EB-2011-0040
EB-2011-0041
EB-2011-0042

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B, and in particular, Section 90 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Ear Falls and the Municipality of Red Lake, both in the District of Kenora;

AND IN THE MATTER OF the Municipal Franchises Act, R.S.O. 1990, c.M.55, as amended; and in particular Sections 8 and 9 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order approving the terms and conditions upon which the Corporation of the Municipality of Red Lake is, by Bylaw, to grant to Union Gas Limited the right to construct and operate works; to supply gas to the inhabitants of the said municipality; and the period for which such rights are to be granted;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order directing and declaring that the assent of the municipal electors of the Municipality of Red Lake to the by-law is not necessary;

AND IN THE MATTER OF an Application by Union Gas Limited for a Certificate of Public Convenience and Necessity to construct works to supply gas to the inhabitants of the Municipality of Red Lake.

BRIEF OF AUTHORITIES

June 17, 2011

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Tab No.

TAB 1

Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions

(REPRINTED 1966)
(REPRINTED 1978)

LAYOUT IS NOT EXACTLY LIKE ORIGINAL

TRANSCRIBED FROM:
ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

Cat. No. Ci 72-0366

ORDER IN COUNCIL SETTING UP COMMISSION FOR TREATY 3

The Committee have had under consideration the memorandum dated 19th April, 1871, from the Hon. the Secretary of State for the provinces submitting with reference to his report of the 17th of the same month that the Indians mentioned in the last paragraph of that report and with whom it will be necessary first to deal occupy the country from the water shed of Lake Superior to the north west angle of the Lake of the Woods and from the American border to the height of land from which the streams flow towards Hudson's Bay.

That they are composed of Saulteaux and Lac Seul Indians of the Ojibbeway Nation, and number about twenty-five hundred men, women and children, and, retaining what they desire in reserves at certain localities where they fish for sturgeon, would, it is thought be willing to surrender for a certain annual payment their lands to the Crown. That the American Indians to the south of them surrendered their lands to the Government of the United States for an annual payment which has been stated to him (but not on authority) to amount to ten dollars per head for each man, woman and child of which six dollars is paid in goods and four in money. That to treat with these Indians with advantage he recommends that Mr. Simon J. Dawson of the Department of Public Works and Mr. Robert Pither of the Hudson's Bay Company's service be associated with Mr. Wemyss M. Simpson-and further that the presents which were promised the Indians last year and a similar quantity for the present year should be collected at Fort Francis not later than the middle of June also that four additional suits of Chiefs' clothes and flags should be added to those now in store at Fort Francis-and further that a small house and store for provisions

should be constructed at Rainy River at the site and of the dimensions which Mr. Simpson may deem best-that the assistance of the Department of Public Works will be necessary should his report be adopted in carrying into effect the recommendations therein made as to provisions, clothes and construction of buildings.

He likewise submits that it will be necessary that the sum of Six Thousand dollars in silver should be at Fort Francis subject to the Order of the above named Commissioners on the fifteenth day of June next-And further recommends that in the instructions to be given to them they should be directed to make the best arrangements in their power but authorized if need be to give as much as twelve dollars a family for each family not exceeding five-with such small Sum in addition where the family exceeds five as the Commissioners may find necessary-Such Subsidy to be made partly in goods and provisions and partly in money or wholly in goods and provisions should the Commissioners so decide for the surrender of the lands described in the earlier part of this report.

The Committee concur in the foregoing recommendations and submit the same for Your Excellency's approval.

Signed: Charles Tupper
25 April/71

TREATY No. 3

ARTICLES OF A TREATY made and concluded this third day of October, in the year of Our Lord one thousand eight hundred and seventy-three, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, the Honourable Alexander Morris, Lieutenant-Governor of the Province of Manitoba and the North-west Territories; Joseph Alfred Norbert Provencher and Simon James Dawson, of the one part, and the Saulteaux Tribe of the Ojibway Indians, inhabitants of the country within the limits hereinafter defined and described, by their Chiefs chosen and named as hereinafter mentioned, of the other part.

Whereas the Indians inhabiting the said country have, pursuant to an appointment made by the said Commissioners, been convened at a meeting at the north-west angle of the Lake of the Woods to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

And whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purpose as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty and arrange with them so that there may be peace and good will between them and Her Majesty and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

And whereas the Indians of the said tract, duly convened in council as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and

Headmen, who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have thereupon named the following persons for that purpose, that is to say:-

KEK-TA-PAY-PI-NAIS (Rainy River.)
KITCHI-GAY-KAKE (Rainy River.)
NOTE-NA-QUA-HUNG (North-West Angle.)
NAWE-DO-PE-NESS (Rainy River.)
POW-WA-SANG (North-West Angle.)
CANDA-COM-IGO-WE-NINIE (North-West Angle.)
PAPA-SKO-GIN (Rainy River.)
MAY-NO-WAH-TAW-WAYS-KIONG (North-West Angle.)
KITCHI-NE-KA-LE-HAN (Rainy River.)
SAH-KATCH-EWAY (Lake Seul.)
MUPA-DAY-WAH-SIN (Kettle Falls.)
ME-PIE-SIES (Rainy Lake, Fort Frances.)
OOS-CON-NA-GEITH (Rainy Lake.)
WAH-SHIS-KOUCE (Eagle Lake.)
KAH-KEE-Y-ASH (Flower Lake.)
GO-BAY (Rainy Lake.)
KA-MO-TI-ASH (White Fish Lake.)
NEE-SHO-TAL (Rainy River.)
KEE-JE-GO-KAY (Rainy River.)
SHA-SHA-GANCE (Shoal Lake.)
SHAH-WIN-NA-BI-NAIS (Shoal Lake.)
AY-ASH-A-WATH (Buffalo Point.)
PAY-AH-BEE-WASH (White Fish Bay.)
KAH-TAY-TAY-PA-E-CUTCH (Lake of the Woods.)

And thereupon, in open council, the different bands having presented their Chiefs to the said Commissioners as the Chiefs and Headmen for the purposes aforesaid of the respective bands of Indians inhabiting the said district hereinafter described:

And whereas the said Commissioners then and there received and acknowledged the persons so presented as Chiefs and Headmen for the purpose aforesaid of the respective bands of Indians inhabiting the said district hereinafter described;

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded, as follows, that is to say:-

The Saulteaux Tribe of the Ojibbeway Indians and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits, that is to say:-

Commencing at a point on the Pigeon River route where the international boundary line between the Territories of Great Britain and the United States intersects the

height of land separating the waters running to Lake Superior from those flowing to Lake Winnipeg; thence northerly, westerly and easterly along the height of land aforesaid, following its sinuosities, whatever their course may be, to the point at which the said height of land meets the summit of the watershed from which the streams flow to Lake Nepigon; thence northerly and westerly, or whatever may be its course, along the ridge separating the waters of the Nepigon and the Winnipeg to the height of land dividing the waters of the Albany and the Winnipeg; thence westerly and north-westerly along the height of land dividing the waters flowing to Hudson's Bay by the Albany or other rivers from those running to English River and the Winnipeg to a point on the said height of land bearing north forty-five degrees east from Fort Alexander, at the mouth of the Winnipeg; thence south forty-five degrees west to Fort Alexander, at the mouth of the Winnipeg; thence southerly along the eastern bank of the Winnipeg to the mouth of White Mouth River; thence southerly by the line described as in that part forming the eastern boundary of the tract surrendered by the Chippewa and Swampy Cree tribes of Indians to Her Majesty on the third of August, one thousand eight hundred and seventy-one, namely, by White Mouth River to White Mouth Lake, and thence on a line having the general bearing of White Mouth River to the forty-ninth parallel of north latitude; thence by the forty-ninth parallel of north latitude to the Lake of the Woods, and from thence by the international boundary line to the place beginning.

The tract comprised within the lines above described, embracing an area of fifty-five thousand square miles, be the same more or less. To have and to hold the same to Her Majesty the Queen, and Her successors forever.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and also to lay aside and reserve for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, in such a manner as shall seem best, other reserves of land in the said territory hereby ceded, which said reserves shall be selected and set aside where it shall be deemed most convenient and advantageous for each band or bands of Indians, by the officers of the said Government appointed for that purpose, and such selection shall be so made after conference with the Indians; provided, however, that such reserves, whether for farming or other purposes, shall in no wise exceed in all one square mile for each family of five, or in that proportion for larger or smaller families; and such selections shall be made if possible during the course of next summer, or as soon thereafter as may be found practicable, it being understood, however, that if at the time of any such selection of any reserve, as aforesaid, there are any settlers within the bounds of the lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just so as not to diminish the extent of land allotted to Indians; and provided also that the aforesaid reserves of lands, or any interest or right therein or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians She hereby, through Her Commissioners, makes them a

present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred.

And further, Her Majesty agrees to maintain schools for instruction in such reserves hereby made as to Her Government of Her Dominion of Canada may seem advisable whenever the Indians of the reserve shall desire it.

Her Majesty further agrees with Her said Indians that within the boundary of Indian reserves, until otherwise determined by Her Government of the Dominion of Canada, no intoxicating liquor shall be allowed to be introduced or sold, and all laws now in force or hereafter to be enacted to preserve Her Indian subjects inhabiting the reserves or living elsewhere within Her North-west Territories, from the evil influences of the use of intoxicating liquors, shall be strictly enforced.

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.

It is further agreed between Her Majesty and Her said Indians that such sections of the reserves above indicated as may at any time be required for Public Works or buildings of what nature soever may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon.

And further, that Her Majesty's Commissioners shall, as soon as possible after the execution of this treaty, cause to be taken an accurate census of all the Indians inhabiting the tract above described, distributing them in families, and shall in every year ensuing the date hereof, at some period in each year to be duly notified to the Indians, and at a place or places to be appointed for that purpose within the territory ceded, pay to each Indian person the sum of five dollars per head yearly.

It is further agreed between Her Majesty and the said Indians that the sum of fifteen hundred dollars per annum shall be yearly and every year expended by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians.

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band of the said Indians who are now actually cultivating the soil or who shall hereafter commence to cultivate the land, that is to say: two hoes for every family actually cultivating, also one spade per family as aforesaid, one plough for every ten families as aforesaid, five harrows for every twenty families as aforesaid, one scythe for every family as aforesaid, and also one axe and one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grind-stone, one auger for each band, and also for each Chief for the use of his band one chest of ordinary carpenter's tools; also for each band enough of wheat, barley, potatoes and oats to plant the land actually broken up for cultivation by such band; also for each band one yoke of oxen, one bull and four cows; all the aforesaid

articles to be given once for all for the encouragement of the practice of agriculture among the Indians.

It is further agreed between Her Majesty and the said Indians that each Chief duly recognized as such shall receive an annual salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, shall receive fifteen dollars per annum; and each such Chief and subordinate officer as aforesaid shall also receive once in every three years a suitable suit of clothing; and each Chief shall receive, in recognition of the closing of the treaty, a suitable flag and medal.

And the undersigned Chiefs, on their own behalf and on behalf of all other Indians inhabiting the tract within ceded, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will in all respects obey and abide by the law, that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any part of the said ceded tract, and that they will not molest the person or property of any inhabitants of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person passing or travelling through the said tract, or any part thereof; and that they will aid and assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this treaty, or infringing the laws in force in the country so ceded.

IN WITNESS WHEREOF, Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands at the North-West Angle of the Lake of the Woods this day and year herein first above named.

Signed by the Chiefs within named, in presence of the following witnesses, the same having been first read and explained by the Honorable James McKay:

ALEX. MORRIS
L.G.,
J. A. N.
PROVENCHER,
Ind. Comr.,
S. J. DAWSON,

JAMES McKAY,
MOLYNEUX St. JOHN,
ROBERT PITHER,
CHRISTINE V. K. MORRIS,
CHARLES NOLIN,
A. McDONALD, Capt.,
Comg. Escort to Lieut. Governor.
JAS. F. GRAHAM,
JOSEPH NOLIN,
A. McLEOD,
GEORGE McPHERSON, Sr.,
SEDLEY BLANCHARD,
W. FRED. BUCHANAN,
FRANK G. BECHER,

KEE-TA-KAY-PI-NAIS,
his x mark
KITCHI-GAY-KAKE,
his x mark
NO-TE-NA-QUA-HUNG,
his x mark
MAWE-DO-PE-NAIS,
his x mark
POW-WA-SANG,

ALFRED CODD, M.D.,
G. S. CORBAULT,
PIERRE LEVIELLER,
NICHOLAS CHATELAINE.

his x mark
CANDA-COM-
IGO-WI-NINE,
his x mark
MAY-NO-WAH-
TAW-WAYS-
KUNG,
his x mark
KITCHI-NE-KA-
BE-HAN,
his x mark
SAH-KATCH-
EWAY,
his x mark
MUKA-DAY-WAH
-SIN,
his x mark
ME-KIE-SIES,
OOS-CON-NA-
GEISH,
his x mark
WAH-SHIS-
KOUCE,
his x mark
KAH-KEE-Y-ASH,
his x mark
GO-BAY,
his x mark
KA-ME-TI-ASH,
his x mark
NEE-SHO-TAL,
his x mark
KEE-JEE-GO-
KAY,
his x mark
SHA-SHA-
GAUCE,
his x mark
SHAW-WIN-NA-
BI-NAIS,
his x mark
AY-ASH-A-
WASH,
his x mark
PAY-AH-BEE-
WASH,
his x mark
KAH-TAY-TAY-PA
-O-CUTCH,
his x mark

We, having had communication of the treaty, a certified copy whereof is hereto annexed, but not having been present at the councils held at the North West Angle of the Lake of the Woods between Her Majesty's Commissioners, and the several Indian Chiefs and others therein named, at which the articles of the said treaty were agreed upon, hereby for ourselves and the several bands of Indians which we represent, in consideration of the provisions of the said treaty being extended to us and the said bands which we represent, transfer, surrender and relinquish to Her Majesty the Queen, Her heirs and successors, to and for the use of Her Government of Her Dominion of Canada, all our right, title and privilege whatsoever, which we, the said Chiefs and the said bands which we represent have, hold or enjoy, of, in and to the territory described and fully set out in the said articles of treaty, and every part thereof. To have and to hold the same unto and to the use of Her said Majesty the Queen, Her heirs and successors forever.

And we hereby agree to accept the several provisions, payments and reserves of the said treaty, as therein stated, and solemnly promise and engage to abide by, carry out and fulfil all the stipulations, obligations and conditions therein contained, on the part of the said Chiefs and Indians therein named, to be observed and performed; and in all things to conform to the articles of the said treaty as if we ourselves and the bands which we represent had been originally contracting parties thereto, and had been present and attached our signatures to the said treaty.

IN WITNESS WHEREOF, Her Majesty's said Commissioners and the said Indian Chiefs have hereunto subscribed and set their hands, this thirteenth day of October, in the year of Our Lord one thousand eight hundred and seventy-three.

Signed by S. J. Dawson, Esquire, one of Her Majesty's said Commissioners, for and on behalf and with the authority and consent of the Honorable Alexander Morris, Lieutenant Governor of Manitoba and the North-West Territories, and J. A. N. Provencher, Esq., the remaining two Commissioners, and himself and by the Chiefs within named, on behalf of themselves and the several bands which they represent, the same and the annexed certified copy of articles of treaty having been first read and explained in presence of the fol lowing witnesses:
THOS. A. P. TOWERS,
JOHN AITKEN,
A. J. McDONALD.
UNZZAKI.

For and on behalf of the Commissioners, the Honorable Alexander Morris, Lieut. Governor of Manitoba and the NorthWest Territories, Joseph Albert Norbert Provencher, Esquire, and the undersigned
S. J. DAWSON,
Commissioner.
PAY-BA-MA-CHAS,
his x mark
RE-BA-QUIN,
his x mark
ME-TAS-SO-QUE-NE
-SKANK,
his x mark

JAS. LOGANOSH,
his x mark
PINLLSISE.

To S. J. Dawson, Esquire, Indian Commissioner, &c., &c., &c.

SIR,-We hereby authorize you to treat with the various bands belonging to the Salteaux Tribe of the Ojibbeway Indians inhabiting the North-West Territories of the Dominion of Canada not included in the foregoing certified copy of articles of treaty, upon the same conditions and stipulations as are therein agreed upon, and to sign and execute for us and in our name and on our behalf the foregoing agreement annexed to the foregoing treaty.

NORTH-WEST ANGLE, LAKE OF THE WOODS,
October 4th, A.D. 1873.

ALEX. MORRIS,
Lieutenant-Governor.
J. A. N. PROVENCHER,
Indian Commissioner.

ADHESION BY HALFBREEDS OF RAINY RIVER AND LAKE (A.)

This Memorandum of Agreement made and entered into this twelfth day of September one thousand eight hundred and seventy-five, between Nicholas Chatelaine, Indian interpreter at Fort Francis and the Rainy River and acting herein solely in the latter capacity for and as representing the said Half-breeds, on the one part, and John Stoughton Dennis, Surveyor General of Dominion Lands, as representing Her Majesty the Queen through the Government of the Dominion, of the other part, Witnesseth as follows:-

Whereas the Half-breeds above described, by virtue of their Indian blood, claim a certain interest or title in the lands or territories in the vicinity of Rainy Lake and the Rainy River, for the commutation or surrender of which claims they ask compensation from the Government.

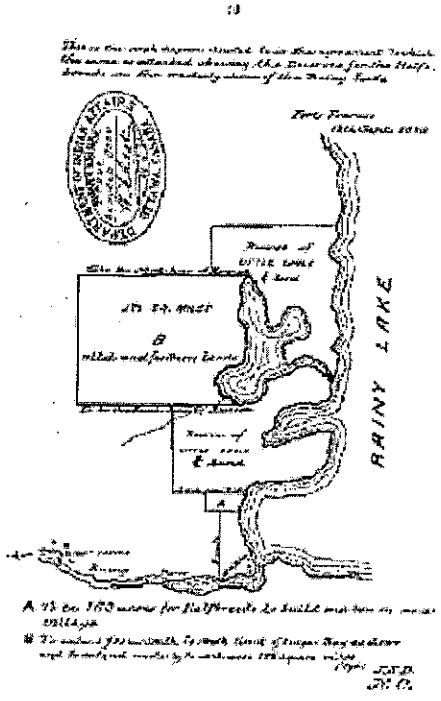
And whereas, having fully and deliberately discussed and considered the matter, the said Half-breeds have elected to join in the treaty made between the Indians and Her Majesty, at the North-West Angle of the Lake of the Woods, on the third day of October, 1873, and have expressed a desire thereto, and to become subject to the terms and conditions thereof in all respects saving as hereinafter set forth.

It is now hereby agreed upon by and between the said parties hereto (this agreement, however, to be subject in all respects to approval and confirmation by the Government, without which the same shall be considered as void and of no effect), as follows, that is to say: The Half-breeds, through Nicholas Chatelaine, their Chief above named, as representing them herein, agree as follows, that is to say:-

That they hereby fully and voluntarily surrender to Her Majesty the Queen to be held by Her Majesty and Her successors for ever, any and all claim, right, title or interest

which they, by virtue of their Indian blood, have or possess in the lands or territories above described, and solemnly promise to observe all the terms and conditions of the said treaty (a copy whereof, duly certified by the Honourable the Secretary of State of the Dominion has been this day placed in the hands of the said Nicholas Chatelaine).

In consideration of which Her Majesty agrees as follows, that is to say:-



That the said Half-breeds, keeping and observing on their part the terms and conditions of the said treaty shall receive compensation in the way of reserves of land, payments, annuities and presents, in manner similar to that set forth in the several respects for the Indians in the said treaty; it being understood, however, that any sum expended annually by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Half-breeds shall not be taken out of the fifteen hundred dollars set apart by the treaty for the purchase annually of those articles for the Indians, but shall be in addition thereto, and shall be a pro rata amount in the proportion of the number of Half-breeds parties hereto to the number of Indians embraced in the treaty; and it being further understood that the said Half-breeds shall be entitled to all the benefits of the said treaty as from the date thereof, as regards payments and annuities, in the same manner as if they had been present and had become parties to the same at the time of the making thereof.

And whereas the said Half-breeds desire the land set forth as tracts marked (A) and (B) on the rough diagram attached hereto, and marked with the initials of the parties aforementioned to this agreement, as their reserves (in all eighteen square miles), to which they would be entitled under the provisions of the treaty, the same is hereby agreed to on the part of the Government.

Should this agreement be approved by the Government, the reserves as above to be surveyed in due course.

Signed at Fort Francis, the day and date above mentioned, in presence of us as witnesses: A. R. TILLIE,
CHAS. S. CROWE,
W. B. RICHARDSON,
L. KITTSON.

J. S. DENNIS,
[L.S.]
NICHOLAS CHATELAINE.
[L.S.]
his x mark

ADHESION OF LAC SEUL INDIANS TO TREATY No. 3

LAC SEUL, 9th June, 1874.

We, the Chiefs and Councillors of Lac Seul, Seul, Trout and Sturgeon Lakes, subscribe and set our marks, that we and our followers will abide by the articles of the Treaty made and concluded with the Indians at the North West Angle of the Lake of the Woods, on the third day of October, in the year of Our Lord one thousand eight hundred and seventy-three, between Her Most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners, Hon. Alexander Morris, Lieutenant Governor of Manitoba and the North-West Territories, Joseph Albert N. Provencher, and Simon J. Dawson, of the one part, and the Saulteaux tribes of Ojibewas Indians, inhabitants of the country as defined by the Treaty aforesaid.

IN WITNESS WHEREOF, Her Majesty's Indian Agent and the Chiefs and Councillors have hereto set their hands at Lac Seul, on the 9th day of June, 1874.

(Signed) ACKEMENCE,
Councillors.
his x mark
MAINEETAINEQUIRE,
his x mark
NAH-KEE-JECKWAHE,
his x mark

R. J. N. PITHER,
Indian Agent.
JOHN CROMARTY,
Chief.
his x mark

The whole Treaty explained by
R. J. N. PITHER.

Witnesses:
(Signed) JAMES McKENZIE.
LOUIS KITTSON.
NICHOLAS CHATELAINE.
his x mark

Date Modified:2008-11-03

TAB 2

Minister of Forests and Attorney General of British Columbia on behalf of Her Majesty The Queen in Right of the Province of British Columbia *Appellants*

v.

Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation *Respondents*

and between

Weyerhaeuser Company Limited *Appellant*

v.

Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General for Saskatchewan, Attorney General of Alberta, Squamish Indian Band and Lax-kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries, Mining Association of British Columbia,

Ministre des Forêts et procureur général de la Colombie-Britannique au nom de Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Appelants*

c.

Conseil de la Nation haïda et Guujaaw, en leur propre nom et au nom des membres de la Nation haïda *Intimés*

et entre

Weyerhaeuser Company Limited *Appelante*

c.

Conseil de la Nation haïda et Guujaaw, en leur propre nom et au nom des membres de la Nation haïda *Intimés*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général du Québec, procureur général de la Nouvelle-Écosse, procureur général de la Saskatchewan, procureur général de l'Alberta, Bande indienne de Squamish et Bande indienne des Lax-kw'alaams, Nation haisla, Sommet des Premières nations, Première nation Dene Tha', Tenimgyet, aussi connu sous le nom d'Art Matthews, chef héréditaire Gitxsan, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of

British Columbia Cattlemen's Association and Village of Port Clements *Interveners*

INDEXED AS: HAIDA NATION v. BRITISH COLUMBIA (MINISTER OF FORESTS)

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — Whether duty extends to third party.

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a "Tree Farm License" (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

Held: The Crown's appeal should be dismissed. Weyerhaeuser Co.'s appeal should be allowed.

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which

Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association et Village de Port Clements *Intervenants*

RÉPERTORIÉ : NATION HAÏDA c. COLOMBIE-BRITANNIQUE (MINISTRE DES FORÊTS)

Référence neutre : 2004 CSC 73.

N° du greffe : 29419.

