of all Tsilhqot'in people. They were determined that any logging in Tachelach'ed would be on their terms. The nen and their Aboriginal rights were threatened. The seasonal harvest could be interrupted in order to discharge their duty to protect the nen.

25 Tsilhqot'in people were frustrated and angry. What they considered "their wood" was leaving the community without any economic benefit to Tsilhqot'in people. Over 40 families were on the Xeni Gwet'in housing wait list. The wait for housing was upwards to 25 years on Tsilhqot'in Reserves. There was also high unemployment. Forestry provided very few jobs for Tsilhqot'in people and the profits from harvesting the wood did not flow to their communities.

26 The forecasted clear cut logging was expected to interfere with their Aboriginal right to hunt and trap.

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Insufficient consideration had been given to sustaining their communities in the model for sustainability employed by British Columbia.

27 These were the central issues that interrupted the 1992 season for tsi'lagh. The events that year on the bridge at Henry's Crossing, just downriver from Tis T'si Gunlin and Biny Gwetsel, subsequently spiralled into these long and costly proceedings.

b. Nature of the Litigation

28 This is an action for declarations of Tsilhqot'in Aboriginal title and certain defined Tsilhqot'in Aboriginal rights relating to land in the central region of British Columbia.

c. The Region and People

29 The Chilcotin Region is located in the central interior of British Columbia. The region spreads west from the Fraser River, across the Chilcotin Plateau to the Coast Mountain Range. It rises into the Chilcotin Mountain Range in the south. The Blackwater River cuts across its northern edge. The landscape of the high elevation plateau and surrounding mountain ranges is both the backdrop and the heartland of the present action.

30 The Chilcotin Region is named after the Tsilhqot'in people. The Tsilhqot'in people are an Athapaskan speaking Aboriginal people. The Tsilhqot'in First Nation is comprised of the Xení Gwet'in, the Tl'esqox (Toosey), the Tsi Del Del (Redstone), the Tletinqox-t'in (Anahim), the ?Esdilagh (Alexandria) and the Yunesit'in (Stone).

d. Tsilhqot'in Population

31 At the present time, there are approximately 3,000 Tsilhqot'in people. They are spread across communities from Fort Alexandria to Anahim Lake. It is not clear how many Tsilhqot'in people live off reserve. Those who make their homes on the reserves are a relatively small community of people, spread over great distances. The Xení Gwet'in community of Tsilhqot'in people is the most remote and is clearly situated on historical Tsilhqot'in territory.

32 Historical data reveals a population in the Tsilhqox corridor of approximately 150 - 200 people at the time of sovereignty assertion. Given the semi-nomadic nature of Tsilhqot'in people over 160 years ago, collecting an accurate census would have been impossible. Those who were recorded were seen or reported to be along the river corridor. Undoubtedly others, outside this river corridor, were not counted. The numbers of Tsilhqot'in people were greatly reduced in the 1860's due to an epidemic of smallpox, a fate that was met by many Aboriginal people.

33 Today, the Xení Gwet'in number about 390 - 400 people. Of these, approximately 200 persons live on the Xení Gwet'in reserves in Xení and about 15 live off reserve in the Claim Area. The balance live off reserve, outside of the Claim Area.

e. The Parties

34 Chief Roger William is a member of the Tsilhqot'in First Nation and is the Chief of the Xení Gwet'in. This action is brought by Chief William in his representative capacity.

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35 The Xeni Gwet'in First Nations Government, also known as the Nemiah Valley Indian Band, is a body of Aboriginal persons. They constitute a "band" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. Common Crown lands have been set apart for their use and benefit.

36 In 1996, the Tsilhqot'in National Government (TNG) was incorporated under the *Canada Corporations Act*, R.S.C. 1970, c. C-32 on February 28, 1996. Only five Tsilhqot'in bands are members of the TNG. The Tl'esqox Band is not a member. It maintains a membership in the Carrier/Tsilhqot'in Tribal Council.

37 The defendant, Her Majesty the Queen in Right of the Province of British Columbia, is that aspect of the Monarch in which the lands at issue in these proceedings are said to vest pursuant to s. 109 of the *Constitution Act, 1867*. The Regional Manager of the Cariboo Forest District is that person exercising powers and authority over forestry related matters pursuant to the *Forest Act*, R.S.B.C. 1996, c. 157 (and under the predecessor legislation: the *Forest Act*, R.S.B.C. 1979, c. 140). The Office of the Regional Manager was created on January 1, 1979 and continued until March 31, 2003. At that time, the duties were assumed by the Regional Manager of the Southern Interior Forest Region. At all material times, the Regional Manager was authorized to make decisions relating to the granting of forest tenures on the lands in the Claim Area pursuant to the *Forest Act*, the *Ministry of Forests and Range Act*, R.S.B.C. 1996, c. 300 and the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159.

38 The defendant, the Attorney General of Canada, is named in these proceedings pursuant to *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 23(1).

39 These actions were initiated to prevent the harvesting of timber in the Claim Area. Forest companies with rights and plans to harvest timber were parties to the action in its early stages. When these companies abandoned plans to log in the Claim Area, the proceedings against them were discontinued.

f. Description of the Claim Area

i. Tachelach'ed and the Trapline Territory

(1) Landscape

40 The plaintiff makes claims with respect to lands known as the Brittany Triangle and the Trapline Territory. The Brittany Triangle is known to Tsilhqot'in people as Tachelach'ed. It refers to the land enclosed by the Tsilhqox and Dasiqox (Taseko River) with a southern boundary running through Xeni.

41 Tachelach'ed encompasses plateau, mountain and transition zones (between mountains and plateau). It falls within the Cariboo Forest Region of British Columbia. The Chilcotin Plateau, located in the central and northern portion of the Claim Area, consists of level to gently rolling terrain. The southern and western halves of the Claim Area are made up of the Chilcotin and Pacific Ranges. The transition zone between these two areas is relatively narrow. Elevations on the plateau range from 1,000 to 1,500 m. Deeply incised valleys have been cut into the plateau by the major river systems. The Chilcotin and Pacific Ranges are rugged glacial mountains that rise to approximately 2,800 m elevation.

42 The boundaries of Tachelach'ed are described as follows: the point of commencement is marked by the confluence of the Tsilhqox and Dasiqox. The eastern boundary follows the Dasiqox to the Davidson Bridge. The southern boundary follows the Nemiah Valley Road in a westerly direction until it reaches Xeni Biny (Konni

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Lake), then follows the southern shore of Xení Biny to its confluence with Xení Yeqox (Nemiah Creek). It then follows Xení Yeqox to the eastern shore of Tsilhqox Biny (Chilko Lake). The western boundary follows the eastern shore of Tsilhqox Biny in a northerly direction to the Tsilhqox. It then continues along the Tsilhqox until the point of commencement, the confluence of the Tsilhqox and Dasiqox.

43 The area of Tachelach'ed, including the geographic area which overlaps the Trapline Territory, totals 141,769 hectares. The area of Tachelach'ed, excluding the geographic area which overlaps the Trapline Territory, totals 100,395 hectares.

44 For the purposes of this action, Tachelach'ed does not include the lands within the following Indian Reserves: Chilco Lake 1; Chilco Lake 1A; Garden 2; Garden 2A; Lezbye No. 6; Lohbiee 3; Tanakut 4 and Tsunnia Lake.

45 The Trapline Territory is the land within the boundary of Trapline Licence #0504T003 issued by British Columbia and does not include lands within the Indian Reserves noted in the preceding paragraph.

46 To orient the reader of this judgment, I have attached as Appendix A, three maps. Map 1 situates the Claim Area in the Province of British Columbia. The large body of water within the Claim Area is Tsilhqox Biny. Map 2 is a portion of the locater base map marked as exhibit 10 in these proceedings. Tachelach'ed is outlined with a solid yellow line; the Trapline Territory, east and west is outlined with a broken yellow line. Map 3 locates Tsilhqot'in sites inside and outside the Claim Area and is intended to assist in an understanding of my later review of Tsilhqot'in occupation of the Claim Area.

(2) Climate

47 Five distinct biogeoclimatic zones are found within the Claim Area. I rely on the evidence of Brian T. Guy, Ph.D., a hydrologist, in describing the climate of the Claim Area.

48 Tachelach'ed is located primarily in the Sub-Boreal Pine Spruce zone. The lowest elevations within the major valleys are within the Interior Douglas Fir zone. The Montane Spruce, Englemann Spruce Subalpin Fir, and Alpine Tundra zones dominate the Trapline areas to the west and south of Tachelach'ed (within the Chilcotin Ranges) at the highest elevation.

49 The climate in the Claim Area is largely controlled by location and physiography. The exposed Chilcotin Plateau portion of the Claim Area has a moderate continental climate with cold winters, warm summers and relatively low levels of precipitation. The movement of continental arctic air in the fall and winter and continental tropical air in the summer result in large seasonal variability in air temperature across the Claim Area. Moisture availability to the plateau is limited primarily by the Coast Mountains, which dewater moist maritime air coming from the Pacific.

50 The Pacific and Chilcotin Ranges act as a partial barrier between the interior continental systems and coastal systems. Air temperatures are significantly colder in the high mountains and milder in the low elevation valleys. Precipitation values in the mountains are highest in the winter months (September to February) due to a continuous succession of frontal systems moving eastward from the Pacific. Glaciers in the Chilcotin and Pacific Ranges reflect the higher winter precipitation values. In the summer months, dry weather is more common.

51 Precipitation on the plateau is highest from June through August. During these three months, the plateau

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receives nearly half of its annual precipitation (which averages 337.6 mm). Extreme daily precipitation events of greater than 25 mm can occur throughout the year. In summer, daytime high temperatures are between 18° and 22° centigrade.

52 Talhiqox Biny (Tatlayoko Lake), located on the western boundary of the Trapline Territory, is situated in the valley bottom between the Chilcotin and Pacific Ranges. Here the climate exhibits characteristics of both the plateau and the mountain regions of the Claim Area. Day time temperatures during the summer are generally between 18° and 23° centigrade at Talhiqox Biny. Winter night time minimum temperatures typically range from -6° to -12° centigrade.

53 In the valley bottom, the wettest months occur between October and January. Nearly half of the annual precipitation, which averages 434.2 mm, falls during these four months.

54 The Tsilhqox and Dasiqox both flow through large valley bottom lakes, Tsilhqox Biny and Dasiqox Biny, at the northern limit of the mountains before they begin their journey across the plateau. These two rivers mark the boundaries of Tachelach'ed and join together at its northern tip. There they continue on to the Chezqox (Chilcotin) River which drains into the Fraser River. These river systems have historically provided a variety of salmon runs, an important source of food for First Nations people and in particular, the Tsilhqot'in people. Other significant valley bottom lakes near the mountain-plateau transition include Talhiqox Biny, Ts'uni?ad Biny (Tsuniah Lake), Xeni Biny, ?Elhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake). Streams originating on the plateau tend to be smaller and tend to have a more meandering habit characterized by frequent lakes and wetlands. There are some significant shallow plateau lakes in the Claim Area including Tsanigan Biny (Chaunigan Lake), Mainguy Lake, Natasewed Biny (Brittany Lake), Naghatalhchoz or Chelquoit Biny (Big Eagle Lake), Gwedzin Biny (Cochin Lake), Lhuy Nachasgwengulin (Little Eagle Lake) and many small lakes.

ii. Forest Cover

55 The Claim Area is situated in the Williams Lake Timber Supply Area. Within that larger area, forestry is responsible for more jobs than any other component of the economy. Other major areas of the economy include mining, tourism, farming and ranching.

56 The nature of the forest cover is dependant on climate and terrain. The dominant species are pine, spruce and Douglas fir. A major infestation of Mountain Pine Beetle has had a profound impact on the pine forests in the Claim Area.

iii. Public Lands / Crown Lands

(1) Provincial Parks

57 Ts'yl?os Provincial Park totals approximately 233,000 hectares. It is located in both Tachelach'ed and the Trapline Territories. Nuntsi Provincial Park is situated in the central eastern portion of Tachelach'ed and totals 20,570 hectares.

(2) Fishing Station

58 A Federal Department of Fisheries station is located at the outlet of Tsilhqox Biny. This is an important location for the management of the Tsilhqox salmon run which itself is a component of the larger Fraser River salmon runs.

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g. Xení Gwet'in Declaration

59 On August 23, 1989, the Xení Gwet'in people made a declaration concerning the Nemiah Aboriginal Wilderness Preserve which included Tachelach'ed and the Trapline Territory. The Xení Gwet'in people declared that within the Nemiah Aboriginal Wilderness Preserve, the following rules were to apply:

- a) There shall be no commercial logging. Only local cutting of trees for our own needs i.e., firewood, housing, fencing, native uses, etc.
- b) There shall be no mining or mining explorations.
- c) There shall be no commercial road building.
- d) All-terrain vehicles and skidoos shall only be permitted for trapping purposes.
- e) There shall be no flooding or dam construction on Chilko, Taseko, and Tatlayoko lakes.
- f) This is the spiritual and economic homeland of our people. We will continue in perpetuity:
 - i. To have and exercise our traditional rights of hunting, fishing, trapping, gathering, and natural resources.
 - ii. To carry on our traditional ranching way of life.
 - iii. To practice our traditional native medicine, religion, sacred, and spiritual ways.
- g) That we are prepared to share our Nemiah Aboriginal Wilderness Preserve with non-natives in the following ways:
 - i. With our permission visitors may come and view and photograph our beautiful land.
 - ii. We will issue permits, subject to our conservation rules, for hunting and fishing within our Preserve.
 - iii. The respectful use of our Preserve by canoeists, hikers, light campers, and other visitors is encouraged, subject to our system of permits.
- h) We are prepared to enforce and defend our Aboriginal rights in any way we are able.

3. Details of the Litigation

a. Chronology of the Litigation and Related Events

60 In 1983, Carrier Lumber Ltd. (Carrier) was granted a forest licence authorizing logging activities in the Trapline Territory.

61 In 1989, Carrier submitted a Forest Development Plan (FDP). This FDP proposed logging in the Trapline Territory and was approved during that year. Carrier was granted a cutting permit for blocks in the Trapline Territory in 1990.

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62 On August 23, 1989, as a consequence of this and other forestry activities in the surrounding areas, the Xeni Gwet'in people issued the Xeni Gwet'in (Nemiah) Declaration.

63 On December 14, 1989, the plaintiff commenced Action No. 89/2573 against British Columbia (the "Original Action"). The plaintiff claimed essentially the same relief as claimed in this action, No. 90/0913 (the "Nemiah Trapline Action" or the "Trapline Action"). The Original Action was discontinued when the Trapline Action was commenced.

64 The Nemiah Trapline Action was commenced in the Supreme Court of British Columbia on April 18, 1990 against the Regional Manager of the Cariboo Forest Region, British Columbia, Carrier and other forest companies. At that time, the plaintiff sought injunctions restraining the defendants from clear-cut logging within the Trapline Territory.

65 On December 17, 1990, Millward J. made a consent order accepting Carrier's undertaking not to apply to British Columbia for timber cutting permits in the Nemiah Trapline without notice.

66 The proceedings against the other forest companies were eventually discontinued.

67 On October 11, 1991, this Court issued an injunction by consent, enjoining Carrier from logging (or any other preparatory work for logging) within the Trapline Territory until the trial of this matter. Carrier was specifically enjoined from logging certain named cut blocks located within the Trapline Territory.

68 In 1998, the Trapline Action was amended to advance claims for Tsilhqot'in Aboriginal title, damages for infringement of Aboriginal rights and title, compensation for breach of fiduciary duty, declaratory orders concerning the issuance and use of certain forest licences and injunctions restraining the issuance of cutting permits.

69 Following the injunction restraining logging in the Trapline Territory, forest companies indicated interest in logging within Tachelach'ed (Brittany Triangle). Logging in this part of the Claim Area required an upgrade of the bridge at Henry's Crossing, a bridge spanning the Tsilhqox (Chilko River) and providing access to Tachelach'ed.

70 On May 7, 1992, Tsilhqot'in members mounted a blockade to prevent work on the bridge at Henry's Crossing. This activity attracted the attention of the provincial government and on May 13, 1992, Premier Michael Harcourt promised the Xeni Gwet'in people that there would be no further logging in their traditional territory without their consent.

71 In 1992, the Xeni Gwet'in people commissioned a sustainable forestry plan for Tachelach'ed lands. This plan was rejected by the Ministry of Forests. Ministry officials proposed various logging plans and sought the views of Xeni Gwet'in people. Between 1994 and 1997, Xeni Gwet'in people voted against logging plans for Tachelach'ed in a series of community referenda.

72 The dispute between Ministry of Forests officials and the Xeni Gwet'in people centred on the control of logging in Tachelach'ed. Tsilhqot'in people sought a right of first refusal with respect to any logging activities. They argued that such a right was essential to the maintenance of their traditional way of life. Ministry officials declined to grant such a right, arguing that there was no legislative authority that enabled them to grant such a concession to Tsilhqot'in people.

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73 On January 12, 1994, Ts'il'os Provincial Park was established as a Class A park under the *Park Act*, R.S.B.C. 1979, c. 309 by Order-in-Council No. 64.12. At the centre of this wilderness park is Ts'il'os (Mount Tatlow). Ts'il'os Park comprises 39% of the Claim Area. In its amended statement of defence, British Columbia admits that Xení Gwet'in people hold Aboriginal hunting and trapping rights for subsistence and ceremonial use throughout Ts'il'os Park.

74 On February 16, 1994, Tsilhqot'in Chiefs met with members of the British Columbia Cabinet to discuss, amongst other things, forestry issues.

75 On January 1, 1997, British Columbia issued Forest Licence A54417 to Timberwest Forest Limited. This forest licence permitted logging within the Trapline Territory and Tachelach'ed. On January 8, 1997, the Xení Gwet'in filed a notice of intention to proceed with the Nemiah Trapline Action. Harvesting rights under this licence were transferred to Riverside Forest Products (Soda Creek) Limited on June 23, 1997.

76 On March 1, 1997, British Columbia granted Forest Licences A55901 to Lignum Limited; A55902 to West Fraser Mills Limited; A55904 to RFP Timber Ltd.; and A55905 to Jackpine Forest Products Ltd., which permitted additional logging of the Trapline Territory and Tachelach'ed.

77 In the fall of 1998, with the assistance of the David Suzuki Foundation, the Xení Gwet'in began ecosystem based planning for forestry and cultural tourism in the Trapline Territory and Tachelach'ed.

78 On November 1, 1998, British Columbia re-issued Forest Licences A20016 to RFP Timber Ltd. and A20019 to Riverside Forest Products Limited which would have permitted further logging of the Trapline Territory and Tachelach'ed. Both of these renewed licences replaced licences of the same number dated November 1, 1993.

79 The plaintiff commenced Action No. 98/4847 (the "Brittany Triangle Action") on December 18, 1998 against British Columbia, Riverside Forest Products Ltd. and others, seeking declarations similar to those in the Nemiah Trapline Action with respect to the lands known as Tachelach'ed.

80 On February 19, 2001, the plaintiff filed a fresh statement of claim in the Brittany Triangle Action. On March 9, 2001, British Columbia filed a fresh statement of defence in the Brittany Triangle Action setting out British Columbia's reserve creation defence.

81 On November 2, 1999, I dismissed an application brought by British Columbia to strike the representative claim for Aboriginal title in both actions: *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.* (1999), 37 C.P.C. (4th) 101, 1999 CarswellBC 2438 (B.C. S.C.).

82 The parties consented to the consolidation of the Trapline Action and the Brittany Triangle Action. On February 21, 2000, a notice of trial was issued setting the trial date in both actions for September 10, 2001.

83 On October 5, 2000, upon application by the plaintiff, I made an order that Canada be added as a defendant in the Brittany Triangle Action.

84 On November 2, 2000, Canada was added as a defendant in the Nemiah Trapline Action, by consent.

85 On February 2001, a fresh statement of claim was filed and, in March 2001, fresh statements of defence were filed by British Columbia and by Canada. In its statement of defence, Canada did not support British

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Columbia's reserve creation defence.

86 Upon application by Canada on March 19, 2001 the trial of the action was adjourned to a date to be fixed.

87 On April 18, 2001, a Ministry of Forests official confirmed that logging and road building in the Claim Area were inevitable, as the decision to permit harvesting in the disputed area was made at the time the licences were issued early in 1997.

88 On April 4, 2002, an order was made consolidating the Nemiah Trapline Action and the Brittany Triangle Action.

89 On August 14, 2002, I dismissed an application by the defendant, British Columbia, for an order compelling the plaintiff to provide notice of the plaintiff's claims to all land or resource use tenure holders, or applicants for tenure, whose interests may be affected by the litigation: *Xeni Gwet'in First Nations v. Riverside Forest Products Ltd.*, 2002 BCSC 1199 (B.C. S.C.).

90 On September 13, 2002, the plaintiff filed a consolidated fresh statement of claim. On October 22, 2002, British Columbia filed a consolidated fresh statement of defence. This new pleading did not contain the reserve creation defence.

91 The trial of the consolidated action began on November 18, 2002. On November 20, 2002, I dismissed an application by Canada to be removed as a party: *William v. British Columbia*, 2002 BCSC 1904 (B.C. S.C.).

92 On January 8, 2003, I struck out the claim against Riverside Forest Products Ltd.: *William v. British Columbia*, 2003 BCSC 2036 (B.C. S.C.).

93 On February 14, 2003, I allowed the plaintiff to amend the statement of claim and dismissed an application by British Columbia for an order striking out the statement of claim on the basis that it disclosed no reasonable claim, or was otherwise an abuse of process: *Xeni Gwet'in First Nations v. British Columbia*, 2003 BCSC 249 (B.C. S.C.).

94 On June 16, 2003, the plaintiff filed an amended statement of claim. On June 19, 2003, Canada filed an amended statement of defence. On June 26, 2003, British Columbia filed a statement of defence. On June 27, 2003, the plaintiff filed a reply to British Columbia's statement of defence.

95 On February 6, 2004, I made a ruling on the admission of oral history evidence. In that ruling I established a procedure for the preliminary examination of lay witnesses who intended to offer oral history evidence. The purpose of that procedure was to assist the court in assessing the necessity and reliability of oral history evidence and ultimately, its admissibility: *Xeni Gwet'in First Nations v. British Columbia*, 2004 BCSC 148 (B.C. S.C.).

96 On May 6, 2004, I directed counsel to frame an issue of law or fact, or partly of law and partly of fact, pursuant to Rule 33. Counsel were unable to frame such a issue by consent. On July 16, 2004, following submissions by counsel, I concluded that this case or specific issues arising in this case ought not to proceed as a stated case pursuant to Rule 33: *Xeni Gwet'in First Nations v. British Columbia*, 2004 BCSC 964 (B.C. S.C.).

97 The trial of this action has consumed 339 trial days. It has had a long history and in its initial stages, a

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faltering start. The foregoing summary does not include a description of the various motions in this court on the issue of costs, two of which were appealed to the Court of Appeal. One of these decisions was also considered on appeal in the Supreme Court of Canada.

98 The triggering events for these proceedings were proposals to harvest timber in the Claim Area. There is a fundamental dispute between the Province and Tsilhqot'in people on the issue of land use. The result of this litigation has been to bring logging in the Claim Area to a halt.

99 In the late fall and early winter of 2003, the court convened at the Naghataneq School at Tl'ebayi in Xení (Nemíah Valley). As our time at Xení spanned several weeks during winter months, travel throughout the Claim Area was not possible. Thus, I was only able to see a small portion of Xení and Tachelach'ed by traveling the short distance from the Davidson Bridge over the Dasiqox (Taseko River) to the eastern shore of Tsilhqox Biny (Chilko Lake).

100 The parties filed written argument and, by agreement and with my consent, there were no oral arguments.

b. Issues to be Decided

101 The issues raised by these proceedings include the following:

- a) Are the Tsilhqot'in people entitled to a declaration of Aboriginal title to all or part of the Claim Area?
- b) Are the Tsilhqot'in people entitled to a declaration of Aboriginal rights to hunt and trap birds and animals throughout all or part of the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses, inclusive of a right to capture and use horses for transportation and work?
- c) Are the Tsilhqot'in people entitled to a declaration of an Aboriginal right to trade in the furs, pelts and other animal products obtained from all or part of the Claim Area as a means of securing a moderate livelihood?
- d) Does the *Forest Act* apply to Aboriginal title lands?
- e) Does the issuing of forest licences, the granting of authorizations and any forest development activity unjustifiably infringe Aboriginal rights in the Claim Area?
- f) Are Tsilhqot'in people entitled to damages?
- g) Are any claims advanced statute barred or otherwise affected by the doctrines of Crown immunity or laches?

4. Preliminary Issue

102 One of the issues to be decided in this case is whether the plaintiff has existing Aboriginal title to Tachelach'ed (Brittany Triangle) and the Trapline Territory. To meet the test for Aboriginal title, the plaintiff must establish a sufficient degree of physical occupation of the Claim Area by Tsilhqot'in people at the time of sovereignty assertion. Physical occupation may be established by evidence of "regular use of definite tracts of

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land": *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 149.

103 In his main argument, the plaintiff refers to evidence which, in his submission, portrays a regular and highly organized schedule of Tsilhqot'in land use and occupancy throughout the Claim Area. The plaintiff organizes this evidence by season according to Tsilhqot'in subsistence patterns. The evidence provides details about the character of the lands. It includes evidence about the bioclimatic zones, animal habitats, and seasonal variations in animal and plant abundance allowing Tsilhqot'in people to sustain themselves from these resources.

104 The plaintiff seeks to demonstrate regular use of all of the various geographical areas that comprise the Claim Area pursuant to an organized pattern of occupation. This pattern consists of systematic, oscillating, regular use of the plateau lands, its lakes, rivers and streams and the mountainous regions of the Claim Area.

105 The plaintiff argues that this evidence is presented through the lens proposed by the Supreme Court of Canada in *Delgamuukw* and *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 (S.C.C.). This evidence is grounded in the perspective of Tsilhqot'in people and focuses on the cultural, economic and legendary significance of their land use patterns.

106 British Columbia argues that the plaintiff has advanced an "all or nothing" claim and, accordingly, the Court may only find Aboriginal title to the Claim Area in either Tachelach'ed or the Trapline Territory, or reject the claim outright. British Columbia characterizes the plaintiff's original review of the evidence as:

... a vast amount of loosely organized information concerning a number of uses to which a variety of geographic areas — some relatively localized, some not, some inside the Claim Area, some not — have in different times and by different sets of people been put. Rarely does the Plaintiff include details that would allow the Court to understand what the evidence shows concerning the frequency, intensity or general time frame for the alleged traditional use in question.

Because the Plaintiff has chosen to organize his review of the evidence of use of land in Appendix 3 by season, as opposed to by use for traditional purposes or by specific geographic location (as in [British Columbia's] Appendix 2), it is very difficult to analyse the evidence in a way that might be helpful to the Court.

107 In his reply, the plaintiff takes issue with British Columbia's characterization of his argument and his review of the evidence. The plaintiff argues that the Court has jurisdiction to make a declaration of title with respect to all or a portion of the Claim Area. In particular, he argues the Court has jurisdiction to find that portions of the component parts of the Claim Area, Tachelach'ed and the Trapline Territory, may also be found to be definite tracts of land that qualify for a declaration of Aboriginal title.

108 To demonstrate this point, the plaintiff took the same body of occupation evidence that is presented in the main argument according to season and by geographical location. This presentation of the occupation evidence is set out in the plaintiff's reply, Appendix 1A and Appendix 1B. This allows the Court to consider the evidence associated with each of the various tracts of land that comprise the Claim Area. Thus the Court had the benefit of considering the occupation evidence from the perspective of traditional, seasonal use (as conveyed for the most part in Appendix 3 of the main argument) or from the perspective of geographical location (as set out in the reply Appendices 1A and 1B).

109 Both defendants object to the submissions set out in Appendices 1A and 1B. They say that the Trapline

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Territory and Tachelach'ed are the only two definite tracts of land pleaded in the statement of claim. Together they are defined as the Claim Area. The defendants say that the disputed appendices set out alternate definite tracts of land within the larger Claim Area. No motion has been filed to amend the statement of claim to allow the Court to consider each of these tracts of land individually.

110 The defendants say they are prejudiced by the plaintiff's late stage attempts to convert the pleaded definite tracts of land — Tachelach'ed and the Trapline Territory - into smaller definite tracts of land. In their submission, the plaintiff is bound by his pleadings and cannot succeed simply by saying the smaller definite tracts of land are all included in the greater Claim Area.

111 By way of example, counsel for both defendants point out that the southern boundary of Tachelach'ed was described differently by three Aboriginal witnesses. At the time the evidence was heard, they did not consider the southern boundary of Tachelach'ed to be an issue in the case. If it were an issue, they say it would have prompted a different cross examination of the witnesses. In their submission there is a resulting prejudice. If smaller definite tracts of land are to be considered, notice of such tracts should have been set out in the pleadings. The defendants say this would have triggered a different approach to the evidence in the course of the trial.

112 In *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C. S.C.) the plaintiffs claimed ownership and later Aboriginal title to 133 individual tracts of land on behalf of 51 "Houses". The sum of the individual tracts equaled the total landmass of the overall territory claimed. The claims were rejected by the trial judge for various reasons. One reason was that the internal boundaries of the individually claimed portions of the territory had not been established. On appeal in *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 (B.C. C.A.), Macfarlane J.A., for the majority, said the following at p. 499:

The plaintiffs did not establish to the satisfaction of the trial judge they had the requisite exclusive possession of land to make out their claim for ownership except in locations already within reserves. As well, there was significant difficulty with the delineation of specific boundaries for the claim. It is clear that no one can own an undefined non-specific parcel of land. In my view the trial judge applied the relevant law in dismissing the plaintiffs' claim.

In addition to the claims of "ownership" and "jurisdiction", the plaintiffs also asked "the court to grant them whatever other rights they may be entitled to": *Delgamuukw* (B.C.S.C.) at p. 237. Although the plaintiffs did not amend their pleadings to claim other Aboriginal rights, McEachern C.J. concluded that "a claim for Aboriginal rights other than ownership and jurisdiction was also open to the plaintiffs": *Delgamuukw* (B.C.S.C.) at p. 283.

113 On appeal the plaintiffs sought to amalgamate the individual House claims into two claims, one brought by the Gitksan Nation and the second by the Wet'suwet'en Nation. The plaintiffs argued that there was no prejudice because the greater territorial claim was merely the sum of the individual claims. The Supreme Court of Canada rejected this argument. In the judgment of Lamer C.J.C. at para. 76, he said:

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 collect-

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ive 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.

114 It is clear from the foregoing passage that the Supreme Court was of the view that the collective claims were not in issue at trial. Thus, the Court was not prepared to allow the appellants to frame their case in a different manner on appeal because of the resulting prejudice to the respondents.

115 British Columbia argues that the plaintiff is attempting to reframe his case in the same manner as the plaintiffs on appeal in *Delgamuukw*.

116 The plaintiff relies upon the provisions of s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. That provision sets out a direction to the Court to grant "all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter...". I interpret those words to mean that appropriate remedies are to be granted for those matters that have been pleaded and proven to the satisfaction of the court at trial.

117 The plaintiff's amended statement of claim states at para. 10:

As part of the lands exclusively occupied by the Tsilhqot'in, at and before the time the British Crown assumed sovereignty, the Tsilhqot'in exclusively occupied lands known as the Brittany Triangle (the "Brittany"). The Tsilhqot'in continue to exclusively occupy the Brittany today.

118 Paragraph 11 of the amended statement of claim provides a geographical description of the boundaries of Tachelach'ed. Paragraph 12 states:

As part of the lands exclusively occupied by the Tsilhqot'in at the time of British sovereignty, the Tsilhqot'in exclusively occupied the whole of the lands within the boundary of Trapline Licence #0504T03 issued by British Columbia (the "Trapline Territory"). The Tsilhqot'in continues to have exclusive occupation of the Trapline Territory today ...

119 The plaintiff seeks the following declarations in his amended statement of claim:

- a) A declaration that the Tsilhqot'in have existing Aboriginal title to the Brittany;
- b) A declaration that the Tsilhqot'in have existing Aboriginal title to the Trapline Territory.

120 The plaintiff does not explicitly claim Aboriginal rights or title to portions of the Tachelach'ed or Trapline Territories. Indeed, in para. 11, the plaintiff alleges Tsilhqot'in people occupied "the whole of the lands within the boundaries of Trapline Licence #0504T003". In the prayer for relief the plaintiff does not seek a declaration that Tsilhqot'in people have existing Aboriginal title to the Claim Area *or any portions thereof*. A plain reading of the pleadings shows the plaintiff has claimed Aboriginal title over all of the lands, which may be said to be an "all or nothing" claim. The plaintiff is now attempting to reframe his claim to include Aboriginal title over smaller included portions of Tachelach'ed and the Trapline Territory.

121 It appears that British Columbia was aware of the potential for this alternative claim to title over portions of these defined areas. In its amended statement of defence, British Columbia does not admit that the Tsil-

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hqot'in Nation exclusively occupied Tachelach'ed or the Trapline Territory: para. 12(a), but says in the alternative at para. 12(c):

... that if the Aboriginal activities that may have been practiced by the Ancestral Tsilhqot'in Groups constituted occupation establishing Aboriginal title to any portions of the Brittany or Trapline Territory, such occupation did not extend to the whole of the Brittany or the Trapline Territory, but only to limited portions thereof and put the Plaintiff to the strict proof of the location and extent of such limited portions;

122 Although British Columbia may have been aware of an alternate claim to portions of the Claim Area, any mention of this in the statement of defence is not a *de facto* amendment of the plaintiff's pleadings. More importantly, such a plea does not define the smaller tracts of land said to be contained within the two component parts of the Claim Area.

123 In *Delgamuukw* (S.C.C.) at para. 76, Lamer C.J.C. declined to allow the plaintiff's to "frame the case in a different manner on appeal" because it "would retroactively deny the respondents the opportunity to know the appellants' case". The Supreme Court of Canada ruled that the plaintiffs could not amend their claim to make a collective claim for Aboriginal rights and title because it was simply not the case the plaintiffs had originally pleaded. Similarly the plaintiff here did not claim *portions* of Tachelach'ed or the Trapline Territory in his statement of claim.

124 "Volume 36.1: Pleading", in *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1999) states at para. 51: "[a]n omission to seek an appropriately precise declaration may disqualify the party seeking it to such relief", citing *Biss v. Smallburgh Rural District Council*, [1964] 2 All E.R. 543 (Eng. C.A.).

125 The plaintiffs in *Biss* were the owners of 105 acres of land known as Warren Farm. Shortly after purchasing the property, the plaintiffs cleared nine acres and advertised the lands as a site suitable for caravans and campers. The plaintiffs' application to the district planning authority for a license to use some of the lands as a caravan site was denied.

126 The plaintiffs asked the court for a declaration that either 72 acres or alternatively 35 acres of Warren Farm was eligible for a licence. The trial judge declared that the plaintiffs were entitled to a site licence for the 9 cleared acres. On appeal, the court found that the 9 acres of declared lands were the trial judge's own invention and there was no attempt to lead evidence to prove anything smaller than the portions actually claimed in the statement of claim.

127 Harman L.J. of the English Court of Appeal described the plaintiffs' cross appeal as follows at pp. 553-554:

... the cross-appeal was conducted after the manner of a Dutch auction where the auctioneer starts at the top price and comes gradually down till he finds a bidder. So here various lines of demarcation were suggested coming down at last to about three acres round the house, and we were treated to a minute review of the evidence ... of the stationing of caravans (a) on the area immediately to the south of the farm-house, (b) between it and the sea, and (c) round about the first pylon carrying the electric power line to the house. I do not think that this is a legitimate way of conducting an action such as this. No suggestion was made of any amendment of the pleadings, which be it remembered dealt only with the seventy-two acres or the thirty-five acres as a whole, and I do not think that the remedy by declaration can be properly used in this way. It is a useful method, but I think that he who seeks a declaration must make up his mind and set out in his

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pleading what that declaration is.

128 The Court of Appeal's reasoning in *Biss* echoes the concerns raised by the defendants here. In my view, the plaintiff must make up his mind and set out in his pleadings exactly what declaration he seeks.

129 I am bound by the conclusions reached by the Supreme Court of Canada in *Delgamuukw*. I conclude that the reply argument Appendices 1A and 1B are a reframing of the plaintiff's case. The case is framed as an "all or nothing" claim. To allow the plaintiff to now seek declarations over portions of the Claim Area would be prejudicial to the defendants.

130 I should acknowledge, however, that I have rejected British Columbia's request that I not consider the material in reply Appendices 1A and 1B. I have found the material to be helpful from two perspectives. The first is in an overall assessment of the entire body of evidence on the issue of Tsilhqot'in Aboriginal title. The second relates to the opinions I express on potential Tsilhqot'in Aboriginal title inside and outside the Claim Area. These opinions are not binding on the parties, but emerge from a consideration of the entire evidentiary record. For these assessments, I have found the plaintiff's method of organizing the evidence in reply Appendices 1A and 1B to be helpful.

5. Evidentiary Issues

a. Oral History / Oral Tradition Evidence

131 Tsilhqot'in was not a written language until the last half of the twentieth century. The history of the Tsilhqot'in people is an oral history, accessed by listening to the stories and legends told by Tsilhqot'in people. The listener is taught how the land was formed; the need to respect the land and all it has to offer; the bond between plants, animals and people; the rules that must be followed and the consequences of failing to follow those rules; places and events that shape the lives of Tsilhqot'in people; and all those matters of importance that provide substance and meaning to the life of a Tsilhqot'in person.

132 The absence of a Tsilhqot'in written record raises a number of evidentiary challenges. The plaintiff must lead evidence about a pre-contact Aboriginal society "across a gulf of centuries and without the aid of written records": *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, 2001 SCC 33 (S.C.C.) at para. 27. Courts that have favoured written modes of transmission over oral accounts have been criticized for taking an ethnocentric view of the evidence. Certainly the early decisions in this area did little to foster Aboriginal litigants' trust in the court's ability to view the evidence from an Aboriginal perspective. In order to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization.

133 This process requires a court to not only "peer beyond recorded history" but also to set aside some closely held beliefs about the reliability of oral history evidence. The Supreme Court of Canada provided some general direction on the use of oral history and oral tradition evidence in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.) 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

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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.

134 In *Delgamuukw* (S.C.C.), at para. 80, Lamer C.J.C. repeated those words and emphasized that the evidence must not be undervalued merely because it does not conform precisely to existing or traditional evidentiary standards. He continued at paras. 81-82 as follows:

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).

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.

135 The description of Aboriginal oral history found in the *Report of the Royal Commission on Aboriginal Peoples* (1996), Vol. 1 (*Looking Forward, Looking Back*), at p. 33, and quoted by Lamer C.J.C. in *Delgamuukw* at para. 85, bears repeating here:

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

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they define their identity in relation to their environment, and how they express their uniqueness as a people.

136 In a fact-driven process, such as the determination of Aboriginal rights and title, one must sift through the layers of oral history and oral tradition evidence with an awareness of context and an appreciation of the role of that tradition within Aboriginal society. Lamer C.J.C. addresses this process at paras. 86-87, as follows:

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.

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...

137 Many of the oral histories and oral traditions I was privileged to hear in this case were woven with history, legend, politics and moral obligations. This form of evidence is a marked departure from the court's usual fare and poses a challenge to the evaluation of the entire body of evidence. Courts generally receive and evaluate evidence in a positivist or scientific manner: a proposition or claim is either supported or refuted by factual evidence, with the aim of determining an objective truth. However, in cases such as this, the "truth" which lies at the heart of the oral history and oral tradition evidence can be much more elusive.

138 In *Mitchell*, McLachlin C.J.C., at para. 33, said the following:

The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonable reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

139 The foregoing observations by McLachlin C.J.C. provided the foundation for my decision in *Xeni*

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Gwet'in First Nations v. British Columbia, 2004 BCSC 148 (B.C. S.C.). I concluded that a central question on the admissibility of hearsay evidence was the issue of reliability. To provide the defendants with the opportunity to test the reliability of oral evidence proffered by the plaintiff, I established a procedure that was followed by counsel whenever a witness was expected to give oral history or oral tradition evidence. Now that this evidence has been heard, the more difficult issue of evidentiary weight must be addressed.

140 Jan Vansina is an anthropologist and a leading authority on oral history and oral tradition evidence and the role it can play in historical reproduction. Vansina was accepted as an authority by both John Dewhirst for the plaintiff and Dr. Alexander von Gernet for Canada, the two experts who provided opinions on oral history and oral tradition evidence at trial.

141 In his seminal work, *Oral Tradition As History* (Madison: The University of Wisconsin Press, 1985), Vansina makes a distinction between oral history and oral tradition. There is a very helpful explanation at pp. 12-13:

The sources of oral historians are reminiscences, hearsay, or eyewitness accounts about events and situations which are contemporary, that is, which occurred during the lifetime of the informants. This differs from oral traditions in that oral traditions are no longer contemporary. They have passed from mouth to mouth, for a period beyond the lifetime of the informants ...

...

As messages are transmitted beyond the generation that gave rise to them they become oral traditions ...

142 At pp. 27-28, Vansina defines oral traditions as follows:

We are now ready to define oral traditions as verbal messages which are reported statements from the past beyond the present generation. The definition specifies that the message must be oral statements spoken, sung, or called out on musical instruments only. This distinguishes such sources not only from written messages, but also from all other sources except oral history. The definition also makes clear that all oral sources are not oral traditions. There must be transmission by word of mouth over at least a generation. Sources for oral history are therefore not included. On the other hand the definition does not claim that oral traditions must be "about the past" nor that they are just narratives ...

143 Appellate Courts, including the Supreme Court of Canada, have used the terms oral history and oral tradition interchangeably. In situations involving claims for declarations of Aboriginal title and rights, it would appear that the evidence tendered includes both oral tradition and oral history evidence. However, it is the oral tradition evidence in Aboriginal rights and title cases which may be the only available evidence relating to an event or situation which occurred prior to sovereignty assertion or first contact.

144 Oral traditions about a pre-sovereignty event (for example) pass through a chain of transmission to the present day. Vansina discusses this chain and its implications at p. 29 of his text:

The first and simplest model supposes that an observer reported his experience orally, casting it in an initial message. A second party heard it and passed it on. From party to party it was passed on until the last performer, acting as informant, told it to the recorder. A chain of transmission exists in which each of the parties is a link. From the definition ... it is evident that to a historian the truly distinctive characteristic of

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oral tradition is its transmission by word of mouth over a period longer than the contemporary generation. This means that a tradition should be seen as a series of successive historical documents all lost except for the last one and usually interpreted by every link in the chain of transmission. It is therefore evidence at second, third or nth remove, but it is still evidence unless it be shown that a message does not finally rest on a first statement made by an observer. It cannot then be evidence for the event or situation in question, even though it still will be evidence for later events, those that gave rise to the "false" message.

145 Vansina also points out that the transmission is not a communication from "one link in one generation to a link in the next one". Rather, "the transmission really is communal and continuous": Vansina, p. 30. Oral traditions and their communication are a vital part of Tsilhqot'in society. They are told and retold while hunting or fishing, at camp, at gatherings or at home. As Chief William testified: "that's the only way that we were Tsilhqot'in".

146 Applying Vansina's definition, the evidence tendered by the plaintiff can be characterized as both oral tradition and oral history evidence. The oral tradition evidence consists of verbal messages from the past beyond the present generation. Examples of this type of evidence include: descriptions of how and where the ?Esggidam (ancestors) participated in seasonal rounds; evidence of the locations of cultural depressions (the visible remains of Tsilhqot'in dwellings) that are understood to be created by the ?Esggidam; evidence about the formation of particular landmarks; and legends such as Lhin Desch'osh. These reported transmissions are communal and continuous. Other evidence can be characterized as oral history evidence. Examples of oral history include evidence of when a witness participated in seasonal rounds and how he or she learned from parents or grandparents about how to construct and live in traditional shelters.

147 Although oral traditions are continuous, unlike written documents they may change through their transmission. Vansina discusses this key distinction between oral and written accounts at pp. 195-6:

Oral and written sources differ with regard to the subjectivity of the encoder of the message. Oral sources are intangible, written sources are tangible. Tangible sources survive unaltered through time and are defined by their properties as objects. If they can be dated, they testify directly to the time of their manufacture. In this, a written source participates in the advantage of an archaeological source or an ancient monument. Nothing has altered the source since it was made, and because written sources are the only ones which are both messages and artifacts, the subjectivity of the encoder of the message is clear and unaltered since the time of writing. Copyists can add or subtract from the original message and add yet another interpretation to the message, but even there the sum of interpretations ends at the date of writing. Hence the concern of scholars with originals and contemporary, "first hand" written data. Here subjectivity is reduced to a minimum: an interpretation encoding the message at the time of the event and an interpretation of the decoder, the historian.

When sources are intangible, such as oral tradition, ... they must be reproduced from the time of their first appearance until they are recorded. ... That means that they accumulate interpretations as they are being transmitted. There is no longer an original encoding interpretation and a decoding one, but there are many encoding and decoding interpretations ...

Nevertheless, one should keep in mind that the first encoded message limits the decoder's interpretation. Hence, and however much various successive encoders have altered original messages through selection or interpretation, they were also restrained by the previous interpretations. Such interpretations are therefore

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cumulative. The one a researcher is confronted with is to a degree a collective interpretation. It is the product of a continuing reflection about the past, the goal of which was not to find out "what really happened," but to establish what in the past, believed to be real, was relevant to the present.

148 Tsilhqot'in oral traditions come to life within that community. They are told and retold to members of that group within the context of a specific geographical location — Tsilhqot'in territory. How the community interprets those traditions is an unfolding process, based on their environment and culture. The oral traditions demonstrate how Tsilhqot'in people "establish what in the past, believed to be real, was relevant to the present".

149 Some Tsilhqot'in oral traditions have become written documents after they were recorded by visiting anthropologists. Reading the collection of legends collected by Livingston Farrand, *Traditions of the Chilcotin Indians* (New York: 1900) and listening to the oral version of particular legends provided by Tsilhqot'in elders at trial, I was able to observe that stories have changed with the passage of time.

150 Changes in an oral tradition pose a challenge where one seeks to use the evidence provided by that oral tradition to reconstruct the past. Vansina advocates a particular methodology when using oral history or oral tradition evidence for historical reproductions. He states at p. 196:

It follows that oral traditions are not just a source about the past, but a historiography (one dare not write historiography!) of the past, an account of how people have interpreted it. As such oral tradition is not only a raw source. It is a hypothesis, similar to the historian's own interpretation of the past. Therefore oral traditions should be treated as hypotheses, and as the first hypothesis the modern scholar must test before he or she considers others. To consider them first means not to accept them literally, uncritically. It means to give them the attention they deserve, to take pains to prove or disprove them systematically for each case on its own merits.

151 Dr. Alexander von Gernet was called as a witness by Canada. He is an anthropologist and ethnohistorian. He was qualified to express opinions in the fields of oral history and oral traditions. His evidence on these subjects has been accepted and relied upon by other courts: see, for example, *Benoit v. Canada*, 2003 FCA 236, 228 D.L.R. (4th) 1 (Fed. C.A.). Dr. von Gernet wrote two reports for Canada to assist the Court in this case. The first report is entitled *Oral History and Oral Tradition Evidence in the Forensic Reconstruction of Aboriginal History and Practices* (May 2006). This report advocates assessments on a case by case basis. Dr. von Gernet's evidence was that oral history and oral tradition evidence must be assessed by making three distinct inquiries into:

- 1) The context of the performance in which the oral history is related;
- 2) The internal coherence of the oral history; and,
- 3) An external comparison of the oral history with outside sources.

152 The third branch of this approach calls for some independent corroboration of the oral tradition evidence. Rejecting oral tradition evidence because of an absence of corroboration from outside sources would offend the directions of the Supreme Court of Canada. Trial judges are not to impose impossible burdens on Aboriginal claimants. The goal of reconciliation can only be achieved if oral tradition evidence is placed on an equal footing with historical documents. Oral tradition evidence "would be consistently and systemically undervalued" if it were never given any independent weight but only used and relied upon where there was confirmat-

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ory evidence: see *Delgamuukw* (S.C.C.) at para. 98.

153 Canada says it is not their position, nor the position of Dr. von Gernet, that oral tradition evidence can only be given weight when it is corroborated by documentary or archaeological evidence. Corroboration will, of course, increase the ability of the court to assess historical factual accuracy. However, when oral history cannot be corroborated, it may still bear independent weight and the court must do its best to evaluate its strengths and weaknesses. Canada submits that, even where oral tradition is contradicted by documentary evidence, oral tradition evidence may still prevail and assessments must be made to gauge which, on a balance of probabilities, is more plausible. Such an approach is in keeping with the directions set out by the Supreme Court of Canada.

154 Despite what Canada has argued, I was left with the impression that Dr. von Gernet would be inclined to give no weight to oral tradition evidence in the absence of some corroboration. His preferred approach, following Vansina, involves the testing of oral tradition evidence produced in court by reference to external sources such as archaeology and documentary history. In the absence of such testing, he would not be prepared to offer an opinion on the weight to be given any particular oral tradition evidence. If such testing did not reveal some corroborative evidence, it is highly unlikely that he would give any weight to the particular oral tradition evidence. This approach is not legally sound. Trial judges have received specific directions that oral tradition evidence, where appropriate, can be given independent weight. If a court were to follow the path suggested by Dr. von Gernet, it would fall into legal error on the strength of the current jurisprudence.

155 Dr. von Gernet also presented a second report entitled *Analysing Tsilhqot'in Oral Traditions*. In this report, Dr. von Gernet assessed the oral tradition evidence submitted in this case. At p. 4, he explains his role in this regard was "to assist the Court in assessing whether, or to what extent, oral tradition evidence is useful and reliable in the forensic reconstruction of an actual past, without in any way usurping the Court's function of assessing the credibility of the witnesses through whom such evidence has been tendered." Dr. Von Gernet arrived at two conclusions at pp. 91-92:

Many, but by no means all, of the Tsilhqot'in personal narratives or oral traditions are rich in detail and internally consistent with each other. Here, as in many other cases, some elements of the traditions may be used either independently or in concert with other evidence to reconstruct the lifeways of people in the past, at least in the short term. The problem is that, while they may be reliable in some respects (such as a record of certain traditional fishing or hunting practices), in this instance, they are not a reasonably reliable historical record of the actual use of particular locations at or prior to 1846.

...

In general, the traditions relating to the "Chilcotin War" are not unlike other Aboriginal traditions about specific nineteenth-century events, in that they likely contain at least some independent information about what actually happened, together with modern inferences about why things happened. Once again the problem is the use to which they are now being put. Having examined the Tsilhqot'in oral traditions about this war, it is my opinion that this corpus does not strongly support a theory that the Tsilhqot'in people of 1864 intended to maintain exclusive use and occupancy of the Claim Area, particularly since the story-tellers (including the Plaintiff himself) cite alternate motivations.

156 While Dr. von Gernet's second opinion concludes with a touch of argument, it is an opinion that has been expressed by others in the course of this trial. While I accept much of what Dr. von Gernet has said, I conclude he would not give oral tradition evidence any weight without some corroboration from an outside source.

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As I have noted, this approach is not supported by the jurisprudence. When I consider the oral tradition evidence about the Tsilhqot'in War, I believe it does give some support to a theory that the Tsilhqot'in people of 1864 intended to maintain some control over the use and occupation of Tsilhqot'in territory by others. I am called upon to weigh that evidence along with all the other evidence I heard concerning the causes of that historic conflict.

157 The plaintiff relies upon the evidence of John Dewhirst, a cultural anthropologist. In my preliminary ruling on the issue of oral tradition evidence, I relied on an opinion of Dewhirst that had been filed in affidavit form.

158 In his affidavit, Dewhirst expressed the view that Tsilhqot'in oral history is maintained primarily by repetition and that Tsilhqot'in people are generally reluctant to relate oral history unless they are confident they are able to accurately recount an event or piece of knowledge. He also said that Tsilhqot'in people have a "subtle and intricate system of cultural checks related to the transmission of oral history". This system includes: (1) repetition between family members providing opportunities to check consistency; (2) caution in relating oral history only if they are confident and certain; (3) deference to those who are more knowledgeable and/or raised in a "traditional way"; (4) recognition by elders of their role to relate oral history to the young; and (5) relating oral histories when engaged in traditional activities at particular places.

159 Dewhirst acknowledged his work has been influenced by Vansina's approach to the assessment of oral tradition evidence. Dewhirst was much less critical of oral tradition evidence and, contrary to the Vansina approach, less concerned with providing or disproving such evidence "systematically for each case on its merits". He was, however, prepared to give it independent weight and, to that extent, he was following the directions of the Supreme Court of Canada.

160 Dewhirst was able to check his oral history and oral tradition sources in his geneology work. His efforts to identify the ancestors of the modern Xenigwet'in community was of great assistance to the court.

161 Tsilhqot'in oral history and oral tradition practices are somewhat less formal than those reported in *Delgamuukw* (B.C.S.C.). In that case the trial judge was presented with the *adaawk* and *kungax* of the claimant First Nations, which Lamer C.J.C. described, at para. 93, as follows:

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*.

162 The trial judge in *Delgamuukw* was also called upon to consider oral history evidence, which he characterized as "recollections of aboriginal life." He also considered the "territorial affidavits", affidavits sworn by claimant group chiefs attesting to the territorial holdings of each Gitksan or Wet'suwet'en House.

163 Tsilhqot'in oral history and oral tradition evidence can loosely be grouped into three categories. The first category, constituting the majority of the oral history evidence, can be generally characterized as "recollections of aboriginal life" as that heading was described in *Delgamuukw*. Evidence in this category consists of a witness's account of what he or she learned from deceased individuals within the community concerning genea-

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logy or traditional activities and practices, including land use.

164 The second category consists primarily of a witness's version of legends and stories about events from the more distant past — oral traditions said to be shared by the larger community.

165 The third category relates to specific historical events. I include in this category: the Tsilhqot'in War, an encounter with the "Qaju" or Homalco people on the slopes of Potato Mountain and the forced removal of Edmund Elkins from Lhiz Bay Biny to the Elkin Creek area.

166 Oral traditions differ from Aboriginal nation to Aboriginal nation. Even within an Aboriginal group, the oral traditions of the community may be handed down across generations in a variety of ways. Some of these mechanisms of transmission may be highly formalized and structured, others entirely without form or structure.

167 The Tsilhqot'in method of oral transmission is an expression of their non-hierarchical society and culture. While elders (and in some instances, particular elders) are recognized as having more expertise in the relating of oral history and traditions, there are no formally recognized experts within Tsilhqot'in society. Nor does an individual require community permission or authority to relay oral traditions. Some elders said that story tellers would be corrected if the story were told incorrectly. Others did not accept that proposition. Some elders said that certain oral traditions (myths and legends) could only be told after sunset, others disagreed. Those witnesses who would not tell stories until after the sun had set were accommodated by the Court holding special evening sittings. Other witnesses were comfortable telling the stories during the normal daylight sitting hours. Formalities about story telling varied with the witnesses. These differences of opinion on the formalities of story telling do not detract from the weight to be given to the oral histories and traditions.

168 I agree with the view expressed by Dr. von Gernet that many of the Tsilhqot'in personal narratives or oral traditions are rich in detail and internally consistent with each other. As Dr. von Gernet concludes, some elements of these oral histories and traditions "may be used either independently or in concert with other evidence to reconstruct the lifeways of people in the past, at least in the short term". They are reliable as a record of certain traditional fishing or hunting practices. Contrary to the view he expressed, I find that some oral tradition evidence of Tsilhqot'in people does assist in the construction of a reasonably reliable historical record of the actual use of some portions of the Claim Area at or prior to 1846.

169 The myths and legends of Tsilhqot'in people connect them to their land. Can these myths or legends assist in any measure to provide historical evidence for the periods that are relevant in this case?

170 Lhin Desch'osh is a central Tsilhqot'in myth. According to Tsilhqot'in witnesses, it is an account of both their origins as a distinctive Tsilhqot'in people, and of their shared homeland. The version of Lhin Desch'osh (Lendix'tcux) recorded by Farrand in 1897 mentions "Chilcotin country" and provides a rough sketch of some of its most distinctive features, including the Tsilhqox (Chilco River), Tsilhqox Biny (Chilko Lake) and the Dasiqox (Taseko River). The plaintiff invites the court to infer that Tsilhqot'in people were using and occupying these locations for a long time prior to 1897 because the locations were recorded by Farrand in this important and elaborate myth.

171 In his report Dr. von Gernet expressed the opinion that "a raconteur's identification of his or her source (e.g. grandparent or respected elder), a faithful reproduction, frequent repetition and an assurance that the story is very old, are insufficient to show that we are dealing with a myth related from remote times by a particular culture": von Gernet Report, p. 49. Furthermore, he says at p. 50 that "most of the Tsilhqot'in myths published

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by Farrand are, *for whatever reason*, essentially the same as those told by other peoples, are fragments of longer myths told elsewhere, or are local adaptations of a standard repertoire".

172 The evidence I heard leads to the conclusion that a variation of this story is part of the repertoire of many North American Aboriginal groups. The references to local geography are adapted to suit local conditions. One witness told the court that the Toosey people have different and fewer "stone dogs" — referred to in Lhin Desch'osh - than the Xení people. Dr. von Gernet noted that the Secwepemc (Shuswap) version of the Lhin Desch'osh myth (told to Farrand eight years before he visited Tsilhqot'in people) contains references to specific locations within Secwepemc territory.

173 The commonality between the oral traditions of North American Aboriginal groups is not surprising. The Tsilhqot'in people share a common ancestry with other Athapaskan people. There was also an active trade system between neighbouring Aboriginal groups which provided an opportunity to communicate stories and legends. As groups of people migrated and shifted their geographical locations, the details of the stories and legends also shifted to match the groups' current subjective experience. This gradual shift makes it difficult, if not impossible, to place an accurate time depth on a peoples' arrival in any particular area based on the details contained in myth or legend.

174 The legend of Ts'il?os and ?Eniyud tells of the origin of Ts'il?os (Mount Tatlow), of ?Eniyud Dzelh rising to the west of Talhiqox Biny (Tatlayoko Lake) and of the planting of wild potatoes throughout Tsimol Ch'ed (Potato Mountain) and Xení (Nemíah Valley). Tsilhqot'in people rely upon this legend to assert that they have occupied these spaces since the origins of the land itself. I do not challenge the sincerity of these beliefs. However, neither this legend nor the legend of Lhin Desch'osh can be taken as evidence that Tsilhqot'in people used or occupied those locations from the beginning of time.

175 However, given the ages of some witnesses who recounted the legend of Lhin Desch'osh for the court, and understanding that Farrand heard the legend from Tsilhqot'in people in the late nineteenth century, I am satisfied that the legend was developed before first contact with Europeans and well before fur traders of the HBC visited the Claim Area in the second quarter of the nineteenth century. Farrand does not report hearing the legend of Ts'il?os and ?Eniyud. However, I am satisfied that legend shows territorial familiarity of Tsilhqot'in people stretching back several generations into the eighteenth century.

176 The most detailed version of the story of Lhin Desch'osh was presented as a written exhibit, as recorded in Livingston Farrand's 1900 publication, *Traditions of the Chilcotin Indians*. I heard many elders relate portions of the legend of Lhin Desch'osh, a legend that is said to be a Tsilhqot'in creation story. The story, as told to me in court, was consistent in theme and lesson but lacked consistency in detail. Herein lays an excellent object lesson.

177 There is a natural tendency to view Farrand's account and conclude that much has been lost in the ensuing century. But I do not know how Farrand collected and constructed his version of the legend. I do not know how many Tsilhqot'in people he interviewed. I do not have evidence as to whether he accurately recorded or indeed, if he took any literary licence. If all the oral versions of Lhin Desch'osh available today could be recorded and compiled as a single version, how would that document compare with Farrand's account?

178 This points to the conclusion that it is not details that need close examination. If the legend is to establish "what in the past, believed to be real [is] relevant to the present", I must be sensitive to the fact that I am listening to "a communal and continuous communication" and it is the underlying theme or lesson that provides

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consistency to the legend. Thus, as a listener, I must gather up the fragments of this collective story and seek to determine what, if anything, it tells me about the presence and activities of Tsilhqot'in people in the Claim Area pre-contact and at the time of sovereignty assertion.

179 Anthropologist Robert Lane spent approximately 12 months living with and studying Tsilhqot'in people between 1948 and 1951. His recordings of Tsilhqot'in oral histories during those years are a valuable record against which to consider the oral histories adduced at trial.

180 A review of Lane's work indicates there may be some loss of Tsilhqot'in oral traditions concerning the presence of other Aboriginal people in the Claim Area. In his article entitled "Chilcotin", included in Volume 6 of the *Handbook of North American Indians*, (Washington: Smithsonian Institution, 1981), Lane recounted the following oral tradition from his Tsilhqot'in informants at p. 402:

Many older Chilcotins believed that other peoples once lived in parts of what is now Chilcotin territory and that the Chilcotin at that time occupied the drainage system of the Chilcotin River above where it joins the Chilko River and perhaps the upper Nazko River. They believed that the Bella Coola once controlled most of the habitable lands along the east front of the Coast Range south of Anahim Lake. Salish people lived around the headwaters of the Homalco River. The main valley of the Chilcotin River was the home of a semi-mythical people, the ?enaycel 'little Salishan(s)' who lived in pit houses and subsisted on salmon. The Chilcotin entered the valley, scared the ?enaycel away, and took over the salmon fishery.

181 During the course of this trial, some witnesses provided oral tradition evidence about the ?Enaycel (Little Salishans or little Shuswap). However, many of the Tsilhqot'in witnesses did not relate stories regarding the ?Enaycel when asked about past residents of the Claim Area and some denied that others had ever occupied the Claim Area. I did not hear any oral tradition evidence regarding the Nuxalk (Bella Coola) controlling much of the habitable lands along the east front of the Coast Range south of Anahim Lake. I am not able to say if this area referred to by Lane would be inclusive of the Claim Area.

182 In his 1953 thesis entitled *Cultural Relations of the Chilcotin Indians of West Central British Columbia* (Ph.D. Thesis, University of Washington, 1953) [unpublished], Robert Lane also recounted Tsilhqot'in oral tradition. Lane described "Bute Inlet people" coming up to Tsilhqox Biny and building 'salt water' houses and canoes and attempting raids, at p. 91. According to Lane's informants, the Bute Inlet people stayed on the lake for several years and the Tsilhqot'in "simply avoided the lake at this time": thesis, p. 91. I did not hear any oral tradition evidence concerning these "salt water houses". There is nothing in Lane's work that would date the presence of these structures. By the time Alfred Waddington began the construction of his failed overland route to the gold fields, the historical record leads to but one conclusion: the Homalco people living at Bute Inlet feared the Tsilhqot'in and were reluctant to venture into Tsilhqot'in territory. I did hear oral tradition evidence recounting the killing of Tsilhqot'in young women on Tsimol Ch'ed by the Qaju (Homalco) and the subsequent reprisal attack and running off of these invaders by Tsilhqot'in warriors. However, there is certainly no historical evidence before me supporting the presence of Homalco people on Tsilhqox Biny.

183 Another set of Tsilhqot'in oral histories, described by Lane, that I did not hear at trial are accounts of non-Tsilhqot'in pit houses in and around the Claim Area. In his 1953 thesis, Lane distinguished between two types of pit house sites: "relatively large sites with numerous closely spaced pits ... located along the Chilcotin River or at the lower ends of large lakes in the western part of the country"; and small, widely scattered pit house sites with only a few pits in each site and located far away from the Chezqox (Chilcotin River): at p. 275.

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He concluded that the large sites were not Tsilhqot'in, based in part on Tsilhqot'in oral history:

The Chilcotin deny that they are Chilcotin sites or that the Chilcotin had ever wintered along the river. At least one of the important large sites is in territory which informants claim was never occupied by Chilcotin ... Furthermore, informants who deny Chilcotin occupation of the large river sites specifically identify them as Little Shuswap.

On the other hand, the Chilcotin do claim as their own the isolated lake pit house sites. The size of these sites is consistent both with knowledge of Chilcotin patterns of living and with the assumption that pit houses were only recently adopted by the Chilcotin. A few of these sites or pits can be associated with specific families.

184 Lane mapped the pit house sites that he was told about by Tsilhqot'in informants on Map 2 of his thesis at p. 36. He also indicates whether the pit house sites were said by Tsilhqot'in people to be Tsilhqot'in or non-Tsilhqot'in. In doing so, Lane noted that he visited few of the sites and made no methodical survey of them. It follows that he relied almost entirely on Tsilhqot'in oral history and oral traditions in this regard. Many of the sites identified as non-Tsilhqot'in by Lane (based on Tsilhqot'in oral tradition) are in and around the Claim Area and, more specifically, at the north end of Tsilhqox Biny and along the Tsilhqox.

185 The Tsilhqot'in oral history and oral tradition evidence attributes pit house sites in the Claim Area to the ?Esiggidam. Many witnesses specifically refuted the notion that other Aboriginal groups may have lived in the area and built or lived in any of the pit houses in and around the Claim Area. For example, Theophile Ubill Lulua stated that he had only heard of Tsilhqot'in people living in pit houses "around here" and that he had never heard that any other people were in "these territories".

186 Martin Quilt testified that he was told stories about "Little Shuswap" living near Tl'egwated (Kigli Holes) and building big pit houses. However, he still attributed all the pit house sites that he knew about to Tsilhqot'in people.

187 I acknowledge the archeological record is clear that some of the pit houses in the area are of a non-Tsilhqot'in origin. When I weigh the entirety of the evidence including: Lane's work, the oral traditions I heard at trial, the archeological and anthropological evidence, and the historical evidence; it does not reveal to me the presence of any other Aboriginal group in the Claim Area in the late eighteenth or early nineteenth century. I am not able to conclude that relevant oral traditions were kept from me during the course of this trial. I heard what was available to be heard.

188 Finally, I heard no oral tradition evidence concerning the migration of Tsilhqot'in people to the Claim Area. The evidence at trial was Tsilhqot'in people had lived in the region and in particular the Claim Area from the beginning of time. Doris Lulua said they had been there "ever since the earth began". Martin Quilt testified the Tsilhqot'in people came from in and around the Claim Area and had not moved there from some other location.

189 In his 1981 article, Robert Lane wrote, at p. 402, that "Their own recollections carry no hint of such a move. They have no traditions of migration or of the origin of themselves as a people". Similarly, the early ethnographer James Teit was unable to obtain any tradition of a migration of Tsilhqot'in people to the southeast.

190 In contrast, external sources consistently state that Tsilhqot'in people moved into the area in the not so

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distant past. Again, in his 1981 article at p. 402, Robert Lane wrote that "[t]he Chilcotin probably moved from a more northerly region onto the Chilcotin plateau in the not too distant past". He was inclined to place their move to their present location to a "very late date" and quite possibly linked to the movements of various Aboriginal groups taking place across Western Canada in the mid-eighteenth and early nineteenth centuries: Lane Thesis, p. 279.

191 Both James Teit and Livingston Farrand document the centre of the Tsilhqot'in community shifting from the Anahim Lake area down to the Chilcotin River Valley in the 1860's. Tsilhqot'in oral traditions do not record a migration into the Claim Area. As a result, I must look to other evidence to reconstruct this piece of the past.

192 I have also considered the reliability of Tsilhqot'in oral history evidence in the context of the story told about the death of Chief Sil Canem. This Tsilhqot'in oral history is contradicted by external sources. Chief Roger William testified about a persistent oral history among members of the Xenigwet'in that Chief Sil Canem was murdered in 1932 in order to prevent his securing Xenigwet'in as an Indian reserve. According to the oral history, Sil Canem had a paper by which the Federal Government set all of Xenigwet'in as a reserve but, before he could accomplish this goal, he was murdered by Andy George who had been hired by one of the Purjue brothers.

193 This oral history account concerning Chief Sil Canem is not confirmed by any external source and, in fact, is contradicted by the results of a coroner's inquest that described Chief Sil Canem as dying by falling in a fire, without mention of Andy George or any other act of murder.

194 One must always bear in mind that the reports to the Coroner might not be accurate. They are only as reliable as the evidence the Coroner received. Disrespect for Aboriginal people is a consistent theme in the historical documents. At this point in time, there is no way to reinvestigate this death to determine what actually happened. It is noteworthy, in passing, that a "conspiracy theory" about particular important events appears commonplace even within modern nation states.

195 I also did not hear any oral tradition evidence concerning the arrival of HBC people and the construction of Fort Chilcotin. HBC records lead one to conclude that the HBC was deliberately established in Tsilhqot'in territory to facilitate trade with Tsilhqot'in people. Nothing concerning its arrival or departure was considered significant enough from the Tsilhqot'in perspective to report these events from one generation to another. There are oral traditions concerning the visits of priests but they lacked any detail beyond the fact of the visits. There are also oral traditions that related to the events of the Tsilhqot'in War of which I will have more to say later.

196 I am satisfied that all of the witnesses who related oral tradition and oral history evidence at trial did so to the best of their abilities. The central theme and lessons of the legends remained consistent. I propose to take this entire body of evidence into account and to the extent that I am able, consider it from the Aboriginal perspective. If the oral history or oral tradition evidence is sufficient standing on its own to reach a conclusion of fact, I will not hesitate to make that finding. If it cannot be made in that manner, I will seek corroboration from the anthropological, archeological and historical records. I understand my task is to be fair and to try to avoid an ethnocentric view of the evidence.

b. Historical Documents

197 A comprehensive record of historical documents has been tendered in these proceedings. The records

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span the period from the eighteenth to the twenty-first centuries. It is surprisingly comprehensive, providing rich and informative details and insight on particular events.

198 The historical record includes the journals of early explorers of what was to become the Province of British Columbia. For example, there are extracts from the journals of Captain George Vancouver, Alexander Mackenzie and Simon Fraser.

199 Western Canada is the repository of the most complete records of first contact between Europeans and Aboriginal peoples anywhere in the world. This record is contained in the detailed journals kept by the Officers and Gentlemen of the HBC. Copies of the relevant journals, where available, form a valuable part of the record of this trial.

200 The fur traders were followed by Christian missionaries. Once again, where relevant and available, copies of the journals of missionary priests are part of the trial record. The arrival of missionaries had a profound and lasting impact on Tsilhqot'in people, many of whom embraced a new form of spirituality. The records of these early Christian missionaries make an important contribution to our understanding of this time in the history of British Columbia.

201 Some years later, railroad surveyors met and interacted with Tsilhqot'in people. The surveyors recorded their observations and opinions in journals that also form part of this trial's extensive record.

202 There are also copies of reports, correspondence and newspaper articles spanning a 250 year period. The written work of scholars who studied and reported on this record has also been of great assistance.

203 There is always a Eurocentric tendency to look for and rely on the written word. Try as one might, it is difficult to read these words and not see in them events as they really were. To follow this path in a trial of this nature would relegate oral history and oral tradition evidence to some lesser level of importance, contrary to the directions of the Supreme Court of Canada. Important as the historical documents are, I have attempted at all times to give equal weight to the oral history and oral tradition evidence.

6. Historical Narrative

204 What follows is not a comprehensive history of the Chilcotin Region of British Columbia. It is a sketch of the important events that have occurred in this area. It is intended to place the events of this trial and this judgment in an historical context.

205 As one might expect, the historical and pre-historic record of this part of British Columbia was not written by the Tsilhqot'in, but by Europeans and, subsequently, Euro-Canadians. Accordingly, it is important to consider Tsilhqot'in oral history to balance and complete the picture.

a. Pre-Historic Period

i. Dene/Athapaskan Migrations

206 There is some disagreement over the exact pathway and timing of early migrations into North America. Many archaeologists agree that the Nadene people arrived in North America approximately 10,600 radiocarbon years Before Present (BP). During the thousands of years following this migration the Nadene people diversified into many different cultures. Their subsequent migrations into different parts of North America led to the devel-

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opment of technologies and lifestyles suited to particular geographic locations.

207 Members of the Athapaskan language group are descendents of the Nadene people. Between 500 and 800 years ago, Tsilhqot'in people began to diverge (linguistically) from other Northern Athapaskan people.

208 Prior to the arrival of Athapaskan speaking people, the Chilcotin Region was populated by members of the Plateau Pithouse Tradition (PPT). Archaeologist Dr. Richard Matson was called as a witness for the plaintiff. He was qualified to express opinions concerning the length of time Tsilhqot'in people have been in the Claim Area. Dr Matson conducted field research on several different locations in the Chilcotin Region. One of those locations was within Tachelach'ed (Brittany Triangle). The other two locations were within the Trapline Territory. He determined that the PPT people commenced living on the Chilcotin Plateau approximately 2,000 years Before Present. The PPT people ceased occupation in that area sometime after 1400 AD but before 1500 AD.

209 The PPT is characterized in part by the pit house winter dwelling. The pit house is an elaborate structure. Most of the dwelling is below ground. A roof is built over the structure and is then covered with earth. These dwellings were usually assembled together in large groups close to a water source such as a river or lake.

210 The PPT people who lived in the Chilcotin Region may have spoken a variation of the Salish language.

211 What caused the PPT people to leave the Chilcotin Region is a mystery. Dr. Matson was unable to say where the PPT people went, or if people in neighbouring areas are descendents of these PPT people.

212 Pit house remains are located by the Chezqox (Chilcotin River) on the Chilcotin Plateau in Tachelach'ed and elsewhere in the Claim Area. Tsilhqot'in people associate some of these sites with a people known as the ?Ena Tsel (Little Shuswap).

213 As previously noted, Robert Lane, in his unpublished 1953 Ph.D. dissertation, noted that Tsilhqot'in elders recognized that a number of the areas more recently occupied by Tsilhqot'in people were previously inhabited by other groups.

214 The chasing of the ?Ena Tsel from the Tsilhqox (Chilko River) corridor, particularly in the area of Tl'egwated (Kigli Holes), was raised by more than one Tsilhqot'in witness in the course of the trial.

215 Tsilhqot'in oral traditions describe the ?Ena Tsel as a group of people with a short stature (3 or 4 feet tall), who spoke a language Tsilhqot'in people did not understand. According to these traditions the ?Ena Tsel lived in pit houses along the Tsilhqox. Some of the oral tradition evidence suggests that Tsilhqot'in people killed the ?Ena Tsel. Other oral tradition evidence suggests Tsilhqot'in people drove them away. The oral traditions do not explain where the ?Ena Tsel went and deny that the Stl'atl'imx (Lillooet), Nuxalk (Bella Coola), Secwepemc (Shuswap) are descendants of the ?Ena Tsel.

