Kitkatla Band *v*. British Columbia (Minister of Small Business, Tourism and Culture),

[2002] 2 S.C.R. 146, 2002 SCC 31

Chief Councillor Mathew Hill, also known as Tha-lathatk, on his own behalf and on behalf of all other members of the Kitkatla Band, and Kitkatla Band *Appellants*

v.

The Minister of Small Business, Tourism and Culture, the Attorney General of British Columbia and International Forest Products Limited *Respondents*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta, the Council of Forest Industries and the Truck Loggers Association *Interveners*

Indexed as: Kitkatla Band *v*. British Columbia (Minister of Small Business, Tourism and Culture)

Neutral citation: 2002 SCC 31.

File No.: 27801.

2001: November 2; 2002 : March 28.

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

on appeal from the court of appeal for british columbia

Constitutional law – Division of powers – Property and civil rights – Provincial legislation protecting heritage objects while retaining ability to make exceptions – Whether provisions are intra vires province – Whether power to order alteration or even destruction of cultural object is beyond provincial powers when it affects native cultural objects – Whether pith and substance of provisions fall within property and civil rights or Indians and lands reserved to Indians – Constitution Act, 1867, ss. 91(24), 92(13) – Heritage Conservation Act, R.S.B.C. 1996, c. 187, ss. 12(2)(a), 13(2)(c), (d).

Indians – Protection of native cultural heritage – Provincial legislation protecting heritage objects while retaining ability to make exceptions – Whether legislation constitutional – Constitution Act, 1867, ss. 91(24), 92(13) – Heritage Conservation Act, R.S.B.C. 1996, c. 187, ss. 12(2)(a), 13(2)(c), (d).

The respondent Interfor held a forest licence over land in the central coast of British Columbia. Interfor provided direct notification of its development plans to the appellant Kitkatla Band since early 1994, but these plans never specifically identified the Kumealon area. The appellants claimed aboriginal rights in this area and had been engaged in treaty negotiations with the province. Interfor was alerted to this claim, and the firm of archaeologists it had hired contacted the Band in order to ascertain their views. Of concern was the possible presence of native heritage sites and objects, including culturally modified trees (CMTs) in the area to be harvested. These trees have often been altered by aboriginal people as part of their traditional use and they have cultural, historical and scientific importance. The archaeologist reported the presence of a significant number of these trees in seven cutblocks Interfor intended to harvest.

Interfor applied to the respondent Minister for a site alteration permit under s. 12 of the provincial *Heritage Conservation Act* to authorize the cutting and processing of CMTs during logging operations. The Minister wrote to the Band and invited their written submissions. The Band failed to respond by the deadline. The Minister granted a site alteration permit without having considered a single archaeological report.

The Band commenced judicial review proceedings to challenge the legality of the permit. The administrative law challenge was successful and the Minister was ordered to reconsider the part of its decision which affected the CMTs, after giving the Band an adequate opportunity to be consulted and to make representations. The judge dismissed the Band's constitutional argument that the Act was *ultra vires* the province. The reconsideration was conducted by the Minister, and during this process the Band asserted a claim of aboriginal rights in the continued existence of the CMTs. It petitioned for an order in the nature of prohibition, to restrain the Minister from granting the site alteration permit. The Minister took the position that this issue fell outside the scope of a permit-granting procedure and should be left to the courts. The judge agreed and the petition was dismissed. The Minister issued a site alteration permit in accordance with the CMT management plan proposed by Interfor which provided that all fallen CMTs should be preserved together with 76 of 116 trees still standing in the cutblocks. The trial court's decisions were upheld by a majority of the Court of Appeal. Only the constitutionality of ss. 12(2)(a) and 13(2)(c) and (d) of the *Heritage Conservation Act* are at issue in this appeal.

Held: The appeal should be dismissed.

In order to establish the relationship between the impugned provisions and the relevant sources of legislative power, a pith and substance analysis must be

conducted. This analysis involves categorizing the impugned provisions, and examining both the purpose and effect of the legislation. Sections 13(2)(c) and 13(2)(d) of the *Heritage Conservation Act* have as their purpose the protection of certain aboriginal heritage objects from damage, alteration or removal. Section 12(2)(a), on the other hand, provides the Minister responsible for the operation of the Act as a whole with the discretion to grant a permit authorizing one of the actions prohibited under s. 13(2)(c) and (d). The practical effect is to permit the destruction of certain CMTs while protecting others from alteration and removal. The effect of the provisions is the striking of a balance between the need and desire to preserve aboriginal heritage and the need and desire to promote the exploitation of British Columbia's natural resources. The Act provides a protective shield, in the guise of the permit process, against the destruction or alteration of heritage property.

Sections 12(2)(a) and 13(2)(c) and (d) of the Act are valid provincial legislation falling within provincial jurisdiction over property and civil rights in the province. While legislation that singles out aboriginal people for special treatment is *ultra vires* the province, the impugned provisions do not single out aboriginal peoples or impair their status or condition as Indians. The impugned provisions prohibit everyone, not just aboriginal peoples, from the named acts, and require everyone, not just aboriginal peoples, to seek the Minister's permission to commit the prohibited acts. The treatment afforded to aboriginal and non-aboriginal heritage objects is the same and any disproportionate effects are due to the fact that aboriginal peoples have produced the largest number of heritage products. The Act is tailored, whether by design or by operation of constitutional law, to not affect the established rights of aboriginal peoples, a protection that is not extended to any other group. There is no intrusion on a federal head of power. It has not been established that these provisions affect the essential and distinctive values of Indianness which would engage the federal power over native

affairs and First Nations in Canada. In the circumstance of this case, the overall effect of the provisions is to improve the protection of native cultural heritage and, indeed, to safeguard the presence and the memory of the cultural objects involved in this litigation. This appeal does not raise issues affecting the identity of First Nations, and engaging the relevant heads of federal powers, based on the weak evidentiary record and the relevant principles governing the division of powers in Canada.

Cases Cited

Referred to: *R. v. Alphonse* (1993), 80 B.C.L.R. (2d) 17; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206; *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641; *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C. 1985, App. III.

Canadian Charter of Rights and Freedoms, s. 15.

Constitution Act, 1867, ss. 91(24), 92(13).

Constitution Act, 1982, s. 35(1).

Heritage Conservation Act, R.S.B.C. 1996, c. 187, ss. 1 "heritage object", 4, 8, 12(1), (2), (7), 13(1), (2), (4).

Indian Act, R.S.C. 1985, c. I-5, s. 88.

APPEAL from a judgment of the British Columbia Court of Appeal (2000), 183 D.L.R. (4th) 103, [2000] 4 W.W.R. 431, 132 B.C.A.C. 191, 215 W.A.C. 191, 72 B.C.L.R. (3d) 247, [2000] 2 C.N.L.R. 36, [2000] B.C.J. No. 86 (QL), 2000 BCCA 42, affirming two decisions of the British Columbia Supreme Court, [1999] 1 C.N.L.R. 72, [1999] 7 W.W.R. 584, 61 B.C.L.R. (3d) 71, [1998] B.C.J. No. 2440 (QL), supplementary reasons [1998] B.C.J. No. 3059 (QL), and [1999] 2 C.N.L.R. 176, [1998] B.C.J. No. 3041 (QL). Appeal dismissed.

