

**ABORIGINAL TITLE AND RIGHTS:
FOUNDATIONAL PRINCIPLES AND RECENT
DEVELOPMENTS**

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ABORIGINAL TITLE AND RIGHTS

I. Introduction

Canadian jurisprudence on Aboriginal title and rights, while still in its formative stages, has evolved rapidly in recent years, adding much needed shape and substance to legal discourse in this area. Nonetheless, Aboriginal law is complex and remains largely unknown for many practitioners. Furthermore, its ever changing character presents significant challenges for both solicitors and litigators specializing in the area. Accordingly, this paper provides an analytical review of leading Supreme Court of Canada and other cases with a view to highlighting essential first principles, recent developments and their implications. In doing so, it will become apparent that most areas of practice will be impacted by the legal principles articulated below.

This paper will begin with a review of the scope and substance of Aboriginal title and rights, addressing both the source and unique nature of these rights. The paper then addresses the legal obligations imposed on the Crown by our common law in relation to the recognition and affirmation of these rights in our constitution. The implications of these rights on land and resource development will also be addressed, both with regard to proven and unproven Aboriginal rights as well as related jurisdictional issues. More specifically, the Crown's duty to consult and accommodate Aboriginal rights will be reviewed in detail, in light of the prevailing case law. Finally, this paper will examine the status of Aboriginal governance rights and their place in Canada's constitutional framework.

II. The Source and Substance of Aboriginal Title

The Supreme Court of Canada's decision in *Guerin v. The Queen* was the first decision of the Court to clearly articulate the nature of Aboriginal title as "a unique interest in land" which embodies "a legal right to occupy and possess certain lands."¹ Previous jurisprudence described Aboriginal title as "a personal usufructuary right," thereby generating considerable legal debate concerning whether Aboriginal title embodied merely the right to use the land for certain activity bases purposes (such as hunting or trapping) or whether it constituted an interest in the land itself.² *Guerin* finally established that there was indeed a proprietary aspect to Aboriginal title, although Dickson J. (as he then was) cautioned against defining Aboriginal title by applying the "somewhat inappropriate terminology drawn from general property law."³

Of significance, Dickson J.'s analysis in *Guerin* found its genesis in *Calder* where the Supreme Court of Canada recognized that the occupation of traditional lands by an Aboriginal society gave rise to an unique form of title in land which arose independent of a treaty, legislation or executive order. Mr. Justice Judson reasoned as follows:

Although I think it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their

¹ *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 339 ["*Guerin*"].

² See for example *Calder et al v. Attorney General of Canada* (1973), 34 D.L.R. (3rd) 145 ["*Calder*"]; *Smith v. The Queen*, [1983] 1 S.C.R. 554.

³ *Guerin, supra* at p. 383.

forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a “personal or usufructuary right.” What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and this right has never been lawfully extinguished.⁴

Along a similar vein, Mr. Justice Hall reasoned that possession of tribal lands was in itself proof of “ownership”:

In enumerating the indicia of ownership, the trial judge overlooked that possession is of itself proof of ownership. Prima facie, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial...⁵

The analysis in *Calder* rested upon the prior possession of tribal territories by Aboriginal societies as the source of Aboriginal title. This focal point effectively foreshadowed the legal test for proving Aboriginal title, which was established almost 25 years later by the Supreme Court of Canada in the *Delgamuukw* case wherein Chief Justice Lamer identified Aboriginal use and occupation of traditional tribal territory, prior to the assertion of British sovereignty, as a central and necessary criterion of proof.⁶

The nature of Aboriginal title was further clarified in *Roberts v. Canada*,⁷ where Madam Justice Wilson, speaking for a majority of the Supreme Court of Canada, concluded that the law of Aboriginal title formed part of the federal common law. In doing so, she affirmed the unique character of Aboriginal title:

In *Calder v. A.G.B.C.* this court recognized Aboriginal title as the legal right derived from the Indians’ historic occupation and possession of their tribal lands. As Dickson J. (as he then was) pointed out in *Guerin*, Aboriginal title pre-dated colonization by the British and survived British claims of sovereignty. The Indians’ right of occupation and possession continued as a “burden on the radical or final title of the sovereign: [cites omitted]...”⁸

(emphasis added)

The significance of this passage is found not only in its affirmation of Aboriginal title as a right which survived the assertion of British Sovereignty but, as well, in its depiction of Aboriginal title as a co-existing burden on the underlying title of the Crown.

⁴ *Calder, supra* at p. 156.

⁵ *Calder, supra* at pp. 189-90.

⁶ *Delgamuukw et al v. The Queen* (1997), 153 D.L.R. (4th) 193 at para. 143 [“*Delgamuukw SCC*”].

⁷ *Roberts v. Canada* (1989), 57 D.L.R. (4th) 197 [“*Roberts*”].

⁸ *Roberts, supra* at p. 131.

In *Paul v. Canadian Pacific Ltd.*,⁹ the Supreme Court of Canada further reasoned that the Aboriginal title embodied more than the right to enjoy and occupy traditional lands:

The inescapable conclusion from the court's analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy, although, as the Chief Justice pointed out in *Guerin*, it is difficult to describe what more in traditional property law terminology.¹⁰

(emphasis added)

The conclusion that Aboriginal title comprises “more than the right to enjoyment and occupancy” led eventually to the decision of the Supreme Court in *Delgamuukw* that Aboriginal title includes rights of possession and the attendant right against trespass. This conclusion is consistent with prior express statements by the Supreme Court of Canada in *Guerin* and *Roberts* that Aboriginal title comprises rights of both occupancy and possession. What confounds the analysis somewhat is the unique or *sui generis* nature of Aboriginal title. Fortunately, as will be addressed below, the reasoning in *Delgamuukw* considerably expands the jurisprudence in this regard.

It is noteworthy that Canadian jurisprudence regarding the nature of Aboriginal title as an exclusive right to the land itself, comprising more than the sum of traditional activities or uses, is consistent with the view adopted by other commonwealth courts. In *Mabo v. State of Queensland*,¹¹ for example, the High Court declared that the Meriam People were “entitled as against the whole world to possession, occupation, use and enjoyment” of the land that they held by virtue of their native title. Similarly, the Privy Council in *Amodu Tijani v. Secretary, Southern Nigeria*,¹² described Aboriginal title as a communal occupation “which may be so complete as to reduce any radical title in the sovereign to one which extends to comparatively limited rights of administrative interference.”¹³ The authorities define Aboriginal title consistently as a “pre-existing” legal right and as an unique interest in land which both pre-dated and survived the assertion of British sovereignty. It is this fundamental underpinning which has guided the Supreme Court of Canada in subsequent cases and which lies at the heart of the constitutional protection enveloping Aboriginal rights today.

The distinction drawn by our courts between Aboriginal title and Western common law notions of property ownership, particularly when considered in light of the separate yet co-existing nature of both fee simple title and the radical title of the Crown, amply illustrates the complexity of this area of law. Moreover, giving expression to Aboriginal title as an enforceable right within our present day land tenure system (and within a commercial environment that has previously not been required to accommodate this right) has become an increasingly difficult

⁹ *Paul v. Canadian Pacific Ltd.*, [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487 [“*Paul*”].

¹⁰ *Paul*, *supra* at p. 503.

¹¹ *Mabo v. State of Queensland* (No. 2) (1992), 175 C.L.R. 1 [“*Mabo*”].

¹² *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 [“*Tijani*”].

¹³ *Tijani*, *supra* at pp. 409-410.

challenge. It is a challenge, nonetheless, which was squarely faced by the Supreme Court of Canada in *Delgamuukw*.

A. The Nature and Scope of Aboriginal Title as Defined by the Supreme Court of Canada in *Delgamuukw*

Delgamuukw, was the first Supreme Court of Canada decision since *Calder* that dealt directly with the existence, substance and scope of Aboriginal title. In that case, the Gitskan and Wet'suwet'en peoples brought an action, *inter alia*, for a declaration affirming their Aboriginal title rights. *Calder* had left open the question of whether Aboriginal title existed in British Columbia; three members of the Court (Martland, Judson, Ritchie JJ) found Aboriginal title had been extinguished, three found it had not (Hall, Spence, Laskin JJ) and one dismissed the case on the basis that the Nishga had not met the technical requirement of first obtaining a fiat from the Lieutenant-Governor of British Columbia.¹⁴ *Delgamuukw* finally confirmed Aboriginal title had not been extinguished by legislation and Crown land grants.¹⁵ However, the Court only allowed the appeal in part, sending the matter back to trial due to both a defect in the pleadings and the trial judge's failure to give sufficient weight to Gitskan and Wet'suwet'en oral history evidence. The Court nonetheless significantly advanced the jurisprudence in this area.

The Court succinctly concluded that Aboriginal title could be encapsulated in two essential propositions:

. . . first, that Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.¹⁶

The first proposition indicates that a First Nation may develop land use plans over their traditional territories that are not limited to traditional activities or practices such as hunting, fishing and trapping. Indeed, the Court expanded this principle by confirming its reasoning in cases such as *Guerin* and *Paul* that Aboriginal title embodies a legal interest in land which is more than the right to enjoyment and occupancy:

. . . On the basis of *Guerin*, Aboriginal title also encompasses mineral rights, and lands held pursuant to Aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands. . .¹⁷

. . . At the other end of the spectrum [of Aboriginal rights which are recognized and affirmed by s. 35(1)], there is Aboriginal title itself. As *Adams* makes clear, Aboriginal title confers more than the right to engage in site-specific activities

¹⁴ *Calder, supra*.

¹⁵ *Delgamuukw SCC, supra* at para 172-186.

¹⁶ *Delgamuukw SCC, supra* at para. 117.

¹⁷ *Delgamuukw SCC, supra* at para. 122.

which are aspects of the practices, customs and traditions of distinctive Aboriginal cultures. Site-specific rights can be made out even if title cannot. What Aboriginal title confers is the right to the land itself. . .¹⁸

. . . 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. . .¹⁹

The Court, therefore, confirmed expressly that Aboriginal title embraced the right to exploit resources and to choose how Aboriginal title land is used.

B. The Unique Nature of Aboriginal Title and Its Inherent Limits

Aboriginal title can be distinguished from fee simple ownership in several fundamental respects. First, Aboriginal title is inalienable except to the Crown; this protects against the erosion of the Indian land base to “ensure that Indians are not dispossessed of their entitlements.”²⁰ Second, Aboriginal title is a collective right, shared by all members of an Aboriginal community, based on historical occupancy prior to the assertion of European sovereignty.²¹ Third, Aboriginal title as a species of Aboriginal right is now constitutionally protected and entrenched in Section 35(1) of the *Constitution Act, 1982* such that Aboriginal title which existed prior to 1982 can no longer be extinguished and any further infringement of Aboriginal title must now be justified by the Crown.²²

Finally, Aboriginal title as an interest in land has certain inherent limits. Consider the following passages from *Delgamuukw*:

. . . lands subject to Aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to Aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular Aboriginal group has Aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group’s distinctive culture. It seems to me that these elements of Aboriginal title create an inherent

¹⁸ *Delgamuukw SCC, supra* at para. 138.

¹⁹ *Delgamuukw SCC, supra* at para. 168.

²⁰ *Delgamuukw SCC, supra* at para. 129 and *Mitchell v. Sandy Bay* [1990] S.C.R. 85 at p. 133.

²¹ See for example *Guerin, supra*; *Delgamuukw SCC, supra*.

²² *Delgamuukw SCC, supra* at paras. 133-134; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 28 [“*Van der Peet*”].

limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims Aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).²³

The Court in *Delgamuukw* concluded that the “inherent and unique value in itself, which is enjoyed by the community with Aboriginal title to it” requires that “the community cannot put the land to uses which would destroy that value.”²⁴ In clarifying this limitation, the Court relied on the concept of “equitable waste”:

. . . a useful analogy can be drawn between the limit on Aboriginal title and the concept of equitable waste at common law. Under that doctrine, persons who hold a life estate in real property cannot commit “wanton or extravagant acts of destruction” . . . or “ruin the property” . . . This description of the limits imposed by the doctrine of equitable waste capture the kind of limit I have in mind here.²⁵

In this light, the Court’s reference to “wanton acts of destruction” indicates that First Nations may choose to develop their traditional territories provided that the land base is not destroyed. However, it is noteworthy that the Court envisaged the entitlement of First Nations to surrender Aboriginal title land if a community wished to use such land in a way not permitted by its inherent limits.²⁶ There is flexibility, therefore, in the manner in which such lands may be used, either as Aboriginal title lands or, alternatively, as surrendered lands.

C. The Interpretation of Section 35 and its Purpose

Section 35 (1) of the *Constitution Act, 1982* provides that: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Section 35(2) defines the “aboriginal peoples of Canada” as including the “Indian, Inuit and Métis peoples of Canada.” In *Van der Peet*, the Supreme Court reasoned that this provision must be given a “generous, purposive and liberal” interpretation, highlighting that it constitutes a solemn commitment that must be given meaningful content.²⁷ Further, the Court underscored the purpose which underpins s. 35:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.

²³ *Delgamuukw SCC, supra* at para. 128.

²⁴ *Delgamuukw SCC, supra* at para. 129.

²⁵ *Delgamuukw SCC, supra* at para. 130.

²⁶ *Delgamuukw SCC, supra* at para. 131.

²⁷ *Van der Peet, supra* at para. 231; see also paras. 24, 142 and 162.

It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. **The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.**²⁸

(emphasis added)

The purpose of reconciliation is repeatedly underscored by the Court in several passages in *Delgamuukw*, as well as in subsequent judgments. For example, in *Haida*²⁹ the Court refers to the importance of reconciliation in guiding the Crown's duty to consult and accommodate unproven rights. In *Mikisew*, the Court relies on the purpose of reconciliation as one which informs the implementation of treaty rights. Indeed, it characterizes "reconciliation" as the "overall objective of the modern law of treaty and aboriginal rights."³⁰

The majority in *Delgamuukw* concluded its reasons for judgment by specifically advocating that reconciliation be achieved through negotiations between the Crown and First Nations:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Let us face it, we are all here to stay.³¹

As will become apparent in the examination of the case law to follow, whether the Crown is called upon to justify an infringement of an Aboriginal right or, alternatively, whether it is honour bound to consult and accommodate with regard to an asserted but unproven Aboriginal right, the substance and scope of its legal obligation to First Nations peoples is shaped by the purpose of reconciliation. In each instance, the Court will consider whether the conduct under scrutiny advanced or impeded this objective.

²⁸ *Van der Peet, supra* at paras. 30-31.

²⁹ *Haida Nation v. British Columbia (Minister of Forest)*, 2004 SCC 73 [*"Haida SCC"*].

³⁰ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at paras. 1, 4, 35, 49-54 and 63 [*"Mikisew"*]; *Delgamuukw SCC, supra* at paras. 148, 161, 165 and 186; *Haida SCC, supra* at paras 14, 17, 32-38, 45-51.

³¹ *Delgamuukw SCC, supra* at para. 186.

D. The Infringement and Justification Analysis Pursuant to Section 35

Aboriginal title, like any Aboriginal right protected pursuant to s. 35, is not an absolute right. The Crown may infringe an Aboriginal right. However, in doing so, the constitutional status of Aboriginal rights places a “heavy onus” on the Crown to justify any infringement.³²

Before the Crown’s duty to justify an infringement arises, the Aboriginal people asserting the right must first prove that the right in question has been infringed. In contrast to the Crown’s onerous duty to justify an infringement, in *R. v. Sampson*,³³ the British Columbia Court of Appeal reasoned that the onus on a First Nation to prove an infringement is not a heavy one; the case concerned the right to fish for food purposes and the Court found that by denying the appellants their preferred means of exercising their right to fish for food, the Crown had infringed their right.

