BRITISH COLUMBIA UTILITIES COMMISSION
PROJECT NO. 3698545/ORDER G-30-09
INQUIRY INTO BRITISH COLUMBIA'S
LONG-TERM TRANSMISSION INFRASTRUCTURE

BOOK OF AUTHORITIES
OF THE WE WAI KAI NATION AND THE HAISLA NATION
WITH RESPECT TO FIRST NATION CONSULTATION ISSUES

Submissions of the We Wai Kai Nation and the Haisla Nation on First Nation Consultation Issues

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Mikisew Cree First Nation v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69. http://www.canlii.org/en/ca/scc/doc/2005/2005scc69/2005scc69.html	Ex.B2-7 BCH Tab 5

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TAB 1

Bell Canada *v.* Canadian Telephone Employees Association, [2003] 1 S.C.R. 884, 2003 SCC 36

Bell Canada *Appellant*

v.

Communications, Energy and Paperworkers Union of Canada, Femmes Action and Canadian Human Rights Commission *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Canadian Labour Congress, Public Service Alliance of Canada and Canada Post Corporation *Interveners*

Indexed as: Bell Canada *v.* Canadian Telephone Employees Association

Neutral citation: 2003 SCC 36.

File No.: 28743.

2003: January 23; 2003: June 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the federal court of appeal

Administrative law — Procedural fairness — Institutional independence — Impartiality — Canadian Human Rights Tribunal — Canadian Human Rights Commission — Canadian Human Rights Act authorizing Commission to issue guidelines binding on Tribunal concerning "a class of cases" — Act also authorizing Tribunal Chairperson to extend terms of Tribunal members in ongoing inquiries — Whether Commission's guideline-making power compromises Tribunal's independence and impartiality — Whether Chairperson's power to extend appointments compromises Tribunal's independence and impartiality — Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 11, 27(2), 48.2(2) — Canadian Bill of Rights, S.C. 1960, c. 44, s. 2(e).

Bell brought a motion before a panel of the Canadian Human Rights Tribunal, which had been convened to hear complaints filed against Bell by female employees. Bell alleged that the Tribunal's independence and impartiality were compromised by two powers: first, the power of the Canadian Human Rights Commission to issue guidelines that are binding on the Tribunal concerning "a class of cases", and second, the power of the Tribunal Chairperson to extend Tribunal members' terms in ongoing inquiries.

The Tribunal rejected Bell's position and directed that the hearings should proceed. The Federal Court, Trial Division, allowed Bell's application for judicial review, holding that even the narrowed guideline power of the Commission unduly fettered the Tribunal, and that the Chairperson's discretionary power to extend appointments did not leave Tribunal members with a sufficient guarantee of tenure. The Federal Court of Appeal reversed that judgment.

Held: The appeal should be dismissed.

Neither of the two powers challenged by Bell compromises the procedural fairness of the Tribunal. Nor does either power contravene any applicable quasi-constitutional or constitutional principle.

The Tribunal should be held to a high standard of independence, both at common law and under s. 2(*e*) of the *Canadian Bill of Rights*. Its main function is adjudicative and it is not involved in crafting policy. However, as part of a legislative scheme for rectifying discrimination, the Tribunal serves the larger purpose of ensuring that government policy is implemented. The standard of independence applicable to it is therefore lower than that of a court. The Tribunal's function in implementing government policy must be kept in mind when assessing whether it is impartial.

The guideline power does not undermine the independence of the Tribunal. The requirement of independence pertains to the structure of tribunals and the relationship between their members and members of other branches of government. It does not have to do with independence of thought. Nor does the guideline power undermine the Tribunal's impartiality. The guidelines are a form of law. Being fettered by law does not render a tribunal partial, because impartiality does not consist in the absence of all constraints. The guideline power is limited; and the statute and administrative law contain checks to ensure that it is not misused.

The power to extend members' appointments does not undermine the independence of Tribunal members. This question is settled by *Valente*. Nor does the

power undermine the Tribunal's impartiality. A reasonable person informed of the facts would not conclude that members whose appointments were extended were likely to be pressured to adopt the Chairperson's views.

Cases Cited

Referred to: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Canada (Attorney General) v. Central Cartage Co.*, [1990] 2 F.C. 641; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146; *Liteky v. United States*, 510 U.S. 540 (1994); *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405; *R. v. Greenbaum*, [1993] 1 S.C.R. 674; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

Statutes and Regulations Cited

Canadian Bill of Rights, S.C. 1960, c. 44 [reproduced in R.S.C. 1985, App. III], s. 2(*e*).

Canadian Charter of Rights and Freedoms.

Canadian Human Rights Act, R.S.C. 1985, c. H-6 [am. 1998, c. 9], ss. 11(1), (4), 27(1), (2), (3), 48.1(3), 48.2(1), (2), 48.3, 48.6(1), 50(2).

Constitution Act, 1867, s. 96.

Equal Wages Guidelines, 1986, SOR/86-1082.

Statutory Instruments Act, R.S.C. 1985, c. S-22.

APPEAL from a judgment of the Federal Court of Appeal, [2001] 3 F.C. 481, 272 N.R. 50, 199 D.L.R. (4th) 664, 32 Admin. L.R. (3d) 1, 9 C.C.E.L. (3d) 228, [2001] F.C.J. No. 776 (QL), 2001 FCA 161, allowing the respondents' appeal from a judgment of the Trial Division, [2001] 2 F.C. 392, 190 F.T.R. 42, 194 D.L.R. (4th) 499, 26 Admin. L.R. (3d) 253, 5 C.C.E.L. (3d) 123, 39 C.H.R.R. D/213, 2000 C.L.L.C. ¶230-043, [2000] F.C.J. No. 1747 (QL), quashing the decision of the Canadian Human Rights Tribunal. Appeal dismissed.

Roy L. Heenan, *John Murray*, *Thomas Brady* and *David Stratas*, for the appellant.

Peter C. Engelmann, *Jula Hughes* and *Fiona Campbell*, for the respondent the Communications, Energy and Paperworkers Union of Canada.

No one appeared for the respondent Femmes Action.

Ian Fine and *Philippe Dufresne*, for the respondent the Canadian Human Rights Commission.

Donald J. Rennie and *Alain Préfontaine*, for the intervener the Attorney General of Canada.

Sara Blake and *Karin Rasmussen*, for the intervener the Attorney General of Ontario.

Mary F. Cornish and *Fay C. Faraday*, for the intervener the Canadian Labour Congress.

Andrew Raven and *David Yazbeck*, for the intervener the Public Service Alliance of Canada.

Brian A. Crane, Q.C., and *David Olsen*, for the intervener the Canada Post Corporation.

The judgment of the Court was delivered by

THE CHIEF JUSTICE AND BASTARACHE J. —

I. Introduction

1 This appeal raises the issue of whether the Canadian Human Rights Tribunal (the "Tribunal") lacks independence and impartiality because of the power of the Canadian Human Rights Commission (the "Commission") to issue guidelines binding on the Tribunal concerning "a class of cases", and the power of the Tribunal Chairperson to extend Tribunal members' terms in ongoing inquiries.

2 The appeal marks the latest proceeding in a lengthy dispute between Bell Canada ("Bell") and the respondents, dating back to the early 1990's, when two unions, Canadian Telephone Employees Association ("CTEA") and Communications, Energy and Paperworkers Union of Canada ("CEP"), and Femmes Action filed complaints against Bell alleging gender discrimination in the payment of wages, contrary to s. 11 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "Act"). More than a decade later, the complaints have yet to be heard by the Tribunal. Instead, the parties have been engaged in litigating Bell's challenges to the Tribunal, a process that has taken them to the Federal Court, Trial Division three times, to the Federal Court of Appeal twice, and now to this Court.

3 In our view, Bell's arguments are without merit. Neither of the two powers challenged by Bell compromises the procedural fairness of the Tribunal. Nor does either power contravene any applicable quasi-constitutional or constitutional principle. We would dismiss the appeal and have the complaints, finally, proceed before the Tribunal.

II. Background

4 Between 1990 and 1994, the CTEA, the CEP and Femmes Action, filed complaints with the Commission against Bell, alleging that Bell pays female employees in certain positions lower wages than male employees performing work of equal value, in violation of s. 11 of the Act. In May of 1996, the Commission asked the President of the Tribunal (now "Chairperson") to inquire into the complaints.

5 The matter quickly became complicated. Bell applied for judicial review of the Commission's decision to refer the complaints to the Tribunal. The Federal Court, Trial Division granted Bell's application and quashed the Commission's decision: *Bell Canada v. Communications, Energy and Paperworkers Union of Canada* (1998), 143 F.T.R. 81. On appeal, the Federal Court of Appeal reversed this judgment and restored the Commission's decision: [1999] 1 F.C. 113. Leave to appeal to this Court was sought by Bell, but was denied: [1999] 2 S.C.R. v.

6 While this was occurring, a panel of Tribunal members was appointed to inquire into the original complaints. Bell brought a motion before the panel urging that the Tribunal was institutionally incapable of providing a fair hearing in accordance with the principles of natural justice. The panel dismissed the motion: *Canadian Telephone Employees Association v. Bell Canada*, Can. H.R. Trib., June 4, 1997.

7 Bell then applied for judicial review of the panel's decision. The Federal Court, Trial Division quashed the panel's decision: *Bell Canada v. Canadian Telephone Employees Assn.*, [1998] 3 F.C. 244, and ordered that there be no further proceedings in the matter until the Act had been satisfactorily amended by the legislature. At that time, the Act differed from the current legislation in two relevant respects. Firstly, it was the Minister of Justice and not the Tribunal Chairperson to whom the Act gave the discretionary power to extend Tribunal members' appointments beyond their expiry dates. McGillis J. held that, as a result, Tribunal members lacked sufficient security of tenure. Secondly, the Commission's guideline power was broader than it now is, permitting the Commission to make guidelines concerning the application of the Act in a particular case, and not only in "a class of

cases". McGillis J. expressed reservations about this power, stating that it would be preferable if the guidelines were non-binding.

8 The judgment of McGillis J. was appealed to the Federal Court of Appeal, but the appeal was adjourned *sine die* on June 1, 1999, in light of amendments to the Act: (1999), 246 N.R. 368. The amendments transferred the power to extend appointments of Tribunal members to the Tribunal Chairperson, and limited the Commission's guideline power so that it became only a power to issue guidelines respecting the interpretation of the Act "in a class of cases": S.C. 1998, c. 9, s. 20(2).

9 At this time, the Commission, together with CTEA, CEP and Femmes Action, urged the Chairperson of the Tribunal to set formal hearing dates for the panel, so that the original complaints could at last be heard. Bell resisted, and a case-planning meeting before the Tribunal's Vice-chairperson was arranged at which Bell and the respondents put forward their positions. Bell argued that the 1998 amendments did not eliminate the problems of procedural fairness that had been identified by McGillis J. The Vice-chairperson rejected Bell's position, and, in an interim decision of April 26, 1999, directed that the hearings should proceed: Can. H.R. Trib., Decision No. 1 in file T503/2098.

10 Bell then applied for judicial review of this decision. The Federal Court, Trial Division allowed the application: *Bell Canada v. Canada (Human Rights Commission)*, [2001] 2 F.C. 392. Tremblay-Lamer J. held that even the narrowed guideline power of the Commission unduly fettered the Tribunal, and that the Chairperson's discretionary power to extend appointments did not leave Tribunal members with a sufficient guarantee of tenure.

11 The Commission, CTEA, CEP and Femmes Action appealed. Before the Federal Court of Appeal, Bell argued that the Tribunal violated not only the requirements of procedural fairness, but also Bell's right to a fair hearing under s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III). The Federal Court of Appeal rejected Bell's view that the Tribunal violated the requirements of procedural fairness, and held it unnecessary to consider the arguments based on the *Canadian Bill of Rights*: [2001] 3 F.C. 481, 2001 FCA 161.

12 It is on appeal from this decision of the Federal Court of Appeal that the parties now appear before this Court — thirteen years after the filing of the respondents' original complaints, which still have yet to be heard.

III. Relevant Statutory Provisions

13 *Canadian Human Rights Act*, R.S.C. 1985, c. H-6

> **11.** (1) It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.
>
> . . .
>
> (4) Notwithstanding subsection (1), it is not a discriminatory practice to pay to male and female employees different wages if the difference is based on a factor prescribed by guidelines, issued by the Canadian Human Rights Commission pursuant to subsection 27(2), to be a reasonable factor that justifies the difference.
>
> . . .
>
> **27.** . . .

(2) The Commission may, on application or on its own initiative, by order, issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases described in the guideline.

(3) A guideline issued under subsection (2) is, until it is revoked or modified, binding on the Commission and any member or panel assigned under subsection 49(2) with respect to the resolution of a complaint under Part III regarding a case falling within the description contained in the guideline.

48.2 (1) The Chairperson and Vice-chairperson are to be appointed to hold office during good behaviour for terms of not more than seven years, and the other members are to be appointed to hold office during good behaviour for terms of not more than five years, but the Chairperson may be removed from office by the Governor in Council for cause and the Vice-chairperson and the other members may be subject to remedial or disciplinary measures in accordance with section 48.3.

(2) A member whose appointment expires may, with the approval of the Chairperson, conclude any inquiry that the member has begun, and a person performing duties under this subsection is deemed to be a part-time member for the purposes of sections 48.3, 48.6, 50 and 52 to 58.

50. . . .

(2) In the course of hearing and determining any matter under inquiry, the member or panel may decide all questions of law or fact necessary to determining the matter.

Canadian Bill of Rights, S.C. 1960, c. 44 (reproduced in R.S.C. 1985, App. III)

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

. . .

(*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

IV. Issues

14 By order of the Chief Justice dated July 10, 2002, the following constitutional questions were stated for the Court's consideration:

(1) Are ss. 27(2) and (3) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable or inapplicable?

(2) Are ss. 48.1 and 48.2 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable and inapplicable?

V. Analysis

15 Bell argues that the power of the Commission to issue guidelines binding on the Tribunal, under ss. 27(2) and 27(3), compromises the Tribunal's independence because it places limits upon how the Tribunal can interpret the Act, and undermines the Tribunal's impartiality because the Commission is itself a party before the Tribunal. Similarly, Bell argues that the discretionary power of the Tribunal Chairperson to extend members' terms for ongoing inquiries, under ss. 48.2(1) and 48.2(2), compromises the Tribunal's independence because it threatens their security of tenure, and undermines the Tribunal's impartiality because the Chairperson may pressure such members to reach outcomes that he or she favours.

16 Since Bell's arguments draw upon both independence and impartiality, it will be useful to begin by discussing the distinction between these two requirements of procedural fairness.

A. *The Distinction Between Independence and Impartiality*

17 The requirements of independence and impartiality at common law are related. Both are components of the rule against bias, *nemo debet esse judex in propria sua causa*. Both seek to uphold public confidence in the fairness of administrative agencies and their decision-making procedures. It follows that the legal tests for independence and impartiality appeal to the perceptions of the reasonable, well-informed member of the public. Both tests require us to ask: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? (See *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, *per* de Grandpré J., dissenting.)

18 The requirements of independence and impartiality are not, however, identical. As Le Dain J. wrote in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685 (cited by Gonthier J. in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 41):

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" . . . connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

19 As noted above, Bell challenges both the Tribunal's independence and its impartiality. However, the above discussion of the difference between the two requirements suggests that one of Bell's challenges involves a category mistake. Bell's claim that the guideline power undermines the Tribunal's independence is based upon the contention that it threatens members' independence of thought. But the requirement of independence pertains to the structure of tribunals, and to the relationship between their members and others, including members of other branches of government, such as the executive. The test does not have to do with independence of thought. A tribunal must certainly exercise independence of thought, in the sense that it must not be unduly influenced by improper considerations. But this is just another way of saying that it must be impartial. Bell's only real objection to the guideline power, then, is that it leaves the Tribunal insufficiently impartial.

20 We will look first at this objection to the guideline power, and will then turn to Bell's two objections to the power of the Chairperson to extend appointments. Before doing so, however, we must determine the precise content of the requirements of impartiality and independence that apply to the Tribunal. How high a degree of independence is required? And what constitutes impartiality in this particular context?

B. *Content of the Requirements of Procedural Fairness Applicable to the Tribunal*

21 The requirements of procedural fairness — which include requirements of independence and impartiality — vary for different tribunals. As Gonthier J. wrote in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 323-24: "the rules of natural justice do not have a fixed content irrespective of the nature of the tribunal and of the institutional constraints it faces". Rather, their content varies. As

Cory J. explained in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636, the procedural requirements that apply to a particular tribunal will "depend upon the nature and the function of the particular tribunal" (see also *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 82, and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 21-22, *per* L'Heureux-Dubé J.). As this Court noted in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52, administrative tribunals perform a variety of functions, and "may be seen as spanning the constitutional divide between the executive and judicial branches of government" (para. 24). Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence (see *Newfoundland Telephone*, at p. 638, *per* Cory J., and *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.)).

22 To say that tribunals span the divide between the executive and the judicial branches of government is not to imply that there are only two types of tribunals — those that are quasi-judicial and require the full panoply of procedural protections, and those that are quasi-executive and require much less. A tribunal may have a number of different functions, one of which is to conduct fair and impartial hearings in a manner similar to that of the courts, and yet another of which is to see that certain

government policies are furthered. In ascertaining the content of the requirements of procedural fairness that bind a particular tribunal, consideration must be given to all of the functions of that tribunal. It is not adequate to characterize a tribunal as "quasi-judicial" on the basis of one of its functions, while treating another aspect of the legislative scheme creating this tribunal — such as the requirement that the tribunal follow interpretive guidelines that are laid down by a specialized body with expertise in that area of law — as though this second aspect of the legislative scheme were external to the true purpose of the tribunal. All aspects of the tribunal's structure, as laid out in its enabling statute, must be examined, and an attempt must be made to determine precisely what combination of functions the legislature intended that tribunal to serve, and what procedural protections are appropriate for a body that has these particular functions.

23 The main function of the Canadian Human Rights Tribunal is adjudicative. It conducts formal hearings into complaints that have been referred to it by the Commission. It has many of the powers of a court. It is empowered to find facts, to interpret and apply the law to the facts before it, and to award appropriate remedies. Moreover, its hearings have much the same structure as a formal trial before a court. The parties before the Tribunal lead evidence, call and cross-examine witnesses, and make submissions on how the law should be applied to the facts. The Tribunal is not involved in crafting policy, nor does it undertake its own independent investigations of complaints: the investigative and policy-making functions have deliberately been assigned by the legislature to a different body, the Commission.

24 The fact that the Tribunal functions in much the same way as a court suggests that it is appropriate for its members to have a high degree of independence

from the executive branch. A high degree of independence is also appropriate given the interests that are affected by proceedings before the Tribunal — such as the dignity interests of the complainant, the interest of the public in eradicating discrimination, and the reputation of the party that is alleged to have engaged in discriminatory practices. There is no indication in the Act that the legislature intended anything less than a high degree of independence of Tribunal members. Members' remuneration is fixed by the Governor in Council, and is not subject to their performance on the Tribunal: s. 48.6(1). Members hold office for a fixed term of up to five years (or up to seven years, in the case of the Chairperson and Vice-chairperson) (s. 48.2(1)); and their terms may only be extended to enable them to finish a hearing that they have already commenced. Further, the Chairperson is removable only for cause; and before a member is disciplined or removed, the Chairperson may request the Minister of Justice to look into the situation, who in turn may request the Governor in Council to appoint a judge to conduct a full inquiry (s. 48.3). All of these features of the statutory scheme suggest that the legislature intended the Tribunal to exhibit a high degree of independence from the executive branch.

25 We turn now to impartiality. The same test applies to the issue of impartiality as applies to independence (*R. v. Lippé*, [1991] 2 S.C.R. 114, at p. 143, *per* Lamer C.J., citing *Valente*, *supra*, at pp. 684 and 689). Whether the Tribunal is impartial depends upon whether it meets the test set out by de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at p. 394: would a well-informed person, viewing the matter realistically and practically, have a reasonable apprehension of bias in a substantial number of cases? As Lamer C.J. stated in *Lippé*, allegations of institutional bias can be brought only where the impugned factor will give a fully

informed person a reasonable apprehension of bias in a substantial number of cases (p. 144).

26 In answering this question, we must attend not only to the adjudicative function of the Tribunal, but also to the larger context within which the Tribunal operates. The Tribunal is part of a legislative scheme for identifying and remedying discrimination. As such, the larger purpose behind its adjudication is to ensure that governmental policy on discrimination is implemented. It is crucial, for this larger purpose, that any ambiguities in the Act be interpreted by the Tribunal in a manner that furthers, rather than frustrates, the Act's objectives. For instance, as the intervener Canadian Labour Congress argued before this Court, it would be counterproductive if the Tribunal were, in pay equity disputes, to compare the value of different forms of work using a method that itself rests on discriminatory attitudes. This would perpetuate discrimination, rather than helping to eradicate it. In endowing the Commission with the power to issue interpretive guidelines, and in binding the Tribunal to observe these guidelines, the legislature has attempted to guard against this possibility. The Act therefore evinces a legislative intent, not simply to establish a Tribunal that functions by means of a quasi-judicial process, but also to limit the interpretive powers of the Tribunal in order to ensure that the legislation is interpreted in a non-discriminatory way. The fact that the legislature regarded such limits as necessary for the fulfilment of the ultimate purpose of the Act must be borne in mind in determining precisely which sorts of fetters on the Tribunal's decision-making power adversely affect its impartiality, and which do not.

27 Our analysis has, thus far, looked to the statute and its overall purpose in determining the appropriate content for the requirements of independence and

impartiality that apply to the Tribunal. However, the content of the requirements of procedural fairness applicable to a given tribunal depends not only upon the enabling statute but also upon applicable quasi-constitutional and constitutional principles.

28 Here, the *Canadian Bill of Rights*, quasi-constitutional legislation, applies. Section 2(*e*) of the *Canadian Bill of Rights* requires that parties be given a "fair hearing in accordance with the principles of fundamental justice". Canadian courts have held that the content of s. 2(*e*) is established by reference to common law principles of natural justice (*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 229-30; *Canada (Attorney General) v. Central Cartage Co.*, [1990] 2 F.C. 641 (C.A.), at pp. 663-64). As the parties in the case at bar did not suggest that the guarantees of independence and impartiality under s. 2(*e*) would in this case differ from the common law requirements of procedural fairness, it is unnecessary for us here to devote separate discussion to the *Canadian Bill of Rights*.

29 Bell also argues that the Tribunal is bound by a constitutional principle — the "unwritten principle of judicial independence" — which confers on it the same degree of independence as a court established under s. 96 of the *Constitution Act, 1867*: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. Bell presents no authority for this argument. As an administrative tribunal subject to the supervisory powers of s. 96 courts, the Tribunal does not have to replicate all features of a court. As discussed above, the legislature has conferred a high degree of independence on the Tribunal, stopping short of constituting it as a court, but nevertheless supporting it by safeguards adequate to its function.

30 Bell suggests, in the alternative, that the constitutional principle applies and holds the Tribunal to the standard of common law procedural fairness. Since, as discussed below (at para. 53), the common law standard is met, this submission does not advance Bell's argument.

31 This discussion shows that the Tribunal, though not bound to the highest standard of independence by the unwritten constitutional principle of adjudicative independence, must act impartially and meet a relatively high standard of independence, both at common law and under s. 2(*e*) of the *Canadian Bill of Rights*.

32 We turn now to Bell's challenges to the Tribunal.

C. *The Guideline Power*

33 Bell alleges that the Commission's power to issue binding guidelines regarding the proper interpretation of the Act undermines the Tribunal's impartiality. In Bell's words, this provision "usurps the power of the Tribunal to make its own decisions concerning the interpretation and application of the Act". Moreover, Bell argues, it is problematic that the Commission, the body that directs the Tribunal in its interpretation of the Act, also appears before the Tribunal as a party.