2004 : 24 mars; 2004 : 18 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Couronne — Honneur de la Couronne — Obligation de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations — La Couronne a-t-elle envers les peuples autochtones une obligation de consultation et d'accommodement avant de prendre une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et titres ancestraux non encore prouvées? — L'obligation vise-t-elle aussi les tiers?

Depuis plus de 100 ans, les Haïda revendiquent un titre sur les terres des îles Haïda Gwaii et les eaux les entourant; ce titre n'a pas encore été juridiquement reconnu. En 1961, la province de la Colombie-Britannique a délivré à une grosse compagnie forestière une « concession de ferme forestière » (CFF 39) l'autorisant à récolter des arbres dans la région des îles Haïda Gwaii connue sous le nom de Bloc 6. En 1981, en 1995 et en l'an 2000, le ministre a remplacé la CFF 39 et en 1999 il a autorisé la cession de la CFF 39 à Weyerhaeuser Co. Les Haïda ont contesté devant les tribunaux ces remplacements et cette cession, qui ont été effectués sans leur consentement et, depuis 1994 au moins, en dépit de leurs objections. Ils demandent leur annulation. Le juge en son cabinet a rejeté la demande, mais a conclu que le gouvernement a l'obligation morale, mais non légale, de négocier avec les Haïda. La Cour d'appel a infirmé cette décision, déclarant que le gouvernement et Weyerhaeuser Co. ont tous deux l'obligation de consulter les Haïda et de trouver des accommodements à leurs préoccupations.

Arrêt : Le pourvoi de la Couronne est rejeté. Le pourvoi de Weyerhaeuser Co. est accueilli.

Il est loisible aux Haïda de demander une injonction interlocutoire, mais ce n'est pas leur seul recours. Par

may fail to adequately take account of their interests prior to final determination thereof. If they can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue other available remedies.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, 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. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

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. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. 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 people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably

ailleurs, il est possible que l'injonction interlocutoire ne tienne pas suffisamment compte de leurs intérêts avant qu'une décision définitive soit rendue au sujet de ceux-ci. S'ils sont en mesure d'établir l'existence d'une obligation particulière donnant naissance à l'obligation de consulter ou d'accommoder, ils sont libres de demander l'application de ces mesures.

L'obligation du gouvernement de consulter les peuples autochtones et de trouver des accommodements à leurs intérêts découle du principe de l'honneur de la Couronne, auquel il faut donner une interprétation généreuse. Bien que les droits et titre ancestraux revendiqués, mais non encore définis ou prouvés, ne soient pas suffisamment précis pour que l'honneur de la Couronne oblige celle-ci à agir comme fiduciaire, cette dernière, si elle entend agir honorablement, ne peut traiter cavalièrement les intérêts autochtones qui font l'objet de revendications sérieuses dans le cadre du processus de négociation et d'établissement d'un traité. L'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà de la reconnaissance formelle des revendications. L'objectif de conciliation ainsi que l'obligation de consultation, laquelle repose sur l'honneur de la Couronne, tendent à indiquer que cette obligation prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci. La prise de mesures de consultation et d'accommodement avant le règlement définitif d'une revendication permet de protéger les intérêts autochtones et constitue même un aspect essentiel du processus honorable de conciliation imposé par l'art. 35 de la *Loi constitutionnelle de 1982*.

L'étendue de l'obligation dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre. La Couronne n'a pas l'obligation de parvenir à une entente mais plutôt de mener de bonne foi de véritables consultations. Le contenu de l'obligation varie selon les circonstances et il faut procéder au cas par cas. La question décisive dans toutes les situations consiste à déterminer ce qui est nécessaire pour préserver l'honneur de la Couronne et pour concilier les intérêts de la Couronne et ceux des Autochtones. Des consultations menées de bonne foi peuvent faire naître l'obligation d'accommodement. Lorsque des mesures d'accommodement sont nécessaires lors de la prise d'une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et de titre ancestraux non encore prouvées, la Couronne doit établir un équilibre

with the potential impact of the decision on the asserted right or title and with other societal interests.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples.

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case. The Haida's claims to title and Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential Aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims.

Cases Cited

Applied: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; **referred to:** *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996]

raisonnable entre les préoccupations des Autochtones, d'une part, et l'incidence potentielle de la décision sur le droit ou titre revendiqué et les autres intérêts sociétaux, d'autre part.

Les tiers ne peuvent être jugés responsables de ne pas avoir rempli l'obligation de consultation et d'accommodement qui incombe à la Couronne. Le respect du principe de l'honneur de la Couronne ne peut être délégué, et la responsabilité juridique en ce qui a trait à la consultation et à l'accommodement incombe à la Couronne. Toutefois, cela ne signifie pas que des tiers ne peuvent jamais être tenus responsables envers des peuples autochtones.

Enfin, l'obligation de consultation et d'accommodement s'applique au gouvernement provincial. Les intérêts acquis par la province sur les terres lors de l'Union sont subordonnés à tous intérêts autres que ceux que peut y avoir la province. Comme l'obligation de consulter et d'accommoder qui est en litige dans la présente affaire est fondée sur l'affirmation par la province, avant l'Union, de sa souveraineté sur le territoire visé, la province a acquis les terres sous réserve de cette obligation.

En l'espèce, la Couronne avait l'obligation de consulter les Haïda au sujet du remplacement de la CFF 39. Les revendications par les Haïda du titre et du droit ancestral de récolter du cèdre rouge étaient étayées par une preuve à première vue valable, et la province savait que les droits et titre ancestraux potentiels visaient le Bloc 6 et qu'ils pouvaient être touchés par la décision de remplacer la CFF 39. Les décisions rendues à l'égard des CFF reflètent la planification stratégique touchant l'utilisation de la ressource en cause et risquent d'avoir des conséquences graves sur les droits ou titres ancestraux. Pour que les consultations soient utiles, elles doivent avoir lieu à l'étape de l'octroi ou du renouvellement de la CFF. De plus, la solidité de la preuve étayant l'existence d'un titre haïda et d'un droit haïda autorisant la récolte du cèdre rouge, conjuguée aux répercussions sérieuses sur ces intérêts des décisions stratégiques successives, indique que l'honneur de la Couronne pourrait bien commander des mesures d'accommodement substantielles pour protéger les intérêts des Haïda en attendant que leurs revendications soient réglées.

Jurisprudence

Arrêt appliqué : *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; **arrêts mentionnés :** *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. Badger*, [1996] 1 R.C.S. 771; *R. c. Marshall*, [1999] 3 R.C.S. 456; *Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245, 2002 CSC 79; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Nikal*, [1996] 1

frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

compte d'un droit ou de la justification de ses limites sans avoir une idée de l'essence de ce droit et de sa portée actuelle ». Cependant, il est souvent possible de se faire, à l'égard des droits revendiqués et de leur solidité, une idée suffisamment précise pour que l'obligation de consulter et d'accommoder s'applique, même si ces droits n'ont pas fait l'objet d'un règlement définitif ou d'une décision judiciaire finale. Pour faciliter cette détermination, les demandeurs devraient exposer clairement leurs revendications, en insistant sur la portée et la nature des droits ancestraux qu'ils revendiquent ainsi que sur les violations qu'ils allèguent. C'est ce qui s'est produit en l'espèce, lorsque le juge en son cabinet a procédé à une évaluation préliminaire, fondée sur la preuve, de la solidité des revendications des Haïda à l'égard des terres et des ressources des îles Haïda Gwaii, en particulier du Bloc 6.

37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

Il y a une différence entre une connaissance suffisante pour entraîner l'application de l'obligation de consulter et, s'il y a lieu, d'accommoder, et le contenu ou l'étendue de cette obligation dans une affaire donnée. La connaissance d'une revendication crédible mais non encore établie suffit à faire naître l'obligation de consulter et d'accommoder. Toutefois, le contenu de l'obligation varie selon les circonstances, comme nous le verrons de façon plus approfondie plus loin. Une revendication douteuse ou marginale peut ne requérir qu'une simple obligation d'informer, alors qu'une revendication plus solide peut faire naître des obligations plus contraignantes. Il est possible en droit de différencier les revendications reposant sur une preuve ténue des revendications reposant sur une preuve à première vue solide et de celles déjà établies. Les parties peuvent examiner la question et, si elles ne réussissent pas à s'entendre, les tribunaux administratifs et judiciaires peuvent leur venir en aide. Il faut régler les problèmes liés à l'absence de preuve et de définition des revendications en délimitant l'obligation de façon appropriée et non en niant son existence.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest

J'estime que, bien que le respect des obligations de consultation et d'accommodement avant le règlement définitif d'une revendication ne soit pas sans poser de problèmes, de telles mesures ne sont toutefois pas impossibles et constituent même un aspect

pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. *The Scope and Content of the Duty to Consult and Accommodate*

The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

In *Delgamuukw*, *supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

essentiel du processus honorable de conciliation imposé par l'art. 35. Elles protègent les intérêts autochtones jusqu'au règlement des revendications et favorisent le développement entre les parties d'une relation propice à la négociation, processus à privilégier pour parvenir finalement à la conciliation : voir S. Lawrence et P. Macklem, « From Consultation to Reconciliation : Aboriginal Rights and the Crown's Duty to Consult » (2000), 79 *R. du B. can.* 252, p. 262. Les mesures précises que doit prendre le gouvernement peuvent varier selon la solidité de la revendication et les circonstances, mais elles doivent à tout le moins être compatibles avec l'honneur de la Couronne.

D. *L'étendue et le contenu de l'obligation de consulter et d'accommoder*

39 Le contenu de l'obligation de consulter et d'accommoder varie selon les circonstances. La nature précise des obligations qui naissent dans différentes situations sera définie à mesure que les tribunaux se prononceront sur cette nouvelle question. En termes généraux, il est néanmoins possible d'affirmer que l'étendue de l'obligation dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre.

40 Dans *Delgamuukw*, précité, par. 168, la Cour a examiné l'obligation de consulter et d'accommoder dans le contexte de revendications dont le bien-fondé a été établi. Le juge en chef Lamer a écrit :

> La nature et l'étendue de l'obligation de consultation dépendront des circonstances. Occasionnellement, lorsque le manquement est moins grave ou relativement mineur, il ne s'agira de rien de plus que la simple obligation de discuter des décisions importantes qui seront prises au sujet des terres détenues en vertu d'un titre aborigène. Évidemment, même dans les rares cas où la norme minimale acceptable est la consultation, celle-ci doit être menée de bonne foi, dans l'intention de tenir compte réellement des préoccupations des peuples autochtones dont les terres sont en jeu. Dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Certaines situations pourraient même exiger l'obtention du consentement d'une nation autochtone, particulièrement lorsque des provinces prennent des règlements de chasse et de pêche visant des territoires autochtones.

41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty

La transposition de ce passage dans le contexte des revendications non encore établies permet d'avancer ce qui suit. Bien qu'il ne soit pas utile de classer les situations dans des compartiments étanches, il est possible d'identifier différentes situations appelant des solutions différentes. Dans tous les cas, le principe de l'honneur de la Couronne commande que celle-ci agisse de bonne foi et tienne une véritable consultation, qui soit appropriée eu égard aux circonstances. Lorsque vient le temps de s'acquitter de cette obligation, les garanties procédurales de justice naturelle exigées par le droit administratif peuvent servir de guide.

À toutes les étapes, les deux parties sont tenues de faire montre de bonne foi. Le fil conducteur du côté de la Couronne doit être « l'intention de tenir compte réellement des préoccupations [des Autochtones] » à mesure qu'elles sont exprimées (*Delgamuukw*, précité, par. 168), dans le cadre d'un véritable processus de consultation. Les manœuvres malhonnêtes sont interdites. Cependant, il n'y a pas obligation de parvenir à une entente mais plutôt de procéder à de véritables consultations. Quant aux demandeurs autochtones, ils ne doivent pas contrecarrer les efforts déployés de bonne foi par la Couronne et ne devraient pas non plus défendre des positions déraisonnables pour empêcher le gouvernement de prendre des décisions ou d'agir dans les cas où, malgré une véritable consultation, on ne parvient pas à s'entendre : voir *Halfway River First Nation c. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (C.A.C.-B.), p. 44; *Heiltsuk Tribal Council c. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (C.S.C.-B.). Toutefois, le seul fait de négocier de façon serrée ne porte pas atteinte au droit des Autochtones d'être consultés.

Sur cette toile de fond, je vais maintenant examiner le type d'obligations qui peuvent découler de différentes situations. À cet égard, l'utilisation de la notion de continuum peut se révéler utile, non pas pour créer des compartiments juridiques étanches, mais plutôt pour préciser ce que le principe de l'honneur de la Couronne est susceptible d'exiger dans des circonstances particulières. À une extrémité du continuum se trouvent les cas où la revendication

on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown

de titre est peu solide, le droit ancestral limité ou le risque d'atteinte faible. Dans ces cas, les seules obligations qui pourraient incomber à la Couronne seraient d'aviser les intéressés, de leur communiquer des renseignements et de discuter avec eux des questions soulevées par suite de l'avis. La [TRADUCTION] « "consultation", dans son sens le moins technique, s'entend de l'action de se parler dans le but de se comprendre les uns les autres » : T. Isaac et A. Knox, « The Crown's Duty to Consult Aboriginal People » (2003), 41 *Alta. L. Rev.* 49, p. 61.

44 À l'autre extrémité du continuum on trouve les cas où la revendication repose sur une preuve à première vue solide, où le droit et l'atteinte potentielle sont d'une haute importance pour les Autochtones et où le risque de préjudice non indemnisable est élevé. Dans de tels cas, il peut s'avérer nécessaire de tenir une consultation approfondie en vue de trouver une solution provisoire acceptable. Quoique les exigences précises puissent varier selon les circonstances, la consultation requise à cette étape pourrait comporter la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision. Cette liste n'est pas exhaustive et ne doit pas nécessairement être suivie dans chaque cas. Dans les affaires complexes ou difficiles, le gouvernement peut décider de recourir à un mécanisme de règlement des différends comme la médiation ou un régime administratif mettant en scène des décideurs impartiaux.

45 Entre les deux extrémités du continuum décrit précédemment, on rencontrera d'autres situations. Il faut procéder au cas par cas. Il faut également faire preuve de souplesse, car le degré de consultation nécessaire peut varier à mesure que se déroule le processus et que de nouveaux renseignements sont mis au jour. La question décisive dans toutes les situations consiste à déterminer ce qui est nécessaire pour préserver l'honneur de la Couronne et pour concilier les intérêts de la Couronne et ceux des Autochtones. Tant que la question n'est pas réglée, le principe de l'honneur de la Couronne commande que celle-ci mette en balance les

may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Mäori* (1997) provides insight (at pp. 21 and 31):

> 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 finalised
> - seeking Mäori opinion on those proposals
> - informing Mäori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Mäori have to say
> - being prepared to alter the original proposal
> - providing feedback both during the consultation process and after the decision-process.

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim,

intérêts de la société et ceux des peuples autochtones lorsqu'elle prend des décisions susceptibles d'entraîner des répercussions sur les revendications autochtones. Elle peut être appelée à prendre des décisions en cas de désaccord quant au caractère suffisant des mesures qu'elle adopte en réponse aux préoccupations exprimées par les Autochtones. Une attitude de pondération et de compromis s'impose alors.

À la suite de consultations véritables, la Couronne pourrait être amenée à modifier la mesure envisagée en fonction des renseignements obtenus lors des consultations. Le *Guide for Consultation with Mäori* (1997) du ministère de la Justice de la Nouvelle-Zélande fournit des indications sur la question (aux p. 21 et 31):

> [TRADUCTION] La consultation n'est pas seulement un simple mécanisme d'échange de renseignements. Elle comporte également des mises à l'épreuve et la modification éventuelle des énoncés de politique compte tenu des renseignements obtenus ainsi que la rétroaction. Elle devient donc un processus grâce auquel les deux parties sont mieux informées . . .
>
> . . .
>
> . . . de véritables consultations s'entendent d'un processus qui consiste . . . :
>
> - à recueillir des renseignements pour mettre à l'épreuve les énoncés de politique;
> - à proposer des énoncés qui ne sont pas encore arrêtés définitivement;
> - à chercher à obtenir l'opinion des Mäoris sur ces énoncés;
> - à informer les Mäoris de tous les renseignements pertinents sur lesquels reposent ces énoncés;
> - à écouter avec un esprit ouvert ce que les Mäoris ont à dire sans avoir à en faire la promotion;
> - à être prêt à modifier l'énoncé original;
> - à fournir une rétroaction tant au cours de la consultation qu'après la prise de décision.

S'il ressort des consultations que des modifications à la politique de la Couronne s'imposent, il faut alors passer à l'étape de l'accommodement. Des consultations menées de bonne foi peuvent donc faire naître l'obligation d'accommoder. Lorsque la

and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: ". . . the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

revendication repose sur une preuve à première vue solide et que la décision que le gouvernement entend prendre risque de porter atteinte de manière appréciable aux droits visés par la revendication, l'obligation d'accommodement pourrait exiger l'adoption de mesures pour éviter un préjudice irréparable ou pour réduire au minimum les conséquences de l'atteinte jusqu'au règlement définitif de la revendication sous-jacente. L'accommodement est le fruit des consultations, comme la Cour l'a reconnu dans *R. c. Marshall*, [1999] 3 R.C.S. 533, par. 22 : « . . . il est préférable de réaliser la prise en compte du droit issu du traité par des consultations et par la négociation ».

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

48 Ce processus ne donne pas aux groupes autochtones un droit de veto sur les mesures susceptibles d'être prises à l'égard des terres en cause en attendant que la revendication soit établie de façon définitive. Le « consentement » dont il est question dans *Delgamuukw* n'est nécessaire que lorsque les droits invoqués ont été établis, et même là pas dans tous les cas. Ce qu'il faut au contraire, c'est plutôt un processus de mise en balance des intérêts, de concessions mutuelles.

This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

49 Cette conclusion découle du sens des termes « accommoder » et « accommodement », définis respectivement ainsi : « **Accommoder qqc. à.** L'adapter à, la mettre en correspondance avec quelque chose . . . » et « Action, résultat de l'action d'accommoder (ou de s'accommoder); moyen employé en vue de cette action. [. . .] Action de (se) mettre ou fait d'être en accord avec quelqu'un; règlement à l'amiable, transaction » (*Trésor de la langue française*, t. 1, 1971, p. 391 et 388). L'accommodement susceptible de résulter de consultations menées avant l'établissement du bien-fondé de la revendication correspond exactement à cela : la recherche d'un compromis dans le but d'harmoniser des intérêts opposés et de continuer dans la voie de la réconciliation. L'engagement à suivre le processus n'emporte pas l'obligation de se mettre d'accord, mais exige de chaque partie qu'elle s'efforce de bonne foi à comprendre les préoccupations de l'autre et à y répondre.

The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised

50 La jurisprudence de la Cour confirme cette conception d'accommodement. Dans *Sparrow*, la Cour

the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

a évoqué cette notion, insistant sur la nécessité d'établir un équilibre entre des intérêts sociétaux opposés et les droits ancestraux et issus de traités des Autochtones. Dans *R. c. Sioui*, [1990] 1 R.C.S. 1025, p. 1072, la Cour a affirmé qu'il incombe à la Couronne de prouver que son occupation des terres « ne peut s'accommoder de l'exercice raisonnable des droits des Hurons ». Et, dans *R. c. Côté*, [1996] 3 R.C.S. 139, par. 81, la Cour s'est demandé si les restrictions imposées aux droits ancestraux « [étaient] conciliable[s] avec les rapports spéciaux de fiduciaire de l'État à l'égard des premières nations ». La mise en équilibre et le compromis font partie intégrante de la notion de conciliation. Lorsque l'accommodement est nécessaire à l'occasion d'une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et de titre ancestraux non encore prouvées, la Couronne doit établir un équilibre raisonnable entre les préoccupations des Autochtones, d'une part, et l'incidence potentielle de la décision sur le droit ou titre revendiqué et les autres intérêts sociétaux, d'autre part.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

Il est loisible aux gouvernements de mettre en place des régimes de réglementation fixant les exigences procédurales applicables aux différents problèmes survenant à différentes étapes, et ainsi de renforcer le processus de conciliation et réduire le recours aux tribunaux. Comme il a été mentionné dans *R. c. Adams*, [1996] 3 R.C.S. 101, par. 54, le gouvernement « ne peut pas se contenter d'établir un régime administratif fondé sur l'exercice d'un pouvoir discrétionnaire non structuré et qui, en l'absence d'indications explicites, risque de porter atteinte aux droits ancestraux dans un nombre considérable de cas ». Il convient de souligner que, depuis octobre 2002, la Colombie-Britannique dispose d'une politique provinciale de consultation des Premières nations établissant les modalités d'application des lignes directrices opérationnelles des ministères et organismes provinciaux. Même si elle ne constitue pas un régime de réglementation, une telle politique peut néanmoins prévenir l'exercice d'un pouvoir discrétionnaire non structuré et servir de guide aux décideurs.

E. *Do Third Parties Owe a Duty to Consult and Accommodate?*

The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

It is suggested (*per* Lambert J.A.) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

It is also suggested (*per* Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of "knowing receipt". However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests.

E. *Les tiers ont-ils l'obligation de consulter et d'accommoder?*

52 La Cour d'appel a conclu que Weyerhaeuser, l'entreprise forestière détenant la CFF 39, avait l'obligation de consulter les Haïda et de trouver des accommodements à leurs préoccupations. En toute déférence, je ne puis souscrire à cette conclusion.

53 Il a été dit (le juge Lambert de la Cour d'appel) qu'un tiers peut être tenu de consulter les Autochtones concernés du fait qu'il a la faculté, en cas de violation des droits de ces derniers, de plaider en défense que l'atteinte est justifiée. Comme nous l'avons vu, cependant, l'obligation de consulter et d'accommoder découle de la proclamation de la souveraineté de la Couronne sur des terres et ressources autrefois détenues par le groupe autochtone concerné. Cette théorie ne permet pas de conclure que les tiers ont l'obligation de consulter ou d'accommoder. La Couronne demeure seule légalement responsable des conséquences de ses actes et de ses rapports avec des tiers qui ont une incidence sur des intérêts autochtones. Elle peut déléguer certains aspects procéduraux de la consultation à des acteurs industriels qui proposent des activités d'exploitation; cela n'est pas rare en matière d'évaluations environnementales. Ainsi, la CFF 39 obligeait Weyerhaeuser à préciser les mesures qu'elle entendait prendre pour identifier et consulter les [TRADUCTION] « Autochtones qui revendiquaient un intérêt ancestral dans la région » (CFF 39, CFF haïda, paragraphe 2.09g)(ii)). Cependant, la responsabilité juridique en ce qui a trait à la consultation et à l'accommodement incombe en dernier ressort à la Couronne. Le respect du principe de l'honneur de la Couronne ne peut être délégué.

54 Il a également été avancé (le juge Lambert de la Cour d'appel) que les tiers pourraient être assujettis à l'obligation de consulter et d'accommoder par l'effet de la doctrine du droit des fiducies appelée « réception en connaissance de cause ». Cependant, comme nous l'avons vu, même si les obligations de fiduciaire de la Couronne et son obligation de consulter et d'accommoder découlent toutes du principe que l'honneur de la Couronne est en jeu dans ses rapports avec les peuples autochtones, l'obligation de

As noted earlier, the Court cautioned in *Wewaykum* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, made it clear that the "trust-like" relationship between the Crown and Aboriginal peoples is not a true "trust", noting that "[t]he law of trusts is a highly developed, specialized branch of the law" (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it

consulter est différente de l'obligation de fiduciaire qui existe à l'égard de certains intérêts autochtones reconnus. Comme il a été indiqué plus tôt, la Cour a souligné, dans *Wewaykum*, qu'il fallait se garder de supposer l'existence d'une obligation générale de fiduciaire régissant tous les aspects des rapports entre la Couronne et les peuples autochtones. En outre, dans *Guerin c. La Reine*, [1984] 2 R.C.S. 335, la Cour a clairement dit que la relation « semblable à une fiducie » qui existe entre la Couronne et les peuples autochtones n'est pas une vraie « fiducie », faisant observer que « [l]e droit des fiducies constitue un domaine juridique très perfectionné et spécialisé » (p. 386). Il n'y a aucune raison d'introduire la doctrine de la réception en connaissance de cause dans la relation spéciale qui existe entre la Couronne et les peuples autochtones. Il n'est pas certain non plus qu'une entreprise en vertu d'une concession de la Couronne puisse être assimilée à une personne qui, en toute connaissance de cause, divertit à son profit des fonds en fiducie.