E. Jack Woodward, *Patricia Hutchings* and *Christopher Devlin*, for the appellants.

Paul J. Pearlman, Q.C., and *Kathryn L. Kickbush*, for the respondents the Minister of Small Business, Tourism and Culture, and the Attorney General of British Columbia.

Patrick G. Foy, Q.C., *William K. McNaughton* and *Robert J. C. Deane*, for the respondent International Forest Products Limited.

Gerald Donegan, Q.C., and *Jennifer Chow*, for the intervener the Attorney General of Canada.

Lori Sterling and *Daniel Guttman*, for the intervener the Attorney General for Ontario.

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

Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.

Holly D. Penner, for the intervener the Attorney General of Manitoba.

Stan H. Rutwind, for the intervener the Attorney General for Alberta.

Written submissions only by *Charles F. Willms*, for the intervener the Council of Forest Industries.

Written submissions only by *John J. L. Hunter, Q.C.*, for the intervener the Truck Loggers Association.

The judgment of the Court was delivered by

LEBEL J.—

I. Introduction

1 This case concerns a constitutional challenge to the application of provincial legislation on the protection of cultural heritage property. The dispute relates to culturally modified trees or CMTs. These trees have often been altered by aboriginal

people as part of their traditional use and have cultural, historical and scientific importance for a number of First Nations in British Columbia. In the opinion of the appellants, legislation authorizing the removal or modification of these cultural objects would fall beyond the scope of provincial legislative powers. Hence, the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187 ("the Act"), should be struck down in part to the extent that it allows for the alteration and destruction of native cultural objects. For the reasons which are set out below, I am of the view that this appeal should fail because the impugned legislation falls within the provincial jurisdiction on property and civil rights within the province, as the British Columbia Court of Appeal held.

II. The Origins of the Case

2 The dispute arose during the process of administrative review and authorization of logging operations in British Columbia. The respondent, International Forest Products Limited ("Interfor"), had long held a forest licence over land in the central coast of British Columbia which included an area known as the Kumealon. Provincial forestry legislation required Interfor, as the holder of a forest licence, to propose sequential forest development plans. The legislation also granted the public some participatory rights in the creation of these plans. Interfor provided direct notification of its development plans to the appellant Kitkatla Band ("the Band") since early 1994, but these plans never specifically identified the Kumealon area. The appellants claimed aboriginal rights in this area and had been engaged in treaty negotiations with the province. In early 1998, aware of its obligations under the Act, Interfor hired a firm of archaeologists in order to report on the impact of future logging operations in an area that included the Kumealon. Coincidentally, it appears, the appellants expressed an interest in the Kumealon at roughly the same time. Interfor was alerted to this claim, and, shortly thereafter, the firm it hired contacted the Band in order

to ascertain their views. The Band designated two persons for this purpose. Interfor was concerned with the possible presence of native heritage sites and objects including CMTs in the area to be harvested. The archaeologist eventually reported the presence of a significant number of these trees in seven cutblocks Interfor intended to harvest.

3 Meanwhile, Interfor applied to the respondent, the Minister of Small Business, Tourism and Culture ("the Minister"), for a site alteration permit under s. 12 of the Act, to authorize the cutting and processing of CMTs during logging operations. The Minister forwarded Interfor's application to the Band, along with a covering letter requesting its written submissions on the application. No submissions were received by the deadline. One week later, on March 31, 1998, and without having considered a single archaeological report, the Minister issued a site alteration permit.

4 At this stage, the Band commenced proceedings to challenge the legality of the permit. They began judicial review proceedings. These proceedings raised administrative law arguments asserting that the Minister had failed to address all relevant issues — and had violated his fiduciary obligations towards the appellants by failing to provide them with proper notification and the opportunity to consult — before issuing the permit. The Band also challenged the Act as being *ultra vires* the province.

5 The administrative law challenge succeeded. A judgment of the British Columbia Supreme Court ordered the Minister to reconsider the part of its decision which affected the CMTs, after giving the Band an adequate opportunity to be consulted and to make representations. At the same time, the trial court dismissed the constitutional challenge.

6 The Minister went through the reconsideration process. During this process, the Band asserted a claim of aboriginal rights in the continued existence of the CMTs. It petitioned for an order in the nature of prohibition, to restrain the Minister from granting the site alteration permit. The Minister took the position that this issue fell outside the scope of the permit granting procedure and should be left to the courts. Wilson J. agreed with the Minister and dismissed the petition. In the end, the Minister issued a site alteration permit in accordance with the CMTs management plan proposed by Interfor which provided that all fallen CMTs should be preserved together with 76 of 116 trees still standing in the cutblocks. This led to the present appeal. Meanwhile, the Band launched another judicial review application on the basis that the Minister should have considered native rights in the permit granting procedure. This new challenge also failed.

III. Judicial History

A. *British Columbia Supreme Court*

7 As indicated above, the constitutional challenges launched by the Band failed in the trial court. Wilson J. rendered two judgments on October 21, 1998 (with supplementary reasons on November 12, 1998) and on December 15, 1998 where he discussed the constitutional issues. I will now review them briefly.

(1) First Judgment, [1999] 1 C.N.L.R. 72, supplementary reasons [1998] B.C.J. No. 3059 (QL)

8 The first judgment of Wilson J. dealt with the constitutional division of powers question, after a review of the facts and background of the matter. He found that the dominant purpose of the Act was the preservation or non-preservation of heritage

property in the province generally and that, while the legislation certainly affected Indians, it did not single them out for special treatment. He concluded that the legislation was in respect of property and civil rights and, therefore, it was *intra vires* the province under the authority of s. 92(13) of the *Constitution Act, 1867*. He dismissed the application for a declaration that the relevant sections of the Act were *ultra vires*.

9 Although he concluded that the legislation did not deal with Indianness, Wilson J. went on to consider in *obiter dicta* whether, if the legislation interfered with an aboriginal status and capacity, it was validated by s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5. He referred to the test set out by the British Columbia Court of Appeal in *R. v. Alphonse* (1993), 80 B.C.L.R. (2d) 17, regarding when s. 88 of the *Indian Act* was triggered, i.e. when provincial laws of general application affect Indians in relation to the core values of their society, they depend on s. 88 to give them the force of federal law. He concluded at p. 80 that *Alphonse* was indistinguishable from the case at bar:

> The denial of the taking of fish, or the denial of the taking of deer, in the interests of conservation of a natural resource, is equivalent to, albeit not the same as, the denial of retention of a thing, in the interests of the preservation of a heritage resource.

He held that the relevant sections of the Act were laws of general application that also applied to Indians.

10 Wilson J. then considered the issue of procedural fairness in the process of issuing the site alteration permit to the respondent Interfor. He concluded that the respondent Minister had breached his fiduciary duty to the appellant Band and had failed to take into consideration the proper factors in his decision. He directed the Minister to reconsider that part of his decision which affected CMTs in seven cutblocks in order to

take into consideration relevant information, and to consult with the appellant Band. This aspect of the decision is not the subject of appeal at this Court.