With regard to Aboriginal title, practically speaking, most infringements will likely be self-evident where the Crown legislative or regulatory authority impacts or restricts the use or occupancy of Aboriginal title lands without the consent of the First Nation in question. This appears to have been implicitly understood in *Delgamuukw* where the Court directed its analysis to the issue of justification and did not address the issue of infringement, thereby suggesting that where Aboriginal title has not been recognized and use is made of the land without the consent of the First Nation in question, infringement has, indeed, occurred.³⁴

To determine whether the infringement can be justified, *Delgamuukw* established the following justification test in relation to Aboriginal title:³⁵

- (1) Is the infringement in furtherance of a valid legislative objective that is substantial and compelling?
- (2) If there is a substantial and compelling legislative objective, has the honour of the Crown been upheld in light of the Crown’s fiduciary obligation? This in turn is determined by asking:
 - (a) whether the process by which the Crown allocated the resource and the allocation of the resource reflects the prior interest of the holders of Aboriginal title;
 - (b) whether there has been as little infringement as possible to effect the desired result;
 - (c) whether compensation has been paid; and

³² *Mikisew*, *supra* at paras. 1, 4, 35, 49-54 and 63; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; 1190 4 W.W.R. 410 at pp. 436-437 [“*Sparrow*”].

³³ *R. v. Sampson* (1995), 16 B.C.L.R. (3rd) 226 at para. 43.

³⁴ *Delgamuukw SCC*, *supra* at paras. 160-165.

³⁵ *Delgamuukw SCC*, *supra* at paras. 161-162.

- (d) whether the Aboriginal group has been consulted in good faith.

The factors informing the question of whether the Crown has justified its breach are not exhaustive but guide a Court's analysis.³⁶ The various elements of this test will be addressed in their respective order below.

(i) *Is there a valid Legislative Objective?*

The content of what constitutes "substantial and compelling legislative objective" is specifically addressed by the Court in *Delgamuukw* as follows:

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.³⁷

(ii) *Has the Honour of the Crown Been Upheld in Light of its Fiduciary Duty?*

With regard to the question of whether or not the Crown has met its fiduciary obligation in recognizing and accommodating the existence of Aboriginal title, the Court underscored that the allocation of the resource in question must reflect the prior interest of holders of Aboriginal title in land. The Court specifically reasoned that by analogy this would include, for example, that the government accommodate the participation of Aboriginal peoples in the development of the resources of British Columbia:

The exclusive nature of Aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown's fiduciary duty requires that Aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply. What is required is that the government demonstrate (at para.62) "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest" of the holders of Aboriginal title in the land. By analogy with *Gladstone*, this might entail, for example, that governments

³⁶ *Delgamuukw SCC, supra* at para. 167.

³⁷ *Delgamuukw SCC, supra* at para. 165.

accommodate the participation of Aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of Aboriginal title lands, that economic barriers to Aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced. This list is illustrative and not exhaustive. This is an issue that may involve an assessment of the various interests at stake in the resources in question. No doubt, there will be difficulties in determining the precise value of the Aboriginal interest in the land and any grants, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.³⁸

On the question of consultation, the Court found that there is “always a duty of consultation”:

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.³⁹

The Court specifically characterized those cases where there is only a duty to discuss important Crown decisions that will be taken with respect to Aboriginal title lands as “rare”; further, such consultation must be conducted “in good faith” with “the intention of substantially addressing the concerns of Aboriginal peoples whose lands are at issue.”⁴⁰

The Court expands our current understanding of how an infringement can be justified by providing that compensation will ordinarily be required to be paid by the Crown where an infringement has occurred:

. . . Aboriginal title, unlike the Aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to Aboriginal title can be put. The economic aspect of Aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of Aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal title is infringed. The amount of

³⁸ *Delgamuukw SCC, supra* at para. 167.

³⁹ *Delgamuukw SCC, supra* at para. 168.

⁴⁰ *Delgamuukw SCC, supra* at para. 168.

compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.⁴¹

(emphasis added)

In the light of the reasoning in of the Court in *Delgamuukw*, First Nations are now seeking allocations of land and resources as well as compensation for the loss of each at treaty and other negotiations with the Crown. This presents an immense challenge for both First Nations and the Crown who must contend with the fact that all of British Columbia is subject to Aboriginal title claims and interests.⁴²

E. The Implications of *R. v. Marshall* and *R. v. Bernard*

R. v. Marshall and *R. v. Bernard* were decided simultaneously by the Supreme Court of Canada and constitute the first time the Court applied its decision in *Delgamuukw*.⁴³ In both cases, the Court held that the Mi'kmaq had not established Aboriginal title to the inland areas of Nova Scotia (where the accused had been harvesting trees). The Court found that to prove Aboriginal title to land, the evidence must demonstrate exclusive pre-sovereignty occupation of the land by the First Nation's ancestors; it reasoned that "occupation" means physical occupation and "exclusive occupation" denotes an intention and capacity to retain exclusive control of the land.⁴⁴ Further, the Court found that the First Nation in question must demonstrate it exercised "effective control of the land," from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so.⁴⁵ According to the Court, this can be established by showing regular occupancy or use over definite tracts of land for hunting, fishing or exploiting resources;⁴⁶ however, evidence of acts of exclusion is not required to establish Aboriginal title.⁴⁷ The Court summarizes its reasons as follows:

In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: *Delgamuukw*, at para. 156. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes. Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are

⁴¹ *Delgamuukw SCC*, *supra* at para. 169.

⁴² A portion of Vancouver Island is subject to the Douglas Treaties and Treaty 8 applies to the northeast corner of the Province. However, the majority of the Province is subject to unresolved Aboriginal title claims.

⁴³ *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220 [*"Marshall/Bernard"*].

⁴⁴ *Marshall/Bernard*, *supra* at paras. 55-58.

⁴⁵ *Marshall/Bernard*, *supra* at para. 65.

⁴⁶ *Marshall/Bernard*, *supra* at para. 70.

⁴⁷ *Marshall/Bernard*, *supra* at para. 65.

relied on for the right. On all these matters, evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right. This must be approached with sensitivity to the aboriginal perspective as well as fidelity to the common law concepts involved.⁴⁸

The decision has been subject to varied interpretation and debate. Recently, in the *Tsilhqot'in* case, for example, the Crown argued that *Marshall* and *Bernard* applied a fairly stringent test for the proof of Aboriginal title, which would require the claimants to prove a settled and intensive pattern of use over all parts of the territory claimed. The plaintiffs argued, however, that the defendants mischaracterized the legal test by advancing a “postage stamp” theory of Aboriginal title in order to confine Aboriginal title to narrowly defined pinpoint sites.⁴⁹ The trial judge in *Tsilhqot'in* adopted the plaintiff’s argument concluding that: “There is no evidence to support a conclusion that Aboriginal people ever lived this kind of postage stamp existence.”⁵⁰ It remains to be seen whether the trial judge’s application of *Marshall* and *Bernard* in *Tsilhqot'in* will be upheld on appeal. Whatever the outcome, it is clear, that in *Delgamuukw* and also in *Marshall* and *Bernard*, the Supreme Court of Canada has consistently required that proof of Aboriginal title necessitates evidence of regular and exclusive pre-sovereignty use by First Nations of definite tracts of land.

F. The Implications of *Tsilhqot'in v. British Columbia*

*Tsilhqot'in Nation*⁵¹ is one of the most significant trial judgments on Aboriginal title and rights since *Delgamuukw*. Decided in late 2007, it is the first case in Canada in which a court has concluded that the evidence before it proved Aboriginal title over certain lands. The case was brought on behalf of approximately 3,000 members of the Tsilhqot'in Nation, of which the Xeni Gwet'in is a part. Tsilhqot'in territory lies in the Cariboo-Chilcotin region of British Columbia, near Williams Lake. The Court’s decision related to a portion of Tsilhqot'in territory, referred to as the “Claim Area.” The Tsilhqot'in claimed Aboriginal title and rights throughout the Claim Area.

The trial judge held that, notwithstanding the evidence tendered proved the existence of Aboriginal title, he could not make a final declaration of Aboriginal title or grant a legal remedy because of the way the case had been pleaded in the plaintiff’s Statement of Claim. The apparent technical defect in the pleadings is currently under appeal. However, Vickers J. concluded on the evidence before him that the Tsilhqot'in have Aboriginal title to a significant portion of the Claim Area – an area estimated to comprise approximately 200,000 hectares. The judgment expressly encouraged the parties to negotiate a swift resolution of the outstanding issues and to bring to reality a reconciliation of the longstanding Tsilhqot'in claims to their territory.

⁴⁸ *Marshall/Bernard*, *supra* at para. 70.

⁴⁹ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at paras. 554-556 [*“Tsilhqot'in”*].

⁵⁰ *Tsilhqot'in*, *supra* at para. 610.

⁵¹ *Tsilhqot'in*, *supra*.

The Court affirmed that the Tsilhqot'in have Aboriginal rights to hunt, trap, and trade in furs to sustain a moderate livelihood, throughout the Claim Area. The trial judge also considered the impact of the B.C. *Forest Act*. He concluded that while the passage of forestry legislation, in and of itself, does not infringe Aboriginal title, the application of such legislation does constitute an infringement. This conclusion was based on the ruling of the Supreme Court of Canada in *Delgamuukw* that Aboriginal title includes the right to make choices about how land is used. Clearly, the application of the *Forest Act* impacts such choices. Given that the *Forest Act* restricts the ability of Aboriginal people to control the use to which forested land is put, the trial judge ruled it constituted an unreasonable limitation on Aboriginal title, thereby constituting an infringement which requires justification.

In considering the justification analysis as articulated in previous cases, the trial judge concluded that British Columbia had failed to establish that it had a compelling and substantial legislative objective for forestry activities in Tsilhqot'in Aboriginal title lands. First, the trial judge noted that there is no evidence that logging in the title lands is economically viable. Second, he concluded that there was no evidence that it was necessary to log the title lands to deter the spread of the mountain pine beetle.

The trial judge also found that the Crown was obliged to garner sufficient information to allow a proper assessment of the impact of the proposed forestry activity on wildlife in the area:

Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area must have some meaning. A management scheme that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot'in Aboriginal rights. To justify harvesting activities in the Claim Area, including silviculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area. As I mentioned earlier, the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.⁵²

The Court thereby placed a positive obligation on the Crown to research both the nature and scope of the right at stake as well as the impact of the regulated activity in question (in this case forestry practices) as part of its duty to consult.

On the issue of consultation, the trial judge held:

In effect, the Province has taken unto itself the right to decide the range of uses to which lands in the Claim Area will be put, and has imposed this decision on the

⁵² *Tsilhqot'in*, *supra* at para. 1294.

Tsilhqot'in people without any attempt to acknowledge or address aboriginal title or rights in the Claim Area.⁵³

As a result, the trial judge found that British Columbia did not meet its obligation to consult with the Tsilhqot'in people, and consequently had not justified its infringement of Tsilhqot'in Aboriginal title.

In an attempt to justify its infringement of Aboriginal title, the Province provided the trial judge with a booklet of evidence regarding the extent of various consultations with the Tsilhqot'in in relation to the Cariboo Chilcotin Land Use Plan. After reviewing the evidence, the trial judge commented that he must determine whether "consultation amounts to genuine effort."⁵⁴ He found against the Province on this point, noting that the Province had made detailed commitments to third parties which prejudiced and infringed Tsilhqot'in title by restricting the Tsilhqot'in right to determine how land would be used without any accommodation of Tsilhqot'in interests.⁵⁵ The trial judge also criticized the Province's policy to only address Aboriginal title and rights at the treaty table, concluding that the policy resulted in the failure to address these rights as required by law:

Pursuant to the CCLUP, the Province determined how the Claim Area lands were to be used. Despite the statement that the Province's decision was being made "without prejudice" to Aboriginal rights, the CCLUP makes many detailed commitments to third party interests, and does indeed prejudice and infringe upon Tsilhqot'in Aboriginal title. Title encompasses the right to determine how land will be used and how forests will be managed in the Claim Area. In effect, the Province has taken unto itself the right to decide the range of uses to which lands in the Claim Area will be put, and has imposed this decision on the Tsilhqot'in people without any attempt to acknowledge or address Aboriginal title or rights in the Claim Area.⁵⁶

Over the years, British Columbia has either denied the existence of Aboriginal title and rights or established policy that Aboriginal title and rights could only be addressed or considered at treaty negotiations. At all material times, British Columbia has refused to acknowledge title and rights during the process of consultation. Consequently, the pleas of the Tsilhqot'in people have been ignored.⁵⁷

Consultation involves communication. It has often been said that communication is the art of sending and receiving. Provincial policies either deny Tsilhqot'in title and rights or steer the resolution of such title into a treaty process that is unacceptable to the plaintiff. This has meant that at every stage of land use planning, there were no attempts made to address or accommodate Aboriginal

⁵³ *Tsilhqot'in, supra* at 1135.

⁵⁴ *Tsilhqot'in, supra* at para. 1123.

⁵⁵ *Tsilhqot'in, supra* at para. 1137.

⁵⁶ *Tsilhqot'in, supra* at para. 1135.

⁵⁷ *Tsilhqot'in, supra* at para. 1136.

title claims of the Tsilhqot'in people, even though some of the provincial officials considered those claims to be well founded. A statement to the effect that a decision is made "without prejudice" to Aboriginal title and rights does not demonstrate that title and rights have been taken into account, acknowledged or accommodated.⁵⁸

The trial judge demonstrated considerable sympathy for the limited resources available to the Tsilhqot'in in responding to the numerous requests of government officials for consultation:

Tsilhqot'in people also appeared from time to time to have a fixed agenda, namely the promotion of an acknowledgement of their rights and title. It must be borne in mind that it is a significant challenge for Aboriginal groups called upon in the consultation process to provide their perspectives to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely or adequate fashion.⁵⁹

Consultations with officials from the Ministry of Forests ultimately failed to reach any compromise. This was due largely to the fact that there was no accommodation for the forest management proposals made by Xenigwet'in people on behalf of Tsilhqot'in people. Forestry proposals that concerned timber assets in the Claim Area were usually addressed by representatives of Xenigwet'in people. But, from the perspective of forestry officials, there was simply no room to take into account the claims of Tsilhqot'in title and rights.⁶⁰

This case touches upon the practical difficulty that First Nations often face when requested to participate in case by case or *ad hoc* consultation discussions rather than strategic level consultation processes. This dynamic has been referred to by First Nations as "the death of a thousand cuts" since many First Nations are often inundated with consultation requests and many do not have the personnel or funding to engage. In the result, meaningful consultation and accommodation negotiations often do not occur and, consequently, land dispositions or developments proceed without the consideration or accommodation of the interests or concerns of Aboriginal peoples affected. The dynamic creates uncertainty not only for First Nations and the Crown but also for third party interests who wish to do business on Crown-held lands. Implementing effective and timely consultation protocols is an issue of considerable effort and discussion across Canada.

The Court in *Tsilhqot'in* does provide some useful direction by underscoring that consultation efforts are meaningful and productive when the accommodation of Aboriginal rights is based on joint decision-making and consensus building processes:

⁵⁸ *Tsilhqot'in*, *supra* at para. 1137.

⁵⁹ *Tsilhqot'in*, *supra* at para. 1138.

⁶⁰ *Tsilhqot'in*, *supra* at para. 1139.