34 It is unclear exactly what objection Bell is making here. On one reading, Bell's objection lies simply with the fact that the Tribunal is "fettered" — that is, that it does not have full freedom to interpret the Act in whatever manner that it wishes, unconstrained by any other body. On a second reading, the objection is rather that the fact that the Commission has the power to issue binding guidelines may make the

Tribunal more likely to favour the Commission in the proceedings before it. On a third reading, the objection is simply to the fact that Parliament has placed in one and the same body the functions of investigating complaints, formulating guidelines, and acting as prosecutor in hearings before the Tribunal. The objection is that this overlap of functions itself gives rise to a reasonable apprehension of bias. Finally, on a fourth reading, Bell is objecting that the Commission may use its guideline power to manipulate the outcome of a particular case, to ensure that it succeeds as prosecutor. We shall consider each of these versions of the objection, in turn.

35 In oral argument, counsel for Bell stated repeatedly that the guideline power "fetters" the Tribunal in its application of the Act. This assumes that the sole mandate of the Tribunal is to apply the Act, and not also to apply any other forms of law that the legislature has deemed relevant — such as guidelines. This assumption is mistaken. If the guidelines issued by the Commission are a form of law, then the Tribunal is bound to apply them, and it is no more accurate to say that they "fetter" the Tribunal than it is to suggest that the common law "fetters" ordinary courts because it prevents them from deciding the cases before them in any way they please.

36 It might be contended that ss. 27(2) and 27(3) of the Act do not adequately empower the Commission to issue valid subordinate legislation, and that consequently, the guidelines are not "law". In our view, this view is incorrect. The guidelines issued by the Commission under the Act are indistinguishable from regulations issued by other administrative bodies (see *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.), at paras. 136-41, *per* Evans J., as he then was). They are, like regulations, of general application: indeed, under the amended s. 27(2), they must pertain always to "a class of cases". Like regulations, the Commission's

guidelines are subject to the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, and must be published in the *Canada Gazette*. Moreover, the process that is followed in formulating particular guidelines resembles the legislative process, involving formal consultations with interested parties and revision of the draft guidelines in light of these consultations. The *Equal Wages Guidelines, 1986*, SOR/86-1082, for instance, were the result of consultation with some 70 organizations, including Bell. The Commission met with all organizations who requested a meeting; and, as a direct result of the consultation process, Commission staff made changes to the draft guidelines prior to their submission to the Commission for approval.

37 While it may have been more felicitous for Parliament to have called the Commission's power a power to make "regulations" rather than a power to make "guidelines", the legislative intent is clear. A functional and purposive approach to the nature of these guidelines reveals that they are a form of law, akin to regulations. It is also worth noting that the word used in the French version of the Act is *ordonnance* — which leaves no doubt that the guidelines are a form of law.

38 The objection that the guideline power unduly fetters the Tribunal overlooks the fact that guidelines are a form of law. It also mistakenly conflates impartiality with complete freedom to decide a case in any manner that one wishes. Being fettered by law does not render a tribunal partial, because impartiality does not consist in the absence of all constraints or influences. Rather, it consists in being influenced only by relevant considerations, such as the evidence before the Tribunal and the applicable laws. As Scalia J. pointed out in *Liteky v. United States*, 510 U.S. 540 (1994), at p. 550, the words "bias" and "partiality" "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either

because it is undeserved, or because it rests upon knowledge that the subject ought not to possess" (emphasis in the original). Similarly, as Cory J. emphasized in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 119, not all predispositions amount to "bias". Predispositions that simply reflect applicable law do not undermine impartiality. On the contrary, they help to preserve it. Hence, the fact that the Tribunal must apply all relevant law, including guidelines formulated by the Commission, does not on its own raise a reasonable apprehension of bias.

39 The second version of Bell's objection is that the Tribunal is more likely to favour the Commission during a hearing because the Commission has the power to issue guidelines that bind it. It is not evident to us why this would be so. When the Commission appears before the Tribunal, it is in no different a position from any representative of the government who appears before an administrative board or court. The public does not, in other contexts, assume that a decision-maker will favour submissions by government representatives simply because the decision-maker must apply laws that the government has made. The Tribunal seems no more likely to be biased in favour of the Commission because the Commission provides the Tribunal's guidelines than it is likely to be biased in favour of Bell because Bell provides the Tribunal's phone service.

40 On a third interpretation, Bell objects that Parliament has placed in one and the same body the function of formulating guidelines, investigating complaints, and acting as prosecutor before the Tribunal. Bell is correct in suggesting that the Commission shares these functions. However, this overlapping of different functions in a single administrative agency is not unusual, and does not on its own give rise to a reasonable apprehension of bias (see *Régie des permis d'alcool*, *supra*, at paras. 46-

48, *per* Gonthier J.; *Newfoundland Telephone*, *supra*, at p. 635, *per* Cory J.; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301). As McLachlin C.J. observed in *Ocean Port*, *supra*, at para. 41, "[t]he overlapping of investigative, prosecutorial and adjudicative functions in a single agency is frequently necessary for [an administrative agency] to effectively perform its intended role".

41 Indeed, it may be that the overlapping of functions in the Commission is the legislature's way of ensuring that both the Commission and the Tribunal are able to perform their intended roles. In *Public Service Alliance*, *supra*, Evans J. noted that although it was unusual for Parliament to have conferred the power to make subordinate legislation on the Commission and not the Governor in Council, Parliament must have contemplated that "the expertise that the Commission will have acquired in the discharge of its statutory responsibilities for human rights research and public education, and for processing complaints up to the point of adjudication" (para. 140) was necessary in the formulation of the guidelines, and was more important than certain other goals. In our view, Evans J.'s conjecture regarding Parliamentary intent is correct. The Commission is responsible, among other things, for maintaining close liaisons with similar bodies in the provinces, for considering recommendations from public interest groups and any other bodies, and for developing programs of public education (s. 27(1)). These collaborative and educational responsibilities afford it extensive awareness of the needs of the public, and extensive knowledge of developments in anti-discrimination law at the federal and provincial levels. Placing the guideline power in the hands of the Commission may therefore have been Parliament's way of ensuring that the Act would be interpreted in a manner that was sensitive to the needs of the public and to developments across the country, and hence,

that it would be interpreted by the Tribunal in the manner that best furthered the aims of the Act as a whole.

42 This point is related to our earlier discussion of the importance of considering the aims of the Act as a whole, in assessing whether the requirement of impartiality has been met. We noted there that the Act's ultimate aim of identifying and rectifying instances of discrimination would only be furthered if ambiguities in the Act were interpreted in a manner that furthered, rather than frustrated, the identification of discriminatory practices. If, as the Act suggests, this can best be accomplished by giving the Commission the power to make interpretive guidelines that bind the Tribunal, then the overlapping of functions in the Commission plays an important role. It does not result in a lack of impartiality, but rather helps to ensure that the Tribunal applies the Act in the manner that is most likely to fulfill the Act's ultimate purpose.

43 We note in passing that, given the relatively small volume of s. 11 equal pay cases adjudicated by the Tribunal, the promulgation of guidelines by the Commission has likely provided parties with a sense of their rights and obligations under the Act in a more efficient and clearer way than would an incremental development of informal guidelines by the Tribunal itself, through its decisions in particular cases.

44 Bell's real objection may be that placing the guideline power and the prosecutorial function in a single agency allows the Commission to manipulate the outcome of a hearing in its favour.

45 This version of Bell's objection might have been stronger had Bell provided some evidence that, in practice, the Commission had attempted to use the guidelines to influence the Tribunal's views toward it (see *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405, and *Matsqui Indian Band*, *supra*, at paras. 117-24, *per* Sopinka J.). No such evidence was provided in this case. Indeed, since the only guidelines that apply to the complaints brought against Bell are the *Equal Wages Guidelines, 1986*, which were introduced several years before the complaints against Bell were brought, it is difficult to see how these guidelines could have been formulated with the aim of unduly influencing the Tribunal against Bell.

46 In suggesting that the Commission could misuse its guideline power in this way, and that the misuse could remain undetected, Bell seems to be overestimating the breadth of the guideline power. Indeed, counsel for Bell suggested in oral argument that the guideline power would permit the Commission effectively to repeal provisions of the Act. Counsel also argued that the guideline power might be used to strip away any procedural protections guaranteed in the Act, and that the Tribunal has no power to "escape the fetters of any guidelines imposed on it by declaring them *ultra vires* the Commission".

47 As the Commission has readily acknowledged, the guideline power is constrained. The Commission, like other bodies to whom the power to make subordinate legislation has been delegated, cannot exceed the power that has been given to it and is subject to strict judicial review: *R. v. Greenbaum*, [1993] 1 S.C.R. 674. The Tribunal can, and indeed must, refuse to apply guidelines that it finds to be *ultra vires* the Commission as contrary to the Commission's enabling legislation, the Act, the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*.

The Tribunal's power to "decide all questions of law or fact necessary to determining the matter" under s. 50(2) of the Act is clearly a general power to consider questions of law, including questions pertaining to the *Charter* and the *Canadian Bill of Rights*: see *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854. No invalid law binds the Tribunal. Moreover, the Commission's guidelines, like all subordinate legislation, are subject to the presumption against retroactivity. Since the Act does not contain explicit language indicating an intent to dispense with this presumption, no guideline can apply retroactively. This is a significant bar to attempting to influence a case that is currently being prosecuted before the Tribunal by promulgating a new guideline. Finally, any party before the Tribunal could challenge a guideline on the basis that it was issued by the Commission in bad faith or for an improper purpose; and no guideline can purport to override the requirements of procedural fairness that govern the Tribunal.

48 In addition to these factors, there are specific indications in the Act that the legislature intended the scope of the guideline power to be limited. In determining the reach of this power, both language versions of s. 27(2) must be read harmoniously. The English version, which empowers the Commission to "issue a guideline setting out the extent to which and the manner in which, in the opinion of the Commission, any provision of this Act applies in a class of cases", must be read in such a way as to be coherent with the French version. The French version states that the Commission can, in a category of given cases, "*décider de préciser, par ordonnance, les limites et les modalités de l'application de la présente loi*". This power to "make precise the limits and the modes of application of the law" certainly falls short of the power to repeal portions of the Act which Bell fears. An apt example of what is involved in merely "making precise" the limits of the Act is provided by s. 11(4), which envisions

that guidelines will be promulgated to list the factors (*facteur reconnu*) which would justify what might otherwise amount to discrimination under s. 11(1). This provision clearly contemplates guidelines adding precision to the Act, without in any way trumping or overriding the Act itself.

49 It is of course true that by "making precise" various provisions of the Act, the guidelines will affect the outcome of cases. However, they will only risk undermining the impartiality of the Tribunal if they do so in a manner that is unjust or improper. Given the many constraints on the Commission's guideline power, and the many ways in which the Tribunal is empowered to question or set aside guidelines that are in violation of the law, it does not seem likely that the Commission's guidelines could improperly influence the Tribunal.

50 Parliament's choice was obviously that the Commission should exercise a delegated legislative function. Like all powers to make subordinate legislation, the Commission's guideline power under ss. 27(2) and 27(3) is strictly constrained. We fail to see, then, that the guideline power under the Act would lead an informed person, viewing the matter realistically and practically and having thought the matter through, to apprehend a "real likelihood of bias": *S. (R.D.)*, *supra*, at para. 112, *per* Cory J.; *Committee for Justice and Liberty*, *supra*, at p. 395, *per* de Grandpré J.

D. *The Chairperson's Power to Extend Appointments*

51 Bell challenges the Chairperson's power to extend appointments of Tribunal members in ongoing inquiries. Bell argues that this power robs members of

the Tribunal of sufficient security of tenure. In addition, Bell contends that it threatens members' impartiality.

52 There is an obvious need for flexibility in allowing members of the Tribunal to continue beyond the expiry of their tenure, in light of the potential length of hearings and the difficulty of enlisting a new member of a panel in the middle of a lengthy hearing. It would not, for this reason, be practicable to suggest that members simply retire from a panel upon the expiry of their appointment, with no official having the power to extend their appointments. And of the officials who could exercise this power, the Tribunal Chairperson seems most likely both to be in a good position to know how urgent the need to extend an appointment is and also to be somewhat distant from the Commission.

53 In any case, the question of whether this power compromises the independence of Tribunal members is settled by *Valente*, *supra*. That case concerned legislation that conferred a discretionary power upon the Chief Justice of the provincial court to permit judges who had attained retirement age to hold office until the age of 70, and that conferred a discretionary power upon the Judicial Council for Provincial Judges to further approve the extension of a judge's term of office from age 70 to 75. Prior to amendments in the legislation, these powers had rested with the executive. At p. 704, Le Dain J. wrote of the amendments that:

> This change in the law, while creating a post-retirement status that is by no means ideal from the point of view of security of tenure, may be said to have removed the principal objection to the provision . . . since it replaces the discretion of the Executive by the judgment and approval of senior judicial officers who may be reasonably perceived as likely to act exclusively out of consideration for the interests of the Court and the administration of justice generally.

In our view, this passage resolves the question. If the discretionary power of the Chief Justice and Judicial Council of the provincial courts to extend the tenure of judges does not compromise their independence in a manner that contravenes the requirements of judicial independence, then neither does the discretionary power of the Tribunal Chairperson compromise the independence of Tribunal members in a manner that contravenes common law procedural fairness.

54 It remains to consider Bell's claim that this power undermines the Tribunal's impartiality. Bell's argument here seems to be that members might feel pressure to adopt the views of the Chairperson in order to remain on a panel beyond the expiry of their appointment, and that because of this, a reasonable person might doubt whether members were guided only by legitimate considerations in the disposition of their final case. However, given that members whose appointments have expired will not sit on another panel again, it is difficult to see what power the Chairperson could ultimately have over them, once their appointments have been extended and it is time for them to decide the case. Moreover, there are ample provisions in the Act to suggest that the Tribunal Chairperson can reasonably be regarded as disinterested in the outcome of cases. The Chairperson must have been a member in good standing in the bar of a province for at least ten years (s. 48.1(3)). He or she can be removed from the position for cause (s. 48.2(1)) by the Governor in Council. A reasonable person informed of these facts would not conclude that members were likely to be illegitimately pressured to adopt the Chairperson's views.

VI. Conclusion

55 We would therefore uphold the conclusions of the Federal Court of Appeal, and dismiss the appeal with costs. The constitutional questions should be answered as follows:

(1) Are ss. 27(2) and (3) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable or inapplicable?

Answer: No.

(2) Are ss. 48.1 and 48.2 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, and the constitutional principle of adjudicative independence and therefore inoperable and inapplicable?

Answer: No.

Appeal dismissed with costs.

Solicitors for the appellant: Heenan Blaikie, Montréal.

Solicitors for the respondent the Communications, Energy and Paperworkers Union of Canada: Engelmann Gottheil, Ottawa.

Solicitors for the respondent the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

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

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

Solicitors for the intervener the Canadian Labour Congress: Cavalluzzo Hayes Shilton McIntyre & Cornish, Toronto.

Solicitors for the intervener the Public Service Alliance of Canada: Raven, Allen, Cameron & Ballantyne, Ottawa.

Solicitors for the intervener the Canada Post Corporation: Gowling Lafleur Henderson, Ottawa.

TAB 2

Citation:	Gitxsan and other First Nations v. British Columbia (Minister of Forests) 2002 BCSC 1701	Date:	20021210
		Docket:	12437
		Registry:	Smithers

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

Counsel for the Petitioners:	Gordon Sebastian, Bertha Joseph and Cynthia Joseph
Counsel for the Respondent, Minister of Forests:	Paul J. Pearlman, Q.C. and Paul Yearwood
Counsel for the Respondent, Skeena Cellulose Inc.:	Charles F. Willms
Dates and place of hearing:	September 23-27, 2002 Smithers, B.C.

- AND –

Docket: L021279
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

Counsel for the Petitioners:	Gregory J. McDade, Q.C. and James P. Tate
Counsel for the Respondents, Minister of Forests and Attorney General of the Province of British Columbia:	Paul J. Pearlman, Q.C. and Paul Yearwood
Counsel for the Respondents, Skeena Cellulose Inc. and NWBC Timber & Pulp Ltd.:	Charles F. Willms
Date and Place of Hearing/Trial:	September 23-27, 2002 Smithers, B.C

- AND –

Docket: L021243
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

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

Counsel for the Petitioners:	Peter R.A. Grant and David Kalmakoff
Counsel for the Respondent, Minister of Forests:	Paul J. Pearlman, Q.C. and Paul Yearwood
Counsel for the Respondent, Skeena Cellulose Inc.:	Charles F. Willms and Kevin G. O'Callaghan
Date and Place of Hearing/Trial:	October 21-23, 2002 Vancouver, B.C.

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE TYSOE

INDEX

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 Court of Canada in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ("*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, *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* 2002 BCCA 59, leave to appeal to S.C.C. granted [2002] S.C.C.A. No. 148 ("*Taku River*"), *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 147 ("*Haida No. 1*") and *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 462 ("*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 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) Gitxsan

[14] Representatives of the Ministry of Forests met with representatives of the Gitxsan (also spelled Gitksan) First Nation on April 12 and 19. The April 12 meeting was public and it was attended by non-Gitxsan persons as well as Gitxsan representatives. It is unclear whether the meeting was expressed as a consultation

on aboriginal rights and title. A Gitxsan representative asked to see a copy of the agreement between the Crown and NWBC, and was told that it was confidential. One of the Gitxsan speakers expressed the view that there was nothing upon which the Gitxsan could make a decision to approve or disapprove of the transaction. Another Gitxsan speaker stated that some of the Gitxsan Houses opposed the transfer because they were not consulted on activities occurring within their territories. Employment concerns were also raised by the Gitxsan. At the conclusion of the meeting, the Gitxsan stated that there had to be a thorough consultation process and that "mere consultation" was not sufficient.

[15] On April 15, the Chair of the Gitxsan Treaty Society wrote to the Minister about the April 12 meeting and future meetings. The letter stated that there must be a discussion of the process for consultation and accommodation. The letter listed a number of issues in respect of which the Gitxsan wished to be consulted. It requested seven items of information. The letter concluded by expressing the view that the Gitxsan needed to be fully informed of the implications of the transaction before they could be properly consulted. The Gitxsan First Nation have never received a reply to this letter.

[16] The April 19 meeting lasted approximately 1 ½ hours. A number of Gitxsan speakers expressed concerns about such matters as unemployment, the lack of any offers of partnership and the removal of resources from their territories. The meeting concluded with a Gitxsan speaker stating that the Gitxsan did not view the meeting as a consultation meeting and that they were prepared to enter into proper consultation when they had full information. One of the Ministry's representatives responded that the concerns expressed by the Gitxsan at the meeting would be forwarded to the Minister.

(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 ½ 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 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 *In the Matter of CCAA and Skeena Cellulose, et al* 2002 BCSC 597, leave to appeal granted but stayed until the determination of these proceedings, *Lax Kw'alaams Indian Band v. British Columbia (Minister of Forests)* 2002 BCCA 403). 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 ("*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 CJ.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)

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 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 Gitxsan 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 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 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 Gitxsan, 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 Gitxsan 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.

[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 allege 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.

[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 and Immigration)*, 2002 SCC 1 ("*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 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 Gitxsan, 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. Canada (Minister of National Revenue)*, 2001 SCC 33. 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 Gitxsan 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 Gitxsan, some portions of the territory are claimed by two or more Gitxsan 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 Gitxsan 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 Gitxsan 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 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 licenses. 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 and Culture)* 2002 SCC 31. 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.

[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 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 ("*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 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 Gitxsan 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.T.T.C.) 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 v. Canada and British Columbia,* [1999] 3 C.N.L.R. 89 (B.C.S.C.) 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 Gitxsan 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 (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 Gitxsan 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 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 Gitxsan 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 Gitxsan 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 re-apply 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 Gitxsan 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 re-apply in the event that any of the Petitioners do not believe that the Minister is fulfilling the duty which I have declared in clause (a);

(e) I order that the Petitioners are entitled to their party and party costs of their respective proceedings up to the date hereof; and

(f) I order that the balance of the relief sought in the Petitions, including the request by the Gitanyow for a declaration that the Minister breached a duty to negotiate a treaty in good faith and the claim of the Gitanyow relating to the major amendment of the forest licence of one of Skeena's subsidiaries and the plan for the small business forest enterprise program,

is dismissed.

[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.

"D.F. Tysoe, J."
The Honourable Mr. Justice D.F. Tysoe

TAB 3

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management),*** 2005 BCCA 128

Date: 20050307
Docket: CA031826

Between:

Musqueam Indian Band

Appellant
(Petitioner)

And

The Minister of Sustainable Resource Management, Land and Water British Columbia Inc., University of British Columbia, and The Attorney General of the Province of British Columbia

Respondents
(Respondents)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Lowry

M. A. Morellato and J. M. Spencer	Counsel for the Appellant
L. J. Mrozinski and P. E. Yearwood	Counsel for the Respondents other than the University
J. P. Taylor, Q.C. and R. W. Sieg	Counsel for the Respondent, University of British Columbia
A. C. Pape, R. B. Salter and B. R. Zoe	Counsel for the Intervenor, First Nations Summit
Place and Date of Hearing:	Vancouver, British Columbia 21st, 22nd and 23rd September, 2004
Place and Date of Judgment:	Vancouver, British Columbia 7th March, 2005

Written Reasons concurring in allowing the appeal by:
The Honourable Madam Justice Southin

Written Reasons by:
The Honourable Mr. Justice Hall (P. 43, para. 75)

Concurring Reasons by:
The Honourable Mr. Justice Lowry (P. 60, para. 103)

Reasons for Judgment of the Honourable Madam Justice Southin:

[1] The issue in this appeal is whether Her Majesty the Queen in right of British Columbia, represented here by the respondents other than the respondent, University of British Columbia, by agreeing to convey certain lands adjacent to but not within the City of Vancouver, known as the University Golf Course, to the University, has breached the duty to consult and accommodate the appellant, and, if so, what remedy should be given for that breach.

[2] At the conclusion of the hearing in this Court, the Court said it would not deliver judgment until the Supreme Court of Canada delivered judgment in the cases known as ***Haida Nation v. British Columbia (Minister of Forests)*** and ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, in both of which the scope of the duty to consult and accommodate was the central issue.

[3] Judgment in those cases having been delivered (2004 SCC 73 and 2004 SCC 74), counsel have made further submissions which we have considered.

[4] Before addressing the substance of this appeal, I propose to digress into history because this year is the centenary of the birth of the Honourable Louis-Philippe Pigeon who, from 21st September, 1967, to 8th February, 1980, was a judge of the Supreme Court of Canada.

[5] Had his judgment in the celebrated case of ***Calder v. British Columbia (Attorney-General)***, [1973] S.C.R. 313 at 422, not turned on a point which

apparently neither side in the Supreme Court of Canada sought to be decided, it is probable that this action and others like it would have no possibility of success.