Enfin, il a été affirmé (le juge Finch, juge en chef de la C.-B.) que, pour qu'il soit possible d'accorder une réparation efficace, il faudrait considérer que les tiers sont tenus à l'obligation. La première difficulté que comporte cette affirmation réside dans le fait que la réparation ne détermine pas la responsabilité. Ce n'est qu'une fois la question de la responsabilité tranchée que se soulève la question de la réparation. Il ne faut pas mettre la charrue (la réparation) devant les bœufs (la responsabilité). Nous ne pouvons poursuivre une personne riche simplement parce qu'elle a de l'argent plein les poches ou que cela permet d'obtenir le résultat souhaité. La seconde difficulté est qu'il n'est pas certain que le gouvernement ne dispose pas de mécanismes suffisants pour procéder à des mesures de consultation et d'accommodement utiles. En l'espèce, la partie 10 de la CFF 39 prévoit que le ministre des Forêts peut modifier toute concession accordée à Weyerhaeuser pour la rendre conforme aux décisions des tribunaux relativement aux droits ou titres ancestraux. Le gouvernement peut également exiger de Weyerhaeuser qu'elle modifie son plan d'aménagement si le chef des services forestiers le considère inadéquat du fait qu'il porte atteinte à un droit ancestral (paragraphe 2.38d)). Enfin, le

a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" ((2002), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

F. *The Province's Duty*

The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

The Province's argument rests on s. 109 of the *Constitution Act, 1867*, which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces." The Province argues that this gives it exclusive right to the land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do

gouvernement peut exercer son autorité sur la question par voie législative, comme il l'a fait en édictant la *Forestry Revitalization Act*, S.B.C. 2003, ch. 17, qui permet de récupérer 20 pour 100 du droit de coupe des titulaires de concession, en partie pour mettre des terres à la disposition des peuples autochtones. De par son pouvoir de légiférer sur les ressources naturelles de la province, le gouvernement provincial dispose d'un outil puissant pour s'acquitter de ses obligations légales, situation qui met en doute l'affirmation du juge en chef Finch de la C.-B. qu'il [TRADUCTION] « ne peut allouer une partie de ce bois d'œuvre aux Haïda sans le consentement ou la collaboration de Weyerhaeuser » ((2002), 5 B.C.L.R. (4th) 33, par. 119). Le fait de ne pas imposer à Weyerhaeuser l'obligation de consulter et d'accommoder ne rend pas la réparation [TRADUCTION] « futile ou illusoire ».

56 Le fait que les tiers n'aient aucune obligation de consulter les peuples autochtones ou de trouver des accommodements à leurs préoccupations ne signifie pas qu'ils ne peuvent jamais être tenus responsables envers ceux-ci. S'ils font preuve de négligence dans des circonstances où ils ont une obligation de diligence envers les peuples autochtones, ou s'ils ne respectent pas les contrats conclus avec les Autochtones ou traitent avec eux d'une manière malhonnête, ils peuvent être tenus légalement responsables. Cependant, les tiers ne peuvent être jugés responsables de ne pas avoir rempli l'obligation de consulter et d'accommoder qui incombe à la Couronne.

F. *L'obligation de la province*

57 La province de la Colombie-Britannique soutient que l'obligation de consulter ou d'accommoder, si elle existe, incombe uniquement au gouvernement fédéral. Je ne peux accepter cet argument.

58 L'argument de la province repose sur l'art. 109 de la *Loi constitutionnelle de 1867*, qui dispose que « [t]outes les terres, mines, minéraux et réserves royales appartenant aux différentes provinces du Canada [. . .] lors de l'union [. . .] appartiendront aux différentes provinces. » Selon la province, cette disposition lui confère des droits exclusifs sur les terres en question. Ce droit, affirme-t-elle, ne peut être limité par la protection accordée aux

TAB 3

Norm Ringstad, in his capacity as the Project Assessment Director of the Tulsequah Chief Mine Project, Sheila Wynn, in her capacity as the Executive Director, Environmental Assessment Office, the Minister of Environment, Lands and Parks, and the Minister of Energy and Mines and Minister Responsible for Northern Development *Appellants*

v.

Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation, Redfern Resources Ltd., and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd. *Respondents*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia, Aggregate Producers Association of British Columbia, Doig River First Nation, First Nations Summit, and Union of British Columbia Indian Chiefs *Interveners*

INDEXED AS: TAKU RIVER TLINGIT FIRST NATION *v.* BRITISH COLUMBIA (PROJECT ASSESSMENT DIRECTOR)

Norm Ringstad, en sa qualité de directeur d'évaluation de projet pour le Projet de la mine Tulsequah Chief, Sheila Wynn, en sa qualité de directrice administrative, Bureau des évaluations environnementales, le ministre de l'Environnement, des Terres et des Parcs, et le ministre de l'Énergie et des Mines et ministre responsable du Développement du Nord *Appelants*

c.

Première nation Tlingit de Taku River et Melvin Jack, en son propre nom et au nom de tous les autres membres de la Première nation Tlingit de Taku River, Redfern Resources Ltd., et Redcorp Ventures Ltd. auparavant connue sous le nom de Redfern Resources Ltd. *Intimés*

et

Procureur général du Canada, procureur général du Québec, procureur général de l'Alberta, Business Council of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, British Columbia Wildlife Federation, Council of Forest Industries, Mining Association of British Columbia, Aggregate Producers Association of British Columbia, Première nation de Doig River, Sommet des Premières nations et Union of British Columbia Indian Chiefs *Intervenants*

RÉPERTORIÉ : PREMIÈRE NATION TLINGIT DE TAKU RIVER *c.* COLOMBIE-BRITANNIQUE (DIRECTEUR D'ÉVALUATION DE PROJET)

Neutral citation: 2004 SCC 74.

File No.: 29146.

2004: March 24; 2004: November 18.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate Aboriginal peoples prior to making decisions that might adversely affect their as yet unproven Aboriginal rights and title claims — If so, whether consultation and accommodation engaged in by Province prior to issuing project approval certificate was adequate to satisfy honour of Crown.

Since 1994, a mining company has sought permission from the British Columbia government to re-open an old mine. The Taku River Tlingit First Nation ("TRTFN"), which participated in the environmental assessment process engaged in by the Province under the *Environmental Assessment Act*, objected to the company's plan to build a road through a portion of the TRTFN's traditional territory. The Province granted the project approval certificate in 1998. The TRTFN brought a petition to quash the decision on grounds based on administrative law and on its Aboriginal rights and title. The chambers judge concluded that the decision makers had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the TRTFN's concerns. She set aside the decision and directed a reconsideration. The majority of the Court of Appeal upheld the decision, finding that the Province had failed to meet its duty to consult with and accommodate the TRTFN.

Held: The appeal should be allowed.

The Crown's duty to consult and accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title, is grounded in the principle of the honour of the Crown, which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. The Crown's honour cannot be interpreted

Référence neutre : 2004 CSC 74.

N° du greffe : 29146.

2004 : 24 mars; 2004 : 18 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Couronne — Honneur de la Couronne — Obligation de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations — La Couronne a-t-elle l'obligation de consulter les peuples autochtones et de trouver des accommodements à leurs préoccupations avant de prendre une décision susceptible d'avoir un effet préjudiciable sur des revendications de droits et titres ancestraux non encore prouvées? — Dans l'affirmative, les mesures de consultation et d'accommodement adoptées par la province avant de délivrer le certificat d'approbation de projet étaient-elles suffisantes pour préserver l'honneur de la Couronne?

Depuis 1994, une entreprise d'exploitation minière demande au gouvernement de la Colombie-Britannique l'autorisation de rouvrir une vieille mine. La Première nation Tlingit de Taku River (« PNTTR »), qui a participé à l'évaluation environnementale effectuée par la province conformément à l'*Environmental Assessment Act*, s'est opposée au projet de l'entreprise de construire une route sur une partie de son territoire traditionnel. La province a octroyé le certificat d'approbation de projet en 1998. Invoquant des moyens fondés sur le droit administratif et sur son titre et ses droits ancestraux, la PNTTR a présenté une demande visant à faire annuler la décision. La juge en son cabinet a conclu que les décideurs n'avaient fait preuve de suffisamment de prudence durant les derniers mois de l'évaluation afin de s'assurer qu'ils avaient bien répondu à l'essentiel des préoccupations de la PNTTR. Elle a annulé la décision et a ordonné le réexamen de la demande. La majorité de la Cour d'appel a confirmé la décision, concluant que la province ne s'était pas acquittée de son obligation de consulter la PNTTR et de trouver des accommodements aux préoccupations de cette dernière.

Arrêt : Le pourvoi est accueilli.

L'obligation de la Couronne de consulter les peuples autochtones et, s'il y a lieu, de trouver des accommodements à leurs préoccupations, même avant que l'existence des droits et titre ancestraux revendiqués n'ait été établie, repose sur le principe de l'honneur de la Couronne, qui découle de l'affirmation de la souveraineté de la

narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) of the *Constitution Act, 1982*. The duty to consult varies with the circumstances. It arises when a Crown actor has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This in turn may lead to a duty to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation. The scope of the duty to consult is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's title and rights claims and knew that the decision to reopen the mine had the potential to adversely affect the substance of the TRTFN's claims. The TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its inclusion in the Province's treaty negotiation process. While the proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation. It is impossible, however, to provide a prospective checklist of the level of consultation required.

In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty to consult and accommodate. The TRTFN was 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 measures designed to address both its immediate and its long-term concerns. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN. Finally, it is expected that, throughout the permitting, approval and licensing process, as well as in the

Couronne face à l'occupation antérieure des terres par les peuples autochtones. Le principe de l'honneur de la Couronne ne peut recevoir une interprétation étroite ou formaliste. Au contraire, il convient de lui donner plein effet afin de promouvoir le processus de conciliation prescrit par le par. 35(1) de la *Loi constitutionnelle de 1982*. L'obligation de consulter varie selon les circonstances. Elle naît lorsqu'un représentant de la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle d'un droit ou titre ancestral et envisage des mesures susceptibles d'avoir un effet préjudiciable sur ce droit ou ce titre. Cette obligation peut, à son tour, donner lieu à l'obligation de trouver des accommodements aux préoccupations des Autochtones. La volonté de répondre aux préoccupations est un élément clé tant à l'étape de la consultation qu'à celle de l'accommodement. L'étendue de l'obligation de consultation dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou titre.

En l'espèce, la Couronne avait l'obligation de consulter la PNTTR. La province était au courant des revendications de titre et de droits de la PNTTR et elle savait que la décision de rouvrir la mine pouvait avoir un effet préjudiciable sur le fond de ses revendications. Les revendications de la PNTTR sont relativement solides et à première vue fondées, comme le démontre le fait qu'elles ont été acceptées en vue de la négociation d'un traité. La route proposée n'occupe qu'une petite partie du territoire sur lequel la PNTTR revendique un titre; toutefois, le risque de conséquences négatives sur les revendications est élevé. En ce qui concerne le niveau de consultation que requiert le principe de l'honneur de la Couronne, la PNTTR avait droit à davantage que le minimum prescrit dans les circonstances et elle avait le droit de s'attendre à une volonté de répondre à ses préoccupations qui puisse être qualifiée d'accommodement. Il est cependant impossible de déterminer à l'avance le niveau de consultation requis.

En l'espèce, la province s'est acquittée de son obligation de consultation et d'accommodement en engageant le processus prévu à l'*Environmental Assessment Act*. La PNTTR faisait partie du comité d'examen du projet et elle a participé à part entière à l'examen environnemental. Ses vues ont été exposées aux décideurs et le certificat d'approbation du projet final contenait des mesures visant à répondre à ses préoccupations, à court comme à long terme. La province n'avait pas l'obligation de se mettre d'accord avec la PNTTR et le fait qu'elle n'y soit pas parvenue ne constitue pas un manquement à son obligation d'agir de bonne foi avec la PNTTR. Enfin, on s'attend à ce que, à chacune des étapes (permis, licences et

development of a land use strategy, the Crown will continue to fulfill its honourable duty to consult and, if appropriate, accommodate the TRTFN.

Cases Cited

Applied: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

Statutes and Regulations Cited

Constitution Act, 1982, s. 35(1).
Environmental Assessment Act, R.S.B.C. 1996, c. 119 [rep. 2002, c. 43, s. 58], ss. 2, 7, 9, 10, 14 to 18, 19(1), 21, 22, 23, 29, 30(1).
Judicial Review Procedure Act, R.S.B.C. 1996, c. 241.
Mine Development Assessment Act, S.B.C. 1990, c. 55.

APPEAL from a judgment of the British Columbia Court of Appeal (2002), 211 D.L.R. (4th) 89, [2002] 4 W.W.R. 19, 163 B.C.A.C. 164, 267 W.A.C. 164, 98 B.C.L.R. (3d) 16, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, 91 C.R.R. (2d) 260, [2002] B.C.J. No. 155 (QL), 2002 BCCA 59, affirming a decision of the British Columbia Supreme Court (2000), 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209, [2000] B.C.J. No. 1301 (QL), 2000 BCSC 1001. Appeal allowed.

Paul J. Pearlman, Q.C., and *Kathryn L. Kickbush*, for the appellants.

Arthur C. Pape, *Jean Teillet* and *Richard B. Salter*, for the respondents Taku River Tlingit First Nation and Melvin Jack, on behalf of himself and all other members of the Taku River Tlingit First Nation.

Randy J. Kaardal and *Lisa Hynes*, for the respondents Redfern Resources Ltd. and Redcorp Ventures Ltd. formerly known as Redfern Resources Ltd.

Mitchell Taylor and *Brian McLaughlin*, for the intervener the Attorney General of Canada.

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

autres autorisations) ainsi que lors de l'élaboration d'une stratégie d'utilisation des terres, la Couronne continue de s'acquitter honorablement de son obligation de consulter la PNTTR et, s'il y a lieu, de trouver des accommodements aux préoccupations de cette dernière.

Jurisprudence

Arrêt appliqué : *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73; **arrêts mentionnés :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010.

Lois et règlements cités

Environmental Assessment Act, R.S.B.C. 1996, ch. 119 [abr. 2002, ch. 43, art. 58], art. 2, 7, 9, 10, 14 à 18, 19(1), 21, 22, 23, 29, 30(1).
Judicial Review Procedure Act, R.S.B.C. 1996, ch. 241.
Loi constitutionnelle de 1982, art. 35(1).
Mine Development Assessment Act, S.B.C. 1990, ch. 55.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2002), 211 D.L.R. (4th) 89, [2002] 4 W.W.R. 19, 163 B.C.A.C. 164, 267 W.A.C. 164, 98 B.C.L.R. (3d) 16, 42 C.E.L.R. (N.S.) 169, [2002] 2 C.N.L.R. 312, 91 C.R.R. (2d) 260, [2002] B.C.J. No. 155 (QL), 2002 BCCA 59, qui a confirmé une décision de la Cour suprême de la Colombie-Britannique (2000), 77 B.C.L.R. (3d) 310, 34 C.E.L.R. (N.S.) 209, [2000] B.C.J. No. 1301 (QL), 2000 BCSC 1001. Pourvoi accueilli.

Paul J. Pearlman, *c.r.*, et *Kathryn L. Kickbush*, pour les appelants.

Arthur C. Pape, *Jean Teillet* et *Richard B. Salter*, pour les intimés la Première nation Tlingit de Taku River et Melvin Jack, en son propre nom et au nom de tous les autres membres de la Première nation Tlingit de Taku River.

Randy J. Kaardal et *Lisa Hynes*, pour les intimées Redfern Resources Ltd. et Redcorp Ventures Ltd., auparavant connue sous le nom de Redfern Resources Ltd.

Mitchell Taylor et *Brian McLaughlin*, pour l'intervenant le procureur général du Canada.

Pierre-Christian Labeau, pour l'intervenant le procureur général du Québec.

2000 BCSC 1001). She also found in the TRTFN's favour on administrative law grounds. She set aside the decision to issue the Project Approval Certificate and directed a reconsideration, for which she later issued directions.

20 The majority of the British Columbia Court of Appeal dismissed the Province's appeal, finding (*per* Rowles J.A.) that the Province had failed to meet its duty to consult with and accommodate the TRTFN ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59). Southin J.A., dissenting, would have found that the consultation undertaken was adequate on the facts. Both the majority and the dissent appear to conclude that the decision complied with administrative law principles. The Province has appealed to this Court, arguing that no duty to consult exists outside common law administrative principles, prior to proof of an Aboriginal claim. If such a duty does exist, the Province argues, it was met on the facts of this case.

III. Analysis

21 In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, heard concurrently with this case, this Court has confirmed the existence of the Crown's duty to consult and, where indicated, to accommodate Aboriginal peoples prior to proof of rights or title claims. The Crown's obligation to consult the TRTFN was engaged in this case. The Province was aware of the TRTFN's claims through its involvement in the treaty negotiation process, and knew that the decision to reopen the Tulsequah Chief Mine had the potential to adversely affect the substance of the TRTFN's claims.

préoccupations de la PNTTR ((2000), 77 B.C.L.R. (3d) 310, 2000 BCSC 1001). La juge a également donné raison à la PNTTR en ce qui concerne les moyens fondés sur le droit administratif. Elle a annulé la décision accordant le certificat d'approbation du projet et elle a ordonné le réexamen de la demande de permis, réexamen à l'égard duquel elle a plus tard donné des directives.

La majorité de la Cour d'appel de la Colombie-Britannique (sous la plume de la juge Rowles) a rejeté l'appel de la province, concluant que celle-ci ne s'était pas acquittée de son obligation de consulter la PNTTR et de trouver des accommodements aux préoccupations de celle-ci ((2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59). Dissidente, la juge Southin était d'avis que la consultation avait été adéquate au vu des faits. Tant les juges majoritaires que la juge dissidente semblent conclure que la décision était conforme aux principes du droit administratif. La province s'est pourvue devant la Cour, faisant valoir que, sauf application des principes du droit administratif prévus par la common law, il n'existe pas d'obligation de consultation, tant qu'une revendication de droits ancestraux n'a pas été établie. Elle ajoute que, si une telle obligation existe, les faits démontrent qu'elle a été respectée en l'espèce.

III. Analyse

Dans l'affaire *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73, entendue en même temps que le présent pourvoi, la Cour a confirmé l'existence de l'obligation de la Couronne de consulter les peuples autochtones et, s'il y a lieu, de trouver des accommodements aux préoccupations de ceux-ci même avant que n'ait été tranchée une revendication de droits ou de titre. En l'espèce, la Couronne avait l'obligation de consulter la PNTTR. La province était au courant des revendications en raison de la participation de la PNTTR au processus de négociation de traités, et elle savait que la décision de rouvrir la mine Tulsequah Chief pouvait avoir un effet préjudiciable sur le fond des revendications de la PNTTR.

On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN in making the decision to reopen the Tulsequah Chief Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.

A. *Did the Province Have a Duty to Consult and if Indicated Accommodate the TRTFN?*

The Province argues that, before the determination of rights through litigation or conclusion of a treaty, it owes only a common law "duty of fair dealing" to Aboriginal peoples whose claims may be affected by government decisions. It argues that a duty to consult could arise after rights have been determined, through what it terms a "justificatory fiduciary duty". Alternatively, it submits, a fiduciary duty may arise where the Crown has undertaken to act only in the best interests of an Aboriginal people. The Province submits that it owes the TRTFN no duty outside of these specific situations.

The Province's submissions present an impoverished vision of the honour of the Crown and all

Selon les principes analysés dans *Haïda*, il ressort de ces faits que l'honneur de la Couronne commandait que celle-ci consulte la PNTTR avant de décider de rouvrir la mine Tulsequah Chief. En l'espèce, la province s'est acquittée de son obligation en engageant le processus prévu à l'*Environmental Assessment Act*. La PNTTR faisait partie du comité d'examen du projet et elle a participé à part entière à l'examen environnemental. Elle a été déçue, trois ans et demi plus tard, de voir celui-ci prendre fin sur ordre du Bureau des évaluations environnementales. Ses vues ont toutefois été exposées aux ministres et le certificat d'approbation du projet final contenait des mesures visant à répondre à ses préoccupations, à court comme à long terme. La province avait l'obligation de consulter. Elle l'a fait et elle a pris des mesures d'accommodement à l'égard des préoccupations exprimées. Elle n'avait cependant pas l'obligation de se mettre d'accord avec la PNTTR et le fait qu'elle n'y soit pas parvenue ne constitue pas un manquement à son obligation d'agir de bonne foi avec la PNTTR. 22

A. *La province avait-elle l'obligation de consulter la PNTTR et, s'il y a lieu, de trouver des accommodements aux préoccupations de cette dernière?*

La province plaide que, tant que les droits n'ont pas été fixés dans une décision, une procédure judiciaire ou un traité, elle n'a que l'obligation, prévue par la common law, de « négocier honorablement » avec les peuples autochtones dont les revendications risquent d'être touchées par les décisions gouvernementales. Elle affirme que l'obligation de consulter pourrait prendre naissance une fois les droits établis, par l'effet de ce qu'elle appelle une [TRADUCTION] « obligation fiduciaire de justification ». Subsidiairement, elle soutient qu'une obligation fiduciaire peut naître lorsque la Couronne s'engage à agir uniquement dans le meilleur intérêt d'un peuple autochtone. Elle prétend qu'en dehors de ces situations précises elle n'a aucune obligation envers la PNTTR. 23

Les prétentions de la province donnent une vision étroite de l'honneur de la Couronne et de 24

that it implies. As discussed in the companion case of *Haida*, *supra*, the principle of the honour of the Crown grounds the Crown's duty to consult and if indicated accommodate Aboriginal peoples, even prior to proof of asserted Aboriginal rights and title. The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).

25 As discussed in *Haida*, what the honour of the Crown requires varies with the circumstances. It may require the Crown to consult with and accommodate Aboriginal peoples prior to taking decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1119; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168. The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process. Although determining the required extent of consultation and accommodation before a final settlement is challenging, it is essential to the process mandated by s. 35(1). The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key

tout ce que ce principe implique. Comme il a été expliqué dans l'arrêt connexe *Haïda*, précité, l'obligation de la Couronne de consulter les peuples autochtones et, s'il y a lieu, de trouver des accommodements à leurs préoccupations, même avant que l'existence des droits et titres ancestraux revendiqués n'ait été établie, repose sur le principe de l'honneur de la Couronne. L'obligation d'agir honorablement découle de l'affirmation de la souveraineté de la Couronne face à l'occupation antérieure des terres par les peuples autochtones. Ce principe a été consacré au par. 35(1) de la *Loi constitutionnelle de 1982*, qui reconnaît et confirme les droits et titres ancestraux existants des peuples autochtones. Un des objectifs visés par le par. 35(1) est la négociation de règlements équitables des revendications autochtones. Dans toutes ses négociations avec les Autochtones, la Couronne doit agir honorablement, dans le respect de ses relations passées et futures avec le peuple autochtone concerné. Le principe de l'honneur de la Couronne ne peut recevoir une interprétation étroite ou formaliste. Au contraire, il convient de lui donner plein effet afin de promouvoir le processus de conciliation prescrit par le par. 35(1).

