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**The Crown's Constitutional Duty to Consult and
Accommodate Aboriginal and Treaty Rights**

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DES PREMIÈRES NATIONS

**Research Paper for the
National Centre for
First Nations Governance**

February, 2008

**THE CROWN'S CONSTITUTIONAL DUTY TO
CONSULT AND ACCOMMODATE ABORIGINAL AND
TREATY RIGHTS**

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for the National Centre for First Nations Governance, February 2008**

TABLE OF CONTENTS

| | |
|---|----|
| INTRODUCTION | 1 |
| PART I: GUIDING FIRST PRINCIPLES..... | 3 |
| <i>The Seminal cases of R. v. Sparrow, R v. Van der Peet and R. v. Gladstone</i> | 3 |
| <i>Marshall v. Her Majesty the Queen</i> | 10 |
| <i>R. v. Adams</i> | 13 |
| <i>Delgamuukw v. Her Majesty the Queen</i> | 14 |
| <i>Halfway River</i> | 19 |
| <i>Musqueam Indian Band v. Canada (Governor in Council)</i> | 20 |
| <i>Haida</i> | 21 |
| <i>Taku River</i> | 28 |
| <i>Musqueam v. Minister of Sustainable Resource Management</i> | 29 |
| <i>Mikisew</i> | 34 |
| <i>Hupacasath</i> | 39 |
| <i>Platinex</i> | 43 |
| <i>R. v. Morris and Olsen</i> | 49 |
| <i>Tsilhqot' in Nation v. British Columbia</i> | 50 |
| PART II: CONSULTING AND ACCOMMODATING THROUGH THE INHERENT RIGHT TO SELF-GOVERNANCE..... | 56 |
| <i>Aboriginal Governance as Recognized in Canadian Law</i> | 57 |
| <i>Accommodating Aboriginal Governance Rights</i> | 64 |
| PART III: CONCRETE STEPS TOWARD RECONCILIATION..... | 65 |
| <i>Consultation and Accommodation Through Negotiated Agreements: Substantially Addressing the Concerns of First Nations</i> | 66 |
| <i>Allocating Land and Resources in a Manner that Reflects Aboriginal and Treaty Rights</i> 66 | |
| <i>Interpreting Legislation and Fulfilling Treaty Promises in a Manner in Keeping with the Crown's Fiduciary Duty and the Honour of the Crown</i> | 68 |
| <i>Strategic Level Planning</i> | 69 |
| <i>Replacing the Referral Process with a Joint Decision-Making Process</i> | 70 |
| <i>Developing Alternative Dispute Resolution Processes</i> | 72 |
| <i>Interim Measures</i> | 73 |
| CONCLUSION | 74 |

INTRODUCTION

The Crown's duty to consult and accommodate Aboriginal and treaty rights is a fundamental matter of social justice which invokes very solemn legal obligations. At the heart of the Crown's legal responsibility to consult and accommodate aboriginal and treaty rights are choices made every day by Crown leaders and officials which very seriously impact not only fundamental constitutional rights but, also, the very health and well being of hundreds of thousands of women, men and children living in Canada. Also at stake is the cultural identity and right to self-determination of both current and future generations of numerous Aboriginal peoples across this country, each with their own sense of nationhood and history. While daunting, the exercise of Crown discretion and authority also creates significant opportunities for positive change towards the dismantling of our colonial legal heritage and the actualization of rights which have historically been denied or minimized. Crown decisions regarding Aboriginal and treaty rights over traditional lands, resources and governance structures can galvanize the rights of Indigenous¹ peoples within Canada, advance their quest for self-determination within our Canadian constitutional fabric and, in doing so, facilitate the necessary reconciliation process. Conversely, Crown decisions and decision-making processes can engender further injustice, marginalization, poverty and suffering. The choice is truly ours.

While the stakes of moving forward are clearly very high, there is cause for optimism. Indigenous peoples are breaking free from colonial and racist strictures, and Canadian courts have articulated a series of enforceable legal principles whose purpose is to both protect and actualize Aboriginal and treaty rights. Central to this development is a ground swell of increasingly strong aboriginal leaders, supported by strong communities who are forging new law and utilizing important court rulings to implement their rights. These court rulings both direct and guide Crown conduct in consulting and accommodating Aboriginal and treaty rights in a manner which facilitates reconciliation between the Crown and Aboriginal peoples.

A key aspect of the reconciliation process is the accommodation of Aboriginal and treaty rights by the Crown in a way which reflects the diverse choices, values and visions of Indigenous peoples in Canada. However, the consultation and accommodation processes will ultimately lack authenticity and workability unless Aboriginal governance rights are also incorporated into these processes so that decisions affecting Aboriginal and treaty lands, resources and peoples do

not constitute a unilateral exercise of Crown authority. Rather, Crown decisions ought to be informed and shaped by the priorities and choices of the peoples whose Aboriginal and treaty rights are being impacted. Indeed, as discussed below, our case law supports such an approach.

A challenge faced today in virtually every Indigenous community in this country is the implementation, in a respectful and collaborative manner, of newly established legal principles such that Aboriginal and treaty rights “become real” and tangibly expressed through measurable social, cultural and economic benefits within First Nation societies. Too often those of us who work in this area are struck by the wide chasm between those time honoured principles affirmed in our case law and the stark reality of life for Canada’s Aboriginal peoples.

The law has changed significantly but Crown policy and decision-making processes have not kept pace. This must be addressed now. This paper attempts to assist in bridging this chasm by articulating an approach to policy and practice development that rests not only on legal principles but also on pragmatic observations and considerations based on what is and is not working “on the ground” in the consultation processes currently operated by both provincial and federal governments.

This paper begins with an examination of the major Aboriginal and treaty right cases through the analytical lens of the Crown’s duty to consult and accommodate, for purposes of underscoring and framing the enforceable legal principles which must shape and define this duty. The duty to consult and accommodate will be explored with respect to both proven and unproven Aboriginal rights as well as established treaty rights. Specifically, Part I of this paper comprises a summary of “first principles” which lay the foundational and operational foundation upon which the legal duty to consult and accommodate must be exercised. These principles will also be reviewed in light of practical implications affecting Crown decision-making, with the objective of orienting the discussion which follows in Part II. Part II of this paper addresses how the inherent right of self-government informs the scope and substance of current Crown decision-making policies. This examination will include how current approaches or practices must be changed, with a view to furthering the objective of reconciliation. Finally, Part III of this paper will, in light of the preceding analysis, address the discrepancy between law and policy, as well as some key

shortcomings found within current Crown policies, decision-making structures and consultation practices, in an effort to identify more constructive and productive approaches.

PART I: GUIDING FIRST PRINCIPLES

The Seminal cases of R. v. Sparrow,² R v. Van der Peet³ and R. v. Gladstone⁴

R. v. Sparrow is the first Supreme Court of Canada decision which applied s. 35 of the *Constitution Act, 1982*. Generally speaking, the Court expressly held the Crown legally accountable to Aboriginal peoples by limiting the exercise of legislative power and, therefore, Crown conduct. This is a foundational principle upon which the duty to consult and accommodate arises. 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).⁵

(emphasis added)

It is well established that the justification of Crown actions, pursuant to the *Sparrow* analysis, 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.

Of particular interest to this analysis, 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 fishery."⁶ This doctrine or principle of priority was applied by the Supreme Court of Canada in *Van der Peet* and *Gladstone* in the context of commercial fishing rights, and in *Delgamuukw* within the context of an Aboriginal title claim, albeit in a modified form.⁷ 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 that 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**.⁸

(emphasis added)

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 in the public interest. 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. In the absence of such accommodation, the Crown risks a finding that an infringement cannot be justified. It is important to understand that this principle of prioritization is applicable not only with regard to fisheries resources but also to land and natural resources as well, as became apparent in the Court's later reasons in *Delgamuukw* (which will be addressed in greater detail below).⁹

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

- (a) questions of 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.¹⁰

The third question or point, 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 s. 35 rights. Collectively, the questions enumerated above, while not exhaustive, signal what was later made clear in cases such as *Delgamuukw* and *Haida*: if government actions infringe potential or existing Aboriginal rights, if 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.¹¹

We now know, since the advent of the Supreme Court of Canada's decision in *Haida*,¹² that the Crown's fiduciary duty does not apply to unproven Aboriginal rights. In the context of unproven rights, the Crown's fiduciary duty is supplanted by the honour of the Crown and, more specifically, by the duty to consult and accommodate Aboriginal rights. However, the principle in *Sparrow* that s. 35 shapes, informs and curtails the free exercise of legislative power remains ever present in the context of Crown decisions which impact unproven rights, as does the purpose of reconciliation embodied in s. 35. The analysis in *Van der Peet*, in which the Court describes the nature and origin of Aboriginal rights and also underscores the purpose of reconciliation, is instructive in this regard. Consider the following passage of the Court in *Van der Peet*:¹³

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, **what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their**

own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown

(emphasis added)

In short, the “constitutional framework” of s. 35(1) applies equally to the pre-proof scenario. *Van der Peet* makes clear that the Crown’s legislative authority and conduct is attenuated by the requirement to reconcile “the pre-existence of aboriginal peoples living in communities on the land with the assertion of British sovereignty” and *Sparrow* directs that the Crown must “take these rights seriously.” These principles clearly inform the nature and scope of the duty to consult and accommodate in the context of unproven Aboriginal or treaty rights; otherwise s. 35 would be rendered meaningless for the majority of Aboriginal peoples in this country who have not proven their rights in a courtroom. This issue will be addressed in greater depth later in this paper in the context of the reasoning of the Court in *Haida*.

It is noteworthy that while the Court in *Sparrow* does not expressly use the term “accommodation,” it does refer in its justification analysis to various ways of accommodating the Aboriginal right in question such as minimizing the infringement and paying compensation. Moreover, in *Gladstone*, which applied the *Sparrow* justification analysis to the commercial Aboriginal right to harvest herring spawn-on-kelp, the Supreme Court used the word accommodation and expressly reasoned as follows:¹⁴

Questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government **has accommodated the exercise of the aboriginal right to participate in the fishery** (through reduced licence fees, for example), whether the government’s objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of aboriginal rights holders, the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how the government has accommodated different aboriginal rights in a particular fishery

(food *versus* commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users. These questions, like those in *Sparrow*, do not represent an exhaustive list of the factors that may be taken into account in determining whether the government can be said to have given priority to aboriginal rights holders; they give some indication, however, of what such an inquiry should look like.

(emphasis added)

As indicated above, in *Gladstone*, the Supreme Court of Canada considered the *Sparrow* justification analysis in light of the Heiltsuk commercial fishing right. In doing so, the Court modified and adapted its justification analysis in *Sparrow*. The Court found that the Gladstone brothers, as members of the Heiltsuk First Nation, had a commercial right to harvest and sell herring spawn-on-kelp. The Court also found that the fishery regulations infringed that right but reflected a valid legislative objective. On the question of whether the infringement was justified, however, the Court sent the matter back to trial. In doing so, the Court set out an analytical framework which addressed the issue of the Crown's fiduciary obligation and, in particular, its duty to accommodate the existence of the commercial right. Specifically, the Court reasoned:

. . . the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples. **This means . . . that the government must demonstrate that it has given the aboriginal fishery priority in a manner consistent with this Court's decision in *Jack v. The Queen*, [1980] 1 S.C.R. 294 at p. 313 where Dickson J. (as he then was) held that the correct order of priority in the fisheries is '(i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing'**.¹⁵

(emphasis added)

The Court was clearly concerned with the notion that giving priority to a First Nation to exercise a commercial right, in the circumstances of a right with no inherent limit (such as a commercial right to fish), would lead to an Aboriginal right to the exclusive use of a commercial resource. Such a result was not, according to the Court, the intention of the *Sparrow* decision:

The basic insight of *Sparrow* -- that aboriginal rights holders have priority in the fishery -- is a valid and important one; however, the articulation in that case of what priority means, and its suggestion that it can mean exclusivity under certain limited circumstances, must be refined to take into account the varying circumstances which arise when the aboriginal right in question has no internal limitations.¹⁶

Accordingly, the doctrine of priority enunciated in *Sparrow* was modified to ensure that no Aboriginal right-holder would have the right to the exclusive use of a given resource where no internal limitation to the right exists. However, the obligation to prioritize the allocation remains:

Where the aboriginal right is one that has no internal limitations then the doctrine of priority does not require that, after conservation has been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. **Instead, the doctrine of priority requires that the government demonstrate that in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resources in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at this stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal right holders in the fishery.**¹⁷

(emphasis added)

Therefore, it is patent that the Crown is obliged to set up a process of consultation with First Nations, before allocating a given resource among various users and, further, the actual allocation determined by the Crown must reflect the prior interest of the Aboriginal right-holder. As the Court later reasoned in *Gladstone*, the content of the doctrine of priority is “something less than exclusivity but which nonetheless gives priority to the aboriginal right.”¹⁸ Further, the Court did provide some guidance on how the question of whether the Crown granted priority to a First Nation could be assessed. The Court in *Gladstone* referred to its reasons in *Sparrow* relating to consultation and compensation and then set out the following additional factors:

- (1) whether the government has accommodated the exercise of the Aboriginal right to participate in the fishery (through reduced licence fees, for example);
- (2) whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of Aboriginal right holders;
- (3) the extent of the participation in the fishery of Aboriginal right holders relative to their percentage of the population;
- (4) how the government has accommodated different Aboriginal rights in a particular fishery (food vs. commercial rights, for example);
- (5) how important the fishery is to economic and material well-being of the Band in question; and
- (6) what criteria have been taken into account by the government in, for example, allocating commercial licences amongst different users.