(2) Second Judgment, [1999] 2 C.N.L.R. 176

11 As indicated above, the appellant Band had brought a second judicial review application, pending the respondent Minister's reconsideration of the issuance of the site alteration permit ordered by Wilson J. on November 12, 1998. The appellant Band sought an order that the respondent Minister must take into account s. 8 of the Act to determine whether the appellant Band's aboriginal rights could be affected by the issuance of a site alteration permit.

12 In the process of reconsideration, the appellant Band had written to the respondent Minister and stated, among other things:

> [The appellant Band] therefore asserts an aboriginal right to the preservation of C.M.T.s in the Kumealon, as a part of a more general aboriginal right to the preservation of its heritage objects and sites.

13 The appellants argued that an authorization to harvest CMTs would derogate from their aboriginal rights and, accordingly, would be outside the jurisdiction of the respondent Minister pursuant to s. 8 of the Act. The respondent Minister stated that it was not in a position to make such a determination in a permit granting procedure, and that only a court could do so.

14 Wilson J. reviewed the arguments of the parties. He accepted the position of the respondents and concluded that the legislature did not confer a power of decision on aboriginal rights upon the Minister (p. 180).

15 Wilson J. thus dismissed the application.

B. *British Columbia Court of Appeal* (2000), 183 D.L.R. (4th) 103, 2000 BCCA 42

16 The appellants appealed the judgments rendered by Wilson J. Braidwood and Hall JJ.A. upheld the decision of the trial court. In dissent, Prowse J.A. would have granted the appeal. Each judge wrote reasons.

(1) Braidwood J.A.

17 Braidwood J.A. briefly reviewed the history of the proceedings. He then framed the issues on appeal as follows (at para. 5):

> [First Application]
>
> 1. Are sections 12(2)(a) and 13(2) of the *Heritage Conservation Act* in pith and substance laws in relation to Indians or Lands reserved for the Indians, or alternatively, are the laws in relation to property, and, therefore, within the exclusive legislative competence of the Province under section 92(13) of the *Constitution Act, 1867*?
>
> 2. If the impugned provisions of the *Heritage Conservation Act* are within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867* do they apply to the appellants *ex proprio vigore*?
>
> 3. If the impugned provisions do not apply to the appellants *ex proprio vigore* do they nonetheless apply by virtue of s. 88 of the *Indian Act*?
>
> [Second Application]
>
> 1. Is the Minister required to decide whether the appellants have aboriginal rights concerning CMTs before the issuance of a permit under section 12(2) of the *Heritage Conservation Act*?

18 Braidwood J.A. noted that the appellants did not take issue with the Act as a whole, but argued that ss. 12(2)(a) and 13(2)(c) and (d) of the Act are *ultra vires* the province because in pith and substance they were legislation concerning Indians or lands reserved for them. In the alternative, even if the legislation was not invalid because of the division of powers analysis, the appellants argued that the impugned sections touched upon the core of Indianness and could not apply of their own force. However, they could not be saved by s. 88 of the *Indian Act* because they were not laws of general application. The respondents argued that the impugned sections were valid provincial law because they dealt with property and civil rights. Therefore, they applied of their own force to Indians, or, in the alternative, they were saved by s. 88 of the *Indian Act* as a law of general application affecting Indians in their Indianness.

19 Turning to his analysis of the issues, Braidwood J.A. discussed the principles governing the determination of the pith and substance or "matter" of particular legislation. He noted that each federal head of power had a basic, minimum and unassailable content which the provinces are not permitted to encroach indirectly. Referring to *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 178, he quoted Lamer C.J.'s statement that aboriginal rights "encompass practices, customs and traditions which are not tied to land" (para. 46). Braidwood J.A. concluded that the proper analysis of the "matter" of the Act should be conducted in light of Lamer C.J.'s definition; thus, the impugned sections should be looked at in the context of the whole of the Act. He noted that the express purpose of the Act was to encourage and facilitate the protection and conservation of heritage objects and sites.

20 The respondents had conceded that the majority of items caught by the provisions of the Act would be aboriginal in origin but that the impugned sections were not limited to those items and applied generally. Braidwood J.A. then concluded that the

Act was a law of general application which was not aimed at Indians or at the impairment of their status. As such, it remained a valid exercise of provincial powers in respect of property and civil rights. The Act in general enhanced the protection of both non-aboriginal and aboriginal heritage objects and the Act retained its character as legislation dealing with property and civil rights. The impugned sections must be read in the context of the entire Act.

21 Braidwood J.A. then discussed the issue of whether the impugned provisions applied of their own force. He distinguished this Court's decision in *Dick v. The Queen*, [1985] 2 S.C.R. 309, because the Act does not restrict any activity which relates to Indianness as did the hunting regulations in that case. He found that the impugned provisions of the Act did not affect Indians in relation to the core values of their society and, therefore, the provisions applied of their own force.

22 Although he did not need to consider whether s. 88 of the *Indian Act* could validate the impugned provisions of the Act, Braidwood J.A. went on to consider that question in *obiter dicta*. He found that they would have been saved under s. 88, a law of general application in the province, which did not single out Indians in such a way as to impair their status as Indians (para. 81).

23 Next, Braidwood J.A. dealt with the issue on the second application, in which the appellants had argued that, pursuant to s. 8 of the Act, the respondent Minister should inquire whether an aboriginal right, established by a court of law or by treaty or otherwise, might be affected by his decision, and that failing to do so, no permit should be issued until the right has been determined by treaty or court of law. Braidwood J.A. rejected this argument. Section 8 of the Act meant that the granting of any privileges under the Act would have no impact on the determination of aboriginal rights.

(2) Hall J.A.

24 Hall J.A. adopted the facts and legislative provisions as set out in Braidwood J.A.'s reasons. He dismissed the appeal on the second application for the same reasons as Braidwood J.A. He concurred with the result and with Braidwood J.A's reasons generally regarding the first application but offered some further comments of his own.

25 Hall J.A. agreed with Braidwood J.A. that the pith and substance of the legislation in question is the preservation of heritage objects in the province. While the main thrust of the legislation is preservationist, the Act also permits proper use and management of provincial land and resources. He noted that while the Act referred to "First Nation" and "aboriginal" it was not legislation which dealt with Indians or lands reserved for Indians. The Act applied equally to all heritage objects and sites.

26 Hall J.A. distinguished the case at bar from *R. v. Sutherland*, [1980] 2 S.C.R. 451, which was a case involving a colourable attempt by the Manitoba legislature to affect hunting rights vested in Indians under a federal-provincial agreement that effectively vested existing treaty rights. There was a clear singling out of Indians in that case. Hall J.A. noted that, in the Canadian federation, there will always be some uncertainty regarding the subject matters that lie within provincial and federal jurisdiction. The legislation in question naturally fits in the provincial sphere because it possessed more local aspects and concerns with respect to property in the province. For these reasons, Hall J.A. agreed that the appeal on constitutional issues should be dismissed (para. 109).