216 At around the disappearance of the PPT people, Athapaskan speaking people migrated into the region. Dr. Matson was unable to say with certainty whether these Athapaskan speaking people were Tsilhqot'in people or whether they were another Athapaskan people such as the Dakelh (Carrier). However, Dr. Matson assumed these people were Tsilhqot'in people based on Tsilhqot'in present occupation.

217 Athapaskan people traditionally built rectangular winter lodges consisting of a single ridgepole and combined roofs and walls to form an "A" shaped cross section. Athapaskan people also traditionally used a distinctive boat shaped hearth. They are also known to have built isolated pit house dwellings, smaller than those

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built by people of the PPT.

218 Athapaskan speaking people have populated the Chilcotin Region for hundreds of years. Dr. Matson concluded that Tsilhqot'in people have been in the region since at least 1645 - 1660 AD.

b. Proto-Historic Period

i. Early European Exploration to 1808

219 Over 500 years ago and before the migration of Tsilhqot'in people to the Claim Area, colonization of North America began with the migration of Europeans to this continent. In the sixteenth century Spanish people explored the continent's western shores. Shrouded in secrecy, Sir Francis Drake departed from Plymouth, England on December 13, 1577. His voyage consumed almost three years and is said to have reached to the shores of what is now British Columbia which he named New Albion: Samuel R. Bawlf, *The Secret Voyage of Sir Francis Drake* (Vancouver: Douglas and McIntyre, 2004).

220 In 1606 The First Charter of Virginia was signed. In *R. v. White* (1964), 52 W.W.R. 193, 50 D.L.R. (2d) 613 (B.C. C.A.), Norris J.A. said at p. 641:

In 1763 the full extent of the continent was not known, but the territories comprising it had been claimed by the British at least from the time of the Charter of Virginia in 1606 (C. M. Andrews, *Colonial Period of American History*, 1943, pp. 82-8).

221 In approximately 1745 a Tsilhqot'in war party destroyed the Dakelh village of Chinlac located at the confluence of the Stuart and Nechako Rivers, north of the Claim Area. The massacre was in retaliation for the death of a Tsilhqot'in leader. Three years later, in approximately 1748, a large number of Tsilhqot'in people were killed by Dakelh warriors in revenge for the Chinlac massacre.

222 In the eighteenth century, exploration of the coastal regions of the Province had begun, led by the Spanish traders Juan Perez and Juan Bodega y Quadra in 1774 and 1775 respectively. They were followed by British Captain James Cook in 1778. The East India Company sent two trade expeditions to the West Coast in search of furs: the first in 1785, the "Sea Otter" under the command of Captain James Hanna; and the second in 1786, the "Experiment" under the command of Captain James Strange.

223 In that same year, Captain John Meares made his first of several voyages to the West Coast to trade with coastal Aboriginal people for sea otter pelts. At the same time, he formally annexed the Strait of Juan de Fuca in the name of the King of Britain, not unlike other navigators who had preceded him in this area.

224 In 1785 an expedition was sent by the King George's Sound Company to develop trade with the inhabitants of the American northwest coast. The leaders of the voyage, Captains Nathaniel Portlock and George Dixon commanding the "King George" and the "Queen Charlotte", had previously accompanied James Cook between 1776 and 1780. They left England in 1785 and explored and traded along the Pacific coast of Canada between Cook's River and Nootka Sound in 1786. After selling their furs in China in 1787, they arrived back in England in 1788.

225 On June 4, 1792 Captain George Vancouver stepped ashore and claimed all of the land of what was later to become British Columbia on behalf of the British Crown.

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226 In 1793 Sir Alexander Mackenzie recorded the fact that he had reached the Pacific by inscribing his achievement on a rock face near Bella Coola. That same year Captain George Vancouver sailed by that rock face on his historic voyage. He demonstrated that Vancouver Island was separated from the mainland, and provided future generations of mariners with accurate maps of the northwest coast.

227 These Spanish and English explorers made contact with coastal Aboriginal people during their voyages. The interior of what is now British Columbia was known as New Caledonia to the European fur traders. Trade between Aboriginal people on the West Coast and their neighbours to the east resulted in European goods arriving into this interior region before the first European visitor.

228 The British reconnaissance of part of New Caledonia was led by Sir Alexander Mackenzie. On July 15, 1793 Mackenzie met with a small party of Aboriginal people in North Bentinck Arm, northwest of the Claim Area. These people were taking hides to the coast for trade. There is divided opinion on whether any of the Aboriginal persons at that meeting were Tsilhqot'in people. When describing the people he met, Mackenzie sometimes made use of designations that have not continued in the historical record beyond his account, and it is possible that one of these groups could have included Tsilhqot'in people.

229 In that same year, the Treaty of Paris was signed. Under the terms of that document, France ceded of its North American possessions to Great Britain.

230 Writing in 1900, James Teit noted that "about a hundred years ago a war-party supposed to be Chilcotin penetrated into the territory of the Shuswap, and went as far south as the north side of the Thompson River near Spences Bridge". He says that in their retreat, they were "almost exterminated": *The Jesup North Pacific Expedition*, Part IV, ed. by Franz Boas (New York: G. E. Stechert, 1909), at p. 269.

231 On June 1, 1808 Simon Fraser met "a tribe of Carriers who inhabit the banks of a large river which flows to the right; they call themselves Chilk-hodins". Fraser described the Tsilhqot'in people as being on horseback. On his return trip the following month, Simon Fraser wrote:

... we found the Old Chief with a large assembly of Atnahs and Chilkoetins [Chikotins]. The latter are from the westward and came on purpose to have a sight of us, having never seen white people before. They had the information of our return from the lower parts of the river by messages across the Country. The Chilkoetins ... are from the head of a river [the Chilkotin] ... they speak of their Country as plentifully stocked with all kind of animals ... (*The Letters and Journals of Simon Fraser*, ed. by W. Kaye Lamb (Toronto Pioneer Books), pp. 124-125).

c. Historic Period

232 The North West Company opened Fort Alexandria in 1814. The fort was named after Sir Alexander Mackenzie. Fort Alexandria was located in Dakelh country and was a central trading post in the region. Originally, the fort was located on the Fraser River about 30 km north of Soda Creek. After the merger of the North West Company with the Hudson's Bay Company in 1821, the fort was moved north, up the river to a Dakelh fishing site. Records and correspondence show the fort was moved across to the west side of the river in the hopes of attracting Tsilhqot'in people to trade.

233 In a letter dated November 28, 1821 John Stuart, the new Chief Factor of the amalgamated Hudson's Bay Company wrote to HBC clerk George McDougall who was stationed at Fort Alexandria suggesting a trad-

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ing excursion to the "Chilkoutins".

234 In January of 1822 McDougall travelled into Tsilhqot'in territory to trade and to explore opportunities for further trade. In a letter to Stuart dated January 18, 1822 McDougall described his trip "to the Chilkotins". He reported meetings with various "Chilkotin" Indians and his efforts to trade with them. McDougall wrote that they crossed the river and "got to a Lodge where we saw 3 Indians & their Families". He wanted to trade with them but "they had no Beaver, having worked it all into 3 or 4 New Beaver Robes we seen on their backs". The next day he traveled "8 or 9 more miles, which brought us to two ground Lodges containing 9 or 10 Families who had a few Furs" but were unwilling to trade because they had made them into "7 or 8 fine New Robes, that must have been made within a month". McDougall described the "Chilkotins" and their country in the following terms:

... a fine, brave looking set of Indians, whose lands are far from being poor either, as to beaver or Large Animals, if we can judge from what was told us & that part of their lands which fell under our immediate Eye corroborated a part, which their Dress was still a farther proof of what they told us, the Men being generally well and warmly clad, with good Chevreux, Elk, as well as some Carriboux Skins as Blankets, with good Leggings of excellent Leather, their women ... as well the Children are in general covered with good Beaver Robes ... from those we seen & who appeared to have some authority among them, we got much information respecting their Country in general ... the West side of the River abounds with Lakes & Small Rivers where there is a quantity of Beaver & of almost all kinds of Fish ... the East Side ... is their favourite hunting grounds for Large Animals, we who saw some moose skins ... but it appears that the Carriboux are the most numerous at certain seasons ... a Large Lake which they say is about a half a mile broad & takes them two days En Canot [by canoe] to go from the entrance to its extremity ...

235 In his letter, McDougall reported he asked the "Chilkotins" for an estimate of their population and was told that "there are 6 Large Ground Lodges, about the Lake, containing 53 Families ... in all along the River 29 Lodges containing 131 Families ...". He concluded that they have "one great Chief & 4 others somewhat respected ...". McDougall also took note that one of the Chilkotins he met:

... had a Gun, it was one of Barnetts 1808, he says he and several others have had Guns from Indians who came from the Sea, at the extremity of this Lake of theirs, they cross over a Mountain, which portage takes them from 5 to 6 days light, where they fall upon a River running in a Southerly direction & said to empty itself into the Sea.

236 In 1823 the HBC resolved that a "new establishment ensuing summer be made among the Chilcotin Tribes": Minutes of Council Northern Development of Pupert Land, 1821-31, ed. by R.H. Fleming (Toronto: Champlain Society, 1940), 5 July 1823, p. 45. For various reasons, several years pass before this establishment was made.

237 In December of 1825 the new HBC Chief Factor for New Caledonia, William Connolly, wrote in his "Journal of Occurrences New Caledonia District 1825/26" that he made an expedition into Tsilhqot'in territory to determine the feasibility of the proposed Chilcotin Post.

238 In the winter of 1826 four Talkotin hunters made an excursion into Tsilhqot'in territory and three of the Talkotin were killed by Tsilhqot'in people. This killing was followed by what has been described as a war between the Tsilhqot'in and Talkotin. The Talkotin sent a raiding party from Alexandria on April 19, 1827. They returned with twelve Tsilhqot'in scalps. In response, the Tsilhqot'in sent two groups of warriors to kill the

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Talkotin. The first group of 27 Tsilhqot'in warriors arrived near Fort Alexandria in June of 1827. They killed at least one Talkotin traveling from the Fort. A second group of 80 Tsilhqot'in warriors arrived at Fort Alexandria on September 24th. They launched a bloody battle against the Talkotins who were lodged in a fortified house near the fort. In the "Fort Alexandria District Report, 1827", the following was written:

... the bloody contest would have lasted much longer and probably to the annihilation of the Talkotins had we not given them [the Talkotins] assistance in Arms and Ammunition — which intelligence being conveyed by a Woman — they [the Tsilhqot'in warriors] immediately retreated — some crossing in Canoes (which they had the foresight of seizing) whilst others pursued the route a foot — previous to their departure, they did not refrain from expressing their opinion of our proceedings — breathing vengeance — and threatening to cut off any Whites that might hereafter fall in their way. *Part of Dispatch from George Simpson, Esq. ... to the Hudson's Bay Company* (London: Champlain Society, 1947), p. 214.

239 In approximately 1826 Louis Setah was born in Xení (Nemiah Valley). In approximately 1827 Old Nemiah was born in Xení.

240 In 1829 the HBC opened the Chilcotin Post. The location of Fort Chilcotin was described as being west of Tsulyu Ts'ilhed (Bull Canyon) between the junctions of Tish Gulhdzinqox (Alexis Creek) and the Chezqox with the Tsilhqox. This site is approximately 15 km east of the northern boundary of the Claim Area at the apex of Tachelach'ed. It is in close proximity to the site of three present-day Tsilhqot'in Reserves: about 8 km from the Tletincox-t'in (Anahim) Reserve on the north shore of the Tsilhqox; approximately 12 km from the Yun-esit'in (Stone) Reserve on the south shore of the Tsilhqox; and, approximately 8 km from the Tsi Del Del (Redstone) Reserve.

241 HBC faced many challenges in the establishment and operation of their Chilcotin Post. In a letter to George McDougall, dated January 28, 1830, Chief Factor Connolly wrote:

... no advantage Can accrue from the Chilcotin Establishment during the winter, and Not deeming it safe to continue it for the summer No manner of injury can therefore arise from withdrawing it as soon as possible.

On March 4, 1830 Connolly wrote to "The Govenor In Chief & Council Northern Development". He stated:

... I would consider it very unsafe to leave a small establishment amongst a people with whom we are not yet much acquainted, and of whose audacity we have sufficient proofs, I in consequence ordered its abandonment ...

242 The post reopened in 1831. In September of that year, several men who were sent to Tsilhqot'in territory "met with a very rough reception. That tribe behaved with much violence and used some menaces towards them, which prevented them from going so far as was intended": 9 October 1831, Fort St. James Post Journal 1831-2. The HBC's ability to respond to the violence was limited. The October 9, 1831 entry in the Fort St. James Post Journal reads:

... these untoward Events happen when we have neither Gentlemen, men or Provisions to take any Steps to put a Stop to these insults.

243 In 1838 Chief Allow ordered the fur traders off his lands. The event is reported in the HBC Chilcotin Post Journal entry (1837-39) for December 23, 1838:

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He set off quit [sic] displeased and, this day, an Indian was sent to me by his order to apprise me that he had forbidden all the Indians to hunt and that he expected we would be off from his Lands immediately, so that they might have the pleasure of burning the Fort, stating that the whites did them no good, Could not smoke when they wished, that the Ft. at this time was always destitute of Trading goods, that we rejected their bad Furs and sold at a high Tariff ...

244 The dispute between McBean and Allaw was not long in being resolved. It appearing from the journals that both men felt the need to exert some authority.

245 In 1839 Tsilhqot'in people "completely barred the River" downstream from the fort, preventing Fort Chilcotin employees from catching fish: Chilcotin Post Journal 1839-40.

246 The entry in the Chilcotin Post Journal for May 9, 1839 reports that a raiding party of Ah-Skut (Stl'atl'imx) Indians attacked the Long Lake village. In response to the attack, Tsilhqot'in people gathered together in collective action to repel the Stl'atl'imx people. The Chilcotin Post Journal from May 10, 1839 recorded that:

All the Indians at Ponts-een have that day started to join the Long Lake Indians to assist these to make a general attack upon the [Ah-Skut] ...

On August 2 and 3, the following was recorded:

All the Indians are assembled at Allaw's Lodge and notice has been sent to the above Villages, and a great number more are expected in the course of the night when, tomorrow, they will all give them a chase ... Last night and About day-light, several Bands of armed Indians from Stelah and Tloquotock stopped here on their way to Allaw's Lodge, the place of rendezvous, and today are to give chase upon the enemy.

247 In June of 1840 Fort Chilcotin clerk William McBean complained that the Tsilhqot'in people preferred to continue their traditional trade with other Aboriginal people, rather than trading with the HBC. In his letter to John Tod, recorded in the ChilcotinPost Journal, he wrote:

... I wish next to secure the sundry Furs which the Chilcotins have abt. them, & which, from the scarcity of Goods, I have not been able to trade previous to their disposing them shortly to the Atnahyews [Bella Coolans], a Tribe whom they are in the habit of visiting & trading annually ... You will bear in mind also that the Estabt. is without defence (destitute of powder & Balls) which, if possible, should be otherwise, owing to the evil disposition of these Inds.

... The Chilcotins take advantage we are depending on them for provisions & ask an enormous price for them ...

248 In 1840 the Hudson's Bay Company sent a trader from the Chilcotin Post to Long Lake. Upon his return, the Chilcotin Post Journal entry for February 1, 1840 reported an accusation was made that the trader and his associates were responsible for the death of two wives of a Tsilhqot'in person. After chasing his accuser away, the trader's camp was surrounded by "at least a hundred Indians, who seemed disposed to take the Yg. man's part, and approved his conduct." The matter was ultimately resolved with the assistance of Chief Quill Quall Yaw.

249 On June 29, 1841 Father Demers set out from Fort Vancouver, Washington, to accompany Peter Skene

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Ogden, Chief Factor of the HBC for New Caledonia, to Fort Alexandria. Father Demers was the first Catholic missionary to travel to the Cariboo/Chilcotin region.

250 In 1843 the HBC closed the Chilcotin Post, substituting Tluz-Cus in Dakelh territory. In an entry in the Fort Alexandria Journal for October 4, 1842, the following complaint is recorded:

The Keeping up such a paltry Establishment is, in my humble opinion, a dead loss to the H.H.B.Co. and risking the lives of People placed at it, who are little better than slaves to the Indians, being unable to keep them in check.

251 I conclude that Fort Chilcotin was closed by the HBC for sound business reasons; in particular, the insufficient trade with Tsilhqot'in people. The decision was also made easier because of the reported friction from time to time between HBC personnel and Tsilhqot'in people. This was in contrast with the welcoming, friendly disposition of the Tluz-cus people.

252 In advocating for the Tluz-cus location to the HBC Governor Alexander Anderson, the clerk in charge at Fort Alexandria (who was later appointed a Chief Trader) reported in January 1843 that "[t]o maintain the post, owing to the evil disposition of the Chilcotin Indians, and the threatening aspect which their actions frequently assume, an officer and at least two men are necessary": Letter from Anderson to Simpson, 21 January 1843.

253 In his 1953 Ph.D dissertation, at p. 91, Robert Lane reports: "a few generations ago" there was a raid by Bute Inlet people who killed a number of Chilcotins, but "the intruders were ambushed en route home and wiped out". As well, in the 1840's, the Tsilhqot'in people "killed a group of Homalco fishermen": Lane Thesis, p. 89.

254 There is oral tradition evidence of an attack by Qaju (Homalco/Kwakiatl) people on a group of young girls on Tsimol Ch'ed that brought decisive retaliatory action by Tsilhqot'in warriors. This may be the same event as was described by Lane.

255 In 1845 Father Giovanni Nobili, an Italian Jesuit priest, departed Fort Alexandria and journeyed into Tsilhqot'in territory. His detailed letters, dated November 30 and December 27, 1845, indicate that his route took him through part of the Claim Area. Father Nobili's letters confirm the presence of Tsilhqot'in people, the role of chiefs, hunting, trapping and fishing activities, the use of furs, and the presence of Tsilhqot'in structures including lodges and bridges.

256 On June 1, 1846, Father Nobili wrote a letter reporting on his trip, which is now found in the Jesuit Oregon Province Archives. He wrote, in part, as follows:

The 24th of October, I visited the village of the *Chilcotins* — this mission lasted twelve days during which time I baptized 18 children and twenty-four adults, and blessed eight marriages. I blessed here the first cemetery, and I buried, with all the ceremonies of the ritual, an Indian woman, the first converted to Christianity. I visited next two other villages of the same tribe ...

257 In 1845 Nancy Setah was born in Xení.

258 On June 15, 1846 the Oregon Treaty was signed. This treaty, also referred to as the Treaty of Washington, settled the boundary with the United States at the 49th parallel.

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259 In 1858 the Fraser River Gold Rush commenced.

260 In 1858 the Colony of British Columbia was created. It consisted of what is now considered mainland British Columbia and did not include Vancouver Island.

261 In 1859 Chief Dehtus of Anahim attended an inter-tribal meeting near Lac La Hache. Present were a number of European men. The Tsilhqot'in people were led by Chief Dehtus; the Yubatan Dené were led by Chief LoLo; and the Secwepemc people were led by Chief Williams (Willyums) of Williams Lake. The following account was reported by Peter Dunleavy to Alex McInnes, published by Edith Beeson in *Dunleavy From the Diaries of Alex P. McInnes* (Lillooet: Lillooet Publishers, 1971), pp. 634-65. Chief Dehtus is quoted as making the following speech in 1859:

It makes warm the heart of the Chilcotin ... to come to this old time meeting place of the Shuswaps to visit with our brothers the Denés and the Yabatans and our cousins the Shuswaps ... These games are the chief attraction, for they keep us strong and brave, eager and fleet, not only for the hunt but to scare away our enemies. It is mainly for this last point that Anahiem of the Chilcotins has come to make talk and consult with his brother chiefs at this meeting ... For some time, our scouts have been bringing us news of white men who are coming up our rivers ... We have tolerated these men ... thinking them to be weak-minded and therefore entitled to the reverent regard which all Indians have for these weak ones as dictated by the Great Spirit. However, we have found out that these men are really not crazy and are washing out little pieces of yellow stone which they call gold and which they use for what we call sunia (money), to use as we use skins to trade for other goods. The Indians of Lillooet have already been corrupted ... this sunia really belongs to us and the white men are taking it without asking us for it. The priests tell us this is stealing. If we steal they tell us that their God will punish us. But these whitemen are stealing from us. Will their God punish them for this bad act or have they made a convenient arrangement with this God? Has He one law for the Indian and another law for the whiteman? ... We must keep these white men out! ... We tribes must act together. If we do not act immediately we will only have to drive them out later. This will result in much bloodshed, for them and also for our own people. We must act now or we are lost!

262 In 1860 the Cariboo Gold Rush commenced.

263 In 1861 R.C. Lundin-Brown, an Anglican priest, wrote that "the agent told me of a tribe of Indians who were camping in the neighbourhood [Fort Alexandria] ... They were the Nicootlem Indians, a branch of the Chilcoatens, a powerful tribe ... whose fishing-grounds extended over the vast tract of country which lies between the northern part of the Fraser River and the Gulf of Georgia": quoted in David Dinwoodie, Expert Report, p. 11.

264 On January 15, 1861 Jnos. Saunders wrote from Fort Alexandria to P. Ogden, Esquire C. T., the Officer in Charge of New Caledonia District, noting:

Perhaps it would not be too much trouble to add in the requisition a few more guns and axes, as they are in great demand here and the Chilcotans rather than go without them, trade their furs with the Atnayuhs who procure these goods from the Coast. This I learnt when on my trading trip, and indeed I found the Chilcotans quite independent and threatening that if they did not get goods more to their liking they would trade altogether with the Atnayuhs with whom they are now at peace having formerly been on unfriendly terms towards each other ... (*Fort Alexandria Correspondence Book, 31 Aug. 1860 to 12 Aug. 1865*)

265 In 1861 Alfred Waddington sent Robert Homfray to survey a road from Bute Inlet to Fort Alexandria.

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Homfray failed to get beyond the Homathko Canyon, where he and his party were rescued and taken into underground pit houses by Tsilhqot'in people who proved unfamiliar with white men. On December 22, 1894, Homfray wrote an article in *The Province* entitled "A Winter Journey in 1861". Here he reported on his meeting:

The Indian then slackened his hold, lifted up my arms, looked into my mouth, examined my ears, to see if I were made like himself, as he had evidently never seen a white man before.

266 By the summer of 1862 a smallpox epidemic had struck several Tsilhqot'in sites. Nagwentl'un (Anahim Lake, Nacoontloon) the Tsilhqot'in headquarters of Chief Anaham and his tribe, suffered significant casualties. Smallpox also claimed many victims at Tatlah Biny (Tatla Lake) and the areas south and east through to Tsilhqox Biny in the years 1862-3. This epidemic also struck the Secwepemc people. The significant loss of life caused by smallpox resulted in an eastward migration of both Aboriginal populations. Chief Anaham eventually relocated to the present day site of Tsi Del Del.

267 There was a second significant event in the spring of 1862 when representatives of Alfred Waddington arrived at Bute Inlet. They brought with them plans to make an exploratory expedition inland through Tsilhqot'in territory to Fort Alexandria and the Cariboo region. The *British Colonist* newspaper reported on May 7, 1862 that upon hearing of the presence of Waddington's party at the head of the inlet, several Tsilhqot'in people descended through the Coast Mountains to trade furs.

268 In 1862 Lt. H. Spencer Palmer of the Royal Engineers surveyed the route from Bentinck Arm to the gold fields on the Fraser River. His reference to Tsilhqot'in people is found at p. 24 of his *Report of a Journey of Survey from Victoria to Fort Alexandria* (New Westminster: Royal Engineer Press, 1863). He said:

... others who dwell in the mountains, such as the Chilcotins who occupy the country traversed by the fifth and sixth sections of our journey, are seen in a purely savage state of existence, clothed in furs, armed with bows and arrows, in the use of which they are singularly expert, and devoid of all resources but those which the lakes, rivers, prairies and woods supply.

269 In 1862 Alfred Waddington and the Commissioner of Lands and Works for British Columbia reached an agreement permitting Waddington to build a road to the Cariboo through Tsilhqot'in territory, in exchange for the ability to charge tolls. On May 16, 1862, H.O. Tiedemann departed Victoria for Bute Inlet in a canoe "with the ultimate view to make a Wagonroad, from a Point on the Homathco River...": H.O. Tiedemann, *Journal of the Exploration for a Trail from the Head of Bute Inlet to Fort Alexandria in the year 1862*. His objective on this trip was to perform an exploratory survey on behalf of Waddington. He arrived in Fort Alexandria on June 25, 1862.

270 Waddington's exploratory expedition returned from Fort Alexandria to Victoria on July 29, 1862. It appears that Waddington was encouraged by this exploratory work because he had crews begin construction of a road inland from Bute Inlet in September through November of 1862. They resumed their work, proceeding up the Homathko River watershed during April to December 1863. Waddington's road-builders returned to Bute Inlet on March 22, 1864 to continue construction, only to meet their fate as they encroached on Tsilhqot'in territory.

271 In 1864, after Waddington's men advanced the road several miles into Tsilhqot'in territory, the road crew was killed. This was the first event in what has been characterized as the Chilcotin War. At dawn on April 30, 1864 a group of Tsilhqot'in warriors, led by Lha Ts'as'in (Klattessine), attacked and killed most of the men

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comprising Waddington's main and advance camps on the Homathko River. This area, just above Bute Inlet, is southwest of Tsilhqox Biny and not far from the Claim Area.

272 Several days later Tsilhqot'in warriors attacked members of Macdonald's pack train on its approach to Tsilhqot'in territory from North Bentinck Arm. Macdonald and two of his men were killed, and five escaped. The Tsilhqot'in warriors also attacked and killed a settler named William Manning.

273 William Manning had settled on property formerly occupied by Tsilhqot'in people. The fact that Manning's wife was a Tsilhqot'in woman did not spare him. In his bench book, Begbie noted "Land quarrel" alongside the verdict against Tahpitt, the Tsilhqot'in person convicted of Manning's murder: Foster Report, "Tsilhqot'in Law", p. 32.

274 Reverend Lundin-Brown later reported in *Klatassan and other Reminiscences of Missionary Life* (London: Gilbert and Rivington, 1873) that a Tsilhqot'in person had spoken to someone in the Bute Inlet work party prior to the mass killing. Apparently someone in Waddington's work party accused the Tsilhqot'in people of theft. In response a Tsilhqot'in person is reported by Lundin Brown in *Klatsassan* at p. 9 to have said: "You are in our country; you owe us bread."

275 A search ensued for the Tsilhqot'in chiefs and warriors who took part in the Bute Inlet uprising. Commissioner William G. Cox, a Cariboo Police Magistrate from Fort Alexandria, led a party down the west side of Tsilhqox Biny and through part of what is now the Western Trapline Territory. Cox and his search party found trails and a village along Tsilhqox Biny. It is reported:

He pushed 25 miles south of Tatla Lake into Klatassine's favourite hunting and fishing territory, the mountainous range covering 30 miles east-west between Mosely Creek, a branch of the Homathco, and Chilko Lake ... Dozens of Indian trails criss-crossed the area ... They discovered a village of deserted Indian lodges ... (Dinwoodie Report, p. 16)

276 In Dispatch No. 7 to the British Colonial Office, dated May 20th, 1864, Governor Frederick Seymour wrote a lengthy report concerning the killing of Waddington's road party. In part he said:

The witnesses declare there was no provocation given no tampering with the women or abuse of the men. The incentive to the slaughter remains unknown, and the deponents fall back in their conjecture, on cupidity. But this seems an insufficient motive. The property of small values the rough clothes and poor provisions of the road makers would offer but small temptation to the Commission of so terrible an outrage. Some people say that Mr. Waddington's party may have given offence by carrying the road into the Territory of the Chilcoaten Indians without asking for permission. But this again breaks down inasmuch as the perpetrators of the massacre are it is believed the very men, Chilcoaten Indians, who assisted the road makers in their labours. Others throw out the proceedings previous to Sir James Douglas' departure, have led the Indians to imagine that the whitemen are left without a head. Possibly so. We know that the more civilized tribes on the Fraser have been allowed to believe that they are now without a protector or a friend.

The most plausible supposition was made to me verbally by Mosely. There may have been he thinks a quarrel between Smith the ferry man and some Indians. Smith was a man of violent character and irregular habits. The quarrel might have led to blows — the blows to death. A dread of punishment may have arisen. Hence perhaps the throwing of the body into the river, and cutting adrift of the scow. To conceal the murder the general massacre may have taken place. This last hypothesis would assume a greater fear of the white

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man than I can suppose to exist in the breast of an Indian. All remains mere guess work respecting the motives which caused this melancholy incident.

277 On August 30, 1864 Governor Seymour sent Dispatch No. 25 to the British Colonial Office that said in part:

The Chilcotens who massacred Mr. Waddington's road party at Bute Inlet, as mentioned in my Despatch No.7 20th May, marched into the Interior where joined by other members of the tribe, and succeeding in murdering or expelling every white person from the sea to the upper Fraser.

The country in the hands of the insurgents might be described as about 300 miles from East to West by 150 North & South. It was inevitable that steps should be taken for the assertion of our authority, then parties of volunteers were started for the interior. The one under Mr. Cox, a police Magistrate of Cariboo, from Alexandria, the other under Mr. Brew, police Magistrate of New Westminster from Bella Coola at the head of Bentinck Arm. This latter force I accompanied.

These two small bodies had to make their way to Benshee Lake in the heart of the country. Mr. Cox's party of 60 men would then be 112 miles from Alexandria, the base of his operations, and Mr. Brew's band of 40, 250 miles from Bella Coola, whence only he could draw his supplies.

It is hardly necessary for me to say that our communication with the civilized parts of the Colony were closed to these parties as soon as they were in the hostile Country, or at least could only be kept up by detaching a large portion of either force. Thus isolated in the bush our fate became a matter of speculation throughout the Colony, and the most fanciful rumours circulated.

The two forces met at Benshee in the 6th July and on the following day Mr. Cox's party was sent by me down towards the Bute Inlet mountains. They travelled over a country presenting every natural difficulty, for a fortnight pursuing the trails of the Indians and occasionally exchanging shots with them. Mr. McLean the second in command, fell a victim to his excess of zeal.

In the meantime the headquarters of Mr. Brew's party, with which I remained, occupied the important post at Benshee Lake, where all the Indian trails converge ...

...

... Alexis, one of the principle Chiefs, of the Chilcoten Indians, who had refrained from joining the hostile movements of the tribe, was induced to present himself to me & after many days negotiation promised to accompany the attack, in full force ...

278 In August 1864 Lha Ts'as'in and some of the other Tsilhqot'in warriors surrendered under circumstances that remain to this day the subject of disagreement and debate. They were tried for murder by Chief Justice Begbie and were convicted. They were subsequently hanged at Quesnellemouth. Lha Ts'as'in's final words are reported to be "We meant war, not murder!": William Turkel, *The Archive of Place: Environment and the Contested Past of a North American Plateau* (Ph.D., Thesis, M.I.T., 2004) [unpublished], p. 295.

279 Governor Seymour later wrote to the Colonial Office to report on the events and said, in part:

It suited our purpose to treat officially these successive acts of violence as isolated massacres, but there is

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no objection to our now avowing, an Indian insurrection existed, extremely formidable from the inaccessible nature of the country over which it raged. It seemed that the whole Chilcoten Tribe was involved in it, as Benshee where Manning was murdered is under the jurisdiction of Alexis, Sutleth where McDonald and his two men fell, under that of Anaheim. They must have had the sympathy of at least of the Bella Coola's also for Anaheim descended to their lands to finish the extermination of the whites, & it was only by mere chance that Mr. Hamilton his wife & daughter, escaped with their lives just as the Chilcotens arrived. ... with the departure of the Hamiltons, the white occupation ceased from the sea to the Fraser.

280 In 1865 two further Tsilhqot'in participants in the Chilcotin War, Ahan and Lutas, were tried. Ahan was executed at New Westminster.

281 The causes of these events have been variously described by many people in the ensuing years. Tsilhqot'in witnesses gave oral tradition evidence on those causes: A memorandum written by Chief Justice Begbie is reproduced in the report of H.L. Langevin, printed in the *Sessional Papers* (No. 10) (Ottawa: Taylor, 1872). At p. 27, the following is reported:

There has never, since 1858, been any trouble with Indians except once, in 1864, known as the year of the Chilcotin Expedition. In that case, some white men had, under color of the pre-emption act, taken possession of some Indian lands (not, I believe, reserved as such, — the whole matter arose on the west of the Fraser River, where no magistrate or white population had ever been — but *de facto* Indian lands, their old accustomed camping place, and including a much-valued spring of water), and even after this, continued to treat the natives with great contumely, and breach of faith. The natives were few in number, but very warlike and great hunters. They had no idea of the numbers of the whites, whom they had not seen.

282 One triggering event of the Chilcotin War was the theft of some flour by a Tsilhqot'in person, followed by a threat to use smallpox by way of punishment. "You are in our country and you owe us bread" can be seen as a threat of extortion. Professor Hamar Foster, a legal historian, was called by the plaintiff. He was qualified to express opinions on historical relations between Aboriginal and non-Aboriginal people and legal systems in what is now British Columbia. Professor Foster, at p. 30 of his January 2005 report entitled "Chilcotin Law", explained: it is "much more likely that they [the words] represent the straightforward application of a legal principle", namely, an expectation that one would be paid for the use of one's land by another, particularly where such use included the extraction of resources. The work party had paid nothing for the privilege of using Tsilhqot'in trails, cutting timber, catching fish and killing game. The work party failed to understand that payment was required not just for work, but also for use and occupation of property. The missing flour prompted Mr. Brewster to write down the names of the Tsilhqot'in workers and make a threat about the use of smallpox as a punishment. In the language of modern times, one elder described this as a threat of "germ warfare". Given the events of 1862, this would undoubtedly be viewed by Tsilhqot'in people as a direct threat against their security and well being.

283 Abuse of Tsilhqot'in women, lack of food, and plunder have all been advanced as contributing causes of the Chilcotin War. Almost 250 years later, it is not possible to ascribe the cause to any single event. Undoubtedly, Governor Seymour's observation that the road was being developed without Tsilhqot'in permission was a factor but, as he noted, up to that point the Tsilhqot'in people were assisting the work party.

284 The entire body of historical evidence reveals a statement by the Tsilhqot'in people that the road would go no farther and that there would be no further European presence in their territory. The use of their land was

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clearly an issue.

285 It is not at all clear from the evidence available whether the entire nation of Tsilhqot'in people were involved in the events. If there ever was a united front, this unity was not sustained, as Chief Alexis joined forces with Governor Seymour to track down the Tsilhqot'in individuals who were involved.

286 In his report to the Court, Professor Foster said at pp. 35-36:

The immediate cause of the Chilcotin War was the ill-advised threat of smallpox. But the Tsilhqot'in had always been concerned about incursions into their territory and Waddington's wagon road, constructed without permission and without compensation, represented the greatest incursion to date. Even elements of the colonial press acknowledged that land was a key issue in the conflict, and so did Judge Begbie.

287 In 1866 Father James Maria McGuckin, O.M.I., established St. Joseph's Mission in the San Jose Valley just south of Williams Lake. The site is located approximately twelve miles southwest of the present town of Williams Lake. Later it became the Williams Lake Indian Residential School.

288 In 1867 Fort Alexandria was closed by the HBC.

289 In 1872 in the face of increasing settlement, Tsilhqot'in people began to stake off land they claimed for themselves and their livestock. In that same year, British Columbia removed the Chilcotin Valley from the operation of the pre-emption Land Ordinance, preventing pre-emption.

290 On June 6, 1872, settlers L.M. Riske and McIntyre complained to Lt. Governor Joseph Trutch about Tsilhqot'in people and their treatment of John Salmon. They stated that Tsilhqot'in "have always however considered the land theirs, and that we are beholden to them for it, and occupy it on sufferance."

291 On June 13, 1872 Father McGuckin (McGuggan) made a statement to Chief Justice Begbie describing the ill treatment of Tsilhqot'in people by John Salmon:

The Indians complain that Salmon has moved both his own stakes & theirs on the meadow. Salmon changed his pre-emption claim again this spring (three times in all) & occupies a favourite hunting ground & water. The Indians seeing the white man putting stakes to mark their claims have followed their example, & have also staked off more land on the meadows which they claim for themselves & their cattle.

292 On August 20, 1872 Peter O'Reilly wrote to the Provincial Secretary regarding his trip to the "Chilcotin country". The purpose of his trip was to make "enquiry into the cause of the alleged disturbance between them [Tsilhqot'in people] and the settlers in the Chilcotin valley." He described his meeting with "three of the principal Chiefs; Alexis, Annahaim, and Enella":

They received with evident satisfaction the intelligence that they will not be disturbed in the possession of their hunting, & fishing grounds; and that the whites are desirous of maintaining friendly relations with them; and that it is the intention of the Government to provide for them the means of education, and assist them in their agricultural pursuits.

I explained to the Chiefs ... they need not be apprehensive of any loss resulting from it [the road survey]. ... they did not evince the least disposition to engage in any occupation of any kind [relating to the survey or road building]; which was probably due to the fact that they do not understand the value of money, and that

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they are at present fully occupied in fishing, and gathering berries for the support of their families during the Winter.

... it would be highly advisable that the Indian Reserves in this portion of the country should be defined with as little delay as possible; and, that it would be well to instruct the Assistant Commissioner of Lands and Works not to entertain any further applications for pre-emptions in the Chilcotin Country, until the reserves are laid out, in order to prevent the possibility of collision between the Indians and intending settlers.

The population of the Chilcoten tribes amounts to five hundred ... of these about one hundred & fifty are adult males. They expressed themselves desirous of cultivating the land; and any assistance to educate them in this direction would be thankfully received ...

...

I enquired carefully into the complaint of John Salmon, wherein he accuses the Indians of threatening him, and thereby causing him to abandon his farm, and with burning his premises; these charges they emphatically deny, and appear to be uneasy lest untruthful reports of this River should involve them in trouble similar to that of 1864.

... [the Tsilhqot'in] complain of the treatment they received at the hands of Salmon, who appears to be a man of uneven, and rough temper ... They further complain, that he more than once moved the stakes on his pre-emption claim, and that he had lately enclosed a portion of land used by them as a meadow.

...

I subsequently ascertained ... [that the threats to Salmon had come from a different source and that he voluntarily] packed his traps, set fire to his house, stable and hay stack and drove his cattle away.

Salmon, finding that I was in possession of these facts, afterwards admitted to me that they were substantially correct.

293 In 1872 C.P. Railways Engineer and surveyor Marcus Smith conducted surveys for the CPR from Bute Inlet inland into Tsilhqot'in territory. In his report to CPR Chief Engineer, Sanford Fleming dated May 1, 1873, Smith noted his arrival at the site where Waddington's work party was killed. His notes, published in Fleming's *Report of Progress of the Explorations and Surveys up to January, 1874* (Ottawa: MacLean, Roger & Co., 1874) records at p. 113, that:

... the Clahoose Indians were getting tired of the work and would not in any case go beyond the foot of the Canyon, as they were afraid of the Chilcotin Indians; so that all the assistance the party had at present to depend on was from two families of Chilcotin Indians whom we found hunting there ...

294 Upon returning to Bute Inlet on July 10, 1872 Smith met a boat containing County Court Judge P. O'Reilly "with a constable and an Indian servant". In his Journal entry of July 10, Smith wrote:

Mr. O'Reilly was on a mission at the instance of the Dominion Govt. to arrange with the Chief Alexis some difficulty that had occurred with a squatter named "Salmon" and also to explain the object of our work and pave the way for a good understand between us and his people (the Chilcotins) ...

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295 Smith subsequently traveled by ship to Victoria and then journeyed up the Fraser River and beyond, to resume his travel to Bute Inlet from the east. Once again his packers were reluctant to enter Tsilhqot'in territory. In his report to Sanford Fleming, Smith records that his Mexican packers and English cook "were with difficulty persuaded to go as rumours were rife of the warlike attitude of the Chilcotin Indians...".

296 Smith eventually met with Chief Alexis, one of the Tsilhqot'in Chiefs and persuaded him to accompany the party to meet O'Reilly who was traveling up the Homathko River from Bute Inlet. O'Reilly was late in arriving because:

... the Euclatah Indians, whom I [Smith] had engaged before I left Bute Inlet, had gone up the Homathko river with supplies as far as the ferry, but there the two Indians whom we had left in charge told them that a band of Chilcotin Indians — (with whom the Euclatahs have a feud) - were coming down the valley, upon which they threw down their loads, ran to their canoes and made for their homes with all possible speed...

297 In his description of this journey, Smith reported camping on August 7, 1872:

... by the margin of Tatla lake not far from the camp of Keogh, the chief of a small band of Indians who subsist by fishing on the lakes and hunting on the slopes of the Cascade mountains, from which they have the local name of 'Stone Indians,' — they had a number of horses pastured round the camp.

298 The next day he reported reaching Tatla Lake and later that day, "camping by a small stream near an Indian burying ground".

299 On November 29, 1872 Marcus Smith wrote to the Hon. Geo. A. Walkem, Chief Commissioner of Land & Works responding to his request for "information respecting the Indians settled in the country between Bute Inlet and the Fraser River". Smith wrote:

At the time I passed through that district there were very few of the Indians at their head quarters — most of them being engaged in Salmon fishing and picking berries on the Fraser and Homathcho rivers-

It is difficult to estimate their numbers...variously estimated at 200 to 300 and I do not think they can much exceed the latter, all told.

... two chiefs — the larger proportion being under the Chief Alexis, whose winter quarters are generally at Alexis Lake or at Puntzee Lake.

The fresh water fishing and shooting-stations most used in the Autumn by the tribes under Alexis are on a string of lakes and swamps, along the margin of which runs the old trail from Fort Alexandria to Bella Coola and Bentinck arm.

... on the northwest shore of Puntzee lake is an important fishing station and a favourite camp of the tribes under Alexis — here they are visited by their neighbours the Stone Indians from the borders of the Cascade range-and those to the westward of them under the Chief Annahime.

On the northwest side of Tatla lake — and near midway of its length — which is about 20 miles — are the headquarters of Keogh, the Chief of the Stone Indians residing on the margin of the string of lakes and swamps from Tatla to Bluff and Middle lakes and down the Homathcho river — They have also stations by the lakes in the mountains from Tatla to the headwaters of the Chilco river-

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... Keogh's people keep quite a number of horses.

I am informed by the Surveyors since I passed through the Indians have staked out grounds which they wish reserved-

Above the mouth of the Chilco river if any white settler were sanguine enough to endeavour to make a living at so great a distance from any road — I do not think it would be safe for him to do so until the Indians are consulted and some lands reserve for them — for the good lands above this point are so mixed up with Indian hunting grounds that it would scarcely be possible to avoid a collision.

... the number of Indians estimated above does not include any of those living farther to the north and west under the Chief Annahme... they are said to be numerous and on friendly terms with those under Alexis and Keogh — and ready to help them in case of any difficulty with the whites.

300 On August 21, 1875, Marcus Smith provided further information about his journeys through Tsilhqot'in territory in 1872. His letter addressed to I. Powell, Supt. of Indians, includes the following:

... I picked up a good deal of information respecting the Indians inhabiting that region which I shall put in form as soon as I have time...

I found the blind Chief Eulas and his tribe encamped near Risky's ...

I saw the Chief Alexis at his camp in the Chilcotin valley about 40 miles above Risky's - he was apparently in a dying state. There were only his wife, and a few old women and children round him. The rest of the tribe were away hunting or had gone to a grand Cultus potlatch given by the Chief Annaheim near the Blackwater.

This Chief and his tribe lately had their headquarters at Lake Nacoontloon, situated between the heads of the Dean and Belta Coola rivers, but they are coming down to the Chilcotin valley and it is probable that if Alexis dies, Annaheim will be chosen Chief of the two tribes ...

I passed within 5 miles of the Camp of Keogh the Chief of the Indians about Tatla Lake. He was away at the Potlache, but his tribe had received presents of clothing etc. from the survey stores of last year. Keogh gave all away to his people, kept nothing for himself, so I sent him the other suit of uniform, for which his wife sent her son out to thank us.

There is another tribe of Stone Indians to the Northeast of Tatlah Lake which I did not see. But we saw some of them in 1872. Altogether there are between 500 and 600 people (men, women and children) speaking the Chilcotin language ... These are divided into six tribes, each with a chief and several petty chiefs.

I met Father Marshall, one of the priests from Williams Lake Mission. ... these priests are going to create a great deal of trouble by interfering with the secular affairs of the Indians.

This priest has been marking off claims covering the best agricultural land in the Chilcotin Valley, indeed taking the whole of the valley for 15 miles in length. These he has apportioned among the different tribes even including the Stone Indians who are now living 150 miles farther west ... This is sheer madness. The Indians cannot live by agriculture alone. They are far more profitably employed both for themselves and the country in hunting and fishing. All that is wanted is a block of arable land subdivided for each family to cul-

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tivate a patch of potatoes and other vegetables and some wheat or grain if they desire, but the women and children alone cultivate the land.

At Alexis creek where the tribe have had undisputed possession of the land from time immemorial, there is a patch of less than an acre cultivated by 14 families. It will be a long time before we see an average of one acre to a family under cultivation. But give them say 5 acres of arable land to a family. This would be 500 acres to each tribe of the Chilcotins, but this should be surrounded by a large block of hill ground for pasturing horses and cattle. These are my views, but however that may be, the Priests have no right to interfere. I find also that they undertake to depose and appoint Chiefs not according to their fitness to govern, but as they will best subserve Church interests.

They also order or at least encourage the brutality of whipping women for various offences.

301 By an Order in Council dated January 1873 the Provincial Government partially removed the withdrawal from pre-emption. This opened up a portion of traditional Tsilhqot'in territory to pre-emption.

302 In 1875 George Dawson journeyed into Tsilhqot'in territory to conduct a survey. His surveys include portions of the Claim Area, and he makes references to "Eagle Lake", "Tallyoco Lake" and "Cochin Lake": *Journals of George M. Dawson: British Columbia, 1875-1878*, Vol.1, ed. by Douglas Cole and Bradley Lockner (Vancouver: UBC Press, 1989).

303 In a letter dated September 5, 1883 by Father Adrian Morice, published in *Missions de la Congregation des Missionnaires Oblats* (Paris, 1883), there is a reference to the "Tchilkotines". He called them the "Tchilkotines des Rochers" or "Stone Chilcotin".

304 In Minutes of Decision Nos. One and Two regarding the "Anahim Indians" dated July 8, 1887, two reserves for the Anahim Indians ("Anaham Flat and Anaham Meadow) were recorded. In Minutes of Decision Nos. One and Two, dated July 11, 1887, two reserves for the Stone Indians were recorded.

305 In 1893 Father Morice presented his "Notes on the Western Dénés" to the Canadian Institute. He stated at p. 23: "All of these TsilKoh'tin have abandoned their original semi-subterranean huts to dwell in log houses covered with mud according to the fashion prevailing among the neighbouring whites...".

306 In 1894 Tsilhqot'in people claimed land at Tish Gulhdzinqox on which they had a number of improvements. The Tsilhqot'in claimed a white settler was attempting to survey. In a letter to the Indian Reserve Commissioner, P.O. Reilly dated August 31, 1894, E.M. Skinner said, in part:

They seem very anxious to have their land defined with some hay meadows allotted which they are in the habit of cutting, and express fear lest an attempt to acquire their land should lead to violence.

307 In 1897 James Teit guided anthropologists Franz Boas and Livingston Farrand through Tsilhqot'in territory on horseback.

308 In 1897 Edmund Elkins became the first white settler to attempt to settle in Xení. Chief ?Achig ordered Elkins to move out of the valley. Elkins did not follow the order and as a result, a physical altercation between the Chief and Elkins took place. After this struggle, Elkins moved to the end of the valley to a place that is now known as Elkin Creek.

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309 By letter addressed to James A. Smart, Deputy Minister of the Interior Department, dated July 27, 1899, Hewitt Bostock, M.P. for the region, requested that "what is known as Nemaiah Valley in the western end of the Chilcoten country" be made a reserve.

310 In 1899 Indian Reserve Commissioner A. W. Vowell traveled to Xení and laid out four reserves: Chilco Lake Reserve, Garden Reserve, Fishery Reserve and Meadow Reserve, all in or near Xení. The reserves were not formally created due to delays in completing a survey. In a letter dated October 18, 1899 to the Secretary, Department of Indian Affairs, Ottawa, Vowell discussed his trip to Xení. He noted, in part:

I learned that the greater number of the Indians were absent in the mountains hunting and fishing and putting up their winter supply of dried meat, etc. I also learned that they are generally absent in the Spring and Fall, engaged in trapping, and that the only time when they are all at home is in the dead of winter. Upon close inquiry I learned that some 59 Indians, men, women and children, have for a long time lived in the valley as far as I could learn having been there located before the laying off of other reserves in the Chilcoten country ...

311 In Minutes of Decision dated September 20, 1904 the Redstone Flat Reserve for the Alexis Creek Indians was recorded.

312 In September 1909, the proposed Xení reserves were finally surveyed.

313 The Annual Report of the Department of Indian Affairs for the year ending March 31, 1912 (Ottawa: Parmelee, 1912) recognized the Nemiah Valley Indian Band and their reserve and noted the population to be 57 persons.

314 In 1914 Xení Chief Seal Canim testified before the Royal Commission on Indian Affairs for the Province of British Columbia (Williams Lake Agency) on the need for more land. On July 22, 1914, he testified that there were then 67 persons in the band of whom 14 were married men. At pp. 117-118 from his testimony before Commissioner MacDowall, Chief Canim is reported to have said:

Q: You want to get the land near No. 2 Reserve on which your houses are built and on which there is a meadow?

A: I wish to get from No. 1 Reserve to No. 2 Reserve.

Q: How much land do you want to get?

A: I want 3 miles along the creek, and 2 miles across it.

Q: How much land do you want on each side of the creek?

A: I want a piece that will join No. 1 and No. 2, going on both sides of the creek, and about 2 miles wide. About 5 square miles in all.

Q: Does any white man own any land there? I understand Mr. Robertson owns some land there?

A Yes; they cut all the meadow between them.

Q: Has any white man got any land near No. 1 or No. 2?

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A: Yes; there are two places belonging to white men.

Note: Indian Agent Ogden to find out what is free.

Q: It would be unfair to you if we were to tell you that we would get you land that white men already own, because we cannot take land away from anyone. If the land is free, we will be glad to get you some more, because the Indians here seem to need more. We will ask Mr. Ogden to look at this land with you, and if no arrangement can be made about that, perhaps you will be able to show Mr. Ogden another piece which possibly we may be able to get for you.

I understand you want some pasture land north of No. 2. Is that right?

A: Yes.

...

Q: Now, you want some timber lands south of No. 2?

A: Yes.

...

Q: Now, you want 2 miles square of land for cultivation, east of No. 4 ... Is that land good for cultivation?

A: Yes.

315 Chief Canim went on to say (at p. 119) that the band had 45 cattle and 325 horses. He requested land for a fishing reserve on the creek "adjoining Tsunniah Lake on the Chilco Lake, and directly north of No. 1 Reserve." He also asked for the right to hunt for food when hungry and was told by the Commissioner (p. 119) that "[i]n this district, you can kill a male deer over one year old, out of season — at any time of the year, for your own use; but it must be for your own use and not for sale."

316 In 1916, three new reserves were created in Xenì.

317 In a letter dated December 31, 1922, to J.E. Umbach, the Surveyor General, R.P. Bishop wrote of the Xenì Gwet'in Indians:

Ten families of Indians have their headquarters in the valley but lead a semi-nomadic existence during the greater part of the year. Like all the Chilcotens, they are born horsemen and do not like going where they cannot ride; ...

After a few years residence in one place they have a tendency to move on, possibly being influenced by the condition of the range and of the hay meadows. At present the main village of the band is near the south boundary of lot 305, but there are several old village sites in the valley.

The Nemaïas go in largely for horses, and two members are said to own between them several hundred of these beasts ... At present the extent of the Indians' holding is not clearly defined and a good deal of uncertainty exists on the subject. The settlement of this question, which has been pending for some years and is

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now on the verge of completion, will make things much more satisfactory both for the white men and the Indians ...

In the early summer the village is generally deserted, as nearly everybody takes to the hills to gather wild potato or hunt meat for consumption during the haying season ... After the hay season a good many take to the hills to hunt the marmot, which is used both for "ground-hog robes" and for meat. In the winter comes the trapping season.

318 On July 4, 1927 ten chiefs, including six Tsilhqot'in chiefs, one of whom was Chief Seal Canim of Xeni, wrote a letter to Prime Minister McKenzie King asking for the return of their "Old Law":

We Undersign Beg of you to [see?] in [Regard?] to our trapping and fishing Rights in first place we Have no show to trapp as White Men Chases us away and Police we Have no show to trapp as white man Has trappers Licence so we Ask Government of Ottawa to try Help us and get our Old Law Back ... we also ask you to Help out fishing Law in Regard to Indian Agent, we also ask you to Help us; he goes around with Priest Makes very Severe Laws on Indians ... We were also trubbled with trappers we were Chased all over we couldnt trapp as White men Has trappers Licence and some Had 30, Miles trapp Line and sent Police Officer all over after us, they also wen so far as to thretten us with guns so we urge if you please try to get our old [Law?] Back again so we can trapp [Hunt?] as we did before, we also Ask you to [try] get our Water Right as white men got Water Recorded and we cant get any they wont let use water ... Let it go as Olden day no trappers Licence, and Game Laws we cant Kill any Game and Deer some times we are very hungry ...

319 In 1929 the first of the existing traplines in the Claim Area was registered in the name of members of the Nemiah Valley Indian Band. Over the next decades, most of the traplines in the Claim Area were registered to Nemiah Band Members.

320 From 1950 to 1956, Canada attempted unsuccessfully to purchase additional lands for reserves for the Xeni Gwetin.

321 In 1964 the federal government assumed responsibility for the St. Joseph's Mission Residential School attended by many of the witnesses in this trial. The school had operated for many years under the Oblate Brothers of St. Joseph, prior to this assumption of responsibility. Margaret Whitehead's 1979 thesis about the St. Joseph's Mission explains the work of the Oblate Fathers: *Missionaries and Indians in Cariboo: A History of St. Joseph's Mission, Williams Lake, British Columbia*. (M.A. Thesis, University of Victoria, 1979) [unpublished]. Father Paul Durieu, later Bishop Durieu, established the Durieu system in willing Aboriginal villages. At pp. 21-22 of her thesis, Whitehead said:

In a letter to Father Jean Marie LeJacq, dated November 17, 1883, Durieu included a detailed description of the working of his system. "To bring the Indians to lead a Christian life" he stated "the missionary must exercise upon them a twofold action. A destructive action, in destroying sin wherever it flourishes and a formative action, in moulding the inner man by instruction, preaching and the reception of the sacraments." He went on to say that sin had to be destroyed "by repressing and punishing it relentlessly as an evil, horrible and degrading thing." The missionary had to "inculcate horror, fear and flight from sin" and the repression of evil was to be accomplished through the help of the chief and the watchman. The Indians played an active part in the imposition of the Durieu system.

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322 The Durieu System is likely what led to some Tsilhqot'in members being named "Captain". Whitehead, at p. 52, noted that "Father McGuckin appointed the 'usual officers' of the Durieu system" for the "Indians" under Chief Alexis, and promised to do the same for the other two chiefs, Anaham and Ke-ogh, the following year. At p. 21 of her thesis, Whitehead noted that Durieu borrowed from the "Instructions on Foreign Missions" which set out that:

Every means should therefore be taken to bring the nomad tribes to abandon their wandering life and to build houses, cultivate fields and practise the elementary crafts of civilized life.

323 In 1977 the Nemiah Valley Indian Band Council passed a resolution to amalgamate twelve traplines into a Band Line.

324 In 1980 most family traplines were cancelled and replaced by two large traplines in the name of the Nemiah Valley Indian Band.

325 On August 23, 1989 the Xenigwet'in issued the Nemiah Declaration (see Sec. 2. f.: "Description of the Claim Area").

326 In October 1992 The Honourable Anthony Sarich P.C.J. was appointed by Order in Council to conduct the Cariboo-Chilcotin Justice Inquiry "to inquire into and report on the relationship between the Cariboo-Chilcotin aboriginal community and the police, Crown prosecutors, courts, probation and family court counselors in the administration of justice in the Cariboo-Chilcotin Region": O.I.C. No. 1508 (1 Oct 1992); O.I.C. No. 0967 (23 July 1993).

327 In 1992 Tsilhqot'in people passed the Tsilhqot'in Declaration of Sovereignty 1992.

328 As already noted, in 1992 Premier Michael Harcourt promised the Xenigwet'in people there would be no harvesting of timber in their traditional territory without their consent.

329 In 1993 Judge Sarich's Report on the Cariboo-Chilcotin Justice Inquiry was released. One of the report's recommendations was that a posthumous pardon be granted to the Tsilhqot'in chiefs sentenced to their deaths as a consequence of the Tsilhqot'in War. In the course of his comments concerning the Sarich Report, The Honourable Colin Gabelmann, Attorney General for British Columbia, extended an apology to the Tsilhqot'in people for wrongs done to them during and after the War.

330 In 1994 the Province designated Ts'il?os Provincial Park, and erected a sign which states, in part:

The Tsilhqot'in have steadfastly protected their remote territory through the centuries and because of their sustained presence the land has remained relatively unaltered.

331 In 1999 the Province unveiled a memorial plaque marking the gravesite of five Tsilhqot'in chiefs who were executed in the aftermath of the Tsilhqot'in War. In part the plaque reads:

This commemorative plaque has been raised to honour those who lost their lives in defence of the territory and the traditional way of life of the Tsilhqot'in and to express the inconsolable grief that has been collectively experienced at the injustice the Tsilhqot'in perceive was done to their chiefs.

7. Ethnographic Narrative

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a. Ethnography

332 The Tsilhqot'in are a group of Aboriginal people who speak a variant of the Athapaskan language. They inhabit an area in the west central portion of British Columbia. The Tsilhqot'in are considered to be the southern most group of Athapaskan speaking people in Canada. Today there are six bands of Tsilhqot'in people, five of whom form the Tsilhqot'in National Government (TNG). There is also a seventh group who reside with Ulkatcho Dakelh (Carrier) people on the Ulkatcho reserves located around Anahim Lake. This group of Tsilhqot'in/Ulkatcho people are not a part of the TNG.

333 The Tsilhqot'in people have not received a lot of attention from anthropologists and ethnographers. A few ethnographers, professional and amateur, wrote on Tsilhqot'in social organization and culture at the very end of the nineteenth century and the beginning of the twentieth century, including Father Adrien Gabriel Morice, James Teit, Livingston Farrand, Diamond Jenness and Verne Ray. In the mid-twentieth century, Robert Lane undertook the first major, and still the most detailed, study of most aspects of Tsilhqot'in ethnography in his 1953 dissertation, *Cultural Relations of the Chilcotin Indians*. Parts of that dissertation were refined and condensed in Lane's 1981 article on the Tsilhqot'in people in the *Handbook of North American Indians*.

334 Lane was the first anthropologist to place primary emphasis on the Tsilhqot'in. In preparing his dissertation in the early 1950's, Lane reviewed the studies of ethnographers writing before him. Lane also undertook his own careful fieldwork among Tsilhqot'in speaking communities over a period of four years. His dissertation is an important contribution to the understanding of Tsilhqot'in people and his work continues to be relied upon by contemporary scholars. At pp. 4 - 6 of his 1953 dissertation, he said:

Thus the Chilcotin have been assigned, with some question, to the Plateau culture area or to a Northern Athapaskan area. On their boundaries, we find Plateau groups, Northwest Coast groups (if we consider the Gulf of Georgia area separately, one group from that area), and possibly groups within a Northern Athapaskan area or at least having linguistic and cultural relationships with the Northern Athapaskans. This is a fairly unique situation in that, in almost every direction, there are peoples certainly with different types of culture; and, in most cases, lying within different culture areas.

This situation made the Chilcotin very much of a border group. They lay on the southwest frontier of the Northern Athapaskans, sharing a language which, in many dialects, was spoken in northern North America from the coast of Alaska eastward to Hudson ...

By virtue of their position on the northern boundary or in the northern part of the Plateau, the Chilcotin shared cultural elements with and were influenced by people, primarily Salish speaking, who occupied the interior valleys and plateaus east of the Coast Range.

West of the Chilcotin, the Coast Range is particularly rugged and forms a barrier between the coast and the interior. However, there are valleys through the mountains, and by these routes, the Chilcotin were able to communicate with the central Northwest Coast and, at least in recent times, draw upon the cultural resources of the Northwest Coast and incorporate coast elements into their culture. This was particularly true at the northern point of contact where the Chilcotin met the Bella Coola. Here, however, coastal influences came to the Chilcotin from a people who were themselves somewhat atypical to the central Northwest Coast in that they had a riverine rather than strictly coastal culture.

The cultural position of the Chilcotin is, as has been pointed out, unique. They occupy an area where three

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(or four) different areas of culture met: the Yukon-Mackenzie or Northern Athapaskan; the Plateau; the Gulf of Georgia Salish; and the Northwest Coast. It is logical to expect that the content of Chilcotin culture would reflect this frontier position.

335 Dr. David Dinwoodie, anthropologist, was called as a witness for the plaintiff. He was qualified to express opinions in the field of anthropology. In his report, there is a short reference to some of the "Evidence in Anthropological Accounts". Dr. Dinwoodie notes, at p. 23, that in 1898 Livingston Farrand wrote the following about the Tsilhqot'in people:

Intercourse with the coast Indians, and particularly with the Bella Coola, was formerly much more frequent than now, for the reason that the early seat of the Chilcotin was considerably farther west than at present, while the Bella Coola extended higher up the river of that name into the interior. The results of this early intercourse is seen very clearly in certain of their customs, and particularly in details of their traditions. In former times and down to within about thirty years the center of territory and population of the Chilcotin was Anahem Lake, and from here they covered a considerable extent of country, the principle points of gathering beside the one mentioned being Tatlah, Puntze, and Chezaikut Lakes. They extended as far south as Chilco Lake, and at the time of the salmon fishing were accustomed to move in large numbers down to the Chilcotin River to a point near the present Anahem Reservation, always returning to their homes as soon as the fishing was over. More recently they have been brought to the eastward, and today the chief centres of the tribe are four reservations-Anahem, Stone, Risky Creek, and Alexandria - the first three in the valley of the Chilcotin, and the last named, consisting of but a few families, somewhat removed from the others, on the Fraser. Besides these there are a considerable number of families leading a seminomadic life on the old tribal territory in the woods and mountains to the westward. These latter, considerably less influenced by civilization than their reservation relatives, are known by the whites as Stone Chilcotin or Stonies.

1899 *"The Chilcotin". The North-Western Tribes of Canada — Twelfth and Final Report of the Committee, 68th Annual Report of the British Association for the Advancement of Science for 1898.* pp. 645-8. London. (Reprinted in: 8(1-2): 338-349.1974.) *Northwest Anthropological Research Notes.*

336 Dinwoodie's report at pp. 24-25 also quotes James Teit's observations made in 1900:

At the present day the whites generally divide the tribe into three divisions, named according to their habitat - first, the Lower Chilcotin; second, the Stone Chilcotin, or Stonies; and third, the Stick or Upper Chilcotin. The first-named consist of three bands, originally emigrants from Nacoontloon Lake and neighbourhood. One of these, called the Anahem, live in a village on the north side of the Chilcotin Valley; about eight miles west of Hanceville, where they have reserves; the second band, called the Toozeys, live really within the Shuswap territory, on Riskie Creek, not far from Frazer River; and the remaining band have located at Alexandria, within the Carrier territory. The Stone Chilcotin make their winter headquarters on a reserve on the south side of the Chilcotin Valley, about four miles west of Hanceville. The Stick Chilcotin live in small scattered communities around Chezikut Lake, Puntzee Lake, Anahem or Nacoontloon Lake, Tatla Lake, Chilco Lake, etc. Both they and the Stonies are much more nomadic than the Anahem and other bands, and roam during the greater part of the year over their hunting grounds to the west and south.

Until about thirty-five or forty years ago, nearly two-thirds of the whole tribe lived in the valley which skirts the eastern flanks of the Coast Range from Chilco Lake north to near the bend of Salmon River. Most of them were located in the northern part of the valley, at Anahem or Nacoontloon Lake, just east of the ter-

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ritory of the Bella Coola ...

Smaller bands had headquarters around Chilco and Tatla Lakes and some families wintered along Chilco and Chilanco Rivers ...

1909 Notes on the Chilcotin Indians; Memoirs of the American Museum of Natural History 4(7); 759-789. New York.

337 Both the Farrand and Teit accounts note the presence of Stone Chilcotin or Stick Chilcotin living in scattered communities around various lakes, including Tsilhqox Biny. These are without a doubt the ancestors of the Xení Gwet'in, who pursued a semi-nomadic life in the "old tribal territory". The historical record confirms the presence of Tsilhqot'in people down the length of the Tsilhqox corridor up to and including Tsilhqox Biny. At the time of sovereignty assertion, the Stone Chilcotin made their winter headquarters along that river corridor on both sides and extending to the lakes, rivers and streams to the south, east and west.

338 At the time of Farrand and Teit's writings reserves had not been established in Xení. These reserves were set much later than the other Tsilhqot'in reserves due to their remote location and the lack of an adequate transportation network. The "considerable number of families leading a semi-nomadic life on the old tribal territory in the woods and mountains to the westward" resulted in the reserve commissioners and surveyors experiencing a difficult time locating these groups of Tsilhqot'in people.

339 Even today the community of Xení Gwet'in may be characterized as remote. At the time of the Court's sitting, electricity had not arrived in the valley and an entire community of people relied upon generated power. The long winter drive over a road from Hanceville covered with ice and snow made this community seem all the more remote.

b. Language and Culture

340 The most important bond shared by Tsilhqot'in people is language. The capacity to speak and understand Tsilhqot'in appears to have been the most significant identifying trait of members of that community. The number of proficient Tsilhqot'in speakers, at least in some communities (such as the Xení Gwet'in community) remains today very high.

341 Lane said the following about the Tsilhqot'in language in his 1953 thesis, at p. 164:

The Chilcotin were distinguished from their neighbors by their exclusive sharing of a common dialect, a common territory, a common culture, and a feeling of basic unity. Probably the deepest tie was language. I know of or can conceive of cases in which the importance of any of the other criteria might be diminished or lacking; but as long as the linguistic bond was there, the person would be recognized as a Chilcotin. Once the linguistic bond was broken, as it is in the case of a few individuals today, the person's status as a Chilcotin was immeasurably endangered.

...

The common territory as a criterion of unity is, of course, interrelated with the other criteria

...

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I get the impression that the common culture was a relatively less important criterion. The Chilcotin were tolerant of cultural and individual differences.

342 I had the same impression at the conclusion of this trial. For example, differences in the telling of legends and in the details of legends can vary from band to band, indicating an ability to tolerate differences within their own culture.

343 The Tsilhqot'in language is derived from an original proto-Athapaskan root. If Lane meant that the current Tsilhqot'in language is a dialect of this common root, I agree with his observation. However, today Tsilhqot'in is not characterized as a dialect of the Athapaskan language, rather it is considered a truly distinct language.

344 The Tsilhqot'in language was one area that did not provoke controversy in this case. The only expert evidence on the subject comes from the report of Eung-Do Cook, Ph. D. (Linguistics), Professor Emeritus, University of Calgary, "Chilcotin/Tsilhqot'in: An Athabaskan Language of Canada", September 2002, filed by the plaintiff. Professor Cook's report was accepted by the defendants and he was not required for cross-examination.

345 With the assistance of Dr. Cook's report, I understand that "[t]here is no simple and straightforward method of defining distinct languages and dialects". Tsilhqot'in is the term consistently used by those who identify and classify the Athapaskan languages to identify a distinct language. As advised by Dr. Cook, "no one has ever suggested that Chilcotin is a dialect of any other language" and "there is no controversy on the identification of Chilcotin as a distinct language".

346 Tsilhqot'in is a word used exclusively by the Tsilhqot'in communities in British Columbia to identify themselves. The literal translation of the word Tsilhqot'in is the people of the Tsilhqox (Chilko River).

347 I accept Dr. Cook's opinion that "there is hardly any mutual intelligibility between Chilcotin and other Athabaskan languages" and "there is no mutual intelligibility whatsoever between Athabaskan (e.g., Chilcotin, Carrier) and any neighbouring Salish languages, including Lillooet, Shuswap, and Thompson".

348 Changes in phonology (sound system) and grammar (morphology and syntax) are not generally conspicuous and abrupt. It is not possible to say precisely how long Tsilhqot'in or any Aboriginal language has existed as a distinct language. Dr. Cook's evidence is that Tsilhqot'in is "one of many dialects of a parent language (Proto-Athabaskan)" and "has been a distinct speech community for far more than five hundred years or even more than a thousand years".

349 I accept the evidence of Dr. Cook and conclude that Tsilhqot'in has been a distinct language for more than 500 years.

c. Time Periods

350 It may be helpful to explain some common Tsilhqot'in words and concepts that are used in the evidence I am about to describe. Tsilhqot'in people traditionally used a lunar calendar, identifying months by the phase of the moon. The Tsilhqot'in calendar also identifies the seasons: xi (winter), ?eghulhts'en (spring), dan (summer) and dan ch'iz (fall). Tsilhqot'in history is not known in terms of calendar years. The depth of Tsilhqot'in oral history and oral traditions is measured in terms of generations and historical events.

351 Tsilhqot'in people identify sadanx as a legendary period of time which took place long ago. This was a

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time when legends began and when the ancestors, land and animals were transforming according to supernatural powers.

352 Yedanx denilin is a long time ago and includes the period of time prior to contact and the time period that is pre- and post-sovereignty. Witnesses described their grandparents and great grandparents as living in yedanx. Theophile Ubill Lulua testified that the Tsilhqot'in War occurred in the yedanx period.

353 ?Undidanx is a period of time that one might characterize as recent history. People who lived in the first half of the twentieth century lived in a period described by Theophile Ubill Lulua as the ?undidanx.

354 The time periods progress from sadanx to yedanx to ?unidanx.

355 As I understood the evidence, Tsilhqot'in people, whether living in sadanx or yedanx, are all ?Esggidam (ancestors). A person living in ?unidanx, or the recent historical period is not an ?Esggidam. Witnesses described the seasonal rounds and the activities undertaken on those rounds as activities carried out by the ?Esggidam in yedanx and as far back as sadanx.

d. Socio-Political Structure

356 Tsilhqot'in groups are less stratified and more egalitarian than many neighbouring First Nations. This may have been partly a result of the mobility of Tsilhqot'in groups, which made both accumulation of wealth and rigid organizational structures unwieldy.

357 Traditionally, no one leader of all Tsilhqot'in speakers was recognized. The enforcement of conformity to behavioural norms — to the extent that it occurred at all — occurred at the family or encampment level rather than at the level of band or nation. Prior to contact, as Lane wrote in his 1981 article in the *Handbook of North American Indians*, at p. 408:

Individuals had a high degree of autonomy. In theory, beyond the confines of the family, no one could force anyone else to do anything.

358 Lane also discussed the social political structure of Tsilhqot'in people in his 1953 thesis at p. 166 as follows:

The Chilcotin had various subdivisions. The band was a loosely associated group of families who wintered in the vicinity of a certain lake or group of lakes. The band was usually named for the lake with which it was most intimately associated.

There was a degree of mobility between neighbouring bands [...]

359 He continued at pp. 170-171, as follows:

Within the band there were unnamed local groups, which can be called encampments. Each consisted of several families who usually, particularly in the winter time, camped together; and who often acted as the main cooperating group. Such groups were united by kinship, friendship or by economic dependence.

Several brothers and their families might form such a group; or parents and their families, and their children and their families. Several friends might form such a group and through intermarriage between the friends'

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families, the unity of the group would be perpetuated.

...

In these encampments there was a great deal of mobility. A family might remain in such an association for a season or a lifetime. Probably most families had constituted parts of several different local groups in the course of their existence.

Such a group had no definitely outlined territorial rights. However, it was recognized that the families in such a group had rights to certain winter camping sites, providing that they occupied them every season. However, when the usual occupants of such a site failed to use it for one or more winters, someone else could move in and claim it.

In much the same way, fish trap sites were regarded as belonging to the person who habitually used them. When the habitual user neglected to use them, someone else was free to do so. Band members tended to utilize for hunting and fishing purposes the suitable territories nearest to their wintering sites. However, there were no explicitly defined band territories. In theory and to a lesser degree in fact, any family utilized any part of Chilcotin territory.

360 I pause at this point to note that the latter observation concerning fish trap sites and the use of Tsilhqot'in territory was confirmed by the evidence at trial. Tsilhqot'in elders testified about family fish sites but at the same time were clear that all Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory.

361 Lane continued his observations at pp. 171-173 of this thesis:

At mid-winter all of a band might be concentrated in certain parts of the band territory, hunting around and fishing at various lakes. However, not all of the band would be at any particular lake. In the spring individual families scattered to hunt by themselves. Later in the season groups of families gathered at streams and lakes to fish the various runs of trout, whitefish, suckers and other small fish. In the summer when the salmon were running, large groups gathered at the river fishing sites but they were not necessarily members of the same band. Other large groups hunted and dug roots at certain places in the mountains but again all of the people in one area were not from one band. After the salmon fishing season, families again went off by themselves, to hunt or fish or gather until winter.

The band was a functioning unit only upon a few special occasions such as feasts and celebrations. It never gathered at one place for economic purposes. For about three months of the year, the encampment appears to have been the basic unit, above the family level. For about four months, the individual family lived nomadically and more or less by itself. During the two months or so of the spring fish runs, people gathered in greater numbers at specific sites on lakes. These people were usually from the same band. I call this grouping a "semi-band" because almost everybody at one such site was from the same band; but the entire band rarely gathered at one site.

During three months in the summer, the largest groups of people were together in the mountains and at salmon fishing sites in "mixed bands," composed of families from one or several bands.

... the Chilcotin had very vague concepts of ownership of territory. All Chilcotin had right to use all the Chilcotin territory. Bands occupied vaguely defined geographic areas. They did not "own" such areas. Hunt-

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ing territories were also used rather than "owned" by members of certain bands Fishing sites involved somewhat more of a feeling of ownership. But such ownership also depended upon use.

362 Lane noted at p. 174 of his dissertation that "among none of the Chilcotin's immediate neighbours do we find such a loose and flexible group organization". This description accords with socio-political structure described to me by Tsilhqot'in elders in the course of the trial.