[6] It will be remembered that seven judges sat on ***Calder***, in which the issue was a claim of aboriginal title by the Nisga'a Tribal Council and four Indian bands to a substantial part of north-western British Columbia. Three judges, Martland, Judson and Ritchie JJ., held that aboriginal title was extinguished in British Columbia, and three judges, Hall, Spence and Laskin JJ., that it was not. Had Pigeon J. adhered to the judgment of the former, then, if after the proclamation of the ***Constitution Act, 1982***, the Supreme Court of Canada had reversed that decision and held that aboriginal title was not extinguished, the country would have been shaken to its very foundations. If, however, Pigeon J. had adhered to the judgment of the latter, British Columbia - which from the earliest post-confederation days had asserted that aboriginal title was extinguished (see my judgment in ***Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*** (2000), 80 B.C.L.R. (3d) 233 at 257-259, 2000 BCCA 525) - would have pressed the federal government to join with it in extinguishing such title and, if British Columbia had failed, the Legislature, in light of the adamant position of the then Ministry, which had a majority, that there were no unextinguished aboriginal rights, would not have consented to the repatriation of the Constitution if the Act contained what is now section 35.

[7] Thus did the decision of one judge – and a judge bred not in the common law but in the civil law – to follow his own star become pivotal in the history of this Province.

[8] I come now to the case at bar. As I propose to address hereafter not only the alleged breach but also the procedure for raising such a breach, I must set out at some length the proceedings below.

[9] The appeal is from the judgment of the Honourable Mr. Justice Warren pronounced the 16th April, 2004, dismissing the petition of the appellant for Judicial Review of a decision of the Minister of Sustainable Resource Management authorizing sale of the lands and for an injunction restraining sale pending the determination of the appellant's claim of aboriginal title to the lands in issue. [I have begun the words "Judicial Review" with upper case letters for the reason I alluded to in my judgment in ***Cimolai v. Children's and Women's Health Centre of British Columbia*** (2003), 228 D.L.R. (4th) 420, 14 B.C.L.R. (4th) 199, 2003 BCCA 338 ¶ 72.]

[10] In its further amended petition, the appellant sought, in part:

> 1. an order quashing the decision of the Respondents, Land and Water British Columbia Inc. ("LWBC"), and the Minister of Sustainable Resource Management (the "Minister"), to proceed with the sale of land described as Blocks A and B, District Lot 3900, Group 1, NWD, Plan 20266, Parcel Identifiers 006-707-289 and 006-707-483, otherwise known as the site of the University of British Columbia Golf Course (the "Golf Course Land");

2. an order quashing the Order of the Lieutenant Governor in Council, Order-in-Council No. 0131/03 dated February 14, 2003, ordering that:

   (a) the Minister may survey, resurvey and subdivide any or all of the Golf Course Land into lots, blocks, streets, lanes, boulevards, recreational courts, parks and other areas;

   (b) the Minister may advertise and otherwise provide for the disposition by sale or lease, and sell or lease, any or all of the Golf Course Land in the manner, at the prices and on the terms and conditions that the Minister considers proper; and

   (c) the Minister may dispose of the Golf Course Land by Crown grant to The University of British Columbia.

   (the "Order-in-Council").

3. an order prohibiting LWBC and the Minister, and representatives of each, from authorizing the disposition of the Golf Course Land until such time as the Musqueam Indian Band ("Musqueam") has been consulted in good faith concerning Musqueam's aboriginal rights and title in respect of the Golf Course Land and workable accommodations of Musqueam's aboriginal and treaty interests in the Golf Course Land have been made;

4. a declaration that LWBC and the Minister have fiduciary and constitutional duties to consult with Musqueam in good faith concerning any disposition of the Golf Course Land, prior to any disposition of the Golf Course Land, and to make workable accommodations of the aboriginal and treaty interests of Musqueam in respect of the Golf Course Land prior to any such disposition;

5. a declaration that LWBC and the Minister have not satisfied their fiduciary and constitutional duties to consult with Musqueam in good faith concerning the disposition of the Golf Course Land or made workable accommodations of Musqueam's aboriginal and treaty interests in the Golf Course Land;

* * *

7. an injunction restraining LWBC and the Minister, by their servants, agents or otherwise, from selling, conveying, transferring or otherwise disposing of the Golf Course Land until such

time as an interim measures agreement or a land protection agreement has been finalized among Musqueam, British Columbia and Canada for purposes of protecting against the further alienation of Crown-held land in the Musqueam claim area;

8. a declaration that the Musqueam are entitled to the negotiation of an interim measures agreement or a land protection agreement with British Columbia and Canada for purposes of protecting against the further alienation of Crown-held land in the Musqueam claim area;

* * *

12. an interlocutory order enjoining and restraining the LWBC and the Minister, by their servants, agents or otherwise, from selling, conveying, transferring or otherwise disposing of the Golf Course Land pending the hearing and determination of this Petition;

[11] The Order-in-Council impugned in these proceedings is in these terms:

Order in Council No. 0131, *Approved and Ordered* FEB 14 2003
"Administrator"

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that:

(a) the Minister of Sustainable Resource Management may survey, resurvey and subdivide into lots, blocks, streets, lanes, boulevards, recreational courts, parks and other areas any or all of the lands that are held by the government within:

Block A District Lot 3900 Plan 20266, and

Block B District Lot 3900 Plan 20266

(collectively the "Land");

(b) the Minister of Sustainable Resource Management may advertise and otherwise provide for the disposition by sale or lease, and sell or lease, any or all the Land in the manner, at the prices and on the terms and conditions the minister considers proper; and

(c) the Minister of Sustainable Resource Management may dispose of the Land by Crown grant to The University of British Columbia.

"Minister of Sustainable Resource Management" "Presiding Member of the Executive Council"

(This part is for administrative purposes only and is not part of the Order.)

Authority under which Order is made:

Act and section: University Endowment Land Act, section 2(1)(a) and (d); Land Act, section 51 and 106(3)

Other (specify):

[12] These are the statutory provisions noted as "Authority under which Order is made":

University Endowment Land Act, R.S.B.C. 1996, c. 469 -

2 (1) Subject to the regulations [and with the approval of the Lieutenant Governor in Council], the minister may do one or more of the following:

(a) survey, resurvey and subdivide into lots, blocks, streets, lanes, boulevards, recreational courts, parks and other areas all lands that are held by the government within the University Endowment Land;

* * *

(d) advertise and otherwise provide for the disposition by sale or lease, and sell or lease, any of the land so subdivided into lots or blocks and any of the land subdivided under the *British Columbia University Loan Act, 1920*, S.B.C. 1920, c. 49, in the manner, at the prices and on the terms and conditions the minister considers proper;

[The phrase in brackets was removed by SBC 2003-66-57.]

Land Act, R.S.B.C. 1996, c. 245 –

> **51** (1) Despite any other provision of this Act, Crown land may, with the approval of the Lieutenant Governor in Council and subject to the terms, reservations and restrictions that the Lieutenant Governor in Council considers advisable, be disposed of by Crown grant under this Act, free or otherwise, to a government corporation, municipality, regional district, hospital board, university, college, school board, francophone education authority as defined in the *School Act* or other government related body or to the Greater Vancouver Transportation Authority established under the *Greater Vancouver Transportation Authority Act* or any of its subsidiaries.
>
> (2) A disposition under subsection (1) may be limited to a specific public purpose.
>
> * * *
>
> [**106**] (3) A power under any Act, other than the *Ministry of Lands, Parks and Housing Act*, to dispose of the fee simple in Crown land as defined in this Act, must be exercised in compliance with this Act.

[13] As required by the Rules, the petitioner asserted that it relied on:

1. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241;
2. Sections 24(1) and 35 of the *Constitution Act, 1982*;
3. Rules 10, 44, 45 and 46 of the Rules of Court;
4. Rule 57 of the Rules of Court.

[14] I shall not quote the whole of the enactments there referred to but only sufficient to elucidate the points in issue:

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

> **1** In this Act:
>
> * * *
>
> "**statutory power**" means a power or right conferred by an enactment
>
> (a) to make a regulation, rule, bylaw or order,

(b) to exercise a statutory power of decision,
(c) to require a person to do or to refrain from doing an act or thing that, but for that requirement, the person would not be required by law to do or to refrain from doing,
(d) to do an act or thing that would, but for that power or right, be a breach of a legal right of any person, or
(e) to make an investigation or inquiry into a person's legal right, power, privilege, immunity, duty or liability;

* * *

2 (1) An application for judicial review is an originating application and must be brought by petition.

(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:

(a) relief in the nature of mandamus, prohibition or certiorari;
(b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

* * *

10 On an application for judicial review, the court may make an interim order it considers appropriate until the final determination of the application.

2. ***Constitution Act, 1982*** -

PART I, *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

PART II, RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA:

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.

3. ***Rules of Court, Rules 10, 44, 45 and 46 (in part)*** -

RULE 10 – ORIGINATING APPLICATION

(1) An application, other than an interlocutory application or an application in the nature of an appeal, may be made by originating application where
   (a) an application is authorized to be made to the court,
   (b) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract, or other document,

* * *

RULE 44 – INTERLOCUTORY APPLICATION

(1) If an application in a proceeding is authorized to be made to the court, it must be made by interlocutory application.

* * *

RULE 45 – INJUNCTIONS

(1) An application for an interlocutory injunction may be made by a party whether or not a claim for an injunction is included in the relief claimed.

* * *

RULE 46 – DETENTION, PRESERVATION AND RECOVERY OF PROPERTY

(1) The court may make an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter upon any land or building.

4. ***Rules of Court, Rule 57*** -

As this rule relates only to costs, there is no need to quote it.

[15] As required by the Rules, the petitioner set forth the facts upon which its petition was based, thus:

> 1. The Petitioner Musqueam Indian Band ("Musqueam") is an Indian Band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5 and its members are Indians within the meaning of the *Indian Act* and Section 91(2) of the *Constitution Act, 1867*, and are aboriginal peoples within the meaning of the *Constitution Act, 1982*.
>
> * * *
>
> 3. The Respondent Land and Water British Columbia Inc. ("LWBC"), formerly called British Columbia Assets and Land Corporation, is a corporation incorporated under the laws of the province of British Columbia and having its registered office at 900 Waterfront Centre, 200 Burrard Street, Vancouver, British Columbia. LWCB exercises delegated authority pursuant to the *Land Act*, RSBC 1996, c. 245 and the *Ministry of Lands, Parks and Housing Act*, RSBC 1996, c. 307. LWBC provides lands and assets marketing and land management services for the provincial government.
>
> 4. The Respondent Minister of Sustainable Resource Management is the Minister responsible for LWBC.
>
> * * *
>
> 7. LWBC proposes to sell the Golf Course Land to the University of British Columbia....
>
> 8. The Golf Course Land is located within the traditional territory of the Musqueam.
>
> 9. The Golf Course Land is currently unalienated Crown land registered to Her Majesty the Queen in Right of the Province of British Columbia c/o Ministry of Lands, Parks and Housing.
>
> 10. The present members of Musqueam are descendants of people who lived along English Bay, Burrard Inlet, Point Grey, and the

lower reaches of the Fraser River, including the area known as the University Endowment Lands, where the Golf Course Land is located. Much of what is now known as Vancouver and Richmond is in Musqueam traditional territory.

11. Musqueam's reserve land base is small. Musqueam's reserve allotment on a per capita basis is the smallest of all British Columbia bands.

12. Musqueam's reserves are not adequate for Musqueam's present or future needs in providing housing to its members, nor do these reserve lands provide a sustainable land base for the Musqueam people. The Musqueam are suffering from a serious land shortage.

13. A larger land base, beyond Musqueam's present reserves, is essential for the survival of the Musqueam people as a people. Without more land, Musqueam cannot provide proper housing to its members, prosper or be self-supporting or self-determining as a people. Today the community is poor and many Musqueam people are unemployed. Obtaining a greater land base is the Musqueam's greatest priority at the treaty table for these reasons.

14. The Golf Course Land is one of the very few remaining parcels of Crown held land in the Musqueam traditional territory that could be available for treaty settlement purposes. Since Musqueam first filed its comprehensive land claim in 1977, other significant parcels of Crown held land within Musqueam territory have been disposed of without any consultation with Musqueam or any accommodation of Musqueam's aboriginal title interests. The precious few available Crown held lands remaining within Musqueam territory continue to be sold.

15. The federal and provincial governments have taken the position that they will not offer First Nations any monetary compensation for land previously alienated to third parties. The Crown has specifically advised Musqueam during treaty negotiations that it will not provide compensation to Musqueam for its lost reserve lands or for other infringements of their land based rights.

16. The policy of the federal and provincial governments in negotiating treaties with First Nations is that third party interests in land will not be involuntarily affected. Accordingly, only unalienated Crown lands can be potentially restored through treaty settlements.

* * *

21. For many years, Musqueam has asserted and articulated the nature and scope of their claim to their traditional territory, including the Golf Course Land, to the provincial government through correspondence, court proceedings against the provincial government and treaty discussions.

22. As part of its treaty discussions, Musqueam has repeatedly asked both the federal and provincial governments to preserve Crown-held lands for treaty settlement purposes. However, both governments have a policy of not holding land for treaty settlement until the affected First Nation has signed a Framework Agreement. The federal government will only sign a Framework Agreement on the basis of its policy that it will not include compensation as a negotiable item. In other words, the federal Crown will not negotiate compensation for loss of land or infringement of any other aboriginal right. This has also been the policy of the provincial Crown.

23. In combination, the result of these two policies is that neither the federal nor the provincial governments have implemented any interim measures to preserve Crown-held lands in Musqueam traditional territory. In the meantime, the amount of land which the federal and provincial governments can bring to a treaty settlement has been seriously diminished as various parcels of Crown-held land are alienated to third parties.

* * *

25. LWBC and the Minister have fiduciary and constitutional obligations to consult with Musqueam prior to taking any action that may infringe Musqueam's aboriginal rights or title interests, and to accommodate Musqueam's aboriginal rights and title interests.

26. None of the Respondents, or any other representative of the provincial government, has consulted with Musqueam in good faith concerning a possible accommodation of Musqueam's aboriginal interests in the Golf Course Land. No tangible efforts have been made by the Crown to protect these lands for treaty settlement purposes or to reach any other workable solution with Musqueam. The failure to consult is also a breach of natural justice.

27. On or about January 23, 2003, Musqueam was advised by LWBC that it had decided there was no information that would indicate aboriginal rights or title on the Golf Course Land, and further that LWBC had decided to proceed with the sale of the Golf Course Land to UBC. Musqueam was advised on March 20, 2003 by LWBC that this sale would take place on April 1, 2003.

28. Musqueam says that the decision of LWBC that there is no information that would indicate aboriginal rights or title on the Golf Course Land is unreasonable or patently unreasonable and an error on the face of the record.

29. Musqueam can see no prejudice from any attempts by the Crown to accommodate Musqueam's interests, yet, such accommodation has not yet occurred.

30. Once the government divests itself of lands, those lands are no longer available for treaty settlement. In addition, the government refuses to compensate Musqueam for the loss of any land. If the Crown disposes of the Golf Course Land, Musqueam will be unable to obtain either the land or any monetary compensation therefore [*sic*] at the treaty table. Musqueam is facing the very real prospect of a land-less treaty.

31. On or about October 9, 2003, Musqueam learned for the first time that the Order-in-Council had been issued purporting to approve the disposition of the Golf Course Land to the University of British Columbia. The Order-in-Council was issued on or about February 14, 2003.

32. At the time that the Order-in-Council was issued, no representative of the provincial government had consulted with Musqueam in good faith concerning a possible accommodation of Musqueam's aboriginal interests in the Golf Course Land.

33. While the disposition of the Golf Course Land is imminent, Musqueam know of no reason why the sale must necessarily proceed on April 1, 2003.

How Should Such a Claim be Raised?

[16] The ***Judicial Review Procedure Act***, invoked below, is inapt to the claims asserted here because the appellant does not assert that the transaction in issue is not authorized by statute. To put it another way, no administrative grounds are asserted. I addressed this point of the scope of the ***Judicial Review Procedure Act*** in my judgment in ***Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*** (2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59, rev'd. 2004 SCC 74, at pages 28-30 (B.C.L.R.), and I shall not repeat what I there said.

[17] These cases arising from aboriginal land claims address themselves, in substance, not to whether powers conferred by an enactment are lawfully exercised, but to an overarching constitutional imperative.

[18] During argument in ***Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)***, *supra*, Mackenzie J.A. felicitously described a claim of an aboriginal right as "upstream" of the certificate of indefeasible title.

[19] I consider these claims of failure to consult and accommodate also to be upstream not only of the certificate of indefeasible title but also of the statutes under which the ministerial power has been exercised.

[20] The correct way, in my opinion, for an aboriginal band to invoke the rights conferred upon it by the judgment of the Supreme Court of Canada in ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, as elucidated by the judgment of the Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of***

Forests) (2004), 245 D.L.R. (4th) 33, 2004 SCC 73, is by action against the Attorney General in which the plaintiffs plead along these lines:

1. The plaintiffs assert an aboriginal title to [*here give the legal descriptions*] and have done so heretofore.

   Particulars of Prior Assertion

   [*Here insert particulars.*]

2. Pursuant to an Act of the Legislature of British Columbia [*giving particulars*], the Minister of *this or that* has done or proposes to do *this or that*, e.g. to grant to X lands within the purview of the claim.

3. The plaintiffs are engaging with the Province of British Columbia and the Government of Canada in treaty negotiations pursuant to:

   _____.

4. The Minister of X has failed in his duty on behalf of the Crown to consult with the plaintiffs concerning such proposed grant and has failed to accommodate the particulars of the concerns expressed by the plaintiffs. [*Here insert those concerns.*]

WHEREFORE THE PLAINTIFFS CLAIM:

1. An injunction restraining the defendants and any other Ministry of the Crown from granting to X [*here insert whatever it is which is in issue*] unless and until the concerns of the plaintiffs are duly accommodated or a treaty has been

made between Her Majesty the Queen in right of British Columbia and the plaintiffs.

[21] I do not overlook what was said in ***Haida*** about the inutility in land claims cases of injunctions. But, as I understand the reasons of the Chief Justice of Canada, she is addressing interlocutory injunctions in a proceeding to establish aboriginal title, whereas I am addressing injunctions both interlocutory and permanent in aid of a right to be consulted and accommodated, a related but different right unknown either to law or to equity before the judgment in ***Delgamuukw***.

[22] It is convenient at this point to note that section 24(1) of the ***Constitution Act, 1982***, has nothing to do with claims under section 35 of the ***Constitution Act, 1982***. Section 24 is part of Part I and, on its face, applies only to infringements of rights under the ***Charter***. Section 35 is not part of the ***Charter***.

[23] Although I consider a petition is not apt to this claim, I think it right to proceed as if this were an action commenced by writ for two reasons:

1. The judgment of the Supreme Court of Canada in ***Haida*** has overtaken or elucidated much of what has gone before.

2. While I consider it generally erroneous for the court to treat proceedings which appear to be ill conceived as if the proper proceedings had been brought, to send this case back to the court below, by requiring an action to be brought, will only lead to a further appeal to this Court and further

unacceptable delay in the resolution of issues which have been pending for decades, as well as adding to the already substantial, if not mountainous, expense to which the parties have been put.

Has There Been a Breach of the Duty to Consult and Accommodate?

[24] The learned judge's reasons are now reported at (2004), 27 B.C.L.R. (4th) 254, [2004] 3 C.N.L.R. 224, 2004 BCSC 506. In those reasons the learned judge recounted the dealings between the respondents, other than the University, and the appellant in connection with these lands and I shall not repeat what he said. As will appear, I do not find it necessary to answer the question of whether there was adequate consultation. Whether there was or was not, there has been, in my opinion, a failure to accommodate.

[25] The relief sought in this Court is somewhat different from the relief sought below.

[26] The relief sought here is this:

1. an order that the appeal be allowed and the order of the Honourable Mr. Justice Warren be set aside *[Amended Notice of Appeal ("ANA"), para. (a)]*;

2. an order quashing the decision of Land and Water British Columbia Inc., and the Minister of Sustainable Resource Management, (the "Crown Respondents") to proceed with the sale of the Golf Course Land (legally described as Blocks A and B, District Lot 3900, Group 1, NWD, Plan 20266, Parcel Identifiers 006-707-289 and 006-707-483) *[Further Amended Petition ("FAP"), para. 1; ANA, para. (b)(i)]*;

3. an order quashing the Order of the Lieutenant Governor in Council, No. 0131/03 dated February 14, 2003 *[FAP, para. 2; ANA, para. (b)(ii)]*;

4. an order that the agreement between the Crown Respondents and the University of British Columbia ("UBC") for the purchase and sale of the Golf Course Land be declared void *[FAP, para. 8.1; ANA, para. (b)(iii)]*;

5. a declaration that the conveyance of the Golf Course Land by the Crown Respondents to UBC is *ultra vires* and void; such further additional orders or declarations as are required to give effect to the re-conveyance of the Golf Course Land to Her Majesty the Queen in Right of the Province of British Columbia *[ANA, paras. (c) and (e)]*;

6. an injunction restraining the Crown Respondents from selling, conveying, transferring or otherwise disposing of the Golf Course Land; in the alternative, an injunction restraining the Crown Respondents from selling, conveying, transferring or otherwise disposing of the Golf Course Land pending the development of an interim land protection measure *[FAP, paras. 7, 12; ANA, para. (b)(viii)]*;

7. in the alternative, an order compelling the Respondents to consult with Musqueam in good faith concerning the use and disposition of the Golf Course Land and to make meaningful accommodations of Musqueam's aboriginal and treaty interests *[FAP, para. 6; ANA, para. (vii)]*;

8. any other orders, including declaratory relief, that this Honourable Court considers just *[FAP, para. 14; ANA, para. (f)]*; and

9. costs in this Court and in the Court below *[FAP, para. 13; ANA, para. (g)]*.

[27] The facts which the appellant alleges in the petition are essentially true, but it may be useful to expand upon them somewhat to put this dispute into context.

[28] The lands in issue fall within a part of Point Grey which has been known for a very long time as the University Endowment Lands.

[29] The name, I have always understood, owes its origin to Chapter 45 of the Statutes of 1907:

> 1. This Act may be cited as the "University Endowment Act, 1907."
>
> 2. It shall be lawful for the Lieutenant-Governor in Council to set apart by way of endowment to the University of British Columbia lands in the Province of British Columbia, not exceeding two million acres, in aid of higher education in this Province.
>
> 3. The said reservation of land shall not include any lands held by grant, lease, agreement for sale, pre-emption or other alienation by the Crown, nor shall it include Indian reserves or settlements nor military or naval reserves, nor lakes or lands in which any person other than the Crown shall have a vested interest.
>
> * * *
>
> 6. All revenue derived from the sale or other disposition of said lands, not including, however, any taxes or royalties, shall be devoted to the maintenance by said University of the following Faculties:-
>
> (a.) A Faculty of Arts and Science, which shall embrace all branches of a liberal education necessary for the degrees of Bachelor of Arts and Master of Arts, and such other degrees as may be determined by the said University:
>
> (b.) A Faculty of Medicine, which shall embrace all branches of medical and surgical training necessary for the degrees of Bachelor of Medicine, Doctor of Medicine, Master of Surgery, and such other degrees as may be determined by the said University:
>
> (c.) A Faculty of Law, which shall embrace all branches of the knowledge and practice of law necessary for the degree of Bachelor of Laws, and such other degrees as may be determined by the said University:
>
> (d.) A Faculty of Applied Science, including manual training and engineering, leading to the degree of Bachelor of Applied Science, and such other degrees or diplomas as may be determined by the said University.

[30] No useful purpose would be served by my recounting the chequered history of the Endowment Lands. Suffice it to say that, despite the name, the lands in issue and the revenue from them were not devoted to the maintenance of the University which did not grant its first degrees until shortly after the First World War. Indeed, it was not until after the Second World War that the University embarked on granting degrees in medicine and law. Since that time, the University has become an extremely large institution with a substantial need for financing. Nonetheless, it was, in its inception, and remains, a public institution governed by the ***University Act***, R.S.B.C. 1996, c. 468. As such, there is no reason at all for the Legislature to hold its hand if the University does not do what it decently ought to do.