(3) Prowse J.A. (dissenting)

27 While she concurred with Braidwood J.A.'s outline of the background and the relevant legal principles to be applied in examining the constitutionality of the impugned provisions, Prowse J.A. disagreed with his application of those principles to the impugned provisions, taken in the context of the Act as a whole. She found that it affected the core values of Indianness and Indian society and thus fell outside the scope of provincial powers on property and civil rights (paras. 111-13).

28 After this judgment, the appellants sought and were granted leave to appeal to this Court. A number of parties have intervened in support of the respondents' position with respect to the constitutional questions in discussion.

IV. Relevant Constitutional and Statutory Provisions

29 *Constitution Act, 1867*

> **91.** . . .
>
> 24. Indians, and Lands reserved for the Indians.
>
> . . .
>
> **92.** . . .
>
> 13. Property and Civil Rights in the Province.

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

> **8** For greater certainty, no provision of this Act and no provision in an agreement entered into under section 4 abrogates or derogates from the aboriginal and treaty rights of a first nation or of any aboriginal peoples.

12 (1) In this section, except subsection (6), and in sections 13 (4) and 14 (4), "**minister**" includes a person authorized in writing by the minister for the purposes of the section.

(2) The minister may

(a) issue a permit authorizing an action referred to in section 13, or

(b) refuse to issue a permit for an action that, in the opinion of the minister, would be inconsistent with the purpose of the heritage protection of the property.

13 (1) Except as authorized by a permit issued under section 12 or 14, a person must not remove, or attempt to remove, from British Columbia a heritage object that is protected under subsection (2) or which has been removed from a site protected under subsection (2).

(2) Except as authorized by a permit issued under section 12 or 14, or an order issued under section 14, a person must not do any of the following:

(a) damage, desecrate or alter a Provincial heritage site or a Provincial heritage object or remove from a Provincial heritage site or Provincial heritage object any heritage object or material that constitutes part of the site or object;

(b) damage, desecrate or alter a burial place that has historical or archaeological value or remove human remains or any heritage object from a burial place that has historical or archaeological value;

(c) damage, alter, cover or move an aboriginal rock painting or aboriginal rock carving that has historical or archaeological value;

(d) damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846;

(e) damage or alter a heritage wreck or remove any heritage object from a heritage wreck;

(f) damage, excavate, dig in or alter, or remove any heritage object from, an archaeological site not otherwise protected under this section for which identification standards have been established by regulation;

(g) damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features,

materials or other physical evidence of unknown origin if the site may be protected under paragraphs (b) to (f);

(h) damage, desecrate or alter a site or object that is identified in a schedule under section 4 (4) (a);

(i) damage, excavate or alter, or remove any heritage object from, a property that is subject to an order under section 14 (4) or 16.

. . .

(4) The minister may, after providing an opportunity for consultation with the first nation whose heritage site or object would be affected,

(a) define the extent of a site protected under subsection (2), or

(b) exempt a site or object from subsection (2) on any terms and conditions the minister considers appropriate if the minister considers that the site or object lacks sufficient heritage value to justify its conservation.

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

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

V. Constitutional Questions

30 On January 22, 2001, the Chief Justice stated the following constitutional questions:

(1) Is s. 12(2)(a) in respect of the subject matter of s. 13(2)(c) and (d) of the *Heritage Conservation Act* in pith and substance law in relation to Indians or Lands reserved for the Indians, or alternatively, is the law in relation to property, and, therefore, within the exclusive legislative competence of the Province under s. 92(13) of the *Constitution Act, 1867*?

(2) If the impugned provisions of the *Heritage Conservation Act* are within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867* do they apply to the subject matter of s. 13(2)(c) and (d) of the *Heritage Conservation Act*?

(3) If the impugned provisions do not apply to the appellants *ex proprio vigore*, do they nonetheless apply by virtue of s. 88 of the *Indian Act*?

VI. The Issues

A. *Position of the Parties*

31 All parties agree that legislation concerning the protection of heritage or cultural property falls under provincial legislative jurisdiction as being a law relating to property and civil rights within the province, under s. 92(13) of the *Constitution Act, 1867*. The intervener, the Attorney General of Canada, agrees, with one caveat. She points out that some cultural properties may fall under federal jurisdiction or that the application of unspecified federal heads of power may affect them. In the present case, the Attorney General of Canada supports the validity of the legislation challenged by the appellants. The respondents and all the interveners take the same position.

32 The appellants concede that the province may legislate in respect of cultural properties, but challenge the validity and applicability of the Act to the CMTs found in the Kumealon region. In substance, the appellants submit that legislative provisions allowing for the alteration or destruction of native heritage property fall outside provincial legislative powers, even if provinces may validly legislate in respect of other cultural objects. They submit that ss. 12(2)(a) and 13(2)(c), which authorize the Minister to grant permits to alter, destroy or remove native heritage property impact on federal legislative powers in respect of Indian affairs. The impugned provisions affect objects and sites which stand at or near the core of aboriginal identity. For these reasons, the

impugned provisions fall beyond the scope of provincial legislative authority. Moreover, even if the legislation is *intra vires* under a pure division of powers analysis, aboriginal objects would be immunized from its effects. The interjurisdictional immunity doctrine, which immunizes core federal competencies from the effect of otherwise valid provincial laws, would apply and render site alteration permits issued by the Minister ineffective.

33 At this point, the appellants acknowledge that, sometimes, s. 88 of the *Indian Act* tempers the application of the doctrine of interjurisdictional immunity in respect of provincial laws of general application. They argue, though, that s. 88 would not save the legislation in this case, because the Act is not a law of general application. It singles out Indian aboriginal objects and sites for special treatment. It amounts to discriminatory legislation. Section 88 should be read in such a way as to avoid incorporating discriminatory laws which have a differential impact on First Nations. Section 88 should be applied in a manner consistent with the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, R.S.C. 1985, App. III. This approach would introduce a method analogous to a s. 15 *Charter* analysis in the interpretation of s. 88 of the *Indian Act*.

B. *Respondents' Position*

34 The main argument of the respondents is directed at the division of powers question. They submit that the impugned provisions form part of a comprehensive scheme which, in pith and substance, remains legislation in relation to property and civil rights in a province. The respondents point out that the site alteration permits do not apply to areas included within any Indian reserve and that no Indian title had been established in the Kumealon at the time of the litigation.

35 The primary legal effect of the impugned provisions is to regulate, through the s. 12 permit process, the actions of any person which may damage heritage property protected under s. 13(2). The heritage objects at issue are culturally modified trees.

36 The respondents argue that the impugned provisions of the Act are provincial laws of general application, which do not single out Indians for special treatment. There is no doubt that the Act applies uniformly to all persons throughout the province. The Act does not lose its status as a law of general application by the inclusion of heritage objects of importance to aboriginal people. Neither in purpose nor in effect do the impugned provisions of the Act single out Indians for unique treatment. The impugned provisions apply to all persons in the province whether aboriginal or non-aboriginal and to all heritage objects and heritage sites as enumerated in s. 13(2) of the Act. The respondents submit that the province has the legislative authority to regulate the protection of heritage sites and objects within the province, including heritage sites and objects of aboriginal origin. The right to regulate must include the right to impose limits on that protection. In the absence of any prohibited singling out of Indians, ss. 12(2)(a) and 13(2)(c) and (d) must fall within the same head of legislative authority as the rest of the *Heritage Conservation Act*, namely, "Property and Civil Rights in the Province".