363 Tsilhqot'in people living in bands had a chief. The presence of several bands meant there was more than one chief. They met together as a group for feasts, celebrations or annual gatherings and there was no single person who was the chief of the entire Tsilhqot'in people. Given their semi-nomadic nature, there was frequent movement for hunting, gathering and making the tools and clothing needed for survival. Thus, there appeared to be little time for art, in the way that was pursued by coastal Aboriginal people. There were no totems. There was no evidence of a crest system such as that described in *Delgamuukw*. There was no evidence of named ceremonial groups and no evidence of any honorific ranking system such as is found amongst some Aboriginal people. The oral traditions, stories and legends told from generation to generation provide the binding social fabric for Tsilhqot'in people.

e. Tsilhqot'in Dwellings

364 The harsh climate conditions of the Tsilhqot'in region resulted in specialized survival skills suited to that territory. Tsilhqot'in people used a variety of different dwellings for different purposes. In the winter, they lived in underground lodges or pit houses. In other seasons, more ephemeral structures such as lean to's, wind breaks, and tents served to protect Tsilhqot'in people temporarily from wind and rain.

365 There are two kinds of winter dwellings used throughout the Tsilhqot'in territory. The niyah qungh (or nenyexqungh) is a structure of Tsilhqot'in design and origin. It is distinguished by its rectangular structure. The lhiz qwen yex is a circular shaped structure dug well into the ground. The lhiz qwen yex is also known as a pit house, underground house, subterranean house and kigli hole. It is thought to be a structure of Plateau Pithouse Tradition (PPT) design and origin. While its design and origin likely dates to the PPT culture, some lhiz qwen yex were rebuilt and used by Tsilhqot'in people. There is also evidence that Tsilhqot'in people living today observed the fresh construction of such structures and actually lived in these dwellings.

366 Lane described a basic Tsilhqot'in niyah qungh lodge in his 1953 thesis. Rectangular in shape, the size varied but was generally about 20 feet long by 15 feet wide. The floor was level but not excavated. Usually there were two log posts set into the ground, one at the front of the house and one at the back. A log ridge-pole was elevated and set across between the posts. On each side, at least two log poles were leaned inwards against this ridge-pole. Thus, the niyah qungh house frame was gabled.

367 According to Lane, whole or split logs were then laid horizontally up the sides of the house, almost to the top. This left an opening several feet wide under the ridge-pole. The fire would be laid in the center of the house along the space under the ridgepole. The ends were generally enclosed with vertical whole or split logs. At one end a space was left for a door, which was covered with an animal skin. The house was externally covered with layers of grass, sod and bark. Lane also described a niyah qungh with cribbed lower walls, four end posts, dual ridge-poles and a deer hide door.

368 Dr. Matson described the niyah qungh as a type of Tsilhqot'in winter dwelling. From the archeological perspective, key identifying features of niyah qungh sites include the rectangular form of its footprint, the pres-

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ence of certain projectile points and the elongated fire-pit pattern (the impression of which resembles the shell of a boat). Matson dated a Tsilhqot'in niyah qungh site in the Claim Area at Naghatalhchoz Biny (Big Eagle Lake) as at 1645-1660 A.D.

369 The anthropological and archaeological evidence about winter dwellings are corroborated by the evidence of Tsilhqot'in witnesses. Various Tsilhqot'in elders testified as to having seen or lived in niyah qungh or variations of this dwelling during their younger days. Elizabeth Jeff gave evidence of her great-grandmother's niyah qungh. Francis Setah stayed in his uncle's more modern version of a niyah qungh as a youth.

370 Mabel William testified that she saw her uncle build a niyah qungh and gave evidence of its construction with chendi (lodgepole pine) logs, cribbed lower walls and insulation of sunlh (dry pine needles) and tselxay (swampgrass), or alternately t'uz (bark), plugged with nentses (moss). She lived in this niyah qungh with her uncle's family while trapping. Later in her life, she lived in a niyah qungh in the Claim Area with her husband and in-laws when trapping and hunting. She testified that the long fire pits within the niyah qungh, with the passage of time, came to look like a little boat in the ground. She further gave evidence of how Tsilhqot'in people historically felled trees with the tsi dek'ay (a sharp rock), split the logs with nelh (another form of sharp rock) and a hammer made from a section of tree, and secured the logs with ts'u ghed (spruce roots) or softened k'i (willow). Mabel William, and other Tsilhqot'in elders, provided oral history of Tsilhqot'in people living during xi in niyah qungh since the time of the ?Esggidam.

371 In her affidavit #1, Mabel William testified that as a child she saw her uncle Peter William build a niyah qungh in an area near Nagwentl'un (Anahim Lake). She said they moved into the niyah qungh when "it started to get cold". She said her grandmother Hanlhdzany taught her that she had lived in niyah qungh in xi when she was growing up and that Tsilhqot'in people "had been making different styles of niyah qungh since sadanx".

372 In his 1953 dissertation, Lane also described the pit house dwelling known as a lhiz qwen yex. The circular pit was four or five feet deep with a varying diameter. Four or six log centre posts, each about 14 to 16 feet tall, were set into the ground within the pit. Peeled logs were elevated and set across as the main rafters between the post tops, thus forming a square or hexagon. Many additional log rafters, with their butts placed at the edge of the pit, were then laid inwards onto the main rafters. The rafters were lashed to the central frame with spruce roots. The whole structure was covered with a layer of tselxay or k'i and, occasionally, a layer of t'uz. It was then covered with dirt. A central smoke hole remained above a fire pit and acted as an entrance.

373 Morley Eldridge, an archaeologist called by British Columbia, was qualified to express opinions in the field of archaeology. He agreed that Tsilhqot'in people had a long tradition of building lhiz qwen yex. Relying upon the work of Matson, Eldridge agreed "that Tsilhqot'in people lived in circular pit houses at least as long ago as 1590 plus or minus 80 years AD". In adopting this opinion, Eldridge relied upon the house pit identified on the Tsilhqox that contained Tsilhqot'in artifacts dating to approximately 1600 AD. This house pit is located on the edge of the Claim Area. Eldridge opined that the Tsilhqot'in built and used lhiz qwen yex well into the 1800's.

374 Mabel William testified about being instructed by her grandmother, Hanlhdzany, at Tl'egwated on how to construct a lhiz qwen yex. She said that a niyah qungh took less time to build than a lhiz qwen yex. The niyah qungh was not as warm as the lhiz qwen yex "because lhiz qwen yex were covered with dirt all over" and "you didn't need as big a fire". She described digging the pit with deer antlers or wood "made flat like a shovel; a four

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post, square frame from chendi lashed with ts'u ghed; additional log rafters covered with t'uz and then dirt, leaving a smoke hole at the top; a side door with a ladder made from poles lashed with ts'u ghed; and nists'i (deer) or sebay (mountain goat) hides being used to cover the doorway and, when the fire was not burning, the central smoke hole was also covered with hide". She said these structures were hard to build and were used "over and over again, winter after winter".

375 The oral tradition evidence of Tsilhqot'in witnesses was that lhiz qwen yex were used going back to the time of the ?Esggidam. The oral traditions of Tsilhqot'in people, namely, the legends of Lhin Desch'osh and The Boy Who Was Kidnapped by the Owl feature the use of lhiz qwen yex.

376 Site selection for construction of winter dwelling was dependant on a number of factors, including the availability of resources and the proximity to others for security and socializing during the long winter months.

377 Writing in the 1950's, Lane reported that, according to his Tsilhqot'in informants, the large residence sites with numerous closely-spaced pits situated on river banks were not Tsilhqot'in in origin. His informants claimed the isolated pit house sites located near lakes were Tsilhqot'in in origin.

378 In Lane's view families had rights to certain winter camping sites, providing that they occupied them every season. The stronger attachment to winter residences than to sites used in other seasons was likely due to the longer period passed at the winter site and the more sedentary nature of the activities carried on in this season. According to oral tradition evidence, winter was the season of least movement for Tsilhqot'in people. Joseph William deposed with respect to seasonal movement as follows:

John Baptiste taught me that the ?Esggidam had to move around to get their game, fish, and food — in spring, summer and fall-time they moved around lots. John Baptiste taught me that in winter, the ?Esggidam would stay in lhiz qwen yex (underground houses); in winter they would stay in one place.

f. Semi-Nomadic Lifestyle

379 I have commented several times on the semi-nomadic lifestyle of Tsilhqot'in people. Post Second World War, this lifestyle has changed, partly as a result of declining fur prices and partly as a result of a changing social order. While seminomadic living is a lifestyle in decline, it has not entirely ended. There was evidence that some Tsilhqot'in people still go out on the land to hunt, fish, and gather roots and berries in all seasons, but much less so in the winter months. A more frequent pattern of hunting by a younger generation is to use available roads and to hunt on the road or short distances off road.

380 The Tsilhqot'in traditional semi-nomadic lifestyle was a movement with the seasons. In his Ph.D. dissertation entitled *The Archive of Place: Environment and the Contested Past of a North American Plateau*, Dr. William Turkel described Aboriginal seasonal land use that was inclusive of Tsilhqot'in people. He said the following at pp. 156-157:

Traditional native calendars in the interior started in the winter, in the moon named for ice. ... For people across the interior plateau, this was a time to enter subterranean houses. Deer and other animals like sheep, elk, hare and grouse, were hunted as weather permitted, to supplement caches of stored food. ... the following moon was a time to stay at home, a time of the first real cold. Occasionally it was possible to ice fish the lakes for whitefish, trout and suckers, but more frequently diets consisted of dried salmon and meat, roots and berries.

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The sun turned in midwinter, the time of the big moon, and animals like mink, marten, weasel, fisher, rabbits, lynx, coyote and fox were trapped for their plush winter coats. It was a good time to sew buckskin and to visit. By the following moon, food stores were running low. ... the snow crusted over and began to darken with wind-blown debris. This made travel easier, and it became possible to run down game on foot, as hooves broke through the crust when snowshoes did not. With the beginning of spring, bears came out of hibernation and by the end of the moon most of the people had emerged from their winter houses, too.

People began to disperse throughout band territories to hunt and to fish in the lakes. The snow was melting from the high ground, the grass growing in the valleys. By the beginning of summer, most families had moved to lake fishing stations to catch and dry trout, whitefish and suckers. It was a time to dig potatoes, wild onions, tiger-lily bulbs, and shoots of balsamroot and cow-parsnip. The summer moons were a time for berrying: strawberries and soapberries and saskatoons gathered beside rivers and lakes. The summer also marked the beginning of the spring salmon run for some, and for others a time to hunt waterfowl, mountain goats, and the other ungulates had grown fat on mountain pastures. The salmon runs occupied most people's time until the moon of the sockeye salmon and for some groups the rest of the autumn as well. Others went hunting in the fall moons, and gathered pine seeds near higher-elevation base camps.

381 The seasonal semi-nomadic round was vividly recounted by Tsilhqot'in elders. They recalled the days of their childhood and the stories told to them by parents and grandparents. With the passage of time the direct link to a time pre-sovereignty assertion depended on evidence, two, three and even four generations removed. The best documentary evidence of early to mid-nineteenth century activities remains the written records of the HBC and early missionaries. These records confirm the presence of Tsilhqot'in people in the Claim Area and more importantly confirm their semi-nomadic lifestyle.

382 The evidence showed that the movement of Tsilhqot'in to xi dwelling sites began in November. As the weather turned colder, the hunting of higher elevation species such as debi was discontinued. However, nists'i hunting continued, mainly utilizing ?ash (snow shoes). Fur bearing animals were trapped throughout xi until early March. Snowshoe hares were taken and ice fishing was a regular event.

383 Xi hunting, fishing and trapping grounds are all found in the Claim Area. In Tachelach'ed there was xi nists'i hunting and dwelling sites along the Tsilhqox corridor and across Xeni. Xi hunting and fishing also took place at the lower elevation lakes in the Western Trapline territory and the areas adjacent to it. The northern areas of the Eastern Trapline consist of low elevation lands below the mountains. The animals procured by Tsilhqot'in people in xi on and about the plateau are all found in this area. The evidence revealed that nists'i from the nearby Dzelh Ch'ed (Snow Mountains) migrated into these lands. Gex (rabbit), nundi (lynx), nabi (muskrat), chinaz (otter), nembay (weasel), tsa (beaver), dlig (squirrel) and other furbearer animals were also present.

384 Xi fishing on lakes in and outside the Claim Area occurred during the historical period and continued throughout the twentieth century. Xi house sites were located conveniently close to good fishing, locations near many of the lakes found in the Claim Area.

385 In ?eghulhts'en activities focused on fishing for dek'any (rainbow trout), lhusisch'el (whitefish), sabay (dolly varden or bull trout) and delji-yaz (sucker). Late spring signalled the return of tislagh (steelhead salmon).

386 Closely connected to ?eghulhts'en fishing was nists'i hunting. Tsilhqot'in people tracked the nists'i migration routes as they made their way back to the mountain areas. Other game such as mus (moose), xex (geese) and nat'i or tunulh (duck) were also taken. Tsa and nabi were trapped. This was also the season for gathering

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pine cambium and tsits'ats'elagi (balsamroot sunflower).

387 In early dan, sunt'iny (mountain potato or spring beauty) and ?esghunsh (bear tooth or avalanche lily) bloom. Tsilhqot'in people, along with the animals, followed the melting snow line into the higher country to hunt and gather roots and berries on the high mountain slopes. Of great importance were roots, corns and tubers such as sunt'iny, ?esghunsh, tsits'ats'elagi, tsachen (tiger lily), tl'etsen (wild onion) and chinsdad (silverweed) which were all preserved by drying.

388 The gathering of roots and hunting in the mountainous areas through the summer months continued from historical times up to the mid-twentieth century. The practice began to decline largely due to the growth of ranching in the area.

389 In the late dan the berries ripen and in good years, the salmon return to the Tsihqox and Dasiqox. July is Jes Za or Chinook salmon moon; August is Ts'aman Za or Sockeye salmon moon and September is Dants'ex or pink salmon moon. Along with the salmon runs came the ripening of nuwish (soapberries), dig (saskatoon berries), selhchugh (huckleberries) and nelghes (blueberries). Hunting for nists'i, mus (moose), debi and sebay continued. Activities in the twentieth century described by witnesses included plant gathering in late dan on the shores of the major lakes. Tl'edazulh (wild rice) was also gathered at various locations in the Claim Area.

390 In dan ch'iz nilhish (kokanee, landlocked salmon) spawn in the shallows of certain lakes. White bark pine have seeded their cones and plants like denish (kinnick kinnick) bear fruit. Nists'i begin their migration down from the mountains onto the Chilcotin plateau. As the animals ready for xi, they are fattened and their fur has begun to thicken. Tsilhqot'in people took advantage of this season, fishing for nilhish, gathering ?ests'igwel and denish berries and moving into the mountains to hunt dediny (marmots) and bigger game. Nists'i, debi, sebay and ses (bear) were taken for food, clothing and bedding.

391 The western portion of the Claim Area was a traditional dan ch'iz hunting ground. Tsilhqot'in people hunt sebay and dediny (groundhog or marmot) in this area. There is also a trail running from these hunting grounds to fishing areas around Naghatalhchoz. Along the trail, Tsilhqot'in people hunted dediny, nists'i and sebay in the mountains.

392 There was evidence that Tsilhqot'in people stayed at areas in the Western Trapline, transporting dried meat from their dan ch'iz hunting grounds in the south to their xi residences in the north along the trails on the sides of the lakes and on the water, in ?etaslaz ts'i (spruce bark canoes). Norman George Setah testified that while his family was hunting nists'i, nundi-chugh (cougar) and dlig in this area, they would also be fishing for sabay and dek'any.

393 Martin Quilt testified that the mountains to the west of Tsihqox Biny are traditional Tsilhqot'in trapping and hunting grounds for sebay, sesjiz (marten), dlig and nundi. He described trips taken through the dan ch'iz up to Christmas.

394 Salmon was not plentiful in every year. Mabel William testified that Tsilhqot'in people took ?etaslaz ts'i across Tsihqox Biny and up Talhjez (Franklin Arm) to go over the mountains to get fish from the river that runs into the ocean. She said this was of particular importance in years when there was a shortage of salmon in the Tsihqox or Dasiqox. Salmon on the coast started in October and continued through xi. A trip to the coast to trade with Homalco people was an event that was more likely to have taken place in the twentieth century when relations with these coastal peoples was not as strained as it appeared to have been in the mid-nineteenth cen-

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tury.

395 Dan ch'iz activities also took place in the central portion of the Claim Area. Closer to Xení, Tsilhqot'in people have hunted sebay, dediny and sesjiz in the mountain ranges in dan ch'iz. Nists'i are hunted as they migrate down through the valleys towards their xi range on the plateau. In recent times, mus have also been hunted in this area. Fishing and berries are gathered, and nat'i or tunulh and xex are hunted in this area.

396 Debi, sebay, nists'i, nundi-chugh, and dlig are also hunted and denish are harvested in the eastern portion of the Claim Area.

397 These were the seasonal rounds as told to the court by Tsilhqot'in elders. They testified that their ancestors had performed similar seasonal rounds. I understood that families were not always together and that families did not necessarily go to the same location each year. These rounds are resource dependant. It was important not to deplete a resource in any given area. Some areas were visited annually, others were visited less frequently.

g. Tools and Implements

i. Fishing

398 In his 1953 thesis, Lane recorded that "fishing was done with a variety of equipment and techniques". He noted the use of "basketry traps of various kinds" weirs, gaff hooks and in recent times, dipnets.

399 At trial, Tsilhqot'in elders testified about the use of xestl'un (fencing to bar a creek), a biniwed (cone fish trap), lhughembinlh (gill nets), and a binlagh (box fish trap). Fish were retrieved with a daden (three pronged spear), originally made of bone. Tsilhqot'in people also laid a platform across a shallow creek with split logs on the creek bottom to provide a pale background, allowing fish to be taken directly by hand from the platform.

400 In her affidavit #1, Mabel William deposed to ice fishing, using split chendi inside facing up and laid on the bottom of the stream to see the fish moving in the water. Fish eggs were sprinkled in the water to attract the fish. Two types of spears were used to impale or hook the fish, a danden and a dadzagh, both made with bone or a horn hook.

ii. Hunting and Trapping

401 Trapping and hunting have separate words. Trapping is known as ?eqe?ats'et'in. Hunting is known as nats'ededah. In his 1953 thesis at p. 44, Lane notes that the "Chilcotin were acquainted with many hunting techniques". He makes reference to the use of snares, traps, bows and arrows, spears and clubs.

402 Francis Setah testified about the use of a gex gej teghetl'un (spring snare) to trap gex. Norman George Setah testified about snaring nists'i and naslhiny. Others spoke of snaring gex, dlig, ?elhthilh (prairie chicken), chel?ig (coyote), nundi and other animals. Mabel William deposed to the use of a binlh (snare) made with hide strips to get dlig, gex and nundi. Dead fall traps were also dug and larger animals like ses, nists'i and nundi would fall through and be impaled on spears below.

403 Francis Setah also testified to the use of a deni gha dats'eyel (spear like weapon). He and other elders also testified about the use of bows and arrows.

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iii. Other implements

404 Other implements included the tsi dek'ay to fell trees. Logs were split with a nelh, pounding it into the log and using a stick to keep the split open, then moving the nelh down and repeating the action until the log split into two pieces. A hammer was made from a section of tree with a strong branch attached to it. Before nails arrived, logs were secured together in the construction of dwellings with ts'u ghed or softened k'i. Spruce roots were used to tie logs together. Softened k'i was put together and used as a form of rope.

405 Another type of rope was made by braiding strips of animal hides. Nists'i, sebay, debi, bedzish (caribou) and mus hides were used in this manner. Loads were carried by putting such a strap over the shoulder or around the forehead and, unlike cord, such a strap would not cut into the skin.

406 A bisinchen was a tool made of pine that was used to stretch and soften hides. It was also used to tie, stretch and weave gex pelts.

iv. Baskets and Cooking

407 Tsilhqot'in people wove baskets decorated with a unique pattern. One form of basket is called a qats'ay. It is made with woven ts'u ghed. The basket is soaked to swell the roots and make it water tight so as it can be used to carry water. Alternatively, pitch would be used to make it leak proof. This basket was also used as a pot to boil water. Several elders explained how hot rocks were placed in the basket to bring water to a boil. For example, the basket or pot, in that manner, would be used to cook sunt'iny or ?esghunsh.

408 Chinsdad was boiled using a qats'ay. It was then dried and mixed with dediny fat and a little sugar. Minnie Charleyboy explained that the ?Esggidam placed a fire in a k'eles (dugout). The fire would warm up rocks. The chinsdad was then placed on the warm rocks and additional warm rocks were placed on top.

409 A second type of basket is called a tenelh. It is made from ch'it'uz (birch bark). This basket was used mainly for berry picking as it was not water tight. It was also used for the gathering of medicines and root plants.

410 Chief William testified about a basket made from k'i that was made for the carrying of a baby.

v. ?Etslaz ts'i (Bark Boats)

411 Francis Setah testified that ?etslaz ts'i were used to travel on the lakes, including Tsilhqox Biny, Tatlah Biny, Talhiqox Biny (Tatlayoko Lake) and Dasiqox Biny (Taseko Lake). These boats were made from ?etslaz. Mabel William deposed to the use of the same kind of boat to transport nists'i meat across Dasiqox Biny. Others also testified about the use of ?etslaz ts'i on the lakes.

vi. Bedding

412 Gex pelts were woven using a bisinchen. This blanket was made with the fur exposed on both sides of the blanket. Dediny, dlig, and dediny pelts were also used to make a blanket in the same fashion.

413 Sebay hides were also used to make blankets. Mus hides were used as mattresses. Elders also testified about the use of sebay and nists'i mattresses.

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414 All elders spoke of the use of furs and pelts of various types used as mattresses and bedding in their lifetime and dating back to the time of the ?Esggidam. It was the practice to make these household items in the dan ch'iz when the fur of the animals was at its thickest.

vii. Clothing and Footwear

415 Clothing was made from the pelts of nists'i, sebay, debi and others. Tsa robes were noted in use by the early HBC traders who visited along the Tsilhqot'in corridor.

416 Before the arrival of Europeans, Tsilhqot'in people used animal hides to make gloves, bixest'az (footwear), robes and bixesdah (coats). Bixest'az was a shoe that went up halfway over the ankle and kept the feet warm in the winter months.

417 Tsilhqot'in people also made ?ash (snowshoes) for men that were long; and qilezmbans (snowshoes) that were round for women. These were used to move about and to hunt in the snow during the winter months.

h. Spirituality

418 Overlooked by early settlers and the missionaries was the fact that Tsilhqot'in people are a deeply spiritual people. Gilbert Solomon testified that Tsilhqot'in people have many guardian spirits. The Supreme Spirit or God is Gudish Nits'il'in or higher chief. The spirituality of Tsilhqot'in people is rooted in a deep respect for the land, the plants and the animals. Mr. Solomon explained:

When we have to honour all the spirits, we acknowledge the spirits of water, all the elements, the fire, light, the earth, plants, animals. We all believe that they all have spirits, the same spirit that we have, all humans. Spirits are no different. Say if we talk to any — to any spirits, like the tree spirit, I'll talk to the tree like he's another person.

419 Respect for the earth, plants and animals meant that before an animal was killed, there would be a silent acknowledgment of its spirit; before the berries were picked, there would be a similar acknowledgment. There was a oneness of the earth, of animals and people; an acknowledgement at death and an offering to accompany them on their spiritual journey. A failure to acknowledge this common spirituality might have consequences for the wrongdoer when he or she had to make their journey to the "other side" after death.

420 That spirituality remains today for many Tsilhqot'in people despite their acceptance of the religion brought to them by the missionaries.

i. Deyen

421 A Tsilhqot'in spiritual healer is called a deyen, a person with special healing powers. A person becomes a deyen after having recurring dreams of a particular animal or some aspect of the land. He or she must then go into the mountains for days at a time on a spiritual quest to gain their powers. This involves fasting. On their return, they would gain their powers as a healer. A deyen does not advertise himself or herself as such but is available to assist in healing the sick. Deyen are respected people in the Tsilhqot'in community. Tsilhqot'in people do not walk in the shadow of a deyen.

422 At times, Tsilhqot'in people might take a wrong turn in their lives. Their lives undergo some negative change and they become a different person. Tsilhqot'in people view that person as one who has lost his or her

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soul. A deyen nejede?ah is a particularly powerful deyen who is able to assist in the recovery of a lost soul. If the soul is not recovered, the person dies.

423 Deyens might have special songs or dances. They perform a healing ceremony for sick people and are particularly knowledgeable about the healing powers of medicinal plants. Deyens draw upon the strength, the spirit and the soul of the animal that is their spiritual power or upon the spiritual and healing powers of a particular aspect of the land such as spring water.

424 There are deyens today in Tsilhqot'in society who bring to their communities these special spiritual healing powers and knowledge.

ii. Burial Practices

425 Tsilhqot'in people cremated their dead prior to the arrival of Europeans. Thus there are no ancient burial sites. At death, Tsilhqot'in persons would be cremated along with their clothing and tools, enabling the journey "to the other side". The ritual of burial was introduced by the missionaries. The first cemetery was blessed by Father Nobili on October 24, 1845.

i. Tsilhqot'in Laws

426 Professor Hamar Foster prepared a report to the court entitled "Tsilhqot'in Law". At p. 2 he said:

... as a legal historian I proceed on the assumption that, if people are organized into societies, they participate in rule-governed relationships with others. This is what "law" in its most general sense, means. And it is — to take a telling example from the documentary record in this case — what Judge Begbie meant when he asked the Tsilhqot'in chiefs at their trial what their law of murder was..." (Judge Begbie to Governor Seymour, 30 Sept.1864...).

427 Professor Foster pointed out that in oral societies the documentary records are exclusively non-Aboriginal and the people who produced those records often had "little understanding of the cultures they were describing". Some of their interpretations were careless and often they were interpretations of "what they saw in terms of their own culture". Thus words used to describe Aboriginal behaviour cannot be taken at their face value. As an example, when there is a report of an Indian committing a "murder", one must ask the important question, "according to whose law?" Professor Foster went on to explain at p. 5 of his report:

For example, it was generally true that the killing of a member of one's group could be avenged not only by killing the perpetrator but *any* member of the perpetrator's legally relevant group if he could not be caught. In other words...his household, extended family, or clan — depending on the domestic law of that nation — might bear a collective responsibility...

So, where a colonist (of the British, American or "white" nation) killed an Indian, the death could be avenged by killing any colonist. And the killer of the colonist would not view himself or be viewed by his nation as having maliciously "murdered" an innocent person.

428 In this way there was a "group responsibility for all deaths caused by a member of the relevant group": Foster Report, p. 6. In addition to collective responsibility, there were also notions of causation, as opposed to fault. Accidental deaths required compensation and a failure to report and compensate an accidental death would justify a killing to "wipe out the debt of blood".

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429 Professor Foster acknowledged it was difficult "to ascertain with any precision, the domestic law of any particular nation solely from the documentary record." Nevertheless from the records he did examine, he was of the opinion "the Tsilhqot'in had laws, and that those for which there is evidence appear to have been broadly similar to the laws of other many North American Aboriginal groups". He noted there was evidence "that supports the view that chiefs had specific lands within Tsilhqot'in territory and that these lands descended on some sort of hereditary principle." I too am satisfied that an examination of the historical records leads to a conclusion that Tsilhqot'in people did consider the land to be their land. They also had a concept of territory and boundaries, although this appears to have been enlarged following the movements of the mid-nineteenth century.

430 Professor Foster also addressed the law relating to the killing of others and the ability to seek blood vengeance. Minnie Charleyboy told a story of a Tsilhqot'in man who was accidentally killed by his brother. The killer was subsequently punished by death.

431 Tsilhqot'in people were a rule ordered society. Various Tsilhqot'in elders testified about dechen ts' edilhtan (the laws of our ancestors). Chief Ervin Charleyboy testified that there are laws against taking the property of others, and against creating a disturbance in a community. Offenders were punished by being tied to a post from sun up to sun down in order to shame them before the community. Repeat offenders ran the risk of being banned from their community for a period of time. Killing a person meant death to the killer.

432 There were other rules or laws testified to by several Tsilhqot'in elders. These included: rules about what a boy was to do at the time of his puberty; corresponding rules concerning girls becoming young women; rules concerning what women were able to do "on their moon"; rules about the handling of the dead; rules respecting the weapons of hunter warriors; and rules against marrying a cousin or other person closely related. All of these rules were dechen ts' edilhtan.

j. Legends and Stories

433 Some of the stories and legends told to the Court by Tsilhqot'in elders include:

- Lhin Desch'osh, the legend of how the land was transformed and the animals made less dangerous;
- Ts'il?os and ?Eniyud;
- How Raven Stole the Sun;
- A Story of Raven Stealing Fire;
- The Story of Salmon Boy;
- The Story of the Woman and the Bear;
- The Story of Lady Rock;
- The Story of Qitl'ax Xen, a boy raised by his grandmother;
- The Story of Guli, the Skunk;
- A Story About a Brother and a Sister;

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- A Story About an Owl;
- Two Sisters and the Stars; and,
- Frog Steals a Baby.

434 This is not a complete list but it is representative of the legends I heard. Each carries with it an underlying message or moral that is intended to instruct and inform Tsilhqot'in people in the way they are to lead their lives. They set out the rules of conduct, a value system passed from generation to generation.

435 I distinguish legends from stories. Stories are recordings of actual events in an historical period of time. Often they are of deaths or loss of children. For example, the story of Child Got Lost is about a child who went missing in the northern part of Tachelach'ed. Stories are told to remind people of significant events and are not necessarily designed to carry a life directing message.

k. Summary

436 In the early nineteenth century, Tsilhqot'in people lived in a semi-nomadic hunter, gatherer society in a harsh environment. They were a rule ordered society, tied by language, kinship and customs. Reverence for the land that supported and nourished them continues to the present generation. Tsilhqot'in people no longer live as their forefathers at the time of sovereignty assertion. However, the land continues as a central theme in their lives, providing continuity and stability from generation to generation.

8. Aboriginal Group

a. The Proper Rights Holder

437 Aboriginal rights are communal rights. They arise out of the existence and practices of a contemporary community with historical roots. When making a declaration of Aboriginal rights, the court must identify which present group or community holds those rights. The plaintiff and Canada assert that the proper rights holder is the community of Tsilhqot'in people. British Columbia says that the proper rights holder is the community of Xeni Gwet'in people.

438 Most of the cases that touch on this issue are regulatory cases in which individuals claim Aboriginal rights that belong to a larger collective. In many of these circumstances it is not necessary to identify with precision the appropriate collective. The Supreme Court of Canada has offered some guidance on how to identify and define the distinctive societies that hold Aboriginal rights.

439 This inquiry is primarily a matter of fact to be determined on the whole of the evidence relating to the specific society or culture. One factor to consider is who made decisions about land use and occupation in the historic Aboriginal culture. The Supreme Court of Canada considered this factor in *Delgamuukw* at para. 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.

440 In *Bernard*, the Court related the identification of the proper group to the continuity requirement.

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McLachlin C.J.C. stated the following at para. 67:

The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance": *Delgamuukw*, per Lamer C.J.C., at paras. 150-51.

441 In *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 (S.C.C.), the Court considered a claim to Métis rights under s. 35(1). In order to identify the proper rights holder, the Court undertook a two stage process. The first stage was to identify the historic community that exercised the right. The second stage was to identify the contemporary rights-bearing community.

442 When identifying the historic rights-bearing community, the Court reviewed the historical evidence including demographic evidence contained in Hudson's Bay Company journals. The Supreme Court of Canada noted several other factors in *Powley* at para. 23:

In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim ...

443 After finding the existence of an historic rights-bearing community, the Court went on to consider the claimant's ancestrally based membership in the present community. The Court noted at para. 34:

It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.

444 In my view, the tests for demonstrating the existence of an Aboriginal community that can support the claim to s. 35(1) rights in this case can be no different than those required of a Métis community. I add to the analysis the view that identification as a member of a community is not external. Membership is identified by the community. It should always be the particular Aboriginal community that determines its own membership.

445 No matter how a contemporary community defines membership, a critical inquiry for the purposes of s. 35(1) rights is an ancestral connection to the relevant community extant at contact in the case of rights, or at sovereignty, in the case of title. In all of the Aboriginal rights and title decisions I have reviewed, the relevant historic community has been the larger First Nation that existed at the time of contact or sovereignty.

446 Aboriginal people, like people in societies everywhere, typically belong to more than one group that helps to define their identities. In both historical and contemporary times, an individual can simultaneously be a

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member of a family, a clan or descent group, a hunting party, a band, and a nation.

447 Of interest in the passage from para. 115 of *Delgamuukw* (S.C.C.) is the observation that Aboriginal title is held by all members of the Aboriginal nation. British Columbia submits that in *R. v. Marshall*, [2002] 3 C.N.L.R. 176, 2002 NSSC 57 (N.S. S.C.), the summary conviction appeal judge, Scanlan J., found the rights holder group to be the band rather than the larger Mi'kmaq Nation. At para. 84, Scanlan J. said:

Occupancy necessary to establish Aboriginal possession is a question of fact and Aboriginal title should be determined on the facts pertinent to the band and not on a global basis. That is especially important in this case owing to the fact that Mi'kmaq were organized largely at the band level.

448 In the trial court, (*R. v. Marshall*, [2001] 2 C.N.L.R. 256, 2001 NSPC 2 (N.S. Prov. Ct.)), Curran P.C.J. made a number of findings at para. 5, including:

- a) all the defendants, except perhaps Roger Ward [Mr. Ward was a member of a New Brunswick Band], are entitled to exercise whatever remains of any aboriginal title or any treaty rights the Mi'kmaq of Nova Scotia had in the 18th century;
- b) the Mi'kmaq of mainland Nova Scotia in the 18th century likely had aboriginal title to lands around some bays and rivers;
- c) the Mi'kmaq did not have aboriginal title to any part of Cape Breton Island;
- d) 18th century Mi'kmaq might have had some claim to coastal lands from Musquodoboit to the Strait of Canso.

449 Thus, Curran P.C.J. found the rights holder group to be the Mi'kmaq of Nova Scotia. Curran P.C.J. made some findings about band level organization, but the above remarks of Scanlan J. seem to be entirely the views of that jurist on the summary conviction appeal. In addition, Scanlan J. concluded at para. 117 that "there is evidence to support the Trial Judge in his conclusions" and then went on to cite the findings of the trial judge noted above. The Supreme Court of Canada restored the trial judgment, thereby rejecting the view of Scanlan J. concerning the band as the rights holder.

450 British Columbia argues that the proper historic and modern rights holder group here should be found at the band level. They support this argument by referring to the evidence that, among the historic community of Tsilhqot'in people, decisions about the uses of particular locations were made at the band or encampment level. Thus, it was a group of Tsilhqot'in people, subsequently known as the Alexandria Band, rather than all Tsilhqot'in people, who decided to take up permanent residence near Fort Alexandria in 1860. Similarly, British Columbia points out that when reserves were set aside for the various Tsilhqot'in Bands commencing in the 1880's, decisions concerning the desired locations appear to have been made by individual bands or chiefs, rather than by any pan-Tsilhqot'in institution.

451 In my view, British Columbia places too much emphasis on the notion of a single decision-making body at the time reserves were established. The use of a small decision-making body for one particular purpose is not necessarily the hallmark of a community.

452 As an historical footnote on the growth of the concept of Aboriginal title in Canada, it is worth noting that in *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs & Northern Development)* (1979), [1980] 1

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[F.C. 518](#) (Fed. T.D.), Mahoney J. found that the Inuit people comprised a sufficiently "organized society" to hold rights in the land at common law, notwithstanding their nomadic, widely scattered population and the absence of any overarching social or political organization.

453 The search for a pan-Tsilhqot'in decision-making institution is not unlike the *Baker Lake* test for an "organized society". Such an approach is weighed down with superficial value judgments about Aboriginal ways of life. The need to measure traditional Aboriginal societies against the legal ideals and institutions of a "civilized society" has passed. As Hall J. (dissenting) said in *Calder v. British Columbia (Attorney General)*, [\[1973\] S.C.R. 313](#) (S.C.C.), at p. 346:

The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species ...

454 In setting out the test for Aboriginal title in *Delgamuukw* (S.C.C.), the Court made no reference for the need to find an "organized society". Lamer C.J.C. referred to the *Baker Lake* test at para. 21 but later ignored this element in the test for Aboriginal title set out in his judgment.

455 Bands are defined by the *Indian Act* but are not expressly made legal persons by that statute. While they have an existence separate from that of their members, they lack many of the abilities of natural persons, corporations, municipalities and even unincorporated associations: see *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)*, [\[2001\] 4 F.C. 451, 2001 FCA 67](#) (Fed. C.A.), at para. 15 *et seq.*

456 There is no legal entity that represents all Tsilhqot'in people. The Tsilhqot'in National Government, a federally incorporated legal entity, only represents five of the seven Tsilhqot'in communities. It does not represent either the Toosey/Tletincox-tin Band or Tsilhqot'in people who are members of the Ulkatcho Band at Nagwentl'un (Anahim Lake). It seems to me that the search for a legal entity does not assist in the effort to define the proper rights holder.

457 The recognition by the Supreme Court of Canada in *Powley* at para. 23 that "different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification" applies equally to Tsilhqot'in people. The political structures may change from time to time. Self identification may shift from band identification to cultural identification depending on the circumstances. What remains constant are the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot'in person. The Tsilhqot'in Nation is the community with whom Tsilhqot'in people are connected by those four threads.

458 Aboriginal nations are characterized as such in the same way that French speaking Canadians are viewed as a nation. Nations in this sense are a group of people sharing a common language, culture and historical experience. They are a culturally homogeneous collective of people, larger than a clan, tribe or band. A nation state is a self-governing political entity that has sovereignty and external recognition. First Nations are not nation states; they are nations or culturally homogeneous groups of people within the larger nation state of Canada, sharing a common language, traditions, customs and historical experience.

459 Tsilhqot'in people make no distinction amongst themselves at the band level as to their individual right

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to harvest resources. The evidence is that, as between Tsilhqot'in people, any person in the group can hunt or fish anywhere inside Tsilhqot'in territory. The right to harvest resides in the collective Tsilhqot'in community. Individual community members identify as Tsilhqot'in people first, rather than as band members.

460 When Simon Fraser first met with Tsilhqot'in people on the banks of the Fraser River in 1808, he described them as "Chilk hodins". On his return trip later that year, he again met with people he described as Chilk-hodins, "a tribe of the Carriers". The next reference to Tsilhqot'in people is in the journals of the HBC following the establishment of Fort Alexandria.

461 It is significant that the HBC journals and census documents between 1822-1838 refer to Tsilhqot'in people belonging to certain chiefs. These records provide repeated references to Tsilhqot'in people, with variations on spelling. There is no reference to Xení Gwet'in people in these documents.

462 Nobili's journals refer to visits to Tsilhqot'in villages. His contact with Tsilhqot'in people included the ancestors of people who today describe themselves as Xení Gwet'in people.

463 Marcus Smith makes reference to the "Stone Indians" in his 1872 journal when talking about his travels among the Tsilhqot'in people. He wrote that his party had camped "by the margin of Tatla lake not far from the camp of Keogh, the chief of a small band of Indians who subsist by fishing on the lakes and hunting on the slopes of the Cascade mountains, from which they have the local name of "Stone Indians". The Xení Gwet'in people are the descendants of these people.

464 When reserves were set aside in the "Nemaiah Valley" by A. W. Vowell in 1899, there was no reference to Xení Gwet'in people. The minutes of his decision to set aside Chilco Lake, Garden, Fishery and Meadow Reserves dated September 20, 1899 refer to the "Nemaiah Valley Indians".

465 The laying aside of these reserves appears to have followed a request made by Hewitt Bostock, M.P. to James A. Smart, Deputy Superintendent General of Indian Affairs, in a letter dated July 27, 1899. I have already noted in my historical summary that Bostock referred to the people living in Xení as "a number of Indians who have belonged to different tribes in that part of the country but who for one reason or another have left their own reservation or tribe and have gone to live in this valley". I conclude that the people from "different tribes" were all Tsilhqot'in people who are the ancestors of the modern day Xení Gwet'in.

466 For decades, the people who have lived on these reserves were known as the Nemaiah Valley Indian Band. This was the name given to them by the Federal Department of Indian Affairs. The Tsilhqot'in words Xení Gwet'in translates to "people of the Nemaiah Valley". The Xení Gwet'in people officially changed the name of their band to the Xení Gwet'in First Nations Government in 1995.

467 At the time reserves were fixed, tribes, clans or families of Tsilhqot'in people lived in different locations across a vast territory. The creation of reserves was a consequence of requests made by these clans or families through their chiefs. Prior to and after the allocation of reserves, Tsilhqot'in people watched as Europeans preempted land that was a part of Tsilhqot'in territory. The requests for reserves were as much a part of self-preservation as anything else; a way of protecting some smaller part of the whole from pre-emption by others.

468 In the modern Tsilhqot'in political structure, Xení Gwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xení, including Tachelach'ed. Other bands are considered to be the caretakers of the lands that surround their reserves. Still, the caretakers have no more rights to the land or

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the resources than any other Tsilhqot'in person.

469 The setting aside of reserves and the establishment of bands was a convenience to government at both levels. The creation of bands did not alter the true identity of the people. Their true identity lies in their Tsilhqot'in lineage, their shared language, customs, traditions and historical experiences. While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people.

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 subgroup 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.

471 This conclusion accords with Professor Slattery's view of the law of Aboriginal title. In his article entitled "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 745, Professor Slattery stated:

What role, then, does native custom play in this scheme? The answer lies in the fact that, while the doctrine of aboriginal land rights governs the title of a native group considered as a collective unit, it does not regulate the rights of group members among themselves. Subject, always, to valid legislation, the latter are governed by rules peculiar to the group, as laid down by custom or internal governmental organs.

Thus, the doctrine of aboriginal land rights attributes to native groups a collective title with certain general features. The character of this collective title is not governed by traditional notions or practices, and so does not vary from group to group. However, the rights of individuals and other entities within the group are determined *inter se*, not by the doctrine of aboriginal title, but by internal rules founded on custom. These rules dictate the extent to which any individual, family, lineage, or other sub-group has rights to possess and use lands and resources vested in the entire group. The rules have a customary base, but they are not for that reason necessarily static. Except to the extent they may be otherwise regulated by statute, they are open to both formal and informal change, in accordance with shifting group attitudes, needs, and practices.

[Footnotes omitted].

472 Almost 20 years later, Professor Slattery's view has not altered. In B. Slattery, "The Metamorphosis of Aboriginal Title", (2006) 85, Can. Bar Rev. 255, he discusses Aboriginal title as a *sui generis* right at common law and says, in part, at p. 270:

According to this theory, aboriginal title is not grounded in English property law, nor is it based on the customary laws of particular Indigenous groups. It is a distinctive form of title — a *sui generis* right — that gives an Indigenous group the exclusive right to possess and use its traditional lands for such purposes as it sees fit, subject to the restriction that the lands cannot be transferred to outsiders but may only be ceded to or shared with the Crown, which holds an underlying title to the land.

Viewed *externally*, aboriginal title is a uniform right, which does not differ from group to group. Viewed *internally*, it delimits a sphere within which the customary legal system of each group continues to operate, regulating the manner in which the lands are used by group members and evolving to take account of new

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needs and circumstances.

9. Aboriginal Title

a. Nature of Aboriginal Title

473 The origin and nature of Aboriginal title in Canada has been the subject of great debate both inside and outside the courts. Canadian courts began to outline and define Aboriginal title (also referred to as Indian title or native title) in *St. Catharines Milling & Lumber Co. v. R.* (1888), (1889) L.R. 14 App. Cas. 46 (Ontario P.C.). That case arose out of a timber licensing dispute in the Province of Ontario and did not directly involve Aboriginal people. In 1873 the Saulteaux Tribe ceded certain lands to the federal Crown when they entered into Treaty 3. The company claimed it had a right to log on those lands pursuant to a licence issued by the Canadian government. The Province argued it had the sole authority to license pursuant to s. 109 of the *British North America Act*.

474 The case was ultimately decided by the Privy Council who made several significant findings. The first was that Indian title to lands in Ontario originated from the *Royal Proclamation* (1763), R.S.C. 1985, App. II, No. 1. Lord Watson, speaking for the Court, expressed the view that the land "tenure of the Indians was a personal and usufructuary right, dependant upon the good will of the Sovereign": *St. Catharines Milling*, p. 54.

475 A usufruct is a legal right to use, benefit from and derive profit from property belonging to another person, provided the property is not damaged or altered in any way. According to this concept of title, the Aboriginal occupants have the right to live on the lands but they are prevented from doing anything that would affect the underlying title held by the Crown.

476 The Privy Council also found that the Crown "all along had a present proprietary estate in the land, upon which the Indian title was a mere burden": *St. Catharines Milling* at p. 58. The personal usufructuary right held by the Saulteaux people disappeared when the lands were surrendered to the Crown under the 1873 treaty. The Court held that the federal government ceased to have jurisdiction over the lands pursuant to s. 91(24) of the *BNA Act* because the entire beneficial interest passed to the Province of Ontario under s. 109.

477 The Privy Council later qualified its description of the Aboriginal interest as a personal right. The Court explained that "personal" meant the land was "inalienable except by surrender to the Crown": *Quebec (Attorney General) v. Canada (Attorney General)* (1920), [1921] 1 A.C. 401 (Quebec P.C.), pp. 410-411 (the *Star Chrome* case). The right was thought to be held at the pleasure of the Crown and could be extinguished at any time.

478 The description of Aboriginal title as a usufructuary right was favoured by the Supreme Court of Canada into the 1980's: see, for example, *R. v. Smith*, [1983] 1 S.C.R. 554 (S.C.C.), at pp. 561-2; *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), per Dickson J. at p. 379 and p. 382. Viewed through a more contemporary lens, it is not surprising the Supreme Court of Canada has found that describing Aboriginal title as a usufructuary right is "not particularly helpful": *Delgamuukw* (S.C.C.) at para. 112. Given the nature of Aboriginal title as now defined by the jurisprudence, it is fair to say that it can no longer be characterized as a usufructuary right.

479 The historical view of Aboriginal title grew out of Canada's colonial past, what Professor Slattery calls "the Imperial Model of the Constitution": Slattery, B. "The Organic Constitution: Aboriginal Peoples And The Evolution of Canada" (1995) 34 Osg. Hall. L.J. 101 at p.103. This concept of the Constitution is constructed upon British law, primarily consisting of statutes passed by the Imperial Parliament. From this perspective Ab-

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original people had no inherent jurisdiction over their lands and peoples, and had only those rights that were recognized by a Crown Act.

480 Prior to the 1970's, there was little support in Canadian law for the recognition of Aboriginal title, unless the claim was based on the *Royal Proclamation, 1763*. D.W. Elliott summarized the situation in an article entitled "Aboriginal Title" reproduced in Morse, ed., *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1985) 48 at p. 61:

By January 1973, the Canadian common law position on the question of the legal status of aboriginal title was little different from that resulting from the *St. Catharine's* case eighty-four years earlier. Canadian courts recognized a Proclamation-based title. Although this title had legal status, it was subject to all the geographical and other uncertainties of the Proclamation. There was no clear indication from the courts as to whether the broader concept of an occupancy-based right had any status at common law.

481 The notion of an occupancy-based Aboriginal title started to gain acceptance at a time when countries such as Canada began the process of decolonization. The first major phase of decolonization began after the Second World War, spurred on by the work of the United Nations. The United Nations was setting a new agenda for human rights and equality of the world's peoples: see Peter H. Russell, *Recognizing Aboriginal Title*, (Toronto: University of Toronto Press, 2005). In Canada decolonization experienced its first legal challenge with the Supreme Court of Canada's decision in *Calder*.

482 *Calder* was a turning point which changed our basic understanding of Aboriginal rights and allowed us "to move from a framework grounded in imperial history to a framework more open to local history, tradition, and perspectives": Slattery, "The Organic Constitution" at p. 107.

483 In the *Calder* case the Nishga people sought a declaration of Aboriginal title to lands their ancestors had occupied and used from time immemorial. The Court split three ways, disagreeing on the result. A majority of the Court suggested that Aboriginal title may exist separately from the *Royal Proclamation*. Judson J., speaking for Maitland and Ritchie JJ., found that the geographical limitations of the *Royal Proclamation* meant that it had no bearing upon the question of "Indian title" in British Columbia. He went on to observe at p. 328:

... 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. There can be no question that this right was "dependent on the goodwill of the Sovereign".

484 Judson J. agreed that any right of occupancy had been extinguished in lands not set aside for Indian occupation. He stated at p. 344:

In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

485 Judson J. would have dismissed the appeal on the ground that title had been extinguished. However, he

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also agreed with Pigeon J. that the absence of a fiat from the Crown deprived the trial court of jurisdiction. Due to the court's split decision on extinguishment, Pigeon J.'s decision is the *ratio decidendi* of the case.

486 Hall J., speaking for Spence and Laskin JJ., disagreed with Judson J. on the extinguishment issue. He concluded that if a right was to be extinguished, it must be done by specific legislation, not by general land legislation.

487 In what appears as a fresh approach to the issue of Aboriginal title, Hall J. recognized that the Nishga people were a distinctive cultural entity "with concepts of ownership indigenous to their culture and capable of articulation under the common law": *Calder*, p. 375.

488 A question left open by Hall J. was whether Aboriginal possession of the kind disclosed by the admitted and proved facts in *Calder* was sufficient juridical possession to give rise to proprietary rights. In the Court of Appeal, *Calder v. British Columbia (Attorney General)* (1970), 13 D.L.R. (3d) 64 (B.C. C.A.) at p. 66, Davey C.J.B.C. explained that although "the boundaries of the Nishga territory were well known to the tribes and to their neighbours ... These were territorial, not proprietary boundaries, and had no connection with notions of ownership of particular parcels of land". The issue of boundaries is one which arises repeatedly in Aboriginal title cases.

489 The *Calder* decision was applied in *Baker Lake*. The Inuit people who lived in the Baker Lake area brought an action in the Federal Court of Canada asserting claims over an undefined portion of the Northwest Territories, including approximately 78,000 square kilometres surrounding the community of Baker Lake. The plaintiffs' ancestors lived a nomadic existence on the "barren lands" and their survival depended primarily upon the availability of caribou.

490 The plaintiffs advanced "ownership" claims, including injunctions restraining the Crown from issuing land use permits, and mining companies from mining. They also requested a declaration that the claimed lands were not public or territorial lands. The plaintiffs also made non-proprietary claims of a title to hunt and fish.

491 In regard to the hunting and fishing rights claim, the plaintiffs sought "a declaration that the lands comprising the Baker Lake area" were "subject to the aboriginal right and title of the Inuit residing in or near that area to hunt and fish thereon": *Baker Lake*, p. 524. As Mahoney J. noted at p. 559: "The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did."

492 Mahoney J. considered the source of Aboriginal title and at p. 556 referred to the *Calder* (S.C.C.) decision as:

... solid authority for the general proposition that the law of Canada recognizes the existence of an aboriginal title independent of *The Royal Proclamation* or any other prerogative act or legislation. It arises at common law.

493 Mahoney J. then determined that to establish such a "title" to hunt and fish, the claimants must prove:

1. That they 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.

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4. That the occupation was an established fact at the time sovereignty was asserted by England.

This territorial standard of occupation has since been termed the *Baker Lake* test.

494 The standard used in the *Baker Lake* test reflected the limited content of the right claimed. Mahoney J. commented on the fact that the Inuit were few in number and wandered over a large area, saying at p. 561:

The nature, extent or degree of the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title is to be determined in each case by a subjective test. To the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to human occupation, the Inuit occupied them.

495 Mahoney J. decided that the Inuit of Baker Lake had established their claim to a right to hunt and fish over most of the lands in issue, excepting a portion in the southwest claimed area that had been used by other non-Inuit Aboriginal people. He concluded that the plaintiffs had a common law "aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it ...": *Baker Lake*, p. 563.

496 The court considered that this right to hunt and fish could coexist with the radical or allodial title of the Crown, or with notional occupation by the Crown. However, it could not coexist with physical occupation by private landholders or by the trading posts of the Hudson's Bay Company. Mahoney J. said at p. 565:

The coexistence of an aboriginal title with the estate of the ordinary private land holder is readily recognized as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful enjoyment of his land. However, its coexistence with the radical title of the Crown to land is characteristic of aboriginal title and the [Hudson's Bay] Company, in its ownership of Rupert's Land, aside from its trading posts, was very much in the position of the Crown. Its occupation of the territory in issue was, at most, notional.

497 Mahoney J. emphasized the vulnerable nature of the "title" he was finding, stating at p. 568:

Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

498 And further, at p. 576:

To the extent that their aboriginal rights are diminished by those laws [*Territorial Lands Act; Public Lands Grants Act*], the Inuit may or may not be entitled to compensation. That is not sought in this action. There can, however, be no doubt as to the effect of competent legislation and that, to the extent it does diminish the rights comprised in an aboriginal title, it prevails.

499 The plaintiffs' ownership based claims and requests for a declaration that the lands in question were not public lands and that the Inuit were holders of surface rights were refused.

500 The next important development in Canadian Aboriginal law was the patriation of the Canadian Constitution with the enactment of the *Constitution Act, 1982*, and in particular, s. 35(1). That section reads:

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

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and affirmed.

501 In Professor Slattery's opinion this provision represents "a basic shift in our understanding of the constitutional foundations of Canada": "Organic Constitution" at p. 108. He pointed to the response of the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), at pp. 1105-1106 where the Court quotes with approval an article by Professor Noel Lyon entitled, "An Essay On Constitutional Interpretation" (1988) 26 *Osgoode Hall L.J.* 95:

... 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.

502 Professor Slattery argues for a new concept of the Constitution which he calls the Organic Model. This model "holds that the Constitution is rooted ultimately in Canadian soil rather than in Europe, while acknowledging the important influences of Great Britain and France ... the Model rejects the positivist view that our most fundamental laws are embodied in legislation and are grounded ultimately on the sovereign's power to command obedience...": "Organic Constitution" at p. 111.

503 The view that Aboriginal title is rooted in Canadian soil is embodied in the theory that title is *sui generis*. Put in more simple terms, Aboriginal title in this country is unique and in a class by itself.

504 In *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 (S.C.C.) the Supreme Court of Canada said at p. 678 "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".

505 The description of Aboriginal title as *sui generis* captures the essence of a proprietary right shaped by both the common law and Aboriginal legal systems. Aboriginal title does not belong to either one of these perspectives, and can only be explained and understood by reference to both: *Delgamuukw* (S.C.C) at para. 112. The Court went on to explain the underlying principles of this *sui generis* title at para. 113 of *Delgamuukw*:

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.

506 The source of Aboriginal title also reflects the relationship between common law and pre-existing systems of Aboriginal law. As Lamer C.J.C. explained in para. 114 of *Delgamuukw*:

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 occupa-

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tion 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.

507 Another *sui generis* aspect of Aboriginal title is that it is held communally. Aboriginal title cannot be held by individual persons. Lamer C.J.C. at para. 115 of *Delgamuukw* stated:

... 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.

508 While those rights are held communally by the Aboriginal title holders, the underlying title remains vested in the Crown. The Supreme Court of Canada explained as follows in *Sparrow* 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 ...

509 One of the key challenges of Aboriginal law is reconciliation between present day Aboriginal title holders and the Crown. For there to be a lasting reconciliation, this relationship must be negotiated with reference to contemporary interests and needs, bearing in mind the realities of modern society. As the Court of Appeal in *R. v. Sparrow* (1986), 32 C.C.C. (3d) 65 (B.C. C.A.), explained at pp. 90-1:

The constitutional recognition of the right to fish cannot entail restoring the relationship between Indians and salmon as it existed 150 years ago. The world has changed. The right must now exist in the context of a parliamentary system of government and a federal division of powers. It cannot be defined as if the Musqueam Band had continued to be a self-governing entity, or as if its members were not citizens of Canada and residents of British Columbia. Any definition of the existing right must take into account that it exists in the context of an industrial society with all of its complexities and competing interests. The "existing right" in 1982 was one which had long been subject to regulation by the federal government. It must continue to be so because only government can regulate with due regard to the interests of all.

510 A further *sui generis* aspect of Aboriginal title is that it contains an inherent limit on the uses Aboriginal peoples can make of their lands. Thus "...lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands": *Delgamuukw* (S.C.C.) at para. 125. The Supreme Court of Canada explained at para. 126 that the purpose of this limit is to:

... afford legal protection to prior occupation in the present-day. Implicit in the protection of historical patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

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511 As Brian Slattery points out in his article "The Metamorphosis of Aboriginal Title" ((2006) 85 Can. Bar Rev. 255), the common law has adapted in light of current circumstances. He states at p. 262:

The adaptation was shaped by three needs: to ensure the continuity of aboriginal title and its recognition in a modern form; to supply appropriate remedies for the wrongs visited on Indigenous peoples; and to accommodate public and private interests in the lands concerned.

512 The common law recognition of Aboriginal rights and title calls for a reconciliation of Aboriginal people's prior occupation of Canada and the sovereignty of the Crown. The *Constitution Act, 1982* enshrined the principle of reconciliation by way of s. 35(1). Lamer C.J.C.'s majority decision in *Vanderpeet* clarified our current understanding of the origin and nature of these rights.

513 *Vanderpeet* arose out of the prosecution of a regulatory offence pursuant to the *Fisheries Act*, R.S.C. 1970, c. F-14 and Regulations. Two members of the Sto:lo First Nation caught ten salmon in the Fraser River. They held an Indian food fishing licence which permitted them to catch fish for food. The federal fisheries Regulation specifically prohibited the sale or barter of any fish caught under the authority of such a licence. Ms. Van der Peet, the common law wife of one of the fishermen, sold the salmon for \$50. She was charged under the *Fisheries Act*. She defended the charges against her on the basis that in selling the fish she was exercising an existing Aboriginal right to sell fish.

514 In the result, the majority of the Supreme Court upheld Ms. Van der Peet's conviction. In doing so, Lamer C.J.C. confirmed that s. 35(1) did not create the legal doctrine of Aboriginal rights. Those rights existed and were recognized under the common law prior to 1982. Lamer C.J.C. explained the foundation of the modern doctrine of Aboriginal rights at para. 30, as follows:

... 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.

515 Lamer C.J.C. also explored the purpose behind s. 35(1) and found it goes even further than simply recognizing the existence of Aboriginal rights. The Chief Justice explained in para. 31 that the purpose of s. 35(1) is to:

... provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose: the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

516 In *Vanderpeet* the court also articulated a test for determining whether a particular activity is protected as an Aboriginal right, as follows: para. 44:

In order to fulfill 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

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and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.

517 What emerges from this is that prior to the 1990's, it was thought that fishing and hunting rights were derived from and were dependent upon the existence of a title, usually called Indian title, which existed throughout an Aboriginal group's traditional territory. This approach was summarized by the Quebec Court of Appeal in *R. c. Côté* (1993), 107 D.L.R. (4th) 28 (Que. C.A.) where Beaudouin J.A., at p. 43, said:

Aboriginal Indian title, let us recall, is a sort of *sui generis* right of usufruct implying the right to hunt and fish for subsistence...

518 Today we no longer speak of an overarching Aboriginal title. It is more accurate to speak of a variety of Aboriginal rights. One of these rights is Aboriginal title to land. Aboriginal title is one manifestation of the broader concept of Aboriginal rights: *R. c. Adams*, [1996] 3 S.C.R. 101 (S.C.C.) at para. 25. Aboriginal rights are not a subset of Aboriginal title derived from or dependent upon proof of an overarching or underlying Aboriginal title. Lamer C.J.C. in *Vanderpeet* at para. 33 described Aboriginal title as a subcategory of Aboriginal rights:

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.

And further, at para. 74:

... aboriginal title is a sub-category of aboriginal rights which deals solely with claims of rights to land.

519 This refinement in the terminology used in modern Aboriginal rights and Aboriginal title cases has to be considered when discussing historic Canadian cases and foreign jurisprudence which use different terminology, or sometimes the same terminology, to describe different concepts. In *Vanderpeet* at para. 35, the Court recognized that Aboriginal law in the United States and Australia is "significantly different from Canadian aboriginal law".

520 The Supreme Court of Canada made a similar observation regarding Australian jurisprudence in *Vanderpeet* at para. 38:

Like that of the United States, Australia's aboriginal law differs in significant respects from that of Canada.

521 In the foregoing discussion I have attempted to demonstrate that our understanding of Aboriginal rights and title has evolved as particular issues have been addressed by the courts. In the pre-*Constitution Act, 1982* era, claims were made that Aboriginal title existed throughout traditional territories and gave rise to a right to continue to use Crown lands that had not been granted to others, for traditional pursuits. The content of the Aboriginal title was commonly understood to be inclusive of Aboriginal rights to hunt and fish for food and subsistence with a geographic scope based on a territorial concept of occupation, existing throughout entire traditional territories.

522 This view has been altered in the post-*Constitution Act, 1982* jurisprudence. In the Supreme Court of Canada cases *Adams* and *Côté*, the Court confirmed that "claims to title to the land are simply one manifestation of a broader-based conception of aboriginal rights": *Adams* at para. 25.

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523 *Côté* and *Adams* confirmed that site-specific Aboriginal rights to fish and hunt may be established over some or all of a group's traditional territory even where a claim of Aboriginal title is not made out. Aboriginal title does not subsist everywhere that Aboriginal rights are carried out, and Aboriginal title does not exist everywhere in a group's exclusive traditional territory.

524 This development shed new light upon previous arguments concerning the geographic extent of Aboriginal title. It was possible for an Aboriginal group to show that a particular practice, custom or tradition taking place on particular lands was integral to their distinctive culture so as to establish site-specific Aboriginal rights, but not establish Aboriginal title on those same lands. Thus, it was clear there were areas used by Aboriginal people upon which Aboriginal title did not exist.

525 In *Adams*, the Supreme Court rejected the position of the Quebec government that an Aboriginal fishing right could not be found on land in relation to which the Indians had surrendered their Aboriginal title. In *Adams* at paras. 26 and 27, it was noted "that some Aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances" and that these peoples' form of occupation and use of lands was not "sufficient to support a claim of title to the land" even though "many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures".

526 In *Côté* the appellants, members of the Algonquin nation, were convicted of the offence of entering a controlled harvest zone in the Outaouais region of Quebec without paying a provincially required fee for motor vehicle access. *Côté* was also convicted of the offence of fishing within the zone without a valid licence. The appellants jointly challenged their convictions on the basis that they were exercising an Aboriginal right and concurrent treaty right to fish based on a claimed Aboriginal title to their ancestral lands.

527 As with the other pre-1990 cases, throughout the lower court proceedings the appellants in *Côté* framed their claim as a right to fish incidental to Indian title to their ancestral lands. They relied on the *Baker Lake* test of occupation.

528 The Supreme Court of Canada concluded in *Côté* that fishing for food within the lakes of the relevant territory was a significant part of the life of the Algonquin people. This gave rise to an Aboriginal right exercisable in that territory even in the absence of Aboriginal title.

529 At para. 67 of *Côté* the Supreme Court of Canada stated:

... I conclude that Frenette J. made a finding of fact that ... the *ancestral lands* of the Algonquins lay at the heart of the Ottawa River basin. These *ancestral lands* included the territory demarked by the Z.E.C. ... The Algonquins, as a socially organized but nomadic people, moved frequently within these lands. The traditional diet of the Algonquins depended on the season, but Parent concluded on the basis of the available anthropological evidence that the Algonquins predominantly relied on fish to survive during the fall season prior to winter.

530 Not all the ancestral lands or traditional territory used by an Aboriginal people are subject to Aboriginal title. Freestanding Aboriginal rights may be exercised within those ancestral lands without establishing Aboriginal title. An Aboriginal people may demonstrate that an activity on a specific tract of land gives rise to an Aboriginal right, but this will not be sufficient to satisfy the further hurdle to establish Aboriginal title.

531 The developments in *Adams* and *Côté* were described in an article written by Kent McNeil titled "Abori-

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ginal Title and Aboriginal Rights: What's the Connection?" (1997), 36 Alta. L.R. 117. At p. 121 he said the following:

The picture which emerges from Lamer C.J.C.'s discussions of the relationship between Aboriginal title and Aboriginal rights in *Adams* and *Côté* can be summarized as follows. Aboriginal title depends on proof of a connection with specific land that meets an as yet undefined threshold of sufficient occupation, one aspect of which is a degree of permanence that is also undefined.

532 Since this comment was made, the Supreme Court of Canada has delivered several important decisions that have provided further guidance on the nature and content of Aboriginal title. Perhaps the most significant Aboriginal title case to be decided to date is *Delgamuukw*. That case involved a claim by the Gitksan and Wet'suwet'en people to ownership or title to lands traditionally occupied by their ancestors. In it, the Court provided the current definition of Aboriginal title and explained how that title could be proven.

533 The Court examined in abstract terms: the content of Aboriginal title, how it is protected by s. 35(1) and what is required for its proof. Although the majority of the judgment is considered *obiter dicta*, it is, as Lambert J.A. has observed, "very persuasive *obiter*": D. Lambert, "Van der Peet and Delgamuukw: Ten Unresolved Issues" (1998) 32 U.B.C. Law Rev. 249 at p. 255.

534 Lamer C.J.C. wrote the principle judgment in *Delgamuukw* (S.C.C.). He repeated at para. 2 that the court in *Adams* and *Côté* had "rejected the proposition that claims to Aboriginal rights must also be grounded in an underlying claim to aboriginal title". He also affirmed that Aboriginal title is a "distinct species of aboriginal right that was recognized and affirmed by s. 35(1)": *Delgamuukw*, para. 2. Lamer C.J.C. then authored a theory of Aboriginal rights in which those rights fall along a spectrum, depending on their degree of connection to the land.

535 Lamer C.J.C. adopted Dickson J.'s characterization of Aboriginal title in *Guerin* as *sui generis*. Lamer C.J.C. further stated at para. 111:

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 culture 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.

536 The Court pointed out that Aboriginal title cannot be explained by reference to only the common law rules about real property or to property rules found in Aboriginal legal systems. It must be understood with reference to both: *Delgamuukw* at para. 112.

537 Lamer C.J.C. then provided the following explanation for the content of Aboriginal title at para. 117:

...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

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not be irreconcilable with the nature of the group's attachment to that land.

538 To summarize, Aboriginal title is a species of Aboriginal right which differs from Aboriginal rights to engage in particular activities. It confers a *sui generis* interest in land, that is, a "right to the land itself". That interest can "compete on an equal footing with other proprietary interests": *Delgamuukw*, para. 113.

539 Aboriginal title confers a right to exclusive use, occupation and possession to use the land for the general welfare and present-day needs of the Aboriginal community: *Delgamuukw*, para. 121. Aboriginal title also includes a proprietary-type right to choose what uses Aboriginal title holders can make of their title lands. Title is subject to an inherent limit which is defined by "the nature of the attachment to the land which forms the basis of the particular group's aboriginal title": *Delgamuukw*, para. 111. Such inherent limits prohibit those uses that would destroy the ability of the land to sustain future generations of Aboriginal peoples: *Delgamuukw*, para. 128.

540 Aboriginal title also has an economic component, which will ordinarily give rise to fair compensation when Aboriginal title is infringed, varying in amount with the nature and severity of the infringement "and the extent to which Aboriginal interests were accommodated": *Delgamuukw*, para. 169.

541 Aboriginal title, like Aboriginal rights more generally, is held communally: *Delgamuukw*, para. 115. It is inalienable to third parties, but can be surrendered to the Crown: *Delgamuukw*, paras. 129-131. It must be surrendered in order to use the lands in a way contrary to the inherent limit.

b. Test for Aboriginal Title

i. Pre-sovereignty Occupation

542 Aboriginal title is proven by demonstrating three critical elements, all of which are concerned with occupation of the land, and all of which must be met in order to make out a successful claim. The Aboriginal people must establish that they occupied the lands in question at the time when the Crown asserted sovereignty over those lands. "If present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation." And finally, "occupation must have been exclusive": *Delgamuukw*, para. 143.

543 Aboriginal title arises out of the claimant's connection to their ancestral lands. The particular lands must have been occupied by the claimants prior to sovereignty. Although the Court notes that the group's connection with the land must have been integral to the distinctive culture of the claimants, Lamer C.J.C. also directed 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": *Delgamuukw*, para. 151.

544 Lamer C.J.C. explained at para. 149 that the standard of occupation required to prove Aboriginal title 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,

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and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at p. 758.

545 The cultural relationships between the claimant Aboriginal group and the land, and the ceremonial and cultural significance of the land will also be relevant to this inquiry.

ii. Exclusivity

546 Exclusive occupation may be demonstrated by the ability to exclude others, including "the intention and capacity to retain exclusive control" of the lands: *Delgamuukw*, paras. 155-156. Proof of exclusivity must rely on both the perspective of the common law and the Aboriginal perspective, placing equal weight on each. The Court went on to explain at para. 156:

... 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.

iii. Continuity

547 Continuity is not a mandatory element for proof of Aboriginal title. It becomes an aspect of the test where an Aboriginal claimant relies on present occupation to raise an inference of pre-sovereignty occupation of the claimed territory. Establishing continuity may be difficult for some claimants where their occupation shifted due to colonial settlement, disease and other post-sovereignty conditions.

548 Where an Aboriginal group provides direct evidence of pre-sovereignty use and occupation of land to the exclusion of others, such evidence establishes Aboriginal title. There is no additional requirement that the claimant group show continuous occupation from sovereignty to the present-day. Upon the assertion of sovereignty, Aboriginal title crystallized into a right at common law, and it subsists until it is surrendered or extinguished.

549 Aboriginal claimants do not need to establish an unbroken chain of continuity between present and prior occupation: *Vanderpeet*, para. 65. Aboriginal occupation may have been disrupted "perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title": *Delgamuukw* (S.C.C.), para. 153. Claimants must demonstrate that a substantial connection between the people and the land has been maintained: *Delgamuukw* (S.C.C.), para. 154.

550 Because Aboriginal title is grounded in the continuing relationship between Aboriginal people and the land, it cannot be made the subject of a transfer. This common law principle meant settlers had to derive their title from the Crown, not from Aboriginal inhabitants.

551 In *Delgamuukw* (S.C.C.) Lamer C.J.C. said at para. 126:

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.

552 And further, at para. 127:

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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.

553 In *Delgamuukw* (S.C.C.) Lamer C.J.C. clarified that changes in land use would not typically undermine the continuity element of the test for Aboriginal title. He stated at para. 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 aboriginals.

c. R. v. Bernard

554 *Bernard* is the Supreme Court of Canada's most recent decision on Aboriginal title. That case stands for the proposition that Aboriginal title is not co-extensive with any particular Aboriginal group's traditional territory. The parties in the case at bar appear to accept that proposition but fail to agree upon what that means, taking into account the facts in this case.

555 The parties in this case agree that the modern cases have defined Aboriginal title as an Aboriginal right, grounded in the continuing relationship between the Aboriginal people themselves and the land. They are divided on the application of the principles and in particular on the impact of the Supreme Court's decision in *Bernard*. The plaintiff is accused of misconceiving Aboriginal title as an over arching title, alleged to exist throughout the entire traditional territory of the Tsilhqot'in Nation. The defendants say the plaintiff arbitrarily defines the Claim Area, as one part of the larger traditional territory.

556 The plaintiff says that the above characterization of his claim is entirely incorrect. He says the defendants have taken an untenably narrow view of Aboriginal title, completely divorced from the realities of Aboriginal life. The plaintiff argues that the defendants misunderstand the characterization of definite tracts of land used by the Tsilhqot'in people for hunting, fishing and gathering, and are attempting to confine Aboriginal title to narrowly defined pinpoint sites. He says British Columbia's acknowledgement that Aboriginal title might be established in some exceptional circumstances to a specific "salt lick" or a "narrow defile" where game concentrate each year as opposed to a more broadly used area for hunting, fishing and gathering, is entirely incorrect. In the submission of the plaintiff, this is not the promise of Aboriginal title foretold by the foregoing decisions. Due to the importance of the *Bernard* decision, I must consider in detail the decisions of the lower courts and the Supreme Court of Canada.

557 In *R. v. Bernard*, [2000] 3 C.N.L.R. 184 (N.B. Prov. Ct.), Mr. Bernard, a Mi'kmaq person, cut timber on Crown lands near Miramichi, New Brunswick. He was charged under the provincial statute. In his defence he claimed treaty rights and Aboriginal title to a watershed area that included the Crown lands where the particular cut blocks were located.

558 In rejecting the Aboriginal title claim to the Miramichi watershed, Lordon P.C.J. made the following findings at paras. 98-100 and 103-110:

a) at the time of sovereignty, the Miramichi Mi'kmaq were a hunting, fishing, and gathering people who

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would migrate up and down the Miramichi River seasonally. "In summer they would congregate in large numbers in summer villages." In winter they moved inland, particularly to the area of the confluence of the Little Southwest Miramichi and the Northwest Miramichi. Settlements there had some permanency to them. These areas of permanent or semi-permanent occupation were well-established and well-defined and are now included in Indian reserves;

b) to what extent they would disperse from these areas and to where was uncertain;

c) the entire geographic area of present-day New Brunswick was considered to be the traditional territory of either the Mi'kmaq, the Maliseet or the Passamaquoddy;

d) there were large areas of the province that were considered vacant and available to be granted by the Crown without interfering with any land that was actually occupied by Indians;

e) there was no evidence of recent use of the particular area of the cut blocks;

f) the trial judge was unable to conclude that the cutting site was used on a regular basis. Such trips made there at the time of sovereignty would have been occasional;

g) there was no evidence of capacity to retain exclusive control and, given the vast area of the land and the small population, the Mi'kmaq did not have the capacity nor the intent to exercise exclusive control, which was held by the trial judge to be fatal to the claim for Aboriginal title.

559 In the trial judge's view "[o]ccasional forays for hunting, fishing and gathering are not sufficient to establish Aboriginal title in the land": *R. v. Bernard*, para. 107. The accused were convicted.

560 An appeal to the Court of Queen's Bench sitting as a Summary Conviction Appeal Court confirmed Mr. Bernard's conviction: *R. v. Bernard*, 2001 NBQB 82, 239 N.B.R. (2d) 173 (N.B. Q.B.). The defendant then appealed to the Court of Appeal, where the majority set aside the conviction and entered an acquittal: *R. v. Bernard*, 2003 NBCA 55, 262 N.B.R. (2d) 1 (N.B. C.A.).

561 In the New Brunswick Court of Appeal, Daigle J.A. disagreed with the trial judge on the standard of occupation required to establish Aboriginal title. Daigle J.A. was satisfied that the claimed area was subject to Miramichi Mi'kmaq Aboriginal title. Daigle J.A. also upheld the treaty defence, finding the harvesting of logs to be the contemporary form of a treaty right. Robertson J.A. also disagreed with the trial judge on the standard of occupation required to establish Aboriginal title. Robertson J.A. refrained from answering the question as to whether the evidence was sufficient to support a declaration of Aboriginal title, concluding it was unnecessary in the circumstances. Instead he overturned the conviction on the basis of the existence of a treaty right to harvest and sell logs. Deschenes J.A., dissenting, would not have interfered with the trial judge's findings of fact.