The above questions are not exhaustive, but are indicative of the type of inquiry the Court expects the Crown to engage in, prior to making an allocation decision regarding a given resource. In setting out these guiding questions, the Court underscores that “certainly the holders of such aboriginal rights must be given priority, along with others holding aboriginal rights to the use of a particular resource.”¹⁹ As will be discussed in greater depth below, this principle of priority re-surfaces in *Delgamuukw* where the Court reasoned that the justification analysis may require that the Crown ensure First Nations be provided with the opportunity to participate in resource development.²⁰

It is important to understand that the justification analysis set out in *Sparrow* applies equally to treaty rights. In *R. v. Badger*²¹ the Court found that any infringement of a treaty right must be justified using the *Sparrow* test, otherwise the infringement is unconstitutional and in breach of the Crown's fiduciary duty. Accordingly, the duty to consult and accommodate also arises in the treaty context.²²

Further, Chief Justice Lamer's analysis in *Van der Peet* confirms that the historical relationship between the Crown and Aboriginal peoples, coupled with the fact that the “honour of the Crown is at stake” in the Crown's dealings with Aboriginal peoples, requires that statutory and constitutional provisions protecting the interests of Aboriginal peoples must be given a generous and liberal interpretation.²³ The Court also found that the fiduciary relationship between the

Crown and Aboriginal peoples also requires that any doubt or ambiguity with regard to what falls within the scope of s. 35, must be resolved in favour of Aboriginal peoples:

Because of this fiduciary relationship, and its implications of (sic) the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of aboriginal peoples, must be given a general and liberal interpretation [cite omitted]. This general principle must inform the Court's analysis of the purposes underlying s. 35(1), and of that provision's definition and scope.

The fiduciary relationship of the Crown and aboriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in the favour of aboriginal peoples.²⁴

Because these important interpretive principles are grounded in the "honour of the Crown," they also influence the nature and scope of how Aboriginal and treaty rights are to be accommodated in the pre-proof scenario. Such a "generous and liberal" interpretive approach necessarily informs the discretion exercised by statutory decision-makers such as district foresters or land management officials in approving or not approving permits, licences, leases or sales of Crown-held land or resources. For example, enabling legislation affecting how forest, land and natural resources are allocated and used is to be applied in accordance with this approach of giving generous and liberal interpretations in favour of protecting Aboriginal rights and interests.

Marshall v. Her Majesty the Queen²⁵

The Supreme Court in *Marshall v. Her Majesty the Queen* further illustrates how the honour of the Crown impacts treaty interpretation and implementation. The accused, a Mi'kmaq Indian, was charged with Federal Fisheries Regulation offences. He admitted that he had caught and sold 463 pounds of eel without a licence (worth less than \$800). The only issue at trial was whether he possessed a treaty right to catch and sell fish under the treaties of 1760-61 so as to exempt him from compliance with the Regulations.

The Supreme Court of Canada found that the treaty did protect an Aboriginal right to hunt, fish and trade for purposes of securing the “necessaries” of life, which the Court interpreted to be the equivalent of earning a moderate livelihood from catching and selling fish. The Court also found that the infringement of the right was unjustified.

It is noteworthy that after the release of its reasons for judgment, the Court received an application from an intervener for a re-hearing and stay of its judgment. The Court dismissed this application.²⁶ The intervention application was primarily directed to the presumed effects of the Court’s judgment on the lobster fishery. The case before the Court, however, related to fishing eel out of season, contrary to Federal Fishery Regulations. In its original judgment of September 17, 1999, a majority of the Court concluded that Marshall had established the existence and infringement of a local Mi’kmaq treaty right to carry on small scale commercial eel fishery but the Crown had not attempted to justify the infringement of the treaty right. The issue of justification was raised by the intervener in this subsequent application but was not raised by the parties in the courts below. In dismissing the motion for a rehearing and stay of the judgment, the Court noted that the Crown elected not to try to justify the licensing or closed season restriction on the eel fishery, and an acquittal therefore ensued. However, the Court reasoned that the resulting acquittal could not be generalized to a declaration that licensing restrictions or closed seasons can never be imposed as part of the government’s regulation of the Mi’kmaq limited commercial “right to fish.” Further, the Court found that federal and provincial governments have the authority within their respective legislative fields to regulate the exercise of a treaty right, providing the regulations are justified on conservation or other compelling and substantial grounds such as economic and regional fairness. Accordingly, the Court left its initial ruling intact and followed its previous line of authority in cases such as *Sparrow* and *Badger*. The Court confirmed that Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and Aboriginal rights and that the Minister’s authority to manage the resource was subject to the justification analysis.

It is of significance that in *Marshall*, the Court considered extrinsic evidence, and in particular historical documentation, evidencing the substance of treaty negotiations, in order to ensure that the integrity and honour of the Crown would not be compromised by failing to fulfil promises which caused the Mi’kmaq to sign treaty. In so doing, the Supreme Court of Canada found that

the courts below erred in concluding that the only enforceable treaty obligations were those set out in the written treaty document itself.²⁷ Specifically, the Court reasoned:

If the law is prepared to supply the deficiencies of written context prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask no less of the honour and dignity of the Crown in its dealings with First Nations.²⁸

On this basis then, the Court justified giving effect to the treaty by considering facts not evidenced in the written text of the treaty itself:

The trial judge's view that the **treaty obligations are all found within the four corners** of the March 10, 1760 document [the treaty], albeit generously interpreted, **erred in law by failing to give adequate weight to the concerns and perspectives of the Mi'kmaq people**, despite the recorded history of the negotiations, **and by giving excessive weight to the concerns and perspective of the British who held the pen** [cite omitted]. The need to give balanced weight to the aboriginal perspective is equally applied in aboriginal rights cases [cite omitted].

While the trial judge drew positive implications from the negative trade clause (reversed on this point by the Court of Appeal), such limited relief is inadequate where the British-drafted treaty document does not accord with the British-drafted minutes of the negotiation sessions and more favourable terms are evident from the other documents in evidence the trial judge regarded as reliable. Such an overly deferential attitude to the March 10, 1760 document [the written treaty document] was inconsistent with the proper recognition of the difficulties of proof confronted by aboriginal people, a principle emphasized in the treaty context by *Simon* at p. 408 and *Badger*, at para. 4 and in the aboriginal rights context in *Van der Peet* at para. 68 and *Delgamuukw* at paras. 80-82. The trial judge interrogated himself on the scope of the March 10, 1760 text. He thus asked himself the wrong question. **His narrow view of what constituted "the treaty" led to the equally narrow legal conclusion that the Mi'kmaq trading entitlement, such as it was, terminated in the 1780s. Had the trial judge not given undue weight to the March 10, 1760 document, his conclusions might have been very different.**²⁹

(emphasis added)

It is evident from the above quote that the Supreme Court of Canada will no longer find the express words of a given treaty document determinative. The honour of the Crown in fulfilling treaty promises requires the Court to look at extrinsic evidence in reconstructing the true terms of the treaty. *Marshall* makes it clear that the Court will look at extrinsic evidence such as historical documents. Further, *Delgamuukw* also makes it clear that the Court will consider oral history as well as historical documentation in such a treaty reconstruction process. In the final analysis, the treaty document itself becomes simply one piece of evidence which informs the consultation and accommodation of treaty rights.

The significance of *Marshall* in the context of Crown decision-making affecting treaty lands is clear, particularly when the reasoning in *Marshall* is coupled with the interpretive approach found in *Van der Peet*. Consultation processes dealing with treaty rights must take into account oral history and the promises made at the time of treaty regarding the nature and scope of the treaty rights in question. Rigid adherence to the strict written language of the treaty is not in keeping with the general and liberal interpretation of treaties required by *Marshall* and *Van der Peet*.

These cases require that the accommodation of treaty rights respectfully consider and incorporate the Aboriginal perspective and the oral history concerning the nature and scope of the treaty right in question. For example, if the oral history of a treaty people provides that at the time of treaty, the Crown promised that the treaty people in question could fish for livelihood purposes over surrendered territory, then land and resources within surrendered territory cannot be “taken up” in a manner that fails to accommodate this treaty promise.

R. v. Adams³⁰

In *R. v. Adams*, the Supreme Court of Canada found that the appellant had an Aboriginal right to fish for food. In doing so, and in addressing the justification analysis, the Court shed further light on how the existence of a fiduciary duty must shape the content and language of a legislative and regulatory regimes which affect Aboriginal rights. This in turn influences and directs the consultation process.

The regulations in question did not allow for the issuance of licences for Aboriginal food fishing but simply permitted the Minister, at his discretion, to issue a special permit to an Indian or Inuk, authorizing them to fish for their own subsistence. Further, the regulatory scheme did not set out the criteria through which the Minister's discretion was to be exercised. Accordingly, the Court found that the regulatory scheme imposed undue hardship on the Mohawk appellant and interfered with his preferred means of exercising the right.³¹ In this context, the Court reasoned specifically as follows:

In light of the Crown's unique fiduciary obligation towards aboriginal peoples, **Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confirms administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegated regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights.** In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of the aboriginal rights under the *Sparrow* test.³²

(emphasis added)

This principle requires that specific criteria be articulated in legislative or regulatory regimes which accommodate Aboriginal rights. That is, enabling legislation authorizing the regulation of forestry, mining, fishing and any other resource must include provisions which address and permit the accommodation of affected treaty rights. Any consultation or accommodation decision which is not made pursuant to such specific enabling legislation is, therefore, subject to judicial review. Such a defect could only be rectified through a meaningful consultation process which substantially addresses the concerns of the First Nation in a *bone fide* way, as discussed in cases such as *Delgamuukw* and *Haida*.

Delgamuukw v. Her Majesty the Queen

In *Delgamuukw*, the Supreme Court of Canada addressed its justification analysis as it relates to the special fiduciary relationship between the Crown and Aboriginal peoples, further elucidating

its reasons in *Sparrow*, *Gladstone* and *Adams*. The Court emphasized that the requirements of the fiduciary duty are a function of the “legal and factual context” of each appeal such that the question of whether an infringement can be justified at law must be determined on a case-by-case basis.³³ As it did in *Sparrow*, the Court underscored the onus of the Crown to justify any infringement and indicated that the Crown’s duty to accommodate Aboriginal title must be in keeping with the nature of the Aboriginal right at issue. With respect to Aboriginal title itself, the Court reasoned as follows:

....Three aspects of aboriginal title are relevant here. First, aboriginal title encompasses the right to **exclusive** use and occupation of the lands; second, aboriginal title encompasses the **right to choose** to what use land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, the lands held pursuant to aboriginal title have an inescapable **economic component**.