37 In the respondents' view, any intrusion into federal jurisdiction is simply incidental and constitutionally permissible. Sections 12 and 13 remain an integral part of the legislative scheme of the Act. They permit the Minister to balance the heritage value of a particular site or object against other interests. They preserve a ministerial discretion which is essential for the practical operation of any statutory scheme for the protection and management of heritage property.

38 The respondents submit that the core federal jurisdiction does not extend to the regulation of heritage sites or objects in British Columbia. Provincial law which regulates all heritage objects cannot be said to be aimed at affecting an integral part of primary federal jurisdiction over Indians and lands reserved for the Indians. In this case, the impugned provisions do not, as a matter of application or legal effect, regulate the Band in the exercise of any aboriginal right or in respect of their Indianness. A determination by this Court that the impugned legislation is *intra vires* the province does not preclude the appellants from advancing a claim of aboriginal rights or title in respect of the trees or the lands where they are situated.

39 The respondents submit that, in the alternative, if this Court finds the impugned provisions affect the appellants in their Indianness, ss. 12(2)(a) and 13(2) of the Act would apply as federal law by operation of s. 88 of the *Indian Act*. Section 88 incorporates as federal law those provincial laws of general application which touch upon the essential core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867* and which would otherwise be inapplicable to Indians by virtue of the doctrine of the interjurisdictional immunity. Indeed, the appellants' test for discrimination would substantially restrict the operation of s. 88 and would shift the test for laws of general application from a division of powers analysis to a rights-based analysis. Such a test ought not to be adopted because it confuses the tests applicable to determining the scope of constitutionally protected rights with those which apply to a division of powers analysis.

40 The respondents then turn to a subsidiary argument on s. 88. They note that this provision serves a jurisdictional purpose in allowing those provincial laws which otherwise would not be applicable to Indians because they affect Indianness to apply to Indians. There is no evidence before the Court that the impugned provisions represent

a colourable attempt by the province to single out heritage sites or objects of aboriginal origin for special treatment. The appellants' test contravenes the well established principle that the fact that a law may have different impacts on the persons to whom it applies does not, in itself, prevent it from operating as a law of general application. Even if it could be said that s. 12(2)(a) of the Act affects aboriginal rights, or aboriginal rights in cultural property, it still retains its character as a provincial law of general application applicable to Indians by virtue of s. 88 of the *Indian Act.*

41 Thus, the main issues have been clearly framed by the parties and in the constitutional questions. The Court must first consider the pith and substance of the legislation. Three sub-questions must be discussed in this respect. First, do ss. 12(2)(a) and 13(2)(c) and (d) intrude into a federal head of power, and to what extent? Then, if they do intrude, are they nevertheless part of a valid legislative scheme? At the next step of the analysis, it should be considered whether the impugned provisions are sufficiently integrated with the scheme. If the answer is yes, we may turn to consider the doctrine of interjurisdictional immunity and, if need be, s. 88 of the *Indian Act*. Before I move on to these, I will review the heritage conservation scheme adopted by the province of British Columbia and discuss some evidentiary issues relevant to the rights claimed by the appellants.

C. *Heritage Conservation Legislation in British Columbia*

42 The *Heritage Conservation Act* is designed to grant a broad protection to the cultural heritage of British Columbia in a very comprehensive manner. The history of the province means that its cultural heritage is in the vast majority of cases an aboriginal one, often going back to pre-contact times and prior to the establishment of the first non-native settlements and the creation of the British colonies on Vancouver Island and on

the mainland. The Act was adopted to conserve and protect all forms of cultural property, objects and artifacts as well as sites in British Columbia which have heritage value to the province as a whole, to a community or to an aboriginal people, as appears for example in the definition of "heritage object" in the Act: "'**heritage object**' means, whether designated or not, personal property that has heritage value to British Columbia, a community or an aboriginal people".

43 The Act attempts to address the importance of the cultural heritage of First Nations in various ways. Section 4 provides for agreements with First Nations with respect to the preservation of aboriginal sites and artifacts. Section 8 states a key interpretive principle in the interpretation and implementation of the Act which is designed to protect aboriginal and treaty rights of First Nations:

> For greater certainty, no provision of this Act and no provision in an agreement entered into under section 4 abrogates or derogates from the aboriginal and treaty rights of a first nation or of any aboriginal peoples.

44 Native concerns must be weighed at most steps of the administrative procedures created for the application of the Act. For example, prior to the designation of lands as a heritage site, notice must be given to the First Nations within whose traditional territory they lie. Section 13 grants broad protection against any alteration of sites or things in use before 1846, which will usually be part of the cultural heritage of First Nations in British Columbia (see s. 13(2)(d)).

45 The Act considers First Nations' culture as part of the heritage of all residents of British Columbia. It must be protected, not only as an essential part of the collective material memory which belongs to the history and identity of First Nations, but also as part of the shared heritage of all British Columbians. The Act grants

protection where none existed before. At the same time, heritage conservation schemes such as the Act here must strike a balance between conservation and other societal interests, which may require the destruction of heritage objects or sites after a careful review by the Minister. Time and nature, as well as mishaps and unforeseen events, may destroy or render the conservation of a site or thing an impossibility. Other needs and concerns may arise and require an assessment of the nature and importance of a site or cultural object. Conservation schemes must thus also provide for removal and destruction. This is what is at issue here. Is the power to order the alteration or even destruction of a cultural object beyond provincial powers when it affects native cultural objects?

D. *Evidentiary Problems*

46 Constitutional questions should not be discussed in a factual vacuum. Even in a division of powers case, rights must be asserted and their factual underpinnings demonstrated. In this case, the appellants assert that the importance of the CMTs goes to the core of their cultural values and identity. This assertion grounds their claim that the impugned provisions of the Act impinge on a federal head of power. Because of this assertion, the nature and quality of the evidence offered will have to be assessed and discussed. Even if this case remains a division of powers case, the comments of McLachlin C.J. on evidentiary standards and problems in aboriginal law cases in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, remain highly apposite. In such cases, oral evidence of aboriginal values, customs and practices is necessary and relevant. It should be assessed with understanding and sensitivity to the traditions of a civilization which remained an essentially oral one before and after the period of contact with Europeans who brought their own tradition of reliance on written legal and archival records. Nevertheless, this kind of evidence must be evaluated like any other. Claims

must be established on a balance of probabilities, by persuasive evidence (*Mitchell*, at para. 39, *per* McLachlin C.J.). "Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim . . ." (*Mitchell*, at para. 51, *per* McLachlin C.J.).

47 These comments on the use of evidence must be kept in mind during a review of the evidence in this case. The appellants attempted to downplay the importance and relevance of this issue by stressing that this Court was not faced with a claim of aboriginal rights or title. As stated above, facts must be established in order to demonstrate in this case that there exists a conflict between federal and provincial legislative powers. In this respect, the factual basis of the claim looks weak.