562 In expressing his disagreement with the trial judge, Daigle J.A. said the following at paras. 86-88:

In my view, the trial judge's statement in para. 107 that "occasional" use or "occasional forays for hunting, fishing and gathering are not sufficient to establish aboriginal title in the land" is incorrect and exhibits a fundamental misunderstanding of what *Delgamuukw* requires as sufficient elements of physical occupation to ground title. In para. 74, above, I quoted a passage from *Delgamuukw* in which Lamer C.J. refers specifically to a number of factors to be taken into account in determining the sufficiency of physical occupation. In providing guidance concerning the concept of occupation he first states that physical occupation can

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be established in a variety of ways, one of which is the "regular use of definite tracts of land for hunting, fishing or otherwise exploiting resources". On this point, he references the work of Prof. McNeil, excerpts of which I have quoted in para. 77 above. The relevant factors emphasized are the group's size, manner of life, material resources and the character of the lands claimed. In particular, the inclusion of "manner of life" in the list of factors to be considered for occupation at common law would undoubtedly include consideration of the seasonal pattern of exploitation of the resources of the entire Northwest Miramichi watershed by the Mi'kmaq. I pointed out earlier the overarching principle set out in *Delgamuukw* that the aboriginal perspective must be taken into account alongside the perspective of the common law. Therefore, as a matter of law, the same factor of the Mi'kmaq subsistence pattern, which represents the essential feature of their perspective on the occupation of their lands, must be taken into account in determining the requisite degree of occupation.

As to the meaning of "regular use" of land, the following comments by Prof. McNeil, tacitly adopted although not quoted by Lamer C.J. in *Delgamuukw*, shed light on the nature of the use of land that amounts to physical occupation at common law (p. 202):

Probably even outlying areas that were visited occasionally, and regarded as being under their exclusive control, would also be occupied by them in much the same way as the waste of a manor would be occupied by the lord ...

As to occupation of land by a hunter-gatherer aboriginal group such as the Miramichi Mi'kmaq, it was the author's opinion that such a group "who habitually and exclusively ranged over a definite tract of land ... exploiting natural resources in accordance with their own interests and way of life, would have been in occupation of that land ... As to the extent of their occupation, it would include not just land in actual use by them at any given moment, but all land within their habitual range" (p. 204).

563 *R. v. Marshall* also involved a consideration of the standard of occupation required to prove Aboriginal title. This time, a number of status Mi'kmaq persons cut timber on Crown lands without provincial authorization. They too were charged under the provincial statute. In this case the cutting had taken place in five counties on mainland Nova Scotia and three counties on Cape Breton Island. All the sites were near reserves. In admitting the cutting the defendants sought acquittal on the basis that they were entitled to cut timber for commercial purposes by virtue of their Aboriginal title to Nova Scotia.

564 The trial judge recognized that Nova Scotia was Mi'kmaq territory, unchallenged by any other Aboriginal group. He concluded that the Mi'kmaq probably had Aboriginal title to lands around their local communities but not to the cutting sites. In reaching that conclusion, the trial judge explored the degree of occupancy necessary to establish Aboriginal title saying at para. 139:

The problem for the defendant is that mere occupancy of land does not necessarily establish aboriginal title: (see *Delgamuukw*, *supra*, at paragraph 138, where Lamer C.J. commented on *R. v. Adams*, [1996] 3 S.C.R. 101). If an aboriginal group has used lands only for certain limited activities and not intensively, the group might have an aboriginal right to carry on those activities, but it doesn't have title.

565 The trial judge described the line separating sufficient and insufficient occupancy for title at para. 141, as follows:

The line separating sufficient and insufficient occupancy for title seems to be between nomadic and irregu-

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lar use of undefined lands on the one hand and regular use of defined lands on the other. Settlements constitute regular use of defined lands, but they are only one instance of it. There is no persuasive evidence that the Mi'kmaq used the cutting sites at all, let alone regularly.

566 The convictions were appealed to the Queen's Bench. Scanlan J. agreed with the approach taken by the trial judge to the proof of Aboriginal title, stating at para. 108:

Occasional use of land prior to contact or at the time of sovereignty is not enough to establish Aboriginal title. I reject the submission as put forth by the Appellants that the Mi'kmaq occupied all of Nova Scotia prior to contact to the extent required to prove title. The term occupation is not an absolute term as it applies to the concept Aboriginal title. There are degrees of occupation. Some use and occupation of the lands may be sufficient to establish particular rights short of title. As noted by Judge Curran, given the rather small number of Mi'kmaq at the time of contact and at the time of sovereignty they simply could not use all of the land in Nova Scotia at the same time.

567 Scanlan J. rejected the Mi'kmaq argument that treaties made by Canada in other areas covered vast tracts of land and by so doing Canada must have been recognizing Aboriginal title to those areas. He acknowledged that the Mi'kmaq were a formidable military force. He considered the fact that there are varying degrees of occupation and said at para. 117: "some are sufficient to establish title and some are not".

568 The Nova Scotia Court of Appeal allowed the appeal, set aside the convictions and ordered new trials: *R. v. Marshall*, 2003 NSCA 105, [2003] N.S.J. No. 361 (N.S. C.A.). Cromwell J.A. and Oland J.A. concluded that the Supreme Court of Canada had only provided limited guidance on the nature of Aboriginal occupancy that must be proven to establish Aboriginal title. They concluded at paras. 135-138 that:

(a) the appropriate standard of occupation for aboriginal title, from the common law perspective, is that of a "general occupant", "a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain", not the test applied to a trespasser under the doctrine of adverse possession;

(b) when "dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering" as part of a seasonal pattern of subsistence living should be given more weight than they would be if dealing with enclosed, cultivated land.

569 The Nova Scotia Court of Appeal in *Marshall* concluded that the lower courts had erred in requiring proof of regular, intensive use of the specific cutting sites to establish Aboriginal title. Cromwell J.A. stated at paras. 183-184 (Saunders J.A. also concurring on this point):

The test as expressed in *Delgamuukw* is whether the claimant has established exclusive occupation at sovereignty of the lands claimed. The question, in my opinion, is not whether exclusive occupation of the cutting sites was established, but whether exclusive occupation of a reasonably defined territory which includes the cutting sites, was established. Insistence on proof of acts of occupation of the specific cutting sites within that territory is, in my opinion, not consistent with either the common law or the aboriginal perspective on occupation.

I have not overlooked the Crown submission that the appellants have not established the boundaries of their

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occupation with sufficient certainty to demonstrate occupation of the whole present day province of Nova Scotia. In my view, that is not an issue which it is necessary for us to resolve in this case. To make out the defence on which they rely (and putting aside questions of whether proof of exclusive occupancy at sovereignty would afford a defence), the appellants do not have to establish Mi'kmaq aboriginal title to the whole province (although that is their claim); they have to show aboriginal title to the cutting sites. The question, therefore, is not whether the outer limits of the area of title have been established, but whether the cutting sites fall within an area to which aboriginal title has been proved.

570 In *Bernard*, the Supreme Court of Canada rejected the approaches taken by the appellate courts of Nova Scotia and New Brunswick and restored the convictions on the grounds that Aboriginal title had not been established. McLachlin C.J.C., speaking for five of seven justices, concluded that the trial judges had correctly rejected the claim for Aboriginal title in the relevant areas.

571 At para. 53, McLachlin C.J.C. confirmed the modern concept of a variety of independent Aboriginal rights. She went on to say the following at para. 54:

One of these rights is aboriginal title to land. It is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P. & C.R. 452 (Ch. D.), at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.). The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically: *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.), per Wilson J.A. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land: *Delgamuukw*, at para. 158

572 On the subject of occupation and exclusivity, McLachlin C.J.C. said the following at paras. 55-57:

This review of the general principles underlying the issue of aboriginal title to land brings us to the specific requirements for title set out in *Delgamuukw*. To establish title, claimants must prove "exclusive" pre-sovereignty "occupation" of the land by their forebears: per Lamer C.J.C., at para. 143.

"Occupation" means "physical occupation". This "may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources": *Delgamuukw*, per Lamer C.J., at para. 149.

"Exclusive" occupation flows from the definition of aboriginal title as "the right to *exclusive* use and occupation of land": *Delgamuukw*, per Lamer C.J., at para. 155 (emphasis in original). It is consistent with the concept of title to land at common law. Exclusive occupation means "the intention and capacity to retain exclusive control", and is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent (*Delgamuukw*, at para. 156, citing McNeil, at p. 204). Shared exclusivity may result in joint title (para. 158). Non-exclusive occupation may establish aboriginal rights "short of title" (para. 159).

573 At para. 58, McLachlin C.J.C. emphasized the need to satisfy the common law requirement of title, say-

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ing:

It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.

574 McLachlin C.J.C. points out at para. 60, when title is at issue, the question is:

... whether the pre-sovereignty practices established on the evidence correspond to the right of title to land. These practices must be assessed from the aboriginal perspective. But, as discussed above, the right claimed also invokes the common law perspective. The question is whether the practices established by the evidence, viewed from the aboriginal perspective, correspond to the core of the common law right claimed.

575 At para. 61 McLachlin C.J.C. cautions that it is wrong to apply a Eurocentric perspective on an issue of Aboriginal title. She states:

The common law, over the centuries, has formalized title through a complicated matrix of legal edicts and conventions. The search for aboriginal title, by contrast, takes us back to the beginnings of the notion of title. Unaided by formal legal documents and written edicts, we are required to consider whether the practices of aboriginal peoples at the time of sovereignty compare with the core notions of common law title to land. It would be wrong to look for indicia of aboriginal title in deeds or Euro-centric assertions of ownership. Rather, we must look for the equivalent in the aboriginal culture at issue.

576 At para. 62 she continued by saying:

Aboriginal societies were not strangers to the notions of exclusive physical possession equivalent to common law notions of title: *Delgamuukw*, at para. 156. They often exercised such control over their village sites and larger areas of land which they exploited for agriculture, hunting, fishing or gathering. The question is whether the evidence here establishes this sort of possession.

577 At paras. 64-65, she continues:

The first of these sub-issues is the concept of exclusion. The right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law. In European-based systems, this right is assumed by dint of law. Determining whether it was present in a pre-sovereignty aboriginal society, however, can pose difficulties. Often, no right to exclude arises by convention or law. So one must look to evidence. But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. To insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair. The problem is compounded by the dif-

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faculty of producing evidence of what happened hundreds of years ago where no tradition of written history exists.

It follows that evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.

578 As to whether a nomadic or semi-nomadic people would ever be able to claim Aboriginal title, McLachlin C.J.C. said, at para. 66, that was entirely dependant on the evidence.

579 At para. 67, she addressed the issue of continuity, saying:

The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance": *Delgamuukw*, per Lamer C.J., at paras.150-51.

580 At paras. 68-69 she reminds the trier of fact to take a sensitive and generous approach to the evidence, evaluating it from the Aboriginal perspective. Then, having evaluated the evidence:

the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal perspective.

581 To conclude, she says at para. 70:

In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: *Delgamuukw*, at para. 156. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes. Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are relied on for the right. On all these matters, evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right. This must be approached with sensitivity to the aboriginal perspective as well as fidelity to the common law concepts involved.

582 The case at bar turns on an application of the principles enunciated by the Supreme Court of Canada in *Bernard*. While this case clearly raises similar issues with respect to the land use patterns of semi-nomadic

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people, there are differences. In *Bernard* the persons accused both attempted to prove Aboriginal title at specific sites. Here the plaintiff's evidence is not limited to site specific use and occupation. The evidence ranges over tracts of land. The plaintiff argues the evidence proves a regular use of these tracts of land as well as use of site specific locations, sufficient to warrant a declaration of Aboriginal title.

583 It appears to me that The Supreme Court of Canada has set a high standard, requiring "regular use or occupancy of definite tracts of land". The Supreme Court has now clearly stated that "[t]o say that title flows from occasional entry and use is inconsistent with [...] the approach to aboriginal title which this Court has consistently maintained": *Bernard*, at para. 59.

584 Bearing in mind the directions I have set out above, I must now consider the evidence in the manner directed by the Supreme Court to see whether this is an appropriate case for a declaration of Aboriginal title.

10. Date of Sovereignty Assertion

585 In *Delgamuukw* (B.C.S.C.), McEachern C.J., said at p. 309:

The Oregon Boundary Treaty, 1846 has been judicially accepted as establishing, conclusively, British sovereignty over what is now British Columbia: *Re A.-G. Can. and A.-G. B.C.* (1984), 8 D.L.R. (4th) 161 at pp. 173-6, [1984] 1 S.C.R. 388 *sub nom. Reference re Ownership of the Bed of the Strait of Georgia*, 54 B.C.L.R. 97. Occupation of sorts started in New Caledonia, as has been mentioned, in 1805-06 with the establishment of posts by Simon Fraser.

And continuing at p. 310, he said:

Because of the view I have of this case, I do not think it is necessary to make a specific finding about a date of British sovereignty over the northern part of the province. No specific argument was made by counsel on this question. For practical purposes, especially in the territory it could well have been as early as the 1820's but legally it may not have been until the creation of the colony in 1858. 1846 was the date chosen by Judson J. in *Calder*. In my view the actual date of British sovereignty, whether it be the earliest date of 1803 or the latest date of 1858, or somewhere in between makes no difference.

586 On appeal in the Court of Appeal in *Delgamuukw* and again in the Supreme Court of Canada, all counsel appear to have agreed to treat 1846 as the date of British sovereignty in British Columbia.

587 In these proceedings, both the plaintiff and British Columbia are content to accept the date of sovereignty assertion as 1846, the date of the Oregon Treaty. The Oregon Boundary Treaty, 1846 is also referred to as the Washington Treaty. As noted by McEachern C.J. in *Delgamuukw* (B.C.S.C.) at p. 309:

the Oregon Treaty divided the United States and British territory west of the Rockies at the 49th parallel, but the treaty left Vancouver's Island in British hands (although the actual boundary through the inland sea was not settled until 1898).

588 Canada argues that the most compelling date for the assertion of British sovereignty is 1792; the date Captain George Vancouver made a formal assertion on behalf of King George III.

589 The plaintiff and Canada point out that in *Delgamuukw* (S.C.C.), Lamer C.J.C., in three separate places, referred to the "assertion of sovereignty", to "sovereignty" and to the "conclusive establishment of sovereignty".

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The plaintiff says that Lamer C.J.C. drew no distinction between these three terms and treated them as the same event. Canada disagrees. Canada says that this court must distinguish between the date that sovereignty was "conclusively established" (Canada suggests this date is 1846) and the date that sovereignty was "asserted".

590 Canada suggests the following possible dates of sovereignty assertion:

- a) 1579: The date of Sir Francis Drake's voyage along the Pacific coast and his alleged claim to New Albion (Drake's name for the coast of Northwest America).
- b) 1606: The Charter of Virginia, as noted by Norris J.A. in *R. v. White*, see para. 220, *supra*.
- c) 1763: The signing of the Treaty of Paris, whereby France ceded to the British Crown almost all of its North American possessions east of the Mississippi River, including its claims to what is now the Canadian Province of Quebec.
- d) 1778: The arrival of Captain James Cook at Nootka Sound on Vancouver Island.
- e) 1786: James Strange made a formal claim on behalf of King George III to what is now British Columbia on August 2, 1786. He made this claim in the vicinity of the Scott Islands near the northern tip of Vancouver Island.
- f) 1788: Captain Meares' annexation of "the Straits of John de Fuca ... in the name of the King of Britain" as noted by Dickson C.J.C. in *Canada (Attorney General) v. British Columbia (Attorney General)*, [1984] 1 S.C.R. 388 (S.C.C.) *sub nom. Re: Ownership of the Bed of the Strait of Georgia*, at pp. 402-403.
- g) 1792: Captain George Vancouver's assertion of sovereignty on behalf of the Crown. In advancing this date, Canada relies upon the evidence of Dr. Kenneth Coates, historian and Dr. Kenneth Brealey, cartologist and historical geographer. It should be noted that this was evidence of sovereignty assertion and was not an attempt by these witnesses to express an opinion on the legal effect of this explorer's actions.
- h) 1803: *An Act for Extending the Jurisdiction of the Courts, 1803* (U.K.), 43 George III, c. 138 (*Canada Jurisdiction Act*). This Act provided the courts of Upper and Lower Canada with extraterritorial jurisdiction. Relying on the evidence of Professor Hamar Foster, legal historian, Canada says that this statute extended jurisdiction to the "Indian territories" and in particular, to what is now British Columbia.
- i) 1818: The date of an Anglo-American Treaty establishing the 49th parallel as the international border from Lake of the Woods to the Rocky Mountains (or the "Stony Mountains" as they were then known). This treaty included a "standstill" agreement that was to last for ten years (which was extended indefinitely in 1827) with respect to any country that might be claimed by Britain or the United States on the northwest coast of America, west of the Rockies. It was agreed that the citizens of each country would have free access to such country without prejudice to the claims of the other. At trial, Dr. Coates accepted the assertion of counsel made during cross-examination that "while United States and Britain could not agree on who owned the area, that in 1818 they did agree that one or the other of their two countries had sovereignty over the area".

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j) *1821: An Act for Regulating the Fur Trade, and Establishing a Criminal and Civil Jurisdiction within certain Parts of North America, 1821* (U.K.), 1 & 2 Geo. IV, c. 66. This statute formalized the union between the Hudson's Bay Company and the North West Company. One of its provisions specifically granted rights to trade with the Indians in "any Country on the North West Coast of America, to the Westward of the *Stony Mountains*" (at p. 423, para. III). The result was that trading rights were granted to the Hudson's Bay Company to the exclusion of all other British subjects. It also explicitly allowed citizens of the United States to engage in such trade pursuant to the terms of the 1818 Anglo-American convention. Canada says that this legislation would appear to be the first British legislation which contained language making it specifically applicable to what is now British Columbia, although earlier legislation such as *Canada Jurisdiction Act* had actual effect in this area.

k) *1829*: The date that the Hudson's Bay Company established Fort Chilcotin.

591 The assertion of sovereignty is a matter of international law. In his article, "[Some Thoughts on Aboriginal Title](#)" (1999) 48 U.N.B.L.J. 19 at p. 38, Professor Slattery states:

... [t]he Privy Council and the Supreme Court have authoritatively held that there is a basic distinction between sovereignty and property rights. Sovereign title to a territory does not necessarily import full property rights to the lands located in that territory, any more than property rights to such lands necessarily import sovereign title. Sovereignty is, of course, a question of international law. It entails the right to rule a certain territory to the exclusion of other international entities. By contrast, property rights are primarily a matter of domestic law. They entail the right to occupy and use a certain tract of land to the exclusion of other individuals and groups.

592 Recognizing the distinction between sovereignty and property rights serves to assist in an understanding of the status and interests of Aboriginal nations. Aboriginal nations were not recognized as nation states by the European nations colonizing North America. The European explorers encountered groups of First Nations that were tied together by language, customs, traditions, a shared historical experience and organized in distinct cultures. Each collective of Aboriginal people formed a nation that exercised various Aboriginal rights in their territory. These Aboriginal rights are now provided constitutional protection so that the modern descendants of Aboriginal nations may continue to enjoy the rights held by their ancestors.

593 In *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), Professor R.Y. Jennings states at p. 4:

When we come to look more closely at the various modes which international law recognizes as creating a title to territorial sovereignty we shall find that all have one common feature: the importance, both in the creation of title and of its maintenance, of actual effective control. Every mode, like the Roman Law counterparts, requires the presence of *corpus* as well as *animus*. Not since the 16th century, for example, has it been possible to argue that a mere discovery, coupled with an intention eventually to occupy, is sufficient to create a title.

594 In *Territorial Acquisition, Disputes and International Law* (The Hague: Martinus Nijhoff Publishers, 1997), Surya P. Sharma says at p. 100 that the exercise or display of sovereignty sufficient to confirm sovereignty must be peaceful, actual, sufficient and continuous. In discussing the "actual" requirement, he states at p. 101:

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The rule that the exercise or display of sovereignty must be actual means, at the one extreme, that it must not be just a mere paper claim pretended to be an act of sovereignty and, at the other extreme, it must not require that there must be its "noticeable impact in every nook and cranny of the territory". As Judge Huber remarked, sovereignty cannot be exercised in fact at every moment on every point of territory.

...

In the light of the above cases it can be maintained that the rule of actual exercise or display of sovereignty means "real acts of sovereignty; that is, acts which are either a genuine exercise of domestic jurisdiction in regard to the territory or amount to a genuine international dealing with the territory, e.g., in a treaty". Since the sovereignty cannot and need not be exercised in fact on every point of a territory, it would suffice, for legal purposes, if the sovereignty is exercised or displayed in respect of the territory as a whole.

[Footnotes omitted.]

595 Canada argues that the formal and explicit assertion of sovereignty by Captain George Vancouver is the compelling date.

596 I am not persuaded that private adventurers or commissioned officers of His Majesty's Royal Navy, even with their best intentions, can to the degree required by international law, assert sovereignty over vast territories by planting a flag and speaking to the utter silence of the mountains and boreal forests. They are, in my view, just words blowing in the wind. I agree entirely with Lambert J. A. when he said in *Delgamuukw* (B.C.C.A.) at para. 707:

Sovereignty, of course, does not occur when the first sea captain steps ashore with a flag and claims the land for the British Crown. Cook did that in 1778. Sovereignty involves both a measure of settled occupation and a measure of administrative control.

597 There is no reason to doubt the sincerity of Captain Vancouver's solemn acts on the date of the King's birthday, June 4, 1792. However, there is every reason to conclude that his gift to the sovereign was decidedly less grandiose than he had intended. No doubt it was a step towards the British acquiring sovereignty. But in 1792 there was no British occupation and no ability to maintain control of the territory.

598 Canada argues that even if 1792 were not the date of the assertion of sovereignty, then the correct date could not be much later. This is because by 1818 and 1821 Britain was already acting as if it had previously asserted sovereignty over this area. Canada cites the fact that Britain entered into a treaty with the United States of America in 1818 based upon its claims of sovereignty. Britain also passed legislation to regulate the fur trade in the area in 1821.

599 In addition, Canada says Dickson C.J.C. held in *Re: Ownership of the Bed of the Strait of Georgia*, (S.C.C.) at p. 404 that Britain had "continued to assert sovereignty in, and proprietary rights over, the entire expanse of territory between the California border and the Alaska panhandle" during the period that preceded the 1846 Oregon Treaty. In the submission of Canada, 1818 would therefore seem to be the absolute latest date by which Britain could be found to have asserted sovereignty over the Claim Area.

600 It seems to me that Canada's argument builds on the failed assertion of sovereignty in 1792. While it might be argued that the events of 1818, 1821 and 1830 were a vast improvement over Captain Vancouver's act

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of imperialism, in my view, these events do not meet the tests imposed by international law. New Caledonia was not sufficiently occupied by the Crown on any of these dates. More importantly, there was no actual or effective control over the area. The legislative acts of a distant Parliament do not occupy a territory. Nor do the words on a page, in any sense, provide a *de facto* administrative control over the area.

601 I have no difficulty in concluding that The Treaty of Oregon, 1846 is a watershed date that the courts have relied upon up to now. I see no reason to move from that date. Indeed, as the Province has argued, the authorities would appear to be too well entrenched to admit any reconsideration at this level of court: see *Calder* (S.C.C.) at p. 325, per Judson J.; *Delgamuukw* (B.C.S.C.); *Delgamuukw* (B.C.C.A.); *Delgamuukw* (S.C.C.); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.), at para. 65.

602 Apart from that, by 1846 there was a *de facto* British presence in the area. The Treaty of Oregon is a treaty with another nation settling a boundary dispute and providing international recognition of sovereignty to the land and territory north of the 49th parallel. The assertion of sovereignty, recognized by another nation, is clear at this point in our history.

11. Tsilhqot'in Aboriginal Title

a. Introduction

603 The plaintiff says that a declaration of Aboriginal title, providing a right to exclusive possession and the economic benefits of the land, is fundamental to the cultural and economic survival of Tsilhqot'in people as a distinct society. Such a declaration would help preserve their connection to the land that sustains their communities. The plaintiff says a declaration of Aboriginal rights that does not include a declaration of Aboriginal title to the land would be insufficient to ensure Tsilhqot'in "cultural security and continuity": *R. v. Sappier*, [2006] 2 S.C.R. 686, 2006 SCC 54 (S.C.C.), at para. 33. In the plaintiff's submission, the evidence supports a declaration of title to the entire Claim Area. In the alternative, the plaintiff says such declarations can be made for smaller areas within the Claim Area.

604 The Province says the plaintiff's claims for Aboriginal title are contrary to the existing authorities and cannot be supported. In the submission of the Province, similar claims were made in *Bernard* and failed. In that case, a similar "territorial" approach to Aboriginal title did not succeed.

605 The Province says it struggled to identify specific sites within or outside the Claim Area that are candidates for Aboriginal title status, on the basis of the recent cases. This process cannot be completed without the plaintiff's involvement. The Province is prepared to negotiate with the plaintiff in this regard, should the plaintiff move beyond the "all or nothing" claim presently advanced. In these circumstances, the Province submits that the court could best assist the parties if it dismissed the claim as made. The Province submits that further reconciliation in this case would be enhanced if the dismissal be without prejudice to the right of the plaintiff to make an alternative claim to specific sites if the parties cannot, through negotiations, resolve this issue.

606 Canada says that the legal test for Aboriginal title contained in the more recent cases is not broad enough to allow the plaintiff to succeed in his request for a declaration of Aboriginal title. Canada submits that the evidence is insufficient to allow the Court to find occupation throughout the Claim Area so as to warrant a declaration of Aboriginal title. Canada says there were no village sites or definite tracts of land used on any regular basis. Canada adds there was no Tsilhqot'in occupation of the Claim Area at the time of sovereignty assertion, which it says was 1792.

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607 I conclude that the date of sovereignty assertion was 1846. The question, therefore, is whether Tsilhqot'in people exclusively occupied the Claim Area at that date.

608 Both Canada and the Province argue that the evidence might support a declaration of Aboriginal title to smaller sites where specific Aboriginal activities or practices took place. For example, the Province says that hunting is a practice that will not ordinarily lead to utilization of the same area year after year. Most species of game animals roam the landscape and are taken by hunters on an opportunistic basis wherever they happen to be found. There may be certain exceptions where features of the natural landscape such as a salt lick or a narrow defile between mountains or cliffs attract animals and their hunters to the same place year after year, but these would seem to be the exception.

609 Canada's approach to Aboriginal title is similar. For example, it says that salmon fishing might make it possible for a definite tract of land to be used on a regular basis if, for example, it could be shown that fishers would use a particular rock or promontory each year to spear or net spawning salmon. Canada says it was unable to locate any evidence in the transcripts with this level of specificity. It says that lake fishing would seem even less likely to satisfy the criteria since fish would be distributed throughout the lake, and fishers would be less likely to use any particular spots to fish for them. Once again, Canada was unable to locate any evidence in the transcripts that would satisfy these criteria.

610 The plaintiff characterizes the foregoing arguments of the defendants as a postage stamp approach to Aboriginal title. I think that is a fair description. There is no evidence to support a conclusion that Aboriginal people ever lived this kind of postage stamp existence. Tsilhqot'in people were semi-nomadic and moved with the seasons over various tracts of land within their vast territory. It was government policy that caused them to alter their traditional lifestyle and live on reserves.

611 Marcus Smith in his letter to The Honourable George Walkem, Chief Commissioner, Lands and Works, November 29, 1872 reported:

During the progress of the surveys, parties of these Indians were met with at various places but as they are continually wandering it is difficult to estimate their numbers ...

612 Even as the Xeni Gwet'in reserves were fixed at the turn of the twentieth century, Tsilhqot'in people continued to move around their traditional territory. The first reserves were surveyed by Indian Reserve Commissioner, A.W. Vowell. He set aside 1,257 acres "eastward of Chilko Lake, Coast District," acknowledging at the time that "[a] good deal of this land is entirely worthless": Vowell to Deputy Commissioner of Lands and Works, October 14, 1899. Perhaps from the perspective of a European person, the land could be so described. From the perspective of a Tsilhqot'in person, this land provided their cultural security and continuity. The land sustained them and they were deeply connected to it. Vowell's letter gave a hint of movement in his report that "[s]eventy Indians winter in the valley, some of these however belong to other bands and having already been provided with land were not taken into consideration."

613 Correspondence the following year records the movement of Indians from Xeni (Nemiah Valley) to settle "on the Stone Reserve and at the mouth of Whitewater": E. Bell, Indian Reserve Commissioner, May 3, 1900. In the view I take of these events, the movements of a semi-nomadic people continued, despite the efforts to contain them on reserves.

614 When European people arrived in the nineteenth century, Tsilhqot'in people lived a semi-nomadic life

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ranging inside and outside the Claim Area. Taking into account the directions of the Supreme Court of Canada, my task almost 200 years later is to decide whether Tsilhqot'in occupation of the Claim Area at the date of sovereignty assertion was sufficient to ground a modern day declaration of Tsilhqot'in Aboriginal title. I am required to apply the test set out by McLachlin C.J.C. at paras. 72-75 of *Bernard*, as follows:

The trial judge in each case applied the correct test to determine whether the respondents' claim to aboriginal title was established. In each case they required proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of assertion of sovereignty.

In *Marshall*, Curran Prov. Ct. J. reviewed the authorities and concluded that the line separating sufficient and insufficient occupancy for title is between irregular use of undefined lands on the one hand and regular use of defined lands on the other. "Settlements constitute regular use of defined lands, but they are only one instance of it" (para. 141).

In *Bernard*, Lordon Prov. Ct. J. likewise found that occasional visits to an area did not establish title; there must be "evidence of capacity to retain exclusive control" (para. 110) over the land claimed.

These tests correctly reflect the jurisprudence ...

615 Put in the language of the Supreme Court of Canada, I must "sensitively assess the evidence and then find the equivalent modern common law right. The common law right to title is commensurate with exclusionary rights of control": *Bernard*, at para. 77.

616 My task is to determine the degree of Tsilhqot'in occupation of the Claim Area at the time of sovereignty assertion. It is convenient to begin with a consideration of Tsilhqot'in territory more generally.

b. Tsilhqot'in Traditional Territory and the Claim Area

617 Dr. Kenneth Brealey is a cartologist and historical geographer. He was called as a witness for the plaintiff. Dr. Brealey was qualified to express opinions on the historical territoriality of First Nations, including the Tsilhqot'in people. In his report to the court entitled "Historical Geography of the Tsilhqot'in", at p. 13, footnote 6, Dr. Brealey said the following:

Writ large, the discipline of geography understands territoriality ... as a fundamental condition of human socio political organization. More specifically, territoriality is defined as the attempt by any individual, group or institution to affect, influence, or control people, phenomena, and relationships by delimiting and asserting control over a geographic area, which becomes the territory. Put alternatively, it is a function of three interdependent exertions: a) one that classifies an area with respect to others; b) one that involves some form of shared communication within or across it; and c) one concerned with enforcing control over it. ... there are many forms of territoriality, and each must be assessed and understood on its own terms and through the spatial referencing systems immanent to them. The important point is that oral nomadic societies ... are not 'less territorial' than, say, nation-states or trading blocs. They are simply different ...

618 Aboriginal witnesses testified that Tsilhqot'in traditional territory extended from the Fraser River westward to the eastern slopes of the Coast Range. The western boundary was defined by the Coast Range, although there appear to be overlaps with the Homalco and the Nuxalk traditional territories. On the east, the Fraser River boundary appears to overlap with the Secwepemc (Shuswap) territory. The northern boundary was at a point

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commencing just south of Quesnel, at Alexandria, over to the Coast Range. These territorial boundaries appear to have a large overlap on the northern edge with the Dakelh (Carrier) traditional territory. Similarly, the southern boundary appears to overlap with the St'l'at'imx (Lillooet) and Secwepemc territories.

619 I note that in a separate action for a declaration of Tsilhqot'in title excluding the Claim Area, Tsilhqot'in territory is described as extending well north of Quesnel, British Columbia and includes a large tract of land to the east of the Fraser River. To the south, the boundary appears to go as far as the town of Lillooet.

620 Governor Frederick Seymour in Despatch No. 37, September 9, 1864, reported to the Colonial Office, Great Britain, on the "massacre of Mr. Waddington's road party at Bute Inlet by the Chilcoten Indians". In reporting the difficulty of reaching the interior from the head of Bute Inlet, he said that he "never saw so difficult a country." He described the territory as follows:

Within the great barrier of the Cascade range lies the Chilcoten country ... It was almost unknown to white men until recent events ...

The Territory occupied by the Chilcotens extends probably 200 miles north & South. From the summits of the Bute Inlet mountains to the West Road River E. & W. The tribe roamed from the Cascade Range to the Fraser, a distance of 300 miles. ...

Little was known of the Chilcoten country & not much more of its inhabitants. ...

621 Dr. Brealey's report reviewed the available historical record spanning from the early explorations of Alexander MacKenzie and Simon Fraser, to the twentieth century anthropological and archaeological literature. With regard to Tsilhqot'in boundaries, Dr. Brealey concluded at p. 12:

In my opinion, and as shown on Map 1, pre-contact Tsilhqot'in territory would be (very roughly) triangulated by Anahim's peak in the northwest, Palmer and/or Alexis Lakes in the northeast, and Chilko and Taseko Lakes in the south; but more by the headwaters of the Chilanko and Chilcotin rivers to the northwest, Moss and Tautri Lakes to the northeast, and Chilko and Taseko Lakes in the south after contact. The important point is that neither orientation compromises Tsilhqot'in territorial integrity or continuity in the claim area.

622 After scrutinizing the historical record with respect to Tsilhqot'in conflicts with their Aboriginal neighbours, Dr. Brealey concluded at pp. 20-21 of his report that "[t]he important point, again, is that both Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within Tsilhqot'in territory."

623 In the course of his evidence, Chief William accepted counsel's suggestion that the claimed areas comprise about five percent of what is considered Tsilhqot'in traditional territory. I conclude the Claim Area lands, from the time prior to contact and through to the assertion of Crown sovereignty and beyond, fall well within the much broader area described as Tsilhqot'in traditional territory.

c. Tsilhqot'in Migration, South and East

624 In my historical review I noted that some 500-800 years ago, Tsilhqot'in people began to diverge linguistically from other Northern Athapaskan people. This took place in British Columbia, some distance to the north of where Tsilhqot'in people are at the present time. Over time there was a gradual movement along the curve of the Coast Range mountains, leading Tsilhqot'in people in a southeast direction and out onto the vast

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plateau region. During the nineteenth century there was a central Tsilhqot'in community at Nagwentl'un (Anahim Lake) which, from the base map, appears to be 70 to 80 kilometres outside of the northwestern edge of the Claim Area.

625 In his report to the court, Dr. R.G. Matson expressed the view that Tsilhqot'in people have been in Tachelach'ed (Brittany Triangle) since at least A.D. 1645-1660. Their presence in the Trapline Territories was reported to be about the same time or a little later. It is clear from Dr. Matson's work that Tsilhqot'in people, a people of Athapaskan origin, were preceded in the Claim Area by people of Salish origin. It would seem that this displacement or movement of Salish people from the Claim Area preceded or was co-existent with the movement of Tsilhqot'in people into the area. Certainly, the transition was completed well before first contact with European peoples.

626 Relying on Fraser's journal, we know that by June 1808 Tsilhqot'in people could be found on the banks of the Fraser River interacting with Secwepemc people.

627 The evidence reveals that although Tsilhqot'in groups could be found in areas throughout Tsilhqot'in traditional territory, these groups resided at different sites during different periods. Recent large-scale migrations of Tsilhqot'in groups toward the south and east are well known. In 1900, ethnographer James Teit wrote the following about Tsilhqot'in patterns of movement in his "Notes on the Chilcotin Indians" in the *Jesup North Pacific Expedition*, p. 761:

Until about thirty-five or forty years ago, nearly two thirds of the whole tribe lived in the valley which skirts the eastern flanks of the Coast Range from Chilco Lake north to near the bend of Salmon River. Most of them were located in the northern part of the valley, at Anahem or Nacoontloon Lake, just east of the territory of the Bella Coola, who at that time were a numerous tribe, and had settlements far up the Bella Coola River. Smaller bands had headquarters around Chilco and Tatla Lakes, and some families wintered along Chilco and Chilanco Rivers. Other people, probably belonging to a different sept, lived farther east, at Puntzee and Chezikut Lakes, some of them occasionally wintering in the Chilcotin Valley as far east as Alexis Creek. The band now called the Stonies seem to have wintered on the south side of the Chilcotin River at points considerably farther west than their present headquarters, many of them probably on the lower part of the Chilco River.

628 According to Teit, the exodus of Tshilqot'in people from the Nagwentl'un area had occurred by 1870. By 1900, the locations of various Tsilhqot'in groups had shifted appreciably. According to Teit at pp. 760-762, the community from Nagwentl'un had moved south and east, eventually concentrating in the area of what is now the Anaham Band's set of reserves, leaving their former home at Nagwentl'un "practically deserted" by 1870. The few remaining Tsilhqot'in families joined with incoming Ulgatcho Dakelh (Carrier) peoples, resulting in the Ulgatcho Tsilhqot'in reserve community that currently inhabits the Nagwentl'un area.

629 The Tsilhqot'in group Teit referred to as the Tl'esqox (Toosey Band) also relocated eastward to the Riske Creek area, where reserves were set aside for their use. A diminution of the Secwepemc population caused by smallpox permitted this movement; until then, according to Teit at p. 760, Riske Creek had been "really within Shuswap territory ... not far from Fraser River." Teit described the situation that prevailed in the earlier part of the nineteenth century as follows at p. 761:

The country from a little below Hanceville, or at least all of it east of Big or Deer Creek, was looked upon strictly as Shuswap territory; and the Chilcotin never wintered within even a number of miles west of this

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line, for fear of attack by the Shuswap and other war-parties from the east or south.

630 Other Tsilhqot'in groups took advantage of the departure of Dakelh groups from lands further north along the Fraser. These Tsilhqot'in bands shifted their base to the area around Fort Alexandria, where reserve lands were eventually set aside for them.

631 Even if Teit was mistaken in his identification of particular groupings of Tsilhqot'in or where each community moved, the pattern he identified remains valid. Some of those lands that were considered the centres of Tsilhqot'in residence in the first half of the nineteenth century were no longer so in the latter half. Nagwent'un, probably the most important Tsilhqot'in settlement at one time, had converted into a predominantly Ulgatcho Dakelh community by the late nineteenth century and remains so today. Tatlah Biny (Tatla Lake), Bendzi Biny (Puntzi Lake) and Chezich'ed Biny which were once Tsilhqot'in centres, have seen their populations shift as well, although a reserve was set aside relatively nearby at Tsi Del Del (Redstone). Alexandria, apparently Talkotin Dakelh country in the early to mid-nineteenth century, is now the site of a predominantly Tsilhqot'in reserve.

632 Closer to the Claim Area, a similar pattern of movement can be traced. The archaeology confirms that some of the large pit house villages along the Tsilhqox (Chilko River) and at the mouth of Tsilhqox Biny (Chilko Lake) are Plateau Pithouse Tradition (PPT) rather than Athapaskan in origin: Martin Magne and R.G. Matson, "Athapaskan and Earlier Archaeology at Big Eagle Lake, British Columbia" (University of British Columbia, Report to SSHRC, 1984).

633 However, by the early nineteenth century, some of those pit houses were serving as Tsilhqot'in residential sites. Hudson's Bay Company employees and missionaries visited these pit house villages from the 1820's to the 1840's and observed Tsilhqot'in communities. Other smaller Tsilhqot'in encampments, such as those we find in places within Tachelach'ed, were spread out along lakes and creeks, temporarily housing extended families.

634 By the latter half of the nineteenth century, the village sites on the Tsilhqox appear to have been abandoned as primary habitation sites. Colonial forces did not travel to these communities when searching for the perpetrators of the Waddington massacre in 1864. Similarly, Father Lejacq, who visited the Tsilhqot'in plateau in 1870, made the following report in a letter to Father Durieu dated June 7, 1870:

Les Chilcotins n'ont pas de villages proprement dit: Ils vivent par famille. Chaque famille a son fishing-ground, hunting-ground, son [...] -ground. Ils n'ont pas de places fixes. Ils errent d'une place à l'autre [...]. La plupart du temps ils ne se rencontrent que pour certaines grandes occasions: à la mort d'un grand personnage, à l'occasion d'un grand festin.

[The Chilcotin do not have a village as such. They are living by family, each family has its own *fishing ground, hunting ground, its own (illegible)-ground*. They do not have fixed places. They (*illegible*) from one place to the next (*illegible*) most of the time they do not gather together but for certain big occasions: at the visit of a great person, in the event of a big feast.]

635 When A. W. Vowell attended to Tsilhqot'in reserves in 1899, the Tsilhqot'in people did not ask for the Tsilhqox corridor sites to be surveyed for reserve purposes. Lands were set aside in Xenii (Nemah Valley) for a community whose fixed residence in the area had not been recorded by HBC traders or the later missionaries. I find this lack of documentary evidence is the result of the fact that none of the early visitors appear to have ventured into the area. Hewitt Bostock, a Member of Parliament for the federal riding of Yale Cariboo, wrote a let-

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ter to James A. Smart, Deputy Minister, Interior Department dated July 27, 1899 and set in motion the reserve identification process in the Xení area. According to Bostock, Xení was the refuge of "a number of Indians who have belonged to different tribes in that part of the country but who for one reason or another have left their own reservation or tribe and have gone to live in this valley".

636 The reasons for these movements are complex and cannot be adequately understood on the evidence advanced in this case. Technological changes as a result of contact (including the availability of guns), the impact of the fur trade, the arrival of settlers and land pre-emption, the influence of colonial and church authorities, and large-scale demographic shifts, likely as a consequence of smallpox, all played their parts. The traditionally semi-nomadic lifestyle of Tsilhqot'in people, with its emphasis on mobility and seasonal exploitation of scarce resources, must also be taken into account.

637 The deadly consequences of smallpox in the early 1860's resulted in major shifts among the Aboriginal populations of the interior of British Columbia. As already noted, in the case of some Tsilhqot'in people, this was a movement south and east to locations *already occupied* by Tsilhqot'in people. The movement was largely a regrouping of families as a consequence of the massive number of deaths from smallpox. As evidenced by the records of the HBC, Tsilhqot'in people had already located themselves south and east of Nagwent'un well before this migration.

638 It was not only Tsilhqot'in people who suffered from the smallpox epidemic and the consequent loss of many lives. Their neighbours to the north — the Dakelh people, to the east — the Secwepemc people, and to the south — the Stl'atl'imx people, all endured the same fate. They too were on the move and some of the territories they vacated became occupied by Tsilhqot'in people. As I have already noted, the area around Fort Alexandria in the 1820's was Dakelh territory. The post-smallpox migration saw Tsilhqot'in people move into that area and today there is a Tsilhqot'in reserve in an area that does not appear to have been occupied by Tsilhqot'in people at the time of sovereignty assertion. Fort Alexandria falls outside the Claim Area and its occupation at the time of sovereignty is not in issue here.

639 Perhaps the most important pieces of historical documentary evidence that show a Tsilhqot'in presence in and about the Claim Area arise from the establishment of Fort Chilcotin in the fall of 1829. As I have already noted, this HBC trading post was located west of Tsulyu Ts'ilhed (Bull Canyon, also known as Tobacco Jump) between the junctions of Tish Gulhdzinqox and the Chezqox with the Tsilhqox, approximately 15 km east of the northern boundary of the Claim Area at the apex of Tachelach'ed. It was in close proximity to the site of three present-day Tsilhqot'in Reserves: approximately 8 km from the Tletincox-t'in (Anaham) Reserve on the north shore of the Chezqox; approximately 12 km from the Yunesit'in (Stone) Reserve on the south shore of the Chezqox; and, approximately 8 km from the Tsi Del Del Reserve (Redstone).

640 The establishment of this trading location resulted from a business decision made by the HBC. It was preceded by eight years of trade with Tsilhqot'in people, the first recorded transaction taking place at Fort Alexandria in November 1821. I have no difficulty in concluding that there was a Tsilhqot'in occupation of the areas adjacent to and surrounding Fort Chilcotin. Had there been no Tsilhqot'in people present, Fort Chilcotin would not have been established. I note however that the site of Fort Chilcotin is not within the boundaries of the Claim Area.

d. Boundaries of the Claim Area

641 On several occasions during the course of the trial I remarked that the boundaries of Tachelach'ed and

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the Trapline Territories were entirely artificial. Tachelach'ed is bounded east and west by two rivers, the Tsilhqox and the Dasiqox, and on the south by a boundary characterized by a difference of opinion even amongst the people who live there. No one would suggest that the resource harvesting activities of Tsilhqot'in people ever stopped at the rivers. Indeed, Tsilhqot'in people constructed bridges to allow regular crossings of the rivers. The Tsilhqox was the major salmon stream in the area and it is clear that both sides of the river were used by Tsilhqot'in people for fishing, hunting, berry picking, root gathering and for dwelling sites.

642 The boundaries of the Trapline Territories are the result of a legislative scheme that did not exist at all until well into the twentieth century. Again, the activities of Tsilhqot'in people did not stop at these boundaries but moved across them as people gathered what was needed for survival.

643 At the north end of Tsilhqox Biny, the eastern boundary of the Western Trapline and the western boundary of Tachelach'ed separate as they wind their way to the north. Between these two boundaries is a small piece of land, not included in the Claim Area. It is impossible to conclude anything other than that this small piece of land was occupied and used by Tsilhqot'in people to the same extent as the land to the east and west that is included in the Claim Area.

644 To the south, the separation of the eastern boundary of the Western Trapline Territory and the western boundary of the Eastern Trapline Territory create a similar situation. This land, which does not form part of the Claim Area, is much larger than the piece I referred to in the last paragraph. However, on the evidence I heard, it is equally difficult to conclude that this piece of land was not utilized to the same extent and for the same purposes as the land included in the Claim Area to the east and to the west.

645 As the evidence unfolded it became apparent that in order to assert his claim, the plaintiff had to conform to the Eurocentric need to define boundaries. Traditional boundaries, surveyed with proper metes and bounds were not a possibility; some boundaries simply had to be found. The Trapline Territories provided convenient boundaries, even if they had little historical or anthropological relevance. They are, at least, relevant to the survival of a twentieth century Tsilhqot'in person. Tachelach'ed, on the eastern and western edges, provides natural geographic boundaries, rooted in oral traditions.

646 It is important to consider the issue of boundaries from the Aboriginal perspective. In this case, that perspective emerges from an understanding of nomadic or semi-nomadic subsistence patterns. Dr. Brealey's report at p.13, footnote 1, provides a helpful understanding of nomadism. He states:

While the term 'nomadism' generally implies a high degree of territorial mobility and little or no reliance on 'cultivation' in the Lockean sense, it does not mean 'haphazard' or 'unorganized'. Rather, nomadism is properly conceived as a 'way of living' in which individual or groups are occasionally compelled to alter movements on short notice when conditions demand it, but beyond that inhabit recognizable spaces, know where they can and or cannot go, and whose daily or seasonal patterns of land use tend to follow the same cyclical trajectories over time. Put alternately, nomadism is a form of territoriality ... that accommodates the need of kinship based societies having a relatively low level of technological 'development' and operating in physiographic or climatic environments that often yield their resources grudgingly.

647 Tsilhqot'in society, as described to me by several elder witnesses, displayed a high degree of territorial mobility and, until the twentieth century, appeared to place little or no reliance on European style cultivation. The fixing of reserves and the pressure to raise cattle brought such a "cultivation" component to Tsilhqot'in nomadism. Tsilhqot'in nomadism, characterized by Dr. Brealey as "relatively nomadic" or "semi nomadic" was

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centralized within Tsilhqot'in traditional territory. Tsilhqot'in people tended to follow the same seasonal patterns in ways that accommodated their kinship based society. They were semi-nomadic in the sense that there was a collective regrouping in one location each year as a respite from the dark and cold of winter. Tsilhqot'in nomadism also allowed people to move at short notice in the case of a periodic failure of the salmon run. In these circumstances large numbers moved to the west to winter with their neighbours the Nuxalk people.

648 In Tsilhqot'in semi-nomadic society there were no boundaries in the sense that a boundary is currently understood with reference to set metes and bounds. In his discussion of Tsilhqot'in boundaries on p. 6 of his report, Dr. Brealey said:

Reconstructing boundaries of oral, relatively nomadic, societies in a cartographic register is an exceedingly hazardous undertaking, and never the more so than in the Chilcotin country. To begin with, boundary construction in such societies is, by definition, rather more a 'social', than it is a 'geographical', exercise. In oral societies, boundaries are recognized, understood and validated not by maps and plans, but from 'inside the collective' — i.e. by where creation narratives fade, where genealogical linkages can no longer be traced, where place names are not recognizable, and where languages become unintelligible. Indigenous boundaries often do trace, in metes and bounds fashion, defined watersheds, creeks or lakes, but even then as much by 'coincidence' as design and the lesser the degree of physiographic relief the more 'fuzzy' boundaries tend to get. Further complicating matters in the Chilcotin country ... is the fact that until at least the late 19th century, European explorers, traders, missionaries and surveyors know almost nothing of the plateau country between the Fraser River and the coastal ranges, and south of Mackenzie's course along the Blackwater River. Finally, boundary reconstruction cannot be detached from the disruptions or dislocations engendered by a European presence more generally. In short, tracking Tsilhqot'in boundaries must grapple with the limited geographical knowledge often held by those who documented them, any changes induced by contact and colonization, and, especially, the mobile territorialities that characterized Athapaskan regional bands in the pre-contact period.

649 In hindsight, I fully understand the need to postulate artificial boundaries. There is a contemporary societal demand for limits, even if those limits, measured against the whole, are entirely arbitrary. Boundary construction in Tsilhqot'in society was a social exercise. Their boundaries were and continue to be "recognized, understood and validated not by maps and plans, but from 'inside the collective'".

12. Summary of Evidence - Occupation

a. Introduction

650 I turn now to consider the issue of Tsilhqot'in occupation of the Claim Area at the time of sovereignty assertion viewed, as best I can, with an awareness of the Tsilhqot'in perspective. What follows is a summary of evidence prepared, for the most part, from the arguments of counsel. I am indebted to counsel for their work in marshalling the evidence for my assistance. At this point, a reference to Appendix A, Map 3, would be of assistance to the reader.

651 My consideration of the evidence is over a period of time extending from pre-sovereignty assertion into the period post-sovereignty assertion. It is evident that the presence of Tsilhqot'in people in the Claim Area has been uninterrupted and continuous throughout and up to the present time.

652 Marcus Smith, in his November 29, 1872 report to the Honourable George Walkem said in part, the fol-

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lowing:

On the northwest side of Tatla Lake — and near midway of its length — which is about 20 miles — are the headquarters of Keogh, the Chief of the Stone Indians residing on the margin of the string of lakes and swamps from Tatla to Bluff and Middle lakes and down the Homathco river — They have also stations by the lakes in the mountains from Tatla to the headwaters of the Chilco River —

...

Above the mouth of the Chilco river if any white settler were sanguine enough to endeavour to make a living at so great a distance from any road — I do not think it would be safe for him to do so until the Indians are consulted and some lands reserved for them — for the good lands above this point are so mixed up with Indian hunting grounds that it would scarcely be possible to avoid a collision —

b. Oral Traditions: Legends and Landmarks

653 Numerous geographic landmarks play a prominent part in the stories and legends of Tsilhqot'in people.

654 The legend of Lhin Desch'osh is a Tsilhqot'in creation story. It is central to understanding of some of the Claim Area's geographic features. The legend was told to the court by several Tsilhqot'in witnesses. No single witness was able to recount it with the detail that is found in the story recorded by Livingston Farrand during a visit to the Tsilhqot'in territory in 1897: see Farrand, "Traditions of the Chilcotin Indians" in *The Jesup North Pacific Expedition*.

655 Lhin Desch'osh was recorded by Farrand as "Lendix'tcux". In this legend Lhin Desch'osh, a mythical person who is half man and half dog, together with his sons decided to leave a Tsilhqot'in village and "go and visit the Chilcotin country": Farrand, p.10. The mother did not want her sons to make the visit. Eventually she consented but "taught the boys all the things they would need to know on their journey" because in those times, "all the animals used to kill men ... and she taught the boys how they could get the better of the animals, and make them harmless": Farrand, p. 10. During their wanderings, they came to Tsilhqox Biny, the dominant water body of the Claim Area. While there, they saw "a great beaver dam", the resident of which pulled Lhin Desch'osh under water and swallowed him. The boys searched for their father and followed the Tsilhqox as far as Gwetsilh (Siwash Bridge). This is a course which defines the western boundary of Tachelach'ed. This legend's status as a creation story was developed further by Tsilhqot'in witnesses who testified that the boys, in looking for their father, actually created the rivers by kicking or digging up the earth. In the words of Doris Lulua: "They were kicking up the earth, and it turned into a river, making all the rivers around this area. They made Chilko River and all the small creeks."

656 After backtracking up the Tsilhqox from Gwetsilh, Farrand recorded Lhin Desch'osh's boys searched for him "up the Whitewater" River (Dasiqox) to "its head" (Nadilin Yex), where they eventually found him: Farrand, p. 13. Oral tradition related by the witness Patricia Guichon confirms this part of the legend. Their course traces the eastern boundary of Tachelach'ed and the northwestern portion of the Eastern Trapline boundary. A small portion of the Dasiqox is not included in the Claim Area.

657 According to Farrand at p. 14, Lhin Desch'osh and his sons then returned down the Whitewater River (Dasiqox). Thereafter they transmogrified, turning into several stones at the location where a mythical chipmunk escaped their attempt to catch it. This place, known to Tsilhqot'in people as Lhin Desch'osh, is located near

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Tsulyu Ts'ilhed (Bull Canyon, also known as Tobacco Jump) on the plateau just north of Tachelach'ed. Doris Lulua testified this event of transmogrification occurred when they were "almost home to Chilko Lake."

658 Farrand's record of the Tsilhqot'in legend of Lhin Desch'osh closes at p. 14 by noting that "[b]efore turning into stone, they made Indian potatoes, and scattered them all about on the snow mountains." The oral tradition evidence of Patricia Guichon and Elizabeth Jeff confirms Lhin Desch'osh was the source of sunt'iny (mountain potatoes). The Dzelh Ch'ed (Snow Mountain) identified by Tsilhqot'in witnesses as having sunt'iny include those above Tsi Tese'an (Tchaikazan Valley), Yuhitah (Yohetta Valley) and Tl' ech' id Gunaz (Long Valley). All of those locations are directly south of Tachelach'ed and are partially in the Western Trapline area.

659 Another important Tsilhqot'in legend is that of Ts'il'os and ?Eniyud. Ts'il'os (Mount Tatlow) towering over 10,000 feet is the dominant mountain in the Claim Area.

660 In the times of the ?Esggidam (ancestors), Ts'il'os and ?Eniyud were married and lived with their family in the mountainous area around Xenì. When Ts'il'os and ?Eniyud decided to separate, each took children with them. Shortly after separation, ?Eniyud, Ts'il'os and the children transmogrified into mountain formations. Ts'il'os now presides over the Claim Area. ?Eniyud travelled northwest to the area around Naghatalhchoz Biny (Big Eagle Lake) just prior to the transmogrification. She is now known as ?Eniyud Dzelh. Both are charged with the responsibility of protecting and watching over Tsilhqot'in people forever.

661 According to oral tradition, as ?Eniyud wandered about, she sculpted the land to create Xenì and Ts'uni'ad (Tsuniah Valley). Above these valleys sit the lesser snow mountains of Xenì Dzelh (Konni Mountain), Gweq'ez Dzelh (Mount Nemaih) and Ts'uni'ad Dzelh (Tsuniah Mountain).

662 Tsilhqot'in oral tradition explains that ?Eniyud left Ts'il'os in the mountains around Xenedi'an where sunt'iny and ?esghunsh (yellow avalanche lily/bear tooth) grow. ?Eniyud seeded various other areas with these root vegetables in the course of her journey before she transmogrified into ?Eniyud Dzelh. She seeded the sunt'iny areas of ?Esqi Dzul Tese'an, ?Esgany ?Anx, Gughay Ch'ech'ed and Tl'egwezbens above Xenì. Upon arriving in the area of Naghatalhchoz Biny where her childhood family continued to reside, ?Eniyud seeded Tsimol Ch'ed (Potato Mountain).

663 Various Tsilhqot'in witnesses recounted the legend of Salmon Boy. Farrand recorded it as well at pp. 24-26. In this story, a group of Tsilhqot'in boys were playing on the banks of the Tsilhqox near Henry's Crossing. One boy jumped on a piece of ice floating down the river and rode it all the way to the distant ocean. The legend instructs the listener that this is where the salmon come from, and where they are to be found spawning in Tsilhqot'in country. In the words of Minnie Charleyboy, "if [our ancestors] did not teach you the story, you wouldn't know where the fish came from". The Tsilhqot'in boy is transmogrified into a salmon and swims with the many other salmon on the long journey to the spawning grounds on the Tsilhqox. Approaching their spawning beds near the mouth of Tsilhqox Biny, the salmon are guided by Tizlin Dzelh (Tullin Mountain). A Tsilhqot'in family catches Salmon Boy. He then transforms back into his human form and reveals he is their lost son. The Tsilhqox forms part of the western boundary of Tachelach'ed and Tizlin Dzelh is within the Claim Area.

664 Farrand's accounts identify other Tsilhqot'in landmarks. Tatlah Biny (Tatla Lake), lying to the northwest of the Western Trapline is the location of the legend, The Man and Three Wolves. That lake is also featured in the legend of Bird Pulled Under Water to Catch Fish as told by elder Elizabeth Jeff and reported by Robert Lane in 1953. Francis Setah, Minnie Charleyboy and Elizabeth Jeff told the legend of Guli (skunk). This was

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named *The Adventures of Two Sisters* by Farrand. The story describes the location of a slide area where the mountain was broken up by Guli. The mountain is called Ts'uni?ad Dzelh, the slide area is called Guli Dzelh ?Elhghenbedaghilhdenz or Sa Ten (the place where skunk blew out the mountain). These areas are all within the Claim Area.

665 I acknowledge that many of the legends that form the oral traditions of Tsilhqot'in people are not unique. Many legends are found in the oral traditions of other Aboriginal people. The names of the geographic locations are adapted to their particular circumstances. The fact that others have similar oral traditions does not reduce the cultural significance of Tsilhqot'in oral traditions to Tsilhqot'in people. I conclude that the references to lakes, rivers and other landmarks formed a part of these legends for Tsilhqot'in people at the time of sovereignty assertion.

666 For Tsilhqot'in people, Lhin Desch'osh is an account of both their origins as a people and of their homeland. Tsilhqot'in witnesses variously stated the purpose of Lhin Desch'osh and his sons' mission was to "fix the land", "make the land better" and to "make Tsilhqot'in land safe for humans". Lhin Desch'osh also explains the origins of sunt'iny in the Dzelh Ch'ed.

667 Ts'il?os and ?Eniyud as well as Guli, explain the origins of key mountains, valleys and geographic landmarks in the transitional mountain-plateau zone on the perimeter of the Dzelh Ch'ed (Snow Mountains) at the plateau. Their legend also explains the dispersal of sunt'iny as an important food resource.

668 Salmon Boy explains the origins of the salmon that return annually to the Tsilhqox. These legends also instruct Tsilhqot'in people on the legendary means of root extraction and recovery using root digging sticks. For Chief William, the legends reveal how one is to become a "Tsilhqot'in person"; they are "what we live by" and provide an understanding of Tsilhqot'in land. For Minnie Charleyboy, "the legends were told to you is so you learned how our ancestors live and you also survive by the stories and that's how you — we survived".

669 Ts'il?os and ?Eniyud explain the Dechen Ts'edilhtan (the law) against separation. Consequences include ba ts'egudah (bad luck; negatively affecting one's future). In the case of Ts'il?os and ?Eniyud, they were transmogrified into mountains. Even now, it is considered improper behavior to point at either peak. To do so will bring ba ts'egudah, often in the form of foul weather. Ts'il?os and ?Eniyud are persons to be respected. Tsilhqot'in people are taught that they are charged with the responsibility of respecting all of the land, no less than these two mountain peaks.

670 Lhin Desch'osh and his sons were turned to stone because they neglected to ask all the necessary questions before starting on their journey. As a result, they were unable to complete the task they had been entrusted with, namely, changing all the animals into ones that would not harm humans. They did not completely fix Tsilhqot'in country and thus the ses (bear), for example, remains a lethal threat to Tsilhqot'in people. Lhin Desch'osh also instructs that twins are powerful, and have special responsibilities to fix and maintain the land.

671 This is not intended to be a complete review of all oral traditions relating to the Claim Area. It should also be noted that the teller of these oral traditions does not, as a matter of routine, offer an explanation of the meaning of any particular legend. The listener is left to distill and then apply the meaning to their own life. This is a lifelong process and is enhanced by maturity and reflection on one's various life experiences.

c. Time Depth

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672 The abundance of Tsilhqot'in place names in and about the Claim Area is an important consideration in determining the time depth of occupation. Archaeologist Morley Eldridge testified that "[p]lace names, by their nature, tend to be relatively stable". He provided the example that on the British Columbia coast there are Salishan place names in areas that have been Kwakiutl for the past 150 to 200 years. Coast Salish languages are part of the Salishan language family. Coast Salish territory includes the coastal areas surrounding Georgia Strait and Puget Sound. Kwakiutl is a different group of First Nations people located in areas of Central and Northern Vancouver Island, Queen Charlotte Strait and Johnstone Strait. These are people who do not speak Salishan. In short, there is some longevity in place names.

673 In the central region of British Columbia in which the Claim Area is located, there is an abundance of place names that were anglicized upon the arrival of the European fur traders and settlers. Some examples include Tsilhqox (Chilko River and Lake), Chuzquox (Chilcotin River), Dasiqox (Taseko River), Yuhitah (Yohetta Valley and Lake), Ts'uni?ad Biny (Tsuniah Lake), noted by early Europeans as "Sooneat L., Talhiqox Biny (Tatlayoko Lake), Tatl'ah Biny (Tatla Lake) and Bendzi Biny (Puntzi Lake), first recorded as Benzhee or Puntseen L. Of central significance is the entire Tsilhqot'in (Chilcotin) plateau.

674 Tsilhqot'in place names in and about the Claim Area include prominent mountain peaks, prime resource areas, archaeological sites, sites that related to specific oral traditions and sites that are otherwise significant for Tsilhqot'in people. I accept the evidence of both Eldridge and Dr. Dinwoodie when they say that these place names indicate Tsilhqot'in people have been in the area for a very lengthy period of time.

675 Dr. Nancy J. Turner, a distinguished ethnobotanist and ethnoecologist, provided evidence on the time depth of the presence of Tsilhqot'in people in the Claim Area. Her evidence was the subject of several objections raised by counsel and dealt with by the Court: *Xeni Gwet'in First Nations v. British Columbia*, 2005 BCSC 131 (B.C. S.C.). I concluded that Dr. Turner was entitled to express opinions as an expert in ethnoecology and ethnobotany. She was qualified to express opinions on a range of subjects related to her expertise, including timelines for the acquisition of ecological knowledge.

676 Dr. Turner expressed the opinion that when people first move to an area they are unfamiliar with the local resources. It takes time and observation at a particular location to gather practical knowledge about how to harvest the resources and how to conserve and maintain the resource for future use. Dr. Turner testified that it takes: "a lot of time, generations of teaching and observation, to build up a really complex system of knowledge that leads to sustainable use of people's environment." Tsilhqot'in people have names and uses for numerous plants found in the Claim Area. They have managed and harvested those plants for generations. In Dr. Turner's opinion, it would not have been possible for Tsilhqot'in people to have acquired this knowledge and developed this connection to the plant resources in their territory within the last 150 years. Based on the names of plants and the knowledge of their uses, she concluded Tsilhqot'in people had been resident in the Claim Area for at least 250 to 300 years.

677 Dr. Turner was cross-examined extensively in this area. I have no difficulty in accepting the opinions she expressed. I conclude that Tsilhqot'in people have been present in the Claim Area for over 250 years based on the length of time required to develop the names and knowledge of the Claim Area plants used for food and medicine.

678 In accepting this opinion, I am mindful of Dr. von Gernet's view of Dr. Turner's conclusions. He is critical of her methodology. I appreciate that Dr. Turner was in "uncharted territory". Her opinions were another

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piece of the puzzle tying together the archaeology, anthropology, cartology and history of the Claim Area to be considered along with the evidence of oral history and oral traditions.

d. Trails, Hunting, Fishing and Trapping

679 There was and is an extensive network of Tsilhqot'in trails in the Claim Area. Dr. Brealey used evidence from the historical record to map the transportation trails throughout the Claim Area and beyond. I accept Dr. Brealey's evidence that the rivers, trails, routes, creeks and portages have been used by Tsilhqot'in people since pre-contact times. Cultural anthropologist, John Dewhirst also concluded that a Tsilhqot'in trail network was well established by 1864 and had been used by Tsilhqot'in people prior to 1846, the date of sovereignty assertion. I conclude that prior to contact and at the time of sovereignty assertion there was an extensive network of trails forged and used by Tsilhqot'in people within and adjacent to the Claim Area.

680 One obvious use of this trail network is to assist with hunting, fishing, trapping and resource gathering. In its written argument, the Province submits: "British Columbia does not contest the plaintiff's claim on behalf of the Xeni Gwet'in of an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses." Similarly, in its written argument, "Canada does not contest the plaintiff's claim to an aboriginal right to hunt and trap for domestic purposes throughout the Claim Area." Canada submits that the plaintiff's claim is "weaker in certain specified portions of the Claim Area". I take what Canada says as a reluctant concession. However reluctant, it must have some meaning.

681 Attached to these concessions is the implicit acknowledgement of Tsilhqot'in occupation of the Claim Area at the date of first contact, despite disagreement as to what that date might be and despite arguments as to the precise location of Long Lake. I find that the date of first contact in this case pre-dates sovereignty assertion. Therefore, it follows that these concessions on Aboriginal rights are an acknowledgment that Tsilhqot'in people occupied the Claim Area at the time of sovereignty assertion and before. I find that Tsilhqot'in people, some of whom were the forefathers of the group of people who today call themselves the Xeni Gwet'in, were present in the Claim Area at the time of first contact and at the time of sovereignty assertion.

e. Regular Use of Definite Tracts of Land

682 It is the nature and extent of this occupation that presents the next challenge. As was reiterated in para. 73 of *Bernard*:

. . . the line separating sufficient and insufficient occupancy for title is between irregular use of undefined lands on the one hand and regular use of defined lands on the other. "Settlements constitute regular use of defined lands, but they are only one instance of it" (para. 141).

Permanent village sites, cultivated fields and other lands showing visible signs of an investment of labour would satisfy this test for Aboriginal title.

683 There do not appear to be village sites that were occupied year round by Tsilhqot'in people. At the time of sovereignty assertion, Tsilhqot'in people had no cultivated fields or other lands showing visible signs of an investment of labour. The fields they relied upon were not cultivated in the usual sense. However in Dr. Turner's opinion the mountain slopes that provided the berries and root plants showed evidence of many generations of plant harvesting and management. These slopes have sustained Tsilhqot'in people since before the arrival of

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Europeans. Historical village sites were more in the nature of a collection or grouping of niyah qungh or lhiz qwen yex in which they resided during cold winter months.

684 Another way to demonstrate sufficient occupation is to prove regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: *Delgamuukw* (S.C.C.) at para. 149, citing McNeil, *Common Law Aboriginal Title*, at pp. 201-2.

685 In this case, the plaintiff says that both Tachelach'ed and the Trapline Territories are definite tracts of land used on a regular basis by Tsilhqot'in people. Tsilhqot'in seasonal rounds define these tracts of land within the traditional territory over which Tsilhqot'in people traversed. In the alternative, the plaintiff says that smaller areas within Tachelach'ed and the Trapline Territories form other definite tracts of land that were used on a regular basis by Tsilhqot'in people. These tracts were also defined by the seasonal movements of Tsilhqot'in people. In both his primary position and his alternate position, the plaintiff says Tsilhqot'in occupation has been exclusive and continuous since the date of sovereignty assertion.

686 Earlier I explained that I intend to consider the submissions setting out what the plaintiff considers to be lesser tracts of land included within the whole. While the pleadings confine the nature of the declaration the plaintiff may be entitled to, I am not precluded from expressing a view as to whether other areas might be subject to Aboriginal title. Indeed, in my view both British Columbia and the plaintiff invited me to express my views on what land might qualify for Tsilhqot'in Aboriginal title. I do not intend, after this lengthy trial, to shy away from expressing an opinion in areas that might assist in the ultimate resolution of matters between Canada, British Columbia and the Tsilhqot'in people.

687 Both defendants object to any declaration of Aboriginal title. They point out the artificiality of the Claim Area boundaries and say that the occupation by Tsilhqot'in people within those boundaries has not been sufficient to ground a declaration of title throughout the Claim Area. As already noted, both acknowledge that there might be Tsilhqot'in Aboriginal title to some discrete spots of significance in and about the Claim Area.

13. Claim Area Sites

a. Tsilhqox (Chilko River) and the Historical "Long Lake"

688 In a review of land use and occupation by Tsilhqot'in people both inside and outside the Claim Area, it is appropriate to assess their presence on the Tsilhqox corridor. Canada argues there were no Tsilhqot'in people occupying the Claim Area at the time of sovereignty assertion. To reach that position, Canada argues that the "Long Lake" referred to in historical documents is not Tsilhqox Biny but rather, Tatl'ah Biny.

689 The literal meaning of Tsilhqot'in is people of the Tsilhqox: see Dr. Eung-Do Cook report. The name indicates a longstanding presence of Tsilhqot'in people on this river corridor.

690 They are the people of the Tsilhqox, not the Chezqox. It is true that Tsilhqot'in people have had a presence on the Chezqox for generations. They continue to have that presence. But the Tsilhqox is the major salmon bearing stream at the core of their existence as Aboriginal people, weaving its way into their oral traditions and providing them with sustenance and shelter for centuries.

691 This basic fact is one reason why Canada's argument that Long Lake is actually Tatl'ah Biny and not Tsilhqox Biny remains only a speculative venture. I am entirely satisfied that close scrutiny of all the evidence

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in this case leads to but one conclusion. The reference in the historical documents to Long Lake is a reference to Tsilhqox Biny. For greater clarity I will review some of those historical documents.

692 The importance of Long Lake can be seen in considering the identification of Chief Quill Quall Yaw and Chief Konkwaglia. The records of Fort Chilcotin refer to Chief Quill Quall Yaw, who was said to be the "Chief of Long Lake": see for example, the entries in the Chilcotin Post Journal for Friday, January 25, 1839 and Tuesday, October 22, 1839. In 1825, William Connolly visited Chief Quill Quall Yaw. In 1845, Jesuit Father Nobili visited Chief Konkwaglia. Eldridge and Dewhirst agreed that Chief Quill Quall Yaw identified in the HBC records and Chief Konkwaglia identified in the correspondence of Nobili were the same person. I acknowledge that neither expert is a historian, but in my view their work in this particular area satisfies me that their conclusions on this point are entirely correct.

693 Based upon his opinion concerning the Chief's identity, Eldridge concluded that Connolly and Nobili had both reached either Henry's Crossing or Biny Gwechugh (Canoe Crossing) on the Chilko River in 1825 and 1845 respectively. There they both found Tsilhqot'in people living in villages. This is compelling evidence that there were Tsilhqot'in people living near the north end of Tsilhqox Biny in both 1825 and 1845.

694 Connolly's first visit to "Chilcotin Country" was in 1825. This visit is recorded in the Journal of Occurrences, New Caledonia District 1825/26, entries for December 1825. Connolly proceeded southwest from Fort Alexandria to "Chilcotin country", eventually reaching the Chezqox, encountering Tsilhqot'in people at various locations along the way. On December 17, 1825, Connolly reported that:

At seven oclock we proceeded on our voyage, and at nine we passed a second fork of the Chilcotin which appears to take its rise in the mountains to the southward. Our route lay along the Main Branch which we continued to follow.

695 Connolly continued his narrative, describing what he encountered along the "Main Branch" of the river:

At eleven OC we passed a small lodge, containing only one man and his wife ... and at five oclock in the evening reached the last camp consisting of eight lodges Inhabited by about fifty men and a large number of women and children. The Chief, who visited Alexandria this summer, is a young man and he with all his followers turned out to meet us as soon as we made our appearance and conducted us to his lodge, a large and spacious habitation where we were treated with all the politeness of which an Indian is capable. He was overjoyed to see Mr. McDougall ... They feasted us with the Fat of a Sheep they lately Killed, and gave us as much Salmon as we required for ourselves & Dogs. Tho' of a very inferior quality we are informed that the Chilkotin Lake from whence the main Branch of this River flows is distant only a quarter of a Days march from their present Camp. The entrance of the lake is where they generally reside but the conveniency of being nigh their Salmon Caches is what induces them to remain where they now are. When salmon fails, which frequently happens, they either fish in the lake during the winter or Repair to the River which Sir Alexr. McKenzie descended on his way to the Pacific Ocean, which is inhabited by a numerous Tribe of Atnahs, among whom they live ...

696 Connolly went on to explain that Atnah is "a name applied by the Carriers to all nations who are not of their Race." The Atnahs referred to in the above passage are the Nuxalk (Bella Coola) people.

697 Connolly's journal continues as follows:

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The distance between Alexandria and this spot I should think is from one hundred and eighty to two hundred miles, three fifths of which is in the space which divides Frasers River from the Chilcotin, and the remaining two fifths following the Banks of the latter river to this place. ... along the river a Prairie extends throughout the whole route ... The country is very uneven, and to the south lofty mountains are seen, by which likewise the lake, which lies to the westward, appears to be surrounded ...

698 Eldridge concluded that the "entrance of the lake" where Tsilhqot'in people were said to "generally reside" is the archaeological site EjSa-11, the former village site known as Gwedats'ish, located at the north end of Tsilhqox Biny.

699 Dewhirst also visited the confluence of the two rivers, taking pictures of the locations for the court to consider. He said the Chezqox at this point is "quite small" and compared to the Tsilhqox it is "a kind of creek". It was his opinion that the Tsilhqox was the main river and the Chezqox was a tributary. Dr. Brealey in his Report at p. 56 described the Tsilhqox as the "main salmon bearing stream in the territory". Canada (Department of Fisheries) has for many years maintained a salmon counting site near the Tsilhqox Biny outlet. By contrast, there are no salmon in Tat'ah Yeqox (Tatla Creek) which feeds in to the Chilanko River which then flows into the Chezqox.