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 ‘the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest’ of the holders of aboriginal title in the land. By analogy with *Gladstone*, this might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, and that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of the 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 and the resources in question. No doubt, there will be difficulties in determining the precise value of the aboriginal interest in the lands and any grant, leases or licences given for its exploitation. These difficult economic considerations obviously cannot be solved here.³⁴

(emphasis added)

It would appear, therefore, that in addition to requiring the accommodation of Aboriginal sustenance and commercial rights such as hunting and fishing, the doctrine of priority as articulated in *Sparrow* and modified in *Gladstone*, will also require governments to accommodate Aboriginal title rights by, for example, facilitating the participation of Aboriginal peoples in the development of resources within their traditional lands.

The Court also reasoned, however, that the Crown's duty may be satisfied in alternative ways:

Moreover, the other aspects of aboriginal title suggests that the **fiduciary duty may be articulated in a manner different than the idea of priority**. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. **This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation.** Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group in respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. **The nature and scope of the duty of consultation will vary with the circumstances.** In occasional cases when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions and will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these 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.**³⁵

(emphasis added)

Thus, the exclusive nature of Aboriginal title may require the Crown to accommodate the participation of Aboriginal peoples in the development of the resources of British Columbia.

Further, the principle that Aboriginal title encompasses the right to choose how land can be used, gives rise to the duty on the part of the Crown to involve Aboriginal peoples in its decision-making with respect to traditional Aboriginal lands. Hence, the duty of consultation. The difficulty arises, of course, as to what is meant by consultation. The Court suggests a continuum where one end would comprise “mere consultation” (presumably, the Crown would be required to notify First Nations of intended activity on traditional lands) and the other end of the continuum would require the full consent of a First Nation prior to government action. Presumably, joint decision-making lies somewhere in between.

Unfortunately, the law has not yet developed in a way to provide any greater clarity on the particular issue of when consent is required, although the reasoning in *Haida* suggests that consent will not be required in pre-proof scenarios.³⁶

The Court in *Delgamuukw* also dealt with the question of compensation arising from a breach of fiduciary duty. Specifically, the Court reasoned that Aboriginal title, unlike the Aboriginal right to fish for food, has an “inescapably economic aspect” particularly in light of the modern uses to which lands held pursuant to Aboriginal title can be put.³⁷ The Court reasoned as follows:

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 aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith of the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. Since the issue of damages was severed from the principle action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.³⁸

It would appear, therefore, that the Court in *Delgamuukw* expanded the Crown’s obligation to accommodate Aboriginal title as potentially encompassing the following aspects:

- (1) in light of *Gladstone*, the Court confirms the government must demonstrate that “both the process by which it (the government) allocated the resource and the actual allocation of the resource ... reflect the prior interest of the holders of Aboriginal title in the land”; the Court reasoned that this might require that governments “accommodate the participation of aboriginal peoples in the development of the resources of British Columbia”³⁹; as such, the allocation of land and resources falls within the possible ambit of accommodation efforts;
- (2) accommodation might include the “conferral of fee simples for agriculture, and of leases and licenses for forestry and mining reflect the prior occupation of aboriginal title lands”⁴⁰;
- (3) accommodation may require that the government “reduce economic barriers to aboriginal uses of their lands (e.g., reduced licensing fees)”⁴¹;
- (4) as noted first in *Sparrow*, compensation is also a significant factor and will “ordinarily be required” when Aboriginal title is infringed⁴²; and
- (5) once again the Court underscores that the minimal infringement of Aboriginal title rights is also required⁴³; the Crown is obliged to explore ways in which the proposed activity on Aboriginal land may be conducted such that it does not disrupt Aboriginal use and occupation of the lands in question, or such that it accommodates the preferred manner of exercising affected Aboriginal rights.

While these guidelines are by no means exhaustive, it is clear that the duty to consult and accommodate places significant positive obligations on the Crown to pro-actively address potential infringements with respect to both land and resources subject to aboriginal title.

The application of the principles embodied within this decision will undoubtedly be challenging. An unavoidable conflict arises between the Court’s pragmatic endorsement in *Delgamuukw* of land use by non-aboriginal peoples (e.g., through the conferral of fee simples for agricultural purposes or through resource or other developments on title lands) and the principle of minimal infringement of aboriginal rights as laid down in *Sparrow* and also confirmed in *Delgamuukw* itself. To some degree, this issue was addressed in the recent decision of the Supreme Court of British Columbia in *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700. For present purposes, suffice it to say that a principled application of the “minimal infringement” requirement does not easily accord with widespread use of Aboriginal title lands and will likely be the subject of judicial commentary in the years to come.

*Halfway River*⁴⁴

The decision of the British Columbia Court of Appeal in *Halfway River First Nation v. B.C.* provides further guidance on the Crown's duty to consult. The case involved a district forest manager's decision to permit logging on the traditional lands of the petitioners. The trial judge quashed the decision of the District Manager granting the forest company's application for a cutting permit on Crown land which was adjacent to the Halfway River First Nation reserve. The reserve had been allotted pursuant to Treaty 8.

In upholding the decision of the trial judge to quash the decision of the District Manager to grant the cutting permit in question, Finch J.A. found that the Crown, and in particular the provincial government, through the District Manager, had failed to justify the infringement of the petitioners' rights because it did not conduct adequate and meaningful consultation with them before making the decision. Specifically, he found that the Crown had failed to provide "in a timely way, information that the aboriginal group would need in order to inform itself on the effects of the proposed action and to ensure that the aboriginal group had an opportunity to express their interests and concerns."⁴⁵ While the Supreme Court of Canada has partially overruled the reasoning in *Halfway River* during the course of its recent reasoning in *Mikisew*,⁴⁶ by concluding that the fiduciary duty as set out in *Sparrow* does not apply to the "taking up" by the Crown of land surrendered under Treaty 8, the Court nonetheless affirmed those portions of the Court of Appeal's reasons in *Halfway River* wherein Finch J.A. imposed a **positive** duty (albeit not fiduciary in nature) on the Crown to consult and to inform the petitioners of its intended action on their traditional territory.⁴⁷ The Supreme Court of Canada endorses the following passages of Mr. Justice Finch in *Halfway River*:

...The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.⁴⁸

...The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, **and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.**⁴⁹

(emphasis added)

It is therefore not sufficient for the Crown to take a passive approach to consultation; this includes, more particularly, informing itself about the nature of the Aboriginal or treaty rights at stake or the severity of the potential infringement. In any given instance, the Crown has at law a positive obligation to inform itself and, wherever possible, take steps to demonstrably integrate Aboriginal rights and interests into the proposed plan of action.

*Musqueam Indian Band v. Canada (Governor in Council)*⁵⁰

In this case, Musqueam brought a *Haida*-style petition claiming the federal Crown had failed to consult and accommodate them with respect to the sale of only one of two large parcels of federal Crown-held land remaining within their territory. At the injunction hearing, Phelan J. characterized the requirement to consult and accommodate as a condition precedent to the proper exercise of Crown authority:

The nature of the harm which would be suffered if the Garden City property is transferred is the loss of the right to negotiate and be accommodated in respect of that land. Once the land is transferred, that right is effectively lost.

If that right exists, as arguably it does, the Government of Canada and the Canada Respondents in particular, have an obligation to allow the right to be exercised **before it transfers the land. It is, effectively, a condition of the exercise of statutory powers to transfer the land. The issue raised goes to the jurisdiction of the Canada Respondents to act in the manner contemplated.**

This situation is analogous to those where there is a requirement for an environment study be done before a permit is issued or for proper notice to be given before a decision is made. The relevant considerations are public law principles and remedies. **They are jurisdictional in nature, not monetary.**⁵¹

(emphasis added)

This is a significant finding in that it facilitates the acquisition of injunctions to suspend or enjoin Crown conduct in circumstances where the duty to consult and accommodate has not been satisfied or where the Crown proposes to act unilaterally.

The ruling in this case is consistent with that of the Court in *Yal et al. (Gitksan and other First Nations) v. British Columbia (Minister of Forests)*⁵² where Tysse J. characterized the Crown's duty to consult as a "constitutional pre-requisite to the decision" which must be satisfied in order for the decision to be considered valid.⁵³

Further, consider that in *Haida (#2)*,⁵⁴ Finch C.J.B.C. reasoned that it was within the Court's power to render the forest licence (i.e., the Crown's decision) invalid but exercised its discretion not to do so in the circumstances. While the Court of Appeal's ruling was overturned by the Supreme Court of Canada on the question of whether third parties have an obligation to consult and accommodate, it was not overturned on this point. The law is clear that Crown decisions, permits, licences and grants may be rendered invalid and unconstitutional if the duty to consult and accommodate is not satisfied by the Crown.

*Haida*⁵⁵

Following the Supreme Court of Canada decision in *Delgamuukw*, but prior to the Supreme Court of Canada decisions in *Haida* and *Taku*,⁵⁶ 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, settle this question by holding that proof of title is not required before the Crown will be held to the strict obligation of pro-actively 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.

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?⁵⁷

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.**⁵⁸

To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the ‘meaningful content’ mandated by the ‘solemn commitment’ made by the Crown in recognizing and affirming aboriginal rights and title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.⁵⁹

(emphasis added)

During the pre-proof period (before Aboriginal rights are proven or are resolved through treaty), the above passage makes clear that 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.

The Court’s criticism of unilateral action on the part of the Crown is reinforced again in its decision in *Mikisew*, which will be addressed in great depth later in this paper. For present purposes, suffice it to say that the duty to meaningfully consult requires the incorporation of

Aboriginal and treaty rights and interests into the Crown's planning and strategic decision-making processes. This requires the inclusion and participation of First Nations and treaty peoples in such decision-making because unilateral Crown actions are clearly unconstitutional and will no longer be countenanced by our courts.

In this vein, the Court in *Haida* identified the need for consultation at the strategic level⁶⁰ when five year plans were being approved concerning what volumes of timber would be harvested under a tree farm licence and at what juncture in time. 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 argument has been made that the sort of consultation and accommodation discussed in *Sparrow* and *Gladstone* is not applicable to those situations where a First Nation has not proven their right. This argument continues to be advanced in some quarters, even in the aftermath of the *Haida* decision, apparently in an attempt to narrow the scope of the *Haida* decision. The argument effectively postulates that prior to proof of title, the accommodation of Aboriginal rights does not encompass the obligation to ensure that First Nations have access to lands and resources within their territory nor does it encompass the obligation to pay compensation to First Nations.

Such an argument flies in the face of the reasoning in both *Sparrow* and *Gladstone* where the infringement of potential Aboriginal rights were found to occur at times when the rights in question had not yet been proven (these rights were proven only at the conclusion of these cases but not at the time these cases were brought forward). Lack of proof of a right does not mean that the right, or the corresponding Crown duty and obligations as articulated in such cases, are non-existent. This was expressly acknowledged by the Supreme Court of Canada in *Haida* when it reasoned:⁶¹

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

(emphasis added)

Along a very similar vein, Lambert J.A. reasoned as follows in *Haida* (#1):⁶²

How could the consultation aspect of the justification test with respect to a prima facie infringement be met if the consultation did not take place until after the infringement? By then it is too late for consultation about that particular infringement. **By then, perhaps, the test for justification can no longer be met and the only remedies may be a permanent injunction and compensatory damages.**

One only has to consider the reasons delivered by the Supreme Court of Canada in *R. v. Sparrow* and *R. v. Gladstone* [cites omitted] to understand that the major aspects of justification, including consultation, must be in place before the infringement occurs and, normally, before the aboriginal right is proven in court. In *Gladstone*, the Supreme Court of Canada ordered an inquiry about justification in circumstances where the date for assessment of the justification must have preceded the infringement and must have occurred long before the aboriginal rights were established in the prosecution for offences under the *Fisheries Act*.

And when Chief Justice Lamer says, in *Delgamuukw*, that the measure of compensation for an infringement may depend on the extent to which aboriginal interests were accommodated, he is clearly contemplating accommodations decided upon and put in place before the infringement, and, normally, before the aboriginal right is endorsed by a court of competent jurisdiction.