Conversely, there was good communication between Tsilhqot'in people with officials in the Ministry of Lands, Parks and Housing. Here the two groups were able to reach a consensus on the establishment and management of Ts'il'os Provincial Park, without prejudice to the rights and title claims of Xenigwet'in and Tsilhqot'in people in the park area. The joint management model of this Provincial Park has been such a success that it has been extended to the management of Nuntzi Provincial Park in the northeastern portion of Tachelach'ed.⁶¹

The Court effectively endorses a new model of consultation entailing consensus based conflict resolution; this is to be distinguished from the prevalent model of consultation, where the locus of control relating to strategic level planning has historically rested exclusively with the Crown.

In addition to Aboriginal title, the Tsilhqot'in people claimed specific Aboriginal rights to hunt and trap birds and animals throughout their territory for purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses, the right to capture and use animals, including horses, for transportation and work, and the right to trade skins and pelts obtained by hunting and trapping. These Aboriginal rights were also affirmed by the Court.⁶²

Concerning the plaintiff's right to trade, the trial judge was satisfied that the Tsilhqot'in continuously hunted, trapped and traded throughout the Claim Area and beyond from pre-contact times to the present. Accordingly, the trial judge concluded that the Tsilhqot'in have an Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.

This decision has significant implications for provincial and federal governments, in light of the Province's constitutional jurisdiction over the management and use of lands and natural resources. If the trial judge's decision is upheld on appeal, a legislative vacuum would be created with regard to provincial legislative authority over Tsilhqot'in Aboriginal title lands. The future may see the federal Crown incorporating and adopting by reference provincial legislation relating to lands and resources into its own legislation pertaining to Aboriginal title lands. In any event, however, it is clear that federal, provincial and Tsilhqot'in governments must work together to address land use and jurisdictional issues impacting Tsilhqot'in Aboriginal title lands.

Aboriginal Title and Privately Held Lands

Of great significance is the Court's reasoning relating to the impact on Aboriginal title of both provincial land title legislation and provincial land grants to third parties. Essentially, the Court found that the Province has no jurisdiction to extinguish Aboriginal rights and that such title has not been extinguished by conveyance of fee simple title. The Court reasoned as follows:

⁶¹ *Tsilhqot'in*, *supra* at para. 1140.

⁶² *Tsilhqot'in*, *supra* at paras. 1142–1246.

...Prior to the constitutional entrenchment of Aboriginal rights pursuant to s. 35 (1) of the Constitution Act, 1982 the power to extinguish Aboriginal title was an exclusive federal power under s. 91 (24) of the Constitution Act, 1867. Land held by the Province pursuant to s. 109 of the Constitution Act, 1867 was subject to existing trusts. Those trusts included Aboriginal rights such as Aboriginal title.

Given that the jurisdiction to extinguish has only ever been held by the federal government, the Province cannot and has not extinguished these rights by a conveyance of fee simple title to lands within the Claim Area: see *Delgamuukw v. British Columbia*, (S.C.C.) paras. 172-176.

Thus, regardless of the private interests in the Claim Area (whether they are fee simple title, range agreements, water licences, or any other interests derived from the Province), those interests have not extinguished and cannot extinguish Tsilhqot'in rights, including Tsilhqot'in Aboriginal title.

What is not clear from the jurisprudence are the consequences of underlying Aboriginal rights, including Aboriginal title, on the various private interests that exist in the Claim Area. While they have not extinguished the rights of the Tsilhqot'in people, their existence may have some impact on the application or exercise of those Aboriginal rights. This conclusion is consistent with the view of the Ontario Court of Appeal in *Chippewas of Sarnia Band v. Canada*... [cite omitted].

Reconciliation of competing interests will be dependant on a variety of factors, including the nature of the interests, the circumstances surrounding the transfer of the interests, the length of the tenure, and the existing land use. Such a task has not been assigned to this Court by the issues raised in the pleadings.⁶³

Given that the issue of competing proprietary interests was not put before the Court, the trial judge does not make any conclusions in this regard. It is, however, an open question of great importance which remains undecided. Notably, the trial judge, concluded his reasons by focusing on the purpose of reconciliation and encouraged the parties to settle their differences at the negotiation table.⁶⁴

While this case is under appeal, it is noteworthy that the trial judge's analysis on the issue of extinguishment is consistent with case authority: the Province simply does not have the jurisdiction to extinguish Aboriginal rights. Provincial land grants or dispositions are therefore subject to Aboriginal title claims. As such, it appears that resolving the complexities associated with reconciling fee simple interest with Aboriginal title may very well be a matter that is best addressed through settlement negotiations.

⁶³ *Tsilhqot'in*, *supra* at paras. 996-1000.

⁶⁴ *Tsilhqot'in*, *supra* at paras. 1338-1381.

III. Distinguishing Aboriginal Title and Practice-Based Rights

Aboriginal title is a form of Aboriginal right which is to be distinguished from activity or practice-based rights such as hunting, fishing and trapping. Practice-based rights invoke a different standard of proof and need not necessarily be practiced exclusively within a given territory.⁶⁵

*R. v. Sparrow*⁶⁶ is the first Supreme Court of Canada decision which applied s. 35 of the *Constitution Act, 1982*. The case addressed the Musqueam Aboriginal right to fish for food purposes. The Court noted that the existence of the right to fish for food was not the subject of serious dispute at trial, found that the evidence revealed the Musqueam have lived in the area as an organized society long before the coming of European settlers, and concluded that the taking of salmon was an integral part of their lives and remains so to this day.⁶⁷ Accordingly, it was not necessary for the Court to set out a definitive legal test for establishing a practice-based right. Rather, the judgment focused on the nature of the Crown's duty to protect Aboriginal rights.

The Court in *Sparrow* expressly held the Crown legally accountable to Aboriginal peoples with regard to s. 35 rights by limiting the exercise of legislative power and, therefore, Crown conduct. Specifically, the Court reasoned:

The constitutional recognition afforded by the provision [section 35], therefore, **gives a measure of control over government conduct and a strong check on legislative power**. While it does not promise immunity from government regulation in a society that, in the twentieth century is increasingly more complex, interdependent and sophisticated and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation which has some negative effect on any aboriginal right protected under section 35(1).⁶⁸

(emphasis added)

It is well established that the justification for Crown actions in relation to practice-based rights, such as the Aboriginal right to fish, must satisfy the test in *Sparrow* which requires that the Crown establish: (1) a valid legislative objective; and (2) a legislative scheme or government action which is consistent with the Crown's fiduciary relationship toward Aboriginal peoples. Clearly, this test is virtually identical to that set out by the Court in *Delgamuukw* relating to Aboriginal title.

Of particular interest, the Court reasoned that the Crown's fiduciary obligation required that the food fishing right of the Musqueam be given priority in the allocation of the resource, such that there is "a link between the question of justification and the allocation of priorities in the

⁶⁵ *Delgamuukw SCC*, *supra* at para 139; *Marshall/Bernard*, *supra* at para. 55-59.

⁶⁶ *Sparrow*, *supra*.

⁶⁷ *Sparrow*, *supra* at pp. 1094 and 1095.

⁶⁸ *Sparrow*, *supra* at p. 1110.

fishery.”⁶⁹ This principle of priority was applied by the Court in *Van der Peet*⁷⁰ and *Gladstone*⁷¹ in the context of commercial fishing rights, and in *Delgamuukw* in the context of an Aboriginal title claim, albeit in a modified form.⁷²

These cases provide that the Crown must demonstrate that it has allocated priority of use (as distinct from exclusive Aboriginal use) to the First Nation whose Aboriginal rights are infringed; that is, the First Nation’s rights must be accommodated by facilitating the participation of the First Nation in utilizing the resource. The objective underlying this requirement was expressed by the Supreme Court of Canada in *Sparrow* as follows:

The constitutional entitlement embodied in section 35(1) requires the Crown to ensure that its regulations are in keeping with the allocation of priority. The objective of this requirement is not to undermine Parliament’s ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is, rather, to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.⁷³

It would seem, therefore, that if a legislative scheme, Crown policy or Crown practice is to “take seriously” the rights of Aboriginal peoples, such a scheme must do more than simply establish a licensing or other resource management system solely with the general public interest in mind. Specifically, any legislative or regulatory scheme must be devised in consideration of what Aboriginal or treaty rights might be affected. There must be evidence of an attempt by the Crown to accommodate and give expression to the rights in question.

The Court in *Sparrow* also reasoned that there were further questions to be addressed in the justification analysis, including:

- (a) whether there has been as little infringement as possible in order to effect the desired results;
- (b) whether in a situation of expropriation, fair compensation was available; and
- (c) whether the Aboriginal group in question had been consulted with respect to the conservation measures implemented.⁷⁴

Collectively, these questions signal what was later clarified in cases such as *Delgamuukw*, *Tsihlqot’in* and *Haida*: if government actions infringe potential or existing Aboriginal rights, if

⁶⁹ *Sparrow, supra* at pp. 1114-1115.

⁷⁰ *Van der Peet, supra*.

⁷¹ *R. v. Gladstone*, [1997] 2 S.C.R. 723 [“*Gladstone*”].

⁷² The Supreme Court of Canada refers interchangeably to “the doctrine of priority” and the “idea” of priority in various cases such as *Van der Peet*, *Gladstone*, and *Delgamuukw*.

⁷³ *Sparrow, supra* at 1119.

⁷⁴ *Sparrow, supra* at 1119. The third question of whether the Aboriginal group has been consulted, constitutes the first time the Supreme Court expressly refers to the Crown’s obligation to consult in the context of any s. 35 rights.

the infringement is not minimized and goes beyond what is required to achieve a valid legislative objective, and if fair compensation or other meaningful accommodation is not made, a subsequent court challenge could very well render a Crown decision, license or permit unconstitutional and invalid.⁷⁵

A. The Distinct Legal Tests for Proving Different Kinds of Aboriginal Rights

While the judgment in *Sparrow* did not address the test for proving a practice-based right, the judgment in *Van der Peet* did. The Court ruled as follows:

In light of the suggestion of *Sparrow, supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.⁷⁶

The Court further explained that in order for the activity in question to meet this test it could not arise from any post-contact activity:

The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.⁷⁷

This requirement for proof of a practice-based right is to be distinguished from the legal test for proof of Aboriginal title. Proof of Aboriginal title requires regular and exclusive use over defined tracts of land prior to the assertion of British sovereignty:

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

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the

⁷⁵ For example, the Court in *Delgamuukw* speaks of the “economic component” of Aboriginal title and states that compensation is relevant to the question of compensation; logically, the failure to pay compensation could therefore lead to an unjustified infringement and Crown decisions could be invalidated; *supra* at para. 169; see also *Haida Nation v. British Columbia (Ministry of Forests)*, 2002 BCCA 147 [“*Haida CA*”], where the Court of Appeal affirmed at para. 116 that the failure to consult and accommodate could render a Crown decision or licence invalid.

⁷⁶ *Van der Peet, supra* at para. 46.

⁷⁷ *Van der Peet, supra* at para. 60.

Crown asserted sovereignty over the land subject to the title. The relevant time period for the establishment of title is, therefore, different than for the establishment of aboriginal rights to engage in specific activities. In *Van der Peet*, I held, at para. 60 that “[t]he time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact” This arises from the fact that in defining the central and distinctive attributes of pre-existing aboriginal societies it is necessary to look to a time prior to the arrival of Europeans. Practices, customs or traditions that arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights.⁷⁸

Accordingly, Aboriginal title requires proof of exclusive occupation and use over a defined territory prior to the assertion of British sovereignty. If such exclusive use cannot be proven, practiced-based rights may still be proven by evidence that the practice in question originated prior to contact and was integral to the distinctive culture of the Aboriginal group claiming the right. *Delgamuukw* established the year 1846 as the date British sovereignty was asserted in British Columbia based on the Treaty of Oregon between Canada and the United States.⁷⁹ The year British sovereignty is asserted will vary, however, across the country depending on a region’s history.

B. The Aboriginal Right to Harvest Timber

On December 7, 2006, the Supreme Court of Canada released its decision in *R. v. Sappier; R. v. Gray*.⁸⁰ Messrs. Sappier, Polchies and Gray, were charged with unlawful possession or cutting Crown timber without a licence pursuant to the New Brunswick *Crown Land and Forests Act*. The Court recognized and affirmed an Aboriginal right of the Maliseet and Mi’kmaq peoples of New Brunswick to harvest wood on Crown-held land within their traditional territory for domestic uses such as shelter, transportation, fuel and tools.

While rejecting as too general the characterization of the right as one involving the right to harvest timber for personal uses, the Court found the accused had “a right to harvest wood for domestic uses as a member of the aboriginal community.”⁸¹ The majority of the Court also ruled that the right to harvest timber had no commercial dimension. The Court further reasoned that the right to harvest was subject to regulation and that, because the right was communal in nature, it could not be exercised by any single member of the Aboriginal community independently of the Aboriginal society.

Significantly, the Court confirmed, as it did in *Sparrow*, that Aboriginal rights are not frozen in time and that it must seek to understand how the pre-contact practice relates to the way of life of the Aboriginal people concerned.⁸² The Court reasoned that the practice of harvesting wood for

⁷⁸ *Delgamuukw SCC*, *supra* at paras. 143-144.

⁷⁹ *Delgamuukw SCC*, *supra* at paras. 144-145.

⁸⁰ *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686; 2006 SCC 54 [“*Sappier/Gray*”].

⁸¹ *Sappier/Gray*, *supra* at para. 24.

⁸² *Sparrow*, *supra* at pp. 1093 and 1099; *Sappier/Gray*, *supra* at paras. 23-24.

domestic uses, including shelter, transportation, fuel and tools, was directly related to the pre-contact way of life of the Maliseet and Mi'kmaq. While the Aboriginal right being claimed stemmed from pre-contact harvesting practices, the Court found that this right had evolved to a right to harvest wood by modern means to be used in the construction of modern dwellings. Further, in respect of the site-specific nature of the Aboriginal rights being claimed, the evidence established, and the Crown conceded, that all three accused had harvested the trees in question from Crown-held land within the traditional territory of their respective Aboriginal community.

In the *Gray* case, the Crown argued that four pre-Confederation statutes enacted in New Brunswick had served to extinguish any Aboriginal right to harvest wood in that province. The Supreme Court concluded that this legislation did not indicate a clear intention to extinguish Aboriginal rights.

Sappier and Gray are to be distinguished from the Court's ruling in *Gladstone, supra*. In *Gladstone*, the Court confirmed a commercial Aboriginal right to sell herring spawn-on-kelp and did so on the basis of evidence of significant pre-contact trade of this product between the appellants and surrounding First Nations.⁸³ Accordingly, the reasoning in *Gladstone* indicates that Aboriginal commercial rights may be proven based on facts evidencing pre-contact trade. It appears there was no such evidence in *Sappier and Gray*.⁸⁴

Before the release of its decision in *R. v. Sappier; R. v. Gray*, most Supreme Court of Canada cases dealing with practice-based Aboriginal rights were limited to addressing Aboriginal hunting and fishing rights. By extending Aboriginal rights to include harvesting timber for domestic uses, this case sets an important precedent. While the Aboriginal rights affirmed in this decision are held only by members of the Mi'kmaq of the Pabineau First Nation and the Maliseet of the Woodstock First Nation, it is likely that other Aboriginal communities may refer to the *R. v. Sappier; R. v. Gray* decision and claim similar Aboriginal rights to harvest timber on Crown land elsewhere in the country.