700 On February 1, 1840, McBean reported that he had reached a village called Tse-lah about sundown on the first day and a village called Long Lake on the second day, somewhat after sundown. Both Dewhirst and Eldridge interpreted this to mean that the village Tse-lah was somewhere along the Tsilhqox between Fort Chilcotin and Tsilhqox Biny, which is consistent with their theory that Tsilhqox Biny is Long Lake. Brealey acknowledged Tse-lah could be a village at the east end of Tat'ah Biny as an unlikely possibility. However, in his opinion, all of the evidence points to the fact that Tse-lah was Tsilangh, a fishing and winter encampment on the Tsilhqox.

701 Father Nobili also visited the area in 1845. Canada argues that it is not at all clear that he was anywhere near Tsilhqox Biny. It is true that Father Nobili likely did not see the lake. However, as I understand the evidence, Tsilhqox Biny was not visible from the location where he stood which is graphically described in his journal.

702 Dewhirst considered the historical documents and made some personal observations of the area. His evidence was that he stood at that point described in a letter by Father Nobili dated November 30, 1845. Nobili wrote:

We were standing facing a canyon between two huge mountains of sheer rock, without a single twig or bush ... and the wind coming from the northern coast of the Pacific tore wildly through that channel. I did not know that I was no more than a two days' journey on foot from that coast, I say on foot, because they told me that it was impossible to cross over those two mountains on horseback.

703 Dewhirst's personal observations were made at the north entrance to Chilko Lake at a point where the lake is not visible. The description would not fit the north end of Tat'ah Biny.

704 In his written report entitled "Tsilqot'in Use and Occupancy of the Xení Gwet'in Claim Area, 1793-1864", August 2005, Dewhirst said the following:

In my opinion, the modern names for the Chilko River and Chilcotin River do not reflect the actual geo-

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graphical relationship of the main river to its tributaries. Names on modern maps suggest that the Chilko River is a tributary of the Chilcotin, when, in fact, the main river consists of the Chilko River and the Chilcotin River below the Chilko. The much smaller Chilcotin River above the Chilko is really a tributary of the main river.

In 1825 Connolly visited the last camp on the Chilko River, located above the Taseko-Chilko confluence. The last camp was also the largest visited by Connolly, containing "about Fifty Men and a large number of women and children" (Connolly 1825: 17 Dec 1825). These people told Connolly that they generally resided near the entrance to the "Chilcotin Lake" from which the "main Branch of the River flows" (Connolly 1825: 17 Dec 1825). Connolly also commented in the same entry that "Lofty Mountains" to the south appear to surround the "Lake." High mountains do surround Chilko Lake, and the "main branch" of the river is the Chilko River.

705 In footnote 81, p. 81 of his report, Dr. Brealey set out the evidence he relies upon to express his opinion that "Long Lake" is "an early contact period designation for Chilko Lake": Historical Geography of the Tsilhqot'in, Map Series and Report, September 22, 2004.

706 When I consider the historical documents and the evidence in this case, I have no difficulty in accepting the opinions expressed by Brealey, Eldridge and Dewhirst on this issue. I conclude that the "Long Lake" described in the historical documents is Tsilhqox Biny. Canada's theory is not supported by the weight of the evidence. In reaching this conclusion I have not ignored Canada's submissions regarding the lack of other historical evidence concerning occupation of the Claim Area. It was and remains a remote part of this Province and it comes as no surprise that historical knowledge of the area is sparse. The silence is a direct result of the fact that visits by non-Aboriginals were few and brief.

b. The Tsilhqox (Chilko River) Corridor

707 The Tsilhqox corridor provides the best evidence of residential sites that might qualify as village sites especially during the fall and winter months. Even in these areas, there were no "cultivated fields" as those words are generally understood. The Tsilhqot'in people were not an agrarian people. They utilized what nature had to offer on the mountain slopes and valleys: berry picking, harvesting medicinal plants, mountain potato and other root vegetables. They used and managed these resources and in that sense these areas were their "cultivated fields". McDougall, Connolly, McBean, other HBC employees and Jesuit priest Father Nobili found village or dwelling sites along the Tsilhqox corridor. Dr. Brealey's report to the court said this about the Tsilhqox at p. 56:

Because it was the main salmon-bearing stream in the territory, occupancy of the banks proper was higher in later summer and fall, but there seems to have been year-round habitation at several selected sites; and in 1872, Smith remarked that the plateaux on either side were important Tsilhqot'in hunting grounds. Indeed, archaeological work in the 1970s revealed some 105 previously occupied or used sites (including 40 house-pits) in the first 30 kilometres downstream from the outlet of the lake, but there were larger encampments at the Keekwillie Holes, Siwash Flats and Bridge, Taseko Mouth, Brittany Creek and Lava Canyon.

708 Archaeological studies of the Tsilhqox corridor have identified a series of sites with a substantial number of large, round cultural depressions (frequently referred to as house pits or pit house remains), as well as a number of sites with fewer, smaller cultural depressions in either round or rectangular form. Tsilhqot'in witnesses call the dwellings which left round cultural depressions lhiz qwen yex and the rectangular lodges niyah

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qugh. As already noted, the latter structures are generally regarded as typically Athapaskan, whereas the former — the round house pits, particularly the larger of these — are seen as non-Tsilhqot'in and more likely Plateau Pithouse Tradition (Salish) in origin. A map from Robert Lane's dissertation provides an overview of Tsilhqot'in and non-Tsilhqot'in origin pit house sites on the Chilcotin plateau: Lane Thesis at p. 36.

709 Experts both for the plaintiff and for British Columbia compared the historical records pertaining to Tsilhqot'in villages from the first half of the nineteenth century to the archaeological materials describing sites on the Tsilhqox. These experts theorized that it is likely some of the larger pit house sites of non-Tsilhqot'in origin were partly reoccupied by Tsilhqot'in communities in this time period. Eldridge drew the following conclusion in his report entitled, "The Correlation of Archaeological Sites and Historic Tsilhqot'in Villages along the Chilko River and Vicinity" (March 2006) at p. 17:

In my opinion, the large houses found at the Chilko Lake outlet and Kiggly Holes probably were first constructed during a Salishan presence that predates the entry of the Chilcotin and the collapse of the large mid-Fraser River villages. ... I think it probable that some of the very large pithouses, that were probably initially inhabited a thousand years or more before, were likely rebuilt and used around the time of the establishment of Fort Chilcotin.

710 The house pits along the Tsilhqox were not all occupied simultaneously. The historical records suggest that two or three of the largest pit houses on the Tsilhqox corridor could lodge a community of upwards of 60 individuals. If all of the house-sized depressions were occupied at such densities at the same time, the population would far exceed the maximum carrying capacity of the area.

711 Human carrying capacity can be roughly defined as the number of individuals an environment can sustain or support, taking into account the technologies of resource exploitation adopted by the population. The plaintiff's demography expert estimated the carrying capacity of the whole Claim Area at 100-1000 persons: Mathis Wackernagel, "Assessment of Human Population Carrying Capacity prior to European Influence and Trade of the Brittany Triangle and Xenigwet'in Trapline Areas in the Nemiah Valley, British Columbia" (the "Claim Area"), December 2004.

712 British Columbia says that as a result of the previous occupation of the Tsilhqox corridor by non-Tsilhqot'in people, and because the later reoccupation by Tsilhqot'in people did not extend to all sites or to all features in a given site, the presence of archaeological remains cannot, in itself, indicate a Tsilhqot'in dwelling site or even a Tsilhqot'in presence in an area. This would be true if one were to ignore the presence of Tsilhqot'in people at various locations as recorded in the historical documents. When Connolly, McDougall, McBean and Father Nobili travelled the Tsilhqox corridor they recorded the fact that Tsilhqot'in people were in occupation of these winter dwellings. Thus, the logical inference to draw from the whole of the evidence is that during these times it was Tsilhqot'in people who occupied the entire Tsilhqox corridor. There is no historical evidence of occupation by others during this critical historical period.

i. Gwetsilh (Siwash Bridge)

713 There was considerable evidence, particularly from Aboriginal witnesses, about the site known as Gwetsilh or Siwash Bridge on the Tsilhqox. It is located north of the junction of the Tsilhqox and Dasiqox and was an important gathering place for Tsilhqot'in people outside the Claim Area but clearly within what would be considered Tsilhqot'in territory.

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714 Gwetsilh is an important archaeological site, with pit house remains on both sides of the river. As its English name suggests, Gwetsilh was the site of an Aboriginal bridge, one of three such bridges that Lane discussed in his 1953 dissertation on the Tsilhqot'in. The archaeological sites at Gwetsilh are registered as FaRv-3 and FaRv-1. Eldridge, in his report for British Columbia correlating archaeological sites with historic Tsilhqot'in villages, noted the location of the sites and provided inserts of the site form maps in Figure 7 attached to his report.

715 Dewhirst said that Gwetsilh was the home of one of the four Tsilhqot'in groups identified in the 1838 Hudson's Bay Company census as attached to Fort Chilcotin. In fact, the Gwetsilh or "Koo Tsil" was the group most closely associated with the Chilcotin post, appearing in the 1838 census as "Indians about the Fort" and making frequent appearances in the journals kept by William McBean, the clerk in charge of the fort during that period.

716 Eldridge agreed with Dewhirst's identification of Koo Tsil with Gwetsilh. Of the four sites that appear to be associated with the 1838 HBC census (Gwetsilh, Tlegwated, Tsilangh, and Biny Gwechugh / Gwedats'ish), Gwetsilh, situated approximately five kilometres away from the probable location of Fort Chilcotin, would lie closest to the post.

717 Evidence in this case suggests that Gwetsilh continued to be used in the twentieth century as a preferred fishing location and summer gathering site by Tsilhqot'in people from different bands. Fish drying racks are maintained in the bush above the river, next to a campground.

ii. ?Elhixidlin (Whitewater)

718 At the confluence of the Tsilhqox and the Dasiqox (also called the Whitewater) is a site named ?Elhixidlin. It appears to have been located by elder Martin Quilt on the north side of the confluence and would thus be outside the Claim Area. This site is also called Taseko Mouth. There are no archeological records referring to this site. Dr. Brealey in his report at p. 73 wrote: "... the earliest firm reference appears to be in 1864, when Cox dispatches McLean to what Brown later called a 'great rendezvous' of the Tsilhqot'in, and which seems to have been the confluence between the Taseko and Chilko Rivers."

iii. Tl'egwated

719 Tl'egwated is located on the Tsilhqox, roughly parallel to the north end of Little Eagle Lake (Lhuy Nachasgwengulin). Here, there are at least 15 pit houses located on both sides of the river. At one time there was also a Tsilhqot'in foot bridge (binlish) across the river providing access to Tachelach'ed.

720 The main site at Tl'egwated, where archaeologists have recorded a large number of extensive pit house depressions (EIRw-4), is located on the west bank of the Tsilhqox, and thus outside of the Claim Area. The pit houses on the east bank are within Tachelach'ed and fall inside the Claim Area.

721 The archaeological site recorded as EIRw-4 represents "the largest and most impressive site in the area" of Naghatalhchoz Biny and the Tsilhqox: Matson et al., *The Eagle Lake Project: Report of the 1979 Season* (University of British Columbia, 1980) [unpublished], p. 64. Some 169 pit features have been mapped on or near the site, including numerous pit houses of a very large size. The site, also known as Kigli Holes, is generally regarded as non-Athapaskan (Plateau Pithouse Tradition) in origin, but appears to have been partly occupied by Tsilhqot'in people prior to and at the time of sovereignty assertion. Both Dewhirst and Eldridge believe

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Tl'egwated to be the home of the "Tlo quot tock" Indians recorded as attached to Fort Chilcotin in the Hudson's Bay Company census of 1838. It may also mark the site where Father Nobili visited a relatively large concentration of Tsilhqot'in people in the winter of 1845. A cross commemorating Nobili's visit has been re-erected by Tsilhqot'in people on the site.

722 On the evidence, I conclude that Tl'egwated can be identified with archeological site EIRw-4, and represents the site known to the Hudson's Bay Company as Tlo quot tock as well as the pit house village visited by Nobili. An inference can be drawn that even in the mid-1800's, the population of larger village sites was not stable, or alternatively, the population figures are a reflection of seminomadic movements. The Hudson's Bay Company census recorded only four families, with a total of 28 people, as Tlo quot tock "Indians" resident at the site during the winter of 1838. Yet, when Father Nobili visited Tl'egwated seven years later, he recorded upwards of 120 residents staying in two very large pit houses and additional people in a smaller third pit house. It is possible, although unlikely, that the majority of Tlo quot tock Indians were staying at a different site, or a variety of different sites, during the winter of 1838. Eldridge suggested Father Nobili might have visited a different group at a separate site nearby. And there is always the possibility that the counting was poorly done and incomplete.

723 Mabel William testified that her Grandmother Hanlhdzany's family lived in a Ihiz qwen yex at Tl'egwated during winter when it was really cold when she was a child. Mabel William said that when she was a child, her family would camp at Tl'egwated in the late summer. The use of Tl'egwated in this manner, with both sides of the river connected by a footbridge (binlish) for access to Tachelach'ed, continued into the twentieth century.

724 I conclude that the number of people recorded in a given location reflect movements of people with the seasons, returning to this site on both sides of the Tsilhqox in the late summer, most likely to remain throughout the winter season. There are gravesites at this location but these sites would post date the arrival of missionaries who persuaded Tsilhqot'in people to cease the practice of cremation.

725 The archaeological studies show the remains of a very considerable series of house pits, only three of which were occupied during Father Nobili's visit. Thus, it appears that not all pit houses on the site were occupied simultaneously, at least at the time of his visit.

iv. Tachi

726 Theophile Ubil Lulua testified that Adam Guichon told him there are Ihiz qwen yex located at Tachi, a Tsilhqot'in word meaning mouth of a river or creek. In this case, it refers to the mouth of Dan Qi Yex (Bidwell Creek) where it flows into the Tsilhqox. There is a Tsilhqot'in burial site at that location. Tachi appears to lie outside the Claim Area. This site, located by only one witness, appears to be very close to Tl'egwated.

v. Tsilangh

727 About 1.5 kilometres upstream from Dan Qi Yex lies Tsilangh which Minnie Charleyboy said was a Tsilhqot'in salmon fishing place. It too seems to be on the west side of the Tsilhqox and therefore outside the Claim Area. Dewhirst identified Tsilangh with the "Tsu Luh" Indians as attached to Chilcotin post in the Hudson's Bay Company census of 1838. Eldridge agreed with Dewhirst's association of the Tsu Luh with the place known as Tsilangh, although he was not able to confirm the location of a site because there is, at present, no archaeological inventory of the specific area. In Eldridge's view, Tsilangh may be where Connolly encountered 35

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men and a large number of women and children contained in three pit houses, and may also be where Father Nobili stopped in the winter of 1845, if not at Tl'egwated. Brealey expressed the opinion that this was the Tse-lah referred to by McBean of the HBC.

vi. Tsi Lhizbed

728 In her affidavit # 1, Mabel William testified that Tsi Lhizbed was "not far upriver, over the hill from Tsilangh." It is "across the river from Tachelach'ed." This would place Tsi Lhizbed on the west side of the Tsilhqox, outside of the Claim Area.

729 In her affidavit, which appears to be the sole source of evidence concerning this site, Mabel William deposed that she saw lhiz qwen yex at Tsi Lhizbed. She stated as well that when she was young, Tsilhqot'in people, mainly from Tsi Del Del (Redstone), would camp there for salmon fishing.

vii. Nusay Bighinlin

730 Nusay Bighinlin is upstream from Tsi Lhizbed on the Tsilhqox, where a single pit house site lies near the confluence of Natasewed Yeqox (Brittany Creek) and the Tsilhqox inside Tachelach'ed'ed. Nusay Bighinlin is within the Claim Area.

731 No historical records were cited that confirm Tsilhqot'in residence at Nusay Bighinlin at or about the time of sovereignty assertion. There is some archaeological evidence for the area nearest the confluence of Natasewed Yeqox and the Tsilhqox. In *The Eagle Lake Project* report, at p. 67, Matson et al. recorded a riverside lithic scatter site (EkSa-33) with "abundant surface material but little depth." After recording the presence of a klo-cut or kavick point, as well as a multiple-side notched point, Matson et al. concluded at p. 67:

The radiocarbon date indicates the presence of a Pre-Chilcotin occupation, as suggested for ElRw 4. It also confirms the probable mixed nature of the site and lack of substantial time depth.

732 There is an additional site located by Matson et al and referred to as EkSa-35. It is described in *The Eagle Lake Project* report at p. 69 as a "housepit truncated by the river" near Natasewed Yeqox. Found during the investigation were two projectile points associated with recent Athapaskan archaeological sites. The report concluded at p. 72 that, although the sample from EkSa-35 was limited, the information gathered was in "agreement with what would be expected for a Chilcotin [o]ccupation". EkSa-35 is located further upstream than EkSa-33 and lies perhaps a kilometre south of the juncture of Natasewed Yeqox and the Tsilhqox. In a personal note from Magne to Tyhurst referred to in the latter's Ph.D dissertation dated July 1984, Magne said that the site had subsequently been radiocarbon dated to 500 years B.P. (Before Present). This would locate a presence of Tsilhqot'in people well before sovereignty assertion making it a reasonable to infer, as I do, that there were Tsilhqot'in people one kilometre away, at the Nusay Bighinlin site, well before the assertion of sovereignty.

733 Use of Nusay Bighinlin continued into the twentieth century. There is a cabin at that location which was used as a salmon fishing site. Norman George Setah picked berries at this site and testified that there was an ancient crossing at this location as it was part of a trail network connecting Tatl'ah Biny to Niba ?Elhenealqelh (Capt. Georgetown). Setah used the crossing to get from Tis Tis Gunlin to Nusay Bighinlin. Tsilhqot'in people fished in the spring and hunted in the fall at this location, living in ?el bid qungh (lean to's).

734 Slightly south of Nusay Bighinlin, still on the eastern bank of the Tsilhqox, is an archaeological site

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featuring a number of cultural depressions registered as EkSa-85, marked with a star in Figure 1 attached to Eldridge's report, denoting a site of five pit houses or more. Eldridge did not discuss the site in the body of his report as he was not aware of historical records pertaining to the site. The archaeological site form for EkSa-85 identifies the cultural affiliation for the site as Athapaskan Chilcotin/Stone Chilcotin. The form also indicates that the site was on Crown land when the site form was entered *circa* 1979-1980.

viii. Ts'eman Ts'ezchi or Ts'esman Ts'ez

735 Ts'eman Ts'ezchi or Ts'esman Ts'ez is located a few miles upstream from Nusay Bighinlin, on the western bank of the Tsilhqox. Theophile Ubill Lulua's family built a cabin there in the fall of 1950. It is located about six miles northeast of Naghatalhchoz Biny. The site lies outside of the Claim Area.

736 In his affidavit, Theophile Ubill Lulua deposed that Felix Lulua had a cabin in the same location, built *circa* 1948, which has since burnt down. Theophile Ubill Lulua's family built a cabin in the area as did Oggie and Elmer Lulua. Members of the Lulua family continue to live in both remaining cabins. David Lulua, who was 51 when he testified, told the court that he had stayed at Ts'eman Ts'ezchi between the ages of five and 19 while trapping.

737 Minnie Charleyboy testified that she was born at Ts'eman Ts'ezchi in 1934. She told the court that she had seen lhiz qwen yex at Ts'eman Ts'ezchi and that she had been told they belonged to the ?Esggidam. She testified that Nimayaz's (Nemiah's) daughter Julianna is buried at that location. She stated there were no dwellings on the other side of the Tsilhqox, inside the Claim Area.

ix. Tsi T'is Gulin and Henry's Crossing

738 Henry's Crossing, named after Eagle Lake Henry, is located on the Tsilhqox to the east of Naghatalhchoz Biny. It has a footprint on both banks of the Tsilhqox. Tsi T'is Gunlin is the name used by Tsilhqot'in people for the place on the river just south of Henry's Crossing.

739 Henry's Crossing was marked in slightly different locations by Chief William and Harry Setah (place name 77) and Theophile Ubill Lulua (place name 13). Witnesses for the plaintiff, Martin Quilt, Francis Setah and Theophile Ubill Lulua, marked three separate locations for Tsi T'is Gunlin, perhaps a kilometre or two apart. It is not unusual or surprising that there would be such differences with witnesses working on a map they had not seen before. If witnesses were asked to take someone to these locations I am certain all would arrive at the same place. However, the multiple locations for the sites, coupled with the indeterminacy of the Trapline boundary (which nears the Tsilhqox in the vicinity of Tsi T'is Gunlin and Henry's Crossing), make it very difficult to say whether the sites fall inside or outside of the Claim Area. The lands on the eastern bank of the Tsilhqox lie within the Claim Area. The lands on the western bank, however, may fall within the narrow gap between the Western Trapline's northeastern boundary and Tachelach'ed.

740 According to Mabel William, there are pit house remains at Tsi T'is Gunlin, upstream from Nusay Bighinlin on the western bank of the Tsilhqox. Chief William testified he had been told there were pit house remains on the west bank of the Tsilhqox just north of the bridge at Henry's Crossing, although he had not seen them himself. According to his grandmother and uncles, Tsilhqot'in people lived in the pit houses.

741 Cultural depressions have been recorded on the eastern bank of the Tsilhqox in an area that may correspond roughly to Henry's Crossing. In response to a question put by counsel for Canada, Eldridge marked an ar-

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archaeological site of five or more pit houses on the eastern bank of the Chilko, registered as EkSa-124. No historical records connect this site to Tsilhqot'in residence *circa* 1846.

742 Two of Dewhirst's photos show Tommy Lulua's old cabin and his son, Henry Lulua's cabin near Henry's Crossing. In one of them there is a house pit depression right next to Tommy Lulua's old cabin. Dewhirst testified that the site showed physical remains of Tsilhqot'in use over several generations, at least back to Nunsulian. Nunsulian was born before 1850, and was the father of Jack Lulua and an ancestor of many present members of the Xení Gwet'in.

743 Various Tsilhqot'in witnesses testified to the use of Henry's Crossing as a summer fishing site. It is also the site of the modern annual "Brittany Gathering". David Setah testified that his family camped on the east bank of the river at Henry's Crossing. As a child, Harry Setah stayed in a canvas tent on the Natasewed Biny (east) side of Henry's Crossing, at one of a dozen or so campsites there; his family was often one of several who were there at the same time.

744 There are lhiz qwen yex at Tsi T'is Gulín and Tsilhqot'in people, including Jack Lulua (who was born in 1870), continued to build houses and live there well into the twentieth century. Some houses remain standing. In 1964 the provincial Lands Branch noted that Jack Lulua's son Tommy Lulua (1901 - 1978) was "still residing" on the north eastern portion of District Lot 350, Coast District, "and has possibly built a log fence around the bottom land which extends onto the SW corner of Lot 353 ...".

745 Minnie Charleyboy, Eliza William and Doris Lulua testified that their great grandfather Nentsul ?Eyen (Nunsulian) is buried at Tsi Tis Gulín. In addition, Minnie Charleyboy identified the location as a salmon fishing camp.

746 In 1910, a B.C. government surveyor sketched and attested to the location of "Indian Graves" on Lot 363 near the mouth of Lingfield Creek, just south of Tsi T'is Gunlín.

x. Ts'u Nintil

747 Norman George Setah testified that Ts'u Nintil is about a half mile away from Tsi T'is Gunlín. He camped at this location on the west side of the Tsilhqox, outside the Claim Area. This is a salmon fishing area on the river frequented by Tsilhqot'in people. Minnie Charleyboy said that the salmon fishing always took place on the Nemiah side (east) of the Tsilhqox. Fishing at this location continues to take place, in season. Theophile Ubill Lulua testified that there were lhiz qwen yex in the area. This is a location that spans both sides of the river and is inside and outside the Claim Area.

xi. Biny Gwetsel

748 Biny Gwetsel was marked in two different locations along the eastern bank of the Tsilhqox by Francis Setah and Norman George Setah. Both these locations would appear to lie in the narrow gap between Tachelach'ed and Western Trapline portions of the Claim Area, and thus outside the Claim Area. Although she did not locate Biny Gwetsel on a map, Minnie Charleyboy described the area as roughly where a big creek flowed into the Tsilhqox from the west. She testified that it was both a cremation and grave site. Gilbert Solomon identified Biny Gwetsel as the site of a pit house village on the east side of the Tsilhqox that he visited with archaeologist Michael Klassen. If this site corresponds with EkSa-97, located on the eastern bank of the Tsilhqox about halfway between Tsi T'is Gunlín to the north and Biny Gwechugh (Canoe Crossing) to the south,

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the site would lie within the Claim Area.

749 Francis Setah described Biny Gwetsel as a spring tislagh (steelhead salmon) spawning location. He testified that, according to his grandmother, the ?Esggidam killed or chased the ?Ena Tsel from Biny Gwetsel. Minnie Charleyboy testified that the place known as Biny Gwetsel was a popular tislagh fishing spot, where people would fish on both sides of the river. She said that ancestors and moderns alike slept either in tents or under the trees at this location. She said there was a Tsilhqot'in gravesite on the western bank of the Tsilhqox between Biny Gwetsel and Lingfield Creek.

750 No historical records were cited that would confirm Tsilhqot'in residence on the eastern bank of the Tsilhqox near Biny Gwetsel in or around 1846. Eldridge concluded that the archaeological site recorded as EkSa-97 could not be the village visited by Father Nobili in 1845 since Nobili traveled only on the west bank of the Tsilhqox.

xii. Gwedeld'en T'ay

751 In his affidavit, Theophile Ubill Lulua said that Tsilhqot'in people used to live in pit houses at Gwedeld'en T'ay, about two miles downstream from Biny Gwechugh. In oral testimony, Theophile Ubill Lulua confirmed that the site known as Gwedeld'en Tay is confined to the western side of the Tsilhqox, which means that the site falls outside of the Claim Area.

752 Both Theophile Ubill Lulua and Minnie Charleyboy associate the campsite at Gwedeld'en T'ay with graves and drumming; the name means "Indian Drum". Theophile Ubill Lulua testified that Tsilhqot'in people are buried there and that you can hear them drumming. Minnie Charleyboy testified that no one drums there now.

xiii. Biny Gwechugh (Canoe Crossing)

753 Biny Gwechugh, as its English name, Canoe Crossing, suggests, is a place where the Tsilhqox could be conveniently forded. The name applies to sites on both banks of the Tsilhqox, although the main site appears to be situated on the western bank. Biny Gwechugh is located about 3.5 kilometres north of the mouth of Tsilhqox Biny. Eldridge and Dewhirst agreed that this location next to the village site at Talhiqox Biny (Tatlayoko Lake) has the best correlation between historical records of village sites and the archaeological records. The site is registered in Victoria under Borden numbers EjSa-5 and EjSa-1483.

754 This site was identified on the base map by Francis Setah, Chief William, and Theophile Ubill Lulua. The western side of Biny Gwechugh falls outside of the Claim Area, while the eastern side is within the Claim Area.

755 Minnie Charleyboy testified that she had been told that Qaq'ez (or Kahkul), the great-great grandfather of Chief William (and brother of Lha Ts'as'?'in), was raised in an underground house at Biny Gwechugh. She also fished in a deep area of Biny Gwechugh called Qats'ay bid, using a net. She said that the ?Esggidam used to fish at Biny Gwechugh. She named other Tsilhqot'in people who lived in the Tsilhqot'in pit house village at Biny Gwechugh including Nezulhtsin's parents and Nisewichish's parents. This dates the site as early nineteenth century.

756 Theophile Ubill Lulua testified to learning from Eagle Lake Henry that about 40 lhiz qwen yex once

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lined both sides of the river in the area of Biny Gwechugh. Theophile Ubill Lulua could not say how many people lived in the lhiz qwen yex, but he did know that the residents of Biny Gwechugh had all moved away or died of old age by the time Eagle Lake Henry was 18 years old.

757 Archaeological evidence confirms the existence of cultural depressions on both sides of the Tsilhqox in the area of Biny Gwechugh. The main archaeological site, EjSa-5, is located on the west bank of the Tsilhqox. Matson et al. described the site in 1979 as including "several concentrations of large housepits as well as a large lithic scatter located on a grass covered terrace next to the stream": *The Eagle Lake Project* report, pp. 55-56. A secondary site, for which archaeological information is also available although it cannot be linked to historical records, lies on the eastern bank within the Claim Area.

758 Both Eldridge and Dewhirst were of the opinion that either Biny Gwechugh or Gwedats'ish was the home of the "Tase Ley" or Long Lake Indians, identified as one of four Tsilhqot'in groups attached to Fort Chilcotin according to the HBC census of 1838. In addition, the larger archaeological site at Biny Gwechugh, EjSa-5, located on the west bank of the Tsilhqox, probably corresponds to one of the Tsilhqot'in villages visited by HBC traders, McDougall and Connolly and the missionary Father Nobili in the first half of the nineteenth century. Nobili, who is thought to have visited the site in his travels on the Chilcotin plateau in 1845, recorded erecting a cross on a hill near the village.

759 Modern Tsilhqot'in people have commemorated the missionary's visit to Biny Gwechugh by re-erecting the cross on a ledge on the west shore of the Tsilhqox, overlooking the river.

760 Directly across the river from Biny Gwechugh (EjSa-5) is archaeological site, EjSa-14, also recorded by a team of anthropologists in 1979. EjSa-14 contains some 14 house pits and 21 cache pits. Tsilhqot'in people used and continue to use both sides of the river at this location.

xiv. Sul Gunlin

761 Sul Gunlin is located very near to the outlet of Tsilhqox Biny on the eastern shore of the lake. It is within the Claim Area. Doris Lulua was taught that the ancestors lived in lhiz qwen yex in the vicinity of Sul Gunlin.

762 Theophile Ubill Lulua described Sul Gunlin as a "wild rhubarb place" where Eagle Lake Henry had a hunting cabin. He also testified that he grew up in the area. He said he had seen four lhiz qwen yex at what is now the site of an airport. The airport was constructed in 1962 over top of these archeological remains. No archaeological or historical records were cited that would confirm Tsilhqot'in residence at this site *circa* 1846, but given its proximity to Biny Gwechugh, it is logical to infer, as I do, that this was a site used and occupied by Tsilhqot'in people at the time of sovereignty assertion.

763 Sul Gunlin appears to lie within the boundaries of Ts'il'os Provincial Park. According to Doris Lulua, the area of Sul Gunlin includes the DFO site and Chilko Lake Lodge.

c. Xenia (Nemiah Valley)

764 Xenia is a place of long standing Tsilhqot'in occupation. The word Xenia is said to be a rough substitute for Nemiah. Xenia Yeqox (Nemiah Creek) drains into the valley. Unlike the Tsilhqox corridor, the Xenia sites do not appear in the historical documents until the turn of the last century. The first distinct reference came when Edmund Elkins attempted to take up residence in the valley in the late nineteenth century. The southern bound-

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ary of Tachelach'ed cuts through Xeni and thus it is only partly within Tachelach'ed. It is also within the Western Trapline Territory.

765 As with other parts of the Claim Area, and taking into account the invitation of counsel to express an opinion on where Tsilhqot'in Aboriginal title might lie, it is convenient to consider Xeni as a separate area.

766 Tsilhqox Biny provides the western boundary of Xeni. Ts'il?os (Mount Tatlow) defines its southern boundary. Gweqez Dzelh and Xeni Dwelw provide the northern boundary, while the base of Tsiyi (Tsi ?Ezish Dzelh or Cardiff Mountain) where it meets the Dasiqox, marks its eastern boundary.

767 When Indian Reserve Commissioner A.W. Vowell set aside two reserves on the eastern shore of Tsilhqox Biny, he wrote to the Deputy Commissioner of Lands and Works on October 14, 1899 that one of them was located "where some families have built houses and live in the winter." R.P. Bishop noted in his December 31, 1922 Report to Surveyor-General J.E. Umbach under "Indians" that "there are several old village sites in the valley". Thus, at the time the reserves were created, Tsilhqot'in people were there living in long-established winter quarters.

768 Despite the presence of reserves in Xeni and the fact that most band members reside on reserve, there are a number of band members who live off reserve. The reserves are not included in the Claim Area. There seems to be little regard paid to the fact that not all of Xeni is reserve land. The land appears to be used as needed by the Xeni Gwet'in without licence, lease or payment. Band members who occupy homes off reserve in Xeni include: Eileen William, Emma Pierce, Elsie Quilt, Alex Lulua, Ubill Hunlin, Eugene William, Danny Sammy William and William Lulua.

769 Chief Nemiah was born in Xeni *circa* 1827. It appears that he died on July 11, 1927. His death certificate notes his age to be in excess of 100 years at that time. Dewhirst notes his D.O.B. as *circa* 1830. Chief Sil Canem was buried in Xeni. Chief ?Achig was buried at Xexti in Xeni. Current Chief William was also born in Xeni.

i. Various Sites

770 There are numerous sites in the valley with Tsilhqot'in names. These sites include Ses Ghen Tach'I (a fishing site) and Tses Nanint'i (a camping site), where several trails come together at the west end of the valley.

771 Lhiz Bay at the western end of the valley is both on and off reserve. It is the site where Chief ?Achig had an altercation with the settler named Edmund Elkins in the late nineteenth century. As a result of this incident, Elkins was forced to relocate to another area in Tachelach'ed. It appears that the location of Elkins' attempted pre-emption is now on reserve.

772 Lhiz Bay is a likely candidate for one of the "several old village sites in the valley", noted by the surveyor, R. P. Bishop, in 1922. Norman George Setah personally recalled houses at Lhiz Bay which were occupied by people now deceased. He recalled that when he was around five years old he burned down the house of Johnny Setah or ?Eweniwen (b. *circa* 1871 or 1875, d. 06 March 1955). It was a log house with a grass floor. Little George Setah (b. 1897 or 1899, d. 07 October 1971) also had a house in Lhiz Bay.

773 There is some confusion in the evidence between Lhiz Bay and Lhiz Bay Biny, a small lake south of the Lezbye I.R. #6 boundary. It is clear, however, that most of Lhiz Bay is on reserve and, to that extent, not in-

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cluded in the Claim Area. There is no archaeological evidence available for either of these locations.

774 On March 5, 1969, British Columbia sold Block A of lot 305 to Daniel William (then Chief of the Nemiah Valley Indian Band) for \$845. The band requested that the land be made into a reserve, and it eventually became Lezbye I.R. #6.

775 Xexti is a Tsilhqot'in burial place in Xení near Xexti Biny (Nemiah Lake). It is not on reserve. Four generations of Setahs are said to be buried at this site dating back to Old Sit'ax (Louis Setah). His death certificate records that he was about 100 years of age when he died in Xení on October 29, 1927. There is no archaeological evidence available for this site.

776 Tl'ebayi lies at the west end of Xení Biny. Much of it, but not all, is on reserve. There are the remains of at least two lhiz qwen yex at this location. It is the present school site and the site of the band offices of the Xení Gwet'in First Nations.

777 ?Et'an Ghintil is an underground house site on the south shore of Xení Biny. Gilbert Solomon said that it was occupied by the ?Esggidam.

778 North of Xení Biny, roughly at the centre of the lake, is Tl'ets'inged. This site is approximately half way between the reserves at the east and west ends of Xení Biny. Ubill Hunlin has lived there with his family for about 25 years. Francis William has an old cabin there. Members of Chief William's family have a cabin at this site and use it as a fishing camp from time to time. Xení Gwet'in people camp there for berry picking.

779 Joseph William was taught by his grandmother, Annie William, that the ?Esggidam would pile rocks and set up a snare to catch ?elhtilh (wild chickens) at a place called Tsi Nadenisdzay, which is above Tl'ets'inged on the slope of Xení Dzelh which rises up from Xení Biny. It is not on reserve and therefore, within the Claim Area.

780 Naghataneqed is at the east end of Xení Biny and is mostly on reserve. There are several old house pits in the vicinity. Tsilhqot'in houses and a gravesite are located there. Gatherings are held at Naghataneqed and have been from a time before the church was built there. David Setah also referred to an old village at Naghataneqed which is not on reserve.

781 The gravesite at Naghataneqed is called Chel Letesgan. When the "big flu" came in 1918, before the reserve was surveyed, there were a number of people living in cabins at Naghataneqed. Those people included Tselakoy and his wife, ?Estinlh and their family, ?Amed's mother and ?Eskish (Captain George). Thirty two people who died in the sickness of 1918 are buried there. Captain George (1883 - 1973) is buried at Chel Letesgan.

782 Tl'etates is said to be off reserve at the east end of Xení Biny at Naghataneqed. This is where Chief William was born. Many other Tsilhqot'in people have lived at Naghataneqed during the last century.

ii. Summary

783 Much of the evidence concerning the use and occupation of the various places in Xení relate to twentieth century activities. Oral history evidence provides an understanding of use and occupation in the nineteenth century. That evidence records use and occupation by the ?Esggidam, living in and about the valley, using the old trails, hunting, fishing and harvesting root and medicinal plants. There is also evidence of house pit depres-

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sions. I infer that these were the remains of pit houses in which Tsilhqot'in people lived. This entire area is also in close proximity to the head of Tsilhqox Biny where the evidence clearly shows Tsilhqot'in occupation pre-sovereignty.

d. Tachelach'ed (Brittany Triangle)

784 The name Tachelach'ed refers to the whole area between the Tsilhqox and Dasiqox. Tsilhqot'in people identify the waters of Tachelach'ed as follows. In the southwest, Natasewed Yeqox runs through Natasewed Biny (Brittany Lake), Tsi Tex Biny (Murray Taylor Lake) and Ben Chuy Biny to its outlet on the Tsilhqox at Nusay Bighinlin. The spring water of north central Tachelach'ed is found at ?Esqi Tintenisdzah (Child Got Lost). In the southeast, the Nuntsi chain of waters runs to the Dasiqox. Elkin Valley, named for the first settler in the area and whom Chief ?Achig caused to move to the valley's southern perimeter, contains ?Elhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake). Together these lakes are known as the Twin Lakes. To the valley's west is Tsanngen Biny (Chaunigan Lake), which drains northeast to Elkin Creek.

785 The western boundary of this triangular tract follows the banks of the Tsilhqox. Its southwestern edge runs along the eastern shore of Tsilhqox Biny from the lake outlet to a point at the southwest corner of the Xenigwet'in reserve in Xenig where it meets the baseline southern boundary. The eastern boundary is defined by the Dasiqox. The northern tip is at ?Elhixidlin (Tsilhqox-Dasiqox confluence).

786 The southern boundary of Tachelach'ed was described in three different locations by witnesses. Mabel William described Tachelach'ed as extending south to Ts'il?os. This description includes Xenig, as Ts'il?os stretches eastward to the head of the Dasiqox. Martin Quilt testified that Tachelach'ed extends further south to the head waters of Tsilhqox Biny and Dasiqox Biny. Francis Setah's evidence indicates the southern boundary is as discussed below.

787 Viewed conservatively, the southern boundary runs west to east from Tsilhqox Biny along the Claim Area's mountain plateau transition zone, to the Dasiqox. The boundary on the base map follows the Nemiah Valley Road from the Davidson Bridge crossing over the Dasiqox in a westerly direction until it reaches Xenig Biny, then follows that lake's southern shore to its confluence with Xenig Yeqox where it follows the creek to the eastern shore of Tsilhqox Biny. This triangular tract of land is bounded on the south by Ts'uni?ad Dzelh (Tsuniah Mountain), Ts'uni?ad (Tsuniah Valley), Gweq'ez Dzelh (Nemiah Mountain), Mainguy Lake and Xenig Dzelh (Konni Mountain).

788 Excluding this disagreement over the southern boundary, all Tsilhqot'in witnesses were unanimous that the above mentioned lands and waters are within Tachelach'ed. Thus, Tachelach'ed is seen as a triangular tract of land with a largely uniform character, namely, the plateau dominated forestlands between the Tsilhqox and Dasiqox. The plaintiff's argument proceeded on the assumption that the conservative definition of the southern boundary applies.

789 The plaintiff says that Tsilhqot'in people physically occupied Tachelach'ed prior to, at and well after the assertion of Crown sovereignty. That occupation includes the construction of dwellings, as well as a regular use of Tachelach'ed by Tsilhqot'in people for hunting, fishing and trapping.

790 Few sites within Tachelach'ed can be linked by either historical or archaeological evidence to Tsilhqot'in villages or communities in the time period around 1846. In 1822 McDougall recorded that the land east of the Tsilhqox was a "favourite hunting ground" for Tsilhqot'in people. Most of the evidence available concerns

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twentieth century use and residence. During the twentieth century, Tsilhqot'in people appear to have moved into areas in Tachelach'ed where hay and water could be readily obtained in order to engage in ranching.

791 The evidence discloses that the area around the major lakes in Tachelach'ed, including Natasewed Biny, Tsalngen Biny, ?Elhgateish Biny, and Ts'uni?ad Biny contains pit house remains. Mabel William saw a niyah qungh near Ben Chuy Biny in Tachelach'ed. She said that it had "rotted down" and all the logs had fallen in. Ben Chuy Biny is a long lake inland from Nusay Bighinlin.

792 As semi-nomadic people, there is no doubt that Tsilhqot'in people have derived subsistence from every quarter of Tachelach'ed. They have hunted, fished and moved about this area since before first contact with Europeans. It is a central part of their oral traditions, providing strength and continuity to their lives as Tsilhqot'in people. However, the entire area of Tachelch'ed does not qualify for a declaration of Tsilhqot'in Aboriginal title due to the absence of evidence with respect to the northern and central portions of the triangle. I later discuss those portions of Tachelach'ed that do warrant a finding of Aboriginal title.

793 In reaching this conclusion, I have taken the following factors into account:

- Tachelach'ed is a vast area comprising almost 142,000 hectares.
- At the time of sovereignty assertion, the population of Tsilhqot'in people in this immediate area was approximately 300. That population could mainly be found along the Tsilhqox corridor, at the outlet area of Tsilhqox Biny and southward into Xení. It is not possible to recreate today an accurate census for that period.
- Occupation of a more permanent nature during the winter season was confined to the lakes and rivers at the southern end of Tachelach'ed and towards the Tsilhqox.
- Other than the presence of HBC traders, there is no evidence of occupation by others at the significant historical point of sovereignty assertion.
- Oral history evidence may be traced to the late nineteenth century and the twentieth century. It is extremely difficult to find oral history evidence to accurately connect to a period over 150 years ago.
- The oral history evidence does not demonstrate the same degree of use throughout the entire area. There appears to have been a much wider use at the southern end of the triangle and over towards the Tsilhqox than in other areas of Tachelach'ed.
- There is an absence of historical evidence concerning the interior of Tachelach'ed at the critical historical point.
- There is evidence of the remains of traditional housing in the interior of Tachelach'ed but no archaeological or anthropological evidence to tie these remains to Tsilhqot'in use at the time of sovereignty assertion. If the age of some of these remains were known, it might be easier to connect them to Tsilhqot'in use. Notwithstanding this absence of evidence, I am prepared to draw the inference and acknowledge the use of this housing by Tsilhqot'in people on a balance of probabilities but, once again, the time and extent of use is not known.

794 In summary, there are areas within Tachelach'ed where I consider the use and occupation by Tsilhqot'in

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people at the time of sovereignty assertion to be sufficient to warrant a finding of Aboriginal title. The evidence does not lead to a finding of sufficient use and occupation throughout Tachelach'ed.

795 I now consider specific locations where Tsilhqot'in Aboriginal title might lie in Tachelach'ed.

i. Gweq'ez Dzelh and Xeni Dzelh

796 Gweq'ez Dzelh (Nemiah Mountain) and Xeni Dzelh (Konni Mountain) are located in the transition zone between the Chilcotin Range and the rolling terrain of the Chilcotin Plateau. They are bounded on the northwest by Ts'uni'ad, on the west by Tsilhqox Biny, on the south by Xeni, on the east by Elkin Valley and on the north by the leveling Chilcotin Plateau lands between the Dasiqox and Tsilhqox.

797 The mountains are oriented on a west-east axis; Gweq'ez Dzelh on the west and Xeni Dzelh on the east. The two mountains are joined by a small valley, ?Esqi Dzul Tese'an, that drains waters south into central Xeni. These waters originate from both Shishan Tl'ad (mountain sheep basin) on east Gweq'ez Dzelh and from small lakes on northwest Xeni Dzelh, in particular, Nen Nuy Dilex Biny, Chantl'ex Biny and Ts'itse'ex Biny.

798 The areas surrounding and including these mountains are tied together by a network of Tsilhqot'in trails. These trails connect Xeni to the fishing grounds on Tsuni'ah Biny and farther to the Tsilhqox. These trails provided a regular means of access for Tsilhqot'in people to areas where they hunted, fished and gathered medicinal plants, root plants and berries.

ii. ?Esqi Nintanisdzah (Child Got Lost)

799 Midway between Natasewed Biny and the confluence of the Tsilhqox and Dasiqox is a place known as ?Esqi Nintanisdzah. There is a story of a child getting lost in the area in the early 1930's. Spring water and a meadow that provides feed for horses is available in this area. This location was used in the last century as a late fall or early winter deer hunting site. The use of this location seems to have fallen off with the passing of the years. There is no written historical or archeological evidence about this site.

iii. Nu Natase'ex (Mountain House)

800 Nu Natase'ex is located east of the Tsilhqox, roughly parallel to the north end of Naghatalhchoz Biny (Big Eagle Lake).

801 No archaeological or historical records were cited that would confirm Tsilhqot'in residence at this site in or around 1846. According to the oral history evidence, Tsilhqot'in families have had houses at Nu Natase'ex since the turn of the twentieth century. Burial grounds at the site mark the graves of a number of people who died there as a result of the 1918 influenza epidemic.

802 Mabel William deposed that ?Elegesi (Eagle Lake Henry) told her that at the time of the great flu, Nezulhtsin (also known as Jamadis, born *circa* 1824 or 1827) and his wife had a niyah qungh at Nu Natase'ex. This oral history link between Nu Natase'ex and Nezulhtsin appears to indicate occupation of this site by Tsilhqot'in people at the time of sovereignty assertion.

803 Nu Natase'ex is closely associated with Eagle Lake Henry. He and his two wives are said to be buried at that location. A number of witnesses testified that Eagle Lake Henry lived at Nu Natase'ex, where he was sometimes joined by other Tsilhqot'in people from time to time. A series of documents detail Eagle Lake

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Henry's application to purchase Coast District Lot 1191. This lot is located several kilometres east of the Tsilhqox and was to be used for ranching purposes. The survey documents suggest that Eagle Lake Henry was living in the area for about 16 or 17 years before applying to purchase the land in the early 1940's. He applied as an enfranchised Indian. A Crown Grant to Lot 1191 was issued to Eagle Lake Henry in December of 1944.

iv. Natasewed Biny (Brittany Lake)

804 Not far from Nu Natase?ex is Natasewed Biny. It is a horseshoe shaped lake located east of Naghatalhchoz Biny and is within Tachelach'ed.

805 While no historical records were adduced that would confirm Tsilhqot'in residence at this site in or around 1846, there is some evidence of pre-sovereignty occupation. Theophile Ubill Lulua testified that he saw four pit house remains at the north end of Natasewed Biny where "old people" used to live. He was also told about other pit house remains at that location. Eliza William deposed that her adoptive grandfather, Nezulhtsin fished in the area of Natasewed Biny.

v. Captain George Town

806 Captain George Town, and nearby Neba?elhnaxnenelh?elqelh (Deni Belh Tenalqelh) are located east of Natasewed Biny and north of the Twin Lakes (?Elhghatish Biny and Nabi Tsi Biny) within Tachelach'ed. The site is named after Captain George, an enfranchised Tsilhqot'in person, who established a ranch in the area.

807 Ubill Hunlin testified that Captain George's grandfather lived at Deni Belh Tenalqelh, and that Tsilhqot'in ?Esggidam occupied the site before him.

808 The plaintiff argues that Captain George became enfranchised in order to take back a parcel of land that had been pre-empted by a non-Tsilhqot'in person. However, there is no indication that Lillooet Lot 7381, which Captain George eventually obtained, was previously alienated to another person.

vi. Far Meadow

809 North of Captain George Town, still within Tachelach'ed is Far Meadow. While no archaeological or historical evidence was adduced that would confirm Tsilhqot'in residence at this site in or around 1846, there is evidence of residence by individual Tsilhqot'in people throughout the twentieth century. According to Chief William, Sil Canem built a cabin at Far Meadow. That cabin was later occupied by Eagle Lake Henry. A number of Tsilhqot'in witnesses testified to having lived there during the winter.

810 In 1926, Surveyor J. Davidson surveyed Lillooet District Lot 5411 at or near the place marked as Far Meadow. The survey was requested by Eagle Lake Henry. It appears to have been facilitated by a letter dated 14 January 1922 from W. E. Ditchburn, Chief Inspector of Indian Agencies, to the provincial Deputy Minister of Lands. The letter, written 3 September 1921 to W. E. Ditchburn, cites a report by Indian Agent A. Daunt as follows:

I beg to inform you that there is one Indian in the area north and west of Hanceville, whose holdings of Crown lands should receive some protection.

The case is, however, somewhat difficult to deal with, for not only are the lands unsurveyed, but he has so many places, and so much grazing fenced, that it would be impossible to obtain a representative portion

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within the confines of, say a 160 acre lot.

The man's name is "Eagle Lake Henry", 29 years of age, married, no children, but sister aged eleven lives with him.

He belongs to no Band, and acknowledges no Chief, having been born in the vicinity of Eagle Lake of parents who had themselves remained aloof from other Indians.

811 The letter continues on to note that Eagle Lake Henry had "50 head of cattle and 30 horses", and identified his house as a "very good log cabin of three rooms ... situated about five miles south of the mouth of Britany Creek, and three miles east of the Chilco River". In 1933 Eagle Lake Henry applied for, and received, a Crown Grant for Lot 5411.

vii. Delgi Ch'osh or Lhuy Tu Xadats'ebe?elhtalh (Big Lake)

812 Captain George's family had a fishing site at Delgi Ch'osh. There he constructed a pine windbreaker as a shelter. A number of Tsilhqot'in people have used this location as a springtime fishing campsite.

viii. Ts'uni?ad Biny (Tsuniah Lake)

813 Ts'uni?ad Biny is a significant valley bottom lake. It is the large lake east of Tsilhqox Biny and north of Xení. The southwest end of the lake lies close to Tsilhqox Biny. The northeast end lies at roughly the same latitude as the juncture of Tsilhqox Biny and the Tsilhqox. As a result of the McKenna-McBride Commission, a fishing reserve — Tsuniah Lake IR #5 — was set aside for Tsilhqot'in people on the southwest end of Ts'uni?ad Biny in 1916.

814 The valley includes a small peninsula, Ts'utalh?ad, to the north of Ts'uni?ad Biny. Ts'uni?ad Yeqox drains the lake in the southwest and runs a short distance down to Tsilhqox Biny. At the southwest perimeter of the valley is Nenatats'ededilh (Four Mile Lake, Little Lagoon). On the northwest is Ts'uni?ad Dzelh (Tsuniah Mountain) and to the south, Gweq'ez Dzelh.

815 Theophile Ubill Lulua and Gilbert Solomon testified to seeing, or knowing of, pit house remains at both ends of Ts'uni?ad Biny. According to Theophile Ubill Lulua, some of these remains were filled in during the construction of the Tsuniah Lake Lodge and Merritt airstrips, and are no longer visible. Theophile Ubill Lulua also knew of old niyah qungh at the north end of Ts'uni?ad Biny. Mabel William testified that Nezulhtsin and his wife had a niyah qungh at a place called Ts'u Talh?ad at the north end of the lake. Ts'uni?ad Biny served as a spring fishing site for the distant relatives of some witnesses. According to Norman George Setah, the ?Esggidam hunted in the spring around the lake, and held a gathering called dishugh delmid nagwaghized there every May.

816 A map of the Chilcotin plateau dating from 1864 (Cox Map) shows a fishing site at the present location of Tsuniah Lake IR #5 and the reference "Certain to find Indians at this point early in Spring." In the twentieth century, Tsilhqot'in people camped around the lake and used it as an early spring fishing camp. Witnesses also testified about cremation and burial sites at both ends of the lake. Nezulhtsin is buried at the north end of the lake and a structure has been built to mark the grave location.

817 By the mid-twentieth century few people appeared to use Ts'uni?ad Biny as a residence site. Theophie Ubill Lulua stated in his affidavit that when he was young, his family stayed in two cabins on Ts'uni?ad Biny; a

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small one at the north end of the lake as well as a larger one that had originally been built by a white man. Theophile Ubill Lulua's family used the cabin only seasonally. No other Tsilhqot'in people had cabins there when he was growing up. Theophile Ubill Lulua's family stopped using the cabins when he was 13 years old.

818 Ts'uni?ad Biny lies within that definite tract of land, connecting Xení to the shores of Tsilhqox Biny, the Tsilhqox and further north to Naghatalhchoz.

ix. ?Elhghatish (Between the Lakes)

819 ?Elhghatish is the name of an area between the Twin Lakes (?Elhghatish Biny and Nabi Tsi Biny) in Tachelach'ed, north of the southeast corner of Xení.

820 No archaeological or historical records were adduced that would confirm Tsilhqot'in residence at this site in or around 1846. Tsilhqot'in witnesses identified pit house remains (lhiz qwen yex) at ?Elhghatish which were said to have been occupied by Tsilhqot'in ancestors. Ubill Hunlin testified that Captain George's family had a fishing site at this location. They constructed a pine windbreaker as a shelter at this site.

821 Lot 4669 was surveyed on behalf of, and leased for residential purposes to Rosie Pierce and her (non-Tsilhqot'in) husband in 1976. In a letter dated July 1974, received by the Inspection Division, Lands Service in Williams Lake, explaining why she wanted to lease the land, Pierce stated in part:

1. I am a chilcotin indian who was born and raised in this area.
2. I am now married to a white man and can no longer claim Indian rites.
3. I would like to have this as a home site, garden and room to keep two or three horses for our own use.
4. Much of my family and friends live in this area and would like land of my own to call a home.
5. The land in question has been a garden ground for my family for many years.

822 The difficulty referred to in para. 2 has since been corrected by federal legislation. After receiving the lease, Ms. Pierce attempted in 1989, without success, to have it transferred to the Xení Gwet'in band.

x. Tsanlgen Biny (Chaunigan Lake)

823 Tsanlgen Biny lies just west of ?Elhghatish in Tachelach'ed.

824 According to Gilbert Solomon, there are remains of pit houses that were once occupied by Tsilhqot'in ancestors at Tsanlgen Biny. Martin Quilt testified that one of the pit houses contained human remains.

e. Western Trapline Territory

825 The Western Trapline Territory overlaps with areas in Tachelach'ed. The entire area of the Western Trapline does not qualify for a declaration of Tsilhqot'in Aboriginal title. While there is no doubt that there was a Tsilhqot'in presence in the entire area at the time of sovereignty assertion, much of the area was not occupied to the extent required to ground a declaration of Tsilhqot'in Aboriginal title. Once again, in considering the invitation of counsel to express an opinion on where Tsilhqot'in Aboriginal title might lie, it is convenient to consider

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discrete smaller portions of the Western Trapline Territory.

i. Lhuy Nachasgwengulin (Little Eagle Lake)

826 Lhuy Nachasgwengulin is at the northwestern tip of the Western Trapline Territory. It is located south-east of Tat'ah Biny. It is a shallow plateau lake draining north to Tat'ah Biny on the edge of the Chilcotin Plateau. The boundary of the Western Trapline runs through Lhuy Nachasgwengulin. Therefore the southeastern part of the lake falls outside the Claim Area. The balance of the lake is within the Claim Area.

827 Norman George Setah testified to seeing 10 to 12 pit houses at Lhuy Nachasgwengulin some of which were intact when he first visited the site 50 years ago. He marked these sites at the westernmost end of the lake. When he first saw them, some of the structures were complete with the notched pole used by the occupants as a ladder.

828 Setah noted that there was a little cabin on the trail close to the pit house remains that his family and other Tsilhqot'in people would use when they traveled to Tsi Del Del. In the twentieth century, a trip each year to see the priest at Tsi Del Del was integrated into the seasonal rounds.

829 There is no other evidence concerning occupation or use of this site.

ii. Gwedzin Biny (Quitze or Cochin Lake)

830 Gwedzin Biny is a smaller lake lying northwest of Naghatalhchoz Biny. It is also a shallow plateau lake and it drains south to feed into Talhiqox Biny. Talhiqox Biny is a significant valley-bottom lake with a southern outlet located in the Coast Range or Cascade Mountains. Gwedzin Biny falls within the Claim Area. Gwedzin are the lands about Gwedzin Biny.

831 In August 1875 George Dawson, traveling through the Chilcotin plateau as a surveyor on behalf of the Geological Survey of Canada, camped at Gwedzin Biny. His notes are published in the *Journals of George M. Dawson: British Columbia, 1875-1878*. His journal for August 31, at p. 76 reports:

Passed White Water L. & camped at S.E. end of Cochin L, where site of indian village marked on map really only a camp, & now abandoned. A newly made indian grave on the crest of a little knoll logs piled in square form on the ground, & a pole standing up with an old tin pan spiked upon it, & bearing a red rag for a flag. Found Cached in the bushes several fish traps which had been used in the lake.

832 Numerous Tsilhqot'in people are said to have stayed at Gwedzin in the twentieth century to fish during the summer. Some Tsilhqot'in people have cabins there and live there more permanently. Many Tsilhqot'in people go to this location for early summer fishing and camp all around the lake, often on their way to Tsimol Ch'ed (Potato Mountain). The area has also been used for late fall nists'i hunting as they move from the mountain to the plateau land for winter. Doris Lulua deposed that Eagle Lake Henry told her that a Tsilhqot'in person, ?Ighelqez, lived there year-around but she did not say when or for how long. ?Ighelqez is said to be buried there.

iii. Ch'ezqud

833 Ch'ezqud is a site located just off the western end of Naghatalhchoz Biny. Minnie Charleyboy described it as the area where the creek leaving ?Edibiny enters Naghatalhchoz Biny. Ch'ezqud is within the Claim Area.

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834 Minnie Charleyboy said she had seen niyah qungh remains at the site, and that her grandfather had lived in one at that location. Minnie Charleyboy testified that she stayed at Ch'ezqud in early summer with Tommy Lulua and her adoptive grandmother, Sa Yets'en. According to Minnie Charleyboy, Sa Yets'en's mother, Elizabeth, used to spend winters at Ch'ezqud. This evidence indicates a mid-nineteenth century use. She also named a number of Tsilhqot'in people who used Ch'ezqud as a station for catching nilhish (kokanee) in September, and deljiyaz (suckers) in the spring. Her family stayed in a tent while fishing in spring and fall. Tl'etsen (wild onions) are gathered and hay is cut nearby. According to Minnie Charleyboy, there are also graves at the site.

835 Doris Lulua also testified that her mother had a winter home at Ch'ezqud. She deposed that her mother told her there was a cremation site at that location.

836 According to Mabel William, some of the colonial forces sent to arrest the Tsilhqot'in people who had killed members of Waddington's road crew camped at Ch'ezqud. In her affidavit, Mabel William said that her grandfather taught her that Samadlin (McLean) was killed at Ch'ezqud. His killers escaped into Naghatalhchoz Biny.

iv. ?Edibiny

837 ?Edibiny is a small lake lying south of the west end of Naghatalhchoz Biny, connected to Naghatalhchoz Biny by a creek. It lies within the Claim Area. Minnie Charleyboy testified that there are cache pits and lhiz qwen yex remains near ?Edibiny. Sa Yets'en told Minnie Charleyboy that sites like ?Edibiny were chosen for winter residence by Tsilhqot'in people prior to the introduction of horses, since Tsilhqot'in people needed resources such as fish, water, and fuel for fires close by. Minnie Charleyboy testified that she herself had stayed in a niyah qungh at ?Edibiny. Minnie and Patrick Charleyboy keep a cabin at ?Edibiny, which they use a few times a year.

838 Norman George Setah testified that his family and other Tsilhqot'in people fished at ?Edibiny using gill nets for delji-yaz in the spring, and nilhish in the fall.

v. Naghatalhchoz Biny (Chelquoit Lake or Big Eagle Lake)

839 Naghatalhchoz Biny is the Tsilhqot'in name for Big Eagle Lake. The boundary of the Western Trapline Territory runs through this lake lengthwise from its western to its eastern end. The northern half of the lake falls outside of the Claim Area, while the southern half is inside the Claim Area.

840 Naghatalhchoz is the area around Naghatalhchoz Biny. Only the southern portion is included in the Claim Area. The area on the north side of the lake is excluded from the Claim Area.

841 The Naghatalhchoz Biny basin is situated just northwest of Tsilhqox Biny outlet and west of the Tsilhqox. Naghatalhchoz Biny is a shallow plateau lake that drains northeast to the Tsilhqox as it begins its run through the Chilcotin Plateau.

842 A number of witnesses associated Naghatalhchoz Biny with a particular group of Tsilhqot'in people, the Naghatalhchoz Gwet'in. These people later merged with the Xenii Gwet'in Band. In the twentieth century Naghatalhchoz Biny was associated with the Lulua family. Other individuals and families visited or used the area for hunting, fishing and gathering purposes into the twentieth century.

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843 In the 1970's, a team of archaeologists led by Richard Matson undertook a comprehensive survey of the area around Naghatalhchoz Biny, recording most, if not all, of the sites for which archaeological information is available today. That research refers to the location as the Bear Lake site or EkSa36. According to Matson, this site was particularly interesting for understanding early occupation of the Claim Area. This site at Naghatalhchoz Biny was thought likely to have been Athapaskan in origin. This can be contrasted with the major pit house villages along the Tsilhqox at sites such as Tlegwated, which are understood to have been originally inhabited by Plateau Pithouse Tradition people.

844 There are lhiz qwen yex remains on the south side of the lake. Sa Nagwedijan is the Tsilhqot'in name for one of these sites. Theophile Ubill Lulua testified that Eileen Ellen Lulua and her son, Edward, lived in a niyah qungh at Naghatalhchoz Biny in the mid-1920's. Eliza William deposed that Nezulthsin lived in the area. There is evidence of occupation of this area dating back to Nezulthsin. It is said that he and his wife lived in a niyah qungh in the area of Naghatalhchoz Biny.

845 In his 1953 dissertation, Robert Lane identified Tsilhqot'in pit house remains on the south shore of Naghatalhchoz Biny. The Naghatalhchoz Biny pit houses are one of only two or three such sites identified by Lane that fall within the boundaries of the Claim Area. Lane also reported six or more sites with pit houses of non-Tsilhqot'in origin. Although he reported that Tsilhqot'in people abandoned the use of lhiz qwen yex before the 1850's, Lane also stated that a "reputable white informant" claimed that one pit house was still inhabited in the 1930's or early 1940's near Naghatalhchoz Biny: Lane Thesis, p. 157. From the evidence I heard in the course of the trial, I conclude that Lane was incorrect in this observation concerning the abandonment of lhiz qwen yex.

846 In contrast to the larger Tsilhqox corridor sites such as those at Tl'egwated and Biny Gwechugh, the typically Athapaskan cultural sites in the area of Naghatalhchoz Biny are much smaller in size, and would have supported a much smaller population. While archaeological evidence suggests that Athapaskan habitation at certain sites in the Naghatalhchoz Biny area may date prior to the end of the eighteenth century, the historical literature only begins to record Tsilhqot'in use of and residence in the area in the 1860's.

847 It is significant that members of the Lulua family continue to use this location for fishing, hunting and a range of other activities on the land.

vi. Tsi gheh ne?eten

848 Doris Lulua has a home located at Tsi gheh ne?eten, just a few miles south of the east end of Naghatalhchoz Biny. It is within the Western Trapline Territory. An airstrip was built nearby. Tsi gheh ne?eten is at a main trail linking communities at Gwedats'ish (the mouth of Tsilhqox) and Biny Gwechugh with those downstream on the Tsilhqox, and at Naghatalhchoz Biny. It connects to other trails, including trails to Tsimol Ch'ed, Gwedzin Biny, Ts'uni?ad Biny, Xeni and Talhiqox Biny. This main trail is also part of a network used to access areas seasonally for hunting and fishing and gathering sunt'iny, berries and medicinal plants.

849 At the time of Chief William's testimony in the fall of 2003, Casimir and Madeline Lulua were living north of Naghatalhchoz Biny, outside the Claim Area. Only Doris Lulua was living near the airstrip south of Shishan-qox.

850 It is significant that the British Columbia Crown surveyor declared that Indian cabins at Naghatalhchoz were "owned" by Indians. Mr. Taylor, the surveyor in 1910 of District Lot 357, which is adjacent to the south

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east end of Naghatalhchoz Biny, swore a declaration on June 25, 1910, attesting to certain facts, including, among other things, that Lot 357 had Indian cabins: "The Indian cabins below shown owned by a ... siwash ...".

vii. Sa Nagwedijan

851 Theophile Ubill Lulua identified a site he called Sa Nagwedijan on the south shore of Naghatalhchoz Biny, towards the eastern end of the lake. Sa Nagwedijan falls within the Claim Area. No other witnesses described a site by this name.

852 Theophile Ubill Lulua testified that he grew up in the area of Sa Nagwedijan. He noted that his Aunt Eileen (or Madeline) Lulua and her son Edward stayed in a niyah qungh at Sa Nagwedijan in the 1920's. According to Theophile Ubill Lulua, there were also lhiz qwen yex remains at Sa Nagwedijan.

853 No archaeological or historical records were adduced that would confirm Tsilhqot'in residence at this site in or around 1846.

viii. Tsi Ch'ed Diz'an

854 A number of Tsilhqot'in witnesses described a place called Tsi Ch'ed Diz'an. Tsi Ch'ed Diz'an lies at the far eastern end of Naghatalhchoz Biny, within the Claim Area. It marks the location of a grave yard where members of the Lulua family are buried.

855 According to Theophile Ubill Lulua pit house remains are located about a mile west of the graveyard at Tsi Ch'ed Diz'an. This site is close to, but does not appear to overlap the Bear Lake site discussed by Matson as a typically Athapaskan site with three pit features.

856 This site was at one end of the connecting corridor between the Xení Gwet'in and the Naghatalhchoz Gwet'in in the area around Naghatalhchoz Biny.

ix. Tsilhqox Biny (Chilko Lake) Area

857 On January 18, 1822, HBC Clerk George McDougall concluded in a letter to John Stuart that, "By dint of enquiry & with the help of small sticks", there were "6 Large Ground Lodges, about the Lake, containing 53 Families". Eldridge concludes that this number excludes the lodges on the River, which were counted separately. There has been no archaeological study of Tsilhqox Biny. Eldridge is of the view that if a survey was done, the six large ground lodges could be found.

858 There are lhiz qwen yex remains on both sides of Tsilhqox Biny. Tsilhqox Tu Tl'az (Edmond Creek) is at the south end of the lake. There is a trapping campsite located there. Most of Tsilhqox Biny, apart from the very north end of the lake and the land bordering Xení, falls within Ts'il'os Provincial Park. The entire lake is in the Western Trapline Territory with the exception of a small portion on the northeast side of the lake which is outside the Claim Area.

x. Tsilhqox Biny Area - Gwedats'ish

859 Gwedats'ish is located at the very north end of Tsilhqox Biny. It is a substantial archaeological site, likely pre-Tsilhqot'in in origin. This site was partly inhabited by Tsilhqot'in groups by the early 1800's.

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860 Witnesses also referred to Gwedats'ish, or part of it, as the "DFO site". The Department of Fisheries and Oceans has operated a research station at the north end of Tsilhqox Biny for a number of decades. It is also referred to as "Chilko Lake Lodge". That lodge and its airstrip are also located at the north end of the lake. The relation of any of these sites to the Claim Area remains very unclear. Canada says that District Lot 599, where the Department of Fisheries and Oceans operates its research centre on lands leased from the provincial government, falls outside the Claim Area.

861 Remains of a substantial village of pit houses can be found at the north end of Tsilhqox Biny where it joins the Tsilhqox. The site was first registered as EjSa-11 by a team of archaeologists working in the area in 1979 and was revisited for a more detailed investigation in 1997. In 1997 archaeologists mapped 21 cultural depressions, but also noted that five depressions previously recorded had disappeared as a result of site disturbance. Witnesses testified that the lodge and DFO site currently cover an ancient lhiz qwen yex village that was inhabited by Tsilhqot'in people. These pit houses may have comprised some of the 25 lodges that were said to have lined the Tsilhqox; or they may have been included in the "6 Large Ground Lodges" referred to by McDougall in 1822.

862 Mabel William said that these pit houses were occupied up to the time of her grandmother Hanlhdzany's time. This would place the abandonment of these pit houses at some period in the latter half of the nineteenth century.

863 Dewhirst and Eldridge were of the opinion that either Biny Gwechugh or Gwedats'ish was the home of the "Tase Ley" or Long Lake Indians. As already mentioned, this was identified as one of four Tsilhqot'in groups attached to Fort Chilcotin according to the Hudson's Bay Company census of 1838. In Eldridge's opinion, EjSa-11 probably marks the location where, according to Connolly's 1825 report, Tsilhqot'in people associated with Tsilhqox Biny generally resided. Later HBC accounts link the Long Lake Indians to a Chief known as Quill Quall Yaw. Both Eldridge and Dewhirst accept that this is likely the same chief that Father Nobili met, either at Gwedats'ish or Biny Gwechugh, in the winter of 1845.

864 Several witnesses also testified that this was also an ancient Tsilhqot'in cremation site. They described fishing at this site. Doris Lulua said that Tsilhqot'in people do not like to camp there because people were buried at that location.

xi. Tsilhqox Biny Area - Ch'a Biny

865 Ch'a Biny is the Tsilhqot'in name for a lagoon opposite Xeni on the west side of Tsilhqox Biny. It lies within the Claim Area. Witnesses for the plaintiff testified that there are both niyah qungh and lhiz qwen yex remains in the area. Mabel William deposed that she stayed in one niyah qungh at Ch'a Biny, built by her husband's father, Sam Bulyan. Theophile Ubill Lulua said that there are at least four lhiz qwen yex remains at Ch'a Biny. Other witnesses testified to a campsite and trapping cabin in the area. No archaeological or historical records were cited that would confirm Tsilhqot'in residence at this site in or around 1846. Ch'a Biny was a point used to cross Tsilhqox Biny in modern and ancestral times.

866 From the perspective of Tsilhqot'in people, Ch'a Biny has some mythical meaning as reflected in the story told by Francis William. According to the story, behind Ch'a Biny is the grave of a deyen with owl powers who died under a rockslide. Ch'a Biny lies within the boundaries of Ts'il?os Provincial Park.

xii. Ts'il?os (Mount Tatlow)

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xiii. Dzelh Ch'ed (Snow Mountains) - Coast or Cascade Mountains

xiv. Tl'ech'id Gunaz (Long Valley), Yuhitah (Yohetta Valley), Ts'i Talh?ad (Rainbow Creek), Tsi Tese?an (Tchaikazan Valley) and Tsilhqox Tu Tl'az (Edmond Creek) watersheds

867 Ts'il?os is located south of Xení Biny inside Ts'il?os Park. Part of Ts'il?os is within the Claim Area. The eastern slope is between the two Trapline Territories. The name Ts'il?os derives from the legend of Ts'il?os and ?Eniyud.

868 There are different resource gathering sites in the mountainous area bordering Tsilhqox Biny south of Xení. Ts'il?os, the highest peak in the region, bounds southern Xení. Its western slopes meet the shore of Tsilhqox Biny. South of Ts'il?os are the watersheds of Tl'ech'id Gunaz, Yuhitah, Ts'i Talh?ad, Tsi Tese?an and Tsilhqox Tu Tl'az. These lands are part of the sweep of the Coast or Cascade Mountains known to Tsilhqot'in people as Dzelh Ch'ed.

869 East of Tsilhqox Biny is Yuhitah. It is bisected by the eastern boundary of the Western Trapline Territory. Only a part of the valley is in the Claim Area.

870 As the Yuhitah area was not visited by traders, missionaries or explorers there is no written historical record of the area. There is no doubt the area was used by Tsilhqot'in people in the twentieth century. While trapping activities of Tsilhqot'in people have fallen dramatically with the apparent collapse of the fur market, they continue to use this area for hunting and fishing. Witnesses recounted oral history of their ancestors using the area for hunting, trapping and fishing.

871 The evidence leads to a conclusion that Tsilhqot'in people were present in these areas where they constructed dwellings for use as base camps. From these sites they hunted, trapped, fished and gathered roots and berries.

xv. Talhiqox Biny (Tatlayoko Lake)

872 Talhiqox Biny is a long narrow lake to the west of, and running roughly parallel to, the north end of Tsilhqox Biny. The boundary of the Western Trapline Territory runs through the middle of Talhiqox Biny from the northern end to near its southern end. The entire west shore of the lake falls outside the Claim Area. Most of the eastern shore lies within the Claim Area. ?Eniyud, the legendary wife of Ts'il?os, presides over the west side of Talhiqox Biny. Information on Tsilhqot'in use of Talhiqox Biny in the pre- or early contact period is limited. However, there are historical references to sites on Talhiqox Biny dating from the 1860's and 1870's.

873 In 1863 road builder Alfred Waddington produced an untitled sketch map of the Homathko River and Tatlah Biny area. Waddington's map identifies a "Village and horses" at the north end of the unnamed Talhiqox Biny. It also shows trails connecting the village at north Talhiqox Biny to a fishery at south Lhuy Nachasgwengulin; south Lhuy Nachasgwengulin to the southwest end of "Tacla Lake" (Tatlah Biny). These trails run along the southeast side of Lhuy Nachasgwengulin towards the northeast end of Tatlah Biny and Bendzi Biny.

874 On July 22, 1864 as part of a colonial expedition during the Chilcotin War, magistrate William Cox signed a map based on information from Chiefs Alexis and Eulas that is commonly known today as the Chilcotin War Map. This map identifies a trail network that includes a trail connecting to the Tsilhqox Biny outlet and running the west side of the Tsilhqox. Dewhirst described these trails as "an extensive trail network that con-

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nects the Tatlayoko-Tatla Valley to the Chilko Lake-Chilko River Valley".

875 On August 19, 1864 John Brough's party, present in the area as part of the colonial expedition under Chartres Brew, poled their raft from the head of Talhiqox Biny 11 miles south along its east shore. This area is located in the Claim Area. Brough noted that he "[s]aw some old habitation by the way and places on the creeks where they [Indians] had been trapping long ago": Dewhirst Report, p. 58. On the return trip north several days later, Brough wrote that "J. Berry and two Indians left by the trail as they did not like to risk the raft": Dewhirst Report, p. 58. Dewhirst commented at p. 58 of his Report that, "[t]he Brough account of 1864 ... records an old habitation site and trails on the east shore [of] Tatlayoko Lake that ... likely pre-date 1846".