(emphasis added)

The above passages in *Haida* ought to put to rest the erroneous proposition that the consultation and accommodation questions set out in cases such as *Sparrow* and *Gladstone* (e.g., whether attempts have been made to minimize the potential infringement and whether priority is given to the holder of the Aboriginal right in the allocation of the resources) are not relevant to the Crown's duty to consult and accommodate with regard to unproven Aboriginal or treaty rights.

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.⁶³ Such questions or criteria as set out in *Sparrow* and *Gladstone* are, nonetheless, very relevant in the context of any consultation and accommodation process –whether or not it occurs prior to proof of title. At 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, are necessary questions in determining whether a balancing of interests has been actually effected.

Finally, it must be remembered that if pre-proof consultation and accommodation does not justify the infringement, the Crown grant of Aboriginal lands or resources to third parties could be found to be unjustified and invalid if the matter proceeds to court. This could lead to an invalidation of the Crown grant or permit and to significant compensatory damages. The alternative of negotiated settlement as advocated by the Court is clearly a more prudent course of action. The substance and content of such settlement will 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.

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 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, triggering an obligation to consult and where appropriate accommodate, prior to judicial determination or settlement.

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.⁶⁴

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

According to the Court in *Haida*, the accommodation process does not give Aboriginal groups a veto over what can be done with land pending final proof of claims.⁶⁵ That is, the Aboriginal “consent” referred to in *Delgamuukw* with regard to specific Crown decisions is only appropriate in cases of established rights. Rather, the Court reasoned that what is required is a process of balancing the interests of society at large with Aboriginal and treaty rights.

As noted above, while a veto is not permitted at law in the pre-proof context, the objective of balancing interests is central to any consultation and accommodation process. This objective also guides the scope and substance of the consultation and accommodation process. The Court in *Haida* reasoned as follows:

Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. **Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.**⁶⁶

(emphasis added)

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.⁶⁷

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.⁶⁸ In this regard, the Court cited New Zealand Ministry of Justice's "Guide for Consultation with Maori" which provides as follows:⁶⁹

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.⁷⁰ This analysis is consistent with that of the Court in *Delgamuukw* and in particular the questions posed by the Court in assessing whether an infringement can be justified.⁷¹

As discussed below, in the *Musqueam* case, the "steps to avoid irreparable harm" included Musqueam's substantial concern for the preservation of some Crown-held land within their traditional territory for land settlement purposes. The Golf Course lands in question happened to be one of only two sizeable parcels of provincial Crown-held lands left within Musqueam territory that would be suitable for community building. As discussed below, the Court required the Crown to re-initiate consultations with Musqueam and to address Musqueam's concerns in this regard.

Taku River⁷²

This case was heard and decided by the Supreme Court of Canada at the same time as the *Haida* case. 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 3_ 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 British Columbia Court of Appeal upheld the lower Court's decision to quash the Project Approval Certificate issued by the Ministers in *Taku River*, which it said was issued without regard to the Crown's constitutional and fiduciary obligations to the First Nation, and remitted the matter for reconsideration by the Ministers. The Crown appealed and the appeal was allowed on the basis that the Crown had satisfied its duty to consult and accommodate. Essentially, the Supreme Court of Canada found that while the Tlingit had a relatively strong *prima facie* case of Aboriginal title and the potential infringement was serious, the Crown's consultation and accommodation efforts were adequate.

The Court found that the process engaged in 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.

Musqueam v. Minister of Sustainable Resource Management⁷³

Musqueam Indian Band v. Minister of Sustainable Resource Management 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 (“UBC”). The sale agreement was executed and authorized by a provincial Order-in-Council without first consulting Musqueam. The land in question is located in Musqueam’s traditional territory and is subject to Musqueam’s 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 \$11M sale to UBC would proceed, but Musqueam would receive certain compensation, primarily a \$550,000 cash payment (less than the value of a single residential lot in that part of Vancouver) 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 reasons⁷⁴ 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. 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 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 and directed that the Province and Musqueam negotiate an agreement which would accommodate Musqueam's Aboriginal title interests. 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. The case, 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.

The majority of the Court found that the accommodation package offered by the Crown (in a pre-proof scenario) was not sufficient in circumstances where the Crown had made both an offer of land and of compensation. Musqueam had rejected the Crown's accommodation package because it did not address their severe land crisis (e.g., 45 percent of their members currently live off-reserve). That package included:

1. Payment of \$550,000 to the Musqueam Indian Band (the Band), which represents 5 percent of the sale price of the land in question.
2. Agreement to pay 5 percent of any revenue received for modification or discharge of the Public Golf Course Covenant.
3. Agreement to defer sale of the Crown land at 5375 University Boulevard for a period of seven (formerly five) years, so that it may be considered at the treaty table. This 0.9 ha parcel is located within the University Endowment Lands, and is subject to a lease to University Chapel.
4. As a sign of respect for the Band's active community and culture, delivery of five (formerly two) logging truck-loads of firewood (approximately 75 cords) for the longhouse.

In this context, Mr. Justice Hall reasoned:

While I have observed that having regard to the nature and location of these lands, **this may well be a situation where financial compensation could be found to be an appropriate measure of accommodation, I would not wish to limit the parties from**

engaging in the broadest consideration of appropriate arrangements. I would note that this is not the only tract of land in the Lower Mainland that is Provincial property or property over which the Province has a measure of dominion. Having regard to the wish of the appellant to obtain in the future an enhanced land base and as well its desire to pursue a land settlement related to the treaty process it is engaged in, the parties should be afforded a wide field for consideration of appropriate accommodative solutions. To remedy what I view as the general deficiency in the original consultation process and to provide a full opportunity for meaningful discussion between the parties, I believe an order should be made that will be as efficacious as presently possible. As I noted, we are dealing here with an area of law, aboriginal title, which Lamer C.J. referred to as not particularly developed. Courts will seek to fashion fair and appropriate remedies for individual cases conscious that as yet we do not have much guidance by way of precedent but, as in other fields, the common law will simply have to develop to meet new circumstances.⁷⁵

In order to afford LWBC and the appellant proper opportunity for consultation with a view to reaching some *modus vivendi* on appropriate accommodation, I would order the suspension of the operation of the Order in Council authorizing the sale for two years. That time frame should provide ample opportunity for the parties to seek to reach some agreement. I would direct that at the expiration of such period any party to the negotiations should be at liberty to bring on appropriate proceedings in the Supreme Court of British Columbia to address any issues that may be felt to require decision by the court. Based on what was said by the Supreme Court of Canada in *Haida*, UBC has no role to play in the process of consultation or accommodation between the Province and the appellant. I would therefore allow the appeal of the appellant.⁷⁶

...

Before closing I should perhaps observe, out of an abundance of caution, that UBC has previously agreed to hold the lands subject to future directions of a court of competent jurisdiction. If agreement eludes the negotiating parties, it is clearly possible that some order could be made affecting title to the lands and UBC could be called upon to honour its undertaking. Of course, because these lands are under a long term lease to a golf course operator, I

would not expect any alteration in the *status quo* over the near term.⁷⁷

(emphasis added)

It is important to note that the British Columbia Court of Appeal has 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.”⁷⁸

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 effected in the process of accommodating the Musqueam people prior to their proof of their Aboriginal title. The Court considered the degree of compensation offered (equivalent to one city lot in Vancouver) 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.”⁷⁹ 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. Otherwise, such First Nations would be deprived of an effective remedy as most do not have the funds to litigate Aboriginal title claims. This certainly is not in keeping with the honour of the Crown.

Another aspect of this decision 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 when there are competing claims to the lands or resources in question because the criteria of exclusive possession (necessary to prove Aboriginal title) cannot be demonstrated. This argument is invariably raised in defence of judicial review petitions alleging the Crown’s failure to adequately consult or accommodate. This is a serious issue in provinces where there are numerous competing claims. However, the Court in this case found that notwithstanding such competing claims, the “duty owed to the Musqueam [by the Crown] tended to the more expansive end of the spectrum”⁸⁰ (as was discussed in *Haida*). The Court

noted that the Crown had conceded Musqueam had a *prima facie* case and also noted that the archaeological report found that: “Musqueam had had the strongest case of the bands in the area.”⁸¹ 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 the relative competing claims. *Musqueam* has been judicially considered in subsequent cases in support of the proposition that the issue of competing claims and exclusive possession, while challenging, is not insurmountable.⁸²

This case has not been appealed. It aptly illustrates that where accommodation is required in respect of unproven Aboriginal title rights, the form of accommodation can in large measure be designed and determined by the parties to the negotiation. Further, what is reasonable accommodation must be tailored to the substantial concerns of the First Nation involved. The Musqueam people’s greatest concern in this case was 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 had offered some compensation (although nominal) and had offered to hold a very small lot for a period of years for treaty settlement purposes.

Mikisew⁸³

This is the first case decided by the Supreme Court of Canada which applied the reasoning in *Haida* regarding the duty to consult and accommodate, within the context of treaty rights. The Mikisew, a Treaty 8 Nation, challenged the decision of the Minister of Canadian Heritage to approve the construction 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.⁸⁴ In this regard, Treaty 8 gives rise to both procedural and substantive obligations. The Court reasoned as follows:⁸⁵

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.”⁸⁶ Where 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.

In this case, 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 effects 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 effects 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, consultation was an absolute necessity.

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 which "explain the relations" to "govern future interaction" between the Crown and the Mikisew people and expressly takes issue with Treaty 8 being characterized as "a finished land use blueprint."⁸⁷ Rather, the Court repeatedly refers to the importance of managing the ongoing "relations" or

“relationship” between the Crown and Aboriginal peoples⁸⁸ in a manner in keeping with the honour of the Crown and the objective of reconciliation.⁸⁹ 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.⁹⁰

Further, the Court takes issue with the argument that the Crown is entitled to act unilaterally:⁹¹

There is in the Minister’s argument a strong advocacy of unilateral Crown action (a sort of “this is surrendered land and we can do with it what we like” approach) which not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect. It is all the more extraordinary given the Minister’s acknowledgment at para. 41 of her factum that “[i]n many if not all cases the government will not be able to appreciate the effect a proposed taking up will have on the Indians’ exercise of hunting, fishing and trapping rights without consultation.”

(emphasis added)

As in *Haida*, the Court expressly addresses the unacceptability of the Crown acting unilaterally in making decisions affecting the rights of Indigenous peoples. What is striking for those of us who practice in this area is the significant degree to which such “unilateral action,” so clearly criticised by the Court, continues to reflect the *status quo* in many government departments today. Indeed, many of the cases reviewed in this paper are the product of unilateral action by the Crown. Crown decisions must now be made together with First Nations in an effort to find a consensus or *bona fide* “give and take” or “compromise” as discussed by the Court in *Haida*. If *Haida* and *Mikisew* are to be taken seriously, there must be a significant paradigm shift in the way Crown decisions affecting Aboriginal and treaty rights are made in the future. Put simply, these cases direct that treaty peoples and First Nations be incorporated into the decision-making process engaged in by Crown officials in all decisions which impact their rights.

The Court in *Mikisew* also shed further light on what the duty to consult actually entails as a minimum standard. It 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...”.⁹² 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. 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.”⁹³ 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.

This decision 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;
- (2) The Crown has a duty to disclose relevant information in its possession regarding the proposed development or decision;
- (3) The Crown is under an obligation to inform itself of the impact of a proposed project on the treaty nation in question;
- (4) The Crown must communicate its findings to the affected treaty nation;
- (5) The Crown must, in good faith, attempt to substantially address the concerns of the treaty nation;
- (6) The Crown cannot act unilaterally;
- (7) Administrative inconvenience does not excuse a lack of meaningful consultation;
- (8) The Crown must solicit and listen carefully to the expressed concerns and attempt to minimize the adverse impact on the treaty interests; 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.”

Logically, if a high standard to consult were to be invoked, the Crown obligations would be more onerous than those delineated above.