48 The appellants' claim in this case is concerned with what archaeologists refer to as culturally modified trees (CMTs). From the evidence, large numbers of CMTs are found in British Columbia. Thousands are reported and registered every year in British Columbia in the archaeology branch of the ministry. For ministry purposes, CMTs are trees which bear the marks of past aboriginal intervention occurring as part of traditional aboriginal use. Bark may have been stripped from them. Pieces or chunks of wood may have been removed from the trees to make tools or build canoes. Sap or pitch may have been collected from the trees. It would appear that the identification of CMTs is an involved process. Sometimes, the modifications found on trees result from the work of nature. On the other hand, modifications may have been made by non-native persons. Therefore, in order to identify true CMTs, archaeologists have developed complex "field" guidelines. In certain cases, these guidelines will prove incapable to the task, and it will be necessary to take a sample or even fell a particular tree to determine whether it is a CMT. In this appeal, the CMTs that the archaeologists were able to identify were generally categorized as either "bark-stripped trees" or "aboriginally-logged trees".

49 In addition, there is one matter that, as of now, lies beyond the ken of any archaeological expert. Even if there is evidence of native intervention, it is next to impossible to tell which aboriginal group modified them (see Braidwood J.A., at para. 30). In this case, in particular, the trees are found in an area covered by the conflicting claims of the Band and another group, the Lax Kw'alaams, which, like the appellants, also belong to the Tsimshian Tribal Council. This second group has agreed with the forestry management plan proposed by Interfor, and approved by the Minister.

50 The appellants, in support of their claim, assert that the preservation of the CMTs as living trees is required in order to safeguard evidence of their cultural heritage including the work, activities and endeavours of their forebears. Indeed, they argue that the CMTs constitute the only physical record of their heritage. Unfortunately, the evidence supporting these claims is sparse. Aside from an affidavit sworn by the appellant Chief Hill, there is very little evidence as to the extent to which these trees in the Kumealon had been related to or incorporated into the culture of the Band. In this respect, according to other evidence, the firm of archaeologists hired by Interfor identified these CMTs and brought their existence to the attention of the appellants. The constitutional questions must be reviewed in the context of this factual record, with its particular weaknesses. I will now turn to the constitutional issues.

E. *The Division of Powers Issue*

51 The Constitution of Canada does not include an express grant of power with respect to "culture" as such. Most constitutional litigation on cultural issues has arisen in the context of language and education rights. However, provinces are also concerned with broader and more diverse cultural problems and interests. In addition, the federal government affects cultural activity in this country through the exercise of its broad

powers over communications and through the establishment of federally funded cultural institutions. Consequently, particular cultural issues must be analyzed in their context, in relation to the relevant sources of legislative power. In this case, the issues raised by the parties concern the use and protection of property in the province. The Act imposes limitations on property rights in the province by reason of their cultural importance. At first blush, this would seem to be a provincial matter falling within the scope of s. 92(13) of the *Constitution Act, 1867*. This view will have to be tested through a proper pith and substance analysis, in order to establish the relationship between the impugned provisions and the federal power on Indian affairs.

F. *The Pith and Substance of the Provisions of the Heritage Conservation Act*

52 The beginning of any division of powers analysis is a characterization of the impugned law to determine the head of power within which it falls. This process is commonly known as "pith and substance" analysis: see the comments of Lamer C.J. in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 998. By thus categorizing the impugned provision, one is able to determine whether the enacting legislature possesses the authority under the Constitution to do what it did.

53 A pith and substance analysis looks at both (1) the purpose of the legislation as well as (2) its effect. First, to determine the purpose of the legislation, the Court may look at both intrinsic evidence, such as purpose clauses, or extrinsic evidence, such as Hansard or the minutes of parliamentary committees.

54 Second, in looking at the effect of the legislation, the Court may consider both its legal effect and its practical effect. In other words, the Court looks to see, first, what effect flows directly from the provisions of the statute itself; then, second, what

"side" effects flow from the application of the statute which are not direct effects of the provisions of the statute itself: see *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 482-83. Iacobucci J. provided some examples of how this would work in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 23:

> The effects of the legislation may also be relevant to the validity of the legislation in so far as they reveal its pith and substance. For example, in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, the Court struck down a municipal by-law that prohibited leafleting because it had been applied so as to suppress the religious views of Jehovah's Witnesses. Similarly, in *Attorney-General for Alberta v. Attorney-General for Canada*, [1939] A.C. 117, the Privy Council struck down a law imposing a tax on banks because the effects of the tax were so severe that the true purpose of the law could only be in relation to banking, not taxation. However, merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law.

55 There is some controversy among the parties to this case as to the appropriate approach to the pith and substance analysis where what is challenged is not the Act as a whole but simply one part of it. The appellants tend to emphasize the characterization of the impugned provisions outside the context of the Act as a whole. The respondents and interveners take the opposite view, placing greater emphasis on the pith and substance of the Act as a whole. The parties also disagree as to the order in which the analysis should take place: the appellants favour looking at the impugned provisions first, while the respondents and interveners tend to prefer to look at the Act first.

56 In my opinion, the proper approach to follow in a case such as this is to look first to the challenged provisions. Such a rule is stated in the dictum of Dickson J. (as he then was) in *Attorney General of Canada v. Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206, at p. 270 (quoted by Dickson C.J. in *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 665):

> It is obvious at the outset that a constitutionally invalid provision will not be saved by being put into an otherwise valid statute, even if the statute comprises a regulatory scheme under the general trade and commerce branch of s. 91(2). The correct approach, where there is some doubt that the impugned provision has the same constitutional characterization as the Act in which it is found, is to start with the challenged section rather than with a demonstration of the validity of the statute as a whole. I do not think, however, this means that the section in question must be read in isolation. If the claim to constitutional validity is based on the contention that the impugned provision is part of a regulatory scheme it would seem necessary to read it in its context. If it can in fact be seen as part of such a scheme, attention will then shift to the constitutionality of the scheme as a whole.

57 Laskin C.J. took the same view but put it in somewhat different words in referring to the appropriate analysis of a section of the *Trade Marks Act* in an earlier case, *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, at p. 159 (quoted by Dickson C.J. in *General Motors of Canada*, at p. 665):

> If [the impugned provision] can stand alone, it needs no other support; if not, it may take on a valid constitutional cast by the context and association in which it is fixed as [a] complementary provision serving to reinforce other admittedly valid provisions.

58 Dickson C.J. set out in *General Motors of Canada*, at pp. 666-69, a three-part test for determining the pith and substance of an impugned provision. Iacobucci J. discussed and adopted this test in *Global Securities*, *supra*, at para. 19:

> While *GM Canada* itself was concerned with federal legislation, Dickson C.J. made it very clear, at p. 670, that the same analysis applied to determining the constitutionality of provincial legislation. With respect to the first step, Dickson C.J. said the following (at pp. 666-67):
>
> > The first step should be to consider whether and to what extent the impugned provision can be characterized as intruding into provincial powers. If it cannot be characterized as intruding at all, i.e., if in its pith and substance the provision is federal law, and if the act to which it is attached is constitutionally valid (or if the provision is severable or if it is attached to a severable and constitutionally valid part of the act) then the investigation need go no further.