876 No primary residence sites were marked by Tsilhqot'in witnesses at the northern end of Talhiqox Biny. Archaeological and historical records show two sites within the Claim Area, EjSc-9 and EjSc-1, both located near the north end of Talhiqox Biny at the foot of Tsimol Ch'ed. Of these two, EjSc-1 is the more significant habitation site, consisting of four or five small house pits. This site was first recorded in 1968 during a survey of park reserves. EjSc-1 is located on the eastern shore of Talhiqox Biny, about a kilometre from the head of the lake. As it is the only site in the present inventory with pit house features in an area that has undergone systematic archaeological sampling, Eldridge concluded that EjSc-1 likely corresponded with the habitations observed by John Brough in 1864. EjSc-9, located within the tree cover at the northern tip of Talhiqox Biny, was identified in 1982 as a camp or site where people returned regularly, although no pit house depressions were found in the area. The archaeological team who first investigated EjSc-9 identified the camp as the site mentioned in Tiedemann's 1862 journal. Eldridge agreed with this conclusion.

877 In 1862, H.O. Tiedemann, who traversed parts of the Claim Area while exploring a trail from Bute Inlet to Fort Alexandria on behalf of Alfred Waddington, found a well beaten trail and reached the north end of Talhiqox Biny in mid-June. According to his 1862 journal, there, he met an "old Indian" on June 16. A map dated to 1863 and attributed to Alfred Waddington showed a "village and horses" at the north end of Talhiqox Biny.

878 As noted earlier, on August 19, 1864, John Brough reported seeing "some old habitations by the way and places on the creeks where they [Indians] had been trapping long ago" while he was rafting south down the east side of Talhiqox Biny. In Eldridge's opinion, the habitations observed by Brough were likely pit houses since they were visible from the lake and not set back in the forested areas.

879 Passing through the area a dozen years later, Surveyor George Dawson reported on September 1, 1875 finding an "indian Camp on the Trail near the N. end of Tallyoco L.": *Journals of George M. Dawson: British Columbia, 1875-1878*, p. 78.

880 Norman George Setah testified that Tsilhqot'in people stayed at Tach'idilin (a creek running into Talhiqox Biny) on the eastern shore of Talhiqox Biny. Tsilhqot'in people transported their dried meat from their fall hunting grounds in the south to their winter residences in the north along the trails on both sides of the lake and on the water, in ?etaslaz ts'i (spruce bark canoes). He also testified that his family hunted nists'i, nundi-chugh (cougar) and dlig (squirrel) at Tach'idilin and also fished for sabay (dolly varden) and dek'any (rainbow trout).

881 Tsilhqot'in people camped in the area around Ch'a Biny, Gwech'az Biny and Tach'idilin and would hunt throughout this mountainous region down as far as Talhjez (Franklin Arm). Martin Quilt testified that the mountains to the west of Talhiqox Biny are traditional Tsilhqot'in trapping and hunting grounds for sebay (mountain goat), sesjiz (marten), dlig (squirrels) and nundi (lynx). He described hunting and trapping trips taken through the fall up to Christmas.

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xvi. Tsimol Ch'ed (Potato Mountain)

882 Tsimol Ch'ed is located between the north ends of Tsilhqox Biny and Talhiox Biny. It lies within the Claim Area. British Columbia maps describe the larger area of elevation into which Tsimol Ch'ed falls as the Potato Range.

883 Talhiox Biny is on the western boundary of this mountain range. Naghatalhchoz sits at the Range's northern boundary. Tsilhqox Biny borders Tsimol Ch'ed. Tizlin Dzelh (Tullin Mountain) is found in the north-east. The Ses-Chi (Cheshi Creek) pass bounds the southeastern frontier. Shishan-qox (Lingfield Creek) is the major waterway, its sources include ?Edaz Biny and ?Enes Biny, two small high elevation lakes. Tsimol Ch'ed drains northeast to the Tsilhqox.

884 Tsilhqot'in people gathered roots on Tsimol Ch'ed and hunted in the area through the summer months. This practice continued from historical times up to the mid-twentieth century when it began to decline, largely due to the growth of ranching in the area.

885 The area was used by Xeni Gwet'in and Naghatalhchoz Gwet'in and also by other Tsilhqot'in communities in the summer, generally mid to late June into July, when sunt'iny could be identified and harvested. Into the twentieth century, considerable numbers of Tsilhqot'in people have camped all over the mountain at sites such as K'anlh Gunlin, ?Edaz Biny and ?Elagi seqan. No single site on the mountain appears to have been used every year, or by all harvesters. Some families returned to preferred areas on a regular basis. According to Doris Lulua, ?Edaz Biny was one site where larger numbers of Tsilhqot'in people would congregate to fish, race horses, and play net'e?ah, a game played with bones.

886 The slopes of Tsimol Ch'ed are as close as Tsilhqot'in people came to "cultivated fields" at the time of sovereignty assertion. They were not cultivated in a way that would have been recognized by a European person. However, the root extraction was managed and cultivated in a fashion that ensured a passing on of this important resource from generation to generation.

887 The use of the mountain as a gathering ground fell off during the mid-twentieth century partly due to the use of the area as a grazing range. However, to this day Tsilhqot'in people continue to camp on Tsimol Ch'ed during the relatively brief period in the summer when sunt'iny are harvested.

xvii. Area West and South of Tsilhqox Biny

888 At the southwest extremity of Tsilhqox Biny is Talhjez, lying in a southwest direction towards Bute Inlet. Lofty mountains surround the north and south boundaries of the arm. Nachent'az Dzelh is to the north of Talhjez. Yanats'idlush lies to the west. Tsi Nentsen Tsinsh Dzelh and Sebay Talgog provide a southern boundary. Tsilhqox Dzelh is located at the south-western end of Tsilhqox Biny.

889 Tsilhqot'in people have used the lands surrounding Talhjez, including Nachent'az Dzelh, Tsi Nentsen Tsinsh Dzelh and Sebay Talgog, all around the southern end of Tsilhqox Biny, as hunting and trapping grounds.

xviii. West Side of Tsilhqox Biny

890 To the north of Talhjez is T'asbay se?an Tl'ad (Mount Moore or Goat Mountain), Nilht'isiquz (Stikelan Creek Valley) and Tach'i Dilhgwenlh (Huckleberry mountain).

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891 This area west of Tsilhqox Biny, and southeast of Talhiqox Biny, is also a mountainous region. Dominating the area, and surrounding the Nilht'isiquz, is T'asbay se'an Tl'ad. To the northeast, and essentially on Tsilhqox Biny is Tach'i Dilhgwenlh. Between the two is the Tsilhqox Biny valley, surrounding the small body of water named Ch'a Biny, and running a narrow course north around Tach'i Dilhgwenlh Dzelh to Gwedats'ish. Tsimol Ch'ed bounds the Tsilhqox Biny valley to the northwest at this location.

892 Since before the time of first contact, Tsilhqot'in people have used these lands as important hunting, trapping and gathering grounds, moving about from base camps.

f. Eastern Trapline Territory

893 I am satisfied Tsilhqot'in people were present in the Eastern Trapline Territory at the time of first contact. The area has been used by Tsilhqot'in people since that time for hunting, trapping, fishing and gathering of roots and berries. I am not able to find that any portion of the Eastern Trapline Territory was occupied at the time of sovereignty assertion to the extent necessary to ground a finding of Tsilhqot'in Aboriginal title. Despite this conclusion, I will review certain discrete areas within this portion of the Claim Area.

i. Dasiqox Biny (Taseko Lake) and Eastward

894 Dasiqox Biny and the Claim Area lands to the east are situated at the intersection of the mountain-plateau transition zone. Rugged mountains define the southern boundary of this area. A number of creeks and rivers, including the Lord River, Chita Creek, and the Dasiqox, drain into Dasiqox Biny. Moving northward, the Bisqox (Beece Creek) watershed separates Nabas Dzelh (Anvil Mountain) from its southern counterpart Dzelh Ch'ed. Further to the north the terrain is characterized by forests and meadows straddling the basins of Lhuy Nentsul (Little Fish Lake) and Teztan (Fish Lake) system, and the Jididzay Biny (Onion Lake) watershed.

895 Dzelh Ch'ed dominates the southern landscape. Rivers including ?Ena Ch'ez Nadilin and the headwaters of the Dasiqox flow into Dasiqox Biny at its southernmost extremity, at Ts'i Ts'elhts'ig. The southern reaches are known as Dasiqox Tu Tl'az. Its narrows are known as Nanats'eqish and its outlet is called Nadilin Yex. The Dasiqox flows northward from Nadilin Yex to meet the Tsilhqox. Eastward from Nanats'eqish, the mountainous Gwetex Natel?as provides a passage for migrating nists'i as they make their way to the plateau country. In the northern portion of these lands, Nabas Dzelh towers over the Bisqox watershed, the meadows of Nabas, and the fish-bearing Teztan Biny and Jididzay Biny.

896 Nists'i from the nearby Dzelh Ch'ed migrate into these lands through corridors such as those of T'ox T'ad, Nadilin Yex and Gwetex Natel?as. Gex (rabbit), nundi, nabi (muskrat), tsa (beaver), dlig and other furbearer animals are present near Teztan Biny, Jididzay Biny and Nabas Dzelh.

897 There is evidence of Tsilhqot'in people occupying the lands to the east of Dasiqox Biny, centred in the lowlands of Nabas and about Bisqox, Teztan Biny, Jididzay Biny and Lhuy Nentsul. Tsilhqot'in people moved into the mountainous areas to the south and east of Dasiqox Biny in the summer and fall to harvest resources and prepare for the winter. They did so via the ancestral trail network, which is still used today.

ii. Teztan Biny (Fish Lake)

898 Teztan Biny is located within the northern part of the Eastern Trapline Territory, roughly on the same latitude as the north end of Xenii.

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899 Brealey testified that archaeological studies of Teztan Biny indicate "18 roasting and/or pit depressions" in the area. Whether the cultural depressions have been identified as Tsilhqot'in in origin is not clear. Brealey's only source for this information is Robert Tyhurst's article, "Shuswap and Chilcotin use of Churn Creek" (Calgary: Environment Canada, 1994). That study that is not part of the evidence in this case. Gilbert Solomon saw the cultural depressions at Teztan Biny for the first time when visiting with archaeologists. He said that although he was told that Tsilhqot'in people lived there while fishing, he was not told they lived in underground homes.

900 Tsilhqot'in witnesses have testified to the use of Teztan Biny in the twentieth century as a fishing and hunting camp. Francis William said there are also smaller lakes in the area around Dasiqox Biny where sabay and dek'any could be caught. He also spoke of killing a mus near Teztan Biny, along the road to Dasiqox Biny. Cecelia Quilt said that that Old Seymour had a cabin near Teztan Biny. She recalled that her husband once stayed there all winter taking care of cattle and he said that an old Tsilhqot'in lady was buried there.

iii. Nabas Dzelh (Anvil Mountain)

901 Nabas Dzelh was marked at two different locations by Harry Setah and Chief William. Both locations are on the eastern boundary of the Eastern Trapline. The mountain and area surrounding it straddles the border of the Claim Area. The name Nabas is also sometimes used to refer to the large area between Nabas Dzelh and Teztan Biny to the north.

902 Cecelia Quilt was raised in the area of Nabas. She testified that Tsilhqot'in families used to stay in Nabas (on either side of the mountain) in the winter. They travelled into the mountains in the summer and fall to hunt, harvest plants, and dry meat. The people would stay up on Dzelh Ch'ed, in the summer and then move back to Nabas for the winter. Few of the cabins and barns they used are still standing. She understood from her parents that Tsilhqot'in people lived in the area since before their time. Other witnesses identified sites near Nabas (for example, Jididzay Biny) where other Tsilhqot'in families would stay.

903 Henry Solomon had a cabin between Nabas and Teztan Biny, northwest of Nabas. Francis William testified that his brother Jimmy Bulyan lived in a cabin with his family at Whitewater Meadow, east of the Dasiqox. He also said that Lebusden had a cabin not far from his brother's cabin. He said that Tsilhqot'in people would camp at the north end of Dasiqox Biny, at Nadilin Yex. This location appears to be on the border of the Eastern Trapline. Other witnesses also identified campsites at Nadilin Yex.

904 Brealey testified that Lhuy Nentsul, south of Nabas, has "several log buildings that were built at various points in time." He identified the site as an important fresh water fishery. The archaeology of the area was studied in conjunction with a mining proposal advanced by Taseko Mines. This study found that Lhuy Nentsul and its buildings were associated with the William family. The time frame of the William family's use of the area was not indicated in the excerpt from the report cited.

905 Chief William indicated that at present there are no Tsilhqot'in people living in the Eastern Trapline area on a full-time basis.

906 I am satisfied that this area was used for hunting, trapping and fishing and gathering prior to first contact with Europeans.

iv. Gwetex Natel?as (Red Mountain)

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907 Gwetex Natel?as is located east of Dasiqox Biny within the Eastern Trapline Territory. According to Joseph William, nists'i cross Dasiqox Biny at the north and south end or at the narrows in the fall, and then sometimes stay in the mountains on the east side of the lakes before moving into the low country around Dediny Qox.

908 Joseph William testified that his family used to stay at Nadilin Yex, at the north end of Dasiqox Biny and from there would go in search of nists'i and dediny at Gwetex Natel?as. He said Gwetex Natel?as was one of the areas where nists'i would cross the mountains. Tsilhqot'in people would hunt nists'I there from behind rock blinds.

909 Harry Setah, who had been shown the site on an excursion with William Setah, described the deer blind as follows:

We took a crossing and we went over towards Red Mountain, and he showed us a place where — right over here there's a rock stand here somewhere. There's a plateau and there's a blind — it's built about 5 feet high and it's about 10 feet long, where the deer goes by, and they had a spear or bow and arrow back in those days and it's still there right today.

910 There is no archaeological information concerning the rock blinds at Gwetex Natel?as. David Setah testified that blinds were "used long time ago by our ancestors" when Tsilhqot'in people used bows and arrows to hunt.

911 The evidence indicates occupation by Tsilhqot'in people to hunt and trap sufficient to ground such a Tsilhqot'in Aboriginal right to those activities in Gwetex Natel?as.

14. Exclusivity

912 An Aboriginal group seeking a declaration of Aboriginal title must prove the essential element of exclusivity. In *Delgamuukw* (S.C.C.) at para. 155, Lamer C.J.C. explained that title will only vest in the Aboriginal community that held the ability to exclude others from the title lands.

913 Trespass by other Aboriginal groups may actually support an inference of exclusivity where the claimant group had certain laws or practices such as granting permission to visitors to the territory: *Delgamuukw* at para. 157.

914 The Court revisited this subject in *Bernard*. The Court acknowledged that pre-sovereignty Aboriginal societies may not have had a law or convention around excluding others. In that situation, one must look to the evidence to determine whether the element of exclusivity has been met. McLachlin C.J.C. observed in *Bernard*, at paras. 64-65:

But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective. To insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair. The problem is compounded by the difficulty of producing evidence of what happened hundreds of years ago where no tradition of written history exists.

It follows that evidence of acts of exclusion is not required to establish aboriginal title. *All that is required*

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is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.

[Emphasis added.]

915 The plaintiff argues that Tsilhqot'in people had the capacity to control their territory and in fact did exercise such control. It is submitted that the evidence supports a conclusion that Tsilhqot'in people entered into treaties or bonds of peace from time to time, exercised control over the movements of non-Tsilhqot'in people in their territory, and enjoyed a reputation amongst their neighbours as a people who fiercely defended their land.

916 Tsilhqot'in witnesses testified to their ancestors' use of scouts and runners to check for intruders and warn their communities. There is also some historical evidence of this practice, including the journals of Simon Fraser. On July 26, 1808 Simon Fraser recorded that "Chilkoetins ... had the information of our return from the lower parts of the river by messages across the Country": Letters and Journals of Simon Fraser, pp. 124-125.

917 Professor Foster, a legal historian, wrote in his report at p. 23 that the archival records show that "[t]o be safe" in Tsilhqot'in country, "one had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down".

918 The evidence at trial was that the early fur traders and explorers and later the CPP surveyors did indeed offer "presents" to the Tsilhqot'in people and other First Nations. The motivation behind giving these presents was to develop a positive economic relationship with the Aboriginal recipients. However, as Dr. Coates and Professor Foster pointed out, we do not know how these presents were received from the Aboriginal perspective. A letter written by Chief Factor Connolly in October 1829 to George McDougall states:

Presents also ought to be dealt out with a sparing hand, as they not unfrequently defeat the intention for which they are given, and in time instead of being received as favors are claimed as dues.

919 Notwithstanding Connolly's advice and with consequent knowledge of how those payments would be perceived, the HBC fur traders continued to make presents to Tsilhqot'in people. These presents were given with such frequency that the payments to chiefs are referred to throughout the fur trading journals by terms such as "usual present", "ordinary present", "ordinary allowance", "annual present", "customary present", and "accustomed present". Considered from the Tsilhqot'in perspective, demands for payment were very likely linked to non-Tsilhqot'in passage through or use of Tsilhqot'in lands. Europeans were often well aware of the significance of these payments from the Aboriginal perspective and they made such payments for precisely this reason.

920 Military practices were also used to instil fear of Tsilhqot'in warriors. One such military practice was a policy of killing as many opponents as possible but at the same time, deliberately allowing one or two badly wounded opponents the opportunity to escape death. Upon their return, these badly wounded individuals would present the best evidence possible of the fierceness of Tsilhqot'in warriors. This worked to instill fear of Tsilhqot'in people in all those who might venture into Tsilhqot'in territory.

921 The historical records document situations where non-Tsilhqot'in Aboriginal guides refused to enter Tsilhqot'in territory, expressing fear of Tsilhqot'in people. One example of this was recorded by CPP Surveyor Marcus Smith in 1872, printed in Sandford Fleming's *Report of Progress*, p. 113. On this particular occasion

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Smith was armed and accompanied by a gun-boat to the head of Bute Inlet because of concerns about what Tsilhqot'in people might do. Once his "Clahoose" guides and porters reached the site of the 1864 massacre, the Clahoose refused to go past the foot of the canyon because "they were afraid of the Chilcotin Indians". Smith later engaged the services of three Tsilhqot'in men and two women whom they "found hunting there": *C.P.R. Report of Progress*, p. 113.

922 Canada is critical of the plaintiff's approach to this issue and says that a propensity for violence does not establish Tsilhqot'in exclusivity in the Claim Area. In the submission of Canada, the sparse Tsilhqot'in population would make it impossible for Tsilhqot'in people to maintain exclusive control over their traditional territory. Canada says it is more likely that after Tsilhqot'in people moved on from one location to another leaving the land available for others to move in and exploit. Canada also argues that an abandonment of the Claim Area on a failure of a salmon run would make it impossible to maintain exclusive control, at least during such a period.

923 There is nothing to indicate that Tsilhqot'in populations at any given time were small compared to their neighbours. In fact, early records of the HBC appear to record a marginally larger number of Tsilhqot'in men trading at Fort Alexandria than the numbers of Dakelh (Carrier) men. I acknowledge the population was small given the size of the area, but it is fair to infer there were no large numbers of invaders on the edges of Tsilhqot'in territory.

924 It is also important to place events in context. If an area was used to hunt, fish, and gather berries, root plants and medicines, the area would not be available for resource exploitation for at least another year. It would be highly unlikely that a neighbouring Aboriginal group would follow into an area that had already been exploited. Similarly, if the salmon run failed in any given area, there would be no possibility that any other group would move into such a distressful situation.

925 British Columbia says the fundamental problem lies in the plaintiff's approach to proving Aboriginal title. According to this argument, the plaintiff failed to identify and establish pre-sovereignty occupation of any definite tracts of land within the Claim Area. British Columbia also says that the plaintiff has approached the question of exclusivity from a territorial, rather than a site-specific, perspective.

926 In his reply, the plaintiff argues that exclusivity does not require site-specific evidence of control directed at "each marsh meadow and berry patch". What is required is effective control over the land in question.

927 It is fair to say that the argument made by the plaintiff was directed towards a conclusion that Tsilhqot'in people had vigorously defended their territory and had closely monitored and controlled its use by others. British Columbia's position is consistent with the view that site-specific definite tracts are required in the proof of Aboriginal title and thus proof of site-specific exclusivity is also required.

928 There is merit in both arguments. However, I took the plaintiff's argument to be a review of the evidence that would lead not just to a defence of territory but to an exclusive use of the Claim Area. I am unable to conclude there was sufficient occupation of the Claim Area as a whole. Therefore, my focus on exclusivity will be directed to those parts of the land, inside and outside the Claim Area, that in my view do demonstrate a sufficient degree of exclusive occupation to support a finding of Aboriginal title.

929 The question is: does the evidence shows that Tsilhqot'in people at the time of sovereignty assertion exercised effective control of this land? Or, can a reasonable inference be drawn that Tsilhqot'in people could have excluded others had they chosen to do so?: *Bernard*. In my view the answer to that question must be in the af-

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firmative.

930 As one might expect, the struggle, if any, between different Aboriginal groups came at the margins of their territories, those areas of overlap that existed in the absence of defined and accepted boundaries. For Tsilhqot'in people, the high mountains of the Cascade Range provided a natural barrier from any intrusive actions by others.

931 The historical evidence and oral tradition evidence revealed conflict with other Aboriginal people in areas outside of the Claim Area. These conflicts include: the struggle at Tsulyu Ts'ilhed (Bull Canyon a.k.a. Battle Mountain) with Secwepemc (Shuswap) people and a subsequent killing of two Dakelh (Carrier) people said to have taken place pre-contact; Father Morice's report of a Tsilhqot'in attack on the Dakelh village at Chinlac in 1745; a battle with Secwepemc people at Chinilgwan (Churn Creek) to the east of Dasiqox Biny (Taseko Lake); an incursion revealed by oral tradition accounts of a conflict on Tsimol Ch'ed (Potato Mountain) with the Qaju (Homalco) people; a struggle, revealed by oral tradition, with Secwepemc people before sovereignty assertion at Nen Nalmelh (Bald Mountain); an oral tradition account of a war at Bendzi Biny (Puntzi Lake) with the Dakelh people; another skirmish at Tsulyu Ts'ilhed in the early nineteenth century with the Fraser River Secwepemc people; the Talkotin War with the Dakelh people to the north in mid-1826, recorded in the HBC journals; occasional skirmishes with the Qaju people to the south and west of the Claim Area; the Tsilhqot'in War, south and west of the Claim Area; an unsuccessful attempt by the Stl'atl'imc (Lillooet) to raid Tsilhqot'in sites, see for example, HBC Journal May 9, 1839; and, the war in Deni Deztsan (Graveyard Valley) in the late nineteenth century with the Stl'atl'imc people to the south and east of the Claim Area.

932 An exception to these conflicts is the oral tradition evidence of two incursions by Qaju people into Tsimol Ch'ed inside the Western Trapline Territory reported by Robert Lane in his 1953 dissertation, *Cultural Relations of the Chilcotin Indians*. At p.91, he records the following:

Through the years, fighting with the Homalco was not completely one-sided. The Chilcotin have a detailed account of a raid by Bute Inlet people a few generations ago. The raiders penetrated deep into Chilcotin territory and killed a number of people. However, according to the Chilcotin, the intruders were ambushed en route home and wiped out. Informants claimed that at an earlier date Bute Inlet people came up to Chilko Lake, built "salt water" houses and canoes, and attempted raids. They wintered on the lake for several years but this introduction of coastal patterns of living and raiding by water was unsuccessful. The Chilcotin simply avoided the lake at that time.

933 There is oral tradition evidence of an attack by the Qaju people causing the deaths of several Tsilhqot'in young women on Tsimol Ch'ed. With the assistance of a deyen (medicine man), Tsilhqot'in warriors killed and drove off the Qaju warriors. Whether that oral tradition is the same event noted by Lane is uncertain. It is clear that the event predated sovereignty assertion, as there was no evidence linking that skirmish to the time of sovereignty assertion or any time thereafter.

934 If there was a settlement of Qaju people as recorded by Lane, the settlement is more likely to have been at the lower part of Tsilhqox Biny about the area of Talhjez. This area is inside the Claim Area, but is not one of the areas I find sufficient evidence to ground Tsilhqot'in Aboriginal title.

935 Aside from these two instances, it appears that others respected the territorial integrity of the lands included in the Claim Area. I conclude that, at the time of sovereignty assertion, Tsilhqot'in people did have exclusive control over those lands which they used regularly. A summary of those lands is provided in Section 16

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of these reasons.

936 At the time of sovereignty assertion, the Tsilhqot'in people enjoyed a reasonable trading relationship with the Nuxalk (Bella Coola) people to the northwest and the Secwepemc people to the east.

937 The evidence demonstrates the obvious. Aboriginal groups had overlapping territories. They were constantly pushing the limits of their territories and this often resulted in fighting. These conflicts helped define areas that everyone accepted as "belonging" to a particular Aboriginal group. It was understood that one did not venture into a particular area without permission. The absence of permission placed lives at risk.

938 The area over which I have found a sufficient degree of occupation to ground Aboriginal title, both inside and outside the Claim Area, does not include overlapping territory and was effectively controlled by Tsilhqot'in people. Tsilhqot'in people were there in sufficient numbers to monitor European traders, missionaries, settlers and railway surveyors on their arrival. There is evidence that each of these groups of new arrivals were aware that Tsilhqot'in people considered this to be their land. Others were permitted to be on that land or to pass over that land at the sufferance of Tsilhqot'in people.

939 Two of the first European settlers in the Tsilhqot'in region, L. W. Riske and Donald McIntyre, wrote a letter to Lt. Gov. Trutch dated June 6, 1872 where they stated:

On our coming to this place the Indians here professed themselves friendly and agreeable to our settling here, and on the whole they have acted so far towards us very peaceably. They have always however considered the land theirs, and that we are beholden to them for it, and occupy it on sufferance. We have always avoided arguing it with them till some one in authority could come and explain to them their duties and rights. Our all being invested here, we have been anxious to conciliate them, and to that end we enclosed and ploughed land for them, giving Potatoes to plant and water to irrigate as also Potatoes to many out back, and the privilege of gleaning in the fields in harvest.

940 Ten years later, Riske and McIntyre and three others wrote a letter to Indian Superintendent A.W. Powell. In that letter dated March 19, 1883, the settlers described themselves as "inhabitants of Chilcotin" who were "living here ... at their [the Indians'] sufferance."

941 With respect to the land that I describe in Section 16 outlining my conclusions on Tsilhqot'in Aboriginal title, there are only two incidents that raise any evidence of adverse claimants and a possible loss of control or diminution of control. The first is the possibility of the presence of the ?Ena Tsel (Little Salishans). These people unquestionably lived along the Tsilhqox corridor at some point in time. I am satisfied that well before the assertion of sovereignty, this group of Aboriginal people had vacated the area. There is no mention of them in the HBC diaries and records, and equally no record is made of their presence in the area by the early missionaries.

942 I heard no evidence about Qaju salt water houses on Tsilhqox Biny from Tsilhqot'in witnesses. If there was such an event, there is no archaeological or historical evidence to indicate when it might have occurred. I am satisfied that at the time of sovereignty assertion there was no such settlement on that part of Tsilhqox Biny that is included in the area described in my conclusions on Tsilhqot'in Aboriginal title.

943 In summary, there is no evidence of adverse claimants at the time of sovereignty assertion in the area I describe in my conclusions on Tsilhqot'in Aboriginal title. I conclude that Tsilhqot'in people were in exclusive

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control of that area at the time of sovereignty assertion.

944 My conclusion follows logically from the entire migration of Tsilhqot'in people and the historical record. As I have already described, the migration was southeast, following the curve of the Cascade Mountains. At the time of sovereignty assertion, this migration of people had brought some numbers of Tsilhqot'in people to the entire Claim Area where they led a semi-nomadic lifestyle as hunter gatherers. The occupation of the area I have described in my conclusions on Tsilhqot'in Aboriginal title was exclusive and sufficient to provide a foundation for that title.

15. Continuity

945 I am satisfied Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion. There has been a "substantial maintenance of the connection" between the people and the land" throughout this entire period: *Delgamuuku* (S.C.C.) at para. 153.

16. Conclusions on Tsilhqot'in Aboriginal Title to the Claim Area

946 I have taken the arguments advanced by the parties and attempted to analyze them in detail with particular references to the evidence. In so doing, I have considered the Tsilhqot'in people's use and occupation of the Claim Area from three different perspectives.

947 First, I considered the use and occupation of the Claim Area by locating those sites that would have a measure of permanency attached to them so that they could be characterized as possible villages, dwelling sites, cultivated fields, camping sites, resource gathering sites and the like. At times it was difficult to conclude if a particular site was inside or outside the Claim Area. Other sites were easy to distinguish as being either inside or outside the boundaries selected by the plaintiff.

948 Second, I considered the use and occupation of the Claim Area from a land use perspective. What emerged from that analysis was a clear pattern of Tsilhqot'in seasonal resource gathering in various locations in the Claim Area.

949 Third, I considered the evidence of post-sovereignty use and occupation of the various sites within the Claim Area. What emerged from that analysis was that the historical pattern of seasonal resource gathering in various locations in the Claim Area has continued over time. That pattern has shifted as governments attempted to settle Tsilhqot'in people on reserves. Despite these attempts, a number of Tsilhqot'in people have continued to gather resources and otherwise reside in the areas their ancestors have used for generations, regardless of whether these areas are on reserve or not.

950 While conducting this analysis, I considered the smaller "definite tracts of land" not pleaded individually by the plaintiff but included in the larger Claim Area of Tachelach'ed (Brittany Triangle) and the Trapline Territories. This micro analysis highlighted the fact that use and occupation of some land outside the Claim Area by Tsilhqot'in people was at least as extensive as that within portions of the larger Claim Area.

951 What is not revealed by any of these approaches to the evidence is the number of people that were likely in the Claim Area at the time of sovereignty assertion. Some numbers can be found in the records of the HBC. Father Nobilli's papers are also helpful in that regard. Chief Roger William testified in the fall of 2003 that the Xenigwet'in First Nations Band membership was approximately 390-400 people. Of these, he estimated

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that approximately 200 persons lived on the Xení Gwet'in reserves, and about 15 lived off reserve in the Claim Area. The balance live off reserve and not in the Claim Area. I conclude that, at the time of sovereignty assertion, the population of Tsilhqot'in people living in the entire Claim Area was higher than it is today, but not more than 400 persons.

952 Life today for Tsilhqot'in people is very different than it was at the time of sovereignty assertion, or even 50 or 60 years ago. There are few Tsilhqot'in people today who travel about the Claim Area as people did in the first part of the last century. Many Tsilhqot'in people living in and about the Claim Area today are ranching and work in various occupations including forestry, park maintenance and guiding. Chief William estimated that using the traditional means of transportation available at the time of sovereignty assertion, it would take 10 to 15 days to travel around the Claim Area. He personally had not visited Tsimol Ch'ed (Potato Mountain) until 2002, nor had he travelled beyond Far Meadow in Tachelach'ed. Other non-First Nations persons have settled in the area, bringing many changes. One example of this that emerged from the evidence was that ranching practices on Tsimol Ch'ed have dramatically affected the harvesting of sunt'iny (wild mountain potato).

953 At the time of sovereignty assertion, Tsilhqot'in people living in the Claim Area were semi-nomadic. They moved up and down the main salmon bearing river, the Tsilhqox (Chilko River), in season. They fished the smaller lakes to the east and west of the Tsilhqox, particularly in the spring season. They gathered berries, medicines and root plants in the valleys and on the slopes of the surrounding mountains. They hunted and trapped across the Claim Area, taking what nature had to offer. Then, for the most part, they returned on a regular basis to winter at Xení (Nemíah Valley), on the eastern shore of Tsilhqox Biny (Chilko Lake), on the high ground above the banks of the Tsilhqox, and on the shores of adjacent streams and lakes, from Naghatalhchoz Biny (Big Eagle Lake) and eastward into Tachelach'ed.

954 In Tachelach'ed, the area of more permanent use and occupation was from the Tsilhqox corridor east to Natasewed Biny (Brittany Lake) and from there, south to Ts'uni?ad Biny (Tsuníah Lake) and east past Tsanlgen Biny (Chaunigan Lake) and over to the twin lakes, ?Elhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake).

955 The areas that provided a greater degree of permanency and regular use are the sites where abandoned lhiz qwen yex and niyah qungh are found. The majority of these dwelling sites are not on the reserves set aside for Xení Gwet'in people at the turn of the twentieth century.

956 In early spring, Tsilhqot'in people would disperse again across the area that is, in part, defined in these proceedings as the Claim Area.

957 I am unable to find regular use in the entire area of any of the discreet three parts that make up the whole Claim Area, Tachelach'ed, or the Eastern and Western Trapline Territories. I am unable to make such a declaration of Tsilhqot'in Aboriginal title to smaller areas included within the whole because they have not been separately pleaded, as discussed earlier in Section 4 of these Reasons for Judgment.

958 I took the invitation by counsel to express an opinion on Tsilhqot'in Aboriginal title to be an invitation to go where the evidence lead me. I acknowledge that in expressing this opinion, I am doing precisely what I was uncomfortable with in the course of the trial, namely setting boundaries that are ill defined and not contained within usual metes and bounds. They are, however, boundaries that are shaped by the evidence. On the western side, I have followed the western boundary of the Trapline Territory because it was there, and not because there was a sudden end to the activities of Tsilhqot'in people.

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959 The entire body of evidence in this case reveals village sites occupied for portions of each year. In addition, there were cultivated fields. These fields were not cultivated in the manner expected by European settlers. Viewed from the perspective of Tsilhqot'in people the gathering of medicinal and root plants and the harvesting of berries was accomplished in a manner that managed these resources to insure their return for future generations. These cultivated fields were tied to village sites, hunting grounds and fishing sites by a network of foot trails, horse trails and watercourses that defined the seasonal rounds. These sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title as follows:

- The Tsilhqox (Chilko River) Corridor from its outlet at Tsilhqox Biny (Chilko Lake) including a corridor of at least 1 kilometre on both sides of the river and inclusive of the river up to Gwetsilh (Siwash Bridge);
- Xeni, inclusive of the entire north slope of Ts'il'os. This slope of Ts'il'os provides the southern boundary, while the eastern shore of Tsilhqox Biny marks the western boundary. Gweqez Dzelh and Xeni Dwelw combine to provide the northern boundary, while Tsiyi (Tsi 'Ezish Dzelh or Cardiff Mountain) marks the eastern boundary.
- North from Xeni into Tachelach'ed to a line drawn east to west from the points where Elkin Creek joins the Dasiqox (Taseko River) over to Nu Natase'ex on the Tsilhqox. Elkin Creek is that water course draining Nabi Tsi Biny (Elkin Lake), flowing northeast to the Dasiqox;
- On the west, from Xeni across Tsilhqox Biny to Ch'a Biny and then over to the point on Talhiqox Biny (Tatlayoko Lake) where the Western Trapline boundary touches the lake at the southeast shore, then following the boundary of the Western Trapline so as to include Gwedzin Biny (Cochin Lake);
- On the east from Xeni following the Dasiqox north to where it is joined by Elkin Creek; and
- With a northern boundary from Gwedzin Biny in a straight line to include the area north of Naghatalhchoz Biny (Big Eagle Lake or Chelquoit Lake) to Nu Natase'ex on the Tsilhqox where it joins the northern boundary of Tachelach'ed over to the Dasiqox at Elkin Creek.

960 The foregoing describes a tract of land mostly within the Claim Area but not entirely. It is an area that was occupied by Tsilhqot'in people at the time of sovereignty assertion to a degree sufficient to warrant a finding of Tsilhqot'in Aboriginal title land from three perspectives. First, there are village sites as I have discussed earlier. Second, there are cultivated fields, cultivated from the Tsilhqot'in perspective. These were the valleys and slopes of the transition zone used and managed by Tsilhqot'in people for generations that provided them with root plants, medicines and berries. Third, by a well defined network of trails and waterways, Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering. This is the land over which they held exclusionary rights of control: *Bernard* at para. 77. This was the land that provided security and continuity for Tsilhqot'in people at the time of sovereignty assertion: *Sappier*; *Gray* at para. 33.

961 It should be borne in mind that this view of Tsilhqot'in Aboriginal title is not binding on the parties given the conclusion I have reached in Section 4 on the preliminary issue. If I am wrong on this preliminary issue, then my conclusion on Tsilhqot'in Aboriginal title, insofar as it describes land within Tachelach'ed and the Trapline Territory, is binding on the parties as a finding of fact in these proceedings. My discussion of those lands that are outside the Claim Area remains only an expression of opinion I have made to assist the parties in the ne-

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gotiations that lie ahead.

962 While the court cannot make a formal declaration of Tsilhqot'in Aboriginal title, I trust that expressing the foregoing opinion will assist the parties to achieve a fair and lasting resolution of the issues, which must be found to achieve a reconciliation of all interests.

17. Statutory Authority to Issue Forest Tenures and Authorizations

963 The plaintiff says the *Forest Act*, R.S.B.C. 1996, c. 157 and each iteration of that Act in place at all material times does not and did not apply to Tsilhqot'in Aboriginal title land. The plaintiff characterizes this issue as a matter of statutory interpretation. Simply put, the forestry legislation does not provide the necessary statutory authority to harvest on Aboriginal title lands.

964 Between 1945 and 1978, British Columbia authorized timber harvesting in the Claim Area under the authority of the *Forest Act*, R.S.B.C. 1936, c. 102, as amended. Subsection 17(1) of that Act provided ministerial authority to advertise and sell "a licence to cut and remove any Crown timber which is subject to disposition by the Crown". During this period, at least twenty-four timber licences were issued pursuant to the 1936 *Forest Act*. Harvesting occurred in the Claim Area under the authority of these licences.

965 Later amendments allowed the Minister to delegate officials to advertise and sell the timber licences. That authority was always limited to the sale of "Crown timber". Throughout this period, the definition of "Crown timber" found in s. 2 of the 1936 *Forest Act*, remained consistent:

"**Crown timber**" includes any trees, timber, and products of the forest in respect whereof His Majesty in right of the Province is entitled to demand and receive any royalty or revenue or money whatsoever:

966 A new *Forest Act*, S.B.C. 1978, c. 23 came into effect on January 1, 1979. That legislation also confined provincial forestry officials to the granting of rights in relation to "Crown timber".

967 The 1979 *Forest Act* introduced a new definition of "Crown timber". Pursuant to s. 1 of the 1979 *Forest Act*:

"**Crown land**" has the same meaning as in the Land Act, but does not include land owned by an agent of the Crown;

"**Crown timber**" means timber on Crown land;

...

"**Private land**" means land that is not Crown land;

968 The 1979 *Forest Act* referentially incorporates the definition of "Crown land" from the *Land Act*, R.S.B.C. 1979, c. 214. The 1979 *Land Act* provided the following definition in s. 1:

"**Crown land**" means land, whether or not it is covered by water, or an interest in land, vested in the Crown;

969 These definitions have remained unaltered to the present day, with one minor exception. The definition of "Crown timber" under the 1979 *Forest Act* was soon expanded to include "timber reserved to the Crown":

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Forest Amendment Act, S.B.C. 1979, c. 11, s. 1.

970 The current *Forest Act* also authorizes provincial forestry officials to enter into agreements granting rights to harvest "Crown timber"; that is, timber situated on "land ... or an interest in land, vested in the government".

971 The plaintiff says that timber on Aboriginal title lands is not "Crown timber" and as a result British Columbia lacked the statutory authority required to grant an interest in this timber to third parties. The plaintiff says that timber situated on Tsilhqot'in Aboriginal title lands is not "Crown timber" for the following reasons:

a. Aboriginal title is a right to the land itself. Tsilhqot'in Aboriginal title encompasses the right to the exclusive possession, occupation, use and enjoyment of the land and its resources.

b. British Columbia has no present interest by way of possession, nor does it have any beneficial interest in Aboriginal title lands or the resources on those lands. British Columbia's ownership of the lands and resources in the Province is qualified by and subject to the burden of Aboriginal title, pursuant to s. 109 of the *Constitution Act, 1867*. Because Aboriginal title includes the exclusive right to the possession, occupation, use and enjoyment of its subject lands, the Province's interest is reduced to its underlying title, which does not vest in possession until Aboriginal title is surrendered.

c. The Province is not entitled to demand any revenue or royalties with respect to such timber while Aboriginal title persists. Similarly, such timber is not situated on "Crown lands". Tsilhqot'in Aboriginal title lands vest in the possession of the Tsilhqot'in people and not the Crown.

d. The primary purpose of the *Forest Act*, is the management and allocation of interests in public forestry resources on public lands. The *Forest Act* was never intended as an expropriation statute for granting interests to third parties in timber already held in the possession of a party other than the Crown. In the rare circumstances that the *Forest Act* imbues forestry officials with powers of expropriation (for example, to facilitate the creation of logging roads), it sets this authority out explicitly, and imposes strict guidelines on its use.

e. If the *Forest Act* were to authorize the appropriation of property rights vested in Tsilhqot'in people pursuant to Aboriginal title, it would have to do so in clear and unequivocal language that is not found in that statute.

f. Finally, if the *Forest Act* were intended to apply to Aboriginal title lands, it would be discriminatory in its effect, such that it could not be characterized as a law of general application. Accordingly, it would be *ultra vires* for the Province to enact.

972 Canada made no submissions on the foregoing arguments advanced by the plaintiff.

973 British Columbia says lands burdened by Aboriginal title remain provincial Crown lands, on the authority found in *Guerin v. R.* where Dickson J said at p. 382:

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown.

974 British Columbia acknowledges that Aboriginal title, if it exists, constitutes an encumbrance or burden on the provincial Crown's title to its lands and that Aboriginal title to land can include an interest in the standing

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timber: *Haida Nation v. British Columbia (Minister of Forests)* (1997), 45 B.C.L.R. (3d) 80 (B.C. C.A.).

975 In *Delgamuukw* at para. 111, the Supreme Court of Canada described the contents of Aboriginal title as follows:

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.

976 The Court emphasized this again, at para. 140:

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.

977 Professor Kent McNeil, in "Aboriginal Title and the Supreme Court: What's Happening?", (2006) 69 Sask. L.Rev. 679, at p. 693 states:

The nature of the underlying title the provincial Crown has by virtue of s. 109 is therefore determined negatively: it amounts to whatever interest remains after the Aboriginal title that burdens it has been subtracted. This is the way s. 109 operates where any interests in land are concerned, as they are all burdens on the Crown's underlying title. For example, if burdened by a fee simple estate, the Crown's underlying title does not amount to any present beneficial interest, but rather is a mere right to have the lands go back to the Crown by escheat if the fee simple comes to an end. Like a fee simple, Aboriginal title amounts to a right of exclusive use and possession of potentially infinite duration that includes natural resources. In neither case does the Crown have a present beneficial interest.

978 Aboriginal title brings with it a right to the exclusive use and possession of land, including the use of natural resources. Until there is a finding of Aboriginal title, there must be a presumption that forest lands not held privately are Crown lands. Provincial legislative provisions apply, even where Aboriginal title and other Aboriginal rights are alleged to exist. When Aboriginal title or rights are claimed the duty to consult is engaged: *Haida Nation* (S.C.C.). I am content to give the usual statutory meanings to Crown land and Crown timber in situations where the Crown's interest in the land and timber remains unencumbered by a declaration or finding of Aboriginal title. The Crown's duty to consult, if properly discharged, gives adequate protection to any alleged Aboriginal interests. Should there be a later declaration of rights or title there is a serious risk that, without proper consultation and accommodation, these rights may be infringed. As a result of government action, those persons whose rights or title have been so compromised will have their remedy in damages. There is also the possibility of injunctive relief prior to infringement, assuming the applicant could meet the tests for an interlocutory injunction.

979 The *Forest Act* is primarily a mechanism for managing, protecting, conserving and planning the use of the forest resources of the Crown and not those forest resources belonging to other parties. It is directed towards

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the regulation of public lands, held in the possession of the Provincial Crown for the benefit of the Province as a whole.

980 Private timber is excluded from disposition under the *Forest Act*. There is no statutory mechanism included in the *Forest Act* for expropriating interests in privately owned timber and allocating them to third parties by way of timber licences or other authorizations. The legislation distinguishes between timber resources belonging to the Crown as public landlord (which are available for disposition under the Act) and timber possessed by other parties (which are not). Private lands and timber already owned by a licensee may be included in some forms of tenure granted under the *Forest Act* for certain management purposes (such as tree farm licences and woodlot licences): see *Forest Act*, ss. 11-12, 35(1)(b), (e), 45(1)(b), (c). However, this does not alter the basic point that the granting of rights to harvest timber is limited to Crown timber on Crown land.

981 While I am unable to conclude that the Tsilhqot'in people have Aboriginal title over the entire Claim Area, I do find that there are areas both inside and outside the Claim Area that qualify for a finding of Tsilhqot'in Aboriginal title. The present provisions of the *Forest Act* do not apply to those areas that meet the test for Aboriginal title.

18. Private Lands Issue

982 There are a number of private lots and other private interests within the Claim Area. The Crown has granted fee simple title to some of these lots to non-Tsilhqot'in persons. British Columbia argues that private lands have been excluded from the claims as defined by the parties to this litigation. However, the Province refers to these private lots throughout their submissions on Tsilhqot'in occupation of the Claim Area. The plaintiff argues that I may make declarations that affect these private lands. While I make no declaration of Aboriginal title in this action, I do express an opinion as to where such title may exist. I now propose to address the issue of private lands within the Claim Area and their impact on Aboriginal title, in the hope that it will assist in the process of reconciliation.

983 The plaintiff's statement of claim defines the Trapline Territory as "the lands within the boundaries of Trapline Licence #0504T003". In the application for registration of this trapline (approved on January 18, 1980), the metes and bounds descriptions for both blocks of the trapline conclude with the words: "including all intervening territory except private property". British Columbia submits that the plaintiff appears to have chosen to define the lands claimed in the Trapline Action in a manner that excludes private property.

984 When the two actions were consolidated, the Trapline Territory continued to be defined by reference to the boundaries of Trapline Licence #0504T003. On May 22, 2003, the plaintiff amended the description of the Trapline Territory to exclude Indian Reserves within the Claim Area.

985 The definition of the boundary of Tachelach'ed (Brittany Triangle) does not on its face exclude private property. British Columbia argues that when the Tachelach'ed definition is considered against the allegations of infringement by the British Columbia Forest Service, private lands are also excluded. This is because under the *Forest Act* the Forest Service does not manage forestry on private lands. The Province says the exclusion of private lands from the claims may explain why the plaintiff makes no reference in his argument to the many Crown granted tenures in the Williams Lake Timber Supply Area.

986 The fact that the plaintiff's argument does not address these Crown granted tenures within the William Lake Timber Supply Area is entirely consistent with the plaintiff's position which is that private lands are in-

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cluded and that the holders of such tenures could take no more than what the Crown had to offer, namely, land burdened with Tsilhqot'in Aboriginal title.

987 I have some difficulty in understanding the position now taken by British Columbia given that this issue has already arisen in this litigation. In 2002, British Columbia brought a motion for directions with respect to the service of notice on tenure holders whose interests might be affected by the proceedings. In *Xeni Gwet'in First Nations v. Riverside Forest Products Ltd.*, 2002 BCSC 1199 (B.C. S.C.) at para. 12, I noted the fact that "British Columbia says that the plaintiff has framed claims for relief that may potentially affect the interest of non-parties". It was understood then that the action included private lands. Nothing in the amended pleadings could be taken as a signal that private lands were removed.

988 In my view, the pleadings have always been inclusive of private lands. Indian Reserves were removed from the Claim Area but private lands were not. The description of the Trapline Territory is a reference to the external boundaries of those two pieces of land and is inclusive of "the whole of the lands within the boundary of Trapline Licence #0504T003..." (para. 12, statement of claim). A plain reading of those words leaves no doubt that the plaintiff intended to include all of the land within the boundaries of the Claim Area as described in the pleadings.

989 The second issue which arises is whether any declaratory relief can apply to private lands within the Claim Area. The *Forest Act* does not manage forest resources on private lands. The Province argues that this court cannot grant declaratory relief with respect to such lands because private lands are not engaged in any live controversy based upon forestry operations. In that regard, British Columbia relies upon *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539 (B.C. C.A.).

990 In *Xeni Gwet'in First Nations v. British Columbia*, 2003 BCSC 249 (B.C. S.C.), I considered the implications of *Cheslatta* and how it was to bear on the future of this case. I concluded that a plea of specific and discrete infringement of title was not required in order for the plaintiff to proceed. The view I expressed in that decision was that the pleadings alleged past, present and threatened infringement of rights and title: para. 60. In paras. 63-66 I concluded that, upon the basis of the pleadings, the plaintiff was able to argue:

- a) the establishment of the legislative and administrative regime under the *Forest Act* may be an infringement;
- b) the inclusion of the Claim Area in the Williams Lake Timber Supply Area may be an infringement; and
- c) the authorization of past, present and threatened logging may be an infringement.

991 The plaintiff now urges this Court to make a declaration for relief wherever it is warranted on the evidence. The plaintiff argues that *Cheslatta* was concerned with the ripeness of the conflict at the outset of the litigation, on the face of the pleadings. Different considerations must govern the "almost unlimited" discretion of the Court to issue a declaration at the end of the litigation process. In the plaintiff's submission this court can distinguish *Cheslatta* on the basis that it simply does not speak to the availability of declaratory relief where infringements have been pleaded, voluminous evidence has been led, years of trial have been consumed, argument has been heard, and the Court is situated to make findings on the basis of a fully litigated evidentiary record.

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992 I do not agree with the plaintiff when he argues that after a lengthy trial, the Court is in a position to exercise discretion and, in effect, do whatever appears appropriate in the circumstances. The Court remains bound by the pleadings. In this case the only infringements pleaded are those infringements raised by the forestry legislation and activities conducted pursuant to that legislation. That legislation does not regulate activities on private lands and accordingly there is no plea of an infringement on any private lands in the Claim Area.

993 It may well be that the transfer of a fee simple title, the granting of a grazing permit or a water licence or any other interest from British Columbia to others would all be infringements of Aboriginal rights. But they have not been pleaded. In the absence of any plea of infringement of Tsilhqot'in title and rights existing on private lands in the Claim Area, the Court is unable to make a declaration of such rights in relation to those lands.

994 I also wish to address the Province's repeated reference to private lands within their argument on Tsilhqot'in occupation of the Claim Area. It seems to me that their review of the evidence is attempting to suggest that the granting of fee simple title to non-Tsilhqot'in people has caused a break in continuity. Though not framed as such, the Province appears to be making a veiled attempt to argue that the granting of fee simple title has extinguished Aboriginal title to these privately held lands.

995 In Australia the courts have concluded that Native title can be extinguished by inconsistent grant. The High Court of Australia has held that Native title is extinguished by grants in fee simple, true leases, and other dispositions that are inconsistent with the survival of native title: *Mabo v. Queensland (No. 2)* (1992), 175 C.L.R. 1 (Australia H.C.), paras. 81, 83 (*per* Brennan J.); see also paras. 23, 29, 39 (*per* Gaudron and Deane JJ.).

996 The Supreme Court of Canada has reached a different conclusion. Prior to the constitutional entrenchment of Aboriginal rights pursuant to s. 35 (1) of the *Constitution Act, 1982* the power to extinguish Aboriginal title was an exclusive federal power under s. 91 (24) of the *Constitution Act, 1867*. Land held by the Province pursuant to s. 109 of the *Constitution Act, 1867* was subject to existing trusts. Those trusts included Aboriginal rights such as Aboriginal title.

997 Given that the jurisdiction to extinguish has only ever been held by the federal government, the Province cannot and has not extinguished these rights by a conveyance of fee simple title to lands within the Claim Area: see *Delgamuukw v. British Columbia*, (S.C.C.) paras. 172-176.

998 Thus, regardless of the private interests in the Claim Area (whether they are fee simple title, range agreements, water licences, or any other interests derived from the Province), those interests have not extinguished and cannot extinguish Tsilhqot'in rights, including Tsilhqot'in Aboriginal title.

999 What is not clear from the jurisprudence are the consequences of underlying Aboriginal rights, including Aboriginal title, on the various private interests that exist in the Claim Area. While they have not extinguished the rights of the Tsilhqot'in people, their existence may have some impact on the application or exercise of those Aboriginal rights. This conclusion is consistent with the view of the Ontario Court of Appeal in *Chipewas of Sarnia Band v. Canada (Attorney General)* (2000), [2001] 1 C.N.L.R. 56 (Ont. C.A.).

1000 Reconciliation of competing interests will be dependant on a variety of factors, including the nature of the interests, the circumstances surrounding the transfer of the interests, the length of the tenure, and the existing land use. Such a task has not been assigned to this Court by the issues raised in the pleadings.

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19. Constitutional Issues — Division of Powers

a. Interjurisdictional Immunity

1001 The Province's legislative and regulatory framework must accord with the division of powers under the *Constitution Act, 1867*. A provincial law that in pith and substance relates to "Indians" or "Lands reserved for the Indians" is *ultra vires* the Province: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31 (S.C.C.), at para. 67. Provincial laws of general application apply to Aboriginal people provided they do not touch the "core" of Indianness: *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55 (S.C.C.), at para. 14; *Delgamuukw* (S.C.C.) at paras. 177-178; *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59 (S.C.C.), at para. 84.

1002 The plaintiff argues there are two reasons why British Columbia lacks the constitutional authority to manage forestry resources on Tsilhqot'in title lands. The first is that the provincial *Forest Act* singles out Aboriginal title holders and discriminates against them. The second is that the granting of timber licences or the approval of forest development activities on Aboriginal title lands strikes at the very core of both Aboriginal title and Parliament's jurisdiction under s. 91(24) of the *Constitution Act, 1867*. The plaintiff says the doctrine of interjurisdictional immunity is thus engaged. As a result, British Columbia does not have the constitutional authority to grant interests in the timber situated on Tsilhqot'in title lands to third parties. Nor does British Columbia have the authority to approve forest development activities on these lands.

1003 Further, the plaintiff says that British Columbia lacks the constitutional capacity to impair the exercise of Aboriginal rights to hunt and trap through the operation of its forestry legislation. Again, such impairment is an impermissible intrusion into the protected core of federal jurisdiction.

1004 In addition, the plaintiff pleads that the *Forest Practices Code of British Columbia Act, S.B.C. 1994, c. 41*, is constitutionally inapplicable. The *Forest Practices Code* has since been substantially repealed. For that reason, I have not expressly considered the constitutional implications of that statute with respect to Aboriginal title lands. I note, however, that in *Paul*, Bastarache J. for the Court said in para. 4:

The Code, a law of general application, is clearly legislation in relation to the development, conservation and management of forestry resources in the province under s. 92A(1)(b) of the *Constitution Act, 1867*.

1005 Both Canada and British Columbia say that the Province has the constitutional capacity to infringe upon Aboriginal rights, including title. They argue that the plaintiff's interjurisdictional immunity argument amounts to an "enclave" argument that has been consistently rejected by the courts.

1006 Canada further says that the argument advanced by the plaintiff is both disruptive and unnecessary. If the plaintiff were to succeed, all lands subject to Aboriginal title would cease to be "Public Lands belonging to the Province" within the meaning of s. 92(5) of the *Constitution Act, 1867*. The provincial government would then have no ability to manage timber on such lands. This would be a dramatic shift in the division of powers underlying British Columbia's entry into Confederation.

1007 The starting point for this discussion is the *Constitution Act, 1867*. Section 91 sets out the jurisdiction of the federal government. Section 92 sets out the jurisdiction of the various provincial governments. From the outset of Confederation, the Parliament of Canada has held the responsibility over matters relating to "Indians and Lands reserved for the Indians" pursuant to s. 91(24).

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1008 In *Constitutional Law of Canada*, 4th ed. looseleaf, (Scarborough: Thompson Carswell, 1997) Professor Hogg explains the rationale for s. 91(24) as follows at p. 27-2:

The main reason for s. 91(24) seems to have been a concern for the protection of the Indians against local settlers, whose interests lay in an absence of restrictions on the expansion of European settlement. The idea was that the more distant level of government — the federal government — would be more likely to respect the Indian reserves that existed in 1867, to respect the treaties with the Indians that had been entered into by 1867, and generally to protect the Indians against the interests of local majorities.

1009 Provincial jurisdiction under s. 92 of the *Constitution Act, 1867* includes:

s. 92(5) - The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon

...

s. 92(13) - Property and Civil Rights in the Province

...

s. 92A (1) In each province, the legislature may exclusively make laws in relation to

...

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province ...

1010 The plaintiff asserts that, insofar as the *Forest Act* purports to apply to Aboriginal title lands, it is *ultra vires* the Province because it singles out Indians for special and discriminatory treatment. The plaintiff argues that under the *Forest Act*, Aboriginal title holders' rights in the land are comprehensively managed and are vulnerable to wide-scale appropriation and transfer to third parties. This is a markedly different forestry regime than the one affecting British Columbians who possess land in *fee simple*.

1011 Provincial legislation that singles out Aboriginal people for special treatment or that discriminates against them is invalid and of no force and effect: see *R. v. Tenale*, [1985] 2 S.C.R. 309 (S.C.C.), at para. 35; *Kitkatla Band*, at para. 67; *Morris* at para. 41.

1012 The *Forest Act* is a law of general application designed for the management and control of British Columbia's forest resources. It clearly falls within the Province's jurisdiction under s. 92(5) and s. 92A(1)(b) of the *Constitution Act, 1867*. I have already concluded that where Aboriginal title lands have been clearly defined, those lands are not "Crown lands" as defined by the *Forest Act*. The definition of "Crown timber" does not capture the forest resources located on Aboriginal title lands. In my view, Aboriginal title lands must be treated in the same manner as "private lands" under that Act.

1013 A different situation arises where there is merely an assertion or claim of Aboriginal title to a particular geographic area. Because of the overlapping nature of Aboriginal territories, the sum total of Aboriginal title claims has been said to exceed 100% of the provincial land mass. An Aboriginal title claim cannot place that land in the same category as private lands. When particular lands are the subject of a declaration or a clear find-

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ing of Aboriginal rights or title, the situation has crystallized, and the definition of "Crown lands" and "Crown timber" no longer applies. In my view, at all material times, the *Forest Act* was and remains valid legislation; it simply does not apply to the forest resources located on Aboriginal title lands.

1014 If this conclusion is incorrect and if the definition of "Crown timber" includes the timber situated on Tsilhqot'in title lands, it is necessary that I also consider the plaintiff's second argument. The plaintiff submits that the doctrine of interjurisdictional immunity deprives British Columbia of the constitutional authority to grant interests in timber on Tsilhqot'in title lands to third parties, or to approve forest development activities on these lands, even under a law of general application.

1015 The doctrine of interjurisdictional immunity provides that otherwise valid provincial legislation is not allowed to operate in a way that would fundamentally affect a matter within exclusive federal jurisdiction. The doctrine was raised in *Paul*. In that case, Paul argued that the Province could not grant the Forest Appeals Commission the authority to consider and determine questions about his Aboriginal rights.

1016 On the subject of interjurisdictional immunity, the Court said at para. 15:

The doctrine of interjurisdictional immunity is engaged when a provincial statute trenches, either in its entirety or in its application to specific factual contexts, upon a head of exclusive federal power. The doctrine provides that, where the general language of a provincial statute can be read to trench upon exclusive federal power in its application to specific factual contexts, the statute must be read down so as not to apply to those situations: *Grail, supra*, at para. 81. The doctrine has limited the application of a provincial statute to a matter of exclusive federal power in numerous contexts. For example, in *Grail*, a provincial statute of general application was found to have the effect of regulating indirectly an issue of maritime negligence law. The provincial statute had the effect of supplementing existing rules of federal maritime negligence law in such a manner that the provincial law effectively altered rules within the exclusive competence of Parliament. Accordingly, the provincial statute of general application was read down so as not to apply to a maritime negligence action. In *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 S.C.R. 749, this Court held that a provincial occupational health and safety statute was inapplicable to a federal undertaking. More relevant, for present purposes, in *Delgamuukw, supra*, at para. 181, Lamer C.J. held that s. 91(24) protects a "core" of Indianness from provincial laws of general application, through operation of the doctrine of interjurisdictional immunity. See also *Kitkatla Band, supra*, at para. 75: in that case it was not established that the impugned provisions affected "the essential and distinctive core values of Indianness", and thus they did not "engage the federal power over native affairs and First Nations in Canada".

1017 The Court found that "British Columbia has the constitutional power to enable the Commission to determine questions relative to Aboriginal rights as they arise in the execution of its valid provincial mandate respecting forestry": *Paul*, at para. 34.

1018 *Paul* did not raise the question posed by the plaintiff in this case. Here the plaintiff says that those provisions of the forestry legislation that touch on the management, acquisition and sale of timber on Aboriginal title land would constitute a direct (in the case of title) and indirect (in the case of hunting and trapping rights) intrusion on the defining elements of "Indianness".

1019 As I understand the arguments of the defendants, the doctrine of interjurisdictional immunity protects Aboriginal rights and title from extinguishment but not from infringement. They say the Supreme Court of

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Canada has formulated a distinct set of rules with respect to infringement of s. 35 rights. In *Delgamuukw* (S.C.C.) at para. 160, the Court stated:

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.

1020 A provincial law of general application that does not touch upon core Indianness applies to the exercise of Aboriginal rights, including Aboriginal title. In my view, the Chief Justice referred to these laws in the foregoing passage from *Delgamuukw*. When the Chief Justice stated that provincial laws that infringe Aboriginal rights must pass the test of justification, he was not signalling that the doctrine of interjurisdictional immunity would never apply to a consideration of s. 35 rights.

1021 It is clear from the decision in *Morris* that provincial laws found to infringe upon Aboriginal treaty rights are constitutionally inapplicable due to the operation of the doctrine of interjurisdictional immunity. In *Morris*, two members of the Tsartlip Indian Band of the Saanich Nation were hunting at night. They shot at a deer decoy set up by provincial conservation officers to trap illegal hunters. They were charged with several offences under the *Wildlife Act*, S.B.C. 1982, c.57, including hunting wildlife with a firearm during prohibited hours and hunting by the use or with the aid of a light or illuminating device. The accused claimed a treaty right to hunt over unoccupied lands. The majority held that the provincial *Wildlife Act* did not apply because treaty rights go to the core of Indianness under s. 91(24).

1022 I do not believe there can there be any principled reason for treating Aboriginal rights, including title, protected by s. 35, any differently than Aboriginal treaty rights. In *Vanderpeet*, Lamer C.J.C. said at paras. 19-20:

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.

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.

1023 I have found the judgments of both the majority and minority in *Morris* to be most helpful with respect to the approach to be taken here. Both the majority and dissent in *Morris* approached the question of whether provincial legislation is valid or applicable under the constitutional division of powers (ss. 91 and 92) as

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a separate and distinct inquiry from the question of whether such legislation can be justified under the s. 35 framework. It appears there is no disagreement between the majority and the minority judges as to the analytical approach to be followed.

1024 The first step is to determine whether the impugned provincial law falls within a provincial head of power. The *Forest Act* is directed at the management of the provincial timber resource. It specifically manages the forest resources vested in the provincial Crown. In other words, the purpose of the Act is to manage and allocate the forest resources located on Crown land. Its pith and substance relates to a provincial head of power, specifically s. 92(5) and s. 92A(1)(b). It is not directed at any federal head of power.

1025 Step two is a consideration of the paramouncy doctrine. Pursuant to that doctrine, "valid provincial legislation will be rendered inoperative if it enters into an operational conflict with valid federal legislation": *Morris*, para. 89. As there is no conflicting federal legislation, the paramouncy doctrine does not apply in this case.

1026 The next step requires a consideration of whether the validly enacted legislation affects the core of a federal head of power. As stated in *Morris*, para. 90:

Under the doctrine of interjurisdictional immunity, valid provincial legislation is constitutionally inapplicable to the extent that it intrudes or touches upon core federal legislative competence over a particular matter. Thus, exclusive federal jurisdiction under s. 91(24) protects "core Indianness" from provincial intrusion: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 177. Valid provincial legislation which does not touch on "core Indianness" applies *ex proprio vigore*. If a law does go to "core Indianness" the impugned provincial legislation will not apply unless it is incorporated into federal law by s. 88 of the *Indian Act*.

1027 There can be no doubt that s. 35 Aboriginal rights are part of the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*, such that provincial legislation cannot extinguish Aboriginal rights. In *Delgamuukw*, Lamer C.J.C. described the extent of federal jurisdiction, as follows at paras. 177-178:

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.

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".

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1028 However, as noted in para. 84 of *Morris*:

Although s. 91(24) attributes exclusive jurisdiction over "Indians" and "Lands reserved for the Indians" to Parliament, valid provincial legislation normally applies to aboriginal persons. It is well established that "First Nations are not enclaves of federal power in a sea of provincial jurisdiction" (, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 66)

1029 In *Kiitkatla Band* the Supreme Court of Canada considered the applicability of the provincial *Heritage Conservation Act*, R.S.B.C. 1996, c.187. That Act regulates the protection of heritage sites and objects within the Province, including heritage sites and objects of Aboriginal origin. The Court held that not all objects altered by Aboriginal people as part of traditional use, or that had cultural, historical and scientific importance for First Nations in British Columbia were at the "core of Indianness". The Court emphasized that evidence has to be adduced with respect to the relationship between the objects and the Indian culture before the proposition could be accepted that the destruction of the objects impaired the status or capacity of Indians.

1030 The removal of timber from Aboriginal title land does not extinguish the Aboriginal title. The title to the land would remain even if the land was impoverished by the removal of such a vital asset. I conclude that the provisions of the *Forest Act* authorizing the management, acquisition, removal and sale of timber on Aboriginal title lands do affect the very core of Aboriginal title. These provisions of the *Forest Act* purport to affect a primary asset on that land. Such forests are no longer a public asset, but an asset in the collective hands of the Aboriginal title holders. The Act purports to manage the asset in such a way as to render meaningless the Aboriginal right to manage the very land over which Aboriginal title is held.

1031 The *Forest Act*, an Act of general application, cannot apply to Aboriginal title land because the impact of its provisions all go to the core of Aboriginal title. The management, acquisition, removal and sale of this Aboriginal asset falls within the protected core of federal jurisdiction: *R. v. Simon*, [1985] 2 S.C.R. 387 (S.C.C.), at p. 411; *Delgamuukw*, at para. 178; *Morris*, at para. 91.

1032 Section 35 Aboriginal rights, including title, go to the core of Indianness and are protected under s. 91(24). On principle, they cannot be viewed any differently than Aboriginal treaty rights in that respect. While the exercise of the provisions of the *Forest Act* to which I have just referred do not extinguish Aboriginal title, their exercise goes to the core of Aboriginal title. Accordingly, the doctrine of interjurisdictional immunity is engaged and the *Forest Act* is inapplicable where it intrudes or touches upon forest resources located on Aboriginal title lands.

1033 The fourth and final step in this analysis requires a consideration of s. 88 of the *Indian Act*:

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 the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

1034 The defendants did not place any reliance on s. 88. Instead, they rested on their position that the doctrine of interjurisdictional immunity does not apply because a provincial law can infringe Aboriginal rights and title, subject to the test of justification.

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1035 Section 88 of the *Indian Act* makes some provincial laws applicable to Indians by referential incorporation in the *Indian Act*. That section provides that the provincial laws of general application "are applicable to and in respect of Indians..." There is no reference to the second element of s. 91(24), "Lands reserved for the Indians".

1036 This question was raised and discussed in *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 (S.C.C.), at pp. 297-299. Chouinard J. concluded it was unnecessary to decide the question as the case turned on the application of the federal paramountcy doctrine. In *Cardinal v. Alberta (Attorney General)* (1973), [1974] S.C.R. 695 (S.C.C.), Laskin J. (as he then was) noted at p. 727 that s. 88 "deals only with Indians, not with Reserves ..." Laskin J. was writing for the minority in that decision; the majority did not address the question of the meaning and effect of s. 88. In *Paul*, at para. 12, the Court concluded there was no need to consider s. 88.

1037 In *Derrickson v. Derrickson* (1984), 51 B.C.L.R. 42 (B.C. C.A.), at p. 46, the B.C. Court of Appeal unanimously concluded that s. 88 does not apply to Indian reserve lands which, like Aboriginal title lands, are "Lands reserved for the Indians". (The Court of Appeal decision was affirmed by the Supreme Court of Canada, but this point was not addressed as noted in the foregoing paragraph.) In *Paul v. British Columbia (Forest Appeals Commission)* (2001), 89 B.C.L.R. (3d) 210, 2001 BCCA 411 (B.C. C.A.), the majority of the Court of Appeal decided that s. 88 could not constitutionally invigorate provincial legislation in relation to its application to "aboriginal title and the main body of aboriginal rights which are intimately related to the use of land": para. 76. The Court of Appeal's decision was reversed, but not on this point.

1038 Lysyk J. undertook an extensive analysis of this question in *Stoney Creek Indian Band v. British Columbia* (1998), [1999] 1 C.N.L.R. 192 (B.C. S.C.), reversed on other grounds, 1999 BCCA 527 (B.C. C.A.). He concluded that s. 88 did not constitutionally invigorate provincial laws in their application to Indian lands.

1039 The application of s. 88 to "Lands reserved for the Indians" has not been conclusively resolved by the Supreme Court of Canada. On a consideration of the case law outlined above, I conclude that provision is directed only to "Indians" and cannot be used to invigorate provincial legislation in its application to Aboriginal title lands. This view accords with the opinions expressed by Kent McNeil in "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34 U.B.C.L. Rev. 159, and Brian Slattery in "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at pp. 779-81.

1040 I am supported in this conclusion by the dicta of Lambert J.A. in *Haida Nation* (B.C.C.A.) where he said at paras. 78-79:

...as a matter of constitutional analysis, aboriginal title must lie at the core of Indianness, so provincial laws of general application do not apply to aboriginal title of their own force and, arguably, can not be constitutionally invigorated by s.88 of the *Indian Act* because s.88 applies to Indians but not to Indian lands, a distinction drawn from the wording of s.91(24) of the *Constitution Act, 1867*.

This seeming inconsistency will be resolved in due course ...

1041 I turn now to the question of whether provisions of the *Forest Act* which allow for the management, acquisition, removal and sale of timber applies to Tsilhqot'in Aboriginal rights. These rights include:

- a) a Tsilhqot'in Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and

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crafts, as well as for spiritual, ceremonial, and cultural uses; and

b) a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.

1042 In both situations, I conclude that the provisions of the *Forest Act* do not go to the core of "Indian-ness" or to the core of these two Tsilhqot'in Aboriginal rights.

1043 It bears repeating that this is the type of situation to which Lamer C.J.C. referred in *Delgamuukw*, when he said, at para. 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.

1044 The application of the *Forest Act* providing for the management, acquisition and removal of timber cannot be applied to a forest asset owned by an Aboriginal collective. Forestry activities might well infringe and, to some degree, impact upon an Aboriginal right other than title. In such circumstances, the Province would bear the burden of justification for the acts of infringement.

1045 I summarize my conclusions as follows:

a) Section 35 Aboriginal rights are part of the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*, such that provincial legislation cannot extinguish Aboriginal rights: *Delgamuukw* (S.C.C.); *Morris* (S.C.C.).

b) Provincial management of timber and the acquisition, removal and sale of timber by third parties under the provisions of the *Forest Act* does not extinguish Aboriginal title.

c) The provisions of the *Forest Act* that provide for the acquisition, removal and sale of timber by third parties go to the core of "Indianness", or put in contemporary language, go to the core of Aboriginal title.

d) The provisions of the *Forest Act* do not apply to Aboriginal title land under the doctrine of interjurisdictional immunity.

e) The same provisions do not go to the core of Tsilhqot'in Aboriginal rights. Any infringement of these rights by such activities must be justified by the Province.

1046 The conclusions I have reached reaffirm the central role of Parliament in matters relating to Aboriginal Canadians. The denial or avoidance of this constitutional responsibility is unacceptable if there is to be a just reconciliation in this era of decolonization.

1047 I am aware of the serious implications this conclusion will have on British Columbia. However, I agree with Professor Kent McNeil when he explains that long established principles have been conveniently ignored. At p. 194 of "Aboriginal Title and Section 88 of the *Indian Act*", he states:

Ever since the *St. Catherine's Milling* decision in 1888, it has been apparent that exclusive federal jurisdic-

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tion over "[l]ands reserved for the Indians" might well include jurisdiction over Aboriginal title lands. So in acting as though it had constitutional authority over Aboriginal title lands in British Columbia, the province has skated on thin constitutional ice for over a century. In reality, it appears that the province has been violating Aboriginal title in an unconstitutional and therefore illegal fashion ever since it joined Canada in 1871. What is truly disturbing is not that the province can no longer do so, but that it has been able to get away with it for so many years.

1048 The right of exclusive use and possession is fundamental to Aboriginal title. Aboriginal title confers a right to the land itself, and the right to determine how it will be used. Legislation that authorizes the granting of rights to harvest timber from these lands to third parties strikes at the very core of Aboriginal title. These legislative enactments are beyond the constitutional reach of the Province. They fall within the exclusive domain of Parliament under s. 91(24).

1049 At all material times, the *Forest Act* was and remains constitutionally inapplicable to the extent that it purports to authorize:

- a) the inclusion of Tsilhqot'in Aboriginal title lands in the applicable Public Sustained Yield Units or in the Williams Lake Timber Supply Area;
- b) the issuance of Forestry Tenures and Authorizations that affect Tsilhqot'in Aboriginal title; or
- c) strategic planning decisions with respect to the use, management and control of forest resources on Tsilhqot'in Aboriginal title lands.

b. Submerged Lands

1050 In *Xeni Gwet'in First Nations v. British Columbia*, 2006 BCSC 399 (B.C. S.C.), I concluded that the pleadings were inclusive of some rivers, lakes and streams. At para. 21 I found there is no plea of "any infringement of rights and title by Canada. Specifically, there is no plea that the exercise of federal jurisdiction under the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, or any other federal legislative or administrative enactment, constitutes an infringement on the plaintiff's alleged rights and title".

1051 As there was no claim of infringement of Aboriginal title over submerged lands, it is not necessary for me to consider this issue. There was evidence that Tsilhqot'in people used the lakes, rivers and streams to move about in bark canoes from time to time and for the purpose of resource gathering. While fishing was a large part of the seasonal rounds, the plaintiff does not allege an Aboriginal right to fish. The only evidence concerning the use of submerged lands related to the setting of weirs, traps or devices to assist in the sighting of fish that might, in some situations, lay on submerged land.