*Hupacasath*⁹⁴

This recent decision of the Supreme Court of British Columbia confirms that the Crown’s duty to consult and accommodate may apply in relation to privately held lands. The case is also helpful in summarizing a series of cases where the Crown was found not to have properly consulted and accommodated in relation to the Aboriginal rights in question.⁹⁵

This case concerned two decisions: (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.⁹⁶ This nonetheless required:

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.⁹⁷

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."⁹⁸ 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.⁹⁹

(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 removal decision, compared with the lesser prejudice which could befall the [Hupacasath] if the removal decision is left in effect.”¹⁰⁰ 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. Specifically, the Court ordered:¹⁰¹

The following will be terms of this Court’s order and will be in effect for two years from the date of entry of this order or until the province has completed consultations with the HFN,¹⁰² whichever is sooner:

1. Brascan will maintain the current status of “managed forest” on the Removed Lands and will keep the land under the *Private Managed Forest Land Act*, subject to all of its provisions and regulations governing planning, soil conservation, harvesting rate and reforestation;
2. Brascan will maintain variable retention and stewardship zoning on old growth areas in the Removed Lands;
3. Brascan will fulfill its commitments in the Minister’s letter regarding maintenance of water quality on the Removed Lands;
4. Brascan will maintain all current wildlife habitat areas on the Removed Lands;
5. Brascan will maintain ISO or CSA certifications and will continue to subject the Removed Lands to the public advisory process as per CSA standards;

6. Brascan will maintain current access for aboriginal groups to the Removed Lands;

7. Brascan will provide to the HFN seven days notice of any intention to conduct activities on the land which may interfere with the exercise of aboriginal rights asserted by the HFN.

This order will apply to Brascan, Island Timberlands, and their successors in interest.

The parties will exchange positions as to what kinds of activities might interfere with the exercise of aboriginal rights and if there is a failure to agree on a framework, the matter will go to mediation. The Crown will facilitate the operation of this term of the order, including, if requested by the petitioners and Brascan, providing the services of independent mediators at Crown expense.

The petitioners also seek orders for disclosure of information relevant to the consultation.

I will order that the Crown and the petitioners provide to each other such information as is reasonably necessary for the consultation to be completed. Counsel for the Crown suggested that there should be discussion between the parties as to the exact type and extent of the information to be provided, as in *Homalco* (at para. 124) and *Gitxsan First Nation #1* (at para.113). I agree. I direct that the Crown and the petitioners attempt to agree on the information exchange. If they are unable to agree, the matter will go to mediation.

It is noteworthy that in both the *Homalco* and *Gitxsan* decisions, the Court directed the parties attempt to agree on which documents ought to be disclosed before proceeding to Court on the issue.

Hupacasath is also instructive as it illustrates an established trend in the type of remedy provided by the Court in such cases. Court supervision over court-ordered consultation, accommodation and mediation processes between the Crown and First Nations is now a standard remedy in cases challenging Crown decisions on the basis that aboriginal or treaty rights have not been accommodated.

*Platinex*¹⁰³

Recent decisions of the Ontario Superior Court 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, an Aboriginal people whose traditional territory encompassed the mining claims and leases in question. The injunction prohibiting mining exploration was granted on the basis that the Crown had failed to meaningfully consult and accommodate coupled, it appears, with unilateral action taken by the resource company which the Court considered ill advised.

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, even though they do not have a legal duty to consult or accommodate. The Court reasoned:

[69] After being listed on the stock exchange and raising funds by the issue of flow through shares, Platinex was under pressure to commence drilling in order to satisfy the financial obligations it owed to its investors and the narrow time frames in which those obligations had to be met.

[70] Since 2001, Platinex has received several letters and notices that KI¹⁰⁴ was not consenting to further exploration. It is inconceivable that Platinex did not know that KI was strongly opposing any further drilling on the property.

[71] Platinex decided to gamble that KI would not try to stop them and essentially decided to try to steamroll over the KI community by moving in a drilling crew without notice.

[72] While I accept the evidence of Platinex that it will face insolvency if it cannot complete its drilling by the end of this year or shortly thereafter, Platinex is, to a large degree, the author of its own misfortune.

[73] At the time that Platinex became listed on the stock exchange and issued a prospectus to raise funds, it knew that access to the land was a serious and real issue.

[74] It was at Platinex's request that a meeting with the KI community was scheduled for January 2006. When it became obvious to Platinex that the meeting would not change the position of KI, Platinex cancelled the meeting at the last moment and then, without any notice to KI, proceeded to send in a drilling team when it knew or ought to have known that this action would be strongly opposed by KI.

[75] These unilateral actions of Platinex were disrespectful of KI's interests and were interpreted as an insult by the KI community. They can only be viewed as being motivated by the severe financial pressure that it had created and placed itself under.

[76] For Platinex to now say that it will suffer irreparable harm if an injunction is not granted flies in the face of the equitable basis upon which injunctive relief is premised. The circumstances giving rise to the economic harm that will be potentially suffered by Platinex relate directly to decisions and choices that it made after KI had said that further exploration would be resisted. In making those choices, including the choice to raise funds by means of flow-through shares, and in understating its problems of access to the property, it ignored or was wilfully blind to the concerns and position of the KI community. The financial and time pressures Platinex is now experiencing are self-created and are based on an unreasonable belief that KI would not defend its interests when push came to shove. Platinex had the choice to continue with the process of consultation and negotiation with KI and the Crown and chose not to do so.

(emphasis added)

The Court clearly signals that injunctive relief will not be available to resource companies if consultations and negotiations with First Nations regarding their aboriginal rights do not take place. *Platinex* is also instructive in that the Court casts further light on the content of the consultation process, underscoring that it involves good faith efforts on the part of the Crown to negotiate an agreement with First Nations:

[91] 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.

[92] 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.

[93] In the several years that discussions between Platinex and KI have been ongoing, the Crown has been involved in perhaps three meetings. There is no evidence that the Crown has maintained a strong supervisory presence in the negotiations, despite Platinex having expressed its concerns to Ontario on a number of occasions.

[94] In 1990, in *R v. Sparrow*, the Supreme Court of Canada first stated that the Crown had a duty to consult Aboriginal people. For the past 16 years, courts in Ontario and throughout Canada, have applied and expanded upon this principle, sending consistent and clear messages to the federal and provincial Crowns that their position as fiduciaries compels them to address this duty in all Crown decisions that affect the rights of Aboriginal peoples.

[95] 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.

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

(emphasis added)

This case also speaks to the risks and uncertainty engendered by a dynamic that is not uncommon in the mining sector: often times, 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 a resource development. As is evident from the above quote, such an approach is not in keeping with the honour of the Crown and can lead to serious business uncertainty and loss.

This case is also instructive in the type of remedy imposed. 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:

[138] 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.**

[139] 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.**

(emphasis added)

Like the other cases discussed above, the remedy imposed by the court included mandated negotiations addressing Aboriginal or treaty rights, under the supervision of the court. Rather than minimizing or dismissing the significance of Aboriginal and treaty rights, 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.

Following this decision, the parties resumed negotiation of the 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,¹⁰⁵ 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 (at paras. 4 and 5). He further emphasized that, in adjudicating this matter, there are 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 a Consultation Protocol, timetable and Memorandum of Understanding upon all parties, attached as appendices to the decision.

The Consultation Protocol 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 which must be held at certain points in the consultation process, which continues 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.

In this case, 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 litigation costs. KI's position was that the "serious imbalance between the financial position of the parties renders the consultation process unfair" (at para. 26).

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,'" but that there was insufficient material before the Court 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, that 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 will consider the availability of resources when assessing the adequacy of the consultation process.

As it currently stands, both the consultation protocol and the memorandum of understanding imposed upon the parties, establishes that Ontario will cover KI's reasonable costs in respect to the consultation. Costs which are eligible to be covered under the contribution agreement are detailed in the appendix to the Consultation Protocol and include:

- 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 do 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" (at para. 6). 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.

R. v. Morris and Olsen¹⁰⁶

Recent decisions circumscribe and limit the power of provincial governments to legislate in relation to aboriginal title and treaty rights, thereby further informing the nature and scope of the Crown's obligation to consult and accommodate Aboriginal and treaty rights. In *R. v. Morris and Olsen*, the Supreme Court of Canada clearly delineates constitutional space for, and protection over, aboriginal rights which are rooted in a treaty. That is because any *prima facie* infringement of a treaty right by the provincial Crown is invalid and unconstitutional since, according to *Morris and Olsen*, the provincial Crown does not have the constitutional power to infringe a treaty right. That 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 has made it very clear that such a federal infringement is also invalid or unconstitutional unless and until 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 to be addressed again a year and a half later in *Tsilhqot'in v. British Columbia*, addressed below.

*Tsilhqot'in Nation v. British Columbia*¹⁰⁷

The recent decision of the British Columbia Supreme Court in the *Tsilhqot'in Nation* case is one of the most significant trial judgments on aboriginal title and rights since the *Delgamuukw* case was decided in 1997. *Tsilhqot'in* is the first case in which a court has concluded that the evidence before it proved aboriginal title over certain lands. While this decision has been appealed by all parties, it reinforces the importance of the Crown's obligation to consult and potentially accommodate First Nations in respect of their claims of aboriginal title and rights.

The case was brought by Chief Roger William of the Xeni Gwet'in First Nation, on its behalf and on behalf of the 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 Court held that it 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. However, the judge stated his opinion on the basis of the evidence that had been put before him that the Tsilhqot'in have aboriginal title to a significant portion of the Claim Area – an area estimated by Tsilhqot'in legal counsel to comprise approximately 200,000 hectares. The judge encouraged the parties to negotiate a swift resolution of the outstanding issues, and bring to reality a reconciliation of the longstanding Tsilhqot'in claims to their territory. The Court also found that the Tsilhqot'in have aboriginal rights to hunt, trap, and trade in furs to sustain a moderate livelihood, throughout the Claim Area.

Furthermore, similar to the reasons in *Morris and Olsen*, this Court concluded that the Province lacks the power to legislate with respect to lands over which aboriginal title is proven. Specifically, 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 does 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). The 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. Nonetheless, it is clear that where there is a strong case of aboriginal title or where an aboriginal right exists or is protected by treaty, the provincial Crown's authority to infringe a First Nation's right related to land and resource use is not unlimited and will be subject to judicial scrutiny.

This decision has significant implications for the provincial and federal governments, given B.C.'s longstanding management of provincial natural resources. If the trial judge's decision is upheld on appeal, it will mean that the federal and Tsilhqot'in governments must work together to determine the use to which Tsilhqot'in aboriginal title lands may be put.

The trial judge also considered the impact of the B.C. *Forest Act* in the event he was wrong in concluding that it does not apply to aboriginal title land. He concluded that while the passage of forestry legislation, in and of itself, does not infringe aboriginal title, the application of such legislation does so infringe. 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 concluded that it constitutes 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.

On the critical 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 Tsilhqot'in people without any attempt to acknowledge or address aboriginal title or rights in the Claim Area. (para 1135)

As a result, the trial judge concluded that B.C. 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 actions, 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, Mr. Justice Vickers commented that he must determine whether "consultation amounts to genuine effort"(at para.1123). 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 (para. 1137). Mr. Justice Vickers 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:

[1135] Pursuant to the CCLUP, the Province determined how the Claim Area lands were to be used. Despite the statement that the Province's decision was being made "without prejudice" to Aboriginal rights, the CCLUP makes many detailed commitments to third party interests, and does indeed prejudice and infringe upon Tsilhqot'in Aboriginal title. Title encompasses the right to determine how land will be used and how forests will be managed in the Claim Area. In effect, the Province has taken unto itself the right to decide the range of uses to which lands in the Claim Area will be put, and has imposed this decision on the Tsilhqot'in people without any attempt to acknowledge or address Aboriginal title or rights in the Claim Area.

[1136] Over the years, British Columbia has either denied the existence of Aboriginal title and rights or established policy that

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

[1137] Consultation involves communication. It has often been said that communication is the art of sending and receiving. Provincial policies either deny Tsilhqot'in title and rights or steer the resolution of such title into a treaty process that is unacceptable to the plaintiff. This has meant that at every stage of land use planning, there were no attempts made to address or accommodate Aboriginal title claims of the Tsilhqot'in people, even though some of the provincial officials considered those claims to be well founded. A statement to the effect that a decision is made "without prejudice" to Aboriginal title and rights does not demonstrate that title and rights have been taken into account, acknowledged or accommodated.