Comme il a été expliqué dans *Haïda*, les obligations requises pour que soit respecté le principe de l'honneur de la Couronne varient selon les circonstances. La Couronne peut être tenue de consulter les peuples autochtones et de trouver des accommodements aux préoccupations de ceux-ci avant de prendre des décisions : *R. c. Sparrow*, [1990] 1 R.C.S. 1075, p. 1119; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 168. L'obligation de consulter ne prend pas naissance seulement lorsque la revendication autochtone a été établie, pour justifier des violations. Une telle interprétation de l'obligation de consultation nierait l'importance des racines historiques de l'honneur de la Couronne et empêcherait ce principe de jouer son rôle dans la conciliation. Déterminer, avant le règlement définitif d'une revendication, l'ampleur des mesures de consultation et d'accommodement qui sont requises n'est pas une tâche facile, mais il s'agit d'un aspect essentiel du processus imposé par le par. 35(1). L'obligation de consulter naît lorsqu'un représentant de la Couronne a connaissance,

requirement of both consultation and accommodation.

The federal government announced a comprehensive land claims policy in 1981, under which Aboriginal land claims were to be negotiated. The TRTFN submitted its land claim to the Minister of Indian Affairs in 1983. The claim was accepted for negotiation in 1984, based on the TRTFN's traditional use and occupancy of the land. No negotiation ever took place under the federal policy; however, the TRTFN later began negotiation of its land claim under the treaty process established by the B.C. Treaty Commission in 1993. As of 1999, the TRTFN had signed a Protocol Agreement and a Framework Agreement, and was working towards an Agreement in Principle. The Province clearly had knowledge of the TRTFN's title and rights claims.

When Redfern applied for project approval, in its efforts to reopen the Tulsequah Chief Mine, it was apparent that the decision could adversely affect the TRTFN's asserted rights and title. The TRTFN claim Aboriginal title over a large portion of northwestern British Columbia, including the territory covered by the access road considered during the approval process. It also claims Aboriginal hunting, fishing, gathering, and other traditional land use activity rights which stood to be affected by a road through an area in which these rights are exercised. The contemplated decision thus had the potential to impact adversely the rights and title asserted by the TRTFN.

concrètement ou par imputation, de l'existence potentielle d'un titre ou de droits ancestraux et envisage des mesures susceptibles d'avoir un effet préjudiciable sur ces droits ou ce titre. Cette obligation pourrait également obliger le gouvernement à modifier ses plans ou politiques afin de trouver des accommodements aux préoccupations des Autochtones. La volonté de répondre aux préoccupations est un élément clé tant à l'étape de la consultation qu'à celle de l'accommodement.

26 En 1981, le gouvernement fédéral a annoncé la mise en place d'une politique de règlement des revendications territoriales globales devant régir la négociation des revendications territoriales autochtones. En 1983, la PNTTR a présenté sa revendication territoriale au ministre des Affaires indiennes. Cette revendication a été acceptée pour négociation en 1984, sur le fondement de l'utilisation et de l'occupation traditionnelles des terres par la PNTTR. Il n'y a eu aucune négociation en vertu de la politique fédérale. Cependant, la PNTTR a par la suite entamé la négociation de sa revendication territoriale dans le cadre du processus de conclusion de traités établi par la Commission des traités de la Colombie-Britannique en 1993. En 1999, la PNTTR avait déjà signé un protocole d'entente et un accord-cadre et elle négociait un accord de principe. Il est clair que la province connaissait l'existence des revendications de titre et de droits de la PNTTR.

27 Lorsque Redfern a présenté sa demande d'approbation du projet visant la réouverture de la mine Tulsequah Chief, il était évident que la décision pouvait avoir un effet préjudiciable sur les droits et le titre revendiqués par la PNTTR. Celle-ci revendique le titre ancestral sur une grande partie du nord-ouest de la Colombie-Britannique, territoire qui comprend le secteur où passerait la route d'accès étudiée durant le processus d'approbation. La PNTTR revendique également des droits ancestraux de chasse, de pêche, de cueillette et d'utilisation des terres pour d'autres activités traditionnelles, qui risqueraient d'être touchés si une route traversait cette région. La mesure envisagée était donc susceptible d'avoir un effet préjudiciable sur les droits et le titre revendiqués par la PNTTR.

28 The Province was aware of the claims, and contemplated a decision with the potential to affect the TRTFN's asserted rights and title negatively. It follows that the honour of the Crown required it to consult and if indicated accommodate the TRTFN in making the decision whether to grant project approval to Redfern, and on what terms.

La province était au courant des revendications et envisageait de prendre une décision susceptible d'avoir un effet préjudiciable sur les droits et le titre revendiqués par la PNTTR. L'honneur de la Couronne commandait donc que celle-ci consulte la PNTTR et, au besoin, qu'elle prenne des mesures d'accommodement à l'égard des préoccupations de cette dernière avant de décider d'approuver le projet de Redfern et de fixer les conditions dont son approbation doit être assortie.

B. *What Was the Scope and Extent of the Province's Duty to Consult and Accommodate the TRTFN?*

B. *Quelle est l'étendue de l'obligation de la province de consulter la PNTTR et de trouver des accommodements aux préoccupations de celle-ci?*

29 The scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (*Haida*, *supra*, at para. 39). It will vary with the circumstances, but always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.

L'étendue de l'obligation de consultation « dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre revendiqué, et de la gravité des effets préjudiciables potentiels sur le droit ou le titre » (*Haïda*, précité, par. 39). L'obligation varie selon les circonstances, mais elle requiert dans tous les cas que la Couronne consulte véritablement et de bonne foi les Autochtones concernés et qu'elle soit disposée à modifier ses plans à la lumière des données recueillies au cours du processus.

30 There is sufficient evidence to conclude that the TRTFN have *prima facie* Aboriginal rights and title over at least some of the area that they claim. Their land claim underwent an extensive validation process in order to be accepted into the federal land claims policy in 1984. The Department of Indian Affairs hired a researcher to report on the claim, and her report was reviewed at several stages before the Minister validated the claim based on the TRTFN's traditional use and occupancy of the land and resources in question. In order to participate in treaty negotiations under the B.C. Treaty Commission, the TRTFN were required to file a statement of intent setting out their asserted territory and the basis for their claim. An Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. Nonetheless, the TRTFN's claim was accepted for negotiation on the basis of a preliminary decision as to its validity. In contrast to the *Haida* case, the courts below did

La preuve permet de conclure que, à première vue, la PNTTR détient un titre et des droits ancestraux sur au moins une partie de la région revendiquée. Sa revendication territoriale a été soumise à une procédure exhaustive de validation avant d'être jugée recevable dans le processus fédéral de règlement des revendications territoriales en 1984. Le ministère des Affaires indiennes a engagé une chercheuse pour préparer un rapport sur les revendications de la PNTTR, rapport qui a été examiné à différentes étapes avant que le ministre déclare la revendication valide, sur le fondement de l'utilisation et de l'occupation traditionnelles par la PNTTR des terres et des ressources en question. Pour participer aux négociations de traités sous l'égide de la Commission des traités de la Colombie-Britannique, la PNTTR a dû produire une déclaration d'intention précisant les territoires revendiqués et le fondement de sa demande. Il n'est pas nécessaire qu'un groupe autochtone soit admis à participer au processus de

not engage in a detailed preliminary assessment of the various aspects of the TRTFN's claims, which are broad in scope. However, acceptance of its title claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

The potentially adverse effect of the Ministers' decision on the TRTFN's claims appears to be relatively serious. The chambers judge found that all of the experts who prepared reports for the review recognized the TRTFN's reliance on its system of land use to support its domestic economy and its social and cultural life (para. 70). The proposed access road was only 160 km long, a geographically small intrusion on the 32,000-km² area claimed by the TRTFN. However, experts reported that the proposed road would pass through an area critical to the TRTFN's domestic economy: see, for example, Dewhirst Report (R.R., vol. I, at pp. 175, 187, 190 and 200) and Staples Addendum Report (A.R., vol. IV, at pp. 595-600, 604-5 and 629). The TRTFN was also concerned that the road could act as a magnet for future development. The proposed road could therefore have an impact on the TRTFN's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim.

In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion. While it is

négociation de traités pour que la Couronne ait l'obligation de le consulter. Néanmoins, la revendication de la PNTTR a été acceptée en vue de la négociation d'un traité, par suite d'une décision préliminaire sur sa validité. À l'inverse de l'affaire *Haïda*, les juridictions inférieures n'ont pas en l'espèce procédé à une évaluation préliminaire détaillée des divers aspects des revendications de la PNTTR, revendications qui ont une large portée. Toutefois, l'acceptation de leur revendication de titre en vue de la négociation d'un traité constitue une preuve *prima facie* du bien-fondé de leurs revendications d'un titre et de droits ancestraux.

31 L'effet négatif que la décision des ministres risque d'avoir sur les revendications de la PNTTR semble relativement grave. La juge en son cabinet a conclu que tous les experts ayant préparé un rapport pour l'examen de la proposition ont reconnu que la PNTTR dépendait de son régime d'utilisation du territoire pour soutenir son économie ainsi que la vie sociale et culturelle de sa communauté (par. 70). La route d'accès proposée ne compte que 160 kilomètres et ne représente donc qu'une faible proportion des 32 000 kilomètres carrés revendiqués par la PNTTR. Cependant, les experts ont signalé que cette route traverserait une zone critique pour l'économie de la PNTTR : voir, par exemple, le rapport Dewhirst (d.i., vol. I, p. 175, 187, 190 et 200) et l'addenda du rapport Staples (d.a., vol. IV, p. 595-600, 604-605 et 629). La PNTTR craint également que la route n'attire d'autres projets. La route proposée pourrait donc avoir une incidence sur sa capacité de continuer d'exercer ses droits ancestraux et pourrait modifier le territoire qui est revendiqué.

32 En résumé, les revendications de la PNTTR sont relativement solides et à première vue fondées, comme le démontre le fait qu'elles ont été acceptées en vue de la négociation d'un traité. La route proposée n'occupe qu'une petite partie du territoire sur lequel la PNTTR revendique un titre; toutefois, le risque de conséquences négatives sur les revendications est élevé. En ce qui concerne le niveau de consultation que requiert le principe de l'honneur de la Couronne, la PNTTR avait droit à davantage que le minimum prescrit, à savoir un avis, la

impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation.

C. *Did the Crown Fulfill its Duty to Consult and Accommodate the TRTFN?*

33 The process of granting project approval to Redfern took three and a half years, and was conducted largely under the *Environmental Assessment Act*. As discussed above, the Act sets out a process of information gathering and consultation. The Act requires that Aboriginal peoples whose traditional territory includes the site of a reviewable project be invited to participate on a project committee.

34 The question is whether this duty was fulfilled in this case. A useful framework of events up to August 1st, 2000 is provided by Southin J.A. at para. 28 of her dissent in this case at the Court of Appeal. Members of the TRTFN were invited to participate in the Project Committee to coordinate review of the project proposal in November 1994 and were given the original two-volume submission for review and comment: Southin J.A., at para. 39. They participated fully as Project Committee members, with the exception of a period of time from February to August of 1995, when they opted out of the process, wishing instead to address the issue through treaty talks and development of a land use policy.

35 The Final Project Report Specifications ("Specifications") detail a number of meetings between the TRTFN, review agency staff and company representatives in TRTFN communities prior to February 1996: Southin J.A., at para. 41. Redfern and TRTFN met directly several times between June 1993 and February 1995 to discuss Redfern's exploration activities and TRTFN's concerns and information requirements. Redfern also contracted an independent consultant to conduct

communication d'information et la tenue de discussions en conséquence. Bien qu'il soit impossible de déterminer à l'avance le niveau de consultation requis, il est clair que, dans les circonstances, la PNTTR avait le droit de s'attendre à des consultations plus poussées que le strict minimum et à une volonté de répondre à ses préoccupations qui puisse être qualifiée d'accommodement.

C. *La Couronne s'est-elle acquittée envers la PNTTR de son obligation de consultation et d'accommodement?*

Le processus d'approbation du projet de Redfern a duré trois ans et demi et a dans une large mesure été mené en vertu de l'*Environmental Assessment Act*. Comme il a été expliqué précédemment, la Loi prévoit un processus de collecte d'information et de consultation. Selon la Loi, les peuples autochtones dont le territoire traditionnel abrite le chantier d'un projet assujetti à la procédure d'examen doivent être invités à faire partie du comité d'examen du projet.

Il s'agit en l'espèce de décider si cette obligation a été respectée. Au par. 28 de ses motifs dissidents dans la présente affaire, la juge Southin de la Cour d'appel décrit utilement les événements jusqu'au 1er août 2000. En novembre 1994, la PNTTR a été invitée à faire partie du comité chargé de coordonner l'examen du projet et s'est vu remettre pour examen et commentaires la demande originale qui comportait deux volumes : la juge Southin, par. 39. Elle a participé à part entière en tant que membre du comité d'examen du projet, sauf de février à août 1995, où elle a choisi de se retirer, préférant se concentrer sur les pourparlers au sujet du traité et l'élaboration d'une politique d'utilisation du territoire.

Les spécifications du rapport de projet final (« spécifications ») précisent le nombre de réunions qui ont eu lieu, avant février 1996, entre la PNTTR, le personnel de l'agence d'examen et des représentants de l'entreprise dans les communautés de la PNTTR : la juge Southin, par. 41. De juin 1993 à février 1995, Redfern et la PNTTR se sont rencontrées plusieurs fois pour discuter des activités d'exploration de Redfern ainsi que des inquiétudes et des demandes d'information de la PNTTR. Redfern a

TAB 4

Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority *Appellants*

v.

Carrier Sekani Tribal Council *Respondent*

and

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

Rio Tinto Alcan Inc. et British Columbia Hydro and Power Authority *Appelantes*

c.

Conseil tribal Carrier Sekani *Intimé*

et

Procureur général du Canada, procureur général de l'Ontario, procureur général de la Colombie-Britannique, procureur général de l'Alberta, British Columbia Utilities Commission, Première nation crie Mikisew, Première nation de Moosomin, Nunavut Tunngavik Inc., Conseil tribal de la nation Nlaka'pamux, Alliance des nations de l'Okanagan, Bande indienne d'Upper Nicola, Division des Grands lacs de la nation Secwepemc, Assemblée des Premières Nations, Première nation Standing Buffalo Dakota, Sommet des Premières nations, Première nation Duncan's, Première nation de Horse Lake, Independent Power Producers Association of British Columbia, Enbridge Pipelines Inc. et TransCanada Keystone Pipeline GP Ltd. *Intervenants*

INDEXED AS: RIO TINTO ALCAN INC. *v.* CARRIER SEKANI TRIBAL COUNCIL

2010 SCC 43

File No.: 33132.

2010: May 21; 2010: October 28.

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

RÉPERTORIÉ : RIO TINTO ALCAN INC. *c.* CONSEIL TRIBAL CARRIER SEKANI

2010 CSC 43

N° du greffe : 33132.

2010 : 21 mai; 2010 : 28 octobre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Honour of the Crown — Aboriginal peoples — Aboriginal rights — Right to consultation — British Columbia authorized project altering timing and flow of water in area claimed by First Nations

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Honneur de la Couronne — Peuples autochtones — Droits ancestraux — Droit à la consultation — La Colombie-Britannique a autorisé la construction d'un ouvrage modifiant le débit d'un cours

without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Duty to consult arises when Crown knows of potential Aboriginal claim or right and contemplates conduct that may adversely affect it — Whether Commission reasonably declined to consider adequacy of consultation in context of assessing whether agreement is in public interest — Whether duty to consult arose — What constitutes "adverse effect" — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

Administrative law — Boards and tribunals — Jurisdiction — British Columbia authorized project altering timing and flow of water in area claimed by First Nations without consulting affected First Nations — Thereafter, provincial hydro and power authority sought British Columbia Utilities Commission's approval of agreement to purchase power generated by project from private producer — Commission empowered to decide questions of law and to determine whether agreement is in public interest — Whether Commission had jurisdiction to discharge Crown's constitutional obligation to consult — Whether Commission had jurisdiction to consider adequacy of consultation — If so, whether it was required to consider adequacy of consultation in determining whether agreement is in public interest — Constitution Act, 1982, s. 35 — Utilities Commission Act, R.S.B.C. 1996, c. 473, s. 71.

In the 1950s, the government of British Columbia authorized the building of a dam and reservoir which altered the amount and timing of water flows in the Nechako River. The First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River, but, pursuant to the practice at the time, they were not consulted about the dam project.

Since 1961, excess power generated by the dam has been sold by Alcan to BC Hydro under Energy Purchase Agreements ("EPAs") which commit Alcan to supplying and BC Hydro to purchasing excess electricity. The government of British Columbia sought the

d'eau dans un territoire revendiqué par des Autochtones sans consulter au préalable les Premières nations touchées — La société d'État provinciale d'hydroélectricité a ensuite demandé à la British Columbia Utilities Commission d'approuver un contrat d'achat intervenu avec un producteur d'électricité privé — L'obligation de consulter naît lorsque la Couronne a connaissance de l'existence éventuelle d'une revendication autochtone ou d'un droit ancestral et qu'elle envisage une mesure susceptible d'avoir un effet défavorable sur cette revendication ou ce droit — La Commission a-t-elle agi raisonnablement en refusant de se pencher sur le caractère adéquat de la consultation alors qu'elle était appelée à déterminer si le contrat servait l'intérêt public? — L'obligation de consulter a-t-elle pris naissance? — Que faut-il entendre par « effet défavorable »? — Loi constitutionnelle de 1982, art. 35 — Utilities Commission Act, R.S.B.C. 1996, ch. 473, art. 71.

Droit administratif — Organismes et tribunaux administratifs — Compétence — La Colombie-Britannique a autorisé la construction d'un ouvrage modifiant le débit d'un cours d'eau dans un territoire revendiqué par des Autochtones sans consulter au préalable les Premières nations touchées — La société d'État provinciale d'hydroélectricité a ensuite demandé à la British Columbia Utilities Commission d'approuver un contrat d'achat intervenu avec un producteur d'électricité privé — La Commission avait le pouvoir de trancher des questions de droit et de décider si un contrat était dans l'intérêt public — Avait-elle compétence pour s'acquitter de l'obligation de la Couronne de consulter? — Avait-elle le pouvoir de se pencher sur le caractère adéquat de la consultation? — Dans l'affirmative, lui incombait-il de se pencher sur le caractère adéquat de la consultation pour décider si le contrat servait l'intérêt public? — Loi constitutionnelle de 1982, art. 35 — Utilities Commission Act, R.S.B.C. 1996, ch. 473, art. 71.

Dans les années 1950, le gouvernement de la Colombie-Britannique a autorisé la construction d'un barrage et d'un réservoir qui ont modifié les débits d'eau dans la rivière Nechako. Les Premières nations prétendent que la vallée de la Nechako fait partie de leurs terres ancestrales et elles revendiquent le droit de pêcher dans la rivière Nechako, mais comme ce n'était pas l'usage à l'époque, elles n'ont pas été consultées relativement au barrage projeté.

Depuis 1961, Alcan vend les surplus d'électricité du barrage à BC Hydro au moyen de contrats d'achat d'électricité (« CAÉ ») dans lesquels elle s'engage à vendre l'électricité excédentaire, et BC Hydro à l'acheter. Le gouvernement de la Colombie-Britannique a demandé

Commission's approval of the 2007 EPA. The First Nations asserted that the 2007 EPA should be subject to consultation under s. 35 of the *Constitution Act, 1982*.

The Commission accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, but found that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. The British Columbia Court of Appeal reversed the Commission's orders and remitted the case to the Commission for evidence and argument on whether a duty to consult the First Nations exists and, if so, whether it had been met. Alcan and BC Hydro appealed.

Held: The appeal should be allowed and the decision of the British Columbia Utilities Commission approving the 2007 EPA should be confirmed.

The Commission did not act unreasonably in approving the 2007 EPA. Governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. The duty to consult is grounded in the honour of the Crown and is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation. The duty has both a legal and a constitutional character, and is prospective, fastening on rights yet to be proven. The nature of the duty and the remedy for its breach vary with the situation.

The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. This test can be broken down into three elements. First, the Crown must have real or constructive knowledge of a potential Aboriginal claim or right. While the existence of a potential claim is essential, proof that the claim will succeed is not. Second, there must be Crown conduct or a Crown decision. In accordance with the generous, purposive approach that must be brought to the duty to consult, the required decision or conduct is not confined to government exercise of statutory powers or to decisions or conduct which have an immediate impact

à la Commission d'approuver le CAÉ de 2007. Les Premières nations ont fait valoir que ce dernier devait faire l'objet d'une consultation suivant l'art. 35 de la *Loi constitutionnelle de 1982*.

La Commission a reconnu avoir le pouvoir d'examiner le caractère adéquat de la consultation des groupes autochtones, mais elle a conclu que la question de la consultation ne pouvait se poser étant donné que le CAÉ de 2007 n'allait pas avoir d'effet préjudiciable sur quelque intérêt autochtone. La Cour d'appel de la Colombie-Britannique a annulé ses ordonnances et lui a renvoyé l'affaire pour qu'elle entende preuve et arguments sur la question de savoir s'il existait ou non une obligation de consulter les Premières nations et, dans l'affirmative, si elle avait été respectée. Alcan et BC Hydro ont interjeté appel.

Arrêt : Le pourvoi est accueilli, et la décision de la British Columbia Utilities Commission approuvant le CAÉ de 2007 est confirmée.

La Commission n'a pas agi de manière déraisonnable en approuvant le CAÉ de 2007. Un gouvernement a l'obligation de consulter les peuples autochtones avant de prendre des décisions susceptibles d'avoir un effet préjudiciable sur les terres et les ressources revendiquées par eux. L'obligation de consulter s'origine de l'honneur de la Couronne et c'est un corollaire de celle d'arriver à un règlement équitable des revendications autochtones au terme du processus de négociation de traités. Lorsque ce processus est en cours, la Couronne a l'obligation tacite de consulter les demandeurs autochtones sur ce qui est susceptible d'avoir un effet préjudiciable sur leurs droits issus de traités et leurs droits ancestraux, et de trouver des mesures d'accommodement dans un esprit de conciliation. L'obligation revêt un caractère à la fois juridique et constitutionnel. Elle est de nature prospective et prend appui sur des droits dont l'existence reste à prouver. La nature de l'obligation et le recours pour manquement à celle-ci varient en fonction de la situation.

L'obligation de consulter prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et qu'elle envisage une mesure susceptible d'avoir un effet préjudiciable sur celui-ci. Cette condition comporte trois éléments. Premièrement, la Couronne doit avoir connaissance, concrètement ou par imputation, de l'existence possible d'une revendication autochtone ou d'un droit ancestral. L'existence possible d'une revendication est essentielle, mais il n'est pas nécessaire de prouver que la revendication connaîtra une issue favorable. Deuxièmement, il doit y avoir une mesure ou une décision de la Couronne. Conformément à l'approche généreuse et téléologique que commande l'obligation de

on lands and resources. The duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights. Third, there must be a possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, speculative impacts, and adverse effects on a First Nation's future negotiating position will not suffice. Moreover, the duty to consult is confined to the adverse impacts flowing from the current government conduct or decision, not to larger adverse impacts of the project of which it is a part. Where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource, the issue is not consultation, but negotiation about compensation.

Tribunals are confined to the powers conferred on them by their constituent legislation, and the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on them. The legislature may choose to delegate the duty to consult to a tribunal, and it may empower the tribunal to determine whether adequate consultation has taken place.

The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct, often complex, constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation must be expressly or impliedly empowered to do so and its enabling statute must give it the necessary remedial powers.

The duty to consult is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts. These remedies have proven time-consuming and expensive, are often ineffective, and serve the interest of no one.

consulter, cette mesure ou cette décision ne s'entend pas uniquement de l'exercice d'un pouvoir conféré par la loi ni seulement d'une décision ou d'un acte qui a un effet immédiat sur des terres et des ressources. L'obligation de consulter naît aussi d'une « décision stratégique prise en haut lieu » qui est susceptible d'avoir un effet sur des revendications autochtones et des droits ancestraux. Troisièmement, il doit être possible que la mesure de la Couronne ait un effet sur une revendication autochtone ou un droit ancestral. Le demandeur doit établir un lien de causalité entre la mesure ou la décision envisagée par le gouvernement et un effet préjudiciable éventuel sur une revendication autochtone ou un droit ancestral. Un acte fautif antérieur, une simple répercussion hypothétique et un effet préjudiciable sur la position de négociation ultérieure d'une Première nation ne suffisent pas. Aussi, l'obligation de consulter ne vise que les effets préjudiciables de la mesure ou de la décision actuelle du gouvernement, à l'exclusion des effets préjudiciables globaux du projet dont elle fait partie. Lorsque la ressource est transformée depuis longtemps et que la mesure ou la décision actuelle du gouvernement n'a plus aucune incidence sur elle, il n'y a pas lieu de consulter, mais de négocier une indemnisation.