IV. The Crown's Duty to Consult and Accommodate Aboriginal and Treaty Rights

Following the Supreme Court of Canada decision in *Delgamuukw*, but prior to the Supreme Court of Canada decisions in *Haida*⁸⁵ and *Taku*,⁸⁶ the Crown took the position that it had no obligation to consult and accommodate Aboriginal title unless a First Nation had proven Aboriginal title in the courtroom. The *Haida* and *Taku* cases, however, settled this question by holding that proof of title is not required before the Crown will be held to the obligation of proactively addressing the Aboriginal right being asserted. That is, the Crown's duty to consult and accommodate Aboriginal concerns exists even if Aboriginal title has not been proven in a court of law and flows from the promise of "rights recognition" embodied in s. 35:

⁸³ *Gladstone, supra*, at paras. 25-29.

⁸⁴ *Sappier/Gray, supra* at paras. 21-22, 27.

⁸⁵ *Haida SCC, supra*.

⁸⁶ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 ["*Taku River*"].

Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982. Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises” (Badger, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.⁸⁷

In establishing the constitutional duty to consult and accommodate Aboriginal title rights prior to their proof, the Supreme Court in *Haida* was mindful that proving Aboriginal rights may take a very long time. What happens in the meantime? The Court held that the answer to this question lies in the honour of the Crown, and reasoned as follows:

Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?⁸⁸

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.**⁸⁹

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the ‘meaningful content’ mandated by the ‘solemn commitment’ made by the Crown in recognizing and affirming aboriginal rights and title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal

⁸⁷ *Haida SCC, supra* at para. 20.

⁸⁸ *Haida SCC, supra* at para. 26.

⁸⁹ *Haida SCC, supra* at para. 27.

peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.⁹⁰

(emphasis added)

The above passage makes clear that, during the pre-proof period (before Aboriginal rights are proven or are resolved through treaty), the Crown cannot unilaterally exploit a claimed resource without regard to Aboriginal title concerns. To do so would not be in keeping with the honour of the Crown.

Significantly, the Court in *Haida* identified the need for consultation at the strategic level.⁹¹ The Court did so in the context of the development of the approval of five year plans concerning the question of the quantity of timber to be harvested under a tree farm licence. The tree farm licence in question provided the footprint for a five-year timber harvesting plan. The Court reasoned that consultation at the operational level, after the strategic decision to approve the licence was made, would have little effect and would be less meaningful. This observation underscores the importance of engaging in consultation and accommodation discussions at an early stage of Crown decision-making when legislation, regulations, work plans, timber harvesting plans or business plans are first being designed and instituted.

The Court in *Haida* found that pre-proof consultation and accommodation is aimed at balancing interests pending a final resolution through a later settlement or judgment.⁹² The factors identified by the Court in *Sparrow* and *Gladstone* relating to the second branch of the justification analysis, remain relevant in the context of the consultation and accommodation process prior to proof of title. At a minimum, questions such as whether compensation has been paid prior to the infringement, whether steps have been taken to minimize the infringement, or whether priority has been given to First Nations in the allocation of a resource, must be considered in determining whether a balancing of interests has been actually effected.

Furthermore, as noted above, if pre-proof consultation and accommodation does not justify the infringement, there is a risk that the Crown grant of lands or resources to third parties could be found to be an unjustified infringement if the matter proceeds to court on an Aboriginal title case. This could potentially lead to an invalidation of the Crown grant or permit and to significant compensatory damages both to First Nations and the industry proponents in question. In the alternative, a Crown grant, license or permit could be found to be unconstitutional due to a failure to adequately consult or accommodate prior to proof of Aboriginal title; this was precisely the result in the recent decision of the Federal Court in *Ka'a'gee Tu First Nation v. Canada*. In that case, the Crown's failure to consult and accommodate the First Nation resulted in the setting aside of a water board permit required for a resource development in the Mackenzie Valley.⁹³ The option of negotiated settlements as advocated by the Court in *Delgamuukw* and *Haida* is clearly a more prudent course of action. The substance and content of such settlements will

⁹⁰ *Haida SCC, supra* at para. 33.

⁹¹ *Haida SCC, supra* at para. 76.

⁹² *Haida SCC, supra* at paras. 45, 48.

⁹³ *Ka'a'gee Tu First Nation v. Canada*, [2007] FC 764, July 20, 2007; see also *Chicot v. Canada* [2007] FC 763; [2007] 4 C.N.L.R. 102 and also *Chicot v. Canada* [2008] FC 3, January 3, 2008.

clearly need to be responsive to the questions posed by the Court in *Sparrow*, *Gladstone* and *Delgamuukw* regarding the Crown efforts to accommodate the infringement in question.

A. The Scope and Content of the Duty to Consult and Accommodate

The Court in *Haida* reasoned that it was important for Aboriginal peoples to outline their claims with clarity, focussing on the evidence in support of the Aboriginal rights that they assert and on the alleged infringements. This approach is necessary as it informs the Crown of the strength of the claim asserted and the severity of the infringement, while triggering an obligation to consult and, where appropriate, accommodate.

The content of the duty to consult and accommodate varies with the circumstances:

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.⁹⁴

Generally speaking, the stronger the evidence of Aboriginal title and infringement, the heavier the burden on the Crown to accommodate.

In *Haida*, the accommodation process does not give Aboriginal groups a veto over what can be done with land pending final proof of claims, nor is there a legal obligation to reach agreement.⁹⁵ Rather, the Court reasoned that what is required is a process of balancing the interests of society at large with Aboriginal and treaty rights.

Of particular importance in *Haida* was the reversal of the British Columbia Court of Appeal ruling that third parties have a duty to consult and accommodate Aboriginal claimants. The Court reasoned:

The duty to consult and accommodate...flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group.
...The Crown alone remains legally responsible for the consequences of its actions and interactions of third parties, that affect Aboriginal interests.⁹⁶

The Crown may, by statute, delegate specific procedural aspects of consultation to industry partners; in those cases, the delegation must be appropriately performed. Ultimately, however, the duty to properly consult lies with the Crown.

As in *Delgamuukw*, the Court in *Haida* also gave examples of how consultation might oblige the Crown to make changes to proposed actions based on information obtained through consultation.

⁹⁴ *Haida SCC, supra* at para. 39.

⁹⁵ *Haida SCC, supra*.

⁹⁶ *Haida SCC, supra* at para. 53.

In this regard, the Court cited New Zealand Ministry of Justice's "Guide for Consultation with Maori" which provides as follows:⁹⁷

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

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

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

After setting out these examples, the Court reasoned that where a strong *prima facie* case exists and the consequence of the government's proposed decision may adversely affect the First Nation in significant ways, addressing the Aboriginal concerns may require "steps to avoid irreparable harm or to minimize the impact of an infringement," pending final resolution of the underlying claim.⁹⁸ This analysis is consistent with the questions posed by the Court in *Delgamuukw* in assessing whether an infringement can be justified.⁹⁹

Haida is also precedent setting in that the Court of Appeal maintained supervisory jurisdiction over the consultation and accommodation process.¹⁰⁰ As will be discussed below, this is now an established trend in such cases.

B. Satisfying the Duty to Consult and Accommodate

The *Taku River*¹⁰¹ case was heard and decided by the Supreme Court of Canada at the same time as the *Haida* case with a categorically different result. The case clearly illustrates how the

⁹⁷ *Haida SCC, supra* at para. 46.

⁹⁸ *Haida SCC, supra* at para. 47.

⁹⁹ *Delgamuukw SCC, supra* at paras. 162-169; See also *Sparrow, supra* at 1119.

¹⁰⁰ *Haida CA, supra* at para. 62.

Crown can consult and accommodate Aboriginal rights in a manner that is consistent with its duty to act honourably. The dispute centred on a ministerial approval of a Project Approval Certificate in relation to a mining project. The controversial aspect of the project centred on a plan to build an access road to the mine site. The proposed road would traverse the traditional territories of the Tlingit, increasing public traffic and access to an otherwise pristine area of wilderness within Tlingit territory. The industry proponent and the Tlingit, as well as other stakeholders participated in an environmental review process over a period of 3½ years, which resulted in recommendations to the responsible ministers. The Tlingit participated in the process as a member of the Project Committee charged with conducting the review process. The Committee prepared a Recommendations Report to the responsible Ministers; the Tlingit disagreed with the recommendations of the majority of the Committee and issued a minority report. The responsible Ministers issued a Project Approval Certificate very shortly after receiving the reports. The Tlingit sought to quash the Ministers' decision to approve the Project on the basis the Project would unjustifiably infringe both their asserted Aboriginal rights to use the area for traditional activities as well as their Aboriginal title to the site.

The Supreme Court of Canada found that the process engaged by the Crown under the *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate because the Tlingit were part of the Project Committee, participating fully in the environmental review process; its views were put before the decision-makers, and the final project approval contained concrete measures designed to address both its immediate and its long-term concerns. The Court found that the Province was not under a duty to reach agreement with the Tlingit and its failure to do so did not breach the obligations of good faith. The Court concluded, however, that it expected, throughout the permitting, approval and licensing process, as well as in the development of a land use strategy, that the Crown would continue to fulfil its honourable duty to consult and, if appropriate, accommodate. Accordingly, the Court confirmed its expectations that the Tlingit's concerns would continue to be addressed.

Consultation efforts were also found to be sufficient in the May 9, 2008 decision of the British Columbia Environmental Appeal Board in *Xats'ull First Nation*¹⁰². While the Appeal Board found the impact of the proposed effluent discharge on sturgeon had not been sufficiently addressed and sent the Permit back for reconsideration, it found the Crown's consultation on Aboriginal issues adequate. Specifically, the Board reasoned that although the Crown's conduct "may not have been perfect," the First Nation had refused to fully engage in the consultation process and its conduct verged on "sharp dealing" in refusing to meet with the Crown for a period of time and in suggesting it would delay the consultation process unless the mining company complied with a series of monetary demands.¹⁰³

¹⁰¹ *Taku River, supra*.

¹⁰² *Xats'ull First Nation and Director (Environmental Management Act) and Gibraltar Mines Ltd.*, Decision No. 200-EMA-006(a) [*"Xats'ull First Nation"*].

¹⁰³ *Xats'ull First Nation, supra*, at para. 343 and 358–360.

C. *Haida* Applied: Court-Supervised Consultation and Accommodation Negotiations

*Musqueam Indian Band v. Minister of Sustainable Resource Management*¹⁰⁴ is the first appellate consideration of the duty to consult and accommodate after the *Haida* and *Taku* decisions were released. The case is also the first of its kind to address the issue within an urban setting. It involved a dispute concerning the sale of a Crown-held golf course to the University of British Columbia. The land in question is located in a tony area of Vancouver within Musqueam's traditional territory. Musqueam had identified the land as part of its comprehensive land claim, which has been in the British Columbia Treaty process since the early 1990s.

The Musqueam petitioned for judicial review of the Province's decision to sell the golf course land to UBC on the basis that the Province had not properly consulted with and accommodated Musqueam in light of Musqueam's Aboriginal rights and title. It was common ground in the British Columbia Supreme Court and in the Court of Appeal that the Crown did not consult with Musqueam prior to the execution of a sale agreement with UBC, or prior to the approval of the sale by Order-in-Council. However, after Musqueam filed its petition, further discussions took place between the parties, culminating in an accommodation offer by the Province to Musqueam. Pursuant to this Crown offer, the \$11,000,000 sale to UBC would proceed, but Musqueam would receive certain compensation, primarily a \$550,000 cash payment and some firewood for Musqueam's Longhouse. At no time during these discussions did the Crown resile from its prior contractual obligations to sell the land to UBC.

The issues before the court in *Musqueam* centred upon the efficacy of "after the fact" negotiations to cure the original failure to consult, and upon the adequacy of the Province's offer of economic compensation. The Court of Appeal found that the Province had breached its duty to consult and accommodate Musqueam's Aboriginal title interests in the Golf Course land as part of a process of "fair dealing and reconciliation" consistent with the honour of the Crown. The Court concluded that the process of consultation and the offer of economic compensation did not meet the duty imposed on the Crown.

Specifically, Madam Justice Southin's reasons reflected those of the Supreme Court in *Haida* that the Crown could not cavalierly run roughshod over Aboriginal interests where claims affecting those interests were being seriously pursued.¹⁰⁵ She found that it was not in keeping with the honour of the Crown for the Crown to on one hand be negotiating a treaty and on the other be selling off what little remains of Crown-held land such that there would be little if any land to negotiate about at the conclusion of the treaty. Furthermore, the majority of the Court of Appeal found that because Musqueam's concerns about a land shortage had not been properly addressed or accommodated by the Crown, the Order-in-Council selling the UBC Golf Course lands to UBC should be suspended. Consequently, the Court suspended the Order-in-Council for a two-year period and directed that the Province and Musqueam negotiate an agreement which would accommodate Musqueam's Aboriginal title interests. Furthermore, the Court provided the

¹⁰⁴ *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 ["*Musqueam*"].

¹⁰⁵ *Musqueam*, *supra* at paras. 66-67.

parties with the option to return to Court within the two-year period should the assistance of the Court be required.¹⁰⁶

Like *Haida*, *Musqueam* illustrates that the courts are not reluctant to interfere with transactions involving land or resources in circumstances where Aboriginal interests have not been appropriately addressed. *Musqueam*, however, went further. The Court of Appeal was not persuaded, by the arguments of both the Crown and UBC, that the Crown's accommodation was sufficient. It is important to note that the British Columbia Court of Appeal in *Musqueam* indicated that both compensation and land may be appropriate forms of accommodation and that the parties should be afforded "a wide field for consideration of appropriate accommodation solutions."¹⁰⁷

While compensation has been repeatedly identified by our courts as one criterion in assessing whether an infringement of a proven right can be justified, the Court in *Musqueam* also considered compensation in determining whether a balancing of interests had been affected in the process of accommodating the Musqueam people prior to proof of their Aboriginal title. The Court considered the degree of compensation offered (less than the price one city lot in the area) and sent the parties back to the negotiating table. Indeed, Hall J.A. reasoned that compensation might be warranted prior to proof of Aboriginal title "in claims involving infringement of aboriginal title in a built up area of a large metropolis."¹⁰⁸ The provision of compensation as part of a pre-proof accommodation measure is often essential, particularly for many First Nations communities living near or in the midst of cities, whose traditional territory has been almost completely alienated.

Another aspect of *Musqueam* which is instructive is the Court's dismissal of the Crown's argument that its duty to consult and accommodate the Musqueam was limited due to the existence of competing Aboriginal title claims over the lands in question. The argument is based on the proposition that there is either a weak or no *prima facie* case of Aboriginal title to trigger the Crown's duty to consult due to competing Aboriginal claims to the lands or resources in question. This is a serious issue in British Columbia where there are numerous competing claims. However, the Court in *Musqueam* found that notwithstanding such competing claims, the "duty owed to the Musqueam [by the Crown] tended to the more expansive end of the spectrum."¹⁰⁹ The Court noted that the Crown conceded *Musqueam* had a *prima facie* case and also noted that the archaeological report found: "Musqueam had had the strongest case of the bands in the area."¹¹⁰ This case is, therefore, instructive in demonstrating that the mere existence of competing claims is not fatal to the existence of the Crown's duty to consult and accommodate Aboriginal rights, since the Court will assess the strength of competing claims. *Musqueam* has been judicially considered in subsequent cases in support of the proposition that

¹⁰⁶ *Musqueam*, *supra* at para. 101.

¹⁰⁷ *Musqueam*, *supra* at para. 100.

¹⁰⁸ *Musqueam*, *supra* at para. 98.

¹⁰⁹ *Musqueam*, *supra* at para. 94.