Mr. Justice Vickers also demonstrated considerable sympathy for the limited resources available to the Tsilhqot'in in responding to the numerous requests of government officials for consultation:

[1138] 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.

[1139] Consultations with officials from the Ministry of Forests ultimately failed to reach any compromise. This was due largely to the fact that there was no accommodation for the forest management proposals made by 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.

To date, this case represents one of the few times in which the courts have acknowledged the dysfunctional nature of current consultation processes which all too often leads to no substantial change but, rather “business as usual” without any accommodation of asserted but, as yet, unproven aboriginal rights. However, the Court also underscored that consultation efforts are meaningful and productive when the accommodation of aboriginal rights is based on joint decision making and consensus building processes:

[1140] Conversely, there was good communication between Tsilhqot’in people with officials in the Ministry of Lands, Parks and Housing. Here the two groups were able to reach a consensus on the establishment and management of Ts’il’os Provincial Park, without prejudice to the rights and title claims of Xeni Gwet’in and Tsilhqot’in people in the park area. The joint management model of this Provincial Park has been such a success that it has been extended to the management of Nuntzi Provincial Park in the northeastern portion of Tachelach’ed.

The Court’s reasons point to a new model of consultation based on joint decision making and consensually based conflict resolution; this is to be distinguished from the current model of consultation, predominantly adopted by Crown officials, where the locus of control and decision-making rests exclusively with the Crown.

In addition to aboriginal title, the Tsilhqot’in 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 affirmed by the Court.

Concerning the plaintiff’s right to trade, the trial judge was satisfied that the Tsilhqot’in have 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.

While the judge concluded that provincial legislation could apply to land over which the Tsilhqot’in had only aboriginal rights (short of title), he noted that “the Crown’s ability to alter or infringe upon any aboriginal right would be faced with severe restrictions.” As a result, even

apart from the land over which the judge expressed his opinion as to Tsilhqot'in aboriginal title, the provincial government will be required to engage in extensive consultations concerning the Tsilhqot'in aboriginal rights over the rest of the Claim Area (a further 200,000 hectares or more)

In the course of his judgment, Mr. Justice Vickers addressed the Crown's duty to consult with regard to the impact of forest activities on Tsilhqot'in aboriginal rights such as hunting and trapping. Specifically, he 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:

[1294] Tsilhqot'in Aboriginal rights to hunt and trap in the Claim Area must have some meaning. A management scheme that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot'in Aboriginal rights. To justify harvesting activities in the Claim Area, including 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.

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. This represents a significant clarification of the scope of the Crown's duty to consult.

* * *

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.

PART II: 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, a necessary and 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."¹⁰⁸

Consider the following passage in *Delgamuukw*.¹⁰⁹ The Court affirms its reasons in *Van der Peet* and addresses the purpose of reconciliation:

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.** (para. 141)

(emphasis added)

The constitutional recognition and affirmation of the “prior social organization and distinctive cultures of Aboriginal peoples” as described in the above passage must logically include the recognition of those “distinctive cultures” of self-determining peoples who governed their own lands and resources. That is, the recognition of pre-existing cultures and peoples necessarily embodies a recognition that these Aboriginal societies governed themselves. Yet, those who deny the existence of **inherent** governance rights effectively ignore this critical and definitive passage in *Delgamuukw*, including the purpose of reconciliation embodied in s. 35(1) of the *Constitution Act, 1982* as prescribed by the Supreme Court of Canada. A failure to recognize and reflect the right to self-govern is effectively to deny the affirmation in s. 35(1) of the “prior social organization and distinctive cultures” of Aboriginal peoples who lived on this land prior to the assertion of Crown sovereignty. It is also to deny what is patent today: the continued existence of distinctive Aboriginal cultures and governments in 2006 whose rights do not depend on Crown grants or delegated authority.¹¹⁰

The injustice of ignoring or minimising the existence of self-determining Indigenous peoples within Canada can be in part abated by consultation and accommodation policies and practices which recognize their existence 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 legal system in a manner that respects, facilitates and accommodates First Nations governance choices, customs and laws about how land and resources are managed. This accommodation or adaptation must not only protect Aboriginal governance rights but must also provide opportunities for their expression and exercise in the consultation and accommodation process.

As a starting point, it is important not to lose sight of what history has repeatedly taught us: reconciliation cannot be achieved by unilaterally designed Crown policies or unilateral legislative reform. As discussed above, the Supreme Court of Canada has expressly recognized the unacceptability of unilateral Crown decision-making in cases such as *Haida* and *Mikisew*. The commitment and effort of both the Crown and First Nations to reconcile any conflict or to effect policy reform is decidedly not a one-sided affair. Nor can our judicial system be terribly effective in defining the nature and scope of Aboriginal governance rights since, in the final analysis, it is not individual judges or courts but political leaders, both Aboriginal and non-Aboriginal, who have the capacity and legitimacy to forge new government-to-government relationships. The failure to recognize this pragmatic legal reality has, for example, plagued and undermined legislative change to the *Indian Act* over the years. Any major change in legislation, policy or practice must be designed in conjunction with Aboriginal and treaty peoples and must create space and opportunity for the institution of ways and means of governing consistent with aboriginal governance customs and laws.

Aboriginal Governance 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.¹¹¹ However, a brief review of the relevant case law on point would advance this examination by demonstrating that it is not just aboriginal title rights that must be accommodated prior to their proof but aboriginal governance rights as well.

The source of Aboriginal governance rights is the same as all other Aboriginal rights generally, 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 seems to have been understood and accepted by the Court in *Van der Peet* in its reference to the majority decision in *Mabo v. Queensland*¹¹²; 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.¹¹³

(emphasis added)

The Court then 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**”¹¹⁴ (emphasis added).

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*:¹¹⁵

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)

Along a similar vein, in *Connolly v. Woolrich*,¹¹⁶ 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.¹¹⁷

The first Supreme Court of Canada case to squarely deal with the issue of Aboriginal governance rights was *Pamajewon*.¹¹⁸ As Professor McNeil points out in his article “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty,”¹¹⁹ 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.”¹²⁰ The standard to which the Court was referring is the test for proof of Aboriginal rights found in *Van der Peet*.¹²¹ 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.¹²²

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.¹²³

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 for First Nations who wish to assert self-government rights 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*, allow the court to consider the appellants' claim at the appropriate level of specificity...** (para. 27)

(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."¹²⁴ 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*¹²⁵ 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"¹²⁶ (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*¹²⁷ 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*.¹²⁸ 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, further, qualified as an Aboriginal right recognized and affirmed under s. 35(1). The Court expressly reasoned as follows:

There is a well-established body of authority in Canada for the proposition that the status conferred by aboriginal customary adoption will be recognized by the courts for the purposes of application of the principles of the common law and the provisions of statute law to the persons whose status is established by the customary adoption. (para. 42)

Along a similar vein, in his dissenting Court of Appeal judgment in *Delgamuukw v. the Queen*,¹²⁹ Mr. Justice Lambert describes the right to self-government as a form of internal community authority and regulation:

. . . what they [the plaintiffs] are asking for is surely a right to exercise control over themselves as a community, and over their own lands and institutions in that community. (para. 964)

Later in his decision, Mr. Justice Lambert reasons:

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. (paras. 970-1)

This passage in Mr. Justice Lambert's decision foreshadows the reasoning of the Supreme Court of Canada, on appeal, 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 trial¹³⁰). 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"¹³¹ and then reasons that a further dimension of Aboriginal title is the fact that it is held communally.¹³² That is, the Supreme Court of Canada 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.”¹³³

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.** (para. 126)

(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.” Clearly, the Supreme Court has recognized that prior to the assertion of sovereignty, there was an internal system 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”).

To recognize Aboriginal land rights without recognizing the system of governance which internally regulated the exercise of those land rights simply defies common sense. Based on the Court’s reasoning in *Pamajewon*, inherent governance rights would include those rights that existed prior to European contact concerning an Aboriginal community’s governance practices regarding its people, land and resources. Specifically, Aboriginal title rights which are held communally and which arise from “pre-existing systems of aboriginal law”¹³⁴ must by definition embody rules or mechanisms through which decisions are made about communally held land and resources.

A First Nation with Aboriginal title has a right to the exclusive occupation of land including the use of the resources of that land (which *Delgamuukw* clearly affirms); as such, it logically has the corollary right to internally regulate how the lands and its resources are to be used and

allocated. 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.¹³⁵ 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 are "taken into account when establishing proof of title," it stands to reason that Aboriginal laws and customs governing land use are inherent rights found within s. 35(1).¹³⁶ Simply put, a communal right to determine how land may be used necessarily implies the involvement of the aboriginal government whose communal rights are engaged.

The decision of our Supreme Court in *Campbell v. British Columbia (Attorney General)*,¹³⁷ 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. (para. 180)

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., choice of leadership, leadership structures and land use) manifest themselves within the fabric of existing legislation and laws? To a significant degree, the consultation and accommodation processes can address these questions by recognizing, and respecting the customary governance practices and laws of Aboriginal and treaty peoples. In addition, more comprehensive governance agreements with the Crown may also be negotiated.

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 to seek to accommodate Aboriginal title 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 very well 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 their 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.

PART III: CONCRETE STEPS TOWARD RECONCILIATION

This part of the paper outlines how the principles of law discussed above may be applied to breathe new life into the Crown's consultation and accommodation practices. In short, there is a marked discrepancy between what is required of the Crown at law and how the Crown's duty to consult and accommodate is currently being exercised. It is the author's hope that the discussion which follows will facilitate productive and positive dialogue regarding how current Crown policies and practices may be changed for the better.

Much thinking needs to be done concerning what tangible steps can be taken in order to implement such change. What follows is an attempt to contribute to the necessary discussion by addressing possible new approaches to the consultation and accommodation process, while underscoring how such approaches are mandated by law.

Consultation and Accommodation Through Negotiated Agreements: Substantially Addressing the Concerns of First Nations

The case law patently illustrates that our courts have held the Crown responsible and accountable to Aboriginal peoples in a wide variety of circumstances, including those where the Crown has exercised discretionary power in the management and administration of treaty lands as well as lands and resources subject to unresolved Aboriginal title issues. That accountability, grounded in the Crown's fiduciary duty and also in its duty to act honourably, requires that the Crown engage in good faith consultation with the objective of substantially addressing the concerns of First Nations and treaty peoples, as the case may be. In such circumstances, the Supreme Court of Canada has warned of the unacceptability of unilateral Crown action and has reiterated the objective of reconciliation through negotiated arrangements and settlements.

The Court has also emphasized the importance of integrating Aboriginal and treaty right considerations in the Crown's decisions, plans and courses of action; this effectively requires the participation of Aboriginal and treaty peoples in Crown decisions impacting their lands. A key dysfunction at certain treaty and other negotiating tables, are non-negotiable positions asserted by the Crown based on the assumption that the consultation and accommodation of Aboriginal rights in this manner has no place at the negotiation table. This position must change as it flies in the face of the Crown's duty to act honourably.

Allocating Land and Resources in a Manner that Reflects Aboriginal and Treaty Rights

With regard to Aboriginal rights and title, *Delgamuukw*, *Sparrow* and *Badger* impose positive legal obligations which necessarily involve the protection and meaningful accommodation of Aboriginal and treaty rights. In the context of basic rights such as fishing or hunting for food, *Sparrow* establishes the Crown must give Aboriginal peoples first priority in the allocation of the resource over which the Aboriginal right applies. *Marshall*, *Gladstone* and *Delgamuukw* also

require the application of the principle of priority to commercial Aboriginal rights, including what the Court refers to as the “economic component” of Aboriginal title. As such, the principle of priority applies in the Crown’s allocation of land and resources in a manner which reflects and respects the Aboriginal right in question. Actually prioritizing the allocation of land and resources through the consultation and accommodation process is a principle which has not yet been implemented by Crown decision makers. This is another key change which must be realized if the Crown is to act honourably and in consonance with the rulings of the Supreme Court of Canada articulated above.