Un tribunal administratif doit s'en tenir à l'exercice des pouvoirs que lui confère sa loi habilitante, et son rôle en ce qui a trait à la consultation tient à ses obligations et à ses attributions légales. Le législateur peut décider de déléguer à un tribunal administratif l'obligation de la Couronne de consulter, et il peut lui conférer le pouvoir de décider si une consultation adéquate a eu lieu.

Le pouvoir de consulter, qui est distinct du pouvoir de déterminer s'il existe une obligation de consulter, ne peut être inféré du simple pouvoir d'examiner des questions de droit. La consultation comme telle n'est pas une question de droit. Il s'agit d'un processus constitutionnel distinct, souvent complexe, et dans certaines circonstances, d'un droit mettant en jeu faits, droit, politique et compromis. Le tribunal administratif désireux d'entreprendre une consultation doit y être expressément ou tacitement autorisé, et sa loi habilitante doit lui conférer la pouvoir de réparation nécessaire.

L'obligation de consulter est une obligation constitutionnelle qui fait intervenir l'honneur de la Couronne. Elle doit être respectée. Si le régime administratif mis en place par le législateur ne peut remédier aux éventuels effets préjudiciables d'une décision sur des intérêts autochtones, les Premières nations touchées doivent alors s'adresser à une cour de justice pour obtenir la réparation voulue. L'expérience enseigne que la voie judiciaire est longue, coûteuse et souvent vaine et qu'elle ne sert l'intérêt de personne.

In this case, the Commission had the power to consider whether adequate consultation had taken place. The *Utilities Commission Act* empowered it to decide questions of law in the course of determining whether an EPA is in the public interest, which implied a power to decide constitutional issues properly before it. At the time, it also required the Commission to consider "any other factor that the commission considers relevant to the public interest", including the adequacy of consultation. This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over any "constitutional question", since the application for reconsideration does not fall within the narrow statutory definition of that term.

The Legislature did not delegate the Crown's duty to consult to the Commission. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to engage in consultation because consultation is a distinct constitutional process, not a question of law.

The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups, and reasonably concluded that the consultation issue could not arise because the 2007 EPA would not adversely affect any Aboriginal interest. In this case, the Crown had knowledge of a potential Aboriginal claim or right and BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. However, the 2007 EPA would have neither physical impacts on the Nechako River or the fishery nor organizational, policy or managerial impacts that might adversely affect the claims or rights of the First Nations. The failure to consult on the initial project was an underlying infringement, and was not sufficient to trigger a duty to consult. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives will nevertheless be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them.

Cases Cited

Followed: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; **referred to:** *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC

En l'espèce, la Commission avait le pouvoir de déterminer si une consultation adéquate avait eu lieu. La *Utilities Commission Act* l'investissait du pouvoir de trancher des questions de droit aux fins de déterminer si un CAÉ servait l'intérêt public, ce qui emportait celui de trancher une question constitutionnelle dont elle était régulièrement saisie. Au moment considéré, elle exigeait également de la Commission qu'elle tienne compte de « tout autre élément jugé pertinent eu égard à l'intérêt public », dont le caractère adéquat de la consultation. L'*Administrative Tribunals Act* ne modifie pas cette conclusion même si elle prévoit qu'un tribunal administratif n'a pas compétence à l'égard d'une « question constitutionnelle », car la demande de révision échappe à la définition restrictive de ce terme.

Le législateur n'a pas délégué à la Commission l'obligation de la Couronne de consulter. Le pouvoir de la Commission d'examiner les questions de droit et tout élément pertinent pour ce qui concerne l'intérêt public ne l'autorise pas à entreprendre la consultation, car celle-ci est un processus constitutionnel distinct, et non une question de droit.

La Commission a reconnu à juste titre avoir le pouvoir d'examiner le caractère adéquat de la consultation des groupes autochtones et elle a raisonnablement conclu que la question de la consultation ne pouvait se poser étant donné que le CAÉ de 2007 n'allait pas avoir d'effet préjudiciable sur quelque intérêt autochtone. Dans la présente affaire, la Couronne avait connaissance de l'existence possible d'une revendication autochtone ou d'un droit ancestral, et le projet de BC Hydro de conclure avec Alcan un contrat d'achat d'électricité constituait clairement une mesure projetée par la Couronne. Cependant, le CAÉ de 2007 n'allait pas avoir d'impact physique sur la rivière Nechako ou sur le poisson, ni entraîner de changements organisationnels, politiques ou de gestion susceptibles d'avoir un effet préjudiciable sur les revendications ou les droits des Premières nations. L'omission de consulter relativement au projet initial constituait une atteinte sous-jacente et ne suffisait pas pour faire naître l'obligation de consulter. Vu leur obligation d'agir conformément à l'honneur de la Couronne, les représentants de BC Hydro devront néanmoins tenir compte des groupes autochtones touchés et les consulter au besoin lorsqu'une décision ultérieure sera susceptible d'avoir un effet préjudiciable sur eux.

Jurisprudence

Arrêt suivi : *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; **arrêts mentionnés :** *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483; *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation*

74, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315; *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110; *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1; *An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637; *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203; *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

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Constitution Act, 1867, s. 91(12).
Constitution Act, 1982, ss. 24, 35, 52.
Constitutional Question Act, R.S.B.C. 1996, c. 68, s. 8.
Utilities Commission Act, R.S.B.C. 1996, c. 473, ss. 2(4), 71, 79, 101(1), 105.

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de projet), 2004 CSC 74, [2004] 3 R.C.S. 550; *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388; *Huu-Ay-Aht First Nation c. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74; *Wii'litswx c. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315; *Klahoose First Nation c. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110; *Première nation Dene Tha' c. Canada (Ministre de l'Environnement)*, 2006 CF 1354 (CanLII), conf. par 2008 CAF 20 (CanLII); *An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637; *R. c. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203; *R. c. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653; *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, 2003 CSC 55, [2003] 2 R.C.S. 585; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190.

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of the British Columbia Utilities Commission approving 2007 EPA confirmed.

Daniel A. Webster, Q.C., David W. Bursey and *Ryan D. W. Dalziel*, for the appellant Rio Tinto Alcan Inc.

Chris W. Sanderson, Q.C., Keith B. Bergner and *Laura Bevan*, for the appellant the British Columbia Hydro and Power Authority.

Gregory J. McDade, Q.C., and *Maegen M. Giltrow*, for the respondent.

Mitchell R. Taylor, Q.C., for the intervener the Attorney General of Canada.

Malliha Wilson and *Tamara D. Barclay*, for the intervener the Attorney General of Ontario.

Paul E. Yearwood, for the intervener the Attorney General of British Columbia.

Stephanie C. Latimer, for the intervener the Attorney General of Alberta.

Written submissions only by *Gordon A. Fulton, Q.C.*, for the intervener the British Columbia Utilities Commission.

Written submissions only by *Robert C. Freedman* and *Rosanne M. Kyle*, for the intervener the Mikisew Cree First Nation.

Written submissions only by *Jeffrey R. W. Rath* and *Nathalie Whyte*, for the intervener the Moosomin First Nation.

Richard Spaulding, for the intervener Nunavut Tunngavik Inc.

Written submissions only by *Timothy Howard* and *Bruce Stadfeld*, for the interveners the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band.

Robert J. M. Janes, for the intervener the Lakes Division of the Secwepemc Nation.

British Columbia Utilities Commission approuvant le CAÉ de 2007 confirmée.

Daniel A. Webster, c.r., David W. Bursey et *Ryan D. W. Dalziel*, pour l'appelante Rio Tinto Alcan Inc.

Chris W. Sanderson, c.r., Keith B. Bergner et *Laura Bevan*, pour l'appelante British Columbia Hydro and Power Authority.

Gregory J. McDade, c.r., et *Maegen M. Giltrow*, pour l'intimé.

Mitchell R. Taylor, c.r., pour l'intervenant le procureur général du Canada.

Malliha Wilson et *Tamara D. Barclay*, pour l'intervenant le procureur général de l'Ontario.

Paul E. Yearwood, pour l'intervenant le procureur général de la Colombie-Britannique.

Stephanie C. Latimer, pour l'intervenant le procureur général de l'Alberta.

Argumentation écrite seulement par *Gordon A. Fulton, c.r.*, pour l'intervenante British Columbia Utilities Commission.

Argumentation écrite seulement par *Robert C. Freedman* et *Rosanne M. Kyle*, pour l'intervenante la Première nation crie Mikisew.

Argumentation écrite seulement par *Jeffrey R. W. Rath* et *Nathalie Whyte*, pour l'intervenante la Première nation de Moosomin.

Richard Spaulding, pour l'intervenante Nunavut Tunngavik Inc.

Argumentation écrite seulement par *Timothy Howard* et *Bruce Stadfeld*, pour les intervenants le Conseil tribal de la nation Nlaka'pamux, l'Alliance des nations de l'Okanagan et la Bande indienne d'Upper Nicola.

Robert J. M. Janes, pour l'intervenante la Division des Grands lacs de la nation Secwepemc.

Peter W. Hutchins and *David Kalmakoff*, for the intervener the Assembly of First Nations.

Written submissions only by *Mervin C. Phillips*, for the intervener the Standing Buffalo Dakota First Nation.

Arthur C. Pape and *Richard B. Salter*, for the intervener the First Nations Summit.

Jay Nelson, for the interveners the Duncan's First Nation and the Horse Lake First Nation.

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

Written submissions only by *Harry C. G. Underwood*, for the intervener Enbridge Pipelines Inc.

Written submissions only by *C. Kemm Yates, Q.C.*, for the intervener the TransCanada Keystone Pipeline GP Ltd.

The judgment of the Court was delivered by

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

Peter W. Hutchins et *David Kalmakoff*, pour l'intervenante l'Assemblée des Premières Nations.

Argumentation écrite seulement par *Mervin C. Phillips*, pour l'intervenante la Première nation Standing Buffalo Dakota.

Arthur C. Pape et *Richard B. Salter*, pour l'intervenant le Sommet des Premières nations.

Jay Nelson, pour les intervenantes la Première nation Duncan's et la Première nation de Horse Lake.

Roy W. Millen, pour l'intervenante Independent Power Producers Association of British Columbia.

Argumentation écrite seulement par *Harry C. G. Underwood*, pour l'intervenante Enbridge Pipelines Inc.

Argumentation écrite seulement par *C. Kemm Yates, c.r.*, pour l'intervenante TransCanada Keystone Pipeline GP Ltd.

Version française du jugement de la Cour rendu par

[1] LA JUGE EN CHEF — Dans les années 1950, le gouvernement de la Colombie-Britannique a autorisé la construction du barrage Kenney dans le nord-ouest de la province en vue de la production d'électricité destinée à l'alimentation d'une aluminerie. Le barrage et le réservoir ont modifié les débits d'eau dans la rivière Nechako, dont les Premières nations du Conseil tribal Carrier Sekani (« CTCS ») tirent leur subsistance (notamment grâce à la pêche) depuis des temps immémoriaux. Ces Premières nations n'ont pas été consultées avant la construction du complexe. Le gouvernement de la Colombie-Britannique demande aujourd'hui l'approbation d'un contrat de vente des surplus d'électricité produits par le barrage à une société d'État, British Columbia Hydro and Power Authority (« BC Hydro »). La Cour doit déterminer si la British Columbia Utilities Commission (la « Commission ») est tenue de se pencher sur la question de la consultation des Premières nations du CTCS pour déterminer si la vente sert l'intérêt public.

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

I. Background

A. *The Facts*

[3] In the 1950s, Alcan (now Rio Tinto Alcan) dammed the Nechako River in northwestern British Columbia for the purposes of power development in connection with aluminum production. The project was one of huge magnitude. It diverted water from the Nechako River into the Nechako Reservoir, where a powerhouse was installed for the production of electricity. After passing through the turbines of the powerhouse, the water flowed to the Kemano River and on to the Pacific Ocean to the west. The dam affected the amount and timing of water flows into the Nechako River to the east, impacting fisheries on lands now claimed by the CSTC First Nations. Alcan effected these water diversions under Final Water Licence No. 102324 which gives Alcan use of the water on a permanent basis.

[4] Alcan, the Province of British Columbia, and Canada entered into a Settlement Agreement in

[2] Dans l'arrêt *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511, la Cour affirme qu'un gouvernement a l'obligation de consulter les peuples autochtones avant de prendre des décisions susceptibles d'avoir un effet préjudiciable sur les terres et les ressources revendiquées par eux. Depuis lors, la consultation des Autochtones par le gouvernement constitue un volet important du processus d'exploitation des ressources, spécialement en Colombie-Britannique où beaucoup de terres et de ressources font l'objet de revendications territoriales. Le pourvoi soulève les questions suivantes : d'où naît l'obligation de consulter et quel rôle joue un tribunal administratif dans la consultation et le contrôle de celle-ci? Je suis d'avis d'accueillir le pourvoi, tout en confirmant l'obligation de BC Hydro de consulter les Premières nations du CTCS sur les activités d'exploitation ultérieures susceptibles d'avoir un effet préjudiciable sur leurs revendications et leurs droits.

I. Contexte

A. *Les faits*

[3] Dans les années 1950, Alcan (aujourd'hui Rio Tinto Alcan) a construit un barrage sur la rivière Nechako dans le nord-ouest de la Colombie-Britannique afin de produire de l'électricité destinée à la fabrication d'aluminium. Il s'agissait de travaux colossaux. L'eau de la rivière Nechako a été détournée dans le réservoir du même nom, où une centrale a été construite pour y produire de l'électricité. Après être passée dans les turbines de la centrale, l'eau se déversait ensuite dans la rivière Kemano, puis dans l'océan Pacifique à l'ouest. Le barrage a eu une incidence sur le débit de la rivière Nechako à l'est, ce qui a eu des répercussions sur les stocks de poissons dans les terres aujourd'hui revendiquées par les Premières nations du CTCS. Alcan a effectué ces dérivations d'eau conformément au permis d'exploitation hydraulique permanent n° 102324, qui lui accorde un droit perpétuel d'utilisation de l'eau.

[4] En 1987, Alcan, la province de la Colombie-Britannique et le Canada ont convenu de lâchers

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

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

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

B. *The Commission Proceedings*

[7] The 2007 EPA was subject to review before the Commission. It was charged with determining whether the sale of electricity was in the public interest under s. 71 of the *Utilities Commission*

d'eau pour protéger les stocks de poissons. Le Canada était partie à l'accord, car les pêches, des côtes de la mer ou de l'intérieur, relèvent de la compétence fédérale suivant le par. 91(12) de la *Loi constitutionnelle de 1867*. L'accord de 1987 prévoit des lâchers supplémentaires en juillet et en août afin de protéger le saumon anadrome. De plus, un protocole est intervenu entre la nation Haisla et Alcan pour régulariser les débits d'eau et protéger les frayères d'eulachons.

[5] Au fil des ans, l'électricité générée par la centrale a principalement servi à alimenter une aluminerie. Toutefois, depuis 1961, Alcan vend ses surplus d'électricité à une société d'État, BC Hydro. Ces surplus ont d'abord été consommés localement, puis acheminés vers des collectivités avoisinantes. Le contrat d'achat d'électricité (le « CAÉ ») conclu en 2007, qui fait l'objet du pourvoi, est le plus récent intervenu entre Alcan et BC Hydro. Alcan s'y engage à vendre l'électricité excédentaire produite par la centrale de Kemano, et BC Hydro à l'acheter, jusqu'en 2034. Le CAÉ de 2007 crée un comité conjoint d'exploitation appelé à conseiller les parties sur l'administration du contrat et l'exploitation du réservoir.

[6] Les Premières nations du CTCS prétendent que la vallée de la Nechako fait partie de leurs terres ancestrales et elles revendiquent le droit de pêcher dans la rivière Nechako. Comme ce n'était pas l'usage à l'époque, elles n'ont pas été consultées au sujet du détournement de la rivière occasionné par la construction du barrage dans les années 1950. Elles font toutefois valoir que le CAÉ de 2007 conclu relativement à l'énergie produite par ce barrage devrait faire l'objet d'une consultation. Selon elles, il s'agit d'un droit constitutionnel découlant de l'art. 35 de la *Loi constitutionnelle de 1982*, au sens où l'entend la Cour dans l'arrêt *Nation Haïda*.

B. *Les procédures de la Commission*

[7] Le CAÉ de 2007 a été soumis à l'examen de la Commission, laquelle devait, en application de l'art. 71 de la *Utilities Commission Act*, R.S.B.C. 1996, ch. 473, déterminer si la vente d'électricité

Act, R.S.B.C. 1996, c. 473. The Commission had the power to declare a contract for the sale of electricity unenforceable if it found that it was not in the public interest having regard to the quantity of energy to be supplied, the availability of supplies, the price and availability of any other form of energy, the price of the energy supplied to a public utility company, and "any other factor that the commission considers relevant to the public interest".

[8] The Commission began its work by holding two procedural conferences to determine, among other things, the "scope" of its hearing. "Scoping" is the process by which the Commission determines what "information it considers necessary to determine whether the contract is in the public interest" pursuant to s. 71(1)(b) of the *Utilities Commission Act*. The question of the role of First Nations in the proceedings arose at this stage. The CSTC was not party to the proceedings but the Haisla Nation was. The Haisla people submitted that the Province and BC Hydro "ha[d] failed to act on their legal obligation" to them, but refrained from asking the Commission "to assess the adequacy [of consultation] and accommodation afforded . . . on the 2007 EPA": *Re: British Columbia Hydro & Power Authority Filing of Electricity Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71*, British Columbia Utilities Commission, October 10, 2007 (the "Scoping Order"), unreported. The Commission's Scoping Order therefore addressed the consultation issue as follows:

Evidence relevant to First Nations consultation may be relevant for the same purpose that the Commission often considers evidence of consultation with other stakeholders. Generally, insufficient evidence of consultation, including with First Nations is not determinative of matters before the Commission.

[9] On October 29, 2007, the CSTC requested late intervener status on the issue of consultation on the basis that the Commission's decision

était dans l'intérêt public. La Commission avait le pouvoir de déclarer inapplicable le contrat de vente d'électricité qui, selon elle, n'était pas dans l'intérêt public compte tenu de la quantité d'énergie fournie, de la disponibilité de l'approvisionnement, du prix et de la disponibilité de toute autre forme d'énergie, du prix de l'énergie fournie à une entreprise de services publics et de [TRADUCTION] « tout autre élément jugé pertinent eu égard à l'intérêt public ».

[8] La Commission a entrepris ses travaux par la tenue de deux conférences de nature procédurale pour déterminer notamment le « cadre » de l'audience. Le « cadrage » est le processus par lequel la Commission détermine [TRADUCTION] « les données qu'elle estime nécessaires pour décider si le contrat est ou non dans l'intérêt public » en application de l'al. 71(1)b) de la *Utilities Commission Act*. C'est à cette étape qu'a été soulevée la question de la participation des Premières nations à l'audience. Le CTCS n'était pas partie à la procédure, contrairement à la Nation Haisla, qui soutenait que la province et BC Hydro [TRADUCTION] « avaient manqué à leur obligation légale envers elle », mais qui ne demandait pas à la Commission « de se prononcer sur le caractère adéquat [de la consultation] et des mesures d'accommodement prises [. . .] relativement au CAÉ de 2007 » : *Re : British Columbia Hydro & Power Authority Filing of Electricity Power Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71*, British Columbia Utilities Commission, 10 octobre 2007 (l'« ordonnance sur le cadre de l'audience »), inédite. Dans son ordonnance, la Commission se prononce donc comme suit sur la question de la consultation :

[TRADUCTION] Les éléments de preuve se rapportant à la consultation des Premières nations peuvent être pertinents, et ce, pour les mêmes raisons que la Commission examine souvent la preuve de la consultation d'autres intéressés. De manière générale, une preuve de consultation insuffisante, notamment des Premières nations, n'est pas déterminante eu égard aux questions dont est saisie la Commission.

[9] Le 29 octobre 2007, le CTCS a tardivement demandé d'être constitué partie intervenante sur la question de la consultation au motif que la décision

might negatively impact Aboriginal rights and title which were the subject of its ongoing land claims. At the opening of the oral hearing on November 19, 2007, the CSTC applied for reconsideration of the Scoping Order and, in written submissions of November 20, 2007, it asked the Commission to include in the hearing's scope the issues of whether the duty to consult had been met, whether the proposed power sale under the 2007 EPA could constitute an infringement of Aboriginal rights and title in and of itself, and the related issue of the environmental impact of the 2007 EPA on the rights of the CSTC First Nations.

[10] The Commission established a two-stage process to consider the CSTC's application for reconsideration of the Scoping Order: an initial screening phase to determine whether there was a reasonable evidentiary basis for reconsideration, and a second phase to receive arguments on whether the rescoping application should be granted. At the first stage, the CSTC filed evidence, called witnesses and cross-examined the witnesses of BC Hydro and Alcan. The Commission confined the proceedings to the question of whether the 2007 EPA would adversely affect potential CSTC First Nations' interests by causing changes in water flows into the Nechako River or changes in water levels of the Nechako Reservoir.

[11] On November 29, 2007, the Commission issued a preliminary decision on the Phase I process called "Impacts on Water Flows". It concluded that the "responsibility for operation of the Nechako Reservoir remains with Alcan under the 2007 EPA", and that the EPA would not affect water levels in the Nechako River stating, "the 2007 EPA sets the priority of generation produced but does not set the priority for water". With or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation".

[12] As to fisheries, the Commission stated that "the priority of releases from the Nechako Reservoir [under the 1987 Settlement Agreement]

de la Commission risquait d'avoir un effet préjudiciable sur les droits ancestraux et le titre aborigène qu'il revendiquait alors. Le 19 novembre 2007, au début de l'audience, le CTCS a demandé la révision de l'ordonnance qui en définissait le cadre et, dans son argumentation écrite du 20 novembre 2007, il a demandé qu'à l'audience, la Commission examine en outre les questions de savoir si l'obligation de consultation avait été respectée et si la vente d'électricité projetée dans le CAÉ de 2007 pouvait en soi être préjudiciable aux droits ancestraux et au titre aborigène, ainsi que la question connexe des répercussions environnementales du CAÉ de 2007 sur les droits des Premières nations du CTCS.

[10] La Commission a établi un processus comportant deux étapes pour statuer sur la demande de révision. Elle devait d'abord déterminer si un fondement probatoire raisonnable justifiait la révision de l'ordonnance, puis entendre les arguments des parties sur la question de savoir s'il y avait lieu d'accueillir la demande de recadrage. À la première étape, le CTCS a produit des éléments de preuve, présenté des témoins et contre-interrogé ceux de BC Hydro et d'Alcan. La Commission s'en est tenue à la question de savoir si, en raison de la modification du débit de la rivière Nechako ou du niveau du réservoir Nechako qui en résulterait, le CAÉ de 2007 aurait un effet préjudiciable sur les droits éventuels des Premières nations du CTCS.

[11] Le 29 novembre 2007, la Commission a rendu à la première étape une décision préliminaire intitulée [TRADUCTION] « Impact sur le débit d'eau ». Elle y conclut que [TRADUCTION] « suivant le CAÉ de 2007, l'exploitation du réservoir Nechako continue d'incomber à Alcan » et que le contrat ne changera rien aux niveaux de la rivière Nechako, affirmant que [TRADUCTION] « le CAÉ de 2007 accorde la priorité à la production d'électricité, et non à l'eau ». Avec ou sans le CAÉ de 2007, [TRADUCTION] « Alcan exploite le réservoir Nechako dans le but d'optimiser la production d'électricité ».