1052 In the circumstances, it is unnecessary to decide the effect, if any, of a declaration of Aboriginal title over submerged lands.

20. Infringement of Aboriginal Title

1053 I have concluded that the provisions of the *Forest Act* do not apply to Aboriginal title land. If I am wrong, it becomes necessary for me to consider whether such legislation or the application of the legislative scheme established by the *Forest Act* infringes Tsilhqot'in Aboriginal title. I conclude that the passing of the

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Forest Act does not infringe Aboriginal title but I have no difficulty in finding that the application of the legislative scheme established by the provisions of the *Forest Act* does infringe that title for the following reasons.

a. General Principles

1054 Today we understand that Aboriginal title confers "the right to the land itself": *Delgamuukw* (S.C.C.) at para. 138. 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": *Delgamuukw* (S.C.C.) at para. 117. The Crown does not have a present proprietary interest in such lands. The Crown's interest is residual and is only perfected on surrender of the land by the Aboriginal title holders.

1055 Aboriginal rights are not absolute. Infringement by the Crown "is justified in pursuance of a compelling and substantial legislative objective for the good of larger society": *Bernard* at para. 39, citing *Sparrow* at p. 1113. This holds true for all Aboriginal rights.

1056 The Supreme Court of Canada first established the infringement and justification framework in *Sparrow*. Dickson C.J.C. and La Forest J., writing jointly for the Court, described this framework as a vehicle for reconciling Aboriginal rights with the interests of the greater public. Starting from the premise that the Crown's powers must be reconciled with its duties to Aboriginal peoples, Dickson C.J.C. and La Forest J. at pp. 1109-1110 said:

... the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick, supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada ...

...

The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

1057 The choice of language in *Sparrow* is informative. Justification is demanded of government regulation "that infringes upon or denies aboriginal rights". The denial of Aboriginal rights, as well as infringement, demands justification.

1058 A person claiming an Aboriginal right bears the onus of establishing that the government's conduct amounts to a *prima facie* infringement or denial of that right. Once this onus is discharged, the burden then shifts to the Crown to demonstrate that its conduct was justified. Proof of infringement of an Aboriginal right protected by s. 35(1) triggers the Crown's burden to justify its conduct.

1059 The test for infringement was set out in *Sparrow* at pp. 1111-1112, as follows:

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake.

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...

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.

1060 The *Sparrow* test also requires the Court to consider the factual context in which the issue arises. This involves asking whether the purpose or effect of the legislation or regulation infringes the interests protected by the right.

1061 In *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), the Supreme Court revisited the criteria for infringement of an Aboriginal right and further clarified the concepts raised in the *Sparrow* case. In *Gladstone*, Lamer C.J.C., for the majority, stated, at para. 43:

The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

1062 The onus of establishing a *prima facie* infringement is not high. While the interference must be shown to have more than a *de minimis* effect on Aboriginal rights, the claimant is only required to demonstrate that the claim of infringement is, on its face, meritorious. In *R. v. Sampson* (1995), [1996] 2 C.N.L.R. 184, 131 D.L.R. (4th) 192 (B.C. C.A.), at paras. 42-43, the B.C. Court of Appeal said:

The fact that s. 35(1) of the Act does not fall within the ambit of s. 1 of the *Canadian Charter of Rights and Freedoms* - as acknowledged in *Sparrow* at p. 287 C.C.C., p. 408 D.L.R. — suggests that caution should be exercised in determining what factors are relevant to the issues involved in the first stage of the test — infringement. Consideration of factors which go to the issue of justification would minimize the importance of aboriginal rights established by s. 35(1).

The purpose of the three questions posed in the first stage of the test (is the limitation unreasonable; does the regulation impose undue hardship; and does the regulation deny to the holders of the right their preferred means of exercising that right) is, in our view, to ensure that only meritorious claims are considered. The onus on the applicant is not heavy. The establishment of an infringement on a *prima facie* basis is sufficient. To include consideration of such factors as priority and consultation — factors which are relevant to the second stage of the test — would adversely affect the onus of proof resting upon the applicant. It would diminish the safeguard for aboriginal rights established by s. 35(1) as interpreted by the Supreme Court in

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Sparrow.

1063 The foregoing cases all dealt with an Aboriginal right, not Aboriginal title. A decision relating to infringement of Aboriginal title by government legislation or regulation has yet to be decided.

1064 In *Delgamuukw* at para. 166, Lamer C.J. C. explained that Aboriginal title encompasses three features: the right to exclusive use and occupation of land; the right to choose to what uses land can be put; and that lands held pursuant to Aboriginal title have an inescapable economic component.

1065 There is potential for substantial interference with Aboriginal title at every stage of government land-use planning with respect to Aboriginal title lands. For example, the granting of conditional harvesting rights to third parties in an area encompassing land held subject to Aboriginal title stands in conflict with the right to exclusive use and occupation of the land, and the right to choose to what uses land can be put. Similarly, the economic impact of such grants may arise long before cutting occurs on the ground. Once it is known that the timber on Aboriginal title land is subject to conditional harvesting rights granted by the Crown, the economic value of that timber to the title holder is undermined.

1066 To have any significance for Aboriginal people, Aboriginal title must bring with it the collective right to plan for the use and enjoyment of that land for generations to come. Prior to European colonization, the lands and forests of Tsilhqot'in traditional territory supplied Tsilhqot'in people with sustenance and protection from the elements, as well as a moderate livelihood. Tsilhqot'in people were able to make all land use decisions with respect to that territory. The imposition of the provincial forestry management scheme removes the ability of Tsilhqot'in people to control the uses to which the land is put. Such a scheme also creates uncertainty concerning the protection of the land and forests for future generations of Aboriginal rights holders. In addition, it deprives Tsilhqot'in people of the ability to realize certain economic gains associated with harvesting rights. In my view, this constitutes an unreasonable limitation on Aboriginal title, denying Tsilhqot'in people their preferred means of enjoying the benefits of such title. The cumulative effects of these government decisions with respect to timber harvesting on Aboriginal title lands constitute a *prima facie* infringement and requires justification.

1067 The application of the provincial forestry scheme to Aboriginal title lands amounts to a clear denial of Aboriginal title. Planning to use the land and resources of an Aboriginal group without acknowledging the constitutionally entrenched interests of the Aboriginal group requires justification. Infringement or denial of title can occur at each stage of any land use process and so, at each stage, the Crown must justify its proposed actions with respect to Aboriginal title land.

1068 In the context of an Aboriginal right to fish, the directions in *Sparrow* are clear. The court must determine the following: is the limitation unreasonable; does the regulation impose undue hardship; and does the regulation deny to the holders of the right their preferred means of exercising that right? An application of this test to Aboriginal title land is possible. By failing to acknowledge Aboriginal title, the Crown's plans for Aboriginal title land are unreasonable and impose undue hardship on the title holders. Land use planning that contemplates the removal of an asset attached to the land, without recognition of the true owner of that asset, denies to the holders of Aboriginal title the means of exercising and enjoying the benefits of such title.

1069 In *Haida Nation* (B.C.C.A.), at para. 81, Lambert J.A. stated:

I consider that the only real question at this stage is whether the aboriginal people have been constrained in the use of the land subject to the aboriginal title, or, in the case of an aboriginal right, whether the holders of

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the right have been prevented from exercising it by their preferred means.

1070 British Columbia argues there is no evidence to suggest that Tsilhqot'in use of the land has been affected by provincial land use planning, by the inclusion of the land in the Williams Lake Timber Supply Area (TSA), or by the granting of timber licences. It seems to me that this argument misses an important point: Aboriginal title land does not vest in the Province such that they have the authority to engage in such activities. By so doing, the Province constrains the Aboriginal title holder's use of the land and deprives the Aboriginal group of the right to make decisions with regard to land use and resource extraction.

1071 In addition, the argument advanced by British Columbia fails to acknowledge the denial of Aboriginal title implicit at every stage of the planning process. That denial also constitutes an infringement.

1072 In *Haida Nation*, at para. 84, Lambert J.A. stated:

In the case of the provincial Crown, the infringing actions may be expected to lie in passing the *Forest Act*, issuing the Tree Farm Licence, approving the Management Plans, granting the Cutting Permits, and overseeing Weyerhaeuser's compliance with the scheme embodied in those legislative and exclusive licence provisions. I am only giving an outline of potential infringements.

1073 The foregoing comments were *obiter dicta*. Although Finch C.J.B.C. agreed with Lambert J.A., in the result, he did not endorse his reasons for judgment. Thus, the comments of Lambert J.A. stand alone. His remarks did not attract comment in the Supreme Court of Canada on appeal. As the Supreme Court of Canada did not look at the issue of infringement, their silence on the foregoing passage cannot be viewed as an endorsement of those comments.

b. Application

1074 I am not prepared to say that the mere passing of legislation by a provincial Legislative Assembly, even if it has the potential to infringe Aboriginal title land, is a *prima facie* infringement. For that reason, I do not consider the passing of any forestry legislation to be a *prima facie* infringement on Tsilhqot'in Aboriginal title land. It is not legislation directed at Aboriginal title land but general legislation concerning a Crown asset. It is only when public officials seek to engage the provisions of such legislation in relation to Aboriginal title land that a *prima facie* infringement occurs.

1075 For example, when timber on Aboriginal title land is included in a TSA pursuant to the relevant legislation, there is a *prima facie* infringement of Aboriginal title. Thus, the inclusion of timber on Tsilhqot'in Aboriginal title land in the Williams Lake TSA is an infringement on Tsilhqot'in Aboriginal title. Each administrative step taken thereafter that might ultimately result in timber removal and sale by third parties is also an infringement of Tsilhqot'in Aboriginal title.

1076 It follows that the approval of cut blocks in forest development plans and the allocation of cutting permits are equally an infringement on Tsilhqot'in Aboriginal title.

1077 It bears repeating that the right to use resources, the right to choose land use, and the right to direct and benefit from the economic potential of the land are all aspects of Aboriginal title. If the Crown is engaged in land use planning for its own economic benefit and the economic benefit of third parties, then such activities are a direct infringement on any Aboriginal title. The rights holders do not have to wait for a decision to harvest

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timber before there has been an infringement. The infringement takes place the moment Crown officials engage in the planning process for the removal of timber from land over which the Crown does not have a present proprietary interest.

1078 As the Supreme Court observed at p. 1110 of *Sparrow*:

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

1079 I conclude that if the Province has legislative authority and if there is to be provincial legislation that regulates land use planning and the sale and removal of timber from Aboriginal title lands, then the clear directions set out in *Adams* must be adhered to. While these passages refer to Parliament, they apply with equal force to the enactments of the Provincial Legislative Assembly. The Court in *Adams* stated at paras. 53-54:

In a normal setting under the *Canadian Charter of Rights and Freedoms*, where a statute confers a broad, unstructured administrative discretion which may be exercised in a manner which encroaches upon a constitutional right, the court should not find that the delegated discretion infringes the *Charter* and then proceed to a consideration of the potential justifications of the infringement under s. 1. Rather, the proper judicial course is to find that the discretion must subsequently be exercised in a manner which accommodates the guarantees of the *Charter*. See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1078-79; *R. v. Swain*, [1991] 1 S.C.R. 933, at pp. 1010-11; and *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720.

I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act, 1982*. In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament 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. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

1080 In its final submission, British Columbia argued that the Supreme Court of Canada in *Haida Nation* did not suggest that the *Forest Act* was invalid for failure to satisfy the *Adams* requirements. That is correct. The Court in *Haida Nation* found, at para. 51:

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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.

1081 In this case the provincial forestry guidelines failed to prevent an infringement. I conclude that if the current provincial forestry scheme applies to Aboriginal title land, then its application to Tsilhqot'in Aboriginal title land constitutes a *prima facie* infringement or denial of Tsilhqot'in Aboriginal title triggering the need for justification.

21. Justification of Infringement of Aboriginal Title

a. General Principles

1082 Government power must be reconciled with government duty, "and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights": *Sparrow* at p. 1109.

1083 The test for the justification of infringement of Aboriginal title has two parts. The infringement must be in furtherance of a compelling and substantial legislative objective: *Delgamuukw* (S.C.C.), at para. 161. The infringement must also be consistent with the fiduciary relationship that exists between the Crown and Aboriginal peoples: *Delgamuukw* (S.C.C.), at para. 162.

1084 In this case, British Columbia bears the burden of justifying infringements caused by provincially authorized forestry activities.

b. Compelling and Substantial Legislative Objective

1085 There is a range of legislative objectives that may justify infringement of Aboriginal title. These objectives arise from the need to reconcile the fact that Aboriginal societies exist within and are part of a broader social, political and economic community: *Delgamuukw* (S.C.C.), at para. 161; *Gladstone*, at para. 73. The development of agriculture, forestry, mining and hydro-electric 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 these aims, are the kinds of objectives that may justify the infringement of Aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives is ultimately a question of fact that must be examined on a case-by-case basis: *Delgamuukw* (S.C.C.), at para. 165.

1086 The foregoing view was initially developed by Lamer C.J.C. in the *Vanderpeet* trilogy (*Vanderpeet*, *Gladstone*, and *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672 (S.C.C.)). In these cases, Lamer C.J.C. expressed the opinion that government limits on the exercise of Aboriginal rights are a necessary part of that reconciliation, provided such "limits are of sufficient importance to the broader community as a whole": *Gladstone*, at para. 73. A discussion of the minority opinions of McLachlin J. (as she then was) in *Vanderpeet* and

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Gladstone are set out later in this judgment under the heading "Reconciliation".

1087 In the context of the disposition of Crown resources, the focus is on the particular measure or government activity and not on the overall legislative regime. Normally, such cases proceed on the premise that the Crown's infringing activity is constitutionally valid. It is this validity that raises potential for it to be an infringement. If the activity was unconstitutional the act itself is invalid and there is no need to consider infringement.

1088 I have already decided that provincial forestry legislation is inapplicable to Aboriginal title land. The discussion that follows is upon the basis that this conclusion is incorrect and that British Columbia's forestry legislation does apply to Aboriginal title land. What follows also takes into account the fact that there has been a finding of an infringement of title such as I have made in the preceding section.

1089 There can be no doubt that forestry falls within the range of government activities that might justify infringement of Aboriginal title. Generally speaking, the development of forest resources, and the protection of the environment and wildlife are all valid government objectives that may justify infringement of Aboriginal title and other Aboriginal rights.

1090 However, the analysis cannot end there. In this case I am concerned not with the general, but the specific. Can the Province justify its forestry activities in the Claim Area where such activities infringe Tsilhqot'in Aboriginal title? British Columbia must prove that it has a compelling and substantial legislative objective for the forestry practices, not just generally in British Columbia, but in the Claim Area in particular.

1091 In *Delgamuukw*, Lamer C.J.C. reiterated at para. 161 that legitimate government objectives include "the pursuit of economic and regional fairness". Lamer C.J.C. went on to state that: "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."

1092 This conclusion flows from *Adams* where the Court said at para. 58:

I have some difficulty in accepting, in the circumstances of this case, that the enhancement of sports fishing *per se* is a compelling and substantial objective for the purposes of s. 35(1). While sports fishing is an important economic activity in some parts of the country, in this instance, there is no evidence that the sports fishing that this scheme sought to promote had a meaningful economic dimension to it. On its own, without this sort of evidence, the enhancement of sports fishing accords with neither of the purposes underlying the protection of aboriginal rights, and cannot justify the infringement of those rights. It is not aimed at the recognition of distinct aboriginal cultures. Nor is it aimed at the reconciliation of aboriginal societies with the rest of Canadian society, since sports fishing, without evidence of a meaningful economic dimension, is not "of such overwhelming importance to Canadian society as a whole" (*Gladstone*, at para. 74) to warrant the limitation of aboriginal rights.

1093 There is no doubt that the compelling and substantial nature of the legislative objective will vary from one region to the next. Given the economic importance of forestry activities in British Columbia and in Tsilhqot'in territory, the focus must be on the rationale behind these activities in the Claim Area.

1094 Because Aboriginal title confers the right to the land itself: *Delgamuukw* (S.C.C.), at para. 138, British Columbia's forestry activities infringe Tsilhqot'in Aboriginal title as I have described in the preceding section.

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1095 British Columbia argues, largely from a policy perspective, that there are good reasons for land use and forestry rules in the Claim Area. I believe this oversimplifies the test I must consider and apply.

1096 The question is not whether there is any merit in a provincial regulatory and administrative regime relating to forestry activities on Aboriginal title lands. There may well be merit in the existence of such a scheme. The inquiry here must focus on the application of that scheme to the circumstances of this case. Is there a compelling and substantial objective that justifies the infringements caused by British Columbia's land use planning and forestry activities on Tsilhqot'in title lands?

1097 Dr. Hamish Kimmins, a professional forester and expert in forest ecology, was called as a witness for British Columbia. The opinions he expressed were candid and of considerable assistance to the court. Dr. Kimmins testified that forests can be managed to address a wide range of options. They can be managed to protect a particular species of wildlife or to maximize the production of wood fibre. He confirmed that if one was aware of the cultural and economic objectives of a particular First Nation, a forest could be managed so as to afford that First Nation the opportunity to carry on trapping in a culturally and economically sustainable manner.

1098 As Dr. Kimmins explained, taken individually, each approach to forestry management constitutes single value management. He expressed the following opinions.

a) The current legislative system in British Columbia does not allow for ecosystem management. This is because under the tenure system forest companies and professional foresters are licenced only to manage for timber, with all other values as a constraint on that objective.

b) A major shortcoming in forestry in the past, and sometimes today, is that allowable annual timber harvests (AAC) have been based on timber supply models that are spatial and are driven by stand level growth and yield models that are insensitive to changes in key ecosystem processes that result from human and natural disturbance.

c) The current time and timber supply models used by the Ministry of Forests do not adequately account for climate, ecosystem and management change, although the recalculation of the AAC every 5 years is a way of addressing the shortcoming of the process.

1099 A legislative scheme that manages solely for timber, with all other values as a constraint on that objective, faces a formidable challenge when called upon to balance Aboriginal rights with the economic interests of the larger society.

1100 For many years now, Tsilhqot'in people have opposed clear cutting in the Claim Area. They have argued for a form of ecosystem management that can sustain the region for generations to come. Their proposals have not been accepted because, as Dr. Kimmins observed, the current legislative system in British Columbia does not allow for ecosystem management.

1101 British Columbia appears to argue that the compelling and substantial objectives behind the alleged infringements include the economic benefits that can be realized from logging in the Claim Area, and a need to salvage forests affected by mountain pine beetle for sound silviculture reasons.

1102 Mountain pine beetle is currently destroying the pine forests of British Columbia, including those pine forests located in the Claim Area. Fire suppression activities are one reason offered for the advance of this forest

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infestation. Another reason is climate change. The absence of a sustained cold period during the winter means the beetle is able to survive into another year. However, it must be acknowledged that trees affected by mountain pine beetle play an important ecosystem function, providing valuable wildlife habitat that is consistent with the plaintiff's interests.

1103 What is clear from the evidence of Dr. Kimmins is that "sustainability is multifaceted, involving a complex of physical, biological, social, economic, institutional and cultural dimensions: Kimmins report at p. 41. Given the findings of Tsilhqot'in Aboriginal rights resulting from these proceedings, there will be a need for British Columbia to develop a new model of sustainability in the Claim Area. The burden is on British Columbia to prove that any future harvesting of timber will not infringe Tsilhqot'in Aboriginal rights. That burden will require close consultation with Tsilhqot'in people, taking into account all of the factors that bear on their Aboriginal rights, as well as the interests of the broader British Columbia community.

1104 In an appendix to his report, Dr. Kimmins answered specific questions related to the mountain pine beetle infestation. He expressed the view that from the perspective of forest health, harvesting of lodgepole pine in the Claim Area was not necessary given the unprecedented nature of the mountain pine beetle epidemic and the climatic conditions of the past decade. If there was to be a harvesting of such timber, then, in the view of Dr. Kimmins, clear-cut harvesting would be appropriate so long as there were patches of dead trees of various sizes retained that would be consistent with the habitat need of the animal species of concern. I take it that in such an approach there would be specific consideration given to the well-being and continuity of the animals that are of particular concern to Tsilhqot'in people.

1105 Dr. Kimmins advised that conventional harvesting techniques could be carried out in a sustainable manner. However, this is dependant "on the values one is considering, and the time and spatial scale over which one is considering it": Kimmins report, p. 40.

1106 It is not possible to predict the future in this changing environment. The need to protect Tsilhqot'in Aboriginal rights throughout the Claim Area brings with it the need for a fresh approach to sustainability. This challenge can be met through the development of cooperative joint planning mechanisms taking into account the needs that must be addressed on behalf of the Tsilhqot'in community and the broader British Columbia and Canadian communities.

1107 I conclude that British Columbia has failed to establish that it has a compelling and substantial legislative objective for forestry activities in the Claim Area for two reasons. First, as was the case with sports fishing in *Adams*, there is no evidence that logging in the Claim Area is economically viable. The Claim Area has been excluded from the timber harvesting land base for an extended period of time. Even the Chief Forester acknowledged its more recent inclusion was questionable. The impact of forestry activities on the plaintiff's Aboriginal title is disproportionate to the economic benefits that would accrue to British Columbia or Canadian society generally.

1108 Second, I conclude there is no compelling evidence that it is or was necessary to log the Claim Area to deter the spread of the 1980's mountain pine beetle infestation. Rather, the evidence shows that none of the proposed harvesting is directed at stopping or limiting the mountain pine beetle outbreak.

c. Honour of the Crown

1109 Whether a particular infringement is consistent with the fiduciary relationship between the Tsilhqot'in

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people and the Crown will be a function of the "legal and factual context" of each case: *Gladstone*, at para. 56, cited in *Delgamuukw* (S.C.C.) at para. 162. Three aspects of Aboriginal title are relevant when assessing whether or not the Crown's duty has been discharged in any given instance: the right to exclusive use and occupation of land; the right to choose to what uses the land will be put; and, the inescapable economic component": *Delgamuukw* (S.C.C.), para. 166.

1110 Government is required to 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 the holders of aboriginal title in the land": *Delgamuukw* (S.C.C.) at para. 167, citing *Gladstone*, at para. 62. British Columbia must demonstrate that it gave adequate priority to Tsilhqot'in Aboriginal title and rights.

1111 In *Sparrow* and *Gladstone*, the application of this branch of the justification test meant that Aboriginal people received priority in the exploitation of the fishery resource. The Court indicated that the demands of the fiduciary relationship can manifest themselves in many other guises, including the duty of consultation, and ordinarily including a duty of fair compensation in all cases where title is being infringed.

1112 As suggested in *Delgamuukw*, (S.C.C.) at para. 167, the Crown has a duty to accommodate the participation of Tsilhqot'in people in developing the resources on their title lands. The conferral of fee simple lands for agriculture, and of leases and licences for forestry and mining must reflect the prior occupation of Aboriginal title lands. Economic barriers to Aboriginal uses of their lands, such as licensing fees, may be reduced. The Court explained that this is not an exhaustive list. There must also be an assessment of the various interests at stake in the resources in question.

1113 British Columbia must also demonstrate that "there has been as little infringement as possible in order to effect the desired result": *Sparrow*, p. 1119. Rather than observing this minimal requirement obligation, British Columbia does not appear to have considered in advance how its land use planning activities and proposed forestry activities might result in an infringement on Tsilhqot'in Aboriginal title and rights. Examples of these planning activities include:

- a) the process by which British Columbia developed timber targets and other resource targets and priorities for the Claim Area in the Cariboo Chilcotin Land Use Plan, (CCLUP) and the decision-making process followed by British Columbia to establish those targets as a legally binding higher level plan governing resource use including timber extraction for the Claim Area;
- b) the determination of the Annual Allowable Cuts for the Williams Lake Timber Supply Area, which affects the rate of logging in the TSA and hence the Claim Area;
- c) the process by which British Columbia awarded and subsequently replaced forest tenures relevant to the Claim Area; and
- d) the approval of forest development plans and cutting authorities under those licences relevant to the Claim Area.

d. Duty to Consult

1114 Where Aboriginal title exists or is alleged to exist, there is always a duty of consultation. As explained in *Delgamuukw*, (S.C.C.) at para. 168, the nature and scope of the duty of consultation will vary with the circum-

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stances:

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.

1115 In *Haida Nation* the Court established a framework for the duty to consult and accommodate. The government's duty to consult and accommodate is "grounded in the honour of the Crown" and this is a "core precept": *Haida Nation*, at para. 16. McLachlin C.J.C. went on to say at para. 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 preexistence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

1116 Canadians need to understand that it is not a distant monarch whose honour is at issue. "Honour of the Crown" in our country, in this age, translates to a matter of national honour, an obligation all Canadians are bound to uphold and respect. At para. 18, the Court in *Haida Nation* said:

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: , [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.

1117 After a review of earlier decisions of the Court on the subject of the duty to consult, McLachlin C.J.C. in *Haida Nation* said at para. 25:

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

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accommodate Aboriginal interests.

1118 Noting that the proof of an Aboriginal right may take considerable time (as this case and the current treaty process demonstrate), the Court points out the underlying "need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty" and continues at para. 26 to pose the central questions:

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?

1119 The answer to these questions is provided in para. 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.

1120 The Court in *Haida Nation* rejected the Province's argument that there is no duty to consult and accommodate prior to final determination of the scope and content of any right, saying at para. 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.

1121 At para. 35, the Court explains 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.*". At para. 37, the Court in *Haida Nation* explains that "[k]nowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate".

1122 The Court then considered the scope and content of the duty to consult, noting in para. 41 that "it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified." The Court presented "the concept of a spectrum", stating at paras. 43-45:

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[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.

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

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

e. Application

1123 To assist the Court in the consideration of the evidence, British Columbia summarized the evidence in a booklet entitled, "Chronologies, including consultation chronologies, dating from February 10, 1982 up to December 5, 2005". The consultation chronology consists of 193 pages. There is no doubt that considerable effort has been made to engage Tsilhqot'in people in the forestry proposals and the land use planning in the Claim Area. The central question is whether all of this effort amounts to genuine consultation.

1124 British Columbia argues that it has met its consultation duties respecting the CCLUP and other land use planning processes, but that the plaintiff has not responded in good faith. The plaintiff disagrees and argues that in the CCLUP and other land use planning processes, British Columbia has failed to reconcile its sovereignty with the Tsilhqot'in people's claims of Aboriginal title and rights.

1125 It is informative to consider the setting of the AAC under the provisions of the *Forest Act*. This task is assigned to the Chief Forester. The legislation is silent with respect to Aboriginal title and rights. The Chief Forester interpreted this silence as a direction to him to ignore any actual or claimed Aboriginal title or rights when determining the AAC. The AAC is based on the assumption that all areas contribute to the timber supply within the TSA until the issue of Aboriginal title is finally resolved.

1126 In 1992 the Premier of British Columbia, Premier Michael Harcourt, gave his undertaking to the Tsilhqot'in chiefs that no harvesting would occur in the Brittany Triangle without the consent of the Xeni Gwet'in.

1127 The Chief Forester was aware of this commitment when he made the 1996 AAC determination. Despite this knowledge, the Chief Forester considered it to be his statutory duty to fully incorporate the Claim Area into the timber harvesting land base and to ignore the potential for Tsilhqot'in Aboriginal title. The 1996 AAC was dependant on timber from that area. Notwithstanding that this decision clearly and specifically related to the future use and exploitation of lands in the Claim Area, Tsilhqot'in Aboriginal title is not mentioned as a relevant factor in the 1996 AAC rationale.

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1128 The former Chief Forester testified that he did not (and believed he could not) adjust his AAC determination on the basis of a claim to Aboriginal rights and title. But the claims of the Tsilhqot'in people to Aboriginal rights and title imposed upon him a duty to consult. His failure to consult is not an infringement of Tsilhqot'in Aboriginal rights, including title. But what it means is that the Province is unable to justify their actual infringements of Aboriginal title and rights that might flow from the decision. This failure to consult might result in a later claim for damages dependant on the consequences of the decision that was made.

1129 British Columbia says that while strategic planning decisions may have serious impacts on Aboriginal title, all that such decisions trigger is a duty to consult. There can be no infringement until there is an authorization by the Crown for the removal of timber. Until that occurs, there is no direct infringement, only the potential for infringement.

1130 In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.), when discussing the duty to consult, the Court said at paras. 75-76:

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).

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.

[Emphasis added.]

1131 In my view, all of the events that lead up to the granting of a cutting permit signal the Province's intention to manage and dispose of an Aboriginal asset. These events demand consultation and, where necessary, appropriate accommodations where Aboriginal rights are claimed. The nature of accommodations, if any, would be entirely case specific.

1132 The 1992 Tsuniah Lake Local Resource Use Plan and the 1993 draft Brittany Lake Forest Management Plan demonstrate the Province's determination to open up the Claim Area for logging. This objective was confirmed by the terms of the Cariboo-Chilcotin Land Use Plan established in 1994, and the related planning processes. The CCLUP is an expression of the highest level of provincial land use planning. The portions enacted by Cabinet as a higher level plan have the force of law and establish a process for all lower level decisions. These include timber targets for harvesting that direct a substantial level of commercial harvesting in the Claim

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Area in order to meet the targets mandated by the Plan.

1133 I do not propose to review these land use plans in detail. It is sufficient to note that none of the three plans took into account any Aboriginal title or Aboriginal rights that might exist in the Claim Area.

1134 The Province's express purpose in establishing the CCLUP was "resolving uncertainty" and dedicating "resource lands for industry and jobs". In its October 1994 explanation of the CCLUP, the Province said, in part:

The provincial government recognizes the need to ensure that all Cariboo residents and business interests have certainty of access to the natural resources they depend on to make a living, while ensuring recognition of special values. Secure access to these resources will provide economic and social stability, plus increase opportunities for sustainable growth and investment throughout the region.

1135 Pursuant to the CCLUP, the Province determined how the Claim Area lands were to be used. Despite the statement that the Province's decision was being made "without prejudice" to Aboriginal rights, the CCLUP makes many detailed commitments to third party interests, and does indeed prejudice and infringe upon Tsilhqot'in Aboriginal title. Title encompasses the right to determine how land will be used and how forests will be managed in the Claim Area. In effect, the Province has taken unto itself the right to decide the range of uses to which lands in the Claim Area will be put, and has imposed this decision on the Tsilhqot'in people without any attempt to acknowledge or address Aboriginal title or rights in the Claim Area.

1136 Over the years, British Columbia has either denied the existence of Aboriginal title and rights or established policy that Aboriginal title and rights could only be addressed or considered at treaty negotiations. At all material times, British Columbia has refused to acknowledge title and rights during the process of consultation. Consequently, the pleas of the Tsilhqot'in people have been ignored.

1137 Consultation involves communication. It has often been said that communication is the art of sending and receiving. Provincial policies either deny Tsilhqot'in title and rights or steer the resolution of such title into a treaty process that is unacceptable to the plaintiff. This has meant that at every stage of land use planning, there were no attempts made to address or accommodate Aboriginal title claims of the Tsilhqot'in people, even though some of the provincial officials considered those claims to be well founded. A statement to the effect that a decision is made "without prejudice" to Aboriginal title and rights does not demonstrate that title and rights have been taken into account, acknowledged or accommodated.

1138 Tsilhqot'in people also appeared from time to time to have a fixed agenda, namely the promotion of an acknowledgment of their rights and title. It must be borne in mind that it is a significant challenge for Aboriginal groups called upon in the consultation process to provide their perspectives to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely or adequate fashion.

1139 Consultations with officials from the Ministry of Forests ultimately failed to reach any compromise. This was due largely to the fact that there was no accommodation for the forest management proposals made by Xení Gwet'in people on behalf of Tsilhqot'in people. Forestry proposals that concerned timber assets in the Claim Area were usually addressed by representatives of Xení Gwet'in people. But, from the perspective of forestry officials, there was simply no room to take into account the claims of Tsilhqot'in title and rights.

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1140 Conversely, there was good communication between Tsilhqot'in people with officials in the Ministry of Lands, Parks and Housing. Here the two groups were able to reach a consensus on the establishment and management of Ts'il'os Provincial Park, without prejudice to the rights and title claims of Xeni Gwet'in and Tsilhqot'in people in the park area. The joint management model of this Provincial Park has been such a success that it has been extended to the management of Nuntzi Provincial Park in the northeastern portion of Tachelach'ed.

1141 Utilizing the concept of a spectrum proposed in *Haida Nation* (S.C.C.), I place the rights and title claimed here at the high end of the scale, requiring deep consultation and accommodation. I have already noted there are areas of title inside and outside of the Claim Area. Aboriginal rights in the Claim Area have been acknowledged by the defendants in these proceedings. I have found the plaintiff is entitled to a finding of specific Aboriginal rights on behalf of all Tsilhqot'in people. On the whole of the evidence, and in particular with respect to forestry and land use planning throughout the Claim Area, the failure of the Province to recognize and accommodate the claims being advanced for Aboriginal title and rights leads me to conclude that the Province has failed in its obligation to consult with the Tsilhqot'in people. For these reasons, and for the reasons earlier expressed, the Province has failed to justify its infringement of Tsilhqot'in Aboriginal title.

22. Aboriginal Rights (Excluding Title)

a. Introduction

1142 Earlier in these reasons I discussed the development of the modern concept of Aboriginal rights, focusing on one of those rights, Aboriginal title. It is helpful at this point to review and expand on that discussion as it relates to the additional Aboriginal rights that are claimed in this litigation: the right to hunt and trap and the right to trade skins and pelts obtained by hunting and trapping.

1143 Section 35(1) of the *Constitution Act, 1982* contains a promise that Aboriginal rights are recognized and affirmed. The method through which that promise is to be fulfilled was left to governments and Aboriginal people to resolve, and if necessary, adjudicate.

b. Test for Aboriginal Rights

1144 The first case to outline the framework for analyzing s. 35(1) claims was *Sparrow*. Mr. Sparrow, a member of the Musqueam Band, was charged under the Federal *Fisheries Act*, R.S.C., c. F-14, for fishing with a drift net longer than permitted by the terms of his band's food fishing licence. He admitted the facts alleged to constitute the offence but defended himself on the ground that he was exercising an existing s. 35 Aboriginal right to fish.

1145 Both the trial judge and the county court judge in *Sparrow* followed the B.C. Court of Appeal's decision in *Calder* and held that Aboriginal rights no longer exist in this Province. The Court of Appeal disagreed and recognized an Aboriginal right to fish for food. The Supreme Court of Canada agreed with the Court of Appeal.

1146 The Supreme Court of Canada examined the history of Aboriginal claims prior to 1982 and emphasized the significance of the adoption of s. 35(1), quoting with approval from the article by Professor Noel Lyon, "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 at 100, para. 54. It was clear that the Supreme Court of Canada was renouncing the old rules and opening the way for the development of the modern jurisprudence on Aboriginal rights.

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1147 In *Vanderpeet* at para. 2, the Supreme Court of Canada summarized the four step analysis of a claim under s. 35(1) of the *Constitution Act, 1982*, first presented in *Sparrow*: The analysis is as follows:

1. determine whether an applicant has demonstrated that he or she was acting pursuant to an Aboriginal right;
2. determine whether that right was extinguished prior to the enactment of section 35(1);
3. determine whether that right has been infringed; and finally,
4. determine whether that infringement was justified, considering the specific factual context of the case.

1148 On the evidence in *Sparrow*, the Supreme Court of Canada recognized the appellant had an existing Aboriginal right to fish for food, or for ceremonial and social purposes. This right had not been extinguished by previous regulations and should have been given priority over non-Aboriginal rights to fish. A new trial was ordered to allow the judge to apply an infringement and justification analysis to the net length restriction.

1149 Due to the nature of the claims made in *Sparrow*, the Supreme Court did not set out how a court is to define a s. 35(1) right. That issue was considered in *Vanderpeet*. In *Vanderpeet*, the Supreme Court of Canada succinctly explained the doctrine of Aboriginal rights at paras. 30-31:

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.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose: the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the preexistence of aboriginal societies with the sovereignty of the Crown.

1150 The Court clearly indicated in *Vanderpeet* at para. 74, that Aboriginal rights encompass but are not limited to Aboriginal title, and that Aboriginal rights arise out of both the prior occupation of land and the prior social organization of Aboriginal peoples:

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 subcategory 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

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peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights.

1151 In *Adams* the Supreme Court of Canada expanded on the definition of Aboriginal rights and the relationship between Aboriginal rights and title at paras. 26-27:

... while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land. *Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.

To understand why aboriginal rights cannot be inexorably linked to aboriginal title it is only necessary to recall that some aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances. That this was the case 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. The aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of those the provision was intended to protect.

1152 In *Adams* the Court established a middle ground between Aboriginal rights *simpliciter* and Aboriginal title: site-specific Aboriginal rights. In *Delgamuukw* (S.C.C.) at para. 138, the Court further explained how its judgment in *Adams* set out a "spectrum" of Aboriginal rights:

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

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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.

1153 In *Vanderpeet*, the Court set out the following test for Aboriginal rights at para. 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.

1154 The test for Aboriginal rights set out in *Vanderpeet* and elaborated on in subsequent jurisprudence involves, in essence, four stages:

1. characterizing the claimed Aboriginal right;
2. establishing that the ancestors of the claimant Aboriginal group engaged in particular practices, customs or traditions prior to European contact that correspond with the claimed right;
3. determining whether the ancestral practices, customs or traditions were integral to the distinctive culture of the Aboriginal group prior to European contact; and
4. determining whether there is continuity between the claimed Aboriginal right and the pre-contact practices, customs and traditions on which the right is based.

1155 In *Vanderpeet* at para. 49, Lamer C.J.C. emphasized that the perspective of the Aboriginal people claiming the right must be taken into account. That perspective "must be framed in terms cognizable to the Canadian legal and constitutional structure". This means that sensitivity to the Aboriginal perspective has to be balanced with the common law perspective:

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 from 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.

1156 The Chief Justice concluded at para. 50 that:

... the only fair and just reconciliation is ... 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.

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c. Characterizing the Right

1157 With these underlying considerations in mind, the first step in approaching a claim of Aboriginal rights is to properly characterize the right claimed. The focus is on ascertaining the true nature of the claim, rather than on assessing the merits of the claim or the evidence offered in support.

1158 In *Vanderpeet* the Court set out three factors to guide the characterization of a claim for an Aboriginal right: the nature of the activity undertaken pursuant to an Aboriginal right; the nature of the legislation or government action alleged to infringe the right; and "the ancestral traditions and practices relied upon to establish the right": at para. 53; see also *Mitchell* at para. 15.

1159 Claims to Aboriginal rights must be characterized in context, on a specific rather than general basis, and must not be artificially broadened or narrowed. In *Mitchell* at para. 20, the Court noted that "narrowing the claim cannot narrow the aboriginal practice relied upon, which is what defines the right." The Court repeated this statement at para. 22 and added "[a]n aboriginal right, once established, generally encompasses other rights necessary to its meaningful exercise."

1160 In *Mitchell* Chief Mitchell of the Akwesasne Mohawk people claimed the right to bring goods across the Canada - U.S. border without having to pay customs or duties. He also claimed the right to trade these goods with other First Nations. On appeal to the Supreme Court of Canada he sought to limit the scope of his claim by designating specific trading partners, specifically First Nations in Quebec and Ontario. The Court characterized these limitations as part of Chief Mitchell's strategy of negotiating with the government and minimizing the potential effects on its border control.

1161 The trial judge characterized the right at issue in *Mitchell* as including a right to exchange in small, non-commercial scale trade. The Supreme Court held this artificially narrowed the right, and stated at para. 21 that the "right is best characterized as a right to trade *simpliciter*." Chief Mitchell also denied that his claim entailed the right to pass freely over the border (i.e., mobility rights). The Court held that narrowing the claim could not narrow the Aboriginal right, and stated at para. 22 that "any finding of a trading right would also confirm a mobility right." The Supreme Court characterized the right claimed as "the right to bring goods across the St. Lawrence River for the purposes of trade": *Mitchell* at para. 25.

1162 In *Sappier* the Court emphasized that a claim for an Aboriginal right must be founded upon an actual practice, custom or tradition of the particular group claiming the right. The right cannot be characterized as a right to a particular resource: see *Sappier*, at para. 21. In *Sappier*, the defendants were charged with the unauthorized cutting, damaging, removing and possession of timber from Crown lands. In their defence they claimed an Aboriginal right to harvest timber for personal use. The Court found this characterization to be too general. The Court stated at paras. 24-26:

... the practice should be characterized as the harvesting of wood for certain uses that are directly associated with that particular way of life. The record shows that wood was used to fulfil the communities' domestic needs for such things as shelter, transportation, tools and fuel. I would therefore characterize the respondents' claim as a right to harvest wood for domestic uses as a member of the aboriginal community.

The word "domestic" qualifies the uses to which the harvested timber can be put ...

The right to harvest wood for domestic uses is a communal one. Section 35 recognizes and affirms existing

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aboriginal and treaty rights in order to assist in ensuring the continued existence of these particular aboriginal societies. The exercise of the aboriginal right to harvest wood for domestic uses must be tied to this purpose. The right to harvest (which is distinct from the right to make personal use of the harvested product even though they are related) is not one to be exercised by any member of the aboriginal community independently of aboriginal society it is meant to preserve. It is a right that assists the society in maintaining its distinctive character.

1163 In *Powley* the Court indicated that hunting rights need not be characterized on a species-specific basis. In that case the two defendants had shot a bull moose without a valid license. They argued that they had an Aboriginal right to hunt for food. The Court characterized the right as "the right to hunt for food in the environs of Sault Ste. Marie": *Powley* at para. 19. The Court went on to state at para. 20 that: "[t]he relevant right is not to hunt moose but to hunt for food in the designated territory".

1164 In Canada's submission, the Court's jurisprudence indicates that trading rights must be characterized in a species-specific manner. By way of example, Canada points out that in *Gladstone*, the claimants established a right to trade herring spawn on kelp, rather than a right to trade all fish.

1165 I disagree with Canada on this point. The Court has been silent on whether a right to trade must be characterized as species specific. In *Gladstone* the right claimed and the supporting evidence were entirely about herring spawn. In *Vanderpeet* the defendant was charged after selling salmon but the right was characterized at para. 77 as "an aboriginal right to exchange fish for money or other goods" and not the right to exchange salmon for money. In *Smokehouse* the defendant was charged after selling and purchasing Chinook salmon caught under the authority of an Indian food fishing license. The right was characterized as "the exchange of fish for money or other goods": *Smokehouse* at para. 26. In *Marshall v. Canada*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513 (S.C.C.), the defendant was charged with catching and selling eels out of season. The treaty right was characterized as the right to obtain necessities through hunting and fishing.

d. Establishing the Ancestors of the Claimant Aboriginal Group Engaged in a Particular Practice, Custom or Tradition Prior to European Contact — Continuity Element

1166 The function of the doctrine of Aboriginal rights is to reconcile the existence of pre-existing, distinctive Aboriginal societies with the sovereignty of the Crown. Thus, it is to those pre-existing societies that the courts must look in defining Aboriginal rights. The focus of the inquiry is on the time period prior to the arrival of Europeans. To this end, the Court stated in *Vanderpeet* at para. 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.

1167 In *Sappier* at para. 22, the Court again emphasized that Aboriginal claimants must lead evidence on a pre-contact practice, tradition or custom in order to establish an Aboriginal right:

... The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular ab-

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original community. It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection.

1168 While Aboriginal rights claimants may rely on evidence of practices, customs and traditions post-contact, that evidence must "be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact": *Vanderpeet*, para. 62. In other words, post-contact evidence may be led but it must be demonstrably linked to pre-contact times. Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims: *Vanderpeet* at para. 68.

e. Integral to the Distinctive Culture

1169 To satisfy the "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: *Vanderpeet* at para. 55.

1170 In *Mitchell* at para. 12, the Court succinctly summarized the distinctive culture test and what it means to be integral:

The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet, supra*, at paras. 54-59 (emphasis in original)).

1171 Most recently, in *Sappier*, the Court discarded the notion that the pre-contact practice must go to the core of a society's identity. Likewise, the Court rejected the idea that the pre-contact practice must be a defining feature of the Aboriginal society, such that the culture would be fundamentally altered without it. The Court described the revised distinctive culture test and the integrality inquiry as follows, at paras. 40 and 45:

... the purpose of this exercise is to understand the way of life of the particular aboriginal society, pre-contact, and to determine how the claimed right relates to it. This is achieved by founding the claim on a pre-contact practice, and determining whether that practice was integral to the distinctive culture of the aboriginal people in question, pre-contact. Section 35 seeks to protect integral elements of the way of life of these aboriginal societies, including their traditional means of survival.

...

The focus of the Court should therefore be on the *nature* of this prior occupation. What is meant by "culture" is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits. The use of the word "distinctive" as a qualifier is meant to incorporate an element of aboriginal specificity. However, "distinctive" does not mean "distinct", and the notion of aboriginality must not be reduced to "racialized stereotypes Aboriginal peoples" (J. Borrows and L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997), 36 *Alta. L. Rev.* 9, at p. 36).

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1172 The Court in *Sappier* at para. 38 specifically held that practices undertaken merely for survival purposes can be considered integral to the distinctive culture of an Aboriginal people:

I can therefore find no jurisprudential authority to support the proposition that a practice undertaken merely for survival purposes cannot be considered integral to the distinctive culture of an aboriginal people. Rather, I find that the jurisprudence weighs in favour of protecting the traditional means of survival of an aboriginal community.

1173 In *Sappier* the Court also expanded upon another aspect of the distinctive culture or integrality test: the geographic limitation on site-specific rights. The Court emphasized there is a necessary geographic element of site-specific hunting and fishing rights and linked this element to the principle of integrality as follows, at paras. 50-51:

This Court has imposed a site-specific requirement on the aboriginal hunting and fishing rights it recognized in *Adams*, *Côté*, *Mitchell*, and *Powley*. Lamer C.J. explained in *Adams* at para. 30 that

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. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question. [Emphasis in original deleted.]

The characterization of the claimed right in the present cases, as in *Adams*, *Côté* and *Mitchell*, imports a necessary geographical element, and its integrality to the Maliseet and Mi'kmaq cultures should be assessed on this basis: *Mitchell*, at para. 59. I agree with Robertson J.A. in the *Sappier* and *Polchies* decision that "[t]his result is hardly surprising once it is recognized that all harvesting activities are land and water based" (para. 50).

1174 To date, the Supreme Court of Canada has avoided delineating the precise boundaries of claimed Aboriginal rights. This appears to be possible because the vast majority of Aboriginal rights cases before the courts arise in the context of regulatory prosecutions. In a regulatory prosecution, an Aboriginal right is raised as a defence by the accused and the court need only determine whether the offence occurred within the general boundaries of the site. As a result, the Court has described the boundaries of site-specific rights very vaguely to date. Examples include:

- *Côté*: "right to fish for food within the lakes and rivers of the territory of the Z.E.C": para. 56;
- *Adams*: "right to fish for food in Lake St. Francis": para. 36;
- *Powley*: "right to hunt for food in the environs of Sault Ste. Marie": para. 19; and
- *Sappier*: "right to harvest wood for domestic uses on Crown lands traditionally used for this purpose by members of the Pabineau First Nation": para. 53.

1175 The case at bar is also about specific areas in the sense that a set of boundaries was selected for the purposes of this action. A declaration of rights within these boundaries does not preclude the existence of similar rights outside the boundaries. I have in mind the obvious fact that no person would suggest that in pre-contact

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times, Tsilhqot'in people hunted only on one side of the rivers that bound Tachelach'ed. They hunted, gathered and fished both sides of the rivers. However, for the purposes of this action, the Court is confined to a statement of the rights of Tsilhqot'in people within the boundaries of the Claim Areas. To that extent the declaration of rights is specific to particular land masses but not specific sites.

f. Continuity Between Claimed Rights and Pre-Contact Practices

1176 In order for an activity to qualify as an Aboriginal right, the present practice, custom or tradition must have continuity with the practices, customs and traditions that existed prior to contact. In *Vanderpeet* at para. 63, the Court stated:

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).

1177 The requirement of continuity in this context has two aspects. First, as set out above, the Court has noted the evidentiary difficulties facing Aboriginal rights claimants. The Court stated that evidence of post-contact practices, customs and traditions can be adduced to establish Aboriginal rights, provided that evidence is "directed at" and "rooted in" pre-contact aspects of the Aboriginal society in question: *Vanderpeet* at para. 62. In other words, claimants must establish continuity between pre-contact and post-contact activities.

1178 Second, the requirement of continuity ensures that the claimed right or modern manifestation of the pre-contact practice, custom or tradition can "evolve", but within limits. In *Vanderpeet*, the Court rejected the "frozen rights" approach at para. 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.

1179 As such, pre-contact practices can evolve and establish modern Aboriginal rights, provided continuity between the modern right and pre-contact practices is demonstrated. Evolution, in the context of Aboriginal rights, refers to the same sort of activity, carried on in the modern economy by modern means. The practice is allowed to evolve, but the "activity must be essentially the same": *Bernard* at para. 25; *Mitchell* at para. 13; *Sapier* at para. 48. In other words, continuity allows the logical evolution of Aboriginal rights but within certain limits.

g. Date of Contact

1180 In *Vanderpeet* at para. 60, Lamer C.J.C. articulated the rule and the rationale for the requirement that

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Aboriginal rights must have their origin in pre-contact Aboriginal societies.

1181 The Supreme Court of Canada recently re-affirmed the requirement that Aboriginal rights must be rooted in pre-contact practices, customs or traditions. In *Sappier*, the Court stated the following at para. 34:

It is settled law that the time period courts consider in determining whether the *Van der Peet* test has been met is the period prior to contact with the Europeans (see , [2003] 2 S.C.R. 207, 2003 SCC 43, which modified the *Van der Peet* test insofar as it applies to the Métis although it affirmed it otherwise). As Lamer C.J. explained in *Van der Peet*, "[b]ecause it is the fact that distinctive aboriginal societies lived on the land and 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" (para. 60) ...

1182 The plaintiff argues that the date of contact should be determined with reference to the onset of sustained or meaningful contact between Europeans and the claimant Aboriginal group. In the plaintiff's submission, this offers a principled alternative to an approach that has the potential to crystallize Aboriginal rights at the moment of first contact. The plaintiff says that particular moment was of negligible cultural significance for many First Nations, including Tsilhqot'in people. In advancing this position, the plaintiff submits that the establishment of the Chilcotin Post in 1829 within the traditional territory of Tsilhqot'in people marks the onset of sustained contact between Tsilhqot'in people and Europeans.

1183 The plaintiff points out that even this date demonstrates the problems associated with assuming that contact is synonymous with significant cultural change. In the plaintiff's submission, 1829 did not mark a cultural or historical watershed for Tsilhqot'in people. On the contrary, the engagement of Tsilhqot'in people with the fur trade, and Europeans generally, remained casual and conflict ridden for decades following the establishment of the trading post. Indeed, largely for this reason, the Hudson's Bay Company abandoned the Chilcotin Post in 1843. The remoteness of Tsilhqot'in people, by geography and by inclination, was such that at the time of the Chilcotin War in 1864, Governor Seymour could still profess to the colony's "complete ... ignorance" of Tsilhqot'in country and its inhabitants: Dispatch No. 37, Gov. F. Seymour to Colonial Office, 9 September, 1864.

1184 For the purposes of this litigation the plaintiff is content to accept the date of first contact as 1829 because, in the plaintiff's submission, nothing turns on it. He says the evidence discloses that Tsilhqot'in people engaged in hunting and trapping for both sustenance and trade as an integral feature of their distinctive culture long before any contact with Europeans.

1185 In *Vanderpeet* Lamer C.J.C. did not set out the actual date of contact. However, in *Gladstone* (decided on the same day as *Vanderpeet*), the Chief Justice did refer to a date that was considered to be pre-contact. In *Gladstone* the Court referred to two pieces of historical evidence that recorded the trading of herring spawn. The first was an excerpt from Alexander Mackenzie's diary written in 1793. The second was from William Fraser Tolmie's 1834 diary. The Chief Justice said at para. 28:

The evidence of Dr. Lane, and the diary of Dr. Tolmie, point to trade of herring spawn on kelp in "tons". While this evidence relates to trade post-contact, the diary of Alexander Mackenzie provides the link with pre-contact times ...

1186 It appears that the only cases in which the Supreme Court of Canada has determined a date of contact were *Adams* and *Côté*. In both of those cases the arrival of Samuel de Champlain in 1603 was selected as the date of first contact between First Nations people and Europeans in the Province of Quebec.

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1187 British Columbia says that the date 1603 is a surprisingly specific one. It does not appear to have been selected because it marks a particular incident of actual contact between the ancestors of the modern day rights claimants and Europeans.

1188 The rights claimant in *Adams* was a Mohawk person living on the Akwesasne reserve situated on the St. Lawrence River. The Mohawks were one of the tribes of the Iroquois Confederacy. The evidence suggested that the Iroquois were beginning to move into the portion of the St. Lawrence River upstream from Montreal around 1603. However, there was no evidence that Champlain actually encountered the ancestors of the rights claimant in *Adams*.

1189 The Chief Justice selected 1603 as the relevant date of contact because that was the year "when the French began to assume effective control over the territories of New France": *Côté* at para. 58; also see *Adams* at para. 46. In the submission of the Province, the focus must be on the word "began".

1190 The Province says that with respect to the relationship between the visit of Champlain in 1603 and the French assumption of "effective control" over New France, the historical record is clear. Champlain was not the first European, or even French visitor to the area that was to become New France. Cartier had followed a very similar route almost 70 years earlier.

1191 In the submission of British Columbia, Champlain's 1603 visit did not involve contact with the Mohawk people. His first contact with the Iroquois did not come until 1609 when he met them in battle. Nor did Champlain's visit in 1603 bring him to the vicinity of the Gatineau River Valley which was the homeland of the Algonquin ancestors of the Aboriginal rights claimant in *Côté* who currently reside on the Maniwaki Reserve, 90 km north of Ottawa and 200 km east of Montreal. Champlain only reached the mouth of the Gatineau in 1615, during his exploration of the Ottawa River Valley. Champlain did not establish a settlement in New France until 1608. A permanent French settlement was not established on the Island of Montreal until 1642. There was a pre-existing Aboriginal settlement and a French fur trading post at that site for a number of years before the French settlement was officially founded.

1192 The Province says that while Champlain visited the St. Lawrence River Valley in the interests of the French fur trade monopoly, that monopoly did not actually commence operations in New France until 1608. From 1604 to 1607, the monopoly confined its pursuit of the fur trade to Acadia.

1193 The Jesuits were the first Christian missionary order to actively seek contact with Aboriginal people in New France. However, they did not arrive in the colony until 1625, twenty-two years after Champlain's initial visit.

1194 In the submission of the Province, by applying the same date of contact to the *Adams* and *Côté* cases and relating that date to the beginning of the establishment of French control of New France, Lamer C.J.C. seems to suggest that a single date should be applied to the whole of the colony, without strict regard to the history of European colonization of particular regions.

1195 Obviously, the "effective control" over New France by the French was virtually non-existent in 1603. Champlain's first visit could only be seen as the start of a process that gradually led to effective control. He gained familiarity with the country, and as an excellent cartographer and prolific writer, showed the way for others to follow. Arguably, effective control by a European nation was not actually achieved in some of the hinterland areas of the colony until the assertion of British sovereignty over New France in 1763 or later.

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1196 In *Mitchell* the rights claimant was, like the claimant in *Adams*, a Mohawk person living on the Akewasne reserve. The trial judge appears to have regarded the 1609 battle near Lake Champlain, in which Champlain participated in support of the Iroquois' enemies, as the decisive contact event. The majority decision written by McLachlin C.J.C. does not refer to the actual date of contact. Binnie J., in his concurring judgment, cites the trial judge's finding, but makes no explicit comment as to its correctness: see *Mitchell* at para. 98.

1197 In the more recent case of *R. v. Sappier*, [2004] 4 C.N.L.R. 252, 2004 NBCA 56 (N.B. C.A.), the New Brunswick Court of Appeal accepted the common position of the parties that pre-contact activities dated from around 1500. Robertson J.A. took judicial notice of Cartier's visit to Chaleur Bay between what is now New Brunswick and the Gaspé Peninsula in 1534: see *Sappier* (N.B.C.A.) at para. 74. The Supreme Court of Canada in *Sappier*, while affirming the importance of the date of contact as part of the test for Aboriginal rights, did not comment on the actual date chosen in the courts below.

1198 British Columbia submits that in light of the Supreme Court of Canada's treatment of the issue, 1793 is the appropriate date of contact for the entire mainland colony of British Columbia, and is the date that should be applied in this case.

1199 In 1793, Alexander Mackenzie completed his journey through what is now mainland British Columbia to the Pacific, following the Peace, Fraser, and Blackwater (West Road) Rivers and emerging on the shores of Dean Channel, near present day Bella Coola. That same year Captain George Vancouver completed his survey of the mainland coast of what is now British Columbia as well as the southern Alaskan Panhandle.

1200 Mackenzie and Vancouver were not the first Europeans to visit what is now British Columbia. Spanish, French, American, and possibly Russian sailors preceded them. However, these visits were mainly to the off-shore islands, and ultimately the Spanish, French, and Americans did not stay. The Russians remained on the northwest coast, but they were confined to what is now Alaska.

1201 In terms of English visits, first there is the controversial evidence of Sir Francis Drake's alleged visit to the northwest coast in 1579. There is no doubt that Captain James Cook visited Nootka Sound in 1778. He was followed by other British sailors, such as James Hanna, James Strange, Nathaniel Portlock, George Dixon, and John Meares. The attention of these expeditions was concentrated on the islands off of the west coast, rather than what we now know to be the mainland of British Columbia.

1202 As with Champlain in 1603, neither Mackenzie nor Vancouver established a post during their 1793 expeditions. They did pave the way for others to follow, producing detailed maps of their journeys and readable accounts of what they encountered.

1203 Simon Fraser crossed the Rocky Mountains and began to establish trading posts in 1805. Fraser encountered Tsilhqot'in people in 1808, and enjoyed a far friendlier communication with them than Champlain did with the Iroquois in 1609. In the submission of the Province, Mackenzie and Vancouver began the process that led to British effective control over British Columbia, just as Champlain did for New France in 1603.

1204 The Province acknowledges that it is unlikely Vancouver encountered any Tsilhqot'in people during his voyages of exploration. Mackenzie may or may not have encountered Tsilhqot'in people during his expedition. However, in the submission of the Province, the Supreme Court of Canada's analysis of the date of contact for New France indicates that actual contact with the claimant group is not a requirement in the determination of the date of contact.

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1205 Fixing the date of contact at 1829, the opening of Fort Chilcotin, would appear to be inconsistent with Lamer C.J.C.'s observations in *Gladstone* at paras. 27-28. I have already noted that the Court in *Gladstone* held that the information in Mackenzie's 1793 diary provided "the link with pre-contact times".

1206 The caution given by Lamer C.J.C. in *Vanderpeet* at para. 62 concerning the practical application of the date of contact requirement bears repeating:

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.

1207 To select the date of "effective control" would invite the Court to engage in an inquiry of what "effective control" means in the context of each individual Aboriginal group. In this case, on the evidence, I would not be able to conclude that the British had "effective control" of the Claim Area in 1829. As pointed out by the plaintiff, such control did not come until many years later.

1208 A recent decision of Blair P.C.J. in *R. v. Deneault*, 2007 BCPC 307 (B.C. Prov. Ct.), concerned a Secwepemc Aboriginal right to fish in the High Bar Area, near Clinton on the Fraser River. The trial judge noted the importance of determining the time of first contact. In setting first contact as a time before 1780, he concluded at para. 86 that "... pre-contact must mean the time before the introduction of the horse."

1209 I acknowledge that the horse arrived from Europe. However, there is no evidence in this case to connect the arrival of horses in Tsilhqot'in territory with first European contact. I find that horses arrived in this area at a time that preceded the arrival of the first Europeans. Their use and enjoyment by Tsilhqot'in people was well established at the time of first contact.

1210 *R. v. Billy*, 2006 BCPC 48, [2006] B.C.W.L.D. 2683 (B.C. Prov. Ct.), was a prosecution where two accused Tsilhqot'in persons sought to establish a Tsilhqot'in Aboriginal right to trade in salmon. Gordon P.C.J. found the date of first contact for the purposes of that case to be 1821, the date of merger of the HBC and the North West Company.

1211 To be consistent with the approach taken by the Supreme Court of Canada in *Adams* and *Côté*, the logical date of first contact in this case is 1793. While actual first contact did not occur until Simon Fraser met a group of Tsilhqot'in people in 1808, in the end, I do not think that anything turns on the passage of time between 1793 and 1808. The Tsilhqot'in people in the region lived a semi-nomadic life throughout the entire period, surviving by hunting, fishing, trapping, berry picking, root gathering, and trading with neighbouring Aboriginal groups. Consequently, the choice of the actual date of contact, as between these two years, is of no consequence.

1212 The greater area surrounding Tsilhqot'in traditional territory was named New Caledonia by the fur traders of the HBC. On the evidence and on my reading of the authorities, I would fix the date of contact in New Caledonia at the year 1793.

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23. Tsilhqot'in Aboriginal Rights (Excluding Title)

a. The Position of the Parties

1213 The plaintiff claims Aboriginal rights on behalf of the Xenigwet'in people and the Tsilhqot'in Nation. In his final submissions, the plaintiff claims an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses, inclusive of a right to capture and use horses for transportation and work. The plaintiff also claims an Aboriginal right to trade in furs, pelts and other animal products as a means of securing a moderate livelihood.

1214 British Columbia argues that any Aboriginal rights to hunt and trap are held by the Xenigwet'in people, not the Tsilhqot'in Nation. British Columbia does not contest the right of Xenigwet'in people to hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses. British Columbia admits there is sufficient continuity between the present and pre-contact hunting and trapping practices of the Xenigwet'in people. However, British Columbia denies the Xenigwet'in people hold any right to capture horses for transportation and work.

1215 British Columbia also says the plaintiff has failed to prove that hunting and trapping birds and animals for the purpose of trading their skins and pelts was integral to Xenigwet'in culture and therefore cannot qualify as an Aboriginal right. British Columbia says that a right to trade skins and pelts only exists under the authority of the provincially granted trapline.

1216 In Canada's view, the proper rights holder is the Tsilhqot'in Nation. Canada admits the plaintiff's claim, on behalf of the Tsilhqot'in Nation, to hunt and trap throughout the Claim Area. Canada also admits there is sufficient continuity between pre-contact and present day practices to support this claim. Canada denies the Tsilhqot'in people hold any rights to capture and use horses for work or transportation.

1217 Canada also says the Court should refuse to declare an Aboriginal right to trade skins and pelts on the grounds that the plaintiff has failed to plead an infringement of that right. In the alternative, if an infringement was pleaded, Canada submits that the Tsilhqot'in people have only established an Aboriginal right to trade the skins and pelts of certain species that are hunted and trapped within the Claim Area for food.

1218 Canada disagrees that pre-contact Tsilhqot'in trading practices included trade of all animal species hunted and trapped. They also disagree that pre-contact Tsilhqot'in trading practices consistently included trade for products other than food, or that pre-contact Tsilhqot'in trading practices allowed the Tsilhqot'in people to obtain a moderate livelihood. Similarly, Canada disagrees that any trade, other than the trade of skins and pelts of certain species for food, was integral to the distinctive culture of the Tsilhqot'in at the date of contact. As such, Canada submits that there is no basis on which to grant the Tsilhqot'in people a modern right to earn a moderate livelihood from trading in the products of hunting and trapping.

b. Proper Rights Holder

1219 In the statement of claim, the plaintiff seeks a declaration of Aboriginal rights on behalf of the Xenigwet'in. In his final argument, the plaintiff seeks a declaration on behalf of the Xenigwet'in and the entire Tsilhqot'in Nation. British Columbia says that the plaintiff is attempting to amend the statement of claim by widen-

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ing the scope of any declaration of Aboriginal rights. Canada agrees with the plaintiff that the proper rights holder is the Tsilhqot'in Nation.

1220 In the section of this judgment titled Ethnography, I discussed the sociopolitical structure of Tsilhqot'in people. The evidence in this case leads to one conclusion: all Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory in the course of their seasonal rounds. The Xenigwet'in people are Tsilhqot'in people, distinguished only by their nascent group and the fact of their location at the time reserves were set aside.

1221 This fact comes as no surprise and it cannot be prejudicial to British Columbia to acknowledge that it was Tsilhqot'in people who hunted, trapped and traded throughout the Claim Area and beyond before the arrival of European people.

1222 I have already concluded the proper rights holder for the purposes of Aboriginal title and any other Aboriginal rights is the Tsilhqot'in Nation. Accordingly, any declarations must be of Tsilhqot'in Aboriginal rights.

c. Tsilhqot'in Right to Hunt and Trap

1223 The Aboriginal right sought by the plaintiff may be characterized as the right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses. Both defendants admit the existence of this right. The plaintiff argues the right to hunt and trap includes the right to capture horses for transportation and work. Both defendants say that the Aboriginal right does not extend to this practice.

1224 The Chilcotin Plateau provides a home to bands of wild horses. The reported numbers vary but it is said that there may be as many as 100 wild horses within Tachelach'ed. Their numbers are said to exceed that in other parts of the plateau.

1225 The origins of these animals have not been determined. The Court takes judicial notice of the fact that horses are not native to North America. They were introduced by Europeans, very likely by the Spanish in what is now Mexico. Thereafter, there was a gradual movement of horses across the continent. For my purposes, the route of their travels is unimportant. When Tsilhqot'in people met with Simon Fraser in June of 1808, horses had already arrived on the Chilcotin Plateau and were being used by Tsilhqot'in people. I find this evidence is sufficient to raise a fair inference of Tsilhqot'in use of horses in pre-contact times.

1226 British Columbia argues there is no evidence showing that either the Tsilhqot'in or the Xenigwet'in peoples engaged in the capture of wild horses pre-contact. British Columbia also argues there is no evidence that horses were found in a wild state in the Claim Area or elsewhere in Tsilhqot'in traditional territory in pre-contact times. Following their introduction, horses became extremely valuable to Aboriginal cultures. It is submitted that, in pre-contact days, it is unlikely that any Aboriginal people would have allowed a significant number of horses to remain at large for a sufficiently long period of time to have become "wild".

1227 Canada makes a different argument. Canada points out that the statement of claim alleges trapping and hunting of animals "for their own use". Canada argues this claimed right to hunt and trap animals does not logically encompass the capture and domestication of animals for any purpose. Accordingly, the inclusion of an Aboriginal right to "capture and use horses for transportation and work" is an attempt to improperly amend the

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statement of claim.

1228 Tsilhqot'in witnesses acknowledge their ancestors did not enjoy the use of horses from time immemorial. They understand that horses are European in their origin. However, the plaintiff says that the capture and use of wild horses by Tsilhqot'in people occurred well before first contact.

1229 I reject Canada's submission that the trapping and hunting of animals "for their own use" would not be inclusive of horses. A horse is an animal and the words "for their own use" cannot be limited to consumption. In its broadest sense, this phrase includes the use of animals for transportation and work.

1230 The capture and use of wild horses by Tsilhqot'in people for transportation and work is an integral part of their present day culture. The real issue is whether the capture of wild horses by Tsilhqot'in people for transportation and work should properly be included in a declaration of Tsilhqot'in Aboriginal rights.

1231 From the first reference to Tsilhqot'in people in June 1, 1808 and continuing over the subsequent decades, the historical documents mention the use of horses by Tsilhqot'in people. There is no evidence of any alteration or change in lifestyle between the date of first contact in 1793 and 1808. It is fair to infer that there was pre-contact use of horses.

1232 Indian Reserve Commissioner P. O'Reilly reported to the Supt. General of Indian Affairs on August 16, 1887, that the Tsilhqot'in "are good hunters and trappers, and living on the confines of a country abounding in game, large and small, they are able to make an easy livelihood." On October 14, 1899, another Reserve Commissioner, A.W. Vowell, reported that "[s]eventy Indians winter in the [Nemiah] valley ... They claim to have 150 horses in the valley but own no cattle depending altogether for their living on hunting, trapping and fishing."

1233 In 1909, James Teit described the existence of horses among the Tsilhqot'in as follows: "Horses were introduced at a much later date than amongst the Shuswap, and probably not before 1870 had they become common": *The Jesup North Pacific Expedition* at p. 783. Teit, at p. 535, noted there was a trade in horses from Canyon Secwepemc (Shuswap) people to Tsilhqot'in people "in later days."

1234 The historical documents do not refer to *wild* horses. The HBC records and the notes and journals written by missionaries and railway surveyors do not report the presence of *wild* horses in the Claim Area. I did not hear any oral history or oral tradition evidence that relates to *wild* horses. Despite this lack of evidence, it is clear from the observations of Simon Fraser that, in the early nineteenth century, Tsilhqot'in people were already using horses. Teit appears to have overlooked or been unaware of this historical evidence as he makes no reference to it.

1235 The historical record refers to Tsilhqot'in people's use of horses. The absence of the word "wild" cannot be of any consequence. Nor does the absence of oral tradition evidence persuade me that there were no wild horses in pre-contact times. Given their use in 1808, I believe it is logical to infer they were used in pre-contact times. I also infer that Tsilhqot'in people obtained horses from the wild stock of horses that is now said to have roamed the Chilcotin plateau over the past 200 years. As R.P. Bishop noted in a letter dated December 31, 1922 addressed to J.E. Umbach, the Surveyor General "... they [Tsilhqot'in people] are born horsemen and do not like going where they cannot ride."

1236 If I am wrong in my conclusion that wild horses were in the Claim Area and in use by Tsilhqot'in

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people in pre-contact times, there remains another reason why their capture and use should be included in any declaration of Tsilhqot'in rights. In pre-contact times, Tsilhqot'in people lived and survived entirely from the plants and animals the land provided. Due to climate change and other environmental factors, the bio-diversity of the region is in constant change. Two examples are worth recording.

1237 The first is a modern day example of change. The pine forests are currently being devastated by an infestation of mountain pine beetle. When the pine trees are gone, Tsilhqot'in people will no longer be able to use this tree and its products. Some other substitute or substitutes will have to be found. The protection these trees provide to certain animal species may result in further adjustments for Tsilhqot'in people as species are lost or move on, possibly to be replaced by others.

1238 The second example of change is one that took place in the early part of the twentieth century. Until about the first quarter of that century, Tsilhqot'in people obtained food and clothing by hunting caribou. That animal species has migrated north and is no longer found in the Claim Area. It has been replaced by moose. There is no suggestion that the right to hunt for moose should not be included in any declaration of Tsilhqot'in Aboriginal right merely because moose were apparently not in the Claim Area in abundance in the late eighteenth century.

1239 If wild horses moved into the Claim Area at some later period, their use by Tsilhqot'in people should be no different than the taking of moose. The horse is an animal provided to the Tsilhqot'in people by the land. The capture of horses for transportation and work is a contemporary extension of the pre-contact right the Tsilhqot'in people had to use plants and hunt and trap animals in the Claim Area for their subsistence and livelihood. It is an example of pre-contact practices evolving to establish a modern right: *Bernard; Sappier*.

1240 The proper characterization of the right is: an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses.

1241 I conclude that the ancestors of the Tsilhqot'in people engaged in that right and that it was integral to their distinctive culture.

d. Tsilhqot'in Right to Trade

1242 In the statement of claim the plaintiff alleges that "[b]efore and at the time of European contact, the Xenigwet'in trapped (trapping includes hunting) animals for their own use and for trading in skins and pelts". The prayer for relief seeks declarations that the Xenigwet'in people have an existing Aboriginal right to carry on trapping activities, including trading in skins and pelts, in the Brittany Triangle and Trapline Territories.

1243 An analysis of the statement of claim leaves me with no doubt that an infringement of all Aboriginal rights claimed by the plaintiff has also been pleaded. See, for example: amended statement of claim at paras. 17-19 and 22-26.

1244 In his argument, the plaintiff seeks a declaration of an Aboriginal right to trade in furs, pelts and other products of hunting and trapping animals in the Claim Area. The plaintiff says the right is best characterized as a right to obtain a moderate livelihood from trading in the products of hunting and trapping.

1245 British Columbia says no right to trade has been established. Canada says, if there is a right, it should

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be delineated in accordance with pre-contact Aboriginal practices and is limited to skins and pelts by the pleadings. If any Aboriginal right to trade exists, Canada says the right must be species specific and, in that regard, relies on the Supreme Court of Canada decision in *Gladstone*.

1246 This Aboriginal right is properly characterized as a right to trade skins and pelts as a means to secure a moderate livelihood. In my view, the case law does not support Canada's argument that this right must be restricted to specific species of animals. I find that such an approach would unduly frustrate the modern expression of this Aboriginal right.

1247 Tsilhqot'in people traded animal skins and pelts with their Aboriginal neighbours who were willing to trade with them. These trading relationships were important to the Tsilhqot'in people as a means of obtaining salmon resources, particularly during the years when the salmon fishery failed. Trade was not restricted to years of poor salmon runs. Trading with neighbours was an element of the traditional Tsilhqot'in pattern of survival.

1248 The practice of trade for salmon and accommodations was an integral part of Tsilhqot'in society that cannot be ignored. This type of survival was intermittent but it was regular in the sense that there were always cycles produced by nature which forced changes in the preferred pattern of living off and staying on the land within the Claim Area.

1249 In *Sappier*, the issue arose as to whether a survival practice could be considered sufficiently integral to require protection as an Aboriginal right. The Court concluded that a practice undertaken for survival purposes is sufficient to meet the integral to a distinctive culture test. A Court must seek to understand how the particular pre-contact practice relied upon relates to the Aboriginal group's way of life.

1250 Historically, Tsilhqot'in people did not engage in a brisk trade with the HBC. One of the potential reasons for this reluctance was that the Tsilhqot'in people's principal interest lay in trading for salmon. They could not obtain salmon from the HBC and, in fact, competed with the HBC to find sufficient salmon for survival purposes. The HBC had European goods to offer and when the Tsilhqot'in people required these products, they were willing to trade. The Tsilhqot'in people's primary trading partners were their Aboriginal neighbours to the east and west.

1251 Tsilhqot'in people had essentially two trading partners, the Canyon Secwepemc (Shuswap) people (and through them to other Secwepemc) and the Nuxalk (Bella Coola) people (and through them to other coastal peoples). To the south and north, there was considerable friction between Tsilhqot'in people and the Stl'atl'imx (Lillooet), Qaju (Homalco) and Dakelh (Carrier) peoples. There may have been isolated incidents of trade with these other nations, but they never reached the same level of trade as with the Nuxalk and Canyon Secwepemc.