¹¹⁰ *Musqueam*, *supra*.

the issue of competing claims and exclusive possession, while challenging, is not insurmountable.¹¹¹

Musqueam has not been appealed. The parties reached an agreement wherein, *inter alia*, title to the Golf Course was transferred to Musqueam. Other lands, in addition to the UBC Golf Course land, as well as a settlement sum, were provided to Musqueam under a Reconciliation Agreement. This Agreement resolved this case and two others between the Province and Musqueam.¹¹² One case had not been litigated and dealt with environmentally contaminated lands owned by Musqueam in fee simple known as the “Celtic Lands.” The other case dealt with the Crown’s failure to consult and accommodate Musqueam in relation to the re-location of a casino and the sale of lands adjacent to the casino within Musqueam traditional territory. In the latter case, the Supreme Court of British Columbia also found that Musqueam had not been properly consulted and, accordingly, the Reconciliation Agreement also dealt with this case.¹¹³

Musqueam aptly illustrates that where accommodation is required in respect of unproven Aboriginal title rights, the form of accommodation can be designed and determined by the parties to the negotiation. Further, what constitutes reasonable accommodation will necessarily need to be tailored to the substantial concerns of the First Nation involved. Musqueam’s submissions before the Court identified their greatest concern as the alienation by the Crown of virtually all their traditional territory such that there was very little land left for treaty settlement purposes. It is instructive that the Court found the Crown had not satisfied its duty to consult and accommodate in circumstances where the Crown offered a modest amount of compensation and offered to hold the sale of a small lot for a period of years for treaty settlement discussions.

Following the transfer of the UBC Golf Course to Musqueam, in June of 2008, the Greater Vancouver Regional District filed an action against the Province and Musqueam, alleging that the legislation confirming the transfer of these lands (including other lands forming part of the Reconciliation Agreement with Musqueam) exceeded the legislative authority of the Province and also constituted a breach of the notice provisions of the *Local Government Act*.¹¹⁴ The District alleges the transfers of land are void *ab initio* because the legislation implementing the Reconciliation Agreement is *ultra vires*. This case essentially challenges the authority of the Province to accommodate Aboriginal title and rights, alleging that only the federal government has the authority to do so under section 91(24) of the *Constitution Act, 1867*. It is noteworthy that this argument was made before the Supreme Court of Canada in *Haida* and was unsuccessful.¹¹⁵

¹¹¹ See *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, [2005] 3 C.N.L.R. 74 at 120; 2005 BCSC 1712 at 126-128 [“*Hupacasath*”].

¹¹² Musqueam Reconciliation Agreement: www2.news.gov.bc.ca/news_releases_2005-2009/2008ARR0004-000346.htm - 34k

¹¹³ *Musqueam Indian Band v. Richmond (City) et al* [2005] 4 C.N.L.R. 288

¹¹⁴ *Greater Vancouver Regional District v. Province Of British Columbia et al*, Vancouver Registry S- 084214, Supreme Court of British Columbia.

¹¹⁵ *Haida SCC, supra* at paras. 57-59.

Recent decisions of the Ontario Superior Court in *Platinex*¹¹⁶ underscore the very significant impact the Crown's duty to consult and accommodate exerts on resource development efforts. In the first of several orders, the Court dismissed the injunction motion of a junior exploration company and granted an interim injunction to Kitchenuhmaykoosib Inninuwug ("KI"), an Aboriginal people whose traditional territory encompassed the mining claims and leases in question. An injunction prohibiting the disruption by KI of mining exploration was refused on the basis that the Crown had failed to meaningfully consult and accommodate coupled, it appears, with unilateral action taken by the resource company.

The reasoning in this case underscores the financial risks faced by resource companies in such cases if they do not attempt to address Aboriginal concerns, notwithstanding the ruling in *Haida* that such third parties do not have a legal duty to consult or accommodate. The Court found that injunctive relief was not available because meaningful consultation with KI regarding their Aboriginal rights had not taken place.

Platinex is also instructive in that the Court casts further light on the content of the consultation process:

The duty to consult, however, goes beyond giving notice and gathering and sharing information. To be meaningful, the Crown must make good faith efforts to negotiate an agreement. The duty to negotiate does not mean a duty to agree, but rather requires the Crown to possess a *bona fide* commitment to the principle of reconciliation over litigation. The duty to negotiate does not give First Nations a veto; they must also make *bona fide* efforts to find a resolution to the issues at hand.

The Ontario government was not present during these proceedings, and the evidentiary record indicates that it has been almost entirely absent from the consultation process with KI and has abdicated its responsibility and delegated its duty to consult to *Platinex*. Yet, at the same time, the Ontario government made several decisions about the environmental impact of *Platinex*'s exploration programmes, the granting of mining leases and lease extensions, both before and after receiving notice of KI's TLE Claim. . . .

Despite repeated judicial messages delivered over the course of 16 years, the evidentiary record available in this case sadly reveals that the provincial Crown has not heard or comprehended this message and has failed in fulfilling this obligation.

One of the unfortunate aspects of the Crown's failure to understand and comply with its obligations is that it promotes industrial uncertainty to those companies,

¹¹⁶ *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation et al* (2006) D.L.R.(4th) 727 .(On. Sup. Ct.) ["*Platinex #1*"]; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 C.N.L.R. 221, [2007] O.J. No. 2214 (S.C.J.) ["*Platinex #2*"]; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007], 29 C.E.L.R. (3rd) 191 (Ont. S.C.J.).

like Platinex, interested in exploring and developing the rich resources located on Aboriginal traditional land.¹¹⁷

This case also speaks to the risks and uncertainty engendered by a dynamic that is not uncommon in the mining sector: quite often, government departments and officials will not engage in consultation and accommodation processes with First Nations but will, rather, rely almost exclusively on proponents wishing to engage in resource development. As is evident from the above quote, such an approach can lead to serious business uncertainty and loss if the necessary consultation does not take place.

This case is also instructive given the type of remedy imposed by the Court. In ordering an interim injunction against Platinex, the Court fashioned a remedy which encouraged a negotiated agreement, and imposed a form of court supervision over the consultation process:

Subject to the conditions listed below, an interim order shall issue enjoining Platinex and its officers, directors, employees, agents and contractors from engaging in the two-phase exploration program as described in the affidavit of James Trusler and any other activities related thereto on the Big Trout Lake Property for a period of five months from today's date after which time the parties shall re-attend before me to discuss the continuation of this order and the issue of costs.¹¹⁸

The grant of this injunction is conditional upon:

1. KI forthwith releasing to Platinex any property removed by it or its representatives from Platinex's drilling camp located on Big Trout Lake and this property being in reasonable condition failing which counsel may speak to me concerning the issue of damages;
2. KI immediately shall set up a consultation committee charged with the responsibility of meeting with representatives of Platinex and the Provincial Crown with the objective of developing an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake but not necessarily on land that may form part of KI's Treaty Land Entitlement Claim.¹¹⁹

Like the other cases discussed above, the remedy imposed by the Court included mandated negotiations under the supervision of the Court. Accordingly, prudent practice on the part of both government and industry now requires active and meaningful engagement with Aboriginal communities at the early planning stages of any development.

¹¹⁷ *Platinex #1, supra* at paras. 91-96.

¹¹⁸ *Platinex #1, supra* at para. 138.

¹¹⁹ *Platinex #1, supra* at para. 139.

Following this decision, the parties resumed their negotiations in relation to a Consultation Protocol, timetable, and Memorandum of Understanding. An agreement was reached between Platinex and Ontario; however, no agreement was reached which included KI, seemingly due to disagreement about clauses regarding funding for the consultation process and other compensatory terms.

Shortly after the passing of the Court-imposed deadline to reach agreement, submissions were made by all three parties to the Court for its further review. In the decision which followed,¹²⁰ Mr. Justice G. P. Smith remarked that the underlying purpose of his previous order was “to encourage the parties to continue in a dialogue, with the hope that this would enhance mutual understanding and serve the principle of reconciliation” and that the parties had all made “good faith efforts to appreciate and accommodate the interests” of the other parties.¹²¹ He further emphasized that there were much broader issues at stake than whether, and to what extent, exploration might occur and that any decision must be informed by the larger context of Aboriginal and treaty rights in which these issues appear.

The Court ultimately held that the agreements reached between Platinex and Ontario should serve as a guide to the ongoing relationship between all parties and made three orders imposing the Consultation Protocol, a timetable and a Memorandum of Understanding upon all parties (which were attached as appendices to the decision). Further, the Court expressly gave *Platinex* permission to begin phase one of its drilling program.¹²²

The Consultation Protocol imposed by the Court established the nature and scope of the consultation process, including obligations to agree on timetables and obligations to share information relevant to the consultation. The Memorandum of Understanding provided a framework for KI, Platinex and Ontario to engage in an ongoing consultation process, with accommodation as necessary, during the exploratory project. It also set out details of immediate accommodation measures, including the protection of archaeological sites, mitigation measures regarding environmental impact and traditional gathering activities and the engagement of KI members in the operation of the project. Finally, the timetable sets out a series of meetings to be held at certain points in the consultation process, which would continue beyond the completion of the exploratory operation.

Of particular interest to those currently engaged in the process of consultation and accommodation are the Court’s comments regarding the provincial government’s responsibility for funding those processes. Ontario had offered to fund KI’s reasonable costs for consultations, however, they had set a target of \$150,000 and had proposed that costs be based upon timetables and work plans agreed to by the parties and ultimately governed by a contribution agreement to be entered into between KI and Ontario. KI rejected this proposal, proposed an initial payment of \$600,000, and sought assurance that Ontario would cover all of KI’s consultation and

¹²⁰ *Platinex #2, supra.*

¹²¹ *Platinex #2, supra* at paras. 4-5.

¹²² *Platinex #2, supra* at para. 17.

litigation costs. KI's position was that the "serious imbalance between the financial position of the parties renders the consultation process unfair."¹²³

In reviewing the question of appropriate funding, Mr. Justice G.P. Smith commented that "the issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a 'level playing field.'" However, there was insufficient material before him to make an informed decision about what level of funding would be appropriate. The Court held that if a contribution agreement could not be negotiated prior to June 15, 2007, further submissions might be made towards a judicial determination of this issue. While not substantively articulating a duty to fund the consultation process as an element to the duty to consult, the Court seemed to indicate it would consider the availability of resources when assessing the adequacy of the consultation process.

Nonetheless, both the Consultation Protocol and the Memorandum of Understanding imposed upon the parties, established that Ontario would cover KI's reasonable costs in respect to the consultation. Costs eligible to be covered under the Contribution Agreement were detailed in the appendix to the Consultation Protocol and included:

- Administrative costs for the operation of the KI Consultation Committee;
- Honoraria for KI members and Elders to participate;
- Fees for technical and professional assistance;
- Fees and disbursements for legal services;
- Travel and accommodation expenses for the KI Consultation Committee; and
- Expenses incurred for tripartite and internal community consultations.

Notably, litigation costs did not seem to be explicitly covered by this arrangement.

Also of interest is the Court's use of the interim declaratory order to continue to supervise and facilitate an ongoing consultation process. The decision indicates that the "Court will remain engaged to provide supervision and direction/orders whenever required, subject to the recognition that it is ultimately the responsibility of the parties to attempt to reach their own agreement."¹²⁴ Additionally, the Court imposed a deadline for agreements to be reached with respect to funding between Ontario and KI. Failure to meet this deadline would likely result in further judicial intervention in the consultation process. Finally, Mr. Justice G.P. Smith withheld judgment on a number of issues, such as legal costs and the establishment of a community benefit fund, with the provision that submissions on those matters will be heard in the future, as the consultation process continues.

D. The Duty to Consult and Accommodate in the Treaty Context

Mikisew is the first case decided by the Supreme Court of Canada which applied the reasoning in *Haida* to the Crown's duty to consult and accommodate treaty rights. The Mikisew, a Treaty 8 Nation, challenged the decision of the Minister of Canadian Heritage to approve the construction

¹²³ *Platinex #2, supra*, at para. 26.

¹²⁴ *Platinex #2, supra*, at para. 6.

of a winter road through a portion of the Mikisew Reserve, located within the Wood Buffalo National Park (“Park”), on the basis that they had not been adequately consulted and efforts had not been made to minimize the impact of the road on their treaty rights to hunt, trap, fish and carry out their traditional mode of life, pursuant to Treaty 8. As signatories to Treaty 8, the Mikisew were promised the “right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered... saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”

On the basis that both parties had contemplated at the time of treaty that portions of the surrendered land over which the First Nations had treaty rights to hunt, fish and trap would, “from time to time,” be “taken up” by the Crown and used for other purposes, the Court concluded that the rights protected by Treaty 8 were subject to a further limitation through the “taking up” process. However, the Court ruled that even in the context of “taking up” surrendered lands beyond reserve boundaries, the Crown had a duty to act honourably, reasoning that it was not necessary to invoke the fiduciary duty of the Crown in finding an obligation to consult and accommodate. The Court concluded that the duty to act honourably included the obligation to consult and, if appropriate, accommodate treaty and Aboriginal interests. As such, the duty to consult and accommodate applies to surrendered lands under treaty.

In the context of the potential infringement of a treaty right, the Court found that two potential duties arise: (1) the fiduciary duty relating to the protection of treaty rights over treaty lands which are not surrendered, as per *R. v. Badger*; and (2) the duty to consult and accommodate treaty rights over surrendered lands.¹²⁵ In this regard, Treaty 8 gives rise to both procedural and substantive obligations. The Court reasoned as follows:¹²⁶

As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g., consultation) as well as substantive rights (e.g., hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown’s *substantive* treaty obligations as well.

The Supreme Court confirmed that the Crown’s duty to consult with First Nations is engaged “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely impact it.”¹²⁷ Where

¹²⁵ *Mikisew, supra* at para. 59. Specifically, the Court reasons as follows: “Where, as here, the Court is dealing with a *proposed* ‘taking up’ it is not correct even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the ‘taking up’ is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister’s order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.”

¹²⁶ *Mikisew, supra* at paras. 57-58.

¹²⁷ *Mikisew, supra* at para. 33.

treaties are at issue, the Court further held that the Crown will always have notice of the treaty's contents. The question, however, that will need to be determined on a case-by-case basis is: to what extent would the conduct contemplated by the Crown adversely affect those rights so as to trigger the duty to consult.¹²⁸

In *Mikisew*, the Court noted that the proposed road, if constructed, would adversely affect the rights of the Mikisew by reducing the territory over which the Mikisew could exercise their Treaty 8 rights. There was evidence before the Court of other adverse impacts of the road on the exercise of the Mikisew's treaty rights, including: fragmentation of wildlife habitat; disruption of migration patterns; loss of vegetation; increased poaching due to easier motor vehicle access to the area; and increased wildlife mortality due to motor vehicle collisions. Given these adverse impacts of the road on the Mikisew's hunting and trapping rights, the Court found that the Crown's duty to consult was triggered.

The fact that the road would only affect a portion of the Treaty 8 area did not change the Court's decision in this regard. The Court held that the ability of First Nations to continue to exercise their "meaningful right to hunt" must be ascertained in relation to their specific traditional territories. Thus, the fact that the Mikisew's traditional hunting grounds and trap lines would be adversely affected by the proposed road was enough to trigger the duty to consult.

In *Haida and Taku River*, the Court identified the strength of the claim and the level of non-compensable infringement as the two primary factors for determining the content of the Crown's duty to consult with First Nations. In *Mikisew*, the Court outlined a number of other factors that would be relevant to the analysis, including: the specificity of the treaty promises; the seriousness of the impact of the Crown's proposed conduct on the First Nation; and the history of dealings between the Crown and the First Nation. Referring to the facts before it, the Court held that Treaty 8 provided a framework to manage continuing changes in land use, which would likely result from the taking up of land by the Crown. Within this context, the Court found consultation was essential.