[31] In 2002, Land and Water British Columbia Inc. obtained from Deloitte & Touche an appraisal of the Golf Course Land.

[32] Their report describes the lands in question:

> *Neighbourhood Description*
>
> The subject is located in the University Endowment Lands, which lie west of the City of Vancouver and are generally bound by Camosun and Blanca Streets and Drummond Drive to the east and Marine Drive to the south, west and north. More specifically, the subject property is situated on the west side of Blanca Street and is bisected by University Boulevard. Marine Drive is the major traffic corridor, which surrounds the University Endowment Lands to the south, west and north. Other major traffic arterials leading into the University Endowment Lands (UEL) from Vancouver include West 10th Avenue, which becomes University Boulevard west of Blanca Street, and West 4th, West 16th and West 41st Avenues. The University of British Columbia is located approximately one-half kilometre west of the subject property.
>
> The University Endowment Lands are located within an unincorporated area, and, as such, do not have municipal status. The UEL are located

within Electoral Area A of the GVRD and have a form of government, servicing and taxation that is quite different from municipal systems. For example, UEL residents presently lack control over services and taxes that are administered on a Provincial level. Also, the GVRD locally administers development services through the UEL administration office, for such things as the administration of community sewers, water lines, building permits, street lights, garbage collection, etc.

As at October 2002, the UEL comprises a population of approximately 6,833 residents located within approximately 440 detached dwellings and approximately 600 rental apartment units. A significant recent development is the University Marketplace, a joint venture between Cressey Developments and Trilogy Properties. It comprises a mixed use commercial/residential apartment rental building with a total of 108 residential rental units.

The University of British Columbia is not part of the University Endowment Lands however the developments within the University campus are relevant for this report because of the proximity of the campus to the subject property. One of the most significant residential developments is Hampton Place which is a multiple family neighbourhood incorporating townhouses and low-rise and high-rise apartment buildings. Hampton Place comprises eleven sites which were developed in phases between 1990 and 1998. Three of the sites are student rental housing. The remaining eight parcels have a 99-year prepaid leasehold interest in place and were developed with market oriented housing. There are 947 units in total in Hampton Place which house a total of over 2,000 people. In addition, as of September 20, 2002 the tender for the development of three lots on the University of British Columbia campus closed. The development plans for the lots include a 100-unit residential high-rise, a 32-unit townhouse development and a 55-unit apartment/ townhouse development. All of these developments will be a mix[ed] use of rental housing for faculty and staff and market oriented housing.

Directly south and north of the subject property are portions of the Pacific Spirit Park which is predominantly in its natural state consisting of a second growth forest. Also, north of the subject is a small enclave of detached dwellings known as 'Little Australia' that was developed in the 1950's. In proximity to the west of the subject property are a number of institutional developments, the largest being the University Hill Secondary School. East of the subject property, and within the City of Vancouver, is a mix of single-family dwellings with some mid-rise and low-rise apartment buildings plus ancillary retail commercial development along West 10th Avenue.

> In summary, the subject is located in the University Endowment Lands and just west of the City of Vancouver. The area is generally characterized by the presence of the University of British Columbia campus to the west of the subject with residential dwellings in the immediate area as well as the Pacific Spirit Park. The property is located on a major arterial and good access into the subject neighbourhood is provided. Therefore, it is our opinion that the subject property is well located for its golf course use, and specifically for the operation of a public golf course as stipulated under the lease.

[33] On the 17th May, 1985, Her Majesty granted the lands, which had not previously been brought into the land title system, to UGCC Holdings Inc. for a term of 20 years commencing the 23rd May, 1985:

> 4.01 YIELDING AND PAYING THEREFORE [*sic*] during the Term, rental calculated as follows:
>
> (a) a minimum monthly rental
>
> (i) of $3,600.00 during the first fourteen months of the Term, AND
>
> (ii) for each succeeding year of the Term thereafter, an amount calculated annually, on each anniversary of the Rental Adjustment Date to be 1/12th of the Percentage Rental and Minimum Rental payable in respect of the immediately preceding Financial Year, and
>
> (b) a percentage rental of 8% of the Gross Revenue calculated in respect of each Financial Year, less the Minimum Rental paid in respect of such financial year.

[34] By Article X, the lessee was entitled to apply for a further 20 year lease, but the granting of the lease was to be in the sole discretion of the lessor. The lease was modified by instruments dated the 21st June, 1988, 10th September, 1990, and 11th March, 2003. For present purposes, the important modification is that of 10th

September, 1990, under which the term of the lease was extended to 30 years.

Thus, the lease will expire in 2015.

[35] The offer to purchase by the University, which was made in 2002, was in part this:

> ARTICLE 2 - OFFER
>
> 2.01 The Purchaser offers to purchase the Land from the Province in fee simple, subject to the Permitted Encumbrances, for the Purchase Price and on the terms and conditions set out in this Agreement.
>
> ARTICLE 3 – PURCHASE PRICE, CROWN GRANT FEE, ADJUSTMENTS AND TAXES
>
> 3.01 The Purchaser will deliver the Purchase Price and the Crown Grant Fee to the Province as follows:
>
> (a) the sum of $1,000.00 on account of the Deposit will be delivered to the Province with this offer;
>
> (b) the further sum of $999,000.00 on account of the Deposit will be paid to the Province on the second business day following the removal of the last of the conditions set out in sections 5.01 and 5.03 of this Agreement;
>
> (c) the sum of $7,900,000.00 and the Crown Grant Fee, together with the GST payable on the Crown Grant Fee, plus or minus the adjustments provided for in section 4.01, will be delivered to the Province in accordance with Article 7, and
>
> (d) the balance of the Purchase Price, being $2,100,000.00, and interest on the balance of the Purchase Price accruing from and after the Closing Date at the rate of approximately 4% per annum compounded annually, will be paid to the Province in 3 equal annual instalments of $750,000.00 each, commencing on the 1st anniversary of the Closing Date and ending on the 3rd anniversary of the Closing Date.
>
> * * *

ARTICLE 5 – CONDITIONS PRECEDENT

5.01 The obligation of the Province to complete the sale of the Land is subject to the satisfaction or waiver of the following conditions by the Province on or before February 28, 2003:

(a) in accordance with the guidelines established by the Province concerning consultation on aboriginal rights and title (and all revisions or replacements of such guidelines), the Province has determined that it may complete the transactions contemplated by this Agreement;

(b) the Lieutenant Governor in Council has, by order, approved the survey and sale of the Land in accordance with section 2(1) of the *University Endowment Land Act* and section 51 of the *Land Act*;

(c) the Purchaser, acting reasonably, has agreed as to the form of an agreement under which the Province will assign its interest in the Lease to the Purchaser and under which the Purchaser will assume the Province's obligations under the Lease;

(d) the Purchaser, acting reasonably, has agreed to the form of the covenant registrable under section 219 of the *Land Title Act* which will restrict the use of the Land to a public golf course and which will prohibit any subdivision of the Land;

(e) approval by the Board of Directors of LWBC of this Agreement and the transactions contemplated by it.

5.02 The conditions set out in section 5.01 are for the sole benefit of the Province and may be waived by written notice to the Purchaser prior to the date set out above. If the conditions are not satisfied or waived on or before the date set out above, this Agreement will terminate, the Deposit will be returned to the Purchaser and neither party will have any further obligations to the other under this Agreement.

[36] The restrictive covenant is in part this:

2. The Transferor covenants with the Transferee that it will not subdivide the Land by any means for any purpose other than a purpose directly related to the operation of a public golf course, including without limitation, to accommodate a driving range concession. The Transferor acknowledges that, without limiting

the generality of the foregoing, the Transferor must not subdivide the Land for residential purposes.

3. The Transferor covenants with the Transferee that it will use the Land only for the purpose of operating an 18 hole public golf course and facilities ancillary to the golf course on the Land. The ancillary facilities, including without limitation, any driving range and other practice facilities, restaurant, coffee shop, bar, pro shop, washrooms and other clubhouse facilities, when open, must be generally available to the public and the golf course, when open, must be generally available to the public such that at least 70% of the annual rounds of golf are available for booking and play by the public, with access to the public for booking and playing rounds being evenly distributed throughout the calendar year, with at least proportionate public access during daily and weekly periods of peak demand.

4. The Transferor may use the Land for

   (a) educational purposes connected with the operation of a golf academy,
   (b) physical and health education, and research and athletic activities, all of which must be directly related to golf,

   which golf academy and activities, when open, must be generally available to the public and provided that such golf academy and other activities do not limit the operation of the public golf course on the Land in accordance with section 3.

[37] The appellant wants, in settlement of its claim of aboriginal title, not money but land. It says it does not have a sufficient land base for its members. I have no difficulty in accepting the assertion that there is little land contiguous to or even reasonably near the main reserve still within public control. To the west is the Fraser River; to the east, the affluent and generally expensive residential neighbourhoods of Dunbar, Kerrisdale and Shaughnessy; to the south, the bucolic residential neighbourhood of Southlands familiarly known as the Flats.

[38] As to why it has insufficient land, it asserts that its "reserve allotment on a per capita basis is the smallest of all British Columbia bands."

[39] The implication of that paragraph, perhaps unintended, is that somehow, when the reserve question was settled, the Musqueam people were ill treated. But the reason is that, in 1916 and in the years leading up to the *Report of the Royal Commission on Indian Affairs for the Province of British Columbia*, published in 1916 by Acme Press, Limited, the population of the Musqueam Band was very small. Thus, under the heading "New Westminster Agency" at page 626 of the Report, we find:

> Comparatively little change has been made by the Commission in the matter of Reserves of the New Westminster Agency, in which tours of visitation were made for inspections of Indian lands and meetings with the occupants thereof during the field seasons of 1913, 1915 and 1916; Mr. Agent Byrne also being examined at length as to Indian affairs of his district, from the 25th January to the 16th February and again on the 7th March, 1916.
>
> The Commission at its organization found allotted for the Indians of the New Westminster Agency 157 Reserves, of an aggregate area of 42,310.99 acres, giving a per capita allowance of 16.45 acres for the Agency. There have been sold and surrendered by the Indians for railway and other public purposes, six Reserves in their entirety. The Commission has cut off one Reserve, in the City of New Westminster, originally established to meet camping requirements, no longer existent, of all Coast tribes, in common; and has reduced one other in more legitimate proportion to the Indian utilization and need, the total area of reduction for the Agency being 152.48 acres. At the same time there have been created to meet determined reasonable requirements of the Indians 18 new Reserves, of 1,168.45 acres in all – giving a net added area for the Agency of 1,015.93 acres, and a new total (including 40,923.37 acres in confirmed Reserves) of 41,939.30 acres, or 16.30 acres per capita.
>
> * * *

and then, at 685-686:

New Westminster Agency – Musqueam Tribe

ORDERED: That the Indian Reserves of the Musqueam Tribe or Band, New Westminster Agency, described in the Official Schedule of Indian Reserves, 1913, at Page 98 thereof, and numbered from One (1) to Three (3), both inclusive, BE CONFIRMED as now fixed and determined and shewn on the Official Plans of Survey, viz.:

"No. 1 - 5.16 acres;
No. 2 – Musqueam 416.82 acres, and
No. 3 – Sea Island, 60.75 acres."

Victoria, B.C., April 11th, 1916.

CERTIFIED CORRECT,

C. H. GIBBONS, *Secretary.*

* * *

New Westminster Agency – Pemberton Tribe

ORDERED: That the Indian Reserves of the Pemberton Tribe or Band, New Westminster Agency, described in the Official Schedule of Indian Reserves, 1913, at Pages 98 and 99 thereof, and numbered from One (1) to Eight (8), both inclusive, BE CONFIRMED as now fixed and determined and shewn on the Official Plans of Survey, viz.:

"No. 1 – Pemberton, 188.50 acres;
No. 2 – 105.00 acres;
No. 3 – Ne-such, 909.50 acres;
No. 4 – Lokla, *16.30 acres;
No. 5 – Graveyard, 1.40 acres;
No. 6 – 4,000.00 acres;
No. 7 – 320.00 acres, and
No. 8 – 813.00 acres."

*Less allowed right-of-way of Pacific Great Eastern Railway Co., 3.20 acres-13.10.

Victoria, B.C., April 11th, 1916.

CERTIFIED CORRECT,

C. H. GIBBONS, *Secretary.*

[40] I have included the passage on the Pemberton Tribe which was the subject of the decision of this Court in ***British Columbia (Attorney General) v. Mount Currie***

Indian Band (1991), 54 B.C.L.R. (2d) 156, [1991] 4 C.N.L.R. 3 (B.C.C.A.) because it is clear that the population of the Pemberton Tribe was substantially greater in 1916 than that of the Musqueam.

[41] Although Mr. Ernest Campbell, who was the Chief of the appellant at the time these proceedings were commenced, does not speak to the size of the Band in 1916, he does remark, at paragraph 6 of his affidavit sworn 25th March, 2003:

> 6. ... In 1958 there were 235 Musqueam Band members. Our population has increased at an average rate of 3.5% per year since then to its present level of 1100. If our population continues to increase at that rate (and given the youthful character of our population, and the fact that our current rate of population increase is about 4%, the 3.5% growth rate estimate is conservative), in 50 years our population will increase six fold to 6,600 members.

[42] As to the assertion in paragraph 13 of the petition, "Today the community is poor and many Musqueam people are unemployed", I doubt whether, in comparison with many other Indian bands, the appellant is poor. I say that because the appellant owns lands in the City of Vancouver (not within a reserve) – see ***Musqueam Holdings Ltd. v. British Columbia (Assessor Area No. 9 – Vancouver)*** (2000), 76 B.C.L.R. (3d) 323, 2000 BCCA 299 – and is also the beneficial owner of certain lands which have been leased on long term leases to non-aboriginals. See ***Musqueam Indian Band v. Glass***, [2000] 2 S.C.R. 633, 2000 SCC 52, and see, also, ***Guerin v. Canada***, [1984] 2 S.C.R. 335.

[43] As to paragraph 21 of the petition, there is no doubt of its truth.

[44] The question of the rights of the appellant first came before me on the 2nd July, 1987, in an action, Vancouver Registry C873062, [1987] B.C.J. No. 2788 (QL) (B.C.S.C.), between the plaintiffs, The Chiefs and Other Members of the Musqueam Indian Band, and the defendants, Her Majesty the Queen in the right of the Province of British Columbia, the Minister of Forests and Lands, the Honourable Dave Parker, the Greater Vancouver Regional District, and John Doe and Jane Doe, in which the writ of summons asserted:

> 1. A declaration that the Plaintiffs have a valid and existing aboriginal title to certain lands in the Lower Mainland of British Columbia including the University Endowment Lands, and comprising some 770 hectares, which are the subject matter of a proposal to be considered by the defendant, the Greater Vancouver Regional District, at a meeting on June 24, 1987.
>
> 2. Damages against the Defendants for trespass and for interference with and threatened interference with the Plaintiffs' rights to use the said lands.
>
> 3. An injunction preventing the Defendants, Dave Parker and the Greater Vancouver Regional District, and other persons unknown having notice of the order from trespassing on the said lands or interfering with the plaintiffs' rights in the said land, or altering the present physical condition of the said lands.
>
> 4. Costs.

[45] The plaintiffs sought an interlocutory injunction restraining the defendants until the trial or disposition of the action from:

> (a) Conveying, transferring, disposing of or receiving or accepting those certain lands referred to in the writ of summons in this action; and
>
> (b) Conducting or engaging in activities intending to have the effect of divesting the plaintiffs of their entitlement to the said lands.

[46] In refusing that injunction, I weighed in the scale the delay by the Musqueam in proving their rights, saying in part:

> But although for these reasons the delay in asserting the claim of title from the establishing of the University Endowment Lands in 1925 until 1977 cannot be fairly considered to deprive them of any rights, I consider the delay of this decade at least, that is from say 1978 or '9 to now in commencing this action must weigh heavily in the balance of convenience between themselves and the Regional District.
>
> I am mindful that other Indian Bands brought actions concerning their titles sometime ago. The Ghitskan case, I understand, was commenced in 1984 and I know of no reason why the Musqueam could not have sued the Crown for a declaration of title at least at that time.

[47] What I did not then appreciate, and I doubt anyone else would have appreciated it, is that for an Indian band to establish its "aboriginal rights", whatever they may be, has become an enormously expensive undertaking.

[48] This point is illustrated by the action which began in 1998, between 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, as 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, as defendants, in which the issue is aboriginal title or right to a part of the interior of British Columbia thus described in the Amended Statement of Claim filed 16th June, 2003 (Victoria Registry, No. 90 0913):

> 11. The Brittany is an area located in the Cariboo Forest Region of British Columbia. The boundaries of the Brittany may be described as follows. The point of commencement is marked by the confluence of the Chilko and Taseko Rivers. The eastern boundary follows the

> Taseko River to the Davidson Bridge. The southern boundary follows the Nemiah Valley Road in a westerly direction until it reaches Konni Lake, and then follows the southern shores of Konni Lake to its confluence with Nemiah Creek, and then follows Nemiah Creek to the western shore of Chilko Lake. The western boundary follows the western shore of Chilko Lake in a northerly direction to the Chilko River, then continues along the Chilko River until the confluence of the Chilko and Taseko River (point of commencement). The Brittany includes the inside banks of the rivers, creeks, lakes and other water bodies, which mark its boundaries. The Brittany is outlined in green on the map attached as Schedule A. For the purposes of this litigation, the Brittany 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 5.

[49] There is also asserted a claim to lands known as the "Trapline Territory".

[50] The prayer for relief is, in part, for:

> a) A declaration that the Tsilhqot'in has existing aboriginal title to the Brittany;
>
> b) A declaration that the Tsilhqot'in has existing aboriginal title to the Trapline Territory;
>
> c) A declaration that aboriginal title lands in the Brittany and Trapline Territory are not Crown lands as defined in the *Forest Act* and *Forest Practices Code of British Columbia* (as amended) and that this legislation does not authorize the inclusion of the Brittany and Trapline Territory in the Williams Lake Timber Supply Area or the issuance of Forest Licences or Authorizations and the granting of interests in forest resources on aboriginal title land in the Brittany and Trapline Territory; ....

[51] The trial of that action began in November 2002. As of 6th December, 2004, it had proceeded at trial before the Honourable Mr. Justice Vickers for 163 days and it may well last another 163 days.

[52] The plaintiffs in that action obtained an order for advanced costs.

[53] As of the 31st January, 2004, counsel for the plaintiff had been paid over $5,000,000.00, much of which I infer was for expert witnesses and other out-of-pocket expenses.

[54] Thus, if the appellant has been reluctant to embark on an action of unpredictable length and of unknown cost, I do not fault it.

[55] Had I appreciated in 1987 that a trial of an action to establish aboriginal right is potentially of such dimensions and devastating expense, I might not have given the weight I then did to the delay of the Musqueam in pursuing the claim to the then unoccupied and unconveyed Endowment Lands.

The Position of the Parties

[56] At the hearing before us, the appellant asserted that the learned judge below erred by:

(a) declining to grant a declaration that the Contract of Sale was unenforceable and to quash the Order in Council in circumstances where he found that the Contract of Sale and the Order in Council were entered into in breach of the Province's legal and equitable duty to consult with Musqueam to seek accommodation of Musqueam's interests;

(b) concluding that the Province had, after the filing of these proceedings, satisfied its duty of consultation and accommodation in respect of the sale of the Golf Course Land, even though:

(i) LWBC was contractually bound to complete its agreement with UBC and as such was in no position to enter into *bona fide* consultation and negotiations with Musqueam toward the accommodation of Musqueam's aboriginal title concerns and interests; and

(ii) the proposal made by LWBC did not meaningfully or substantially address the accommodation of Musqueam's aboriginal title concerns and interests.

(c) finding that UBC fulfilled its duties to Musqueam by requiring the inclusion of a contractual term in the Contract of Sale that the Province would satisfy its obligations to Musqueam, in circumstances, *inter alia*, where UBC had acknowledged Musqueam's aboriginal entitlement and its duty to consult with Musqueam; and

(d) failing to restrain the disposition of the Golf Course Land until either a treaty settlement is reached with Musqueam or, alternatively, the Province agrees to consult with and endeavour in good faith to accommodate Musqueam with respect to the development of a land protection measure (which may or may not contemplate the disposition of the UBC Golf Course Land).

[57] For its part, the Crown said that the appeal raises the following issues:

a) Whether the Crown's legal and equitable obligation to accommodate aboriginal rights and title requires it to engage in interim protection measures with respect to matters of interest to aboriginal peoples generally, or in treaty negotiations; and

b) If not, whether the Chambers Judge erred in finding the Crown met its enforceable legal and equitable duty to consult with and seek to accommodate Musqueam's claimed aboriginal rights and title interests in this case.

[58] For its part, the University adopted those issues and, in addition, submitted that the following issues are raised in relation to the University:

a. Can Musqueam seek a declaration or any other order that the University owes Musqueam an independent fiduciary duty to consult without pleading the allegation in the Petition?

b. If the answer to question #1 is yes, then did the University owe an independent fiduciary duty to consult with the Petitioner;

c. If the answer to question #2 is yes, then did the University comply with that obligation?

[59] Now, the Crown says that the issue is:

> Whether the recent decision of the SCC in *Haida* and to a lesser extent *Taku* is relevant to the matters raised in this appeal and therefore ought to be considered by this Court.

[60] The Crown puts its position thus in its supplemental factum:

> 9. The reasons given by the SCC in *Haida* confirm the correctness of the decision of the Chambers Judge below. As the reasons in *Haida* attest, the Crown's duty to accommodate requires it to balance *prima facie* Aboriginal rights and title claims against the short and long term objectives of the Crown in disposing of Crown-held lands in accordance with the public interest and compelling legislative objective. As the Chambers Judge notes at paragraph 71 of his reasons, the duty of consultation and accommodation amounts to a duty to formulate a practical interim compromise. In this particular case, the Chambers Judge was satisfied on the evidence that the Crown had met its duty in this interim stage.
>
> 10. A significant aspect of the Appellant's appeal from the decision of Warren J., supported by the Intervener, was with respect to the notion that the duty to consult was based on the Crown's fiduciary duty to Aboriginal peoples. The Appellant and particularly the Intervener submitted that, as a fiduciary, the Crown was obligated to put the interests of Aboriginal peoples first, before competing public interests. In this regard, the Chambers Judge is said to have erred in accepting the argument below that the Crown's duty to consult amounted to a duty to balance Aboriginal and other interests in the interim, until rights and title were either proven in court or settled in treaty.
>
> 11. The SCC has confirmed that unproven Aboriginal interests are insufficiently specific for the duty to consult to amount to a fiduciary duty. To the contrary, the SCC has confirmed that the duty is a duty to strike a reasonable interim compromise among competing interests. The Chambers Judge has therefore clearly been proven to have correctly interpreted the law regarding the Crown's duty of consultation.
>
> 12. As the Appellant argues at paragraph 75 of its factum, the alleged error of the Chambers Judge was not in relation to the strength or weakness of Musqueam's *prima facie* case, but rather on the basis that in his view, the duty to consult is interim in nature. Again, the SCC decision in *Haida* has shown the Chambers Judge to have been

correct in this regard. The duty to consult is clearly an interim remedy pending proof of title or rights or settlement of those claims in a negotiated process.

[61] For its part, the University says, in part:

> 9. To grant Musqueam a remedy which, in effect, enjoins, aborts, sets aside or otherwise interferes with the transfer to the University and to require the Crown to hold the Golf Course Land in inventory pending *possible* resolution of Musqueam's disputed claims, at some future date, by virtue of treaty negotiations, which resolution may or may not involve the Golf Course Land is, in effect, to give Musqueam a veto; a veto which the Supreme Court of Canada reiterates in *Haida Nation* that Musqueam does not enjoy (*Haida*, *supra*, para. 48).