More specifically, with respect to the Crown’s responsibility in relation to the accommodation of Aboriginal title, the Court has suggested that its duties may be satisfied in a number of ways. First, given that Aboriginal title encompasses the right to exclusively use and occupy traditional Aboriginal lands, the duty might require that the Crown accommodate the participation of Aboriginal peoples in the development of resources within their traditional territories; for example, by granting various licences and permits to Aboriginal communities. Second, given that Aboriginal title encompasses the right to choose to what use land can be put, this aspect of title suggests that the duty of the Crown towards Aboriginal peoples may be satisfied by their involvement in decisions taken with respect to their land. As in the *Musqueam* case, such an accommodation process may require land protection measures to ensure significant parcels of Crown held land are set aside for land settlement purposes upon which Aboriginal communities may be built and sustained. Third, given that Aboriginal title has an inescapable economic component, the honour of the Crown may require that compensation be paid, again as underscored by Hall J.A. in *Musqueam*, particularly where land and resources cannot be replaced.

Simply put, the Crown is legally obliged to ensure that the consultation and accommodation processes involving the allocation and disposition of Crown held land, as well as the licensing and permitting of resource extraction and development on such land, reflect the priority of the holders of Aboriginal and treaty rights.

Interpreting Legislation and Fulfilling Treaty Promises in a Manner in Keeping with the Crown's Fiduciary Duty and the Honour of the Crown

The duty to act honourably towards Aboriginal people also informs the manner in which Crown officials must interpret and apply legislation and treaties. The *Adams* case directs that enactments or regulations which confer a discretionary power on Crown officials should specifically set out the criteria through which such discretionary powers are to be exercised. In *Van der Peet*, the Court not only reaffirmed that statutory and constitutional provisions protecting the interests of Aboriginal people must be given a general and liberal interpretation but also stated that any doubts or ambiguities with respect to the scope of those rights must be resolved in favour of Aboriginal peoples. These principles are especially instructive in the context of treaty interpretation, particularly in light of the Supreme Court of Canada decisions in *Marshall* and *Badger*,¹³⁸ where the Supreme Court has underscored that: (a) treaties represent an exchange of solemn promises between the Crown and various Indian Nations such that the Crown is held to a high standard of honourable dealing; (b) it is always assumed that the Crown intends to fulfil its promises; (c) the Court will not sanction any sharp dealings; and (d) the Court will not consider itself bound by the written text of the treaty but will consider extrinsic evidence in determining the true terms of the treaty agreement.¹³⁹

The principle that the Crown's duty to act honourably requires that it must fulfil its promises, becomes particularly engaging in treaty cases where oral history suggests that promises were made by the Crown at the time of the making of treaty which are not found in the treaty's written text. Since the Supreme Court's decision in *Delgamuukw*, the law requires that the Crown give considerable weight to oral history. As discussed above, the Court specifically stated that oral history must be placed on an equal footing with historical documents.¹⁴⁰ Placing oral history on an equal footing with written historical documents coupled with the principle that the honour of the Crown requires that its promises be kept. Accordingly, during the consultation and accommodation process, the Crown must consider whether the nature and scope of the treaty rights in question are broader than that found in the written text. Further, any related concerns of the treaty peoples in question must be substantially addressed during the consultation process. This is not an approach which has been adopted by the Crown in practice but it is mandated by cases such as *Marshall* and *Mikisew*.

Strategic Level Planning

Cases such as *Haida* and *Mikisew* also highlight the need for strategic planning and the respectful management of the relationship between the Crown and Aboriginal peoples. The duty to consult and accommodate has perhaps the greatest impact when the Crown makes strategic policy decisions (*e.g.*, relating to family and child welfare, land use or resource allocation) which are manifested through legislative or regulatory change. Examples of when consultation is necessary in this context include when the Crown implements legislation which permits the registration of mining claims by internet or when it regulates the renewal of tree farm licences.

The Court's emphasis in *Haida* on the importance of consultation at an early, strategic level of Crown decision-making is a key consideration which was also reiterated in *Mikisew*. The Court clearly adopts the principle in *Halfway River* which requires the Crown to "wherever possible, demonstrably integrate [Aboriginal interests] into the proposed plan of action." Again, this strategic level approach is not commonplace in current Crown practices and it must be made so.

One of the greatest logistical difficulties facing Aboriginal communities today is the what is referred to as the "Crown referral process." Theoretically, this process is triggered anytime the Crown is about to make a decision which may impact Aboriginal rights. The Crown sends letters to First Nations advising of a pending decision, sale, lease, permit or development on Crown land. Such referrals typically involve some degree of consultation, an assessment of the Aboriginal claim and may involve accommodation attempts. The degree of consultation and accommodation is invariably determined by Crown officials. Such referrals are received by First Nations from numerous unrelated government departments and thereby create serious difficulties for First Nations, many of whom are inundated with referral letters week after week. Most First Nations do not have the capacity, resources or staff to address these referrals. The result is what is often referred to by First Nations leaders as the "death of a thousand cuts" since their traditional lands and resources are repeatedly alienated, lost or developed without regard to their Aboriginal or treaty rights and without meaningful accommodation.

Addressing land use and resource development decisions, through the strategic level consultations with First Nations and with the appropriate line ministries, is a sound and practical alternative to the "death by a thousand cuts" scenario, provided this strategic level process is

respected and taken seriously by the Crown and industry, and provided First Nations are equipped with the necessary funding and capacity to meaningfully participate in it. Some First Nations are also developing their own territorial stewardship plans with the hope that these strategic plans will be harmonized with Crown land use plans.

Replacing the Referral Process with a Joint Decision-Making Process

The current referral process is also flawed in that Crown policies do not engage in truly collaborative decision-making processes with First Nations. Until now, a critical piece has been missing in implementing the opportunity for significant change. Although the Supreme Court of Canada in *Delgamuukw* clearly states that First Nations have communally held rights to choose how Aboriginal lands and resources may be used,¹⁴¹ and although the Supreme Court of British Columbia in *Campbell* provides that Aboriginal self-government rights are constitutionally protected and have not been extinguished,¹⁴² the federal Crown and most provinces do not recognize, endorse or operationalize the inherent Aboriginal right to self-government. Such an approach would involve incorporating the inherent right of Aboriginal communities to make decisions relating to the use of their traditional lands and resources into the consultation process. This essential “missing piece” undermines the legitimacy of any consultation and accommodation process and renders “referrals” associated with Crown decisions affecting land and resources largely ineffective and dysfunctional.

A change in policy on the issue of Aboriginal self-government, as reflected in a commitment to shared decision-making, would constitute a very significant change in Crown policy and practice which would advance the reconciliation process. Simply put, the recognition of the right to self-government, including the right to manage land and resources which are subject to Aboriginal title, are essential if consultation and accommodation deliberations between the Crown and First Nations are to be meaningful, authentic and productive.

In light of the above, it is apparent that the creation of new land use planning and “referral” processes are necessary. Currently, Crown decisions relating to land use planning and referrals are not in keeping with the case law; there is no shared or participatory decision-making process between First Nations and the Crown regarding land or resource use, or other Crown decisions impacting Aboriginal or treaty rights. Furthermore, there is no comprehensive or strategic

approach to the many land use decisions that must be made. Nor is there any effective, timely and accessible dispute resolution process. The opportunity for such change is now at hand.

Furthermore, the current referral process is adversarial and imbalanced in that First Nations are inundated with referral letters which require them to justify why the land disposition, licence or development permit in question ought not be granted. This turns the justification process affirmed in *Sparrow* and *Delgamuukw* on its head. Moreover, the referral process facilitates unilateral self-serving actions, since the Crown alone is currently the final arbitrator of land and resource use decisions in circumstances where it stands to gain substantially from further land alienation or resource development. As a consequence, insufficient regard has been given to how Aboriginal concerns can be addressed with a view to protecting Aboriginal rights or creating sustainable economic opportunities for First Nations. Establishing a joint decision-making process to ameliorate the current referral process is in keeping with the cases addressed above and also prevents the sort of unilateral action objected to by the Court in *Mikisew* and *Haida*.

The current *ad hoc* ministry-by-ministry referral process could be replaced, at least in part, with a government-to-government decision-making process. First Nations could, for example, be given the opportunity, on an on-going basis, to address existing provincial referrals at a single negotiating table with government authorities who would be authorized to address land and resource dispositions within the traditional territory of that First Nation (“Joint Decision-Making Committee”). At a minimum, the Joint Decision-Making Committee would address priority referrals identified by members of the Committee.

Ideally, such a referral process would be guided by a comprehensive land use plan, as discussed above, designed in conjunction with the First Nation’s input and perhaps harmonized with the First Nation’s own Territorial Stewardship Plan. It is understood that land use plans typically involve the input of a number of non-Aboriginal stakeholders. While such stakeholders clearly must be consulted, land use plans must necessarily engage a process of government-to-government negotiations with First Nations to shape and refine the land use plan according to First Nations’ Aboriginal rights, interests and concerns. Such plans could then guide the deliberations of the Joint Decision-Making Committee.

This is but one example of the way in which a joint decision-making process may reflect the principle of government-to-government decision-making, which is consistent with the case law articulated above. What must be changed in any event within the current referral process, however, is the marginalization of First Nations in relation to Crown decisions that impact upon their traditional territories and Aboriginal rights. First Nations must be given a voice in the decision-making process and their substantial concerns must be addressed.

Developing Alternative Dispute Resolution Processes

In the event agreement cannot be reached with regard to a referral or land use decision through a “government-to-government” consultation process, the matter could be sent to mediation and/or an independent and specialized tribunal consisting of both First Nation and Crown representatives.

The mediation process is consistent with the Courts’ decisions in *Haida* and *Mikisew* encouraging a balancing of interests and negotiated resolutions. It is also consistent with the Court’s reasons in *Platinex* directing that the parties attempt to reach agreement on the issues before them.

In the event mediation is not successful, a specialized tribunal comprising both Aboriginal and non-Aboriginal adjudicators would, where warranted, address the dispute. Such a tribunal could be legislatively empowered to order the accommodation of the First Nation’s rights through a variety of possible measures, which could include land protection, revenue-sharing and land or resource allocations.

Ideally, a tribunal of this nature could be authorized to adjudicate land and resource-use decisions within a specified time frame, and could direct how the substantial concerns of the First Nation in question ought to be addressed. The parties would be motivated to resolve disputes on a government-to-government basis in an effort to avoid the uncertainty of a tribunal-imposed outcome.

Such an approach would address the current imbalance of power in the land use planning and referral processes currently in place. It is also in keeping with the reasons of the Supreme Court of Canada in *Haida*, where the Court reasoned that consultation may:

...entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. **The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.** ¹⁴³

(emphasis added)

While there are various approaches and processes that can be deployed in keeping with the principles of law outlined in this paper, the establishment of new decision-making and adjudicative processes is clearly required. Mediation and resolution through “impartial decision-makers” has been expressly contemplated by the Supreme Court of Canada, lending greater legitimacy to such institutional reform.

Interim Measures

Crown consultation policies and practices have not yet been amended in the aftermath of the *Haida* or *Mikisew* cases. In the meantime, however, land use plans are being finalized by the Crown and significant Crown decisions are being made in relation to the disposition of Crown-held land and resources which are not in keeping with the principles of law discussed above. As a consequence, Aboriginal rights and title, as well as treaty rights, are not being accommodated, protected or realized as envisioned by our courts. Furthermore, traditional land and resources are being lost without any land protection measures and without any benefit sharing or revenue sharing arrangements with First Nations. It is imperative that this change soon.

Referrals continue to be addressed *ad hoc* on a case-by-case basis with no comprehensive overview or plan which guides the decision-making process. Again, this is extremely problematic, particularly as most First Nations do not have the funds or staff to address each referral, yet continue to face significant Crown decisions which do not accommodate their very substantial concerns regarding continued land and resource dispositions by the Crown within their traditional territories. Interim measures in relation to land and resources could ameliorate this problem in the short term.

The case law articulated above speaks to the development of new decision mechanisms for land and resource protection, including interim measures. These mechanisms ought to be implemented immediately, beginning with those First Nations in urban areas who face the urgent situation where very little of their traditional land and resources remain unalienated by the Crown, making land settlement of treaty negotiations potentially moot.