A dimension of *Mikisew* which ought not be overlooked is its emphasis on the relationship embodied within Treaty 8. The Court refers to the treaty as a vehicle to "govern future interaction" between the Crown and the Mikisew people and takes issue with Treaty 8 being characterized as "a finished land use blueprint."¹²⁹ Rather, the Court repeatedly refers to the importance of managing the ongoing "relations" or "relationship" between the Crown and Aboriginal peoples¹³⁰ in a manner in keeping with the honour of the Crown and the objective of reconciliation.¹³¹ The Court refers to the 1899 treaty negotiations as "the first step in a long journey that is unlikely to end any time soon" thereby underscoring the continuing process of reconciliation and the need for ongoing consultation and accommodation of treaty rights.¹³²

¹²⁸ *Mikisew, supra* at para. 34.

¹²⁹ *Mikisew, supra* at para. 27.

¹³⁰ *Mikisew, supra* at paras. 1, 3, 4, 23, 25, 31, 50, 63.

¹³¹ *Mikisew, supra* at paras. 1, 4, 51-58, 63.

¹³² *Mikisew, supra* at paras. 57-58.

Further, as in *Haida*, the Court expressly addresses the unacceptability of the Crown acting unilaterally in making decisions affecting the rights of Indigenous peoples.¹³³ *Mikisew* suggests that Crown decisions must now be made in collaboration with First Nations in an effort to find a *bona fide* “give and take” or “compromise” as discussed by the Court in *Haida*. *Haida* and *Mikisew* indicate a paradigm shift is taking place, which will affect the way the Crown makes future decisions affecting Aboriginal and treaty rights. That is, these cases direct that treaty peoples and First Nations be incorporated into the decision-making process engaged in by Crown officials in decisions which impact their rights.

Mikisew also shed further light on what the duty to consult actually entails as a minimum standard. The Court found that, on the facts before it, the Crown’s duty would fall at the lower end of the consultation spectrum. In so holding, the Court relied on the fact that the Crown was proposing to build “a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the ‘taking up’ limitation...”.¹³⁴ Nonetheless, the Court reasoned that simply providing notice of the Crown’s intended decision did not amount to adequate consultation. Rather, the duty to consult required the Crown to not only provide notice but also to engage directly with the Mikisew by providing them with information about the project. General public consultation was not sufficient.¹³⁵ Further, the Crown was required to address what it knew to be the Mikisew’s interests and what it anticipated might be the potential adverse effects of the proposed road on those interests. The Court also stated that the Crown was required to solicit and listen carefully to the Mikisew’s concerns and to attempt to minimize the adverse impacts on their treaty rights.

The Court concluded that, in approving the proposed road, the Crown had failed to demonstrate an “intention of substantially addressing [Aboriginal] concerns... through a meaningful process of consultation.”¹³⁶ As a result, the Court quashed the Minister’s approval order and remitted the winter road project to the Minister for reconsideration in light of the Court’s reasons.

Mikisew is instructive in that it articulates the following minimum standard for accommodating treaty rights:

- (1) The Crown must provide notice of the proposed infringement and engage directly with the treaty nation in question;¹³⁷
- (2) The Crown has a duty to disclose relevant information in its possession regarding the proposed development or decision;¹³⁸
- (3) The Crown is under an obligation to inform itself of the impact of a proposed project on the treaty nation in question;¹³⁹

¹³³ *Mikisew, supra* at para. 49.

¹³⁴ *Mikisew, supra* at para. 64.

¹³⁵ *Mikisew, supra* at para. 64.

¹³⁶ *Mikisew, supra* at para. 67.

¹³⁷ *Mikisew, supra* at para. 34.

¹³⁸ *Mikisew, supra* at para. 34.

- (4) The Crown must communicate its findings to the affected treaty nation;¹⁴⁰
- (5) The Crown must, in good faith, attempt to substantially address the concerns of the treaty nation;¹⁴¹
- (6) The Crown cannot act unilaterally;¹⁴²
- (7) Administrative inconvenience does not excuse a lack of meaningful consultation;¹⁴³
- (8) The Crown must solicit and listen carefully to the expressed concerns and attempt to minimize the adverse impact on the treaty interests;¹⁴⁴ and
- (9) The concerns of the treaty nation must be seriously considered by the Crown and “whenever possible, demonstrably integrated into the proposed plan of action.”¹⁴⁵

No case has yet articulated a “high standard” but presumably if such a high standard to consult were to be invoked, the Crown obligations would be more onerous than those delineated above. Notably, what appears to be missing from the above roster are accommodations relating to lands preservation or compensation.

The Federal Court’s recent judgment in *Dene Tha’ Nation v. Canada (Minister of the Environment)*¹⁴⁶ applies *Mikisew* and, further, mirrors the decision in *Platinex* by requiring the Crown to consult with First Nations during the early stages of a proposed development. In *Dene*, the Crown set up various regulatory mechanisms to deal with planning for a natural gas pipeline; parts of the pipeline ran through treaty territory including lands over which the Dene Tha’ had the right to hunt, fish and trap. The federal government set up various environmental and regulatory mechanisms including a co-operation plan (to reduce duplication of regulatory and environmental process) and a joint review panel agreement which addressed the environmental review of the pipeline project. The Court found that the Crown breached its constitutional duty to properly consult and accommodate the Dene Tha’ by failing to consult with them in relation to the formulation of the joint review panel agreement and by providing only 24 hours to respond to the joint review panel process. Phelan J. reasoned that the Dene Tha’ ought to have been provided the opportunity to participate in the environmental and regulatory process “at the outset” and during the development of the co-operation plan which he¹⁴⁷ describes as a form of “strategic planning.”

¹³⁹ *Mikisew, supra* at para. 55.

¹⁴⁰ *Mikisew, supra* at para. 53.

¹⁴¹ *Mikisew, supra* at paras. 55, 64.

¹⁴² *Mikisew, supra* at para. 49.

¹⁴³ *Mikisew, supra* at para. 50.

¹⁴⁴ *Mikisew, supra* at para. 64.

¹⁴⁵ *Mikisew, supra* at para. 64.

¹⁴⁶ *Dene Tha’ Nation v. Canada (Minister of the Environment)*, 2006 FC 1354, 25 C.E.L.R.(3rd)247,[2007] 1 C.N.L.R. 1; upheld on appeal [2008] FCA 20, 35 C.E.L.R.(3rd)1 [“*Dene*”].

¹⁴⁷ *Dene, supra* at paras 108- 114.

The requirement of engaging First Nations in decision making processes relating to project approvals was also stressed in *Ka'a'gee Tu First Nation v. Canada (Attorney General)*.¹⁴⁸ The Court reasoned that the Crown had a duty to involve the First Nation in the formal decision-making process and that the Crown ought not unilaterally change the outcome of that process.¹⁴⁹ This decision reflects the collaborative form of consultation endorsed by the Court in *Mikisew*.

The principle that the duty to consult and accommodate applies to treaty peoples was recently affirmed within the context of a modern comprehensive land claim agreement (i.e., a Final Agreement, forming part of the Umbrella Final Agreement between the Yukon and the Council of Yukon Indians). In *Little Salmon/Carmacks First Nation v. Yukon*¹⁵⁰, the Court dismissed the Crown's argument to the effect that *Mikisew* was distinguishable on the basis that the duty to consult and accommodate was expressly addressed and defined in the Final Agreement with the Little Salmon/Carmacks First Nation. More particularly, the Crown argued that while the honour of the Crown applied to the implementation of the Final Agreement, it ought not be invoked to undermine the certainty of the Final Agreement or, in particular, ought not apply to the Crown's discretion to grant Crown land over areas which the Crown alleged were not designated as part of the Little Salmon/Carmacks First Nation's settlement lands.¹⁵¹ The Court concluded that the honour of the Crown was triggered by the substantial impact of the land grant on the harvest and subsistence rights of the Little Salmon/Carmacks First Nation to hunt, trap and fish over Crown land, each of which were confirmed in the Final Agreement.

The Court also found that the land grant affected the ability of the First Nation to participate in renewable resources development, a right also affirmed in the Final Agreement and also concluded that the land grant would adversely and directly affect a portion of the settlement lands. Notably, the Court declined to quash the land grant but, rather, ordered as follows:

What is required is that the Yukon Government accept its legal duty to engage in a meaningful consultation directly with the First Nation and Johnny Sam. There must be a dialogue on a government-to-government basis and not simply a courtesy consultation. That discussion must include the impact on the hunting and trapping rights, the Settlement Lands and the Fish and Wildlife Management plan. A good starting point would be the issues set out in the First Nation's letter of appeal dated July 27, 2005. There is no obligation to reach agreement and the First Nation does not have a veto. There is a mutual obligation to have a meaningful consultation to determine what accommodation can be made. A written decision on the Paulsen application must address the rights of the First Nation under the Final Agreement, how those rights are impacted and where it is possible to accommodate them.¹⁵²

¹⁴⁸ *Ka'a'gee Tu First Nation v. Canada (Attorney General)*, [2007] 4 C.N.L.R. 102 ["*Ka'a'gee*"].

¹⁴⁹ *Ka'a'gee*, *supra*, at paras. 117 and 120.

¹⁵⁰ *Little Salmon/Carmacks First Nation v. Yukon*, [2007] 3 CNLR 42 ["*Little Salmon*"].

¹⁵¹ *Little Salmon*, *supra* at para. 4-5.

¹⁵² *Little Salmon*, *supra* at para. 128.

The question of whether an impugned Crown decision will be quashed on judicial review remains essentially a matter of discretion. Whether the discretion to quash will be exercised appears in large measure to be informed by a balancing of competing interests (as was done in *Haida*) coupled with the confidence of the Court in the efficacy of the consultation and accommodation process in circumstances where the impugned Crown decision remains intact. In the *Musqueam* case, for example, in suspending the sale of the UBC Golf Course to UBC, the Court presented greater options for resolution which eventually led to a settlement whereby the lands were transferred to the Musqueam as part of a Reconciliation Agreement.¹⁵³ As in *Musqueam*, future decisions may very well fashion remedies that facilitate rather than impede resolution.

E. The Duty to Consult and Accommodate in Respect of Privately-Held Lands

The decision of the Supreme Court of British Columbia in *Hupacasath* indicates that the Crown's duty to consult and accommodate may apply in relation to privately-held lands.¹⁵⁴ The case is also instructive in that it summarizes a series of cases where the Crown was found not to have properly consulted and accommodated the Aboriginal rights in question.¹⁵⁵

This judicial review petition case concerned: (1) a decision by the Minister of Forests which approved the removal of certain privately-held land from a tree farm licence ("Removal Decision"); and (2) a decision of the Crown's Chief Forester determining a new allowable annual cut for the tree farm licence. The privately-held property comprised forested land within the asserted traditional territory of the Hupacasath which was contiguous with forested Crown-held land, also subject to the assertion of Aboriginal title. The Court found that the Hupacasath continue to have a *prima facie* case to hunt, fish, gather food, harvest trees and visit sacred sites on this private land, subject to the rights of fee simple owners to prohibit their access. The Court also found that because the exercise of such rights does not require exclusive occupation and use, the existence of overlapping claims did not in general weaken the Hupacasath's case.

On the specific question of the Crown's duty to consult, the Court found the Crown had a duty to consult the Hupacasath regarding the Removal Decision and also regarding the consequences of the removal of the private lands on the remaining Crown-held land within the tree farm licence. In this regard, the Court found the Crown's duty to consult and accommodate was at the "lower level" given the facts of the case before it.¹⁵⁶ This nonetheless required:

¹⁵³ www2.news.gov.bc.ca/news_releases_2005-2009/2008ARR0004-000346.htm - 34k

¹⁵⁴ *Hupacasath*, *supra* at para. 126.

¹⁵⁵ The court referred *inter alia* to the following consultation and accommodation cases. The cases cited here are examples of the Crown not properly consulting or accommodating and ordering further consultation: *Gitksan First Nation v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126, 2002 BCSC 1701; *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)* (2004), 39 B.C.L.R. (4th) 263, 2005 BCSC 283; *Huu-Ay-Aht*, *supra*; *TimberWest Forest Corp. v. British Columbia (Deputy Administrator, Pesticide Control Act)*, [2003] B.C.E.A. No. 31; *Penelakut First Nations Elders v. British Columbia (Regional Waste Management)*, [2005] B.C.W.L.D. 547.

¹⁵⁶ The court concluded that the Hupacasath's Aboriginal rights were "highly attenuated" because the owners had a right to exclude the Hupacasath from the land; further, the effect of the Crown's decision on the Aboriginal rights was found to be "modest": see paras. 244-254.

informed discussion between the Crown and the [Hupacasath] in which the [Hupacasath] have the opportunity to put forward their views and in which the Crown considers the [Hupacasath] position in good faith and where possible integrates them into its plan of action.¹⁵⁷

The Court concluded the Crown did not meet this duty.

As to the Crown's duty relating to the effect of the Removal Decision on Aboriginal rights asserted on Crown-held land, the Court found it was "higher, and requires something closer to "deep consultation."¹⁵⁸ The Removal Decision provided the land owner with significantly greater latitude in its logging operations. On the evidence, the Court found the Crown did not meet this duty.

With regard to the question of the Chief Forester's decision to amend the allowable cut for TFL 44, the Court found the Crown had met its duty in light of the evidence. Specifically, the Court found the Crown gave notice and disclosed information regarding its decision and there was no evidence that it failed to respond to concerns raised by the Hupacasath. This finding underscores that the type of evidence of infringement put before the Court in such cases is critical.

The remedy provided in this case regarding the Crown's failure to consult with the Hupacasath is also instructive. The Court granted declaratory relief as follows:

There will be a declaration that the **Minister of Forests had, prior to the removal decision on July 9, 2004, and continues to have, a duty to consult with the Hupacasath in good faith and to endeavour to seek accommodation** between their aboriginal rights and the objectives of the Crown to manage TFL 44 in accordance with the public interest, both aboriginal and non-aboriginal.

There will be a declaration that making the removal decision on July 9, 2004 without consultation with the Hupacasath was inconsistent with the honour of the Crown in right of British Columbia in its dealings with the Hupacasath.

There will be a declaration that the **Chief Forester had, prior to the August 26, 2004 decision to amend the allowable annual cut for TFL 44, and continues to have a duty to meaningfully consult in good faith with the Hupacasath and to endeavour to seek accommodation** between their aboriginal rights and the objectives of the Crown to manage TFL 44 in accordance with the public interest, both aboriginal and non-aboriginal.¹⁵⁹

(emphasis added)

The Court declined to order that the Removal Decision be quashed or suspended on the basis of the "substantial prejudice which could flow to third parties from quashing or suspending the

¹⁵⁷ *Hupacasath, supra* at para. 274.

¹⁵⁸ *Hupacasath, supra* at para. 275.

¹⁵⁹ *Hupacasath, supra* at paras. 292 -294.

removal decision, compared with the lesser prejudice which could befall the [Hupacasath] if the removal decision is left in effect.”¹⁶⁰ Nonetheless, the Court expressly ordered the parties to re-initiate the consultation and accommodation process, imposed specific conditions regarding the use of the Removal Lands for up to two years pending the completion of the consultation and accommodation process, directed mediation in the event negotiations were unsuccessful and maintained supervisory jurisdiction over the process.

Like *Musqueam*, *Haida* and *Platinex*, *Hupacasath* reflects an established trend in the type of remedy provided by the Court in such cases. Court supervision over court-ordered accommodation and mediation processes between the Crown and First Nations is now a common remedy in cases challenging Crown decisions on the basis that Aboriginal or treaty rights have not been accommodated. Of note, the case is before the Courts once again on the question of the adequacy of the Crown’s consultation and accommodation.