[62] For purposes of this case, I consider that the central passages in the judgment of the Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of Forests)***, *supra*, are these:

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

* * *

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

* * *

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*

* * *

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.

* * *

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.

* * *

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

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

49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *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.

[63] In 1991, in ***British Columbia (Attorney General) v. Mount Currie Indian Band***, *supra*, I wrote, at 185 (B.C.L.R.):

> THE ISSUE OF ABORIGINAL TITLE
>
> [62] In my opinion, it is quite impossible to decide, at this stage of these proceedings, whether the Band or its predecessors had aboriginal title, whatever that may be, to these lands.
>
> [63] As to what it may be, the chain of authority begins with *St. Catherine's Milling & Lumber Co. v. R.* (1888), 14 App. Cas. 46 (P.C.), and comes, up to now, to *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 46 B.C.L.R. (2d) 1, [1990] 4 W.W.R. 410, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, [1990] 3 C.N.L.R. 160, 111 N.R. 241.
>
> [64] But none of the authorities to which we were referred holds that the aboriginal "right of the aboriginal people" is ipso facto the equivalent of a fee simple. Only something akin thereto or akin to an estate derived therefrom could give a right of exclusive possession at common law.
>
> [65] From the mists of the past, there came to be recognized in English law many rights of use, such as piscary, turbary, common and way, all over land or inland waters and of navigation over tidal waters, which gave the Sovereign's subjects the ability to maintain themselves. Some were public rights, others were given by grant or acquired by prescription. I need not attempt to do what I am not qualified to do, namely trace how these rights came about. But they illustrate that English law has long recognized rights either as a private personal or heritable right or as a right in common with others to go upon land the fee simple of which is in another. Those rights are not equivalent to a fee simple, a right which must have its origin at common law in a Crown grant. It seems to me reasonable that there may well be as a matter of aboriginal right, some sort of interest - perhaps equivalent to a copyhold - in a village and a much lesser interest - perhaps equivalent to a profit à prendre - in lands over which the denizens of the village, for their maintenance, hunted and fished and from which they obtained fuel, building materials and foods such as berries. Although Indian interests are sui generis, it ought to be possible to describe them by analogy to common law interests and, therefore, make them understandable to common law lawyers. Whether it is possible to describe them by analogy to interests known to the civil law, I am, through ignorance of the civil law, unable to say.

[64] The reason why no definition of those rights exists is that no case has yet reached the Supreme Court of Canada with a record sufficient to determine the particular "right" claimed.

[65] ***Delgamuukw v. British Columbia***, *supra*, did not determine the rights of the First Nation represented by the plaintiff because, in the end, a new trial was ordered and no new trial has ever taken place.

[66] With some hesitation I pose the issue here thus: Does the honour of the Crown require that the powers of sale exercised in the impugned Order-in-Council not be exercised to dispose of lands claimed by an aboriginal band when, if the power is exercised, there may be little, if any, public land left available to be granted to the aboriginal band as part of a treaty settlement? To put it another way, is it a breach of the duty to "accommodate" to do what the Crown proposes to do in this case?

[67] My answer to that question is "yes" in the absence of any pressing countervailing public necessity for the disposition in issue.

[68] That the University of British Columbia, of whose convocation I am a member, is generally accepted to be an institution of great public importance, I accept. But I do not accept that the evidence establishes any pressing present need for the University to obtain title to these lands. The lands are leased to a third party until 2015. Thus, the University cannot develop those lands now, for instance, by constructing a new library. If the purpose of the disposition is to enable the

University to make use of the revenue due by the present lessee to the lessor, the Government of British Columbia can easily enough pay that revenue to the University. Thus, this case bears no resemblance on its facts to the ***Taku*** case in which a private business had invested years of time and millions of dollars in seeking to develop a mine. It is well known that such developments not only bring employment to many, but also put revenue into the provincial coffers.

[69] I do not overlook that there is a body of opinion that new mines should not be permitted in British Columbia because they damage the land. But it is not for judges to decide between those holding that opinion and those in favour of turning natural resources to account. Such a dispute falls within the purview of the Legislature.

[70] For these reasons, I would allow the appeal.

[71] The appellant being entitled to a remedy, the question is, how should it be framed? My tentative view (and had I not been differing from my colleagues I should have wished further argument on the proper remedy) is that the University should be ordered, if the lands have been conveyed to it, to re-convey the lands to the Crown and if the purchase price has been paid, the purchase price should be repaid, and the Minister should be restrained during the pendency of treaty negotiations or until further order from exercising the powers conferred upon him by Order-in-Council No. 0131/03.

[72] By saying "or further order", I have in mind that if some pressing public necessity does arise, the Minister may apply to vary or discharge the injunction,

which I decline to describe either as interlocutory or permanent. By making this order, I am not giving the appellant a veto, something which by its nature would prevent, absent the consent of the appellant, any development, no matter what the public necessity might be.

[73] I also have in mind that if either the appellant or the Crown were to announce that under no circumstances will it negotiate for a treaty, the appellant will be forced to commence an action to establish its aboriginal title, whatever that may be. It will then have the right in common with everyone who claims title to lands to apply for an interlocutory injunction in aid of the pending action. If that should happen, then there would be the irony that the appellant is right back to 1987 when the issue of Musqueam title first arose in the Supreme Court of British Columbia.

[74] As I have said, I would allow the appeal. Costs to the appellant against the Minister of Sustainable Resource Management only.

"The Honourable Madam Justice Southin"

Reasons for Judgment of the Honourable Mr. Justice Hall:

[75] In March 2003, the appellant Musqueam Indian Band brought a petition in the Supreme Court of British Columbia under the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241. The Band sought an order quashing a decision by the respondents Land and Water British Columbia Inc. ("LWBC") and the Minister of Sustainable Resource Management to sell the University of British Columbia Golf Course (the "Golf Course Land") to the respondent the University of British Columbia ("UBC"). The petitioner also sought an order quashing an Order in Council dated 14 February 2003 of the Lieutenant Governor in Council authorizing the sale. Essentially, the relief sought was an order prohibiting LWBC and the Minister from proceeding with the disposition of the Golf Course Land until the appellant had been consulted in good faith concerning Musqueam's aboriginal rights and title in respect of the Golf Course Land and some workable accommodation of the title or rights claimed by the Musqueam in the Golf Course Land had been made. The appellant also sought to restrain any disposition of the land pending the finalization of interim measures of land protection to ensure lands are available for purposes of treaty settlement. The Musqueam argued the respondents had not consulted in good faith concerning a possible accommodation of any infringement of the appellant's asserted aboriginal interests in the Golf Course Land. The case was heard over six days in November and December 2003, and on 16 April 2004 Warren J. dismissed the petition.

[76] The appellant submits that the chambers judge erred in:

(a) declining to grant a declaration that the Contract of Sale was unenforceable and to quash the Order in Council in circumstances where he found that the Contract of Sale and the Order in Council were entered into in breach of the Province's legal and equitable duty to consult with Musqueam to seek accommodation of Musqueam's interests;

(b) concluding that the Province had, after the filing of these proceedings, satisfied its duty of consultation and accommodation in respect of the sale of the Golf Course Land, even though:

(i) LWBC was contractually bound to complete its agreement with UBC and as such was in no position to enter into *bona fide* consultation and negotiations with Musqueam toward the accommodation of Musqueam's aboriginal title concerns and interests; and

(ii) the proposal made by LWBC did not meaningfully or substantially address the accommodation of Musqueam's aboriginal title concerns and interests.

(c) finding that UBC fulfilled its duties to Musqueam by requiring the inclusion of a contractual term in the Contract of Sale that the Province would satisfy its obligations to Musqueam, in circumstances, *inter alia*, where UBC had acknowledged Musqueam's aboriginal entitlement and its duty to consult with Musqueam; and

(d) failing to restrain the disposition of the Golf Course Land until either a treaty settlement is reached with Musqueam or, alternatively, the Province agrees to consult with and endeavour in good faith to accommodate Musqueam with respect to the development of a land protection measure (which may or may not contemplate the disposition of the UBC Golf Course Land).

[77] The learned chambers judge at para. 2 of his reasons said this:

In essence, Musqueam says that the interim sale agreement between UBC and LWBC and the Order in Council were made in violation of the Province's fiduciary and Constitutional duties to consult and seek accommodation of Musqueam's interests. It also says that the Province is precluded from disposing of lands that are subject to

> treaty negotiations. It extends these obligations to UBC as a party who is cooperating or dealing with the Province.

[78] At the time this appeal was argued in September 2004, the Supreme Court of Canada had not yet released its decisions in ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73 [***Haida***] and ***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)***, 2004 SCC 74 [***Taku***], both of which were subsequently delivered on 18 November 2004. Following the release of these decisions, counsel for the appellant, respondents and intervener made further submissions to this Court. It seems clear that as a result of the decision of the Supreme Court of Canada in ***Haida***, it cannot be successfully asserted by the appellant that the respondent UBC owed it any duties of consultation and accommodation, although the extent of the Province's duty to consult with and accommodate the interests of the appellant remains a contested issue.

[79] When the Musqueam filed their petition in Supreme Court, UBC and LWBC had already entered into an agreement of purchase and sale, and subsequently the Golf Course Land was conveyed to UBC. UBC has undertaken to abide by any court order made concerning the disposition of the Golf Course Land. The lands in question are the site of an 18-hole golf course, and are adjacent to UBC. These lands have been used as a golf course for upwards of 75 years. A private operator has held a lease over the Golf Course Land since 1985. I understand this lease arrangement runs until 2015 and may thereafter be renewed by the operator for a further term of years. In its factum, UBC states that it wishes to ensure that the land

is maintained as a golf course in perpetuity as a recreational facility for the public including members of the university community. The agreement of purchase and sale between LWBC and UBC includes a restrictive covenant on the lands restricting the use of the property to a public golf course.

[80] When it began to consider selling the lands, LWBC obtained a First Nations heritage overview report from an archaeology research firm that detailed evidence of aboriginal use of the Golf Course Land. This report indicated there had been general historical use by First Nations of the University Endowment Lands, of which the Golf Course Land is a part. There are overlapping claims to this area in the treaty process by other bands, although the appellant was found to have the most significant interest in the area because of the proximity of its villages and evidence of its traditional use of lands in the area for travel, hunting and fishing.

[81] Aside from considerations relating to the treaty process, it seems to me that what is at issue here is a question of aboriginal title to these lands. Although in its petition, the appellant claimed both aboriginal right and title, in effect the Musqueam are here claiming a right relating to the land itself and not merely a right to practice customary uses of the land.

[82] As Lamer C.J. observed in ***Delgamuukw v. British Columbia (Attorney General)***, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, Canadian jurisprudence on aboriginal title is not greatly developed. The roots of the concept in North America can be found in decisions of the Supreme Court of the United States given by

Marshall C.J. in the early years of the nineteenth century. Two of the leading cases are ***Johnson v. M'Intosh***, 21 U.S. (8 Wheat.) 543 (1823) and ***Worcester v. State of Georgia***, 31 U.S. (6 Pet.) 515 (1832). Marshall C.J. said this in ***Johnson*** at 570-71:

> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.
>
> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

[83] In ***Delgamuukw***, Lamer C.J. noted that Canadian jurisprudence on the subject originated in the case of ***St. Catherine's Milling and Lumber Co. v. The Queen*** (1888), 14 App. Cas. 46 (P.C.). That case had its origins in Ontario, where it first came before the Ontario Chancery Division. The case, which was heard by

Chancellor Boyd, involved an issue of which level of government, federal or provincial, had the right to regulate and receive revenue from logging on the lands in north-western Ontario. By a treaty signed in 1873, the federal government had quieted the Indian title to the lands in question. The Province argued that under the ***Constitution Act, 1867*** (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5, title to this land resided in the Province. The defendant lumber company argued that it had a valid licence to cut timber from the Dominion Government. It submitted that because the district in question had been at the time of Confederation in Indian occupation and because the aboriginal title had not been dealt with until the 1873 treaty when the Dominion had acquired the Indian title, which title was asserted to be paramount to the provincial title, the federal title should prevail. Accordingly, it was argued the Province had no ownership of the land nor could it regulate activities on the land. Chancellor Boyd found in favour of the Province, holding that when the aboriginal title to the lands was extinguished by the terms of the Dominion treaty of 1873, thereafter full title to the land was held by the Province. He held that the lands, being relieved of the burden of the aboriginal title, were then in full ownership of the Province and the Province therefore had the right to regulate the lands in question. This conclusion was upheld by the Ontario Court of Appeal, the majority of the Supreme Court of Canada and the Privy Council. See (1885), 10 O.R. 196 (Ch.D.); (1886), 13 Ont. App. R. 148; (1887), 13 S.C.R. 577; and (1888), 14 App. Cas. 46.

[84] In ***R. v. Van der Peet***, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289, Lamer C.J. giving the majority judgment said this at para. 33:

> ...Aboriginal title is the aspect of aboriginal rights related specifically to aboriginal claims to land; it is the way in which the common law recognizes aboriginal land rights. As such, the explanation of the basis of aboriginal title in *Calder* [***Calder v. British Columbia (Attorney General)***, [1973] S.C.R. 313] can be applied equally to the aboriginal rights recognized and affirmed by s. 35(1). Both aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying "the land as their forefathers had done for centuries" (p. 328).

[85] As recognized in ***Delgamuukw***, aboriginal title is a *sui generis* interest in land that is inalienable except to the federal government. Only the federal government has the capacity to affect this title. In British Columbia, for historical reasons, there was not much done by the Crown after 1846 to quiet aboriginal title and the issue remains open today in many parts of the province. The situation is otherwise in most of the other provinces of Canada and in the United States where the aboriginal interest was usually dealt with by treaty in earlier times. For instance, after the transfer of the lands comprising the prairie provinces from the Hudson's Bay Company, a series of treaties quieted the aboriginal title concerning these lands.

[86] In ***Delgamuukw***, Lamer C.J. recognized that actions taken by a provincial government could justifiably infringe upon aboriginal title. He said this at para. 165:

> The general principles governing justification laid down in *Sparrow* [***R. v. Sparrow***, [1990] 1 S.C.R. 1075], and embellished by *Gladstone* [***R. v. Gladstone***, [1996] 2 S.C.R. 723], operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of

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

[87] Thus, provincial governments can justifiably infringe aboriginal title, but as the Supreme Court of Canada recently stated in ***Haida***, if there is infringement or potential infringement of an aboriginal right – which of course includes aboriginal title – consultation is required with those affected with a view to reaching some accommodation pending final resolution of the validity of the rights claimed.

[88] I understand that the appellant has outstanding a claim filed many years ago asserting aboriginal title to the lands in question. This action has not proceeded with any dispatch and there may be difficulties associated with establishing such rights; the issue of whether the appellant enjoyed exclusive occupation of the area may be especially challenging. This difficulty was discussed by Lamer C.J. at paras. 155-58 in his judgment in ***Delgamuukw***. He noted, referring to ***United States v. Santa Fe Pacific Railroad Co.***, 314 U.S. 339 (1941), that the issue of exclusive possession

might be susceptible of a recognition of joint title that could arise from shared exclusivity by different aboriginal groups.

[89] In the court below, LWBC conceded that the appellant had established a *prima facie* case for aboriginal title to the lands in question. Because of the existence of that *prima facie* case, there was no issue in the court below regarding whether the Province had a duty to consult with the appellant and seek to reach some accommodation of the appellant's interest. The learned chambers judge found that the Province had failed in its duty to consult and seek accommodation prior to entering into the agreement of purchase and sale with UBC, and indeed, in its factum, the Crown does not take issue with the finding that it failed to consult prior to entering the sale negotiation, although the Crown notes that the decision of this Court that recognized such a duty, ***Haida Nation v. British Columbia (Minister of Forests)*** (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, was decided late in the sale process.

[90] Ultimately, the chambers judge went on to find that after the appellant commenced the petition proceedings, consultations did occur in a *bona fide* manner. In his reasons, the chambers judge wrote that between April 2003 and the time of the hearing in chambers, LWBC and the Musqueam had discussions further to those they had had prior to the filing of the petition. On 25 August 2003, LWBC tabled a proposal that provided, *inter alia*, for the sale to the land to UBC; for Musqueam to receive $550,000; for Musqueam to receive five per cent of any revenue received by LWBC for any modification of the covenant that required the land be used as a golf

course; and for one truckload of timber per year for two years for use as longhouse firewood. Musqueam's counter-proposal of 22 September 2003 provided that the Musqueam would buy the golf course for $10 million, which it would pay on the earlier of ten years or the conclusion of the treaty; Musqueam would agree to maintain the covenant restricting the use of the land to a golf course for a long-term period; Musqueam would receive a logging truckload of timber for longhouse firewood; and LWBC would assist Musqueam access a forest tenure licence. LWBC's counter-proposal of 30 October 2003 again had as its core the sale of the Golf Course Land to UBC but, *inter alia*, slightly increased the amount of wood available to Musqueam.

[91] The judge held that at the stage at which matters stood relating to the claim of aboriginal title, the duty of consultation and accommodation would amount to a duty to formulate a "practical interim compromise". He found that an offer of economic compensation, which was the core of the LWBC offer, met the duty imposed upon the agents of the Province and, accordingly, he dismissed the petition. In my view, if the chambers judge had had the benefit of the judgments in the cases of ***Haida*** and ***Taku***, he would not have reached the conclusion he did.

[92] We now have the benefit of these judgments of the Supreme Court of Canada. I have found helpful the analysis set forth in these cases. What I take from these judgments is the principle that the duty of government to consult and in appropriate cases to accommodate "is part of a process of fair dealing and reconciliation" with an affected First Nation where aboriginal rights or title are in play.

The honour of the Crown mandates such an approach. There is a legal duty cast on government to consult prior to an aboriginal group proving its claim, which duty is conditioned and informed by the nature and strength of any claims of the First Nation advancing such claims. McLachlin C.J. said this at paras. 37-38 of ***Haida***, *supra*:

> 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.
>
> 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.... 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.

[93] McLachlin C.J. continued to elaborate at paras. 43-44 on what consultation would be required with aboriginal groups. At one end of the spectrum, where the aboriginal group's title claim is weak, the aboriginal right limited, or the potential for infringement minor, all that is required is that the Crown give notice to the band of its plans, disclose information and discuss issues raised in the notice. At the other end of the spectrum, where a strong *prima facie* case for the claim is established, "deep consultation" aimed at finding a satisfactory interim solution may be required. Such

consultation may entail the opportunity for the aboriginal group to make submissions, formally participate in the decision-making process and receive written reasons to show Aboriginal concerns were considered and what impact these concerns had on the decision (at paras. 43-44). According to McLachlin C.J. "[e]very case must be approached individually and 'flexibly'".

[94] In my view, the duty owed to the Musqueam by LWBC in this case tended to the more expansive end of the spectrum. The Crown conceded the Musqueam had a *prima facie* case for title over the Golf Course Land, and the report of the archaeological firm noted that the Musqueam had the strongest case of the bands in the area. Potential infringement is of significance to the Musqueam in light of their concerns about their land base. If the land is sold to a third party, there will likely be no opportunity for the Musqueam to prove their connection to this land again. The Musqueam were therefore entitled to a meaningful consultation process in order that avenues of accommodation could be explored.

[95] In light of my view of the consultation required in this situation, I consider that the consultation process was flawed. If this was only a case where notice was required, the consultation may have been sufficient. However, in the present case, I consider the consultation was left until a too advanced stage in the proposed sale transaction. As McLachlin C.J. observed in ***Haida***, there is ultimately no obligation on parties to agree after due consultation but in my view a decent regard must be had for transparent and informed discussion. Of course, legitimate time constraints may exist in some cases where the luxury of stately progress towards a business

decision does not exist, but such urgency was not readily apparent in the present case. These lands have been used as a public golf course for a long time, and the *status quo* is not about to change having regard to the extant lease arrangements. The Musqueam should have had the benefit of an earlier consultation process as opposed to a series of counter-offers following the decision by LWBC to proceed with the sale.

[96] I note that McLachlin C.J. suggested there should be some measure of 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 would be used by the court when the question is not a purely legal question. She also observed that what is required is not perfection, but reasonableness in any consultation process followed by the Crown. However, even providing an appropriate measure of deference, for the reasons set out above, the Province in my view did not adequately consult with the Musqueam regarding the sale of the Golf Course Land.

[97] McLachlin C.J. also elaborated in ***Haida*** on the accommodation that may be required if the consultation process suggests Crown policy should be amended. 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. In relatively undeveloped areas of the province, I should think accommodation might take a multiplicity of forms such as a sharing of mineral or timber resources. One could also envisage employment agreements or land transfers and the like. 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.

[98] I should think there is a fair probability that some species of economic compensation would be likely found to be appropriate for a claim involving infringement of aboriginal title relating to land of the type of this long-established public golf course located in the built up area of a large metropolis. However, with that said, it is only fair that the consultation process seeking to find proper accommodation should be open, transparent and timely. As I have said, that could not be said to have occurred here because the consultation came too late and was to a degree time constrained because the sale was virtually concluded before any real consultation occurred.

[99] The appellant argues that the Province, presumably through LWBC, should have been required to seek to accommodate the appellant by developing land protection measures so that a bank of land could be made available for treaty purposes. I am not at present persuaded that the courts ought to become involved in such considerations. The treaty process, a process involving not only the Province but as well the federal government, appears to me to be an area discrete from litigation involving questions of aboriginal rights and title. I note that in ***Taku***, the Supreme Court of Canada found that appropriate consultation and accommodation had occurred notwithstanding the position of the First Nation that

any accommodation ought to be part of a treaty or a land claim agreement. I would not foreclose the possibility that some arrangements could be made relating to land being set aside to be dealt with in a treaty process as an interim accommodative measure in a controversy like the instant one, but I consider that any such arrangement should be left to a negotiating process between the consulting parties. The courts, required now to attempt to enunciate principles and pass judgment on disputes concerning aboriginal rights and title have sufficient to do without injecting themselves into treaty processes and negotiations.

[100] While I have observed that having regard to the nature and location of these lands, this may well be a situation where financial compensation could be found to be an appropriate measure of accommodation, I would not wish to limit the parties from engaging in the broadest consideration of appropriate arrangements. I would note that this is not the only tract of land in the Lower Mainland that is Provincial property or property over which the Province has a measure of dominion. Having regard to the wish of the appellant to obtain in the future an enhanced land base and as well its desire to pursue a land settlement related to the treaty process it is engaged in, the parties should be afforded a wide field for consideration of appropriate accommodative solutions. To remedy what I view as the general deficiency in the original consultation process and to provide a full opportunity for meaningful discussion between the parties, I believe an order should be made that will be as efficacious as presently possible. As I noted, we are dealing here with an area of law, aboriginal title, which Lamer C.J. referred to as not particularly

developed. Courts will seek to fashion fair and appropriate remedies for individual cases conscious that as yet we do not have much guidance by way of precedent but, as in other fields, the common law will simply have to develop to meet new circumstances.

[101] In order to afford LWBC and the appellant proper opportunity for consultation with a view to reaching some *modus vivendi* on appropriate accommodation, I would order the suspension of the operation of the Order in Council authorizing the sale for two years. That time frame should provide ample opportunity for the parties to seek to reach some agreement. I would direct that at the expiration of such period any party to the negotiations should be at liberty to bring on appropriate proceedings in the Supreme Court of British Columbia to address any issues that may be felt to require decision by the court. Based on what was said by the Supreme Court of Canada in ***Haida***, UBC has no role to play in the process of consultation or accommodation between the Province and the appellant. I would therefore allow the appeal of the appellant concerning the respondent representatives of the Province of British Columbia in the terms I have indicated and I would dismiss the appeal of the appellant concerning the respondent UBC. I am in agreement with the disposition of costs proposed by Madam Justice Southin.