[12] Au chapitre de la pêche, la Commission a estimé que [TRADUCTION] « les lâchers d'eau effectués à partir du réservoir Nechako [conformément

is first to fish flows and second to power service". While the timing of water releases from the Nechako Reservoir for power generation purposes may change as a result of the 2007 EPA, that change "will have no impact on the releases into the Nechako river system". This is because water releases for power generation flow not into the Nechako River system to the east, with which the CSTC First Nations are concerned, but into the Kemano River to the west. Nor, the Commission found, would the 2007 EPA bring about a change in control over water flows and water levels, or alter the management structure of the reservoir.

[13] The Commission then embarked on Phase II of the rescoping hearing and invited the parties to make written submissions on the reconsideration application — specifically, on whether it would be a jurisdictional error not to revise the Scoping Order to encompass consultation issues on these facts. The parties did so.

[14] On December 17, 2007, the Commission dismissed the CSTC's application for reconsideration of the scoping order on grounds that the 2007 EPA would not introduce new adverse effects to the interests of the First Nations: *Re British Columbia Hydro & Power Authority*, 2008 CarswellBC 1232 (B.C.U.C.) (the "Reconsideration Decision"). For the purposes of the motion, the Commission assumed the historic infringement of Aboriginal rights, Aboriginal title, and a failure by the government to consult. Referring to *Haida Nation*, it concluded that "more than just an underlying infringement" was required. The CSTC had to demonstrate that the 2007 EPA would "adversely affect" the Aboriginal interests of its member First Nations. Applying this test to its findings of fact, it stated that "a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing [without consultation] would not be a jurisdictional error". The Commission therefore concluded that its decision on the 2007 EPA would have no adverse effects on the CSTC First Nations' interests. The duty to consult was therefore not triggered, and no jurisdictional

à l'accord de 1987] visent en priorité le passage des poissons, puis la production d'électricité ». Bien que le calendrier des lâchers d'eau destinés à la production d'électricité puisse changer en raison du CAÉ de 2007, à son avis, cela [TRADUCTION] « n'aura aucun impact sur les apports dans le réseau hydrographique de la Nechako », car ces lâchers d'eau ne sont pas effectués dans la rivière Nechako à l'est — objet de la préoccupation des Premières nations du CTCS —, mais dans la rivière Kemano à l'ouest. La Commission a aussi conclu que le CAÉ de 2007 ne modifiera ni la gestion des débits et des niveaux d'eau, ni la structure de gestion du réservoir.

[13] À la deuxième étape, la Commission a invité les parties à présenter des observations écrites sur la demande de révision — plus précisément, sur la question de savoir si le refus de recadrer l'audience pour que les questions liées à la consultation y soient aussi abordées constituerait une erreur de compétence à la lumière de ces faits. Les parties ont répondu à l'invitation.

[14] Le 17 décembre 2007, la Commission a rejeté la demande du CTCS au motif que le CAÉ de 2007 ne créerait pas de nouveaux effets défavorables sur les intérêts des Premières nations en cause : *Re British Columbia Hydro & Power Authority*, 2008 CarswellBC 1232 (B.C.U.C.) (la « décision sur la demande de révision »). Pour statuer, elle a tenu pour avérés l'atteinte historique aux droits ancestraux et au titre aborigène et le manquement du gouvernement à son obligation de consulter. S'appuyant sur l'arrêt *Nation Haïda*, elle a conclu qu'il fallait [TRADUCTION] « davantage qu'une atteinte sous-jacente ». Le CTCS devait démontrer que le CAÉ de 2007 aurait un « effet préjudiciable » sur les droits ancestraux des Premières nations qui en faisaient partie. Après avoir appliqué ce critère à ses conclusions de fait, elle a statué que l'[TRADUCTION] « examen visé à l'article 71 n'a pas pour effet d'approuver ou de transférer une licence ou une autorisation ou d'en modifier le titulaire, de sorte qu'en l'absence de nouveaux impacts physiques, faire droit [sans consultation] à une demande présentée sous le régime de l'article 71 ne constituerait pas une erreur de compétence ». La Commission a donc estimé que sa décision

error was committed in failing to include consultation with the First Nations in the Scoping Order beyond the general consultation extended to all stakeholders.

[15] The Commission went on to conclude that the 2007 EPA was in the public interest and should be accepted. It stated:

> In the circumstances of this review, evidence regarding consultation with respect to the historical, continuing infringement can reasonably be expected to be of no assistance for the same reasons there is no jurisdictional error, that is, the limited scope of the section 71 review, and there are no new physical impacts.

[16] In essence, the Commission took the view that the 2007 EPA would have no physical impact on the existing water levels in the Nechako River and hence it would not change the current management of its fishery. The Commission further found that its decision would not involve any transfer or change in the project's licences or operations. Consequently, the Commission concluded that its decision would have no adverse impact on the pending claims or rights of the CSTC First Nations such that there was no need to rescope the hearing to permit further argument on the duty to consult.

C. *The Judgment of the Court of Appeal, 2009 BCCA 67, 89 B.C.L.R. (4th) 298 (Donald, Huddart and Bauman JJ.A.)*

[17] The CSTC appealed the Reconsideration Decision and the approval of the 2007 EPA to the British Columbia Court of Appeal. The Court, *per* Donald J.A., reversed the Commission's orders and remitted the case back to the Commission for "evidence and argument on whether a duty to consult and, if necessary, accommodate the [CSTC First Nations] exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA" (para. 69).

concernant le CAÉ de 2007 n'aurait pas d'effet préjudiciable sur les intérêts des Premières nations du CTCS. L'obligation de consulter n'avait donc pas pris naissance, et la Commission n'a pas commis d'erreur de compétence en refusant d'inclure dans le cadre de l'audience la consultation des Premières nations, en sus de la consultation générale de tous les intéressés.

[15] La Commission a ensuite conclu que le CAÉ de 2007 était dans l'intérêt public et devait être approuvé :

> [TRADUCTION] Dans les circonstances du présent examen, on peut raisonnablement tenir pour inutile la preuve relative à la consultation sur l'atteinte historique et continue pour les mêmes raisons qu'il n'y a pas d'erreur de compétence, soit la portée limitée de l'examen visé à l'article 71 et l'absence de nouveaux impacts physiques.

[16] Essentiellement, la Commission a opiné que le CAÉ de 2007 n'aurait pas d'impact physique sur les niveaux d'eau existants de la rivière Nechako, de sorte qu'il ne modifierait pas la gestion des stocks de poissons. Elle a aussi estimé que sa décision ne nécessiterait ni cession ni modification des licences ou des activités d'exploitation. Elle est donc arrivée à la conclusion que sa décision n'aurait aucun effet préjudiciable sur les revendications ou les droits des Premières nations du CTCS, de sorte qu'il n'était pas nécessaire de recadrer l'audience pour permettre que soit débattue plus avant la question de l'obligation de consulter.

C. *Le jugement de la Cour d'appel, 2009 BCCA 67, 89 B.C.L.R. (4th) 298 (les juges Donald, Huddart et Bauman)*

[17] Le CTCS a contesté devant la Cour d'appel de la Colombie-Britannique la décision sur la demande de révision et l'approbation du CAÉ de 2007. Au nom de la Cour d'appel, le juge Donald a annulé les ordonnances et renvoyé l'affaire à la Commission pour qu'elle entende [TRADUCTION] « preuve et arguments sur la question de savoir s'il existe ou non une obligation de consulter [les Premières nations du CTCS] et, au besoin, d'arriver à un accord avec elles et, dans l'affirmative, sur la question de savoir si l'obligation a été respectée relativement au dépôt du CAÉ de 2007 » (par. 69).

[18] The Court of Appeal found that the Commission had jurisdiction to consider the issue of consultation. The Commission had the power to decide questions of law, and hence constitutional issues relating to the duty to consult.

[19] The Court of Appeal went on to hold that the Commission acted prematurely by rejecting the application for reconsideration. Donald J.A., writing for the Court, stated:

> . . . the Commission wrongly decided something as a preliminary matter which properly belonged in a hearing of the merits. The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the [CSTC] would win the point as a precondition for a hearing into the very same point.
>
> I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. [paras. 61-62]

[20] The Court of Appeal held that the honour of the Crown obliged the Commission to decide the consultation issue, and that "the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation" (para. 53). Unlike the Commission, the Court of Appeal did not consider whether the 2007 EPA was capable of having an adverse impact on a pending claim or right of the CSTC First Nations. The Court of Appeal did not criticize the Commission's adverse impacts finding. Rather, it appears to have concluded that despite these findings, the Commission was obliged to consider whether consultation could be "useful". In finding that the Commission should have considered the consultation issue, the Court of Appeal appears to have taken a broader view than did the Commission as to when a duty to consult may arise.

[21] The Court of Appeal suggested that a failure to consider consultation risked the approval of a contract in breach of the Crown's constitutional

[18] La Cour d'appel conclut que la Commission avait compétence pour se pencher sur la question de la consultation. La Commission pouvait trancher des questions de droit et, par conséquent, toute question constitutionnelle liée à l'obligation de consulter.

[19] La Cour d'appel opine ensuite que la Commission a prématurément rejeté la demande de révision. Le juge Donald dit ce qui suit au nom de la juridiction d'appel :

> [TRADUCTION] ... la Commission a tranché une question tenue erronément pour préliminaire alors qu'il s'agissait d'une question de fond. La faille logique a consisté à présumer l'inutilité de la consultation. Autrement dit, la Commission a exigé comme condition préalable à l'examen des prétentions que [le CTCS] en démontre d'abord la justesse.
>
> Je ne dis pas que la Commission serait tenue de conclure à l'existence d'une obligation de consulter en l'espèce. L'erreur de la Commission est de ne pas avoir considéré la question de la consultation dans le cadre d'une audience en bonne et due forme alors que les circonstances exigeaient un examen. [par. 61-62]

[20] La Cour d'appel conclut que l'honneur de la Couronne obligeait la Commission à trancher la question de la consultation et que [TRADUCTION] « le tribunal administratif doté du pouvoir d'approuver le projet doit accepter l'obligation de se prononcer sur le caractère adéquat de la consultation » (par. 53). Contrairement à la Commission, la Cour d'appel ne se demande pas si le CAÉ de 2007 était susceptible d'avoir un effet préjudiciable sur quelque revendication ou droit des Premières nations du CTCS. Elle ne reproche pas à la Commission sa conclusion sur l'effet préjudiciable. Elle semble plutôt estimer que, malgré cette conclusion, la Commission était tenue de déterminer si la consultation pouvait être « utile ». En statuant que la Commission aurait dû examiner la question de la consultation, la Cour d'appel paraît interpréter plus largement que la Commission les conditions auxquelles il y a obligation de consulter.

[21] La Cour d'appel laisse entendre que l'omission de considérer la question de la consultation risquait d'entraîner l'approbation d'un contrat

duty. Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry" (para. 42).

[22] Alcan and BC Hydro appeal to this Court. They argue that the Court of Appeal took too wide a view of the Crown's duty to consult and of the role of tribunals in deciding consultation issues. In view of the Commission's task under its constituent statute and the evidence before it, Alcan and BC Hydro submit that the Commission correctly concluded that it had no duty to consider the consultation issue raised by the CSTC, since, however much participation was accorded, there was no possibility of finding a duty to consult with respect to the 2007 EPA.

[23] The CSTC argues that the Court of Appeal correctly held that the Commission erred in refusing to rescope its proceeding to allow submissions on the consultation issue. It does not pursue earlier procedural arguments in this Court.

II. The Legislative Framework

A. *Legislation Regarding the Public Interest Determination*

[24] The 2007 EPA was subject to review before the Commission under the authority of s. 71 of the *Utilities Commission Act* to determine whether it was in the public interest. Prior to May 2008, this determination was to be based on the quantity of energy to be supplied; the availability of supplies; the price and availability of any other form of energy; the price of the energy supplied to a public utility company; and "any other factor that the commission considers relevant to the public interest":

au mépris de l'obligation constitutionnelle de la Couronne. Le juge Donald pose la question suivante : [TRADUCTION] « Comment un contrat conclu par un mandataire de la Couronne dans le non-respect d'une obligation constitutionnelle peut-il être dans l'intérêt public? L'existence d'une telle obligation et l'allégation de non-respect doivent faire partie intégrante de l'examen relatif à l'intérêt public » (par. 42).

[22] Alcan et BC Hydro interjettent appel devant notre Cour. Elles soutiennent que la Cour d'appel a interprété trop largement l'obligation de la Couronne de consulter et le pouvoir du tribunal administratif de trancher les questions touchant à la consultation. Vu le mandat incombant à la Commission suivant sa loi constitutive et la preuve dont elle disposait, Alcan et BC Hydro prétendent que la Commission a conclu à juste titre qu'elle n'était pas tenue d'examiner la question de la consultation soulevée par le CTCS, car peu importe l'importance du droit de participation reconnu, il était impossible de conclure à l'existence d'une obligation de consulter relativement au CAÉ de 2007.

[23] Le CTCS avance que la Cour d'appel a eu raison de conclure que la Commission avait refusé à tort de redéfinir le cadre de l'audience de manière à permettre la présentation d'observations sur la question de la consultation. Il ne fait plus valoir les arguments procéduraux invoqués devant les tribunaux inférieurs.

II. Le cadre législatif

A. *Dispositions législatives régissant la décision relative à l'intérêt public*

[24] L'article 71 de la *Utilities Commission Act* prévoyait que la Commission devait examiner le CAÉ de 2007 pour déterminer si son approbation était dans l'intérêt public. Avant le mois de mai 2008, la décision devait tenir compte de la quantité d'énergie fournie, de la disponibilité de l'approvisionnement, du prix et de la disponibilité de toute autre forme d'énergie, du prix de l'énergie fournie à une entreprise de services publics et de [TRADUCTION] « tout autre élément jugé pertinent

Utilities Commission Act, s. 71(2)(a) to (e). Effective May 2008, these considerations were expanded to include "the government's energy objectives" and its long-term resource plans: s. 71(2.1)(a) and (b). The public interest clause, however, was narrowed to considerations of the interests of potential British Columbia public utility customers: s. 71(2.1)(d).

B. *Legislation on the Commission's Remedial Powers*

[25] Based on the above considerations, the Commission may issue an order approving the proposed contract under s. 71(2.4) of the *Utilities Commission Act* if it is found to be in the public interest. If it is not found to be in the public interest, the Commission can issue an order declaring the contract unenforceable, either wholly or in part, or "make any other order it considers advisable in the circumstances": s. 71(2) and (3).

C. *Legislation on the Commission's Jurisdiction and Appeals*

[26] Section 79 of the *Utilities Commission Act* states that all findings of fact made by the Commission within its jurisdiction are "binding and conclusive". This is supplemented by s. 105 which grants the Commission "exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act". An appeal, however, lies from a decision or order of the Commission to the Court of Appeal with leave: s. 101(1).

[27] Together, ss. 79 and 105 of the *Utilities Commission Act* constitute a "privative clause" as defined in s. 1 of the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Under s. 58 of the *Administrative Tribunals Act*, this privative clause attracts a "patently unreasonable" standard of judicial review to "a finding of fact or law or

eu égard à l'intérêt public » : al. 71(2)a) à e) de la *Utilities Commission Act*. À compter de mai 2008, se sont ajoutées les considérations suivantes : les [TRADUCTION] « objectifs énergétiques du gouvernement » et son plan à long terme en matière de ressources : al. 71(2.1)a) et b). Or, la disposition portant sur l'intérêt public a vu sa portée ramenée à la prise en compte des intérêts des clients éventuels d'une entreprise de services publics de la Colombie-Britannique : al. 71(2.1)d).

B. *Dispositions législatives régissant le pouvoir de réparation de la Commission*

[25] Au vu des considérations susmentionnées, la Commission peut, si elle juge qu'il est dans l'intérêt public de le faire, rendre une ordonnance approuvant le contrat projeté en application du par. 71(2.4) de la *Utilities Commission Act*. Si elle arrive à la conclusion contraire concernant l'intérêt public, elle peut, par voie d'ordonnance, déclarer le contrat inapplicable, en totalité ou en partie, ou [TRADUCTION] « rendre toute autre ordonnance qu'elle juge indiquée dans les circonstances » : par. 71(2) et (3).

C. *Dispositions législatives régissant la compétence de la Commission et le droit d'appel*

[26] L'article 79 de la *Utilities Commission Act* dispose que les conclusions de fait tirées par la Commission dans les limites de sa compétence sont [TRADUCTION] « opposables et définitives ». L'article 105 confère en outre à la Commission le [TRADUCTION] « pouvoir exclusif de statuer dans toute affaire et sur toute question relevant de sa compétence suivant la présente loi ou un autre texte législatif ». Ses décisions et ordonnances peuvent cependant être contestées devant la Cour d'appel, sur autorisation : par. 101(1).

[27] Ensemble, les art. 79 et 105 de la *Utilities Commission Act* constituent une [TRADUCTION] « disposition d'inattaquabilité » au sens de l'article premier de l'*Administrative Tribunals Act* de la Colombie-Britannique, S.B.C. 2004, ch. 45. Suivant l'art. 58 de l'*Administrative Tribunals Act*, cette disposition d'inattaquabilité assujettit à la norme de

an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause"; a standard of correctness is to be applied in the review of "all [other] matters".

[28] The jurisdiction of the commission is also arguably affected by s. 44(1) of the *Administrative Tribunals Act* which applies to the Commission by virtue of s. 2(4) of the *Utilities Commission Act*. Section 44(1) of the *Administrative Tribunals Act* states that "[t]he tribunal does not have jurisdiction over constitutional questions". A "constitutional question" is defined in s. 1 of the *Administrative Tribunals Act* by s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Section 8(2) says:

> **8.** . . .
>
> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

A "constitutional remedy" is defined as "a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion": *Constitutional Question Act*, s. 8(1).

D. *Section 35 of the Constitution Act, 1982*

[29] Section 35 of the *Constitution Act, 1982* reads:

contrôle de la décision « manifestement déraisonnable » [TRADUCTION] « la conclusion de fait ou de droit ou l'exercice du pouvoir discrétionnaire relatifs à une question sur laquelle le tribunal a compétence exclusive du fait de l'existence d'une disposition d'inattaquabilité ». La norme de contrôle de la décision correcte vaut pour [TRADUCTION] « toute [autre] question ».

[28] On peut aussi soutenir que le par. 44(1) de l'*Administrative Tribunals Act* a une incidence sur la compétence de la Commission en ce qu'il s'applique à celle-ci suivant le par. 2(4) de la *Utilities Commission Act*. Le paragraphe 44(1) de l'*Administrative Tribunals Act* dispose qu'[TRADUCTION] « [u]n tribunal administratif n'a pas compétence pour trancher une question constitutionnelle ». L'article premier de l'*Administrative Tribunals Act* délimite cette matière par renvoi à l'art. 8 de la *Constitutional Question Act*, R.S.B.C. 1996, ch. 68. Voici le texte du par. 8(2) de cette loi :

[TRADUCTION]

> **8.** . . .
>
> (2) Lorsque dans une instance, y compris un dossier ou une affaire,
>
> a) la validité ou l'applicabilité constitutionnelle d'une loi est contestée ou
>
> b) une réparation constitutionnelle est demandée,
>
> la loi ne doit pas être tenue pour invalide ou inapplicable, et la réparation ne doit pas être accordée sans qu'un avis de la contestation ou de la demande n'ait été signifié au procureur général du Canada et au procureur général de la Colombie-Britannique.

La [TRADUCTION] « réparation constitutionnelle » est définie comme étant « la réparation visée au par. 24(1) de la *Loi constitutionnelle de 1982*, hormis celle consistant à écarter un élément de preuve ou découlant d'une telle mesure » : *Constitutional Question Act*, par. 8(1).

D. *L'article 35 de la Loi constitutionnelle de 1982*

[29] Voici le libellé de l'art. 35 de la *Loi constitutionnelle de 1982* :

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

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

III. The Issues

[30] The main issues that must be resolved are: (1) whether the Commission had jurisdiction to consider consultation; and (2) if so, whether the Commission's refusal to rescope the inquiry to consider consultation should be set aside. In order to resolve these issues, it is necessary to consider when a duty to consult arises and the role of tribunals in relation to the duty to consult. These reasons will therefore consider:

1. When a duty to consult arises;
2. The role of tribunals in consultation;
3. The Commission's jurisdiction to consider consultation;
4. The Commission's Reconsideration Decision;
5. The Commission's conclusion that approval of the 2007 EPA was in the public interest.

IV. Analysis

A. *When Does the Duty to Consult Arise?*

[31] The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuits et des Métis du Canada.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

III. Les questions en litige

[30] Les principales questions à trancher sont les suivantes : (1) la Commission avait-elle compétence pour se prononcer sur la consultation et (2), dans l'affirmative, le refus de la Commission de redéfinir le cadre de l'audience pour que la question de la consultation soit abordée devrait-il être annulé? Il faut dès lors déterminer les conditions auxquelles il y a obligation de consulter et examiner le rôle du tribunal administratif à l'égard de cette obligation. J'examinerai donc successivement ce qui suit :

1. les conditions auxquelles il y a obligation de consulter;
2. le rôle du tribunal administratif à l'égard de la consultation;
3. le pouvoir de la Commission de se prononcer sur la consultation;
4. la décision de la Commission sur la demande de révision;
5. la conclusion de la Commission portant que l'approbation du CAÉ de 2007 servait l'intérêt public.

IV. Analyse

A. *À quelles conditions y a-t-il obligation de consulter?*

[31] Dans l'arrêt *Nation Haïda*, notre Cour établit que l'obligation de consulter prend naissance

the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.

[32] The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation: *Haida Nation*, at para. 20. As stated in *Haida Nation*, at para. 25:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

[33] The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a

« lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci » (par. 35). Ce critère comporte trois volets : (1) la connaissance par la Couronne, réelle ou imputée, de l'existence possible d'une revendication autochtone ou d'un droit ancestral, (2) la mesure envisagée de la Couronne et (3) la possibilité que cette mesure ait un effet préjudiciable sur une revendication autochtone ou un droit ancestral. J'examinerai chacun de ces volets plus en détail. D'abord, quelques remarques générales sont de mise concernant la source et la nature de l'obligation de consulter.

[32] L'obligation de consulter s'origine de l'honneur de la Couronne. Elle est un corollaire de celle d'arriver à un règlement équitable des revendications autochtones au terme du processus de négociation de traités. Lorsque les négociations sont en cours, la Couronne a l'obligation tacite de consulter les demandeurs autochtones sur ce qui est susceptible d'avoir un effet préjudiciable sur leurs droits issus de traités et leurs droits ancestraux, et de trouver des mesures d'accommodement dans un esprit de conciliation : *Nation Haïda*, par. 20. Comme le dit la Cour au par. 25 de cet arrêt :

> En bref, les Autochtones du Canada étaient déjà ici à l'arrivée des Européens; ils n'ont jamais été conquis. De nombreuses bandes ont concilié leurs revendications avec la souveraineté de la Couronne en négociant des traités. D'autres, notamment en Colombie-Britannique, ne l'ont pas encore fait. Les droits potentiels visés par ces revendications sont protégés par l'art. 35 de la *Loi constitutionnelle de 1982*. L'honneur de la Couronne commande que ces droits soient déterminés, reconnus et respectés. Pour ce faire, la Couronne doit agir honorablement et négocier. Au cours des négociations, l'honneur de la Couronne peut obliger celle-ci à consulter les Autochtones et, s'il y a lieu, à trouver des accommodements à leurs intérêts.

[33] L'obligation de consulter dont il est fait état dans l'arrêt *Nation Haïda* découle de la nécessité de protéger les intérêts autochtones lorsque des terres ou des ressources font l'objet de revendications ou que la mesure projetée peut empiéter sur un droit ancestral. Sans le respect de cette

final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective. Moreover, with a few exceptions, many Aboriginal groups have limited success in obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.