1252 In his ethnography of the Secwepemc published in *The Jesup North Pacific Expedition*, James Teit described the nature and scale of trade between the Tsilhqot'in and the Secwepemc as follows at p. 535:

The Cañon division were the greatest traders, and acted as middlemen between the other Shuswap bands and the Chilcotin, whom they would not allow to trade directly with one another. They bought the products of both, and exchanged them at a profit. They controlled part of the Chilcotin salmon supply, and the Chilcotin traded extensively with them.

... From the Chilcotin they received large quantities of dentaliumshells, some woven goat's-hair blankets and belts, bales of dressed marmot-skins, a few rabbit-skin robes, a few snowshoes of the best type, and in fact

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anything of value they had to give. In exchange they gave chiefly dried salmon and salmon-oil, some woven baskets of the best type, paint, and in later days horses.

1253 It is interesting to note that Tsilhqot'in people were known to their Canyon Secwepemc neighbours as the "dentalia people". Dentalium is a genus of marine mollusk that has a tubular or conical shell. These shells could only be obtained from the coast. They were used in Aboriginal societies as a medium for exchange and as a status or wealth symbol. The trade in dentalium demonstrates how the Tsilhqot'in people were the middle men between the Nuxalk people and Canyon Secwepemc people.

1254 Teit elaborated on the Tsilhqot'in trade relationships in his "Notes on the Chilcotin Indians" found in *The Jesup North Pacific Expedition* at p. 783:

Trade was carried on chiefly with the Bella Coola and the Canon Division of the Shuswap ... From the Shuswap the tribe obtained dried salmon, said to be superior to that procured from the Bella Coola, salmon-oil, red paint, deer and elk skins some bark thread, and in later days tobacco and horses; also part of the Chilcotin supply of copper and iron seems to have been obtained from the Shuswap. They gave the [Shuswap] in return dentalium-shells, goat's wool blankets, woven rabbit and lynx skin blankets, dressed caribou-skin, raw marmot-skins.

1255 In his report to the Court, historian Dr. Kenneth Coates, discussed the trade relationships between the Tsilhqot'in and the Nuxalk people. Dr. Coates relied upon the following observations of Dr. David Dinwoodie contained in his book entitled *Reserve Memories: The Power of the Past in a Chilcotin Community* (Lincoln: University of Nebraska Press, 2002) at pp. 13-15:

An integral dimension of the traditional patterns, it seems involved transporting hides and horns from the high country over the mountains to the Bella Coola. Such journeys were frequently followed by lengthy visits, with people sometimes staying for entire winters. Food, lodging, and goodwill could be purchased with desirables such as mountain goat horns and various assorted hides. In addition, the Chilcotin could contribute to Coastal life by serving as enthusiastic and appreciative audience members for winter ceremonies.

1256 The evidence of Tsilhqot'in people who testified at trial leads me to conclude that trade, particularly with the Nuxalk people, continued well into the last century and to a limited extent continues to this day.

1257 For Tsilhqot'in people, trade was never about the accumulation of wealth. Trade with their neighbours was motivated by survival. Salmon was and remains a staple of the Tsilhqot'in diet. Salmon runs in the various rivers and streams, upon which Tsilhqot'in people depended, were not consistent, ranging from excellent to none at all. Thus, trade for salmon was vital in those years when the salmon runs failed to produce sufficient quantities. There is historical evidence that entire groups of Tsilhqot'in people left their traditional land and wintered with the people on the coast in those years of salmon drought. The Nuxalk provided both food and permission to lodge with their people. In return, they were paid with furs, root plants, berries and other commodities.

1258 I note that any movement to the coast was a movement for survival purposes and was never intended as an abandonment of traditional territory. It was a cyclical phenomenon, driven by the strength of the salmon runs. It was as much a part of Tsilhqot'in semi-nomadic existence on the land as was their movement about the Claim Area to acquire whatever nature had to offer them.

1259 Earlier, I noted that in *Vanderpeet*, the Supreme Court of Canada set out a test for determining wheth-

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er a particular Aboriginal activity is protected as an Aboriginal right.

1260 An applicant must satisfy the crucial elements of that test. Lamer C.J.C. in *Vanderpeet* at para. 46 stated:

... 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.

1261 The defendants acknowledge the importance of coastal trading relations for Tsilhqot'in people as a means of obtaining salmon resources, particularly in times of a low return or even a collapse in the salmon fishery. The plaintiff says the defendants have overstated the reliance of Tsilhqot'in people on this strategy, but does acknowledge that such trade was a key element of the traditional Tsilhqot'in pattern of survival.

1262 In *Sappier*, the Supreme Court of Canada concluded that a practice undertaken for survival purposes is sufficient to meet the integral to a distinctive culture threshold.

1263 Tsilhqot'in people moved about their territory harvesting what the land had to offer, according to their needs and the seasons. Fish, game, root plants, and berries provided the staples for their diets. Salmon were a critical component. When salmon failed, the Tsilhqot'in way of life included a trade of furs, root plants, and berries for salmon. I am satisfied that trade was not just opportunistic or incidental and was not limited to times of need. It was a way of life, accelerated in times of need. Trade was always undertaken for the necessities of life; it was not trade to accumulate wealth. In my view, the trading practice of the Tsilhqot'in people, at the time of first contact and continuing well into the twentieth century, was more than sufficient to meet the tests of cultural integrality set out by the Supreme Court of Canada.

1264 In *Marshall* (S.C.C.) Binnie J., for the majority, said at para. 59:

The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, at p. 126, described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth (*Gladstone, supra*, at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

1265 The right may be properly characterized as a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood. The evidence shows that the Tsilhqot'in ancestors engaged in that right and that it was integral to their distinctive culture.

e. Continuity

1266 In *Bernard*, McLachlin C.J.C. said at para. 67:

The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices.

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1267 I am satisfied that the hunting, trapping and trading practices of Tsilhqot'in people represent a modern expression of those activities as practiced by Tsilhqot'in people prior to contact with European people.

1268 In addition, the evidence leads to but one conclusion, namely that Tsilhqot'in people have continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present day.

24. Infringements of Aboriginal Rights

a. Introduction

1269 The plaintiff says that forest harvesting activities negatively impact a number of different species, affecting wildlife diversity as well as populations of individual species.

1270 In addition, the plaintiff says forest harvesting leads to the destruction of habitat. In the plaintiff's submission, habitat must be preserved to ensure a harvestable surplus of all species, sufficient to meet the needs of Tsilhqot'in people over time. He says Crown activities are an infringement of Tsilhqot'in rights if they are likely to reduce the habitat available for any particular species to below the level where the necessary harvestable surplus is available.

1271 The question for the Court is whether forest harvesting activities pursuant to the relevant forestry legislation are an infringement on Tsilhqot'in Aboriginal rights to hunt, trap and trade.

b. General Principles

1272 The legal principles that apply here are found in the section on infringement of Aboriginal title. Those principles apply equally to other Aboriginal rights.

1273 It is worth repeating that in *Sparrow*, Dickson C.J.C. and La Forest J., for the Court, stated at p. 1078:

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. Is the limitation unreasonable? Does the regulation impose undue hardship? Does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

Here, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the exercise of the natives' right to fish for food. The issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

1274 This case differs from *Sparrow* in that it does not involve a regulatory restriction on a harvesting right. Here, the issue is whether forest harvesting activities and forest silviculture activities are or might be an infringement of Tsilhqot'in Aboriginal hunting and trapping rights in the Claim Area.

1275 Thus, in this case, the language in *Sparrow* leads to an inquiry as to whether such activities would impose an undue hardship on Tsilhqot'in people and whether the activities would deprive them of their preferred

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means or way of exercising their rights to hunt, trap and trade.

c. Application

1276 On the whole of the evidence, I conclude that forest harvesting activities, which include logging and all other silviculture practices, reduce the number of different wildlife species (diversity) and the number of individuals within each species (abundance) in a landscape. Forest harvesting depletes species diversity and abundance through: 1) direct mortality; 2) the imposition of roads; and, 3) the destruction of habitat.

1277 This depletion in species and abundance is caused primarily by road development and habitat loss. This was the evidence from expert witnesses and lay witnesses. Trappers and hunters report a loss of animals after the occurrence of logging.

1278 Road building opens up areas to industrial and recreational use. The consequence is an increase in wildlife mortality and species decline. There is also the risk of direct collision with animals and machinery. Roads can lead to increased competition between species and to habitat fragmentation which restricts habitat movements. Some animals are not comfortable moving without cover; others will use the roads placing themselves at increased risk. It can take decades for a road to disappear as forests have difficulty in regenerating where the soil has been compacted.

1279 Dry climate and poor soil make regeneration in parts of the Claim Area very difficult. Tree removal directly impacts the size and productivity of wildlife habitats and it can take decades for regeneration to reach a level that is again suitable for wildlife habitat.

1280 Silviculture activities are designed to increase productivity of selected trees by reducing competition for light, water and soil nutrients. Thinning and other silviculture practices are designed to increase the production of wood fibre. The higher stem densities in natural growth pine forests create a preferred habitat for snowshoe hare. This is a key species that is depended upon by fisher, marten and lynx. Thus, a highly productive pine forest enjoying all the benefits of modern silviculture practices is not an appropriate habitat for some wildlife species.

1281 Coarse woody debris is the term applied to snags (standing dead trees), logs and stumps that occur naturally in a forest. In the context of forest harvesting, it also refers to the detritus created during harvesting and is thus inclusive of branches, roots and non-merchantable logs. Coarse woody debris is an important component in forest habitat, providing resting and den sites, access points to areas below the snow, and cover from avian predators. Large, standing snags provide den sites for furbearers and bird species.

1282 There is tension between the economic interests and administrative burdens imposed on the forest industry, and the need to leave sufficient coarse, woody debris after harvesting to meet the needs of wildlife that require suitable habitat. Fines are imposed when harvesting activities leave too much wood on the ground; foresters are pressured to leave a "clean site".

1283 Logging also impacts an area's hydrology. Clear cuts change the patterns of snow accumulation and melt. They increase annual water yields, change the timing and amount of peak flows, and increase late summer soil moisture and stream flow due to reduced summer evapotranspiration. Soil compaction from heavy machinery also reduces the infiltration capacity of the soil and increases run-off from rain and snow melt.

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1284 Roads and ditches change the hydrological regime resulting in a faster stream response to snow melt and rainfall. Increased peak flows affect fish-spawning habitat. An increase in sediment deposits in lakes and wetlands can also have a negative impact on aquatic and riparian species that live in these areas.

1285 The *Ministry of Forests and Range Act*, R.S.B.C. 1996, c. 300, s. 4 reads as follows:

4 The purposes and functions of the ministry are, under the direction of the minister, to do the following:

- (a) encourage maximum productivity of the forest and range resources in British Columbia;
- (b) manage, protect and conserve the forest and range resources of the government, having regard to the immediate and long term economic and social benefits they may confer on British Columbia;
- (c) plan the use of the forest and range resources of the government, so that the production of timber and forage, the harvesting of timber, the grazing of livestock and the realization of fisheries, wildlife, water, outdoor recreation and other natural resource values are coordinated and integrated, in consultation and cooperation with other ministries and agencies of the government and with the private sector;
- (d) encourage a vigorous, efficient and world competitive
 - i) timber processing industry, and
 - ii) ranging sector
 in British Columbia;
- (e) assert the financial interest of the government in its forest and range resources in a systematic and equitable manner.

1286 Despite the presence of s. 4 (c), there is no doubt that the Ministry seeks to maximize the economic return from provincial forests. On the evidence I heard during this trial, the protection and preservation of wildlife for the continued well-being of Aboriginal people is very low on the scale of priorities.

1287 There is wide diversity in the wildlife found in the Claim Area. This diversity creates a demand for differing habitat. Wildlife in the Claim Area includes horses, marten, fisher, wolverine, river otter, mink, long tailed weasel, short tailed weasel (ermine), lynx, bobcat, mountain lion, mule deer, moose, California big sheep, mountain goat, snowshoe hare, red squirrel, northern flying squirrel, beaver, muskrat, grizzly bear, black bear, grey wolf, and voles. All of these species are dependant on forest cover. They are also dependant on each other. For example, marten will feed on voles, mountain lion on ungulates, in particular the mule deer, and lynx will feed on snowshoe hares. The maintenance and well being of this delicate interdependency rests on sufficient forest habitat.

1288 Forest harvesting activities would injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area. The repercussions with respect to wildlife diversity and destruction of habitat are an unreasonable limitation on that right. For these reasons, I conclude that forest harvesting activities are a *prima facie* infringement on Tsilhqot'in hunting and trapping rights and thus demand justification.

25. Justification of Infringements of Aboriginal Rights

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1289 British Columbia's forestry legislation is constitutionally applicable to land over which the Tsilhqot'in people have Aboriginal rights to hunt, trap and trade. The application of that legislation infringes those rights. I now turn to a consideration of whether that infringement is justified.

1290 I have already noted that a legislative scheme that manages solely for timber with all other values as a constraint on that objective can be expected to raise severe challenges when called upon to strike a balance between Aboriginal rights and the economic interests of the larger society.

1291 Recognizing Aboriginal rights to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights. Section 35(1) of the *Constitution Act, 1982* demands that the protection of those rights is a paramount objective. The declaration of Aboriginal rights is not intended to be hollow or short lived. Tsilhqot'in Aboriginal rights grew out of the pre-contact society of Tsilhqot'in people. This historical right is intended to survive for the benefit of future generations of Tsilhqot'in people.

1292 In *Gladstone* the Court offered the following guidance on assessing the reasonableness of government actions at para. 63:

The content of this priority — something less than exclusivity but which nonetheless gives priority to the aboriginal right — must remain somewhat vague pending consideration of the government's actions in specific cases. ... priority under *Sparrow's* justification test cannot be assessed against a precise standard but must rather be assessed in each case to determine whether the government has acted in a fashion which reflects that it has truly taken into account the existence of aboriginal rights. Under the minimal impairment branch of the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103), where the government is balancing the interests of competing groups, the court does not scrutinize the government's actions so as to determine whether the government took the least rights-impairing action possible; instead the court considers the reasonableness of the government's actions, taking into account the need to assess "conflicting scientific evidence and differing justified demands on scarce resources" (*Irwin Toy, supra*, at p. 993). Similarly, under *Sparrow's* priority doctrine, where the aboriginal right to be given priority is one without internal limitation, courts should assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights.

1293 At present, British Columbia does not have a database that provides information on the individual species of wildlife or their numbers in the Claim Area. The Province has not conducted a needs analysis which would inform decision makers on the needs of the Tsilhqot'in people related to their hunting, trapping and trading rights. Such an analysis would ensure those needs are addressed when planning and conducting forestry activities. The absence of a database or a needs analysis indicates that Tsilhqot'in Aboriginal rights in the Claim Area are not a priority with respect to timber harvesting and other forestry activities.

1294 Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area must have some meaning. A management scheme that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot'in Aboriginal rights. To justify harvesting activities in the Claim Area, including siculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area. As I mentioned earlier, the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge

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Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.

26. Forestry Regime — Sustainability

1295 While the relief sought relates to Aboriginal rights, including Aboriginal title, this case had its genesis in the forests of the Claim Area. The initial flash point was clear-cut logging in the Western Trapline territory. This was followed by a blockade at Henry's Crossing where a forest company was preparing to log areas of Tachelach'ed (Brittany Triangle). The claims made here were initially launched to stop the logging for essentially three reasons. First, the proposed logging was to take place on land which Tsilhqot'in people believe they hold title and rights. Second, Tsilhqot'in people felt that any logging would be a taking of their property. Third, any logging would have a severe impact on the wildlife and accordingly, on Tsilhqot'in hunting and trapping activities. Eventually, a claim was added to seek compensation for the timber removed over the past decades.

1296 Dr. Kimmins provided the court with a helpful report entitled "Sustainability in the Xení Gwet'in Claim Area" (15 March 2006). Dr. Kimmins stated at p. 17:

It is an article of faith for most foresters that they are practicing sustainable management. For most of the history of forestry this has mainly meant timber management, although the historical origins of forestry were as much concerned with sustaining wildlife species (mainly game species) or water supplies. ...

1297 The forests of the Claim Area are largely comprised of pine, spruce and Douglas fir species. The most prevalent species is pine. The report noted at p. 36 that "[f]ire has historically been the major disturbance factor over much of the Chilcotin plateau". In the result, there emerged large areas of "relatively pure, even aged lodgepole pine". Dr. Kimmins pointed out at p. 36:

Fire exclusion or reduction over the past 50 years, coupled with a relaxation of one of the major controls of the mountain pine beetle (MPB) — low winter temperatures — has altered this situation. The largest epidemic of MPB in recorded history or memory has affected many millions of hectares of pine forest in the interior of B.C. This epidemic has grown to the point at which the traditional prime target of the beetle — large old lodgepole pine trees — has been modified to include younger trees, which means that younger forest and regenerating trees are also being attacked.

1298 It is clear the pine forests will be lost unless there is a return to colder winters, a prospect that seems unlikely in this age of global warming. Thus, the forest cover will be in transition for generations, posing new challenges for those who seek sustainable management of this resource. Dr. Kimmins pointed out at p. 9 that "[i]n common with many aspects of forest ecosystems — such as ecosystem integrity, health, and biodiversity — there are many dimensions to the concept of sustainability". He elaborated on some of the features of sustainability at pp. 15-17, as follows:

- sustainability does not refer to a lack of change, as humans and the environment are in a constant state of flux;
- the concept of sustainability includes the biological components of ecosystems (i.e. plants, animals, microbes) as well as the physical components of ecosystems (i.e. soil, geology, topography, climate, physical disturbance factors). In addition, the meaning of sustainability encompasses and is affected by ever-changing human social values (i.e. health, standards of living, spirituality, happiness, culture);

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- sustainability must reflect the fact that the types of species that live within ecosystems, as well as ecosystem structures, are constantly changing for a variety of reasons;
- sustainability should be assessed at the larger "landscape-level", rather than at the "stand-level" in order to "encompass the spatial scale of the major disturbances that characterize that ecological region";
- sustainability must be assessed on a long-term basis;
- sustainability will be impossible to achieve if the human population continues to grow, and/or there is an ongoing increase in the per capita impact of humans on the environment;
- sustainability cannot occur if we maintain our dependence on nonrenewable energy and other resources.

1299 At p. 39 of his report, Dr. Kimmins stated:

The approach to biophysical sustainability popular in British Columbia today is dominated by the "coarse filter" approach of managing forest to create a landscape mosaic of stand ages and conditions in a pattern that it is hoped will provide for the habitat needs of native wildlife. The difficulty with this is that it is unlikely that any particular landscape pattern is ever repeated over time under the influence of natural disturbance. While repeatable patterns do occur as a result of soil, topography and stand conditions that influence the landscape pattern of average severity future disturbances, under severe fire conditions and major insect epidemics disturbance appears to ignore the existing patterns. Thus, while a particular pattern may persist through a few disturbance cycles, the periodic severe disturbance events that occur, and may occur with increasing frequency as climates change, will reset the landscape pattern. The present MPB outbreak is an example of this.

1300 Dr. Kimmins also noted at p. 38 that continual change in the western Chilcotin area has "rendered definition of sustainability complex; the values that are to be sustained have changed. Values that the First Nations would have sought included game species for food and furs, fish, medicinal plants, fungi, and other tree-related and non-tree values." With the arrival of European settlers, other values intervened.

1301 My assessment of the evidence leads me to conclude that provincial foresters do practice sustainable management, within a narrow definition of sustainability. The main focus is on timber management and sustainability of the forest resource. Other government Ministries and agencies focus on other sustainability issues such as environment, land, wildlife and water. There is no single government agency that views sustainability through a broad lens, taking into account the values of the people affected by government decisions. Any model of sustainability that is driven solely by an economic engine is deficient if it is incapable of taking into account social values. This is particularly true where the model of sustainability affects Aboriginal people whose social values are so intricately connected to the land.

27. Fiduciary Duty / Honour of the Crown

1302 Both the plaintiff and British Columbia advanced arguments on the subject of breach of fiduciary duty and the honour of the Crown. In *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (S.C.C.), McLachlin J. (as she then was), writing on behalf of the minority, provided the following explanation for the basis of a fiduciary relationship at para. 38:

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Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

1303 In my view, there is no need to consider breach of fiduciary duty based on the facts and context of this case. In *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), at para. 83, the Supreme Court of Canada explained that:

... not all obligations existing between parties to a fiduciary relationship are themselves fiduciary in nature (*Lac Minerals, supra*, at p. 597), and that this principle applies to the relationship between the Crown and aboriginal peoples. It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown has assumed discretionary control in relation thereto sufficient to ground a fiduciary obligation.

1304 I find that in this case it is sufficient to go no further than a consideration of the duty to consult, grounded in the honour of the Crown. In *Haida Nation* McLachlin C.J.C. explained at paras. 16 and 18:

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.

...

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: , [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 interests at stake. As explained in *Wewaykum*, at para. 81, the term "fiduciary duty" does not connoate 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.

1305 In the pre-proof stage, where Aboriginal rights and title have not yet been 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": *Haida Nation* at para. 18.

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1306 In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69 (S.C.C.) the federal government approved a winter road which was to run through the Mikisew reserve. The government did not engage the Mikisew people in direct consultation before approving the road. After the Mikisew people protested, the government altered the road alignment. The alternate road crossed a number of traplines and affected the hunting grounds of approximately 100 Mikisew people. The Mikisew are beneficiaries of Treaty 8 which provides the right to hunt, trap and fish on treaty lands. The Court found that the proposed road would injuriously affect the exercise of those rights. The Treaty contemplated that portions of the surrendered land would be "taken up from time to time for settlement, mining, lumbering, trading or other purposes": *Mikisew Cree* at para. 30. However the Court at para. 31 found "the Crown was and is expected to manage the change honourably". Binnie J., for the Court, said at para. 51:

The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing treaty interpretation and application that was referred to by Gwynne J. of this Court as a *treaty obligation* as far back as 1895, four years before Treaty 8 was concluded: *Province of Ontario v. Dominion of Canada (1895)*, 25 S.C.R. 434, at pp. 511-12 per Gwynne J. (dissenting). While he was in the minority in his view that the treaty obligation to pay Indian annuities imposed a trust on provincial lands, nothing was said by the majority in that case to doubt that the honour of the Crown was pledged to the fulfilment of its obligations to the Indians. This had been the Crown's policy as far back as the *Royal Proclamation* of 1763, and is manifest in the promises recorded in the report of the Commissioners. The honour of the Crown exists as a source of obligation independently of treaties as well, of course. In *Sparrow, Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, *Haida Nation* and *Taku River*, the "honour of the Crown" was invoked as a central principle in resolving aboriginal claims to consultation despite the absence of any treaty.

1307 For these reasons I decline to consider the issue of a breach of fiduciary duty. My consideration of the duty to consult and honour of the Crown with respect to Aboriginal title is found in Section 21. The duty to consult with respect to Aboriginal rights is discussed in Section 25.

28. Limitations, Laches and Crown Immunity

1308 I have found that British Columbia's forest development activities have unjustifiably infringed the plaintiff's Aboriginal title and Aboriginal rights. British Columbia pleads that:

- (a) insofar as those infringements are alleged to have been related to the claimed Aboriginal rights within the Trapline Territory, such causes of action as arose prior to 18 April, 1984 are barred by the passage of time,
- (b) insofar as those infringements are alleged to have been related to the claimed Aboriginal title within the Trapline Territory, such causes of action as arose prior to 26 April, 1993 are barred by the passage of time,
- (c) insofar as those infringements are alleged to have been related to the claimed Aboriginal title and Aboriginal rights within the Brittany, such causes of action as arose prior to 18 December, 1992 are barred by the passage of time:

and in respect of all such claims enumerated in subparagraphs (a), (b), and (c) the Provincial Defendants plead and rely upon:

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(d) the *Statute of Limitations*, R.S.B.C. 1960, c 370, s. 3, 16, 30 and 41; the *Limitation Act*, S.B.C. 1975, c. 37, s. 3, 14 and 18; the *Limitation Act*, R.S.B.C. 1979, c. 236, s. 3, 14; and the *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3, 14; and

(e) in the alternative, upon the legislative provisions enumerated in subparagraph (d) as incorporated by reference into federal law, and made applicable by the *Indian Act*, R.S.C. 1952, c 149, s. 87; the *Indian Act*, R.S.C. 1970, c. 1-6, s. 88, and the *Indian Act*, R.S.C. 1985, c. 1-5, s.88; and

(f) in the further alternative, upon the *Limitation Act, 1623* (U.K.), 21 Jac. 1, c. 16, s. 3; the *Real Property Limitation Act, 1833* (U.K.) 3 & 4 Will. 4, c. 27, ss. 2, 17 and 34; the *English Law Ordinance, 1867*, S.B.C. 1867, c. 7, s. 2; the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 129; and the *British Columbia Terms of Union, 1871*, s. 10.

1309 British Columbia also pleads laches in response to the plaintiff's claims of infringement of Aboriginal title and Aboriginal rights, breaches of fiduciary duty and fiduciary obligations and the claim for damages.

1310 It is important to note that the limitations defence is limited to the plaintiff's claim for infringement of Aboriginal title and rights. The Crown immunity defence is limited to the claims for breach of fiduciary duty and fiduciary obligations. The laches defence is directed to all of the foregoing, as well as the claim for damages.

a. Limitations

1311 British Columbia argues that provincial limitations legislation is constitutionally applicable to Indians as litigants and relies upon *M. (M.) v. Roman Catholic Church of Canada* (2001), 205 D.L.R. (4th) 253, 2001 MBCA 148 (Man. C.A.), clarified (2002), 208 D.L.R. (4th) 190, 2002 MBCA 12 (Man. C.A.), leave to appeal to the Supreme Court of Canada denied October 24, 2002, (2002), 184 Man. R. (2d) 319 (note) (S.C.C.); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135 (Ont. C.A.), at para. 241, leave to appeal to the Supreme Court of Canada denied [2001] 4 C.N.L.R. iv (note) (S.C.C.); *Stoney Tribal Council v. PanCanadian Petroleum Ltd.* (2000), [2001] 2 W.W.R. 442, 2000 ABCA 209 (Alta. C.A.).

1312 The issue here is whether the provincial limitations legislation is constitutionally applicable to a claim for infringement of Aboriginal title and rights. If the infringement can be justified, there is no claim and the limitation period will not apply. For this reason, the issue is narrowed to the application of the provisions of the *Limitation Act* to claims for unjustified infringement of Aboriginal rights, including Aboriginal title.

1313 The four-step analysis set out in *Morris*, discussed above in Section 19, is applicable to a consideration of the provisions of the *Limitation Act*. With respect to step one, the *Limitation Act* is valid provincial legislation and is not directed at any federal head of power. With respect to step two, there is no conflicting federal legislation. The real issue is whether the *Limitation Act* affects the core of a federal head of power.

1314 For the reasons I have already discussed in the section on constitutional issues, I conclude that British Columbia's *Limitation Act* is constitutionally inapplicable to claims for unjustified infringement of Aboriginal title. To conclude that the *Limitation Act* applies to such a claim would mean that with the passage of time and the application of the provisions of the *Act*, the Province could effectively extinguish Aboriginal title. Granting

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the Province the ability to extinguish Aboriginal title is contrary to law. Provincial laws that affect Aboriginal title lands go to the core of Indianness and do not apply to those lands. This is true even though the law purports to be of general application. In *Delgamuukw* Lamer C.J.C. said at paras. 177-178:

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.

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.

1315 In *Stoney Creek Indian Band v. British Columbia* (1998), [1999] 1 C.N.L.R. 192, 61 B.C.L.R. (3d) 131 (B.C. S.C.), Lysyk J. concluded that the *Limitation Act* did not apply to a claim for damages made by an Indian band arising out of the construction of a road across reserve land. While acknowledging the law in this area was not settled, Lysyk J. said at para. 69:

... the right to claim damages for interference with Indian reserve lands not only rests upon the right to possession of those lands, but is sufficiently integral to such possession as to share the same characterization for constitutional purposes. Therefore, the provisions of the Act upon which Alcan relies are constitutionally inapplicable.

1316 An appeal from this decision was allowed on the ground that it was not a proper case for disposition under the provisions of Rule 18A of the Rules of Court.

1317 The "scope of federal jurisdiction over Indians ... encompasses aboriginal rights, including the rights that are recognized and affirmed by s. 35(1)": *Delgamuukw* (S.C.C.) at para. 178. It follows that an unjustified infringement of a constitutionally protected Aboriginal right falls under the same protective umbrella. For these reasons, I conclude that but for s. 88 of the *Indian Act*, the provincial *Limitation Act* is constitutionally inapplicable to a claim for unjustified infringement of Aboriginal rights.

1318 The final step in the *Morris* analysis calls for a consideration of s. 88 of the *Indian Act*. For the reasons I have already discussed in Section 19 of this judgment, s. 88 of the *Indian Act* does not apply to Aboriginal title, infringement of Aboriginal title or to compensation for infringement of Aboriginal title.

1319 Aboriginal rights apart from title are a core federal matter under s. 91(24) of the *Constitution Act, 1867*. Section 88 of the *Indian Act* makes provincial "laws of general application ... applicable to and in respect

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of Indians in the province ...". The exceptions referred to in s. 88 do not apply in this instance and accordingly, I conclude that s. 88 does constitutionally invigorate the *Limitation Act*. As a result, the *Limitation Act* applies to claims of unjustified infringement of an Aboriginal right other than Aboriginal title. The principle of discoverability would be applicable and the limitation period would run only from the date when a party became aware of a cause of action. Accordingly, the period would begin to run from the time of the decision in *Sparrow*, namely May 31, 1990.

1320 Section 3(5) of the *Limitation Act* sets out the applicable limitation period as follows:

Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.

1321 Accordingly, the claims advanced in this case for unjustified infringement of Tsilhqot'in Aboriginal rights in the Trapline Territory are not statute barred because the action with respect to those claims was brought before the expiration of the limitation period. As the Brittany Triangle Action was not commenced until December 18, 1998, any claim for unjustified infringement of Tsilhqot'in Aboriginal rights in Tachelach'ed (Brittany Triangle) that arose prior to December 17, 1992 are statute barred.

1322 The decisions relied on by British Columbia, *M. (M.)* and *Stoney Tribal Council*, do not address Aboriginal title or Aboriginal rights. The first was an action for damages, the second, an action for an accounting and judgment for monies found to be due and owing. Neither went to any issues touching on the core of Indian-ness.

1323 *Chippewas of Sarnia* is not an authority for the general proposition which British Columbia asserts. In *Chippewas of Sarnia*, the Ontario Court of Appeal stated in *obiter* that a general limitations statute could bar a claim for damages arising from the loss of Aboriginal or treaty rights, citing *Blueberry River Indian Band*. The Court went on to hold that the limitations statute at issue did not and could not extinguish the Aboriginal title or treaty rights of the Chippewas because it did not evidence a clear and plain intent to do so.

1324 I do not agree that the *Blueberry River Indian Band* case supports the proposition that the British Columbia *Limitation Act* is constitutionally applicable to Tsilhqot'in title lands. Although the Court found the provisions of the *Limitation Act* applied to the dispute between the Band and the federal government, that case was brought in Federal Court. There, s. 39 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, expressly incorporates provincial limitation legislation into actions brought in Federal Court. Section 39(1) reads:

Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

1325 In *Roberts v. R.* (1999), 27 R.P.R. (3d) 157 (Fed. C.A.), Issac C.J. explained at para. 28:

... that when Parliament incorporates the law of another legislative jurisdiction by reference in its own legislation, the law so incorporated becomes Federal law and is to be applied as such, provided that all the conditions precedent to incorporation have been satisfied. Thus, in these actions, when subsection 39(1) directs that "the laws relating to prescription and the limitation in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in that province, the reference here must be to the relevant provisions of the *B.C. Limitation Act*. This Court is required to apply the *B.C.*

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Limitation Act, not as provincial law, but as federal law. This must be so, because the land in respect of which the actions have been brought are situated wholly within the province of British Columbia and the cause of action in each case is alleged to have arisen in that province.

[Footnotes omitted]

1326 For this reason, the constitutional applicability of the provincial *Limitation Act* did not arise in the *Blueberry River* case.

1327 Nor was the question answered in *Roberts*. In that case, the Federal Court of Appeal expressly declined to decide whether a provincial court in British Columbia trying an Aboriginal title claim could properly apply the *Limitation Act*. In *Roberts* (S.C.C.) at para. 114, the Court affirmed that:

Section 39(1) effectively incorporates by reference the applicable British Columbia limitation legislation, but the relevant provisions apply as federal law not as provincial law: *Blueberry River*, supra, at para. 107.

1328 In response to the Bands' argument that a provincial law could not extinguish an Aboriginal interest, a matter of exclusive federal legislative competence, the Court in *Roberts* (S.C.C.) stated at paras. 115-116:

Section 9 of the B.C. *Limitation Act* provides for extinguishment of the cause of action, but, as stated, it applies as federal law.

Parliament is entitled to adopt, in the exercise of its exclusive legislative power, the legislation of another jurisdictional body, as it may from time to time exist: *Coughlin v. Ontario (Highway Transport Board)*, [1968] S.C.R. 569 (S.C.C.); *Ontario (Attorney General) v. Scott* (1955), [1956] S.C.R. 137 (S.C.C.). This is precisely what Parliament did when it enacted what is now s. 39(1) of the *Federal Court Act*.

1329 In summary, I conclude that the British Columbia *Limitation Act* is constitutionally inapplicable to the plaintiff's claims of unjustified infringement of Aboriginal title and to any claim for damages arising out of an unjustified infringement of Aboriginal title. The *Limitation Act* does apply to the plaintiff's claims of unjustified infringement of Aboriginal rights by way of s. 88 of the *Indian Act*. The plaintiff's claims with respect to unjustified infringements of Aboriginal rights in the Trapline Territories are not barred by the passage of time as I find that the limitation period was postponed until the Supreme Court of Canada's decision in *Sparrow*. The plaintiff's claims with respect to unjustified infringements of Aboriginal rights in Tachelach'ed occurring prior to prior to December 17, 1992 are statute barred.

b. Laches

1330 British Columbia has pleaded laches in its statement of defence. No argument was advanced by British Columbia in support of that plea at the conclusion of the trial. I conclude that, on the whole of the evidence, a plea of laches cannot succeed. The plaintiff could not reasonably have brought these claims for Aboriginal title, infringement of Aboriginal title, and compensation for infringement of Aboriginal title, if the courts still considered that Aboriginal title throughout British Columbia was extinguished in the Colonial period prior to 1871. That was the view taken by the British Columbia courts and not varied by the Supreme Court of Canada in *Calder* through to and including the judgment of the trial judge in *Delgamuukw*. The tide began to turn with the judgment of the B.C. Court of Appeal in *Delgamuukw*, overruling the trial judge on this point.

1331 The plaintiff has not engaged in prolonged, inordinate or inexcusable delay, nor has the plaintiff ac-

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quiesced in the abandonment of Aboriginal title, nor given any grounds for belief that he and all Tsilhqot'in people ever abandoned their Aboriginal title. Finally, there is no evidence of prejudice to British Columbia occasioned by anything done or said by the plaintiff or the Tsilhqot'in people in relation to the Aboriginal title they have claimed.

c. Crown Immunity

1332 British Columbia argues that the Crown was immune from suit in respect of all causes of action in existence prior to August 1, 1974. Prior to 1974, a party seeking a remedy against the Crown was required to file a petition of right under the *Crown Procedure Act*, R.S.B.C. 1960, c. 89. The Lieutenant Governor had discretion to grant a fiat allowing the claim to proceed. British Columbia says that *Calder* is authority for the application of this principle to a case like this.

1333 The pleadings limit the plea of Crown immunity to the claims for breach of fiduciary duty and fiduciary obligations. I have declined to consider the issue of breach of fiduciary duty, favouring instead an analysis of the honour of the Crown and the Crown's duty to consult. In these circumstances the issue of Crown immunity does not arise.

29. Damages

1334 The plaintiff claims damages against British Columbia under two main heads of compensation:

- a) Compensation for infringements of Aboriginal title resulting from the authorization of timber harvesting activities which have taken place in the Claim Area. The plaintiff says that a resource has been removed from Tsilhqot'in Aboriginal title land and he seeks recovery for these pecuniary losses.
- b) Compensation for the infringement of Tsilhqot'in Aboriginal title resulting from British Columbia's imposition of a forestry regime on the Claim Area. The plaintiff says this regime is antithetical to the land management vision which Tsilhqot'in people have sought to implement. Further, that scheme has left Tsilhqot'in people under a constant threat of exploitation for which they are entitled to recover non-pecuniary damages.

1335 Given my inability to make a declaration of Tsilhqot'in Aboriginal title, the damage claim must be dismissed.

1336 I have found there is land inside and outside the Claim Area over which Tsilhqot'in Aboriginal title would prevail. Thus, any dismissal of the claim for damages is without prejudice to the right to renew these claims specific to Tsilhqot'in Aboriginal title land. The resources on Aboriginal title land belong to the Tsilhqot'in people and the unjustified removal of these resources would be a matter for appropriate compensation. It is not my intention to dismiss a valid claim for compensation where such a claim can be tied to Tsilhqot'in title land.

1337 Reconciliation must take these claims into account.

30. Reconciliation

1338 Throughout the course of the trial and over the long months of preparing this judgment, my consistent

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hope has been that, whatever the outcome, it would ultimately lead to an early and honourable reconciliation with Tsilhqot'in people. After a trial of this scope and duration, it would be tragic if reconciliation with Tsilhqot'in people were postponed through seemingly endless appeals. The time to reach an honourable resolution and reconciliation is with us today.

1339 *Black's Law Dictionary*, 8th ed., defines reconciliation as: "Restoration of harmony between persons or things that had been in conflict". The relationship between Aboriginal and non-Aboriginal Canadians has a troubled history. Fuelled by the promise of s. 35(1), the early part of this century has brought significant changes in government policies at both the provincial and federal levels. Thus, there is a kindling of hope and expectation that a just and honourable reconciliation with First Nations people will be achieved by this generation of Canadians.

1340 Unfortunately, the initial reluctance of governments to acknowledge the full impact of s. 35(1) has placed the question of reconciliation in the courtroom — one of our most adversarial settings. Courts struggle with the meaning of reconciliation when Aboriginal and non-Aboriginal litigants seek a determination regarding the existence and implications of Aboriginal rights. Lloyd Barber, speaking as Commissioner of the Indian Claims Commission, is quoted on this issue in *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at p. 203, quoting *A Report: Statements and Submissions* (Ottawa: Queen's Printer, 1977) at p. 2:

It is clear that most Indian claims are not simple issues of contractual dispute to be resolved through conventional methods of arbitration and adjudication. They are the most visible part of the much, much more complex question of the relationship between the original inhabitants of this land and the powerful cultures which moved in upon them.

1341 Courts are obliged to address this complex question in the context of their constitutional obligations. David Stack describes the nature of this obligation in "[The Impact of the RCAP on the Judiciary: Bringing Aboriginal Perspectives into the Courtroom](#)" (1999) 62 Sask. L. Rev. 471, at para. 44 (QL):

The courts' opportunity to advance the larger vision of justice [recognition of Aboriginal rights and self-government] comes from their constitutional obligation to interpret and enforce the Constitution, specifically s. 35(1) which reads:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

These words leave the courts with a wide discretion to protect, define, and recognize the rights of Aboriginals. In many cases, this gives courts the unenviable task of determining the kind of relationships that rights-bearing Aboriginals are to have with the larger non-Aboriginal society.

1342 Some authors have been critical of how Canadian courts have defined the process of reconciliation. For example, John Borrows in "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L.J. 615 (QL) states at para. 64:

Courts have read Aboriginal rights to lands and resources as requiring a reconciliation that asks much more of Aboriginal peoples than it does of Canadians. Reconciliation should not be a front for assimilation.

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Reconciliation should be embraced as an approach to Aboriginal-Canadian relations that also requires Canada to accede in many areas. Yet both legislatures and courts have been pursuing a course that, by and large, asks change only of Aboriginal peoples. Canadian institutions have been employing domesticating doctrines in their response to the [Royal Commission on Aboriginal Peoples]. This approach hinders Aboriginal choice in the development of their lands and resources, rather than enhancing it.

1343 In *Sparrow* Dickson C.J.C. and La Forest J. introduced the concept of reconciliation between Aboriginal peoples of Canada and the Crown in this way:

There is no explicit language in the provision [s. 35(1)] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). *In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.*

[Emphasis added]

1344 As addressed elsewhere in these reasons for judgment, the *Sparrow* test for justification of infringement of Aboriginal rights requires the Crown to prove both a valid legislative objective and respect for the Crown's fiduciary obligations to Aboriginal peoples: *Sparrow* at pp. 1113-1115. In other words, the concept of reconciliation introduced in *Sparrow* focused on working out a new relationship between federal power and federal duty as a result of the Crown's fiduciary relationship with Aboriginal peoples.

1345 The Court revisited its theory of reconciliation in the *Vanderpeet* trilogy: *Vanderpeet*, *Gladstone*, and *Smokehouse*. In defining the scope of Aboriginal rights protected by s. 35(1), Lamer C.J.C. re-interpreted the *Sparrow* theory of reconciliation (a means to reconcile constitutional recognition of Aboriginal rights with federal legislative power) as a means to work out the appropriate place of Aboriginal people within the Canadian state.

1346 In *Gladstone*, Lamer C.J.C. considered what kinds of legislative objectives might be sufficiently compelling and substantial to justify infringement. After quoting from *Vanderpeet*, Chief Justice Lamer stated the following in *Gladstone*, at para. 72:

In the context of the objectives which can be said to be compelling and substantial under the first branch of the *Sparrow* justification test, the import of these purposes is that their objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by aboriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of aboriginal prior occupation with the assertion of sovereignty by the Crown.

1347 This revised theory of reconciliation provided the rationale for the wide range of legislative objectives that could meet the compelling and substantial requirement laid down in *Sparrow*. Lamer C.J.C. continued at para. 73:

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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 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 a 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.

1348 The minority opinions of McLachlin J. (as she then was) in *Vanderpeet* and *Gladstone* address some of the more problematic aspects of Lamer C.J.C.'s judgments in the *Vanderpeet* trilogy. McLachlin J. characterized Lamer C.J.C.'s view of the purpose of s. 35(1) to achieve reconciliation as incomplete. In *Vanderpeet*, McLachlin J. stated at para. 230:

... 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.

McLachlin J. went on to state at para. 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. The 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 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.

1349 In the view of McLachlin J., reconciliation between Aboriginal and non-Aboriginal peoples could be achieved in a way that was more respectful of constitutional principles. She noted that Aboriginal and non-Aboriginal perspectives have historically been reconciled through treaties. McLachlin J. argued for reconciliation through negotiated settlements. In *Vanderpeet* at para. 313, she stated:

It is for the aboriginal peoples and 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 envisaged in *Sparrow*, as I perceive it, for reconciling the aboriginal and non-aboriginal 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

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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.

1350 The Court is clearly concerned with developing a theory of reconciliation that accords with Canada's identity as a constitutional democracy. However, the majority's link between its theory of reconciliation and the justification of infringements test described in *Vanderpeet* and *Gladstone* would appear to effectively place Aboriginal rights under a *Charter* s. 1 analysis. As McLachlin J. points out, this is contrary to the constitutional document, and arguably contrary to the objectives behind s. 35(1). The result is that the interests of the broader Canadian community, as opposed to the constitutionally entrenched rights of Aboriginal peoples, are to be foremost in the consideration of the Court. In that type of analysis, reconciliation does not focus on the historical injustices suffered by Aboriginal peoples. It is reconciliation on terms imposed by the needs of the colonizer.

1351 Lisa Dufraimont, in "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 U.T. Fac. L. Rev. (QL) explains at para. 24:

Like the broadening test for justification of infringement it informs, the discussion of reconciliation in *Gladstone* and *Delgamuukw* suggests that Aboriginal rights must give way when they conflict with public goals and interests. This idea of reconciliation is simply not a plausible articulation of the purpose of s. 35(1). Governments do not recognize and affirm minority rights for the benefit of the majority. Rather, the purpose of s. 35(1), as suggested in *Sparrow*, is remedial. Aboriginal rights have been constitutionalized precisely in order to promote a just settlement for Aboriginal peoples by strengthening and legitimizing their claims against the Crown.

1352 In *Delgamuukw*, Lamer C.J.C. affirmed and applied the *Gladstone* justification test to infringements of Aboriginal title. La Forest J. and L'Heureux-Dubé J. concurring, arrived at the same result in a separate judgment. McLachlin J. concurred with Lamer C.J.C., adding that she was "also in substantial agreement with the comments of Justice La Forest". In his judgment in *Delgamuukw*, Lamer C.J.C. expanded the list of justifiable infringements of Aboriginal title at para. 165:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of those 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.

1353 McLachlin C.J.C. wrote the unanimous judgment in *Haida Nation*. At para. 20, she revisited her vision of reconciliation through negotiated settlements, stating:

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 hon-

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ourable 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.

1354 McLachlin C.J.C. describes her vision of reconciliation at para. 32:

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

1355 Referring to the Court's earlier ideas on the role of reconciliation, she stated at para. 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.

1356 McLachlin C.J.C.'s concerns echo her dissent in *Vanderpeet*, where she disagreed that the goal of reconciliation permits the Crown to require a judicially authorized transfer of an Aboriginal right to non-Aboriginal people without the consent of Aboriginal people, without treaty and without compensation: see *Vanderpeet* at para. 310. McLachlin C.J.C.'s judgment in *Haida Nation* returns the focus to a theory of reconciliation which acknowledges the historical injustices suffered by Aboriginal peoples and places limits on the ability of the Crown to alter the content of the right claimed in the pre-proof stage. It is logical to conclude that, in the post-proof stage, the Crown's ability to alter or infringe upon an Aboriginal right would be faced with severe restrictions.

1357 In an ideal world, the process of reconciliation would take place outside the adversarial milieu of a courtroom. This case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process. Despite this fact, the question remains: how can this Court participate in the process of reconciliation between Tsilhqot'in people, Canada and British Columbia in these proceedings?

1358 Gordon Christie's comments on this issue, in "Aboriginality and Normativity, Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17 No. 2 C.J.L.S. 41 at pp. 69-70, are particularly thought provoking and helpful:

What role, in particular, should the judiciary be playing in this matter? The way forward is clear enough, if unpalatable to the judiciary. A Section One-like approach to justifying legislative interference with Aboriginal rights should never have been contemplated. The judiciary simply cannot justify this change to the law

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as it applies to Aboriginal peoples and their rights. Appeals to the need for the application of the rule of law are empty, as are notions that the Court requires such an approach to operate appropriately in a balanced constitutional democracy. As unpleasant as the resulting situation may be, Aboriginal rights, at this point in the process of reconciliation, must be accorded the sort of legal protection they demand — that of 'sure and unavoidable' rights. These would be the sorts of rights which operate to protect essential Aboriginal interests — in living according to the good ways, knowledge of which has been handed down from generation to generation.

The practical outcome of this should be clear — this would bring the governments of Canada to the negotiating table, and would give Aboriginal peoples the sort of strength they need to work out a fair accommodation, a resolution of the ills caused by centuries of colonialism. This is as it should be, for from the perspective of the theory and principles underlying the superstructure of Canadian society and Canadian law there is no other way to work out an appropriate place for Aboriginal peoples in contemporary society. For Canada to advance to maturity, for the social compact to welcome within all those currently living within Canada's geographic boundaries, Aboriginal peoples must be able to bargain their way into a fair constitutional contract. This can only be accomplished with recognition on the Canadian side of the table of the position occupied by Aboriginal peoples: they come to these negotiations in the same state they were in 500 years ago, as organized societies existing 'prior' to the assertion of Crown sovereignty, societies organized according to separate and distinct conceptions of the good and of how to lead good lives.

1359 In *Mikisew Cree* Binnie J. emphasized the importance of reconciliation at para. 1:

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies.

1360 Courts are not accustomed to taking into account "claims, interests and ambitions" in the process of reconciliation. In the course of a trial, a court will examine an entire body of evidence in an attempt to establish the factual truth in an objective manner. In an adversarial system, claims are dealt with to produce a win/lose result. Interest negotiations, designed to take opposing interests into account, have the potential to achieve a win/win result. Such an approach, in the context of consensual treaty negotiation, would provide the forum for a fair and just reconciliation.

1361 The inquiry into the modern expression of Aboriginal rights requires a court to look at contemporary practices and land use and then determine how this relates to pre-contact or pre-sovereignty practices. In *Bernard*, McLachlin C.J.C. suggested that the Court look to the pre-contact practice and then translate that practice into a modern right. Through this approach, some (but not all) of an Aboriginal group's contemporary interests will be considered.

1362 The Aboriginal interests considered by the courts are necessarily confined to the pleadings. The court must also take into account the interests and needs of the broader society which are not confined to the pleadings. This is what the test of justification requires. Regrettably, the adversarial system restricts the examination of Aboriginal interests that is needed to achieve a fair and just reconciliation.

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1363 Earlier in these Reasons for Judgment, I referred to an article by Professor Brian Slattery entitled "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255. In this article, Professor Slattery argues for the "Principles of Recognition and Reconciliation". He notes at p. 283 that "reconciliation must strike a balance between the need to remedy past injustices and the need to accommodate contemporary interests."

1364 I agree entirely with the views expressed by Professor Slattery at p. 286:

In other words, section 35 does not simply recognize a static body of aboriginal rights, whose contours may be ascertained by the application of general legal criteria to historical circumstances — what we have called historical rights. Rather, the section recognizes a body of generative rights, which bind the Crown to take positive steps to identify aboriginal rights in a contemporary form, with the participation and consent of the Indigenous peoples concerned.

1365 Professor Slattery points out at p. 281 that reconciliation cannot be achieved by the current process of translating an historical right into one that corresponds with a modern common law right. He writes, "such a process artificially constrains and distorts the true character of aboriginal title and risks compounding the historical injustices visited on Indigenous peoples". This case serves as an example of that conclusion. I fear, as he foretold, that "[f]ar from reconciling Indigenous peoples with the Crown," the conclusions I am driven to reach seem more "likely to exacerbate existing conflicts and grievances": Slattery at p. 281.

1366 Professor Slattery further argues that historical title "provides the point of departure for any modern inquiry and a benchmark for assessing the actions of colonial governments and the scope of Indigenous dispossession": Slattery at pp. 281-282. In his view, a number of "*Principles of Reconciliation* govern the legal effect of aboriginal title in modern times." He writes that these principles:

... take as their starting point the historical title of the Indigenous group, ... but they also take into account a range of other factors, such as the subsequent history of the lands in question, the Indigenous group's contemporary interests, and the interests of third parties and the larger society. So doing, they posit that historical aboriginal title has been transformed into a *generative right*, which can be partially implemented by the courts but whose full implementation requires the recognition of modern treaties.

1367 He continues by suggesting that the actions of courts have the potential to diminish the possibility of reconciliation ever occurring. He concludes at p. 282:

... the successful settlement of aboriginal claims must involve *the full and unstinting recognition of the historical reality of aboriginal title, the true scope and effects of Indigenous dispossession, and the continuing links between an Indigenous people and its traditional lands*. So, for example, to maintain that "nomadic" or "semi-nomadic" peoples had historical aboriginal title to only a fraction of the ancestral hunting territories, or to hold that aboriginal title could be extinguished simply by Crown grant, is to rub salt into open wounds. However, by the same token, *the recognition of historical title, while a necessary precondition for modern reconciliation, is not in itself a sufficient basis for reconciliation, which must take into account a range of other factors*. So, for example, to suggest that historical aboriginal title gives rise to modern rights that automatically trump third party and public interests constitutes an attempt to remedy one grave injustice by committing another.

1368 Courts should not be placed in this invidious position merely because governments at all levels, for successive generations, have failed in the discharge of their constitutional obligations. Inevitably this decision

2007 CarswellBC 2741, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112, [2008] B.C.W.L.D. 216, [2008] B.C.W.L.D. 213, [2008] B.C.W.L.D. 215, [2008] B.C.W.L.D. 212, [2008] B.C.W.L.D. 211, [2008] B.C.W.L.D. 209, [2008] B.C.W.L.D. 210, [2008] B.C.W.L.D. 214, [2008] B.C.W.L.D. 237, [2008] B.C.W.L.D. 240, [2008] B.C.W.L.D. 241, 65 R.P.R. (4th) 1

and others like it run the risk of rubbing salt into open wounds.

1369 The narrow role this court can play in defining Tsilhqot'in Aboriginal rights in the Claim Area lies in an application of the jurisprudence to the facts of this case. I can only hope that it will assist the parties in finding a contemporary solution that will balance Tsilhqot'in interests and needs with the interests and needs of the broader society.

1370 The application of Professor Slattery's "Principles of Recognition and Reconciliation" may assist in this process. At pp. 283-284, Professor Slattery suggests that the "Principles of Recognition" should have certain basic characteristics:

1) They should acknowledge the historical reality that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries," as Judson J. observed in the *Calder* case. They should not draw arbitrary distinctions between "settled", "nomadic", and "semi-nomadic" peoples but accept that *all* of the Indigenous peoples in Canada had historical rights to their ancestral homelands — the lands from which they drew their material livelihood, social identity, and spiritual nourishment — regardless whether they had developed conceptions of "ownership," "property," of "exclusivity," and without forcing their practices into conceptual boxes derived from English or French law.

2) They should take account of the long history of relations between Indigenous peoples and the British Crown, and the body of intersocietal law that emerged from those relations.

3) They should draw inspiration from fundamental principles of international law and justice, principles that are truly universal, and not grounded simply in rules that European imperial powers formulated to suit their own convenience, such as the supposed "principle of discovery".

4) They should envisage the continuing operation of customary law within the Indigenous group concerned. At the same time, they should explain the way in which the collective title of an Indigenous group relates to the titles of other Indigenous groups and to rights held under the general land system.

1371 This is, of course, not a task for a court. However, in the context of treaty negotiation, it strikes me as a convenient starting point. Recognition that Aboriginal people have historical rights to their ancestral homelands regardless of whether they had developed conceptions of "ownership," "property," or "exclusivity" quickly moves the debate to the real question: what interests are at stake and how are they to be reconciled?

1372 Professor Slattery further describes the "Principles of Reconciliation", as follows at pp. 284-285:

1) They should acknowledge the historical rights of Indigenous peoples to their ancestral lands under Principles of Recognition, as the essential starting point for any modern settlement.

2) They should explain how historical aboriginal rights were transformed into generative rights with the passage of time, and explain the rise of third party and other societal interests.

3) They should draw a distinction in principle between the "inner core" of generative aboriginal rights that may be implemented without negotiation in modern times, and a "penumbra" or "outer layer" that needs to be articulated in treaties concluded between the Indigenous people and the Crown.

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4) They should provide guidelines governing the accommodation of rights and interests held by third parties within the historical territories of Indigenous peoples.

5) They should create strong incentives for negotiated settlements to be reached within a reasonable period of time.

1373 I confess that early in this trial, perhaps in a moment of self pity, I looked out at the legions of counsel and asked if someone would soon be standing up to admit that Tsilhqot'in people had been in the Claim Area for over 200 years, leaving the real question to be answered. My view at this early stage of the trial was that the real question concerned the consequences that would follow such an admission. I was assured that it was necessary to continue the course we were set upon. My view has not been altered since I first raised the issue almost five years ago.

1374 At the end of the trial, a concession concerning an Aboriginal hunting and trapping right in the Claim Area was made by both defendants. As I have already noted, that concession brings with it an admission of the presence of Tsilhqot'in people in the Claim Area for over 200 years. This leaves the central question unanswered: what are the consequences of this centuries old occupation in the short term and in the long term, for Tsilhqot'in and Xenigwet'in people?

1375 I have come to see the Court's role as one step in the process of reconciliation. For that reason, I have taken the opportunity to decide issues that did not need to be decided. For example, I have been unable to make a declaration of Tsilhqot'in Aboriginal title. However, I have expressed an opinion that the parties are free to use in the negotiations that must follow.

1376 What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries.

1377 A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people. The recognition of the long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact.

1378 Given this basic recognition, how are the needs of a modern, rural, Indigenous people to be met? How can their contemporary needs and interests be balanced with the needs and interests of the broader society? That is the challenge that lies in the immediate future for Tsilhqot'in people, Canada and British Columbia.

1379 As a consequence of colonization and government policy, Tsilhqot'in people can no longer live on the land as their forefathers did. How is a former semi-nomadic existence, one that cannot be replicated in a modern Canada, to be given "cultural security and continuity" in this twenty-first century and beyond? Governments and Tsilhqot'in people must find an accommodation that reconciles the historical Tsilhqot'in place in Canada with the place of their neighbours who come from all corners of the world.

1380 Land is a critical component in the resolution of this dispute. The Xenigwet'in people have found sustenance and continuity in the lands surrounding Xenigwet'in (Nemah Valley). The various Tsilhqot'in Bands are

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separated by great distances and it is possible there will be competing interests amongst them that will have to be addressed.

1381 The land I have described in paragraph 959 may not address the interests of the Xení Gwet'in and the broader Tsilhqot'in community. There will undoubtedly be a need for adjustments, dependant on the nature of the interests both considered and accommodated leading to what the parties ultimately agree upon in a fair and just resolution of all outstanding claims.

1382 Reconciliation is a process. It is in the interests of all Canadians that we begin to engage in this process at the earliest possible date so that an honourable settlement with Tsilhqot'in people can be achieved.

Action allowed in part.

APPENDIX A — MAPS

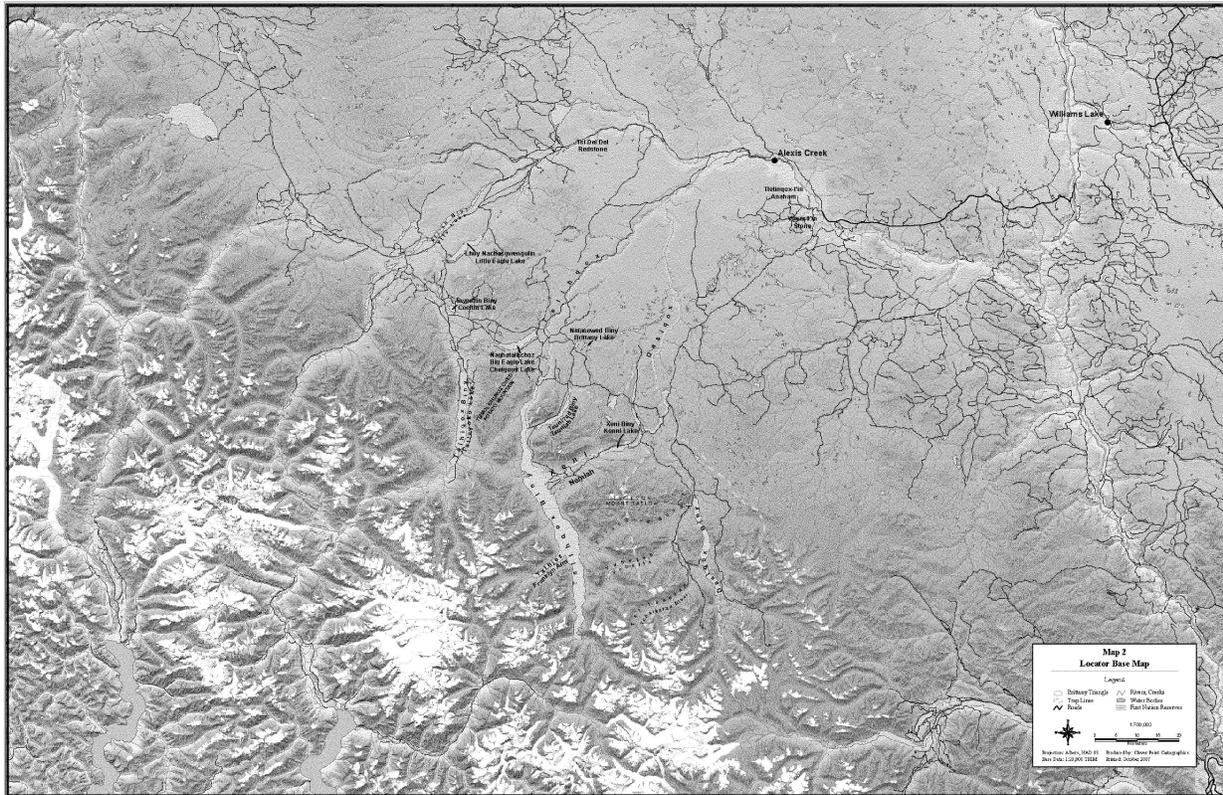
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*Generalized Map of British Columbia
showing the Claim Area.*



Map 1 British Columbia
Land Claim Area

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APPENDIX B — GLOSSARY OF TERMS

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A

?Achig (Tsilhqot'in chief)

Ahan (Tsilhqot'in person)

Alexis (Tsilhqot'in chief)

?Amed (Tsilhqot'in person)

Anaham (Tsilhqot'in chief)

?ash (snowshoes for men that have a point at the front end)

B

ba ts'egudah teghantsilh (bad luck; negatively affecting one's future)

bedzish (caribou)

Ben Chuy (Ben Chuny Biny, lake name)

Bendzi Biny (Puntzi Lake)

Biniwéd (cone fish trap)

binlagh (box fish trap)

binlh (snare)

Biny (lake)

Biny Gwechugh (Canoe Crossing)

Biny Gwetsel (crossing of the T@ilhqox, located north of the mouth of T@ilhqox Biny)

bisinchen (tool made of pine used to stretch and soften hides)

Bisqox (Beece Creek)

bixesdah (type of coat or wrap)

bixest'až (footwear, shoe that goes halfway over the ankle)

C

Ch'a Biny (Big Lagoon)

chel?ig (coyote)

Chel Letešgan (gravesite at Naghtaneqed)

chendi (lodgepole pine)

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Chežqox (Chilcotin River)

Chežich'ed Biny (Chezikut or Chilcotin Lake)

Ch'ežqud (creek located near /Edibiny, at the western end of Naghatalhcho^ Biny)

chinaž (otter)

Chinilgwan (Churn Creek)

chinšdad (silverweed)

ch'it'uz (birch bark)

D

daden (three pronged spear)

dadzagh (spear)

Dakelh (Carrier)

dan (summer)

dan ch'iz (fall)

Dan Qi Yex (Bidwell Creek)

Dants'ex (pink salmon moon, September)

Dasiqox (Taseko River)

Dasiqox Biny (Taseko Lake)

Dasiqox Tu Tl'az (southern reaches of Dasiqox Biny)

debi (bighorn sheep)

dechen ts'edilhtan (the laws of Tsilhqot'in ancestors, the law of the land)

dediny (groundhog or marmots)

Dediny Qox (Big Creek)

Dehtus (Dehtus of Anaham, Tsilhqot'in chief)

dek'any (rainbow trout)

Delgi Chosh (Big Lake)

delji-yaz (sucker)

Deni Belh Tenalqelh (location where the creek leaves the twin lakes)

Deni Dežtsan (Graveyard Valley)

deni gha dats'eyel (spear-like weapon)

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denish (kinnick kinnick)

deyen (spiritual healer, a person with special healing powers)

deyen nejede?ah (powerful deyen, able to assist in the recovery of a lost soul)

dīg (saskatoon berries)

dishugh delmid nagwaghižed (gathering held at Ts'uni/ad Biny every May)

dlig (squirrel)

Dželh Ch'ed (Snow Mountains).

E

?Edaz Biny (small high elevation lake)

?Edibiny (?Edi Biny, small lake south of Naghatalhcho^)

?eghulhts'en (spring)

?Elagi šeqan (mountain camping site)

?el bid qungh (lean to, shelter made with trees)

?Elegesi (Eagle Lake Henry)

?Elhghatish (/Elhxtatish, area between and including the Twin Lakes)

?Elhghatish Biny (Vedan Lake, one of the Twin Lakes)

?Elhixidlin (Taseko Mouth, confluence of the Dasiqox and T@ilhqox, Whitewater)

?elhñilñ (prairie chicken or wild grouse)

?Ena Ch'ež Nadilin (river in Eastern Trapline Territory)

?Ena Tsel (/Enaycel, Little Shuşwap or Little Salishans)

?Enes Biny (small high elevation lake)

?Eniyud (legendary wife of T@il/os)

?Eniyud Dželh (Niut Mountain)

?eqe?ats'et'in (trapping)

?Esdilagh (Alexandria)

?Esgany ?Anx (place where /Eniyud planted suntiny in Xeni)

?Esggidam (T@ilhqot'in ancestors)

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?esghunsh (bear tooth or avalanche lily)

?Eskish (Captain George)

?Esqi Dzul Teše?an (place name)

?Esqi Tintenisdzah (/Esqi Tintenyah, Child Got Lost)

?Estinlh (Tsilhqot'in person)

?ests'igwel (pine nuts or seeds)

?Et'an Ghintil (underground house site on the south shore of Xení Biny)

?etaslaz (spruce bark)

?etaslaz ts'i (spruce bark boat)

?Eweniwen (Johnny Setah)

G

gex (rabbit)

gex gej teghet'un (spring snare)

Gudish Nits'il?in (supreme being, creator, God)

Gughay Ch'ech'ed (place name)

guli (skunk)

Guli Dželh ?Elhghenbedaghilhdenz (Sa Ten, where skunk blew out the mountain)

Gwech'az Biny (place name)

Gwedats'ish (village site located at the north end of T@ilhqox Biny)

Gwedeld'en T'ay (Gwedeldon Dany, Indian Drum, where they drum on both sides)

Gwedzin (lands around Gwedzin Biny)

Gwedzin Biny (Quitze Lake or Cochin Lake)

Gweq'ez Dželh (Mount Nemiah)

Gwetex Natel?as (Red Mountain)

Gwetsilh (Siwash Bridge)

H

Hanlh dzany (T@ilhqot'in person, Mabel William's grandmother)

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I

?lghelqež (Tsilhqot'in person)

J

Jes Za (Chinook salmon moon, July)

Jididžay Biny (Ch'ididzay, Onion Lake)

K

K'anlh Gunlin (mountain camping site)

k'eles (dugout in which cooking took place)

Keogh (Tsilhqot'in chief)

k'i (willow)

L

Lha Ts'as'in (Klattessine, Tsilhqot'in person who fought in the Chilcotin War)

Lhin Desch'osh (Lendix'tcux, a mythical person, also a place name)

Lhiz Bay (location at the western end of Xeni)

Lhiz Bay Biny (small lake south of the Lezbye I.R. #6 boundary)

lhiz qwen yex (circular shaped underground pit house with dirt on top)

lhughembinlh (gill nets)

Lhuy Nachasgwengulin (Little Eagle Lake)

Lhuy Nentsul (Little Fish Lake)

lhušišch'el (whitefish)

Lutas (Tsilhqot'in person)

M

mus (moose)

N

Nabaš (resource gathering area, meadows between Naba@ D^elh and Te^tan)

Nabaš Dželh (Anvil Mountain)

nabi (muskrat)

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Nabi Tši Biny (Elkin Lake, one of the Twin Lakes)

Nachent'az Dželh (Boatswain Mountain)

Nadilin Yex (head of Dasiqox)

Naghatalhchoz (area around Naghatalhchoz Biny)

Naghatalhchoz Biny (Chelquoit Biny, Big Eagle Lake)

Naghatalhchoz Gwet'in (people of Naghatalhchoz, later merged with Xeni Gwet'in)

Naghataneqed (location at the east end of Xeni Biny)

Nagwentl'un (Anahim Lake, Nacoontloon, Area around Anahim Lake)

Nanats'eqish (narrows of Dasiqox Biny)

našlhiny (horse)

Natasewed Biny (Brittany Lake)

Natasewed Yeqox (Brittany Creek)

nat'i (tunulh, duck)

nats'ededah (hunting)

Niba ?Elhenaalqelh (near Captain George Town)

nelghes (dwarf blueberry)

nelh (form of sharp rock)

nembay (weasel)

Nemiah (Nemayah, Tsilhqot'in Chief)

nen (land)

Nenatats'ededilh (Four Mile Lake, Little Lagoon)

Nen Nalmelh (D^elh Nalmelh, Bald Mountain)

Nen Nuay Dilex Biny (Mainguy Lake)

nentses (moss)

net'e?ah (lahal, a game played with bones)

Nezulhtsin (Tsilhqot'in person, also known as Jamadis)

nilhish (kokanee, landlocked salmon)

Nilht'isiquz (Stikelan Creek Valley)

Nimayah (Nemiah, Tommy Luluha)

Nisewhichish (Tsilhqot'in person, father of /Esqw'alyan)

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nists'i (deer)

Nits'il?in (leader or chief)

Nistis'i Tsan Gha Nildzi (Shishan-qox, Lingfield Creek)

niyah qungh (nenyexqungh, rectangular housing structure, winter dwelling).

Nu Natase?ex (Mountain House)

nundi (lynx)

nundi-chugh (cougar)

Nunsulian (Nentsul /Eyen, father of Jack Lulua)

Nuśay Bighinlin (Nu@ay Bighilin)

nuwish (soapberries)

Nuxalk (Bella Coola)

Q

Qaq'ez (Kahkul, great-great grandfather of Chief William)

Qaju (Homalco, Kwakiutl)

qats'ay (basket woven with ts'u ghed spruce roots)

qats'ay bid (where the water is deep)

qiležmbanś (snowshoes for women)

Quill Quali Yaw (Quillquawyaw, Konkwaglia, Tsilhqot'in Chief)

S

sabay (dolly varden or bull trout)

Sadanx (legendary period of time that took place long ago)

Samadlin (McLean)

Sa Nagwedijan (location on the south side of Naghatalhchoz Biny)

Sa Yets'en (Minnie Charley Boy's adoptive grandmother)

śebay (mountain goat)

Sebay Talgog (place name)

Secwepemc (Shuswap)

śelhchugh (huckleberries)

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ses (bear)

Ses-Chi (place name)

Ses Ghen Tach'l (fishing site in Xeni)

sesjiz (marten)

Shishan-qox (Sheshanqox, Lingfield Creek or Mayfield Creek)

Shisan TI'ad (Mountain Sheep Basin)

Sit'ax (Louis Setah)

Stl'at'imx (Lillooet)

Sul Gunlin (location near the outlet of T@ilhqox Biny)

sunlh (dry pine needles)

sunt'iny (mountain potato, spring beauty)

T

Tachelach'ed (Brittany Triangle)

Tachi (mouth of Dan Qi Yex)

Tach'i Dilhgwenlh (Huckleberry Mountain)

Tach'idilin (Taghinlin, large creek that feeds into Talhiqox Biny)

Tahpitt (Tsilhqot'in chief)

Talhiqox Biny (Tatlayoko Lake)

Talhjez (Franklin Arm)

T'ašbay še'an TI'ad (Mount Moore, also known as Goat Mountain)

Tatl'ah Biny (Tatla Lake)

Tatl'ah Yeqox (Tatla Creek)

tenelh (type of basket used to collect suntiny)

Težtan (Fish Lake)

Tish Gulhdzinqox (Alexis Creek)

tišlagh (steelhead salmon)

Tižlin Dželh (Tullin Mountain)

TI'ebayi (location at the west end of Xeni Biny)

TI' ech' id Gunaz (Long Valley)

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Tl'egwezbens̓ (place name)

Tl'egwated (Kigli Holes, village site on the T̓eilhqox)

tl'edažulh (wild rice)

Tl'esqox (Toosey)

Tl'etates̓ (location at the east end of Xeni Biny)

Tl'etingoxt'in (Anaham Band)

tl'etsen (wild onion)

Tl'ets'inged (location roughly at the centre of the Xeni Biny)

T'ox T'ad (Vic's Mountain)

tsa (beaver)

tsachen (tiger lily)

Tsanlgen Biny (Chaunigan Lake)

Tselakoy (Tsilhqot'in person)

t̓selexay (swamp grass, wild hay)

Ts'eman T̓s'ežchi (Ts'eman T̓e'e^ location on the western bank of the T̓eilhqox)

Ts'eman Za (sockeye salmon moon, August)

T̓seš Nanint'i (camping site in Xeni)

T̓si Ch'ed Dižʔan (location at the eastern end of Naghatalhchoz Biny)

t̓si dek'ay (sharp rock used to chop wood)

T̓si Del Del (Redstone)

T̓si gheh neʔeten (location south of Naghatalhchoz Biny)

T̓silangh (fishing and winter encampment on the T̓eilhqox)

T̓si Lhizbed (upriver, over the hill from T̓eilangh)

T̓silhqot'in (Chilcotin, People of the T̓eilhqox)

T̓silhqox (Chilko River)

T̓silhqox Biny (Chilko Lake)

T̓silhqox D̓zelh (Chilko Mountain)

T̓silhqox Tu Tl'az (Edmond's Creek)

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Ts̓'íl'wós Dželh (Mount Tatlow)

Ts̓imol Ch'ed (Potato Mountain)

Ts̓i Nadenisdzay (location on Xení D'elh where /elht̓lh were snared)

Ts̓i Nentsen Tsinsh Dželh (Good Hope Mountain)

Ts̓'i Talh?ad (Rainbow Creek)

Ts̓i Teše?an (Tchaikazan Valley)

Ts'itse?ex Biny (Augers Lake)

Ts̓i Tex Biny (Murray Taylor Lake)

Ts̓i T'is Gunlin (crossing located upstream from Henry's Crossing)

tšits'ats'elagi (balsam root sunflower)

Ts'i Ts'elhts'ig (where the Dasiqox flows into Dasiqox Biny)

Tšiyi (T̓ei /Ezish D'elh, Cardiff Mountain)

ts'u ghed (spruce roots)

Tšulyu Ts'ilhed (Bull Canyon)

Ts'uni?ad (Tsuniah Valley)

Ts'uni?ad Dželh (Tsuniah Mountain)

Ts'un?iad Yeqox (Tsuniah Creek)

Ts'uni?ad Biny (Tsuniah Lake)

Ts'u Nintil (place name)

Ts'u Talh?ad (small peninsula at the north end of Ts'uni/ad Biny)

tunulh (duck)

t'uz (tree bark)

U

?undidanx (recent history)

X

Xenadi?an (Xenadi?an Nen, Small Graveyard Valley)

Xeni (Nemiah Valley)

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Xeni Biny (Konni Lake)

Xeni Dželh (Konni Mountain)

Xeni Gwet'in (people of the Nemiah Valley)

Xeni Yeḡox (Nemiah Creek)

xešt'l'un (fencing to bar a creek)

xex (geese)

Xexti (Tsilhqot'in burial place in Xenii)

Xexti Biny (Nemiah Lake)

xi (winter)

Y

Yanats'idlush (Impasse Ridge)

yedanx denilin (long time ago, prior to contact, pre- and post-sovereignty)

Yuhitah (Yohetta Valley)

Yunesit'in (Stone Reserve)

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