F. Jurisdictional Issues and the Duty to Consult and Accommodate

The Supreme Court of Canada has delineated the power of provincial governments to legislate in relation to Aboriginal title and treaty rights. Cases such as *Delgamuukw*, *Haida* and *Mikisew* make it clear that both the provincial and federal Crown must consult and, where indicated, accommodate Aboriginal rights, by virtue of ss. 91(24) of the *Constitution Act, 1867* (the federal power to legislate in respect of “Indians”). Nonetheless, only the federal Crown has jurisdiction to legislate in a manner that limits Aboriginal rights; the provincial Crown has no jurisdiction to extinguish Aboriginal rights. However, since Aboriginal rights received constitutional protection by virtue of s. 35 of the *Constitution Act, 1982*, the federal Crown can now no longer extinguish existing Aboriginal rights.¹⁶¹

The doctrine of inter-jurisdictional immunity provides that the vesting of exclusive jurisdiction with the federal government over “Indians” and “Indian lands” under ss. 91(24), operates to preclude provincial laws whose purpose is to legislate within this federal sphere.¹⁶² The ownership by the provincial Crown (under s. 109 of the *Constitution Act, 1867*) of lands held pursuant to Aboriginal title is separate from provincial jurisdiction over those lands.¹⁶³ However, provincial laws of general application which would otherwise not apply to Indians *proprio vigore* because they touch on what the courts have referred to as the “core of Indianess” are allowed to do so by virtue of s. 88 of the *Indian Act* which incorporates by reference provincial laws of general application.¹⁶⁴ For example, a provincial law regulating hunting may touch on the “core of Indianess” and would not apply *proprio vigore* but it would still be constitutionally valid pursuant to s. 88 of the *Indian Act*, as a law of general application.

The decision of the Supreme Court in *R. v. Morris and Olsen*,¹⁶⁵ adds further clarity to this complex area of the law. The Court ruled that any *prima facie* infringement of a treaty right by

¹⁶⁰ *Hupacasath*, *supra* at para. 317.

¹⁶¹ *Delgamuukw SCC*, *supra* at paras. 174-181; See also *Van der Peet*, *supra* at para. 28.

¹⁶² *Delgamuukw SCC*, *supra* at para. 181.

¹⁶³ *Delgamuukw SCC*, *supra* at para. 179.

¹⁶⁴ *Delgamuukw SCC*, *supra* at para. 181.

¹⁶⁵ *R. v. Morris and Olsen*, 2006 SCC 59.

the provincial Crown is invalid and unconstitutional since the provincial Crown does not have the constitutional power to infringe a treaty right. The Court reasoned that treaty rights lie squarely within federal jurisdiction. Further, while the federal Crown does have the power under s. 91 of the *Constitution Act, 1867* to infringe treaty rights, the Supreme Court of Canada reasoned that such a federal infringement is also invalid or unconstitutional unless the Crown justifies the infringement as required by the justification test set out in *Sparrow* and *Badger*.

Morris and Olsen squarely raised a critical jurisdictional issue impacting the authority of the province to legislate with respect to s. 35 rights. This issue was addressed again a year and a half later in *Tsilhqot'in v. British Columbia*. The decision of the Supreme Court of British Columbia in *Tsilhqot'in* is consistent with the reasons in *Morris and Olsen*.¹⁶⁶ The Supreme Court of British Columbia concluded that the provincial Crown lacked the power to legislate with respect to lands over which Aboriginal title has been proven. The Court found, on the basis of the doctrine of inter-jurisdictional immunity, that the *Forest Act* (and by extension, any other provincial legislation of general application) does not apply to lands over which Aboriginal title has been proven; that is, the federal government has exclusive constitutional jurisdiction over "Indians and Lands reserved for Indians" and this includes exclusive federal jurisdiction over Aboriginal title lands. However, the Court also concluded that provincial jurisdiction and legislation do apply over lands which are subject to an assertion or claim of Aboriginal title which remains unproven. In particular, the trial judge noted that an area which is merely subject to an *assertion* or *claim* of Aboriginal title or rights is not excluded from the jurisdiction of the *Forest Act* (or, by extension, any other provincial legislation of general application). As such, the duty of the provincial Crown to consult and accommodate with respect to the impact of provincial legislative or regulatory authority over such lands remains intact. The trial judge also held that the existence of Aboriginal rights on land, short of Aboriginal title (such as hunting, trapping and gathering) does not oust provincial jurisdiction over that land. Again, the provincial Crown duty to accommodate such practice-based rights also remains intact.

V. Aboriginal Rights and Section 15 of the Charter

The decision of the Supreme Court of Canada in *R. v. Kapp*,¹⁶⁷ released June 27, 2008, is the first case to squarely address the issue of whether the federal government has the constitutional authority to enact legislation which enhances Aboriginal involvement in a commercial industry fishery by distinguishing between Aboriginal and non-Aboriginal fishers. The case is also the first to formulate a legal test which informs the proper implementation of ameliorative measures or affirmative action programs pursuant to ss. 15(2) of the *Canadian Charter of Rights and Freedoms*.

Essentially, the appellants claimed that the Aboriginal communal fishing licence in question discriminated against them on the basis of race. The Court dismissed the appeal, concluding that the impugned legislation was constitutionally valid. The Court concluded that because the purpose behind the enabling legislation was ameliorative and the Aboriginal communities were

¹⁶⁶ *Tsilhqot'in, supra*.

¹⁶⁷ *R. v. Kapp*, 2008, SCC 41.

“disadvantaged in terms of income, education and a host of other measures” there was no violation of the s. 15 equality provisions of the *Canadian Charter of Rights and Freedoms*.

The appellants were commercial fishers, mainly non-Aboriginal, who asserted that their equality rights under s. 15 of the *Charter of Rights* were violated by a communal fishing licence granting members of three Aboriginal communities the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours. Under the licence, the Aboriginal communities were also allowed to sell the fish harvested. The Federal Crown argued that the general purpose of the program under which the licence was issued, known as the Aboriginal Fisheries Strategy, was intended to better regulate the fishery and that it effectively ameliorated the conditions of a disadvantaged group, namely, the Aboriginal licence-holders. Accordingly, the Court was required to examine how ss. 15(1) of the *Charter*, which prevents governments from making discriminatory distinctions, interacts with ss. 15(2) of the *Charter* which enables “governments to proactively combat existing discrimination through affirmative measures.”

While the Supreme Court of Canada had previously set out the legal test to determine whether there has been a violation of the equality rights protected under ss. 15(1), it had not provided a legal test in relation to ss. 15(2). In the instant case, the Court set out the following formula: a program does not violate the s. 15 equality guarantee if the government can demonstrate that (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds subsumed in ss. 15(1) (the enumerated grounds in ss. 15(1) being race, national or ethnic origin, colour, religion, sex, age or mental or physical disability).

Within this legal context, the Court considered the substantive purpose of s.15 in light of the ameliorative licensing program which provided benefits to the Musqueam, Tseshah, and Tsawwassen First Nations. In doing so, the Court reasoned that “not every distinction is discriminatory” and it noted that identical treatment may actually “produce serious inequality.” Further, while the Court found that the appellants had been treated differently on the basis of race, it concluded the Aboriginal Fisheries Strategy constituted an affirmative measure under ss. 15(2) of the *Charter*. The Court reasoned that ss. 15(2) protected government efforts to adopt remedial schemes designed to assist disadvantaged groups, stating that “the disadvantage of Aboriginal people is indisputable” and underscoring “the legacy of stereotyping and prejudice against Aboriginal peoples.”

It is noteworthy that the majority of the Court (McLachlin, Abella, Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ.) declined to address the nature and scope of s. 25 of the *Charter* which provides, in part, that the “guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada... .” While the Court had originally framed a constitutional question requesting that the parties address this issue (and in fact the parties did so), the Court concluded that given that the matter raised “complex questions of the utmost importance to peaceful reconciliation of aboriginal entitlement with the interest of all Canadians,” the implications flowing from s. 25 would be “best left for resolution on a case-by-case basis as they arise.”

While the majority of the Court declined to address s. 25, Bastarache J. focused his minority judgment precisely on this point, concluding that the *Charter* operated to bar the appellants' constitutional challenge. He also proposed a legal framework for the application of s. 25, reasoning that s. 25 serves the purpose of protecting the rights of Aboriginal peoples where the application of the *Charter* would diminish the distinctive, collective and cultural identity of an Aboriginal group.

The majority reasons of the Court reflect a clear attempt to simplify, re-state, and clarify the guiding legal principles in what has been a complex and somewhat convoluted area of the law. Further, the Court has finally set out a legal test relating to s. 15(2) of the *Charter*. It is now clear that government legislation and programs do not offend the equality provisions of our *Charter* where distinctions are made which provide benefits and advantages to particular groups and not to others; however, to be shielded by ss. 15(2), it is necessary to demonstrate that the law or program in question has an ameliorative or remedial purpose and that the target group is disadvantaged in relation to the enumerated or analogous grounds protected by s. 15. While the majority of the Court did not address the metes and bounds of s. 25 of the *Charter*, the minority decision of Bastarache J. nonetheless advances judicial discourse in relation to this provision.

This is an engaging decision in that it effectively introduces an alternate avenue through which aboriginal and treaty rights may be given expression. In the instant case, for example, the Musqueam argued that the Aboriginal Fisheries Strategy reflected an accommodation of their asserted yet unproven rights to sell salmon. Moreover, given the distinct economic and social disadvantage experienced by many First Nations in Canada, many First Nations in Canada could request remedial programs under s. 15(2). It remains to be seen whether this case will lead to further government regulations and programs whose purpose is ameliorative rather than rights based. Furthermore, in principle at least, such programs need not be restricted to the commercial fishing industry.

* * *

The above review of the case law on consultation and accommodation informs the analyses below. The following part of this paper will address the importance of self-governance rights in guiding and defining the consultation and accommodation process.

VI. Consulting and Accommodating Through the Inherent Right to Self-Governance

To date, our courts have not examined how the right to Aboriginal self-governance informs the process of consultation and accommodation. This development is, however, an inevitable consideration in light of the Court's statement in *Mikisew* that reconciliation is "[t]he fundamental objective of the modern law of Aboriginal and treaty rights" and that it cannot be achieved through unilateral Crown action.¹⁶⁸ The purpose of reconciliation subsumed within s. 35 can only be achieved through government-to-government negotiations; that is, between First Nations governments and provincial and/or federal governments. In such negotiations, First Nations' governance rights are invoked in at least two ways. First, Aboriginal rights are by their

¹⁶⁸ *Mikisew, supra* at paras. 1 and 49.

nature communal rights and it is therefore First Nations governments (rather than individual members) who are required to consult and, where indicated, negotiate with the Crown in relation to these rights. Second, Aboriginal title includes the right to choose how traditional lands are used. As such; this right by definition engages the Aboriginal communal right to govern land use.

Consider also the following passage in *Delgamuukw*.¹⁶⁹ The Court affirms its reasons in *Van der Peet* and addresses the purpose of reconciliation as follows:

Since the purpose of s. 35(1) is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty, it is clear from this statement that **s. 35(1) must recognize and affirm both aspects** of that prior presence – first, the occupation of land, and second, the **prior social organization and distinctive cultures of aboriginal peoples on that land**.

(emphasis added)

The constitutional affirmation of the “prior social organization and distinctive cultures of Aboriginal peoples” as described in the above passage logically embodies a recognition that these Aboriginal societies governed themselves.¹⁷⁰

There is clearly a daunting practical and logistical challenge in recognizing the existence of, as yet, undefined self-government rights within Canada (at least for most communities who have not finalized treaties or who have ascribed to self-government legislation). However this task can be in part abated by consultation and accommodation policies and practices which recognize the existence of First Nations as distinct polities. More specifically, reconciling the prior occupation and existence of Aboriginal societies with the assertion of sovereignty necessarily involves adapting our common law and our legal system in a manner that respects and, where indicated, accommodates First Nations governance choices, customs and laws, in a manner consistent with the Supreme Court’s direction in *Haida* and *Mikisew*, as discussed above. In any event, such consultation and adaptation will likely provide for the expression and exercise of self-governance rights in the consultation and accommodation process.

A. Aboriginal Governance Rights As Recognized in Canadian Law

The existence of inherent Aboriginal governance rights is supported by Canadian jurisprudence. It is beyond the scope of this paper to address this issue in any depth and this issue has been very ably addressed by others.¹⁷¹ However, a brief review of the relevant case law on point is in order since this is a relatively unknown area of the law with potentially wide-ranging implications.

¹⁶⁹ *Delgamuukw SCC, supra* at para 141.

¹⁷⁰ See *Guerin, supra* at pp. 376-377 where the Court affirms that Aboriginal title is not dependent on treaty, executive order or legislative action but is pre-existing.

¹⁷¹ Kent McNeil, “The Inherent Right of Self-Government: Emerging Directions for Legal Research” prepared for the National Centre for First Nations Governance (November 2004).

The source of Aboriginal governance rights is the same as all other Aboriginal rights, including Aboriginal title; that is, these rights arise from the existence of distinct Aboriginal societies occupying certain lands and governing themselves prior to European contact. Indeed, this logical postulate was understood and accepted by the Court in *Van der Peet* in its reference to the majority decision in *Mabo v. Queensland*;¹⁷² the Court in *Van der Peet* relied on the following passage in *Mabo* which indicates that Aboriginal title has been given content by the traditional laws and customs observed by Aboriginal people:

This position is the same as that being adopted here “[T]raditional laws” and “traditional customs” are those things passed down, and arising from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word “tradition” -- that which is “handed down from ancestors to posterity”, Concise Oxford Dictionary (9th Ed.), -- implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the exercise of aboriginal title. **To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title on the pre-existing societies of aboriginal peoples.** This is the same basis as that asserted here for aboriginal rights.¹⁷³

(emphasis added)

The Court refers to Professor Slattery’s observations that the law of Aboriginal rights is “neither English nor aboriginal in origin: it is a form of inter-societal law that evolved from long-standing practices linking the various communities” and that such rights concern “the status of native peoples living under the Crown’s protection, and the position of their lands, customary laws and political institutions.”¹⁷⁴

The Court’s analysis in *Van der Peet*, therefore, directly addresses and acknowledges the pre-existing customs, laws and political institutions of First Nations in this country. This analytical focus of acknowledging Aboriginal practices, traditions and customs, coupled with the Court’s reference to “traditional laws” and “pre-existing societies” suggests that the Canadian legal system is receptive to recognizing self-government rights. Indeed, such recognition is consistent with the following passage in Chief Justice Lamer’s judgment in *R. v. Sioui*:¹⁷⁵

The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. **It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.**

(emphasis added)

¹⁷² *Mabo, supra*.

¹⁷³ *Mabo, supra* at para. 40.

¹⁷⁴ *Van der Peet, supra* at para. 42.

¹⁷⁵ *R. v. Sioui* (1990), 3 C.N.L.R. 127, at 147.