[34] Grounded in the honour of the Crown, the duty has both a legal and a constitutional character: *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6. The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.

[35] *Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-35. The duty is *prospective*, fastening on rights yet to be proven.

[36] The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment*

obligation, un groupe autochtone désireux de protéger ses intérêts jusqu'au règlement d'une revendication devrait s'adresser au tribunal pour obtenir une injonction interlocutoire ordonnant la cessation de l'activité préjudiciable. L'expérience enseigne qu'il s'agit d'une démarche longue, coûteuse et souvent vaine. De plus, sauf quelques exceptions, les groupes autochtones réussissent rarement à obtenir une injonction pour mettre fin à la mise en valeur des terres ou aux activités qui y sont exercées et ainsi protéger des droits ancestraux ou issus de traités qui sont contestés.

[34] Fondée sur l'honneur de la Couronne, l'obligation revêt un caractère à la fois juridique et constitutionnel : *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 6. Elle vise la protection des droits ancestraux et issus de traités, ainsi que la réalisation de l'objectif de conciliation des intérêts des Autochtones et de ceux de la Couronne. Elle reconnaît que les deux parties doivent collaborer pour concilier leurs intérêts au lieu de s'opposer dans un litige. Elle tient aussi compte du fait que les peuples autochtones participent souvent à l'exploitation des ressources. Empêcher la mise en valeur par voie d'injonction risque de ne servir l'intérêt de personne. L'honneur de la Couronne est donc davantage compatible avec une obligation de consulter axée sur la conciliation des intérêts respectifs des parties.

[35] L'arrêt *Nation Haïda* jette les bases du dialogue préalable au règlement définitif des revendications en obligeant la Couronne à tenir compte des droits ancestraux contestés ou établis *avant* de prendre une décision susceptible d'avoir un effet préjudiciable sur ces droits : J. Woodward, *Native Law*, vol. 1 (feuilles mobiles), p. 5-35. Il s'agit d'une obligation de nature *prospective* prenant appui sur des droits dont l'existence reste à prouver.

[36] La nature de l'obligation varie en fonction de la situation. La consultation exigée est plus approfondie lorsque la revendication autochtone paraît de prime abord fondée et que l'effet sur le droit ancestral ou issu de traité sous-jacent est grave : *Nation Haïda*, par. 43-45, et *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur*

Director), 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 32.

[37] The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

[38] The duty to consult embodies what Brian Slattery has described as a "generative" constitutional order which sees "section 35 as serving a dynamic and not simply static function" ("Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at p. 440). This dynamicism was articulated in *Haida Nation* as follows, at para. 32:

> . . . the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.

As the post-*Haida Nation* case law confirms, consultation is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations": D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21.

[39] Against this background, I now turn to the three elements that give rise to a duty to consult.

(1) Knowledge by the Crown of a Potential Claim or Right

[40] To trigger the duty to consult, the Crown must have real or constructive knowledge of a

d'évaluation de projet), 2004 CSC 74, [2004] 3 R.C.S. 550, par. 32.

[37] Le recours pour manquement à l'obligation de consulter varie également en fonction de la situation. L'omission de la Couronne de consulter les intéressés peut donner lieu à un certain nombre de mesures allant de l'injonction visant l'activité préjudiciable, à l'indemnisation, voire à l'ordonnance enjoignant au gouvernement de consulter avant d'aller de l'avant avec son projet : *Nation Haïda*, par. 13-14.

[38] L'obligation de consulter s'inscrit dans ce que Brian Slattery qualifie d'ordre constitutionnel [TRADUCTION] « génératif » où « l'article 35 a une fonction dynamique et non purement statique » (« Aboriginal Rights and the Honour of the Crown » (2005), 29 *S.C.L.R.* (2d) 433, p. 440). Ce dynamisme a été formulé comme suit dans l'arrêt *Nation Haïda* (par. 32) :

> . . . l'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà du règlement formel des revendications. La conciliation ne constitue pas une réparation juridique définitive au sens usuel du terme. Il s'agit plutôt d'un processus découlant des droits garantis par le par. 35(1) de la *Loi constitutionnelle de 1982*.

Comme le confirme la jurisprudence postérieure à cet arrêt, la consultation [TRADUCTION] « s'attache au maintien de relations constantes » et à l'établissement d'un processus permanent de conciliation en ce qu'elle privilégie les mesures « qui favorisent la continuité des négociations » : D. G. Newman, *The Duty to Consult : New Relationships with Aboriginal Peoples* (2009), p. 21.

[39] Sur cette toile de fond, j'examine maintenant les trois éléments qui font naître l'obligation de consulter.

(1) Connaissance par la Couronne de l'existence possible d'une revendication ou d'un droit

[40] Pour qu'elle ait l'obligation de consulter, la Couronne doit avoir connaissance, concrètement

claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, para. 34. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice. As stated in *Haida Nation*, at para. 37:

Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims.

[41] The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27 and 33.

(2) Crown Conduct or Decision

[42] Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that

ou par imputation, d'une revendication visant la ressource ou la terre qui s'y rattache : *Nation Haïda*, par. 35. La norme de preuve applicable, eu égard à la nécessité de préserver l'honneur de la Couronne, n'est pas stricte. Il y a connaissance réelle lorsqu'une revendication a été formulée dans une instance judiciaire ou lors de négociations, ou lorsqu'un droit issu de traité peut être touché : *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388, par. 34. Il y a connaissance par imputation lorsque l'on sait ou que l'on soupçonne raisonnablement que les terres ont été traditionnellement occupées par une collectivité autochtone ou que l'on peut raisonnablement prévoir qu'il y aura une incidence sur des droits. L'existence possible d'une revendication est essentielle, mais il n'est pas nécessaire de prouver que la revendication connaîtra une issue favorable. La revendication doit seulement être crédible. La revendication à l'assise fragile, dont le fondement ne paraît pas plausible à première vue, peut ne faire naître qu'une obligation d'informer. Comme l'affirme notre Cour dans l'arrêt *Nation Haïda* (par. 37) :

La connaissance d'une revendication crédible mais non encore établie suffit à faire naître l'obligation de consulter et d'accommoder. Toutefois, le contenu de l'obligation varie selon les circonstances, comme nous le verrons de façon plus approfondie plus loin. Une revendication douteuse ou marginale peut ne requérir qu'une simple obligation d'informer, alors qu'une revendication plus solide peut faire naître des obligations plus contraignantes. Il est possible en droit de différencier les revendications reposant sur une preuve ténue des revendications reposant sur une preuve à première vue solide et de celles déjà établies.

[41] Il faut que la revendication ou le droit existe réellement et risque d'être compromis par la mesure gouvernementale, car l'objectif de la consultation est de protéger un droit, établi ou non, d'un préjudice irréparable, pendant les négociations en vue d'un règlement : Newman, p. 30, citant *Nation Haïda*, par. 27 et 33.

(2) Mesure ou décision de la Couronne

[42] Deuxièmement, pour que naisse l'obligation de consulter, la mesure ou la décision de la

engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

[43] This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

[44] Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.

Couronne doit mettre en jeu un droit ancestral éventuel. La mesure doit être susceptible d'avoir un effet préjudiciable sur la revendication ou le droit en question.

[43] Dès lors, la question qui se pose est celle de savoir quelle mesure oblige le gouvernement à consulter. Il a été établi que cette mesure ne s'entend pas uniquement de l'exercice d'un pouvoir conféré par la loi : *Huu-Ay-Aht First Nation c. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74, par. 94 et 104; *Wii'litswx c. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, par. 11-15. Cette conclusion s'inscrit dans l'approche généreuse et téléologique que commande l'obligation de consulter.

[44] En outre, une mesure gouvernementale ne s'entend pas uniquement d'une décision ou d'un acte qui a un effet immédiat sur des terres et des ressources. Un simple risque d'effet préjudiciable suffit. Ainsi, l'obligation de consulter naît aussi d'une [TRADUCTION] « décision stratégique prise en haut lieu » qui est susceptible d'avoir un effet sur des revendications autochtones et des droits ancestraux (Woodward, p. 5-41 (italiques omis)). Mentionnons quelques exemples : la cession de concessions de ferme forestière qui auraient permis l'abattage d'arbres dans de vieilles forêts (*Nation Haïda*), l'approbation d'un plan pluriannuel de gestion forestière visant un vaste secteur géographique (*Khaloose First Nation c. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110), la création d'un processus d'examen relativement à un gazoduc important (*Première nation Dene Tha' c. Canada (Ministre de l'Environnement)*, 2006 CF 1354 (CanLII), conf. par 2008 CAF 20 (CanLII)), et l'examen approfondi des besoins d'infrastructure et de capacité de transport d'électricité d'une province (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)). La question de savoir si une mesure gouvernementale s'entend aussi d'une mesure législative devra être tranchée dans une affaire ultérieure : voir *R. c. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, par. 37-40.

(3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right

[45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

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

[47] Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example,

(3) Effet préjudiciable de la mesure projetée par la Couronne sur une revendication autochtone ou un droit ancestral

[45] Le troisième élément requis pour qu'il y ait obligation de consulter est la possibilité que la mesure de la Couronne ait un effet sur une revendication autochtone ou un droit ancestral. Le demandeur doit établir un lien de causalité entre la mesure ou la décision envisagée par le gouvernement et un effet préjudiciable éventuel sur une revendication autochtone ou un droit ancestral. Un acte fautif commis dans le passé, telle l'omission de consulter, ne suffit pas.

[46] Une approche généreuse et téléologique est aussi de mise à l'égard de ce troisième élément puisque, comme le dit Newman, l'objectif poursuivi est [TRADUCTION] « de reconnaître que les actes touchant un titre aborigène ou un droit ancestral non encore établi, ou des droits issus de traités, peuvent avoir des répercussions irréversibles qui sont incompatibles avec l'honneur de la Couronne » (p. 30, citant l'arrêt *Nation Haïda*, par. 27 et 33). Cependant, de simples répercussions hypothétiques ne suffisent pas. Comme il appert de l'arrêt *R. c. Douglas*, [2007] BCCA 265, 278 D.L.R. (4th) 653, au par. 44, il doit y avoir un [TRADUCTION] « effet préjudiciable important sur la possibilité qu'une Première nation puisse exercer son droit ancestral ». Le préjudice doit toucher l'exercice futur du droit lui-même, et non seulement la position de négociation ultérieure de la Première nation.

[47] L'effet préjudiciable comprend toute répercussion risquant de compromettre une revendication autochtone ou un droit ancestral. Il est souvent de nature physique. Cependant, comme on l'a vu relativement à ce qui constitue une mesure de la Couronne, la décision prise en haut lieu ou la modification structurelle apportée à la gestion de la ressource risque aussi d'avoir un effet préjudiciable sur une revendication autochtone ou un droit ancestral, et ce, même si elle n'a pas d'[TRADUCTION] « effet immédiat sur les terres et les ressources » : Woodward, p. 5-41. La raison en est qu'une telle modification structurelle de la

a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

[48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

[49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated

gestion de la ressource peut ouvrir la voie à d'autres décisions ayant un effet préjudiciable *direct* sur les terres et les ressources. Par exemple, le contrat par lequel la Couronne cède à une partie privée la maîtrise d'une ressource risque de supprimer ou de réduire le pouvoir de la Couronne de faire en sorte que la ressource soit exploitée dans le respect des intérêts autochtones, conformément à l'honneur de la Couronne. Les Autochtones seraient alors dépouillés en tout ou en partie de leur droit constitutionnel de voir leurs intérêts pris en considération dans les décisions de mise en valeur, ce qui constitue un effet préjudiciable : voir l'arrêt *Nation Haïda*, par. 72-73.

[48] Une atteinte sous-jacente ou continue, même si elle ouvre droit à d'autres recours, ne constitue pas un effet préjudiciable lorsqu'il s'agit de déterminer si une décision gouvernementale particulière emporte l'obligation de consulter. La raison d'être de cette obligation est d'empêcher que les revendications autochtones et les droits ancestraux ne soient compromis pendant les négociations auxquelles ils donnent lieu : *Nation Haïda*, par. 33. L'obligation naît lorsque la Couronne a *connaissance*, concrètement ou par imputation, de l'existence potentielle ou réelle du droit ou titre ancestral revendiqué et qu'elle « envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci » : *Nation Haïda*, par. 35 (je souligne). Ce critère est repris par notre Cour relativement à des droits issus de traités dans l'arrêt *Première nation crie Mikisew*, par. 33-34.

[49] Il faut déterminer si une revendication ou un droit est susceptible d'être compromis par la mesure ou la décision *actuelle* du gouvernement. L'atteinte antérieure et continue, y compris l'omission de consulter, ne fait naître l'obligation de consulter que si la décision actuelle risque d'avoir un nouvel effet défavorable sur une revendication actuelle ou un droit existant. Il peut néanmoins y avoir recours pour une atteinte antérieure et continue, y compris l'omission de consulter. Comme le signale la Cour dans l'arrêt *Nation Haïda*, le non-respect de l'obligation de consulter peut donner droit à diverses réparations, dont l'indemnisation. Pour que naisse une nouvelle obligation de

Crown action must put current claims and rights in jeopardy.

[50] Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.

(4) An Alternative Theory of Consultation

[51] As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

[52] The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries

consulter — ce dont il est question en l'espèce —, une mesure envisagée par la Couronne doit mettre en péril une revendication actuelle ou un droit existant.

[50] L'effet préjudiciable ne s'entend pas non plus d'une répercussion négative sur la position de négociation d'un groupe autochtone. L'obligation de consulter, que justifie la nécessité de protéger les droits ancestraux et de préserver l'utilisation ultérieure des ressources revendiquées par les peuples autochtones, compte tenu des intérêts opposés de la Couronne, peut assurément retarder au final la mise en valeur entreprise. Elle peut donc servir non seulement à régler provisoirement une question relative aux ressources, mais aussi, accessoirement, à atteindre un objectif d'indemnisation à long terme. Vue sous cet angle, l'obligation de consulter peut être considérée comme un maillon essentiel du dispositif global permettant à la Couronne de s'acquitter de ses obligations constitutionnelles envers les Premières nations du Canada. Toutefois, dissociée de sa raison d'être qu'est la nécessité de préserver les intérêts autochtones, l'obligation de consulter viserait seulement à favoriser une partie par rapport à une autre dans le processus de négociation.

(4) Interprétation nouvelle de l'obligation de consulter

[51] Rappelons que l'obligation de consulter prend naissance lorsque (1) la Couronne a connaissance, concrètement ou par imputation, de l'existence possible d'une revendication autochtone ou d'un droit ancestral, (2) qu'elle envisage une mesure ou une décision et (3) que cette mesure ou cette décision est susceptible d'avoir un effet préjudiciable sur la revendication autochtone ou le droit ancestral. Il faut donc établir un lien de causalité entre la mesure projetée par la Couronne et l'effet préjudiciable possible sur une revendication autochtone ou un droit ancestral.

[52] L'intimé fonde ses prétentions sur une interprétation plus large de l'obligation de consulter. Il prétend que même si le CAÉ de 2007 n'aura aucun impact sur les niveaux d'eau de la rivière

or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.

[53] I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

[54] The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree — an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

Nechako, ses stocks de poissons ou la gestion de la ressource visée par le litige, il peut y avoir obligation de consulter, car le CAÉ de 2007 fait partie d'un projet hydroélectrique qui continue d'avoir des répercussions sur ses droits. Dès lors, si la Couronne projette quelque mesure — aussi modeste soit-elle — se rapportant à un projet qui touche une revendication autochtone ou un droit ancestral, une nouvelle obligation de consulter voit le jour. La mesure ou la décision gouvernementale en cause, qu'elle ait peu de conséquences, voire aucune, devient le fondement de l'obligation constitutionnelle de consulter relativement à la totalité de la ressource.

[53] Je ne peux adhérer à cette interprétation de l'obligation de consulter. L'arrêt *Nation Haïda* écarte une interprétation aussi large. La Cour y fait reposer l'obligation de consulter sur la nécessité de préserver les droits ancestraux allégués jusqu'au règlement des revendications. L'objet de la consultation se limite donc aux seuls effets préjudiciables de la mesure précise projetée par la Couronne, à l'exclusion des effets préjudiciables globaux du projet dont elle fait partie. La consultation s'intéresse à l'effet de la décision *actuellement* considérée sur les droits revendiqués.

[54] La thèse d'une obligation de consulter plus étendue s'appuie sur un principe en matière de preuve — celui du fruit de l'arbre empoisonné — selon lequel la Couronne ne saurait aujourd'hui tirer avantage de ses fautes d'hier. L'intimé prétend donc que l'omission de consulter les Premières nations du CTCS au sujet du projet initial de barrage et de dérivation d'eau empêche toute poursuite de l'exploitation de cette ressource tant qu'il n'y a pas eu consultation sur l'ensemble de la ressource et de sa gestion. Or, comme le fait observer la Cour dans l'arrêt *Nation Haïda*, l'absence de consultation ouvre droit à diverses réparations, y compris l'indemnisation. L'ordonnance de consulter n'est indiquée que lorsque la mesure projetée par la Couronne, qu'elle soit immédiate ou prospective, est susceptible d'avoir un effet préjudiciable sur des droits établis ou revendiqués. Sinon, d'autres réparations peuvent être plus indiquées.

B. *The Role of Tribunals in Consultation*

[55] The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.

[56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.

[57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.

[58] Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

[59] The decisions below and the arguments before us at times appear to merge the different

B. *Le rôle du tribunal administratif dans la consultation*

[55] L'obligation du tribunal administratif de se pencher sur la consultation et sur la portée de celle-ci dépend de la mission que lui confie sa loi constitutive. Un tribunal administratif doit s'en tenir à l'exercice des pouvoirs que lui confère sa loi habilitante : *R. c. Conway*, 2010 CSC 22, [2010] 1 R.C.S. 765. Il s'ensuit que le rôle d'un tribunal administratif en ce qui a trait à la consultation tient à ses obligations et à ses attributions légales.

[56] Le législateur peut décider de lui déléguer l'obligation de la Couronne de consulter. Comme le signale la Cour dans l'arrêt *Nation Haïda*, il est loisible aux gouvernements de mettre en place des régimes de réglementation fixant les exigences procédurales de la consultation aux différentes étapes du processus décisionnel relatif à une ressource.

[57] Sinon, il peut lui confier le seul pouvoir de décider si une consultation adéquate a eu lieu, l'exercice de ce pouvoir faisant dès lors partie de son processus décisionnel. En pareil cas, le tribunal administratif ne participe pas à la consultation. Il s'assure plutôt que la Couronne s'est acquittée de son obligation de consulter une Première nation en particulier sur un éventuel effet préjudiciable de la décision en cause sur ses droits ancestraux.

[58] Le tribunal administratif appelé à examiner une question ayant trait à une ressource et ayant une incidence sur des intérêts autochtones peut n'avoir ni l'une ni l'autre de ces obligations, n'avoir que l'une d'elles ou avoir les deux, selon les attributions que lui confère le législateur. Tant son pouvoir légal d'examiner une question de droit que celui d'accorder réparation sont pertinents pour circonscrire sa compétence : *Conway*. Ils sont donc aussi pertinents pour déterminer si un tribunal administratif particulier est tenu d'effectuer une consultation ou de se pencher sur la consultation, ou s'il n'a aucune obligation en la matière.

[59] Les décisions des tribunaux inférieurs et les prétentions formulées devant notre Cour paraissent

duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation.

[60] This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

[61] A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by

parfois amalgamer les différentes obligations en ce qui concerne la consultation et le contrôle de leur exécution. On prétend plus particulièrement que tout tribunal administratif compétent pour examiner une question de droit a l'obligation constitutionnelle de s'assurer qu'il y a eu consultation adéquate et, s'il n'y en a pas eu, de consulter lui-même les intéressés, que sa loi constitutive le prévoie ou non. Le raisonnement veut que ce pouvoir découle automatiquement du pouvoir du tribunal administratif d'examiner des questions de droit et, par conséquent, des questions constitutionnelles. L'absence de consultation équivaudrait à un vice constitutionnel qui annulerait la compétence du tribunal administratif et qui, en l'espèce, la rendrait contraire à l'intérêt public. Pour s'acquitter de son obligation, le tribunal administratif devrait remédier au vice en effectuant lui-même la consultation.

[60] À mon avis, on ne peut faire droit à cette thèse. Un tribunal administratif n'a que les pouvoirs qui lui sont expressément ou implicitement conférés par la loi. Pour qu'il puisse consulter une Première nation au sujet d'une ressource avant le règlement définitif de revendications, il doit y être expressément ou implicitement autorisé. Le pouvoir de consulter, qui est distinct du pouvoir de déterminer s'il existe une obligation de consulter, ne peut être inféré du simple pouvoir d'examiner une question de droit. La consultation comme telle n'est pas une question de droit. Il s'agit d'un processus constitutionnel distinct, souvent complexe, et dans certaines circonstances, d'un droit mettant en jeu faits, droit, politique et compromis. Par conséquent, le tribunal administratif désireux d'effectuer lui-même la consultation doit avoir le pouvoir de réparation nécessaire pour faire ce à quoi on l'exhorte relativement à la consultation. Le pouvoir de réparation d'un tribunal administratif tient à sa loi habilitante et à l'intention du législateur : *Conway*, par. 82.

[61] Le tribunal administratif doté du pouvoir de se prononcer sur le caractère adéquat de la consultation, mais non du pouvoir d'effectuer celle-ci, doit accorder la réparation qu'il juge indiquée dans les circonstances, conformément aux pouvoirs de réparation qui lui sont expressément ou implicitement

statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation.*

[62] The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

[63] As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

[64] Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:

> The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. . . . Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of

conférés par sa loi habilitante. L'objectif est de protéger les droits et les intérêts des Autochtones et de favoriser la conciliation d'intérêts que préconise notre Cour dans l'arrêt *Nation Haïda.*

[62] Qu'un tribunal administratif doive s'en tenir à l'exercice de ses pouvoirs légaux et ne faire porter son analyse et ses décisions que sur les questions particulières dont il est saisi comporte certes le risque qu'un gouvernement se soustraie de fait à l'obligation de consulter en limitant le mandat d'un tribunal administratif. On peut craindre en effet qu'en privant un tribunal administratif du pouvoir d'examiner les questions relatives à la consultation ou en répartissant le pouvoir de statuer en la matière entre plusieurs tribunaux administratifs de manière qu'aucun d'eux ne puisse se pencher sur l'obligation de consulter que font naître certaines mesures gouvernementales, le gouvernement se soustraie de fait à cette obligation.

[63] Comme le conclut à juste titre la Cour d'appel, l'obligation de consulter les peuples autochtones, qui naît lorsque le gouvernement prend une décision susceptible d'avoir un effet préjudiciable sur leurs intérêts, est une obligation constitutionnelle qui fait intervenir l'honneur de la Couronne et qui doit être respectée. Si le régime administratif mis en place par le législateur ne peut remédier aux éventuels effets préjudiciables d'une décision sur des intérêts autochtones, les Premières nations touchées doivent alors s'adresser à une cour de justice pour obtenir la réparation voulue : *Nation Haïda*, par. 51.

[64] Avant de passer au volet suivant de l'analyse, il me paraît indiqué de préciser quelle norme de contrôle s'applique à la décision du tribunal administratif. Prenons comme point de départ le par. 61 de l'arrêt *Nation Haïda* :

> L'existence et l'étendue de l'obligation de consulter ou d'accommoder sont des questions de droit en ce sens qu'elles définissent une obligation légale. Cependant, la réponse à ces questions repose habituellement sur l'appréciation des faits. Il se peut donc qu'il convienne de faire preuve de déférence à l'égard des conclusions de fait du premier décideur. [. . .] En l'absence d'erreur sur des questions de droit, il est possible que le tribunal

deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness . . . .

[65] It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

C. *The Commission's Jurisdiction to Consider Consultation*

[66] Having considered the law governing when a duty to consult arises and the role of tribunals in relation to the duty to consult, I return to the questions at issue on appeal.