CONCLUSION

Having deliberated upon various cases involving the infringement of Aboriginal and treaty rights, our courts have established and developed legal principles concerning enforceable Crown obligations which provide shape and substance to the consultation and accommodation process which must now invariably take place with Aboriginal peoples. The courts have also underscored the need for reconciliation and negotiated solutions to outstanding aboriginal title and treaty rights disputes. In doing so, our courts have laid the foundation for such reconciliation through negotiated resolutions. The legal guideposts outlined above are equally applicable at the treaty table, or at any negotiation or consultation concerning Aboriginal or treaty rights.

What is immediately required are concrete commitments towards a significant change in the current consultation and accommodation policies and practices of the Crown which reflect the principles of law established by our courts. These must be actively endorsed and taken seriously by both the federal and provincial Crown. Basic tenets relating to the respect, recognition and reconciliation of Aboriginal and treaty rights must be coupled with joint decision-making and dispute resolution processes which will yield tangible benefits to Aboriginal communities in the immediate future. Strategic level planning and decision-making between Aboriginal peoples and the Crown is necessary, as is the harmonization of such planning with the choices and priorities of First Nations communities (e.g., through the implementation of territorial stewardship plans and/or the allocation of land and resources through interim measures in a manner that reflects prior aboriginal rights).

Aboriginal peoples are entitled at law to have a clear and decisive voice in Crown decisions which may impact not only the use and disposition of their traditional lands and resources but also their social and cultural well being. Unilateral decision-making by the Crown is no longer legal in this context. Aboriginal title, and its attendant right to choose how lands and resources

within Aboriginal territories are managed and used, entitles First Nations to be involved in Crown decisions affecting their people, communities, cultures, lands and resources. This requires *bona fide* government to government consultation and accommodation.

Haida makes it clear that prior to resolution by land settlements or court determinations, the consultation and accommodation process is driven by the primary purpose of reconciliation through a balancing of interests. To date, there is a decided imbalance between the lands and resources allocated to First Nations and those allocated to third party interests. Genuine accommodation of Aboriginal and treaty rights can at least begin to rectify this injustice. Such accommodation will likely entail the re-allocation of Crown-held land and resources through joint decision-making and negotiated agreements or, alternatively, through specialized dispute resolution mechanisms where agreements cannot be reached.

As discussed above, and as articulated by the court in *Platinex*, the litigation alternative is a most unfortunate one for Aboriginal peoples, the Crown and industry proponents. Reconciliation and “win-win” situations can be achieved with good faith negotiations if the principles which inform the consultation and accommodation process are honoured and the political will to do so exists.

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¹ The terms “Indigenous” is used to include all first peoples in Canada.

² *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].

⁴ *R. v. Gladstone*, [1997] 2 S.C.R. 723 [*Gladstone*].

⁵ *Sparrow*, *supra* note 2 at 1110.

⁶ *Ibid.* at 1114-1115.

⁷ 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*.

⁸ *Sparrow*, *supra* note 2 at 1119.

⁹ *R. v. Delgamuukw*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

¹⁰ *Sparrow*, *supra* note 2 at 1119.

¹¹ 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* note 9 at para. 169; see also *Haida, infra*, where the Court of Appeal affirmed at para. 116 that the failure to consult and accommodate could render a Crown decision or licence invalid.

¹² *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida SCR*].

¹³ *Van der Peet, supra* note 3 at paras. 30-31.

¹⁴ *Gladstone, supra* note 4 at para. 64.

¹⁵ *Ibid.* at para. 54.

¹⁶ *Ibid.* at para. 61.

¹⁷ *Ibid.* at para. 62.

¹⁸ *Ibid.* at para. 63.

¹⁹ *Ibid.* at para. 66.

²⁰ *Delgamuukw, supra* note 9 at para. 167.

²¹ *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*].

²² See also: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*].

²³ *Van der Peet, supra* note 3 at para. 24.

²⁴ *Ibid.*

²⁵ *R. v. Marshall*, [1999] 3 S.C.R. 456 [*Marshall #1*].

²⁶ *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall #2*].

²⁷ *Marshall #1, supra* note 25 at para. 40.

²⁸ *Ibid.* at para. 43.

²⁹ *Ibid.* at paras. 19-20.

³⁰ *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*].

31 *Ibid.* at paras. 51 and 52.

32 *Ibid.*

33 *Delgamuukw*, *supra* note 9.

34 *Delgamuukw*, *supra* note 9 at paras. 166-167.

35 *Ibid.* at para. 168.

36 The Court in *Haida SCR*, *supra* note 12 reasoned (at para. 48) that Aboriginal groups do not have a veto pending final proof of a claim.

37 *Delgamuukw*, *supra* note 9 at para. 169.

38 *Ibid.*

39 *Ibid.* at para. 167.

40 *Ibid.*

41 *Ibid.*

42 *Ibid.* at para. 169.

43 *Ibid.* at para. 162.

44 *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 [*Halfway*].

45 *Ibid.* at para. 165.

46 *Mikisew*, *supra* note 22.

47 See *Mikisew*, *supra* note 22 at para. 64.

48 *Halfway*, *supra* note 44 at para. 159.

49 *Ibid.* at para. 160.

50 *Musqueam Indian Band v. Canada (Governor in Council)*, 2004 FC 579; 2004 FC 931 [*Musqueam FC*].

51 *Ibid.* at paras. 44-46.

52 *Yal et al. (Gitksan and other First Nations) v. British Columbia (Minister of Forests)*, 202 BCSC 1701 [*Yal*].

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- 53 *Ibid.* at paras. 65, 86.
- 54 *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 462, 5 B.C.L.R. (4th) 33, at para. 116 [*Haida #2*].
- 55 *Haida SCR*, *supra* note 12.
- 56 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74 [*Taku River*].
- 57 *Haida SCR*, *supra* note 12 at para. 26.
- 58 *Ibid.* at para. 27.
- 59 *Ibid.* at para. 33.
- 60 *Ibid.* at para. 76.
- 61 *Ibid.* at para. 34.
- 62 *Haida Nation v. British Columbia (Minister of Forests)*, (2002) 99 B.C.L.R.(3d) 209 at para.42-44 [*Haida #1*].
- 63 *Haida SCR*, *supra* note 12 at paras. 45, 48.
- 64 *Ibid.* at para. 39.
- 65 *Haida #1*, *supra* note 62.
- 66 *Haida SCR*, *supra* note 12 at para. 45.
- 67 *Ibid.* at para. 53.
- 68 See discussion of *Delgamuukw* at pages 14-18 herein.
- 69 *Haida SCR*, *supra* note 12 at para. 46.
- 70 *Ibid.* at para. 47.
- 71 *Delgamuukw*, *supra* note 9 at paras. 162-169.
- 72 *Taku River*, *supra* note 56.
- 73 *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 [*Musqueam BCCA*].
- 74 *Ibid.* at paras. 66-67.

75 *Ibid.* at para. 100.

76 *Ibid.* at paras. 101-102. It is noteworthy that each Court of Appeal Judge gave their own reasons for judgment although each found the Crown had not met its obligation to consult and accommodate Musqueam. Lowry J.A. adopted the reasons of Hall J.A. with the exception of paras. 98-100 inclusive.

77 *Ibid.* at para. 102.

78 *Ibid.* at para. 100.

79 *Ibid.* at para. 98.

80 *Ibid.* at para. 94.

81 *Ibid.*

82 See *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, [2005] 3 C.N.B.L.R. 74 at 120 [*Huu-Ay-Aht*]; *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.*, 2000 BCSC 1712 at 126-128 [*Hupacasath*].

83 *Mikisew, supra* note 22.

84 *Ibid.* 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.”

85 *Ibid.* at paras. 57-58.

86 *Ibid.* at para. 33.

87 *Ibid.* at para. 27.

88 *Ibid.* at paras. 1, 3, 4, 23, 25, 31, 50, 63.

89 *Ibid.* at paras. 1, 4, 51-58, 63.

90 *Ibid.* at paras. 57-58.

91 *Ibid.* at para. 49.

92 *Ibid.* at para. 64.

93 *Ibid.* at para. 67.

94 *Hupacasath*, *supra* note 82 at para. 126.

95 The court referred *inter alia* to the following cases, consultation and accommodation cases which are cited here as 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 First Nation v. British Columbia (Minister of Forests)*, [2005] 3 C.N.L.R. 74, 2005 BCSC 697; *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.

96 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.

97 *Hupacasath*, *supra* note 82 at para. 274.

98 *Ibid.* at para. 275.

99 *Ibid.* at paras. 292 -294.

100 *Ibid.* at para. 317.

101 *Ibid.* at paras. 321-325.

102 "HFN" is a defined term for Hupacasath.

103 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation et al.* (28 July 2006), Thunder Bay 06-0271 (On. Sup. Ct.) [*Platinex*].

104 "KI" is a defined term for Kitchenuhmaykoosib Inninuwug.

105 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 C.N.L.R. 221, [2007] O.J. No. 2214 (S.C.J.).

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

107 *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.

108 *Mikisew*, *supra* note 22 at para. 1.

109 *Delgamuukw*, *supra* note 9.

¹¹⁰ See *Guerin et al. v. The Queen* (1984), 2 S.C.R. 338 at 376-377 where the Court affirms that Aboriginal title is not dependent on treaty, executive order or legislative action but is pre-existing [*Guerin*].

¹¹¹ Kent McNeil, “The Inherent Right of Self-Government: Emerging Directions for Legal Research” prepared for the National Centre for First Nations Governance (November 2004).

¹¹² *Mabo v. Queensland*, [No. 2] 1992, 175 C.L.R. 1 [*Mabo*].

¹¹³ *Ibid.* at para. 40.

¹¹⁴ *Van der Peet*, *supra* note 3 at para. 42.

¹¹⁵ *R. v. Sioui* (1990), 3 C.N.L.R. 127, at 147 [*Sioui*].

¹¹⁶ *Connolly v. Woolrich* (1867), 11 L.C. Jur. 197 (Que. S.C.) [*Connolly*].

¹¹⁷ *Connolly v. Woolrich* (1869) 1 R.L.O.S., 253 (Que. C.A.) [*Connolly CA*].

¹¹⁸ *R. v. Pamajewon*, [1996] 2 S.C.R. 821 [*Pamajewon*].

¹¹⁹ 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.

¹²⁰ *Pamajewon*, *supra* note 115 at para. 24.

¹²¹ *Van der Peet*, *supra* note 3 at para. 46.

¹²² *Ibid.*

¹²³ *Pamajewon*, *supra* note 115 at paras. 23-30.

¹²⁴ *Ibid.* at para. 26.

¹²⁵ *Gladstone*, *supra* note 4.

¹²⁶ See, for example, *Gladstone*, *supra* note 4 at para. 22.

¹²⁷ *Casimel v. ICBC* (1993), 82 B.C.L.R. (2d) 387 [*Casimel*].

¹²⁸ *Insurance (Motor Vehicle) Act* [R.S.B.C. 1996] Chapter 231.

¹²⁹ *Delgamuukw v. The Queen*, [1993] 5 C.N.L.R. 1 (C.A.) [*Delgamuukw CNLR*].

¹³⁰ *Delgamuukw*, *supra* note 9 at paras. 170-171.

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- 131 *Ibid.* at para. 114.
- 132 *Ibid.* at para. 115.
- 133 *Ibid.* at para. 126.
- 134 *Ibid.* at para. 126.
- 135 *Ibid.* at paras. 111 and 165.
- 136 See *Delgamuukw*, *supra* note 9 at paras. 126, 147, and 148, and note 104.
- 137 *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123; 79 B.C.L.R. (3rd)
122 [*Campbell*].
- 138 *Badger*, *supra* note 21.
- 139 *Ibid.* at para. 41; *Marshall*, *supra* note 25 at paras. 4, 9, 19-20, 40, 49-52.
- 140 *Delgamuukw*, *supra* note 9 at para. 87.
- 141 *Ibid.* paras. 111, 126 and 165.
- 142 *Campbell*, *supra* note 134 at paras. 135, 137 and 180.
- 143 *Haida SCR*, *supra* note 12 at para. 44.