> If, on the other hand, the legislation is not in pith and substance within the constitutional powers of the enacting legislature, then the court must ask if the impugned provision is nonetheless a part of a valid legislative scheme. If it is, at the third stage the impugned provision should be upheld if it is sufficiently integrated into the valid legislative scheme.

In my view, Dickson C.J.'s test could be restated in the following form:

1. Do the impugned provisions intrude into a federal head of power, and to what extent?

2. If the impugned provisions intrude into a federal head of power, are they nevertheless part of a valid provincial legislative scheme?

3. If the impugned provisions are part of a valid provincial legislative scheme, are they sufficiently integrated with the scheme?

In the rest of this section, I will consider these questions and apply the test in the context of this appeal.

G. *Purpose of the Provisions Test*

59 The first stage of the analysis requires a characterization of the impugned provisions in isolation, looking at both their purpose and effect. For convenience, I reproduce here ss. 12(2)(a) and 13(2)(c) and (d):

> **12** . . .
>
> (2) The minister may
>
> (a) issue a permit authorizing an action referred to in section 13, . . .

13 . . .

(2) Except as authorized by a permit issued under section 12 or 14, or an order issued under section 14, a person must not do any of the following:

. . .

(c) damage, alter, cover or move an aboriginal rock painting or aboriginal rock carving that has historical or archaeological value;

(d) damage, excavate, dig in or alter, or remove any heritage object from, a site that contains artifacts, features, materials or other physical evidence of human habitation or use before 1846; . . .

60 Paragraphs (c) and (d) of s. 13(2) have as their purpose the protection of certain aboriginal heritage objects from damage, alteration or removal. In other words, the purpose of these paragraphs is heritage conservation, specifically the heritage of the aboriginal peoples of British Columbia. The protection extends to all aboriginal rock paintings or aboriginal rock carvings that have historical or archaeological value, as well as to heritage objects, including artifacts, features, materials or other physical evidence of human habitation or use before 1846, which in effect consists almost entirely of aboriginal cultural artifacts.

61 Paragraph (a) of s. 12(2), on the other hand, provides the minister responsible for the operation of the Act as a whole with the discretion to grant a permit authorizing one of the actions prohibited under s. 13(2)(c) and (d). In other words, this paragraph provides a tempering of the absolute protection otherwise provided by s. 13(2)(c) and (d).

62 The purpose of such a provision seems obvious when one considers the nature of heritage conservation legislation generally and its specific application in the

context of British Columbia. No heritage conservation scheme can provide absolute protection to all objects or sites that possess some historical, archaeological or cultural value to a society. To grant such an absolute protection would be to freeze a society at a particular moment in time. It would make impossible the need to remove, for example, buildings or artifacts of heritage value which, nevertheless, create a public health hazard or otherwise endanger lives. In other cases, the value of preserving an object may be greatly outweighed by the benefit that could accrue from allowing it to be removed or destroyed in order to accomplish a goal deemed by society to be of greater value. It cannot be denied that ss. 12(2)(a) and 13(2)(c) could sometimes affect aboriginal interests. As will be seen below, these provisions form part of a carefully balanced scheme. As recommended by the Court in *Delgamuukw*, it is highly sensitive to native cultural interests. At the same time, it appears to strike an appropriate balance between native and non-native interests. Native interests must be carefully taken into account at every stage of a procedure under the Act. The Act clearly considers them as an essential part of the interests to be preserved and of the cultural heritage of British Columbia as well as of all First Nations.

63 Consequently, any heritage conservation scheme inevitably includes provisions to make exceptions to the general protection the legislation is intended to provide. Such a permissive provision strikes a balance among competing social goals.

H. *Effect of the Provisions*

64 Having looked at the purpose of these provisions, I turn now to consider their effects. Sections 12(2)(a) and 13(2)(c) and (d) grant the Minister a discretion to allow the alteration or removal of aboriginal heritage objects. We have no evidence before us with respect to the total number of aboriginal heritage objects which may be covered by

this legislation. Nor do we have any evidence as to how often the Minister has exercised the discretion to permit the removal or destruction of aboriginal heritage objects of whatever type. We know only that, in the present case, the permit granted to the respondent Interfor allowed it to cut 40 out of about 120 standing CMTs within seven identified cutblocks. Thus, the practical effect, in this case anyway, is to permit the destruction of what are alleged to be Kitkatla heritage objects (although there is no specific proof here that the 40 CMTs in question were indeed the products of Kitkatla ancestors) while protecting 80 CMTs from alteration and removal. In addition, all CMTs allowed to be logged must be catalogued and an archival record of them must be retained. In other words, the effect here is the striking of a balance between the need and desire to preserve aboriginal heritage with the need and desire to promote the exploitation of British Columbia's natural resources.

I. *Effect on Federal Powers*

65 Given this analysis of the purpose and effect of the legislation in order to characterize the impugned provisions, the Court must then determine whether the pith and substance of ss. 12(2)(a) and 13(2)(c) and (d) fall within a provincial head of power or if, rather, they fall within a federal head of power. If the Court characterizes these provisions as a heritage conservation measure that is designed to strike a balance between the need to preserve the past while also allowing the exploitation of natural resources today, then they would fall squarely within the provincial head of power in s. 92(13) of the *Constitution Act, 1867* with respect to property and civil rights in the province.

66 On the other hand, one cannot escape the fact that the impugned provisions directly affect the existence of aboriginal heritage objects, raising the issue of whether

the provisions are in fact with respect to Indians and lands reserved to Indians, a federal head of power under s. 91(24) of the *Constitution Act, 1867*. In considering this question, the Court must assess a number of factors. First, the Court must remember the basic assumption that provincial laws can apply to aboriginal peoples; First Nations are not enclaves of federal power in a sea of provincial jurisdiction: see *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695. The mere mention of the word "aboriginal" in a statutory provision does not render it *ultra vires* the province.

67 Second, it is clear that legislation which singles out aboriginal people for special treatment is *ultra vires* the province: see *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031. For example, a law which purported to affect the Indian status of adopted children was held to be *ultra vires* the province: see *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751. Similarly, laws which purported to define the extent of Indian access to land for the purpose of hunting were *ultra vires* the provinces because they singled out Indians: see *Sutherland*, *supra*; *Moosehunter v. The Queen*, [1981] 1 S.C.R. 282. Further, provincial laws must not impair the status or capacity of Indians: see *Kruger v. The Queen*, [1978] 1 S.C.R. 104, at p. 110; *Dick*, *supra*, at pp. 323-24.

68 Nevertheless, "singling out" should not be confused with disproportionate effect. Dickson J. said in *Kruger*, at p. 110, that "the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application".

69 In the present case, the impugned provisions cannot be said to single out aboriginal peoples, at least from one point of view. The provisions prohibit everyone, not just aboriginal peoples, from the named acts, and require everyone, not just

aboriginal peoples, to seek permission of the Minister to commit the prohibited acts. In that respect, the impugned provisions treat everyone the same. The impugned provisions' disproportionate effects can be attributed to the fact that aboriginal peoples have produced by far the largest number of heritage objects in British Columbia. These peoples have been resident in British Columbia for thousands of years; other British Columbians arrived in the last two hundred years.