[102] Before closing I should perhaps observe, out of an abundance of caution, that UBC has previously agreed to hold the lands subject to future directions of a court of competent jurisdiction. If agreement eludes the negotiating parties, it is clearly possible that some order could be made affecting title to the lands and UBC could

be called upon to honour its undertaking. Of course, because these lands are under a long term lease to a golf course operator, I would not expect any alteration in the *status quo* over the near term.

"The Honourable Mr. Justice Hall"

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[103] I have had the opportunity of reading in draft the judgments of Madam Justice Southin and Mr. Justice Hall. I agree that the appeal of the order dismissing the petition against the Crown (but not University of British Columbia) should be allowed for the reasons given by Mr. Justice Hall. Shortly put, I agree that the consultation on which the parties ultimately embarked was not conducted sufficiently free of unnecessary time constraints to afford a meaningful process of accommodation consistent with what the honour of the Crown requires in the Crown's dealings with First Nations people as most recently mandated by the Supreme Court of Canada in ***Haida Nation v. British Columbia (Minister of Forests)***, 2004 SCC 73. I also agree with the form of order Mr. Justice Hall proposes for the disposition of the appeal.

[104] However, I do not wish to be taken to endorse what my colleague suggests may be appropriate forms of interim accommodation in this case. The disposition of the appeal does not require that any comment be made in that regard and, in my respectful view, what my colleague says in paragraphs 98–100 of his judgment might better be put to one side for now.

[105] There is little in the decided cases from which assistance can be drawn with respect to the measure of interim accommodation that may be required in the circumstances that prevail in this case. Where, as here, no aboriginal title has been finally established, there my well be questions about whether and to what extent

economic compensation or other forms of what might be said to be non-reversible accommodation are necessary or appropriate. Given the disposition of the appeal, I consider these and other related questions that were not directly addressed in argument before us are now best left entirely to the parties unfettered by judicial commentary.

"The Honourable Mr. Justice Lowry"

TAB 4

Ocean Port Hotel Ltd. *v.* British Columbia (General Manager, Liquor Control and Licensing Branch), [2001] 2 S.C.R. 781, 2001 SCC 52

The General Manager, Liquor Control and Licensing Branch *Appellant*

v.

Ocean Port Hotel Limited *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Manitoba, Her Majesty the Queen in right of Alberta and the Minister of Justice and Attorney General for Alberta *Interveners*

Indexed as: Ocean Port Hotel Ltd. *v.* British Columbia (General Manager, Liquor Control and Licensing Branch)

Neutral citation: 2001 SCC 52.

File No.: 27371.

Hearing and judgment: March 22, 2001.

Reasons delivered: September 14, 2001.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for british columbia

Administrative law -- Tribunals -- Liquor Appeal Board -- Institutional independence -- Liquor Control and Licensing Act providing for appointment of Board members "at the pleasure of the Lieutenant Governor in Council" -- In practice, members are appointed for one-year term and serve on a part-time basis -- Whether Board members sufficiently independent to render decisions on violations of Act and impose penalties provided -- Liquor Control and Licensing Act, R.S.B.C. 1996, c. 267, s. 30.

An initial police investigation and a subsequent investigation by a Senior Inspector with the Liquor Control and Licensing Branch led to allegations that the respondent, which operates a hotel and pub, had committed five infractions of the *Liquor Control and Licensing Act* and Regulations. Following a hearing, another Senior Inspector with the Branch concluded that the allegations had been substantiated and imposed a penalty that included a two-day suspension of the respondent's liquor licence. The respondent appealed to the Liquor Appeal Board by way of a hearing *de novo*. The findings on four of the five allegations were upheld, and the penalty was confirmed. Pursuant to s. 30(2)(a) of the Act, the chair and members of the Board "serve at the pleasure of the Lieutenant Governor in Council". In practice, members are appointed for a one-year term and serve on a part-time basis. All members but the chair are paid on a *per diem* basis. The chair establishes panels of one or three members to hear matters before the Board "as the chair considers advisable". The Court of Appeal concluded that members of the Board lacked the necessary guarantees of independence required of administrative decision makers imposing penalties and set aside the Board's decision.

Held: The appeal should be allowed and the matter remitted to the British Columbia Court of Appeal to decide the issues which it did not address.

It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. The statute must be construed as a whole to determine the degree of independence the legislature intended. Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice. However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication.

There is a fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts. Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. Given their primary policy-making function, however, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not.

The legislature's intention that Board members should serve at pleasure is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should be read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed a higher standard is required. Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence. Nor is a constitutional guarantee of independence implicated here. There is no basis upon which to extend the constitutional guarantee of judicial independence that animated the *Provincial Court Judges Reference* to the Liquor Appeal Board. The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. Licences are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government.

This Court's conclusion affirming the independence of the Board makes it necessary to remit the case to the Court of Appeal for consideration of the issues it expressly refrained from addressing. Many of these issues directly relate to the validity of the decision at first instance. Since the Court of Appeal will have the benefit of full argument on the nature of the initial hearing and the relevant provisions of the Act, the Court also remits for its consideration the issue of whether this hearing gave rise to a reasonable apprehension of bias and, if so, whether this apprehension was cured by the *de novo* proceedings before the Board.

Cases Cited

Distinguished: *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; **referred to:** *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405; *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons (Alberta)*, [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Preston v. British Columbia* (1994), 92 B.C.L.R. (2d) 298; *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129; *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *R. v. Silveira*, [1995] 2 S.C.R. 297; *M. v. H.*, [1999] 2 S.C.R. 3.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11(*d*).

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 23.

Constitution Act, 1867, preamble.

Evidence Act, R.S.B.C. 1996, c. 124, s. 10(3).

Liquor Control and Licensing Act, R.S.B.C. 1979, c. 237 [now R.S.B.C. 1996, c. 267], ss. 2, 3, 20, 30, 37, 38(1)(a) [am. 1986, c. 5, s. 11], 45(2) [am. 1988, c. 43, s. 21], 48.

Liquor Control and Licensing Regulations, B.C. Reg. 608/76, s. 11(3).

APPEAL from a judgment of the British Columbia Court of Appeal (1999), 68 B.C.L.R. (3d) 82, 174 D.L.R. (4th) 498, 15 Admin. L.R. (3d) 13, 125 B.C.A.C. 82, 204 W.A.C. 82, [1999] B.C.J. No. 1112 (QL), 1999 BCCA 317, allowing the respondent's appeal from a decision of the Liquor Appeal Board upholding a two-day suspension of the respondent's liquor licence. Appeal allowed.

George H. Copley, Q.C., and *Neena Sharma*, for the appellant.

Howard Rubin and *Peter L. Rubin*, for the respondent.

Donald J. Rennie and *Anne M. Turley*, for the intervener the Attorney General of Canada.

Dennis W. Brown, Q.C., and *Lucy McSweeney*, for the intervener the Attorney General for Ontario.

Shawn Greenberg and *Rodney G. Garson*, for the intervener the Attorney General of Manitoba.

Timothy Hurlburt and *Sean McDonough*, for the interveners Her Majesty the Queen in right of Alberta and the Minister of Justice and Attorney General for Alberta.

The judgment of the Court was delivered by

1 THE CHIEF JUSTICE – This appeal raises a critical but largely unexplored issue of administrative law: the degree of independence required of members sitting on administrative tribunals empowered to impose penalties. As the intervening Attorneys General emphasize, this is an issue that implicates the structures of administrative bodies across the nation.

2 The Court allowed the appeal at the conclusion of the hearing, with reasons to follow. These are the reasons for judgment.

I. The Background

3 Ocean Port Hotel Ltd. operates a hotel and pub in Squamish, British Columbia. The RCMP investigated a number of incidents in and around the Ocean Port Hotel and reported that the establishment had not been operating in compliance with the *Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237 (now R.S.B.C. 1996, c. 267) (the "Act"), the Regulations, and the terms of its liquor licence. Mel Tait, a Senior Inspector with the Liquor Control and Licensing Branch, conducted an investigation into these incidents. This investigation culminated in a hearing, pursuant to s. 20 of the Act, before Peter Jones, another Senior Inspector with the Branch.

4 At this hearing, Senior Inspector Tait presented information to support the following five allegations of non-compliance:

1. May 12, 1996: An intoxicated person was found within Ocean Port contrary to s. 45(2)(a) and (b) of the Act.

2. May 12, 1996: The intoxicated patron attempted to start a fight contrary to s. 38(1)(a) of the Act.

3. October 4, 1996: Ocean Port failed to comply with s. 37 of the Act by permitting minors to enter and remain within the establishment.

4. October 26, 1996: Ocean Port permitted a patron to become intoxicated contrary to s. 45(2)(a) of the Act.

5. October 26, 1996: Two patrons were observed carrying liquor from Ocean Port contrary to s. 11(3) of the *Liquor Control and Licensing Regulations*, B.C. Reg. 608/76.

5 Senior Inspector Jones concluded that the allegations had been substantiated on a balance of probabilities and imposed a two-day suspension of Ocean Port's liquor licence to be served on a prescribed Friday and Saturday. He also ordered that a sign notifying the public of the suspension be posted in a prominent location. He advised Ocean Port of his decision by letter.

6 Ocean Port appealed this decision to the Liquor Appeal Board by way of a hearing *de novo*. At this hearing, the Board heard evidence on the charges from three RCMP officers and two witnesses for Ocean Port. The Board accepted the evidence of the police officers over that of Ocean Port's witnesses where the evidence differed, finding the officers' evidence more credible and consistent. The Board issued written reasons affirming Senior Inspector Jones' decision with regard to the first, second, third and fifth allegations. It held that the actions of the doorman relied on by Ocean

Port did not constitute due diligence. It confirmed the two-day, Friday and Saturday suspension as an appropriate penalty. The panel acknowledged that control of the premises had improved since the appointment of a new general manager, but noted that two of the infractions occurred after his appointment.

7 Ocean Port sought and obtained leave to appeal to the British Columbia Court of Appeal under s. 30(9) of the Act. The Chief Justice of British Columbia stayed the licence suspension pending the resolution of this appeal.

8 Before the Court of Appeal ((1999), 68 B.C.L.R. (3d) 82, 1999 BCCA 317), Ocean Port argued for the first time that the Board lacked sufficient independence to make the ruling and impose the penalty it had, and that as a result the decision must be set aside. It also objected to the order on the grounds that: (1) the Board relied on hearsay, irrelevant evidence and insufficient evidence to support the allegations against Ocean Port, in contravention of the principles of natural justice and its duty of fairness; (2) the Board erred in law in its application of s. 10(3) of the *Evidence Act*, R.S.B.C. 1996, c. 124, and (3) the jurisdiction of the General Manager under the Act was limited to matters of compliance and could not ground a decision on an "offence", a power reserved to the courts.

9 The Court of Appeal, *per* Huddart J.A., held that appointees to the Board lacked the security of tenure necessary to ensure their independence. Huddart J.A. started her analysis by noting the agreement of the parties that the court must be guided by the relevant principles articulated by Gonthier J. in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919. Although Gonthier J. articulated these principles in relation to s. 23 of the Quebec *Charter of Human Rights*

and Freedoms, R.S.Q., c. C-12, he looked to the common law rules of natural justice and fairness to guide his interpretation of this provision's guarantees of independence and impartiality. Huddart J.A. identified two principles affirmed in *Régie*: (1) governmental decision makers imposing penalties must comply with the requirements of impartiality and independence: and (2) the content of these requirements depends on all of the circumstances, "in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make" (*Régie*, at para. 39).

10 Huddart J.A. concluded that the decision to suspend a licence for violation of the Act closely resembles a judicial decision. It is a penalty with serious, albeit purely economic, consequences. In these circumstances, she concluded, the content of the procedural fairness rules, including the requirement of independence, must approach the standards required of a court at common law.

11 Huddart J.A. summarized Ocean Port's complaint about fairness as involving two key issues: the fusion of the General Manager's prosecutorial and adjudicative roles in the senior inspectors and the reliance at both hearings on hearsay evidence. She noted that, had the alleged infractions been prosecuted as criminal offences under s. 48 of the Act, the procedural safeguards available in the Provincial Court may well have resulted in different findings of fact. Further, the maximum fine of $10 000 for conviction of an offence under s. 48 might be less costly than the two-day suspension imposed by the Board. She also noted that this Court, in *Régie*, held that the overlapping duties of senior inspectors gave rise to a reasonable apprehension of bias. However, she concluded that it was unnecessary to resolve the arguments surrounding the decision of Senior Inspector Jones to suspend the licence, since the

General Manager had conceded that this initial decision could stand only if the appeal process was valid.

12 This brought her to the focal point of the appeal: Ocean Port's concerns relating to the independence of the Board. Relying on *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, Huddart J.A. noted that institutional independence consists of three core components: security of tenure, financial security and administrative control. Only the first component, security of tenure, was at issue in the present case. She found, upon reviewing the Act and the evidence, that the Board functioned through part-time, fixed-term appointments. Members of the Board could be removed at pleasure, but were entitled to payment for the term of their appointment. The essential question was whether such appointments provided sufficient security of tenure.

13 Reviewing this Court's decision in *Régie*, Huddart J.A. reasoned that "at pleasure" appointments to administrative agencies such as the Quebec Régie des permis d'alcool and the Liquor Appeal Board, which impose sanctions for violations of statutes, cannot satisfy the requirement of security of tenure. She concluded that the part-time, fixed-term appointments to the Board were indistinguishable from full-time appointments "at pleasure", since a member can in effect be removed (or not assigned to hearings) at the will of the government. As a result, the Board lacked the necessary degree of independence, and its decision was set aside. Since the validity of the decision at first instance hinged on a fair hearing before the Board, that decision was set aside as well. In view of this conclusion, Huddart J.A. did not consider Ocean Port's other grounds of appeal.

14 The Court of Appeal, *per* Ryan J.A., subsequently granted an order staying the execution of the judgment until this Court refused to grant leave to appeal or, alternatively, granted leave and rendered a decision on the appeal: (1999), 128 B.C.A.C. 130. Leave to appeal was granted by this Court ([2000] 1 S.C.R. xii), and the stay remained in force until the appeal was allowed on March 22, 2001.

II. Legislation

15 The relevant provisions of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267, provide as follows:

> **2** (1) The Liquor Control and Licensing Branch, as established in the ministry of the minister, is continued.
>
> (2) The branch may grant licences and permits to purchase liquor from the Liquor Distribution Branch for resale and reuse in accordance with this Act and the *Liquor Distribution Act*.
>
> **3** (1) The minister, under the *Public Service Act*, must appoint a general manager of the branch and set his or her remuneration.
>
> (2) The general manager must, subject to orders and direction of the minister on matters of general policy,
>
> (a) administer this Act, and
>
> (b) supervise all licensed establishments and manufacturers of liquor.
>
> **20** (1) In addition to any other powers the general manager has under this Act, the general manager may, on the general manager's own motion or on receiving a complaint, take action against a licensee for any of the following reasons:
>
> (a) the licensee's failure to comply with a requirement of this Act, the regulations or a term or condition of a licence;
>
> (b) the conviction of the licensee of an offence under the laws of Canada or British Columbia or under the bylaws of a

municipality or regional district, if the offence relates to the licensed establishment or the conduct of it;

(c) the persistent failure to keep the licensed establishment in a clean and orderly fashion;

(d) the existence of a circumstance that, under section 16, would prevent the issue of a licence;

(e) the suspension or cancellation of a municipally, regionally, provincially or federally granted licence, permit or certificate that the licensee is required to hold in order to operate the licensed establishment.

(2) If the general manager has the right under subsection (1) to take action against a licensee, the general manager may do any one or more of the following, with or without a hearing:

(a) issue a warning to the licensee;

(b) impose terms and conditions on the licensee's licence or rescind or amend existing terms and conditions on the licence;

(c) impose a fine on the licensee within the limits prescribed;

(d) suspend or cancel the licensee's licence, in whole or in part.

(3) Despite subsection (2)(d), the general manager must suspend or cancel a licence held by a person who

(a) has been convicted of an offence against prescribed laws of Canada or British Columbia, or

(b) has been convicted of an offence against this Act, if the person committed the offence within 3 years after being convicted of a previous offence against this Act.

30 (1) The Liquor Appeal Board is continued consisting of a chair and other members the Lieutenant Governor in Council may appoint.

(2) The chair and the members of the appeal board

(a) serve at the pleasure of the Lieutenant Governor in Council, and

(b) are entitled to

(i) receive the remuneration set by the Lieutenant Governor in Council, and

(ii) be paid reasonable expenses incurred in carrying out their duties as members of the appeal board.

(3) The chair of the appeal board may designate one member as vice chair.

(4) Subject to section 31(6) and (8), the appeal board must hear and determine any matter appealed under section 31.

(5) The chair of the appeal board may establish one or more panels of the appeal board, each consisting of one or 3 members of the appeal board, as the chair considers advisable, to hear any matter that is before the appeal board, and when a panel is established,

(a) the chair must appoint one of the members of the panel to preside at meetings of the panel, and

(b) the panel has the jurisdiction of the appeal board with respect to matters under this Act that come before the appeal board. . .

16 The preamble to the *Constitution Act, 1867* provides, in part:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom . . . .

III. Issue

17 The issue is whether members of the Liquor Appeal Board are sufficiently independent to render decisions on violations of the Act and impose the penalties it provides. The other grounds raised by the respondent against the validity of the Senior Inspector's initial decision to impose a penalty are not before the Court.

IV. Discussion

18 This appeal concerns the independence of the Liquor Appeal Board. The Court of Appeal concluded that members of the Board lacked the necessary guarantees

of independence required of administrative decision makers imposing penalties. More specifically, it held that the tenure enjoyed by Board members – appointed "at the pleasure" of the executive to serve on a part-time basis – was insufficiently secure to preserve the appearance of their independence. As a consequence, it set aside the Board's decision in the present case.

19 The appellant, with the support of the intervening Attorneys General, argues that this reasoning disregards a fundamental principle of law: absent a constitutional challenge, a statutory regime prevails over common law principles of natural justice. The Act expressly provides for the appointment of Board members at the pleasure of the Lieutenant Governor in Council. The decision of the Court of Appeal, the appellant contends, effectively struck down this validly enacted provision without reference to constitutional principle or authority. In essence, the Court of Appeal elevated a principle of natural justice to constitutional status. In so doing, it committed a clear error of law.

20 This conclusion, in my view, is inescapable. It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.

21 Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1

S.C.R. 495, at p. 503; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: *Matsqui*, *supra* (*per* Lamer C.J. and Sopinka J.); *Régie*, *supra*, at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, at para. 39.

22 However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See generally: *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons (Alberta)*, [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.

23 This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent

jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the "*Provincial Court Judges Reference*"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges – both in fact and perception – by insulating them from external influence, most notably the influence of the executive: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 69; *Régie*, at para. 61.

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

25 In the present case, the legislature of British Columbia spoke directly to the nature of appointments to the Liquor Appeal Board. Pursuant to s. 30(2)(a) of the

Act, the chair and members of the Board "serve at the pleasure of the Lieutenant Governor in Council". In practice, members are appointed for a one-year term (pursuant to an Order-in-Council), and serve on a part-time basis. All members but the chair are paid on a *per diem* basis. The chair establishes panels of one or three members to hear matters before the Board "as the chair considers advisable": s. 30(5).

26 The Court of Appeal, *per* Huddart J.A. concluded that this appointment scheme effectively deprived Board members of security of tenure, an essential safeguard of their independence. Relying on *Preston v. British Columbia* (1994), 92 B.C.L.R. (2d) 298, she held that Board members could be removed at pleasure, although they would be entitled to payment for the fixed term of their appointment. In her view, however, the additional protection offered by the fixed term of employment was illusory. Since the chair has an absolute discretion over the composition of hearing panels, it is possible that members might not be assigned to any cases, thus depriving them of work and remuneration. Thus part-time, fixed term appointments to the Board are indistinguishable from appointments "at pleasure". Both raise a reasonable apprehension that Board members may be unduly influenced by the threat of removal should they render unsatisfactory decisions in the eyes of the executive.

27 In my view, the legislature's intention that Board members should serve at pleasure, as expressed through s. 30(2)(a) of the Act, is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should be read as imposing a higher degree of independence to meet the requirements of natural justice, if indeed a higher standard is required. It is easy to imagine more exacting

safeguards of independence – longer, fixed-term appointments; full-time appointments; a panel selection process for appointing members to panels instead of the Chair's discretion. However, in each case one must face the question: "Is this what the legislature intended?" Given the legislature's willingness to countenance "at pleasure" appointments with full knowledge of the processes and penalties involved, it is impossible to answer this question in the affirmative. Huddart J.A. concluded that the tenure enjoyed by Board members was "no better than an appointment at pleasure" (para. 27). However, this is precisely the standard of independence required by the Act. Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence, "however inviting it may be for a Court to do so": *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129 (C.A.), at p. 137.

28 Part of the problem in this case may be attributable to the Board's apparent concession before the Court of Appeal (at para. 9) that "the court must be guided in its consideration of this appeal by the discussion of the applicable principles" in *Régie*. The Court of Appeal, on this basis, appears to have treated the standards of independence articulated in *Régie* as binding. This overlooks the fact that the requirements of independence in *Régie* emanated from the Quebec *Charter of Human Rights and Freedoms*, a quasi-constitutional statute. Section 23 of the Quebec *Charter* entrenches the right to a "full and equal, public and fair hearing by an independent and impartial tribunal" (emphasis added). No equivalent guarantee of independence constrains the legislature of British Columbia. The Court of Appeal consequently erred in treating the standard articulated in *Régie* – rather than the will of the legislature – as determinative of the degree of independence required of Board members.

29 Nor is a constitutional guarantee of independence implicated in the present case. The respondent does not argue that the proceedings before the Board engage a right to an independent tribunal under ss. 7 or 11(*d*) of the *Canadian Charter of Rights and Freedoms*. Instead, it contends that the preamble to the *Constitution Act, 1867* mandates a minimum degree of independence for at least some administrative tribunals. In support, the respondent invokes Lamer C.J.'s discussion of judicial independence in the *Provincial Court Judges Reference*. In that case, Lamer C.J., writing for the majority, concluded that "judicial independence is at root an unwritten constitutional principle . . . recognized and affirmed by the preamble to the *Constitution Act, 1867*" (para. 83 (emphasis in original)). The respondent argues that the same principle binds administrative tribunals exercising adjudicative functions.

30 With respect, I find no support for this proposition in the *Provincial Court Judges Reference*. The language and reasoning of the decision are confined to the superior and provincial courts. Lamer C.J. addressed the issue of judicial independence; that is, the independence of the courts of law comprising the judicial branch of government. Nowhere in his reasons does he extend his comments to tribunals other than courts of law.

31 Nor does the rationale for locating a constitutional guarantee of independence in the preamble to the *Constitution Act, 1867* extend, as a matter of principle, to administrative tribunals. Lamer C.J.'s reasoning rests on the preamble's reference to a constitutional system "similar in Principle to that of the United

Kingdom". Applied to the modern Canadian context, this guarantee extends to provincial courts (at para. 106):

> The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the *Act of Settlement* of 1701. As we said in *Valente*, *supra*, at p. 693, that Act was the "historical inspiration" for the judicature provisions of the *Constitution Act, 1867*. Admittedly, the Act only extends protection to judges of the English superior courts. However . . . judicial independence [has] grown into a principle that now extends to all courts, not just the superior courts of this country.