Along a similar vein, in *Connolly v. Woolrich*,¹⁷⁶ the Court recognized the marriage customs of the Cree people in litigation concerning the estate of a deceased man who had married a Cree woman. In finding that the marriage had the basic requirements for recognition by the Courts of Lower Canada (i.e., a voluntariness, permanence and exclusivity), the Court determined that the Cree marriage was valid and the decision was upheld on appeal.¹⁷⁷

The first Supreme Court of Canada case to squarely deal with the issue of Aboriginal governance rights was *Pamajewon*.¹⁷⁸ As Professor McNeil points out in his article “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty,”¹⁷⁹ the Court was willing to assume that Aboriginal self-government rights exist but expressly declined to decide the issue on the facts of the case before it. The Court in its decision did, however, reason that self-government rights are “no different from other claims to enjoyment of aboriginal rights and must, as such, be measured against the same standard.”¹⁸⁰ The standard to which the Court was referring is the test for proof of Aboriginal rights found in *Van der Peet*. In *Van der Peet*, the Court set out the following test:

In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.¹⁸¹

Therefore, the Supreme Court of Canada in *Pamajewon* signalled that self-government rights could be proven with reference to practices, customs or traditions which are integral to the distinctive culture of the Aboriginal people claiming the right, provided such a practice, custom or tradition existed prior to European contact and continues to the present day, albeit in a modern form.¹⁸²

The Court’s application of the *Van der Peet* test to a determination of whether a right to self-government exists is not surprising. However, this legal test is a challenging one to meet due to the manner in which the Court requires self-government rights to be characterized. The Court reasoned as follows:

The appellants themselves would have this Court characterize their claim as to “a broad right to manage the use of their reserve lands.” **To so characterize the appellants’ claim would be to cast the Court’s inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case** and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied *supra*,

¹⁷⁶ *Connolly v. Woolrich* (1867), 11 L.C. Jur. 197 (Que. S.C.).

¹⁷⁷ *Connolly v. Woolrich* (1869) 1 R.L.O.S., 253 (Que. C.A.).

¹⁷⁸ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [“*Pamajewon*”].

¹⁷⁹ See for example, Kent McNeil, “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty” published in *Emerging Justice? Essays on Indigenous Rights in Canada and Australia*, Native Law Centre, University of Saskatchewan 2001.

¹⁸⁰ *Pamajewon*, *supra* at para. 24.

¹⁸¹ *Van der Peet*, *supra* at para. 46..

¹⁸² *Pamajewon*, *supra* at paras. 23-30.

allow the court to consider the appellants' claim at the appropriate level of specificity...¹⁸³ (emphasis added)

The appropriate level of specificity identified by the Court in *Pamajewon* was a claim to “the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands.”¹⁸⁴ The Court’s ruling that it will not accept characterizations of self-government rights in any general sense requires proof on a specific practice-by-practice basis. This is a daunting threshold. Nevertheless, the capacity to prove that a particular governance practice constitutes an Aboriginal right within s. 35 is clearly contemplated and endorsed by the Court’s reasoning in *Van der Peet* and *Pamajewon*.

It is noteworthy that the Supreme Court of Canada in *Gladstone* reasoned that to be recognized as an Aboriginal right, an activity must be “an element of a tradition, custom, practice **or law** integral to the distinctive culture of the aboriginal group claiming the right”¹⁸⁵ (emphasis added). As such, the Court’s analysis expressly acknowledges that an Aboriginal right could include the pre-contact laws of an Aboriginal people.

This line of reasoning is consistent with a decision of our British Columbia Court of Appeal in *Casimel v. ICBC*,¹⁸⁶ wherein the Court reasoned that an adoption, in accordance with the customs of the Carrier people, was valid to bring the adopting parents within the definition of dependent parents for purposes of the *Insurance(Motor Vehicle) Act*.¹⁸⁷ The Court found that a customary Aboriginal adoption, as an aspect of social self-regulation or self-government by an Aboriginal community, was not subject to any form of blanket extinguishment and qualified as an Aboriginal right recognized and affirmed under s. 35(1).¹⁸⁸

Along a similar vein, in his dissenting Court of Appeal judgment in *Delgamuukw*,¹⁸⁹ Mr. Justice Lambert described the right to self-government as a form of internal community authority and regulation.¹⁹⁰ He reasoned as follows:

They [the plaintiffs] are claiming the right to manage and control the exercise of the community rights of possession, occupation, use and enjoyment of the land and its resources which constitutes their aboriginal title; and they are claiming the right to organize their social systems on those matters that are integral to their distinctive cultures in accordance with their own customs, traditions and practices which define their culture.¹⁹¹

¹⁸³ *Pamajewon*, *supra* at para. 27.

¹⁸⁴ *Pamajewon*, *supra* at para. 26.

¹⁸⁵ See, for example, *Gladstone*, *supra* at para. 22.

¹⁸⁶ *Casimel v. ICBC* (1993), 82 B.C.L.R. (2d) 387 [“*Casimel*”].

¹⁸⁷ *Insurance (Motor Vehicle) Act* [R.S.B.C. 1996] Chapter 231.

¹⁸⁸ *Casimel*, *supra* at para. 42.

¹⁸⁹ *Delgamuukw v. The Queen*, [1993] 5 C.N.L.R. 1 (C.A.) [“*Delgamuukw CA*”].

¹⁹⁰ *Delgamuukw CA*, *supra* at para. 964.

¹⁹¹ *Delgamuukw CA*, *supra* at paras. 970-1.

This passage in Mr. Justice Lambert’s decision is consistent with the reasoning of the Supreme Court of Canada in *Delgamuukw* four years later (although the Court declined to expressly address the issue of self-government in light of the facts of this case and sent the issue back to trial¹⁹²). The Supreme Court in *Delgamuukw* begins its analysis by referring to one source of Aboriginal title as “the relationship between common law and pre-existing systems of aboriginal law”¹⁹³ and then expressly recognizes that prior occupation by First Nations of traditional lands is significant not only because of the physical fact of occupation but also “because aboriginal title originates in part from pre-existing systems of aboriginal law.”¹⁹⁴

The following passage in the Court’s decision in *Delgamuukw* is instructive:

. . . the law of aboriginal title does not only seek to determine historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present day. **Implicit in the protection of historic patterns of occupation is the recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.**¹⁹⁵

(emphasis added)

The emphasis in this passage on “affording legal protection to prior occupation in the present day” and protecting “historic patterns of occupation” invokes the recognition and protection of those systems of Aboriginal law which informed and guided “historic patterns of occupation” as well as the “relationship of the aboriginal community to its land.” The Supreme Court of Canada thereby recognized that prior to the assertion of sovereignty, there were internal systems of governance that regulated how land could be used, who could use it, when, and for what purpose (e.g., what tract of land belonged to which “house,” “clan” or “tribe”).

Based on the Court’s reasoning in *Pamajewon*, inherent governance rights could include those rights that existed prior to European contact in relation to an Aboriginal community’s governance practices regarding its people, land and resources. That is, Aboriginal title rights which are held communally and which arise from “pre-existing systems of aboriginal law”¹⁹⁶ must by definition embody rules or mechanisms through which decisions are made about communally-held land and resources. This conclusion is implicit in that portion of the Court’s reasoning in *Delgamuukw* which states that Aboriginal title includes the right of an Aboriginal community to choose how its traditional lands are to be used.¹⁹⁷ Because Aboriginal title: (a) is a communal right; (b) which encompasses the right to choose how land is to be used; and (c) finds its source, in part, in “pre-existing systems of aboriginal law,” which (d) are “taken into account when establishing proof of title,” Aboriginal laws and customs governing land use may very well be inherent rights embedded within ss. 35(1).¹⁹⁸ Simply put, a communal right to

¹⁹² *Delgamuukw SCC, supra* at paras. 170-171.

¹⁹³ *Delgamuukw SCC, supra* at para. 114.

¹⁹⁴ *Delgamuukw SCC, supra* at para. 126.

¹⁹⁵ *Delgamuukw SCC, supra* at para. 126.

¹⁹⁶ *Delgamuukw SCC, supra* at para. 126.

¹⁹⁷ *Delgamuukw SCC, supra* at paras. 111 and 165.

¹⁹⁸ See *Delgamuukw SCC, supra* at paras. 126, 147-148; and 104.

determine how land may be used necessarily implies the involvement of the Aboriginal government whose communal rights are engaged.

The decision of the Supreme Court of British Columbia in *Campbell v. British Columbia (Attorney General)*,¹⁹⁹ is also very instructive in this regard. In that case, Mr. Justice Williamson reviews the law relating to Aboriginal governance rights, including the inherent right to self-government, within the context of a constitutional challenge of the Nisga'a Treaty. The plaintiffs sought an order declaring the Nisga'a Treaty to be, in part, inconsistent with the Constitution of Canada and, therefore, of no force and effect. Specifically, the plaintiffs argued that the Treaty violates the Constitution because parts of it purport to bestow, upon the governing body of the Nisga'a Nation, legislative jurisdiction inconsistent with the existing division of powers granted to Parliament and the Legislative Assemblies of the Province by ss. 91 and 92 of the *Constitution Act, 1867*. Second, the plaintiffs also argued that the legislative powers set out in the Treaty interfere with the concept of Royal Assent. Third, the plaintiffs argued that by granting legislative power to citizens of the Nisga'a Nation, non-Nisga'a Canadian citizens who reside in or have other interests in the territory subject to Nisga'a government are denied rights guaranteed to them by s. 3 of the *Canadian Charter of Rights and Freedoms*. The Court dismissed the plaintiffs' action on all three grounds. The case remains good law today.

The Court in *Campbell* concluded that the right of Aboriginal peoples to govern themselves was not extinguished after the assertion of sovereignty by the Crown and reasoned as follows:

The right to aboriginal title "in its full form", including the right for the community to make decisions as to the use of the land and therefore **the right to have a political structure for making those decisions, is, I conclude, constitutionally guaranteed by Section 35.** (para. 137)

(emphasis added)

Later in his decision, Williamson J. concludes:

I have also concluded that the *Constitution Act, 1867* did not distribute all legislative power to the Parliament and the legislatures. Those bodies have exclusive powers in the areas listed in Sections 91 and 92. . . . But the *Constitution Act, 1867*, did not purport to, and does not end, what remains of the Royal prerogative or aboriginal and treaty rights, including the diminished but not extinguished power of self-government which remained with the Nisga'a people in 1982.²⁰⁰

The reasoning in *Campbell* effectively creates constitutional space for accommodating and giving force to Aboriginal governance rights within our Canadian system of law. In this light, the question then becomes: how can Aboriginal governance rights be meaningfully expressed within Canadian constitutional law, structure and process? How can these rights to govern (e.g.,

¹⁹⁹ *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123; 79 B.C.L.R. (3rd) 122 ["*Campbell*"].

²⁰⁰ *Campbell*, *supra* at para. 180.

choice of leadership, leadership structures and land use) manifest themselves within the fabric of existing legislation and laws? To a degree, consultation and accommodation processes can address these questions by recognizing, and respecting the customary governance practices and laws of Aboriginal and treaty peoples. This, however, is a neonatal area of Canadian law. Furthermore, given its complexity and potential ramifications, there is clearly a need for more comprehensive governance agreements between the Crown and First Nations, particularly in areas where treaties have not been made.

B. Accommodating Aboriginal Governance Rights

The *Haida* and *Taku* cases are very useful in providing guidance on the nature of the Crown's obligations to accommodate Aboriginal governance rights *prior* to these rights being proven in a courtroom. As outlined above, the Supreme Court of Canada has made clear that the Crown does have the obligation to consult and, where appropriate, to seek to accommodate Aboriginal rights. In principle, this ruling applies equally to all types of Aboriginal rights including governance rights. Accordingly, where *prima facie* evidence of Aboriginal governance rights and their infringement or potential infringement exists (prior to their formal proof in the courtroom), if the Crown does not attempt to address the substance of the First Nation's concerns, the Crown's actions and authorizations relating to such infringements may be rendered void or unenforceable by a court through the judicial review process.

Simply put, the potential infringement of Aboriginal governance rights are also subject to judicial scrutiny and remedy prior to being proven. This adds an additional layer of Crown obligation to any consultation process relating to land or resource use, requiring that Aboriginal concerns relating to Aboriginal governance rights also be addressed. For example, if an Aboriginal people have a traditional land tenure system or customary law which provides governance authority in relation to land or resources over an area affected by a Crown licensing decision to a particular Clan and/or House, the Aboriginal governance system, according to cases such as *Haida*, ought to be incorporated into the consultation and accommodation process in a manner which respects the Aboriginal people's traditional governance practices. As discussed above, questions such as: (a) whether the process by which the Crown allocated the resource and the allocation of the resource reflects the prior interest of the holders of Aboriginal title; (b) whether there has been as little infringement as possible to effect the desired result; (c) whether compensation has been paid; and (d) whether the Crown bargained in good faith, also guide the consultation process in relation to applicable Aboriginal governance rights relating to any given consultation and accommodation process.

Furthermore, just as the decision in *Campbell, supra*, confirms a place for Aboriginal governance rights within Canada's constitutional framework, so do the rulings in *Haida* and *Delgamuukw*, which confirm that there is always a duty to consult when Aboriginal rights are at stake. Necessarily, the duty to consult relates to communal rights and, therefore, this duty itself is predicated on the right of a First Nation to self-government since the Crown's duty can only be fulfilled by engaging the government that represents the people holding the Aboriginal communal rights. The decision-making authority relating to how to use title lands, coupled with the duty to consult, necessitates Aboriginal self-government.

VII. Conclusion

During the course of the last few years, our courts have significantly advanced the law relating to Aboriginal title and rights. Recent decisions have clarified the nature and scope of these rights and have also developed legal principles concerning Crown obligations in relation to consultation and accommodation processes which now invariably take place with Aboriginal peoples regarding land and resource use.

We now know that Aboriginal title has been defined to encompass an exclusive interest in the land itself, including its resources. Practice-based Aboriginal rights may be sustenance based or may be commercial in nature. Both Aboriginal title and practice-based rights are not absolute rights, although the Crown bears the onus of justifying the infringement of these rights. Asserted but as yet unproven Aboriginal rights do not trigger the Crown's duty to justify their infringement. However, s. 35 of the *Constitution Act, 1982* nonetheless invokes what the Court in *Haida* described as a "promise of rights recognition" in relation to unproven Aboriginal rights such that the Crown has a duty to act honourably by consulting with First Nations and, where appropriate, accommodating asserted rights.

Recent decisions have repeatedly underscored the need for reconciliation and negotiated solutions to outstanding Aboriginal title and treaty rights disputes. Further, the legal foundation for such reconciliation through negotiated resolutions has now been laid. The common law guideposts outlined above are equally applicable at the treaty table, or at any negotiation or consultation concerning Aboriginal or treaty rights.

Aboriginal peoples are entitled at law to a role in Crown decisions which impact not only the use and disposition of their traditional lands and resources but also their social and cultural well-being. In this context, unilateral decision-making by the Crown is no longer acceptable to our courts. *Bona fide* government-to-government consultation which addresses the concerns of First Nation is now required at law.

Leading court authorities have envisioned that, prior to the final resolution of outstanding Aboriginal rights issues through settlements or court determinations, the consultation and accommodation process is to be driven by the primary purpose of reconciliation through a balancing of interests. Such a process may comprise a variety of options, including the re-allocation of Crown-held land and resources and/or compensation payments by the Crown. This may be achieved through joint decision-making protocols, negotiated agreements or, alternatively, where agreements cannot be reached, through specialized dispute resolution mechanisms. In those circumstances where such negotiations do not lead to agreement (and they need not at law), courts have begun to interject themselves into the negotiation process by adopting a supervisory role. In this regard, it is settled law that both the federal and provincial Crown have the obligation to consult and, where appropriate, accommodate.

As discussed above, and as articulated in decisions such as *Platinex*, the litigation alternative is often an unfortunate one for Aboriginal peoples, the Crown and industry proponents. Reconciliation and "win-win" situations can be achieved with good faith negotiations on all sides

if the principles which inform the consultation and accommodation process are honoured. We are now at a crossroads where the will and foresight to do so is emerging.