70 A more serious objection is raised with respect to the issue of whether permitting the destruction of aboriginal heritage objects impairs the status or capacity of Indians. The appellants' submission seeks to situate these cultural interests, along with aboriginal rights, at the "core of Indianness", *Delgamuukw*, *supra*, at para. 181. However, as pointed out above, little evidence has been offered by the appellants with respect to the relationship between the CMTs and Kitkatla culture in this area. The appellants argue that aboriginal heritage objects constitute a major portion of their identity and culture in a way that non-aboriginal heritage objects do not go to the centre of non-aboriginal identity. Consequently, they argue, aboriginal people are singled out for more severe treatment. I would reject this argument. Because British Columbia's history is dominated by aboriginal culture, fewer non-aboriginal objects and sites receive protection than aboriginal objects and sites. The Act provides a shield, in the guise of the permit process, against the destruction or alteration of heritage property. When one considers the relative protection afforded aboriginal and non-aboriginal heritage objects, the treatment received by both groups is the same, and indeed is more favourable, in one sense to aboriginal peoples.

71 In any case, it should be remembered that the Act cannot apply to any aboriginal heritage object or site which is the subject of an established aboriginal right or title, by operation of s. 35(1) of the *Constitution Act, 1982* and by operation of s. 8 of

the *Heritage Conservation Act* (and, by implication, s. 12(7) of that Act which states that a permit does not grant a right to alter or remove an object without the consent of the party which has title to the object or site on which the object is situated). The Act is tailored, whether by design or by operation of constitutional law, to not affect the established rights of aboriginal peoples, a protection that is not extended to any other group. On the whole, then, I am of the opinion that ss. 12(2)(a) and 13(2)(c) and (d) of the Act are valid provincial law and that they do not single out aboriginal peoples or impair their status or condition as Indians.

72 It should be noted that the Attorney General of Canada intervened in support of British Columbia in this case. Dickson C.J. in *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 19-20, commented on the significance of such an intervention in constitutional litigation with respect to the distribution of legislative powers.

> I think it is important to note, and attach some significance to, not only the similar federal legislation but also the fact that the federal government intervened in this appeal to support the Ontario law. The distribution of powers provisions contained in the *Constitution Act, 1867* do not have as their exclusive addressees the federal and provincial governments. They set boundaries that are of interest to, and can be relied upon by, all Canadians. Accordingly, the fact of federal-provincial agreement on a particular boundary between their jurisdictions is not conclusive of the demarcation of that boundary. Nevertheless, in my opinion the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity or, as in this case, actually intervenes to support it and has enacted legislation based on the same constitutional approach adopted by Ontario. [Emphasis deleted.]

73 That is essentially the situation in this case: the Attorney General of Canada has intervened in support of the view of the British Columbia government with respect to the latter's right to legislate in this area. While this is not determinative of the issue, as Dickson C.J. said, it does invite the Court to exercise caution before it finds that the impugned provisions of the Act are *ultra vires* the province.

J. *Paramountcy and Federal Powers*

74 The doctrine of paramountcy does not appear applicable in this case, as no valid federal legislation occupies the same field. There are provisions in the *Indian Act* with respect to aboriginal heritage conservation, but they are confined to objects on reserve lands. As I noted above, the *Heritage Conservation Act* does not apply to aboriginal heritage objects or sites which are the subject of an established aboriginal right or title by virtue both of s. 35(1) of the *Constitution Act, 1982* and s. 8 of the Act itself, which is declaratory of that fact. In any case, the CMTs in question in this case are not located on an Indian reserve but on Crown land.

75 I thus find that there is no intrusion on a federal head of power. It has not been established that these provisions affect the essential and distinctive core values of Indianness which would engage the federal power over native affairs and First Nations in Canada. They are part of a valid provincial legislative scheme. The legislature has made them a closely integrated part of this scheme. The provisions now protect native interests in situations where, before, land owners and business undertakings might have disregarded them, absent evidence of a constitutional right.

76 The Act purports to give the provincial government a means of protecting heritage objects while retaining the ability to make exceptions where economic development or other values outweigh the heritage value of the objects. In the British Columbia context, this generally means that the provincial government must balance the need to exploit the province's natural resources, particularly its rich abundance of lumber, in order to maintain a viable economy that can sustain the province's population, with the need to preserve all types of cultural and historical heritage objects and sites within the province. Given the overwhelming prevalence of aboriginal heritage objects

in the province and, in this particular case, the ubiquitous nature of CMTs, legislation which sought to permit the striking of this balance but which did not attempt to extend this to aboriginal heritage objects and sites would inevitably fall very far short of its goal, if in fact it would not in most respects gut the purposes of the Act.

77 Given this conclusion, it will not be useful to discuss the doctrine of interjurisdictional immunity. It would apply only if the provincial legislation went to the core of the federal power. (See *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 81; *Delgamuukw*, *supra*, at paras. 177-78, *per* Lamer C.J.) In these circumstances, no discussion of the principle governing the application of s. 88 of the *Indian Act* would be warranted.

VII. Conclusion and Disposition

78 Heritage properties and sites may certainly, in some cases, turn out to be a key part of the collective identity of people. In some future case, it might very well happen that some component of the cultural heritage of a First Nation would go to the core of its identity in such a way that it would affect the federal power over native affairs and the applicability of provincial legislation. This appeal does not raise such issues, based on the weak evidentiary record and the relevant principles governing the division of powers in Canada. In the circumstances of this case, the overall effect of the provision is to improve the protection of native cultural heritage and, indeed, to safeguard the presence and the memory of the cultural objects involved in this litigation, without jeopardizing the core values defining the identity of the appellants as Indians. For these reasons, I would dismiss the appeal, without costs. The constitutional questions should be answered as follows:

(1) Is s. 12(2)(a) in respect of the subject matter of s. 13(2)(c) and (d) of the *Heritage Conservation Act* in pith and substance law in relation to Indians or Lands reserved for the Indians, or alternatively, is the law in relation to property, and, therefore, within the exclusive legislative competence of the Province under s. 92(13) of the *Constitution Act, 1867*?

Answer: Section 12(2)(a) in respect of the subject matter in s. 13(2)(c) and (d) of the *Heritage Conservation Act* is in pith and substance law within the legislative competence of the Province under s. 92(13) of the *Constitution Act, 1867*.

(2) If the impugned provisions of the *Heritage Conservation Act* are within provincial jurisdiction under s. 92(13) of the *Constitution Act, 1867* do they apply to the subject matter of s. 13(2)(c) and (d) of the *Heritage Conservation Act*?

Answer: Yes.

(3) If the impugned provisions do not apply to the appellants *ex proprio vigore*, do they nonetheless apply by virtue of s. 88 of the *Indian Act*?

Answer: No need to answer.

Appeal dismissed.

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Solicitors for the respondent International Forest Products Limited: Borden Ladner Gervais, Vancouver.

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

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