These comments circumscribe the requirement of independence, as a constitutional imperative emanating from the preamble, to the provincial and superior courts.

32 Lamer C.J. also supported his conclusion with reference to the traditional division between the executive, the legislature and the judiciary. The preservation of this tripartite constitutional structure, he argued, requires a constitutional guarantee of an independent judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.

33 The Constitution is an organic instrument, and must be interpreted flexibly to reflect changing circumstances: *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127 (P.C.). Indeed, in the *Provincial Court Judges Reference*, Lamer C.J. relied on this principle to extend the tradition of independent

superior courts (derived from the constitution of the United Kingdom) to all courts, stating that "our Constitution has evolved over time" (para. 106). However, I can find no basis upon which to extend the constitutional guarantee of judicial independence that animated the *Provincial Court Judges Reference* to the Liquor Appeal Board. The Board is not a court, nor does it approach the constitutional role of the courts. It is first and foremost a licensing body. The suspension complained of was an incident of the Board's licensing function. Licences are granted on condition of compliance with the Act, and can be suspended for non-compliance. The exercise of power here at issue falls squarely within the executive power of the provincial government.

34 The respondent argues in the alternative that the Court of Appeal correctly found a reasonable apprehension of bias arising from the initial hearing before Senior Inspector Jones. The real issue before the Court of Appeal, in its view, was whether the appeal proceedings were sufficiently fair to "cure" this defect in the initial hearing. In order to "cure" the apprehension of bias arising from the initial stage, it contends, the Board must be sufficiently independent to provide a fair hearing. In the respondent's submission, a fair hearing can only occur if it comports with the principles of natural justice, even if the tribunal's enabling statute contemplates less stringent guarantees of independence.

35 The complaint against the initial hearing before Senior Inspector Jones was framed as follows by the Court of Appeal (at para. 15):

> The appellant [Ocean Port Hotel Ltd.] sees in the delegation of some of the functions of the general manager to senior inspectors a breach of the principle of natural justice requiring impartiality of the decision maker. The overlap in their functions as investigator, prosecutor, and decision maker, offends the rule that no one should be the judge in his own cause.

36 The respondent contends that the last sentence of this paragraph amounts to a finding of bias by the Court of Appeal. Read in context, however, this statement was not a finding of bias, but merely a summary of the respondent's argument. In fact, the Court of Appeal declined to decide this issue. Huddart J.A. stated (at para. 18):

> Because the respondent [the General Manager, Liquor Control and Licensing Branch] conceded the decision at first instance could only be upheld if the appeal process was valid, I do not find it necessary to analyse the arguments surrounding the initial decision to suspend. This brings me to the focal point of this appeal, namely the institutional independence of the Liquor Appeal Board. [Emphasis added.]

37 Upon determining that the Board lacked the necessary guarantees of independence, Huddart J.A. concluded as follows (at para. 38):

> The consequence of the absence of independence in the Board is that its decision must be set aside. Because the validity of the decision of Senior Inspector Jones was dependent on a fair hearing review before the Board, that decision too must be set aside. Having reached this conclusion, I need not consider whether the hearings before the Senior Inspector and the Board were unfair because of the lack of evidence to support their findings of fact or their inappropriate reliance on hearsay evidence. Nor need I consider the two discrete issues on which leave was also granted.

38 The Court of Appeal clearly declined to address any of the issues before it except the issue of the Board's independence. Although it set aside the decision of the Senior Inspector, it did so on the strength of a concession attributed to the appellant, rather than a determination that the initial hearing in fact contravened the rule against bias. This concession, as framed by Huddart J.A., was to the effect that "the decision at first instance could only be upheld if the appeal process was valid" (para. 18). It was on this basis, rather than an analysis of the applicable facts and law, that the initial decision was set aside.

39 The appellant does not make the same concession before this Court. Instead, he contends that no reasonable apprehension of bias arose from the initial hearing. Even assuming the initial hearing might otherwise have offended the rule against bias, he argues, the overlapping of duties performed by senior inspectors was authorized by statute, and consequently cannot be attacked on this basis. Finally, he contends that a finding of bias in the initial hearing would not be fatal in any event, since it was cured by the subsequent *de novo* hearing before the Board.

40 In my view, there is considerable merit to the appellant's submissions. The mere fact that senior inspectors functioned both as investigators and as decision makers does not automatically establish a reasonable apprehension of bias. The respondent relies on *Régie*, where the Court held that an apprehension of bias arose from the plurality of functions performed by the Régie's lawyers and directors. *Régie*, however, is clearly distinguishable from the case at bar. The apprehension of bias in *Régie* resulted from the possibility of a single officer participating at each stage of the process, from the investigation of a complaint through to the decision ultimately rendered. The central concern in *Régie*, succinctly stated by Gonthier J., was that "prosecuting counsel must in no circumstances be in a position to participate in the adjudication process" (para. 56; see also paras. 54 and 60).

41 The respondent makes no similar allegations in the present case. Its concern hinges solely on the fact that the Branch's hearing officers were employed by the same authority as its prosecuting officers. However, as Gonthier J. cautioned in *Régie*, "a plurality of functions in a single administrative agency is not necessarily problematic" (para. 47). The overlapping of investigative, prosecutorial and

adjudicative functions in a single agency is frequently necessary for a tribunal to effectively perform its intended role: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623. Without deciding the issue, I would note that such flexibility may be appropriate in a licensing scheme involving purely economic interests.

42 Further, absent constitutional constraints, it is always open to the legislature to authorize an overlapping of functions that would otherwise contravene the rule against bias. Gonthier J. alluded to this possibility in *Régie*, at para. 47, quoting from the opinion of L'Heureux-Dubé J. in *Brosseau*, *supra*, at pp. 309-10:

> As with most principles, there are exceptions. One exception to the "*nemo judex*" principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue.
>
> . . .
>
> In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. . . . If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*.

43 Thus, even assuming the plurality of functions performed by senior inspectors would otherwise offend the rule against bias, it may well be that this structure was authorized by the Act at the relevant time.

44 Given the apparent merit of the appellant's submissions, I am reluctant to find the initial decision invalid solely on the basis of a concession that is now denied by the appellant, or at least recanted. This Court, of course, is not bound by

concessions on questions of law: *R. v. Silveira*, [1995] 2 S.C.R. 297; *M. v. H.*, [1999] 2 S.C.R. 3. However, in the circumstances, I have concluded that it is best to refrain from embarking on an extensive inquiry into the validity of the initial decision, especially in the absence of a considered decision on this issue in the court below. This Court's conclusion affirming the independence of the Board makes it necessary to remit the case to the Court of Appeal for consideration of the issues it expressly refrained from addressing. Many of these issues directly relate to the validity of the decision at first instance. Since the Court of Appeal will have the benefit of full argument on the nature of the initial hearing and the relevant provisions of the Act, I would also remit for its consideration the issue of whether this hearing gave rise to a reasonable apprehension of bias and, if so, whether this apprehension was cured by the *de novo* proceedings before the Board.

V. Conclusion

45 The appeal is allowed with costs, the order of the British Columbia Court of Appeal is set aside, and the matter is remitted to the British Columbia Court of Appeal to decide the issues which it did not address.

Appeal allowed with costs.

Solicitor for the appellant: The Ministry of the Attorney General, Vancouver.

Solicitor for the respondent: Howard Rubin, Vancouver.

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

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

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor for the interveners Her Majesty the Queen in right of Alberta and the Minister of Justice and Attorney General for Alberta: Alberta Justice, Edmonton.

TAB 5

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Squamish Nation et al v. The Minister of Sustainable Resource Management et al,* 2004 BCSC 1320

Date: 20040927
Docket: L032971
Registry: Vancouver

Between:

THE SQUAMISH NATION,
by the Chiefs and Council of the Squamish Indian Band,
on their own behalf and on behalf of the members of the Squamish Indian Band

PETITIONERS

And:

THE MINISTER OF SUSTAINABLE RESOURCE MANAGEMENT,
on behalf of Her Majesty the Queen in right of the Province of British Columbia;
LAND AND WATER BRITISH COLUMBIA INC. and
THE ENVIRONMENTAL ASSESSMENT OFFICE and
GARIBALDI AT SQUAMISH INC.

RESPONDENTS

Before: The Honourable Madam Justice Koenigsberg

Corrected and Amended Oral Reasons for Judgment

(Changes and Amendments are Highlighted - Additions are bold/underlined
Deletions are bold/double-underlined in square brackets)

Counsel for Petitioners	G.J. McDade, Q.C. James P. Tate
Counsel for Respondents	P.J. Pearlman, Q.C.
Counsel for Garibaldi at Squamish Inc.	C.D. Johnston
Counsel for GAR 96	H. Shapray, Q.C.
Date and Place of Hearing:	September 27, 2004 Vancouver, B.C.

INTRODUCTION

The Petitioner, the Squamish Nation, petitions the Court for a declaration that four decisions made by the Respondent government bodies were made in breach of the government's fiduciary and constitutional duties to consult and seek accommodation with the Petitioner's claimed aboriginal rights before granting rights to third parties which may affect the exercise of those aboriginal rights.

The Parties and their Interests

[1] The Squamish Nation claims aboriginal title over the lands at Brohm Ridge which are the subject of this Petition. The Squamish Nation also claims aboriginal rights to use the area for cultural and sacred practices, and for hunting, fishing, trapping, recreational and other traditional uses. The Squamish Nation asserts that the construction and operation of the proposed project will infringe their title, and will infringe their aboriginal rights.

[2] The Minister of Sustainable Resource Management is the Minister responsible for the ***Land Act***, R.S.B.C. 1996, c. 245.

[3] Land and Water British Columbia Inc. ("LWBC") is a Crown corporation which operates as an agent of government to carry out activities such as the disposition of Crown lands, the

issuance of land tenures and the administration and licensing of Crown water resources.

[4] The Environmental Assessment Office is the office of government continued by the ***Environmental Assessment Act***, SBC 2002, c. 43 responsible for the environmental assessment of reviewable projects under that ***Act***.

[5] Garibaldi at Squamish ("GAS") [**is an interested party**] is the current proponent of a proposed four season mountain resort at Brohm Ridge, near Garibaldi Provincial Park. That project is a reviewable project under the ***Environmental Assessment Act***.

[6] Garibaldi Alpen Resorts (1996) Ltd. ("GAR 96") is an interested party.

[7] GAS plans to create a ski, golf and real estate resort on the slopes of Brohm Ridge, resulting in extensive commercial activity on Mount Garibaldi.

The Issues

[8] The Squamish Nation claims the Crown is in breach of its constitutional and fiduciary duties to the Squamish Nation because of failure to consult with the Squamish Nation about its claim to aboriginal title and rights in the Mt. Garibaldi

area prior to making significant decisions which advance the GAS project, and that the Crown is in further breach of administrative duties owed to the Squamish Nation.

FACTS

[9] The Squamish Nation is an Indian Band within the meaning of the ***Indian Act***. The Nation has four reserves in the urban areas of North and West Vancouver, and 18 reserves outside of the metropolitan area, in the Squamish Valley and Howe Sound.

[10] The asserted aboriginal title over Squamish traditional territory includes the lands within the watersheds draining into Burrard Inlet west of Indian Arm, and lands within the watersheds draining into Howe Sound, including the Squamish Valley to the height of land separating the Howe Sound drainage from the Lillooet drainage (the "Traditional Territory").

[11] Within that traditional territory Mount Garibaldi is an area of cultural and sacred significance. In Squamish Nation history, Mount Garibaldi is known as the harbour of the Squamish Nation during the Great Flood, and therefore is the point of origin of the modern Squamish Nation. The Squamish Nation claims it has exclusively occupied and owned the Mount

Garibaldi area under its laws since time immemorial. Mount Garibaldi is regarded with great reverence.

[12] The Squamish people, both traditionally and presently, use the lands along Brohm Ridge for a variety of purposes including hunting, trapping, medicinal and spiritual practices.

[13] The Squamish Nation's claims to title to the Mount Garibaldi area is well documented and purports to demonstrate that Squamish people have used the Brohm Ridge area for at least 4,000 years.

[14] The Squamish Nation has repeatedly asserted aboriginal rights and title to its traditional territory, including Mount Garibaldi and the Brohm Ridge area. It is presently at Stage 3 of the 6-stage Treaty process with both the Provincial and Federal Crowns. The Treaty Commission accepted the Squamish Nation's Statement of Intent on December 16, 1993.

[15] The Squamish Nation has also produced the Xay Temixw Land Use Plan which designates the Brohm Ridge/Mount Garibaldi area as a "Sensitive Area" where special care must be taken to protect the sacred cultural values which exist there. This area is in the heart of the Squamish territory and is not subject to any significant overlap with other 1st Nations.

[16] The Squamish Nation's claim to the Brohm Ridge area was recognized by the original proponent of the project, the expansion of which is at issue in this Petition, who noted in its application for a certificate under the ***Environmental Assessment Act*** that:

> "The Squamish Nation's use and occupation of their land has continued uninterrupted since the arrival of the Europeans. Despite the negative impact that the European settlement had on their access to Squamish Nation land and resources, their current relationship to the land is extensive, varied and consistent with the reality of life in the late twentieth century."

[17] The Province of British Columbia (the "Province") conducted its own research in June, 2003 which confirmed the Squamish Nation claims to the Brohm Ridge area and concluded the consultation priority to be "High". The author recognized the soundness of Squamish Nation claims to the area, as well as the cultural and religious significance of the area in her conclusions.

[18] The process for developing a commercial ski resort in British Columbia is set out in the Commercial Alpine Ski Policy ("CASP"). CASP is a formal written policy pursuant to the ***Land Act*** that is intended to clarify the exercise of Crown decision-making for land dispositions for ski hills. The

purpose of the policy is to encourage commercial development of Crown Land for alpine ski facilities.

[19] In recognition of the wide-ranging impact of a commercial ski resort, the provisions of CASP require extensive consultation with the public, at least six provincial agencies, and local government. CASP is silent with respect to consultation with First Nations. However, the Crown states that First Nations are included in the "public".

[20] CASP governs the development process from the initial tendering of proposals right through until the execution of Master Development Agreement. CASP sets out the Ministry's commitment when entering into an Interim Agreement, which pursuant to the policy are intended to provide binding commitments from the Crown.

[21] On or about February 28, 1997, an interim agreement (the "Interim Agreement") was signed between the Province and Garibaldi Alpine Resorts (1987) Ltd. ("GAR87").

[22] The Interim Agreement proposed the development of a ski hill with some housing and a limited 5-hole golf course (the "Ski Hill Project"). The Interim Agreement covered a study area of 6,260 acres in the Brohm Ridge area. The original project was based upon a skier estimate of 12,000/day, and

therefore under the CASP policy, the development of hotels and residences was restricted to 12,000 "bed units".

[23] The Interim Agreement was constituted as a formal, legally enforceable agreement pursuant to the Commercial Alpine Ski Policy and defined "the obligations of the parties if a Project Approval Certificate is issued" (or if not issued). It set out a timeline for completion, and details of the final contract. It was conditional upon receipt of a Project Approval Certificate. The Interim Agreement mandated the Province to work towards final completion, to define the steps and studies necessary, and to meet standards of "reasonable" and "diligent" review.

[24] The Interim Agreement also provided GAR87 with a Licence of Occupation pursuant to section 36 of the ***Land Act***, R.S.B.C. 1979, c. 214 (the "Licence"), that allowed it to enter upon the land at any time to carry out its obligations under the Interim Agreement. The Licence also required consideration of the Licensee's interests prior to the authorization of potentially conflicting uses for the land.

[25] Like the Commercial Alpine Ski Policy, the Interim Agreement and Licence are silent with respect to consultation with First Nations, or the discharge of First Nation

consultation obligations representing a condition upon which any further decision would be made.

[26] The Interim Agreement had a four-year term, expiring on February 28, 2001.

[27] On June 10, 1997, the Interim Agreement was assigned by GAR87 to Garibaldi Alpine Resorts (1996) Ltd. ("GAR 96").

[28] The Garibaldi at Squamish resort project, as originally proposed, was a "reviewable project" within the meaning of the ***Environmental Assessment Act***, R.S.B.C. 1996, c. 119. Accordingly, the then proponent, GAR 96 applied, in December, 1997 to the Environmental Assessment Office (EAO) for a Project Approval Certificate for the development of an all-season mountain resort at Brohm Ridge, adjacent to the western boundaries of Garibaldi Park. The proponent required the project approval certificate before proceeding with construction of the project.

[29] On December 23, 1997, the Environmental Assessment Office wrote to Chief Joe Mathias of the Squamish Nation notifying the Squamish Nation that the EAO had accepted for review the proponent's application for a Project Approval Certificate, and inviting the Squamish Nation to comment on the

application, and to participate in the environmental review, as a member of the Project Committee.

[30] The EAO consulted with the Squamish Nation in developing the Project Report Specifications, which set the terms of reference for the Project Report which the proponent was required to prepare for review by the Project Committee.

[31] The Project Report Specifications, issued by the EAO in July, 1998 required the proponent to "make its best efforts to identify any potentially adverse impacts of the project on Squamish Nation interests" and to perform a series of studies requested by the Squamish Nation, including:

- historical aboriginal uses of the lands;
- contemporary uses of the lands;
- the potential for restoration of any resources traditionally used by the Squamish Nation;
- the potential impacts on both existing and potential aboriginal uses of the land; and
- archaeological or spiritually significant sites at, or in the vicinity of, the project site.

[32] On November 29, 1999, the EAO issued amended Project Report Specifications identifying additional work and information required from the proponent in order to identify and assess the potential effects of the resort project.

[33] On December 11, 1998, Chief Gibby Jacob informed the EAO that the Squamish Nation intended to participate on the Project Review Committee. He requested funding for their participation. Subsequently, the EAO invited the Squamish Nation to identify their representatives to the Project Committee and advised that it was prepared to discuss how Squamish Nation interests would be identified and addressed in the review, and to discuss arrangements for funding the Squamish Nation's participation. The proponent had not yet submitted its Project Report for review by the Project Committee.

[34] Following the revisions to the Project Report Specifications in late 1999, the environmental review process came to a halt after GAR 96 ran into financial difficulties when its major investor withdrew. GAR 96 sought to arrange financing that would permit it to complete the studies necessary to prepare a Project Report containing the information requested in the original and revised Project Report Specifications. However, it was unable to complete either the environmental assessment review, or Master Plan review processes, before the term of the original Interim Agreement expired in 2001.

[35] Thereafter, GAR 96 made a number of requests to LWBC to extend or reinstate the Interim Agreement.

[36] In or around [December of 2001] **September of 2002**, GAR 96 [transferred] **assigned** its rights in the Ski Hill Project to a new proponent, Garibaldi at Squamish Inc. ("GAS")[**, a company controlled by Luigi Aqulini and Robert J. Gaglardi].** GAR 96 and GAS are engaged in a lawsuit which contests among other things, GAS' control of the project at issue.

[37] On or about September 19, 2002, the Province entered into a "Modification Agreement" with GAR 96 by which it sought to "reinstate and amend" the Interim Agreement and Licence that had expired the previous year (the "Reinstatement Decision").

[38] Through the Reinstatement Decision and Modification Agreement **and the Change of Control Decision**, the Province awarded rights to develop a Ski Area Master Plan to this new ownership group without going through the procedural requirements of CASP.

[39] On or about September 23, 2002, an Assignment Agreement was executed between GAR 96, GAS and the Province whereby the Province accepted the assignment of the rights of GAR 96 to GAS.

[40] It is acknowledged that the Squamish Nation was not consulted by the Crown with respect to either the Modification Agreement, Reinstatement Decision or Change of Control Decision.

[41] On or about December 30, 2002, GAS wrote to the Crown requesting that the study area of the development be expanded to allow for a ski hill with two separate 18-hole golf courses and a much larger real estate development (the "December 2002 Project"). The expanded study area covered by the December 2002 Project was 12,112 acres, close to double the Ski Hill Project study area. No notice was given to the Squamish Nation with respect to this request for expansion.

[42] On or about December 30, 2002, a new act, the ***Environmental Assessment Act***, S.B.C. 2002, c. 43 (the "new ***EA Act***") came into force. On the same date the EAO issued a transition order (the "Transition Order") pursuant to section 51 of the new Act to provide for the continuance of the environmental assessment of the Ski Hill Project under the new ***EA Act***.

[43] The Transition Order provides, in part, that:

> "(1) The application and supporting information provided to date by the Proponent be accepted as an

> application under section 16 of the Act, subject to condition 3.
>
> (2) The time limit specified by the *Prescribed Time Limits Regulation* (B.C.REG. 372(02) for the review of this application will commence from the date that the additional information described in the Project report specifications is accepted by the Executive Director for review, subject to condition 3; and
>
> (3) The additional information described in the Project report specifications must be provided to the Executive Director by December 31, 2003 or the current assessment of the Project is terminated and the Proponent may not proceed with the Project without a new assessment.
>
> Pursuant to section 51(6) of the *Act*, the reason for this order is that the continuance of the assessment of the Project in accordance with this order will ensure a fair, orderly and timely effects of the Project under the *Act*." [emphasis added]

[44] The Transition Order deadline was subsequently extended to June 30, 2004.

[45] The Squamish Nation first learned of the possibility of the revival of and changes to the Interim Agreement, between January and March of 2003.

[46] On March 26, 2003, and April 24, 2003, the Squamish Nation, through counsel, requested relevant documents and notified LWBC that no alterations to the Interim Agreement, in terms of both approval of the share transfer and an expansion of the boundaries, should be approved by LWBC prior to consultation with the Squamish Nation.

[47] LWBC, through counsel, advised that while consultation would be necessary at some point, it did not believe that consultation was necessary prior to the preparation of a Ski Area Master Plan. LWBC also advised that the processes for review and consultation were set out in the Interim Agreement.

[48] The Squamish Nation met with representatives of the EAO on April 25, 2003 to discuss the Garibaldi process, and were advised that the GAS request for an expansion had been denied. The Nation reiterated its concerns about the process and the project and requested that no further changes to the timelines be made.

[49] On May 16, 2003, representatives of the Squamish Nation attended a meeting with representatives of LWBC. LWBC directly advised that the GAS request for expansion had been rejected by the LWBC Board. LWBC further advised that GAS had appealed that rejection to Minister Stan Hagen and that the original deadline for filing the Master Plan of April 25, 2003 had been extended. LWBC indicated that the appeal was not statutory but political. Squamish Nation representatives expressed their opposition to both the extension of the deadline and to any decision being made by the Minister prior to consultation. The Squamish Nation representatives expressed clear opposition to any expansion of project

boundaries and further indicated that to date LWBC had not kept the Squamish Nation informed about the project.

[50] On June 5, 2003, at a further meeting with LWBC, the Squamish Nation were advised that the expansion had been rejected, and provided a letter from LWBC to GAS (dated May 26, 2003) confirming that it was GAS's intention to proceed with the project as described in the Interim Agreement without the expansion. They were advised that a new Master Plan would be submitted, reflecting the original boundaries.

[51] Also on July 30, 2003, LWBC wrote to Chief Campbell confirming that LWBC had advised GAS that the Master Plan needed to be adjusted to reflect the original boundaries in the Interim Agreement. Attached to that letter was a copy of a letter dated July 14, 2003 from LWBC to GAS confirming that GAS had agreed to revise the design of the project so that it would conform to the original boundaries. That letter to GAS was signed by both LWBC and the EAO.

[52] As a result of the July 30, 2003 letter from LWBC to the Squamish Nation, the Squamish learned for the first time that the authorized capacity of the project had been increased from 12,000 bed units to 15,000, but within the existing boundaries.

[53] On September 18, 2003, the Squamish Nation received a letter from LWBC that indicated that LWBC was currently reviewing a request by GAS to significantly expand the boundaries of the project. The letter was dated September 17, 2003.

[54] The Squamish Nation subsequently learned that a letter requesting expanded boundary areas had been sent to LWBC on July 17, 2003 and that a proposal to expand the boundary of the project had been under consideration since that date.

[55] LWBC then wrote to the Squamish Nation on September 22, 2003 advising that "further to our letter of September 17, 2003, we write to inform you that [LWBC] has approved an amendment to the Interim Agreement between the Province and GAS whereby the study area will be altered and expanded over the land upon which GAS is proposing to develop its mountain/ski project."

[56] The Squamish Nation subsequently learned that LWBC had in fact agreed to the expansion on September 17, 2003 (the "Expansion Decision"), *prior to the receipt by the Squamish Nation on September 18, 2003 of the letter indicating that LWBC had received a request for expansion and that request was under consideration.* The September 22, 2003 letter fails to

indicate that the Expansion Decision had been taken on September 17, 2003.

[57] The Squamish Nation took the position that the letters of September 18, 2003 and September 22, 2003 were either designed to give the appearance of consultation when none actually existed, or were an indication that LWBC had not been acting in good faith. The Squamish Nation both directly and through legal counsel requested that if an expansion decision had been taken that it be reversed or that no steps be taken to formalize any amendments to the Interim Agreement pending substantial consultation and accommodation with the Squamish.

[58] The Expansion Decision reflected approval of an expanded proposal by the proponent, including a full 18-hole golf course outside the original boundaries, an equestrian centre, an increase in the number of housing and hotel units from 12,000 to 15,000 units, an increase in the area of housing development outside the original boundaries, and an increase in the carrying capacity of the ski lifts (now the "Real Estate Project").

[59] The change in the project was described by the proponent as a change from a "sleepy 3 or 4 month resort" to "a vibrant four-season resort".

[60] LWBC said the Expansion Decision "will likely lead to the development of an all-season resort with anticipated investment of $200 million in the first stage." and noted the limitations of the original proposal.

[61] On October 23, 2003 the Squamish Nation filed the within Petition.

[62] On March 26, 2004, the Province, through LWBC, set out a proposal (the "Proposal"), conditional upon the resort project proceeding, which has two elements:

(a) Provision of 150 acres of Crown land in fee simple for commercial development which would be compatible with the GAS resort project; and

(b) A Licence of Occupation over an area of approximately 6,000 acres adjacent to the proposed development for non-commercial purposes.

[63] In the March 26, 2004 letter LWBC also set out the benefits which it understood GAS to be proposing for the Real Estate Project which was the subject of the Expansion Decision.

[64] The Proposal was not reached through a consultation process with the Squamish Nation.

[65] Squamish Nation responded to the Province's March 26, 2004 proposal by letter dated April 13, 2004. Chief Jacob noted, *inter alia*, the following with respect to the process that had been followed:

(a) That LWBC has refused to consult about the Expansion Decision, the Reinstatement Decision and the Change of Control Decision or about Squamish Nation rights, title and cultural interests;

(b) That because of the refusal to consult, the Proposal was unilateral and could not substitute for proper consultation and accommodation; and

(c) That a fair consultation process would not start with the decision pre-determined and irreversible.

[66] Chief Jacob also noted the following points in relation to the Proposal:

(a) That it failed to address or mitigate in any way the severe cultural infringement represented by the Ski Hill Project, Expansion Decision and the Real Estate Project Expansion Decision;

(b) That the Licence of Occupation granted no new rights, and in fact was itself an infringement of existing Squamish Nation rights and title;

(c) That a Licence relating to a different area could not mitigate the loss of such a culturally significant site;

(d) The provision of 150 acres in substitution for the loss of over 7,300 acres was wholly inadequate;

(e) The restriction that the 150 acres could only be used for commercial development compatible with the GAS project was inappropriate; and

(f) That the requirement for an agreement with the Province and GAS that the 150 acres not be developed until "substantially all of the GAS development has been completed" was unacceptable, and granted a priority inconsistent with the Crown's constitutional obligations.

[67] Finally, Chief Jacob noted that the Province's reliance upon any offer by GAS was misguided. Chief Jacob understood that any offer which was currently on the table from GAS was subject to the Squamish Nation agreeing to a further project

expansion, beyond that which was the subject of the Expansion Decision. The GAS proposal is not available on the Ski Hill Project or the Real Estate Project and was also not the result of any consultation process.

[68] On April 21, 2004 LWBC responded to the Squamish letter. LWBC repeated its understanding that the "benefits" that GAS had proposed were not tied to any further expansion, and were available on the Real Estate Project, which was the subject of the Expansion Decision.

[69] The Court was advised at these hearings by the proponent GAS that while it seeks acceptance of the project expansion decision to 7,300 acres from the original 6,260 of the Interim Agreement, it will seek during any EA review, as provided for under the new legislation, an amendment or modification and will seek to expand the project to the larger area of 12,112 acres as it does not consider the smaller area **to be** as economically viable **as the 12,112 acre proposal**.

LAW

[70] A useful discussion of the development of the caselaw in the area of the duty of consultation, is found in ***Gitxsan and Other First Nations v. British Columbia (Minister of Forests)*** (2002), 10 B.C.L.R. (4th) 126, 2002, BCSC 1701. The duty of

consultation has been considered in a number of Court of Appeal and Supreme Court of Canada decisions. In summary that duty arises from the fiduciary duty of the Crown to recognize, affirm and protect aboriginal rights however they arise. Crown title is burdened by aboriginal title and rights – and thus there my be two conflicting rights whenever the Crown seeks to grant rights to parties over land claimed as subject to aboriginal rights. The duty to consult and accommodate then arises from those potentially conflicting rights and becomes the means of reconciling those rights. Whether aboriginal title and rights are potentially infringed must be assessed in light of the potential of a Crown granted right in question being inconsistent with the exercise of aboriginal rights including title if such rights should be proven to exist in the area in question.

[71] In ***Delgamuukw v. British Columbia***, [1997] 3 S.C.R. 1010, (1997), at 1112 at para. 168, Chief Justice Lamer made clear the duty to consult and its general scope:

> Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within

> it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leaded may breach its fiduciary duty at common law: *Guerin*. [emphasis added]
>
> 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.

[72] In ***Haida Nation v. British Columbia (Minister of Forests)***, (2002), 99 B.C.L.R. (3d) 209, (Haida No. 1) at para. 55 Lambert J.A., after quoting from ***Delgamuukw*** and considering the duty to consult concluded that the obligation to consult and accommodate is a free standing enforceable legal and equitable duty.

[73] The duty to consult is triggered whenever there is the potential for impact of third party interests on claimed

aboriginal lands. In this case – there can be no issue about how or why that duty arises at the earliest stages. The Crown knew of the aboriginal claims and knew before it reinstated the Interim Agreement and approved the Change of Control that the Squamish Nation had defined and confirmed interests in the area and a concern about the negative impact on their interests (which were then and still are the subject of treaty negotiations) of any commercial development specifically including a ski hill development. ***Mikisew Cree Nation v. Canada (Minister of Canadian Heritage),*** [2002] 1 C.N.L.R. 169 at 211-213 - a recent decision of the Federal Court Trial Division discusses the importance of consultation at early stages of planning.

[74] The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions, Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project. This case illustrates the importance of <u>early</u> consultations being an essential part of meaningful consultation. At this point, and for some time, GAS has asserted legally enforceable rights to pursue the expansion agreement even though it is aware that there has been no consultation. There is thus, the clear appearance of

bias in favour of GAS's expansion plans, as GAS has issued a warning of legal proceedings against the Crown should rights they believe they now have not be realized.

[75] The case law establishes that the proper questions to be asked in order to assess whether the duty to consult and its scope will arise in respect of statutory decisions in respect of an activity which causes a potential infringement to aboriginal rights and title are these:

a) Does the decision purport to grant rights, in enforceable terms, either actual or conditional ones, in relation to lands which would be inconsistent with aboriginal title or rights?;

b) Does the decision constitute the imposition of obligations or the fettering or restriction of Crown discretion over lands upon which there were duties of consultation?;

c) Does the decision amount to an important decision with respect to the use of aboriginal title lands (including the identity of the future operator)?; and

d) Is the decision a statutory decision which is in furtherance of a legislative or administrative scheme that has the potential to infringe aboriginal rights or title?

(e) Is there strong potential to affect the claimant's rights

[76] In Gitsxan, Tysoe, J. found:

> 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 [emphasis added]

[77] Here the practical implications of the change of control decision are dramatic. The original proponent made a comparatively modest proposal for the development of a ski resort. The Squamish Nation although not formally "consulted" was invited to make submissions on the possible accommodation with such a proposal at the time of the environmental assessment stage. It used that opportunity and made submissions. Subsequent to that process, the new controlling shareholders wasted no time in securing an expansion of the project. Further, at this point, GAS forthrightly states it really is mainly interested in the greatly expanded project.

[78] The defendant government has always agreed there was and is a duty to consult the Petitioners about a decision to allow the development of a ski and golf resort to be built on land which is the subject of the aboriginal rights including title claimed by the Squamish Nation.

[79] Initially the government's position was that the duty to consult was not triggered by any of the decisions made in the approval process required of the proponents of the ski development until the plans had been sufficiently refined that an Environmental Assessment process was underway. In the

approval process leading to that assessment review there are several preliminary steps or hurdles for a proponent and decisions to be made by the government agencies as to whether any particular proposal is appropriate to go on to the next stage. After this hearing was underway in May of this year, the government modified its position and acknowledged that its duty to consult may have arisen earlier. It sought an adjournment of the hearing to seek settlement of the issues including trying to arrive at a consent order. Over objections to such an adjournment from the proponent GAS and the Petitioner, I granted the adjournment to an early resumption date, if settlement was not achieved with leave of the parties to return to court for further directions toward settlement.

[80] Settlement was not achieved. Earlier court dates were not available and the hearing resumed on September 10.

[81] In the interim, the government sought consultation with the Squamish Nation in relation to some or all of the impugned decisions - the Squamish Nation resisted such consultation until the ground rules were established to their satisfaction. The issues surrounding the appropriate ground rules for meaningful consultation among these parties now require the Court to set out the principles to be followed.

[82] Broadly speaking, the specific circumstances in this case which are of most relevance in determining the timeliness and scope of the duty to consult are the following:

1. The aboriginal rights at issue include claimed aboriginal title and other significant aboriginal rights relating to the use of the land in question. The strength of all of those rights and their precise nature is not conceded by the Crown, however, that there is a strong case for aboriginal rights in the area, is conceded. Those rights have been formally asserted and have reached Stage 3 in the Treaty process.

2. The Squamish Nation objected since first it became aware of any proposal for commercial development on land it claims. It was notified in December of 1997 of the original proponents proposal on impacts of a relatively modest proposal for a ski hill development by the early proponent, GAR 96. That proposal lapsed. The Squamish Nation agreed to participate in early discussions but never took the position that any commercial development was agreeable.

3. The decisions made thus far, including Reinstating the lapsed agreement, have not granted any rights to land, but have granted rights to be engaged in the long approval process toward the granting of such rights.

4. *Prima facie* a ski and golf resort of any size will have an impact on the exercise of the claimed aboriginal rights.

5. If the Squamish can prove aboriginal title, that is, exclusive rights to use the land - to any significant part of the land covered by the proposed resort - or any land directly adjacent to it - then accommodation of those rights may entitle them to a near veto, if not a veto, having regard to the specific circumstances of this case. The strength of the claim to title and its breadth is the most contested aspect of the claim - but it is agreed that it is possible they may have title to some land somewhere in the proposed impacted area.

6. The area at issue is still primarily wilderness, that is, although modest encroachments are present, if the aboriginal rights claimed were declared and

> affirmed today - full exercise would be possible and compensation for their loss would not be necessary. This is an important consideration in informing the scope and duty of consultation as well as the reasonableness of any accommodation.

[83] Thus, in my view, the duty to consult in this case arises at the earliest decision making by the government in an approval process leading to the possible infringement of claimed aboriginal rights. Further, the accommodation which may be required in order to justify any infringement may include requiring the consent of the Squamish Nation to some part of the proposed infringement. Therefore, the consultation process must be full, timely and well documented.

[84] Among other considerations, in relation to meaningful consultation in this case - because the claimed rights have as yet not been substantially infringed and the *prima facie* strength of the aboriginal rights is high and includes title, the importance of the legislative objective of economic development must be evaluated in relation to the proposed development of a ski and golf resort. Then that evaluation must be considered in relation to the potential impact on the uses inherent in the exercise of the asserted rights.

[85] Thus, in this case, specifically, - the need and viability of a ski hill and golf resort of any size in this location is a relevant consideration in determining how and whether the accommodation of aboriginal competing interests is to be achieved.

[86] The need for meaningful consultation as discussed above, at every step of the way in this case, is highlighted by the reasoning in the ***Halfway River First Nation v. British Columbia (Ministry of Forests)*** (2000), 178 D.L.R. (4th) 666 (B.C.C.A.) including the dissent of Southin J.A. That case was dealing with Treaty rights on the part of the First Nation - and already granted rights to Canfor. In order for Canfor's rights to be implemented, they were and are, subject to administrative decisions by a District Manager.

[87] The majority upheld the decision of a chambers judge quashing a decision which granted cutting rights to Canfor. Essentially, the majority found that the failure to consult the Halfway River First Nation resulted in an inability on the part of the Crown to justify any possible infringement. Here, infringement of Squamish Nation rights on the ground has not yet occurred and accommodation has not been explored.

[88] Justification requires consideration of the following questions (said in *Sparrow* not be an exhaustive or exclusive list):

> 1. Whether the legislative or administrative objective is of sufficient importance to warrant infringement;
>
> 2. Whether legislative or administrative conduct infringes the treaty right as little as possible;
>
> 3. Whether effects of infringement outweigh the benefits derived from the government action; and
>
> 4. Whether adequate meaningful consultation has taken place.

[89] As Huddart J.A. stated in ***Halfway*** at para. 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.

[90] This paragraph is quoted by Southin J.A. in dissent to expose a difficulty of no inconsiderable moment. From a principled and practical point of view, how does the economic and social life of the Province carry on on behalf of all British Columbians including aboriginal people while large

parts of the Province are subject to undeclared aboriginal rights. It is salutary to remember that ***Halfway*** demonstrates complexities and costs in the process where rights have been declared. In that case treaty rights and competing granted rights to Canfor. Southin J.A. pointed out the sense of practical frustration and injustice on both sides of the situation demonstrated by a failure to consult ***Halfway***. At para. 234 she said:

> 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.
>
> Canfor, a substantial corporation, presumably can afford this litigation. But others whose rights may be imperilled may not have Canfor's bank account.

[91] In this case there are undeclared aboriginal rights on the one side and interim and conditional rights to process on the other.

[92] Thus, the need for consultation to take place at the earliest opportunity arises, before parties seeking land

rights from the government have invested such time and money that practical frustration ripens into legally enforceable rights against the Province and ultimately to the detriment of all British Columbians.

[93] The duty to meaningfully consult in this case arises in relation to the earliest decisions because LWBC knew, from discussions with the Squamish Nation in relation to the GAR 96 earliest proposal that significant rights were being asserted by the Squamish Nation which could result in the need for such significant accommodation that proposals by GAR 96 or others might never be able to go forward. At no time could it be said before or after the GAR 96 proposal that the government was unaware of the legitimate need to meaningfully consult with the Squamish Nation.

[94] Thus, I find that there has been a breach of the government's fiduciary duty to the Squamish Nation in failing to consult the Squamish Nation. The result, at least in part, appears to be a loss of trust in the good faith of the decision makers in relation to decisions already made with regard to the Ski Hill proposals and those still to be made. This loss of trust has made any consultation more difficult to make meaningful. The appropriate remedy, in addition to the declaration that such is the case, is that, in relation to all

of the decisions having been made without consultation, consultation must include consideration of the issues as if those decisions had not already been made.

[95] I would add, meaningful consultation consists of two fully engaged parties.

[96] The Squamish Nation is entitled to timely notice of any proposal in relation to which a decision is sought which could affect their aboriginal interests in the land.

[97] All information relevant to their ability to make meaningful submissions must be provided. On the part of the Squamish Nation they must advise of any specific requirements they have in the way of information in the government's control and once it is provided they must be prepared to make timely submissions based on consideration of the provided information and evidence of their claims and impacts of the proposed government action on the exercise of their claimed rights.

[98] Thus, in summary I set out the applicable principles which must guide consultation in this case.

[99] There was and is a fiduciary and constitutional duty to consult before any decision can be final with regard to the following decisions already made:

- Reinstatement Decision
- Change of Control Decision
- Expansion Agreement Decision

[100] The Expansion Decision is sent back for full reconsideration after consultation has taken place with regard to the earlier abovementioned decisions.

[101] **These Reasons for Judgment do not purport to address whether GAR 96 should be heard in relation to its rights or interests, if any, at the consultation hearing to be held with respect to the Reinstatement and Change of Control decisions**.

"M.M. Koenigsberg, J."
The Honourable Madam Justice M.M. Koenigsberg

TAB 6

Sahota, that well into his 90s he had no qualms about calling up and offering advice and campaigning strenuously on her behalf, particularly at the George Derby Centre, which was his home from the year 2000 on. It's a veterans home, and he was proud to be there. He was a very popular fellow through the years.

A few years ago he was awarded the Queen's Jubilee medal as a signal of thanks from a grateful nation, a grateful monarch, a grateful province. He passed away on March 20. He was a great brother, a great father, a great husband, a great grandfather, a great British Columbian and a great Canadian, and he'll be missed.

Introduction and First Reading of Bills

UTILITIES COMMISSION AMENDMENT ACT, 2008

Hon. R. Neufeld presented a message from His Honour the Lieutenant-Governor: a bill intituled Utilities Commission Amendment Act, 2008.

Hon. R. Neufeld: I move that the Utilities Commission Amendment Act, 2008, be introduced and read a first time now.

Motion approved.

Hon. R. Neufeld: I am pleased to introduce the Utilities Commission Amendment Act. On February 27, 2007, the government's new energy plan was released. The B.C. energy plan places the province at the forefront of environmental and economic leadership.

Today we propose the Utilities Commission Amendment Act, 2008, which will bring the existing act in line with the conservation, energy security and climate action goals of the energy plan. The amendments align the act with the province's energy objectives — to encourage utilities to reduce greenhouse gas emissions, pursue energy conservation and efficiency, produce and obtain electricity from clean or renewable sources, develop energy transmission infrastructure and capacity in time to meet customers' needs, and leverage innovative energy technologies.

It is my honour to introduce legislative amendments to ensure that our energy targets are met. Furthermore, the amendments will create a new process for provincewide electricity transmission planning so that long-term transmission needs will be met. As well, there are provisions to ensure the competitiveness of rates.

It is the commission's role to regulate on a cost basis. The B.C. Utilities Commission can take action to ensure our rates remain among the lowest in North America and still meet the goals of the 2007 energy plan. Overall, the changes to the Utilities Commission Act ensure that the government sets the energy policy framework within the B.C. Utilities Commission, and the B.C. Utilities Commission will regulate utilities.

I move that the bill be placed on the orders of the day for second reading at the next sitting of the House after today.

Bill 15, Utilities Commission Amendment Act, 2008, introduced, read a first time and ordered to be placed on orders of the day for second reading at the next sitting of the House after today.

Statements (Standing Order 25B)

DOWNTOWN EASTSIDE WOMEN'S CENTRE

TAB 7

J. Horgan: I thank the minister and his staff for that. That'll be one less question to ask at the end.

Still within section 4, again, under the heading of what is in the act, section 5, "Commission's duties," we now have section 4(c), sections 4, 5, 6 and 7 through 9.

I'm wondering if the minister could comment. "The commission, in accordance with subsection (5) must conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the inquiry begins." I'm wondering what that means.

[1540]

Hon. R. Neufeld: Prior to this anticipated change — and it still has to be approved by the House — there was no requirement for B.C. Transmission to look forward 20 years, as there is now for B.C. Hydro to look forward 20 years in generation capability. Transmission didn't have that responsibility, and we thought it was prudent that.... Let's say an inquiry started, for the purposes of this, a month from now. They have to look, from that period, 20 years out as to what would possibly be required so that planning for the future 20 years in transmission can be made, not in a per-project process but more long-term planning for the greater good of the utility.

J. Horgan: That's useful for section 4(5). If we go to the following page, subsection (7) says: "The minister may declare, by regulation, that the commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made under subsection (4)." I'm wondering if we're looking....

Again, I think everyone would applaud strategic planning and forward planning for our transmission and generation needs — even our distribution needs, I suppose. But then, when we turn the page, as it were — literally, with the bill — we find that.... Should, over the course of conducting investigation, new information come to light, I seem to think, as I read subsection (7), that that can't be brought forward to the commission for reconsideration. Is that an incorrect interpretation?

Hon. R. Neufeld: In my earlier response, I said BCTC didn't have to, and I was incorrect in that. They did, but they did in a very broad way, and they didn't do it in conjunction with other utilities, that being Fortis — right? So now they have to take that larger look, the 20 years out, incorporating.... We have another large utility in the province of British Columbia called Fortis, so we need to actually make sure that they're part of the long-term planning process too, because there are some difficulties that are happening in that part of the world in regards to transmission.

As I understand, it's to fix the need for a period of time so that you don't constantly go back and keep reviewing transmission. Transmission is a lot of people. In fact, I often thought transmission was probably the easier part to build, but it's apparently not. I've experienced a few of those things in the last number of years with transmission. I'm sure the member is aware of it. So it takes a lot longer to get some of those things happening. We just didn't want it to be something that they constantly replan and replan and replan — that we actually look out 20 years and get on with doing it.

[1545]

J. Horgan: Of course, Fortis is the other large utility. I'm wondering, though. Just while we're on this, then, with respect to transmission, would this contemplate hooking up smaller generators? Would that be part of a long-range plan, or will hooking up smaller generators still be on an as-needed basis, in terms of planning?

Hon. R. Neufeld: Actually, although there will probably be some of that happening individually, it's to try to get away from that. You know, Hydro and Fortis and BCTC need to get together and actually get this plan figured out.

I think Hydro has a good idea of where the energy is generally going to come from — not always exactly where

all of it's going to come from, but generally has a bit of an idea — so that we can actually build transmission to those areas where generation will probably come from in the long term, so that when you build a line, you get the right-of-way and get the line built. You build it a bit for the future, instead of just building for the past.

I think probably if we look at a lot of things that we have done in the province, and it's of no fault of anyone's.... But looking forward at some of these things, such as transmission, that take a long time to build and cost a lot of money.... We should be thinking out 20 years to make sure we build that so it at least facilitates the upgrading of something so that we can actually get more energy as we move forward and the province grows, even though we're going to try to get as much from conservation as possible.

There's no doubt the province is going to continue to grow. It's a great place to live. People are coming here by the thousands, and they're going to continue to need electricity. Probably, when you think about industry and those kinds of opportunities that take place and will take place in the province of British Columbia.... We need to be able to serve their needs.

J. Horgan: Well, one of the areas that the minister, I know, is very interested in — as am I and certainly the members for North Coast and Skeena and the member from Bulkley Valley — is the electrification of Highway 37. I'm hopeful that when one thinks of providing large blocks of energy to industrial users....

I know that this isn't the right time. I am planning a whole bunch of time on this in estimates with both the ministers responsible. But just as an example so we can close this section.... In the 20-year planning, would it be contemplating potential industrial activity, and would BCTC be directed to bring forward plans that contemplate industrial activity that's not yet on the ground — just based on what we would all hope might happen, subject to commodity prices being right and

[Page 10975]