[67] The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.

[68] As discussed above, issues of consultation between the Crown and Aboriginal groups arise from s. 35 of the *Constitution Act, 1982*. They therefore have a constitutional dimension. The question is whether the Commission possessed the power to

administratif soit mieux placé que le tribunal de révision pour étudier la question, auquel cas une certaine déférence peut s'imposer. Dans ce cas, la norme de contrôle applicable est vraisemblablement la norme de la décision raisonnable. Dans la mesure où la question est une question de droit pur et peut être isolée des questions de fait, la norme applicable est celle de la décision correcte. Toutefois, lorsque les deux types de questions sont inextricablement liées entre elles, la norme de contrôle applicable est vraisemblablement celle de la décision raisonnable . . .

[65] Il est donc clair qu'une certaine déférence s'impose à l'égard d'une décision sur une question mixte de fait et de droit, d'où l'application de la norme de la raisonnabilité. Ce qui n'écarte évidemment pas la nécessité de tenir compte de l'intention expresse du législateur pour déterminer la norme de contrôle qu'il convient d'appliquer dans un cas donné : *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339. Il faut donc, en l'espèce, considérer les dispositions de l'*Administrative Tribunals Act* et de la *Utilities Commission Act* pour arrêter la bonne norme de contrôle, ce dont il est question plus en détail ci-après.

C. *Le pouvoir de la Commission de se pencher sur la consultation*

[66] Après examen du droit régissant l'existence de l'obligation de consulter et le rôle du tribunal administratif relativement à celle-ci, je reviens sur les questions en litige dans le pourvoi.

[67] D'abord, l'examen de l'obligation de consulter relevait-elle du mandat de la Commission? S'agissant d'une question de compétence, la norme de contrôle est, en common law, celle de la décision correcte. Les lois applicables considérées précédemment n'écartent pas cette norme. Je conviens donc avec la Cour d'appel que la Commission n'a pas eu tort de conclure qu'elle avait le pouvoir de se pencher sur la question de la consultation.

[68] Rappelons que la consultation des peuples autochtones par la Couronne découle de l'art. 35 de la *Loi constitutionnelle de 1982*, de sorte qu'elle revêt une dimension constitutionnelle. Il faut déterminer si la Commission avait le pouvoir d'en faire

consider such an issue. As discussed, above, tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the Constitution.

[69] It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.

[70] Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?" (para. 42).

[71] This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over

un objet de son examen. Je le répète, un tribunal administratif doit s'en tenir à l'exercice des pouvoirs conférés par le législateur : arrêt *Conway*. Nous devons donc nous demander si la *Utilities Commission Act* reconnaissait à la Commission le pouvoir d'examiner la question de la consultation du fait de l'assise constitutionnelle de celle-ci.

[69] Il est reconnu que la *Utilities Commission Act* investit la Commission du pouvoir de trancher des questions de droit aux fins de déterminer si le CAÉ de 2007 sert l'intérêt public. Le pouvoir d'un tribunal administratif de statuer en droit emporte celui de trancher une question constitutionnelle dont il est régulièrement saisi, sauf lorsqu'il est clairement établi que le législateur a voulu le priver d'un tel pouvoir (*Conway*, par. 81; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, 2003 CSC 55, [2003] 2 R.C.S. 585, par. 39). « [U]n tribunal spécialisé jouissant à la fois de l'expertise et du pouvoir requis pour trancher une question de droit est le mieux placé pour trancher une question constitutionnelle se rapportant à son mandat légal » : *Conway*, par. 6.

[70] Outre les questions de droit qu'elle a le pouvoir général d'examiner, les éléments dont la Commission doit tenir compte suivant l'art. 71 de la *Utilities Commission Act*, bien qu'ils soient surtout axés sur l'économie, sont suffisamment généraux pour englober la consultation des Autochtones par la Couronne. L'alinéa 71(2)e) exigeait aussi de la Commission qu'elle tienne compte de [TRADUCTION] « tout autre élément jugé pertinent eu égard à l'intérêt public ». L'aspect constitutionnel de l'obligation de consulter fait naître un intérêt public spécial qui écarte la prédominance de l'angle économique dans la consultation prévue par la *Utilities Commission Act*. Comme le demande le juge Donald de la Cour d'appel, [TRADUCTION] « Comment un contrat conclu par un mandataire de la Couronne dans le non-respect d'une obligation constitutionnelle peut-il être dans l'intérêt public? » (par. 42).

[71] L'*Administrative Tribunals Act* de la Colombie-Britannique ne modifie pas cette conclusion même si elle prévoit qu'un tribunal administratif

constitutional matters. Section 2(4) of the *Utilities Commission Act* makes certain sections of the *Administrative Tribunals Act* applicable to the Commission. This includes s. 44(1) which provides that "[t]he tribunal does not have jurisdiction over constitutional questions." However, "constitutional question" is defined narrowly in s. 1 of the *Administrative Tribunals Act* as "any question that requires notice to be given under section 8 of the *Constitutional Question Act*". Notice is required only for challenges to the constitutional validity or constitutional applicability of any law, or are application for a constitutional remedy.

[72] The application to the Commission by the CSTC for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982*. In broad terms, consultation under s. 35 of the *Constitution Act, 1982* is a constitutional question: *Paul*, para. 38. However, the provisions of the *Administrative Tribunals Act* and the *Constitutional Question Act* do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, in applying the test articulated in *Paul* and *Conway*, the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.

[73] For these reasons, I conclude that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place.

[74] While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place,

n'a pas compétence en matière constitutionnelle. Le paragraphe 2(4) de la *Utilities Commission Act* assujettit la Commission à certaines dispositions de l'*Administrative Tribunals Act*, dont le par. 44(1), qui dispose qu'[TRADUCTION] « [u]n tribunal administratif n'a pas compétence pour trancher une question constitutionnelle. » Or, le terme [TRADUCTION] « question constitutionnelle » est défini de manière stricte à l'article premier comme s'entendant de « toute question exigeant qu'un avis soit donnée en application de l'article 8 de la *Constitutional Question Act* ». L'avis n'est requis que lorsque la validité ou l'applicabilité constitutionnelle d'une loi est contestée ou qu'une réparation constitutionnelle est demandée.

[72] L'objet de la demande présentée à la Commission par le CTCS pour que le cadre de l'audience soit redéfini de manière à englober la question de la consultation ne correspond pas à cette définition. Il n'y avait ni contestation de la validité ou de l'applicabilité constitutionnelle d'une loi, ni demande de réparation fondée sur l'art. 24 de la *Charte* ou l'art. 52 de la *Loi constitutionnelle de 1982*. De manière générale, la consultation visée à l'art. 35 de la *Loi constitutionnelle de 1982* correspond à une question constitutionnelle : *Paul*, par. 38. Toutefois, l'intention du législateur de soustraire à la compétence de la Commission la question de savoir si la Couronne s'est acquittée de son obligation de consulter les titulaires des droits ancestraux en cause ne ressort ni de l'*Administrative Tribunals Act* ni de la *Constitutional Question Act*. Dès lors, suivant le critère dégagé dans les arrêts *Paul* et *Conway*, la Commission a compétence constitutionnelle pour se pencher sur le caractère adéquat de la consultation effectuée par la Couronne relativement aux questions dont elle est régulièrement saisie.

[73] C'est pourquoi j'estime que la Commission avait le pouvoir de déterminer si les peuples autochtones touchés avaient été convenablement consultés.

[74] Même si la *Utilities Commission Act* confère à la Commission le pouvoir de déterminer si une consultation adéquate a eu lieu, elle ne va pas jusqu'à

its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

[75] As the Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the Legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

D. *The Commission's Reconsideration Decision*

[76] The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups. The reason it decided it would not consider this issue was not for want of power, but because it concluded that the consultation issue could not arise, given its finding that the 2007 EPA would not adversely affect any Aboriginal interest.

[77] As reviewed earlier in these reasons, the Commission held a hearing into the issue of whether the main hearing should be rescoped to permit exploration of the consultation issue. The evidence at this hearing was directed to the issue

l'autoriser à entreprendre elle-même la consultation et à s'acquitter de l'obligation constitutionnelle de la Couronne. Je rappelle que le législateur peut déléguer à un tribunal administratif l'obligation de la Couronne de consulter. Toutefois, en l'espèce, il ne l'a pas fait vis-à-vis de la Commission. La consultation ne constitue pas comme telle une question de droit, mais une démarche constitutionnelle distincte exigeant le pouvoir de transiger et d'accomplir tout ce qui est nécessaire pour concilier les intérêts divergents de la Couronne et des Autochtones. Le pouvoir de la Commission d'examiner les questions de droit et tout élément pertinent pour ce qui concerne l'intérêt public ne l'autorise pas à entreprendre elle-même la consultation des groupes autochtones.

[75] Comme le conclut à juste titre la Cour d'appel, l'obligation de consulter les peuples autochtones, qui naît lorsque le gouvernement prend une décision susceptible d'avoir un effet préjudiciable sur leurs intérêts, est une obligation constitutionnelle qui fait intervenir l'honneur de la Couronne et qui doit être respectée. Lorsque le régime administratif mis en place par le législateur ne peut remédier aux éventuels effets préjudiciables d'une décision sur des intérêts autochtones, les Premières nations touchées doivent s'adresser à une cour de justice pour obtenir la réparation voulue : *Nation Haïda*, par. 51.

D. *La décision de la Commission sur la demande de révision*

[76] La Commission a reconnu à juste titre avoir le pouvoir d'examiner le caractère adéquat de la consultation des groupes autochtones. Elle a décidé de ne pas se pencher sur la question non pas parce qu'elle n'en avait pas le pouvoir, mais parce qu'elle estimait que la question ne pouvait se poser étant donné sa conclusion que le CAÉ de 2007 n'aurait pas d'effet préjudiciable sur quelque intérêt autochtone.

[77] Comme nous l'avons vu, la Commission a tenu une audience sur la question de savoir s'il fallait recadrer l'audience principale de manière à permettre l'examen de la question de la consultation. La preuve alors produite portait sur l'effet

of whether approval of the 2007 EPA would have any adverse impact on the interests of the CSTC First Nations. The Commission considered both the impact of the 2007 EPA on river levels (physical impact) and on the management and control of the resource. The Commission concluded that the 2007 EPA would not have any adverse physical impact on the Nechako River and its fishery. It also concluded that the 2007 EPA did not "transfer or change control of licenses or authorization", negating adverse impacts from management or control changes. The Commission held that an underlying infringement (i.e. failure to consult on the initial project) was not sufficient to trigger a duty to consult. It therefore dismissed the application for reconsideration and declined to rescope the hearing to include consultation issues.

[78] The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statutes, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative Tribunals Act*. Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness" as set out in *Haida Nation* and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

[79] A duty to consult arises, as set out above, when there is: (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right, (b) contemplated Crown conduct, and (c) the potential that the contemplated conduct may

préjudiciable éventuel de l'approbation du CAÉ de 2007 sur les intérêts des Premières nations du CTCS. La Commission a examiné l'effet du CAÉ de 2007 tant sur les niveaux d'eau (impact physique) que sur la gestion de la ressource et sa maîtrise. Elle a conclu que le CAÉ de 2007 n'aurait aucun impact physique négatif sur la rivière Nechako et ses ressources halieutiques. Elle a aussi estimé que le CAÉ de 2007 n'entraînerait [TRADUCTION] « ni transfert ni modification des licences ou des autorisations », écartant du coup tout effet préjudiciable causé par une modification touchant à la gestion ou à la maîtrise. Selon elle, une atteinte sous-jacente (soit l'omission de consulter relativement au projet initial) ne suffisait pas pour faire naître une obligation de consulter. Elle a donc rejeté la demande de révision et refusé de recadrer l'audience de manière que celle-ci porte aussi sur la consultation.

[78] La décision selon laquelle le recadrage n'était pas nécessaire parce que le CAÉ de 2007 ne pouvait avoir d'incidence sur des intérêts autochtones porte sur une question mixte de fait et de droit. Suivant l'arrêt *Nation Haïda*, la norme de contrôle applicable à ce genre de décision est habituellement celle de la raisonnabilité (au sens où toute conclusion fondée sur un principe de droit erroné n'est pas raisonnable). Cependant, il faut tenir compte des dispositions des lois applicables examinées précédemment. La *Utilities Commission Act* prévoit que les conclusions de fait de la Commission sont [TRADUCTION] « opposables et définitives », ce qui appelle la norme de la décision manifestement déraisonnable suivant l'*Administrative Tribunals Act*. La décision portant sur une question de droit doit être correcte. Or, la question dont nous sommes saisis est une question mixte de fait et de droit. Elle appelle une norme se situant entre celles établies par la loi, à savoir la norme de la raisonnabilité, issue de la common law et consacrée par les arrêts *Nation Haïda* et *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190.

[79] Rappelons que l'obligation de consulter prend naissance lorsque les éléments suivants sont réunis : a) connaissance par la Couronne, réelle ou imputée, de l'existence possible d'une revendication autochtone ou d'un droit ancestral, b) mesure

adversely affect the Aboriginal claim or right. If, in applying the test set out in *Haida Nation*, it is arguable that a duty to consult could arise, the Commission would have been wrong to dismiss the rescoping order.

[80] The first element of the duty to consult — Crown knowledge of a potential Aboriginal claim or right — need not detain us. The CSTC First Nations' claims were well-known to the Crown; indeed, it was lodged in the Province's formal claims resolution process.

[81] Nor need the second element — proposed Crown conduct or decision — detain us. BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia.

[82] The third element — adverse impact on an Aboriginal claim or right caused by the Crown conduct — presents greater difficulty. The Commission, referring to *Haida Nation*, took the view that to meet the adverse impact requirement, "more than just an underlying infringement" was required. In other words, it must be shown that the 2007 EPA could "adversely affect" a current Aboriginal interest. The Court of Appeal rejected, or must be taken to have rejected, the Commission's view of the matter.

[83] In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized

projetée par la Couronne et c) risque que celle-ci ait un effet préjudiciable sur la revendication ou le droit. Si, au regard du critère établi dans l'arrêt *Nation Haïda*, on peut soutenir qu'une obligation de consulter pouvait exister, la Commission a eu tort de rejeter la demande de recadrage de l'audience.

[80] Il n'y a pas lieu de s'arrêter au premier élément — la connaissance par la Couronne de l'existence possible d'une revendication autochtone ou d'un droit ancestral. Les revendications des Premières nations du CTCS étaient bien connues de la Couronne et avaient en fait été formulées dans le cadre du processus formel mis sur pied par la province pour le règlement des revendications autochtones.

[81] Il n'y a pas lieu non plus de s'attarder au deuxième élément — la mesure ou la décision projetée par la Couronne. Le projet de BC Hydro de conclure avec Alcan un contrat d'achat d'électricité constitue clairement une mesure projetée par la Couronne. BC Hydro est une société d'État qui agit au nom de la Couronne. Nul ne prétend sérieusement que le CAÉ de 2007 n'équivaut pas à une mesure projetée par la province de la Colombie-Britannique.

[82] Le troisième élément — l'effet préjudiciable de la mesure de la Couronne sur une revendication autochtone ou un droit ancestral — présente une plus grande difficulté. S'appuyant sur l'arrêt *Nation Haïda*, la Commission a estimé que pour satisfaire à l'exigence de l'effet préjudiciable, il fallait [TRADUCTION] « davantage qu'une atteinte sous-jacente ». En d'autres termes, il fallait démontrer que le CAÉ de 2007 était susceptible d'avoir un « effet préjudiciable » sur un intérêt autochtone actuel. La Cour d'appel rejette le point de vue de la Commission sur ce point, ou c'est du moins ce qu'il faut retenir de sa décision.

[83] À mon sens, la Commission a eu raison de conclure qu'une atteinte sous-jacente ne constitue pas comme telle un effet préjudiciable faisant naître une obligation de consulter. Nous l'avons vu, il appert de l'arrêt *Nation Haïda* que le fondement constitutionnel de la consultation réside dans le risque qu'un projet autorisé par l'État ait

developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past. The Commission applied the correct legal test.

[84] It was argued that the Crown breached the rights of the CSTC when it allowed the Kenney Dam and electricity production powerhouse with their attendant impacts on the Nechako River to be built in the 1950s and that this breach is ongoing and shows no sign of ceasing in the foreseeable future. But the issue before the Commission was whether a fresh duty to consult could arise *with respect to the Crown decision before the Commission*. The question was whether the *2007 EPA* could *adversely* impact the claim or rights advanced by the CSTC First Nations in the ongoing claims process. The issue of ongoing and continuing breach was not before the Commission, given its limited mandate, and is therefore not before this Court.

[85] What then is the potential impact of the 2007 EPA on the claims of the CSTC First Nations? The Commission held there could be none. The question is whether this conclusion was reasonable based on the evidence before the Commission on the rescoping inquiry.

[86] The Commission considered two types of potential impacts. The first type of impact was the

un effet préjudiciable sur des intérêts autochtones. La consultation porte principalement sur la façon dont la ressource doit être exploitée pour qu'un préjudice irréparable ne soit pas infligé aux intérêts autochtones existants. Les deux parties doivent se rencontrer de bonne foi, dans un climat de mesure compatible avec l'honneur de la Couronne, pour discuter de mise en valeur dans une optique de conciliation des intérêts divergents. Or, un tel échange est impossible lorsque la ressource est transformée depuis longtemps et que la mesure ou la décision actuelle du gouvernement n'a plus aucune incidence sur elle. Il ne s'agit plus dès lors de consulter sur l'exploitation ultérieure de la ressource, mais plutôt de négocier une indemnisation pour sa transformation intervenue sans consultation adéquate préalable. La Commission a appliqué le bon critère juridique.

[84] Le CTCS fait valoir que la Couronne a porté atteinte à ses droits lorsque, dans les années 1950, elle a autorisé la construction du barrage Kenney et de la centrale électrique, qui a eu des répercussions sur la rivière Nechako, et que cette atteinte est continue et que rien ne permet de croire qu'elle cessera dans un avenir prévisible. Cependant, la question que devait trancher la Commission était celle de savoir si une nouvelle obligation de consulter pouvait prendre naissance *à l'égard de la décision de la Couronne dont était saisie la Commission*. Il lui fallait déterminer si le CAÉ de 2007 pouvait avoir un effet *préjudiciable* sur les droits revendiqués par les Premières nations du CTCS dans le cadre du processus de règlement en cours. Étant donné les limites de son mandat, la Commission n'était pas saisie de la question de l'atteinte continue et se poursuivant toujours, en sorte que notre Cour ne l'est pas non plus.

[85] Quel est donc l'impact possible du CAÉ de 2007 sur les revendications des Premières nations du CTCS? La Commission a conclu qu'il ne pouvait y en avoir. La question est donc celle de savoir si la conclusion était raisonnable au vu de la preuve offerte à l'appui de la demande de recadrage.

[86] La Commission a considéré deux types d'effet possible. Le premier était l'impact physique du

physical impact of the 2007 EPA on the Nechako River and thus on the fishery. The Commission conducted a detailed review of the evidence on the impact the 2007 EPA could have on the river's water levels and concluded it would have none. This was because the levels of water on the river were entirely governed by the water licence and the 1987 agreement between the Province, Canada, and Alcan. The Commission rejected the argument that not approving the 2007 EPA could potentially raise water levels in the Nechako River, to the benefit of the fishery, on the basis of uncontradicted evidence that if Alcan could not sell its excess electricity to BC Hydro it would sell it elsewhere. The Commission concluded that with or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation". Finally, the Commission concluded that changes in the timing of water releases for power generation have no effect on water levels in the Nechako River because water releases for power generation flow into the Kemano River to the west, rather than the Nechako River to the east.

[87] The Commission also considered whether the 2007 EPA might bring about organizational, policy, or managerial changes that might adversely affect the claims or rights of the CSTC First Nations. As discussed above, a duty to consult may arise not only with respect to specific physical impacts, but with respect to high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants. It noted that a "section 71 review does not approve, transfer or change control of licenses or authorization". Approval of the 2007 EPA would not effect management changes, ruling out any attendant adverse impact. This, plus the absence of physical impact, led the Commission to conclude that the 2007 EPA had no potential to adversely impact on Aboriginal interests.

CAÉ de 2007 sur la rivière Nechako et, par conséquent, sur le poisson. La Commission a examiné minutieusement les éléments de preuve sur les effets que le CAÉ de 2007 pouvait avoir sur les niveaux d'eau de la rivière et elle a conclu qu'il n'y en aurait pas. En fait, les niveaux d'eau de la rivière relevaient entièrement du permis d'exploitation hydraulique et de l'accord de 1987 intervenu entre la province, le Canada et Alcan. La Commission a rejeté l'argument voulant que l'omission d'approuver le CAÉ de 2007 puisse entraîner une augmentation des niveaux d'eau de la rivière Nechako, et favoriser ainsi la pêche, eu égard à la preuve non contredite selon laquelle si Alcan ne pouvait vendre ses surplus d'électricité à BC Hydro, elle trouverait un autre preneur. Elle a conclu qu'avec ou sans le CAÉ de 2007, [TRADUCTION] « Alcan exploite le réservoir Nechako dans le but d'optimiser la production d'énergie ». Enfin, la Commission a conclu que la modification du calendrier des lâchers d'eau destinés à la production d'électricité n'avait aucun impact sur les niveaux d'eau de la rivière Nechako puisque l'eau était déversée dans la rivière Kemano à l'ouest, et non dans la Nechako à l'est.

[87] La Commission s'est aussi penchée sur la question de savoir si le CAÉ de 2007 pouvait entraîner des changements organisationnels, politiques ou de gestion susceptibles d'avoir un effet préjudiciable sur les revendications ou les droits des Premières nations du CTCS. Je le répète, il peut y avoir obligation de consulter à l'égard non seulement d'impacts physiques particuliers, mais aussi de décisions de gestion ou politiques qui sont prises en haut lieu et qui peuvent avoir une incidence sur l'exploitation future de la ressource au détriment des demandeurs autochtones. La Commission fait remarquer que l'[TRADUCTION] « examen visé à l'art. 71 n'a pas pour effet d'approuver ou de transférer une licence ou une autorisation ou d'en modifier le titulaire ». L'approbation du CAÉ de 2007 n'allait pas entraîner de changements de gestion, ce qui écartait tout effet préjudiciable concomitant. Ces éléments, joints à l'absence d'impact physique, ont amené la Commission à conclure que le CAÉ de 2007 ne risquait pas d'avoir un effet préjudiciable sur des intérêts autochtones.

[88] It is necessary, however, to delve further. The 2007 EPA calls for the creation of a Joint Operating Committee, with representatives of Alcan and BC Hydro (s. 4.13). The duties of the committee are to provide advice to the parties regarding the administration of the 2007 EPA and to perform other functions that may be specified or that the parties may direct (s. 4.14). The 2007 EPA also provides that the parties will jointly develop, maintain, and update a reservoir operating model based on Alcan's existing operating model and "using input data acceptable to both Parties, acting reasonably" (s. 4.17).

[89] The question is whether these clauses amount to an authorization of organizational changes that have the potential to adversely impact on Aboriginal interests. Clearly the Commission did not think so. But our task is to examine that conclusion and ask whether this view of the Commission was reasonable, bearing in mind the generous approach that should be taken to the duty to consult, grounded in the honour of the Crown.

[90] Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be viewed as organizational changes effected by the 2007 EPA, the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their

[88] Il est toutefois nécessaire de pousser quelque peu l'analyse. Le CAÉ de 2007 prévoit la création d'un comité conjoint d'exploitation formé de représentants d'Alcan et de BC Hydro (clause 4.13). Le comité a pour fonction de conseiller les parties sur l'administration du CAÉ de 2007 et d'accomplir d'autres tâches qui sont précisées ou que lui assignent les parties (clause 4.14). Le CAÉ de 2007 prévoit aussi que, conjointement, les parties élaborent, appliquent et actualisent un modèle d'exploitation du réservoir inspiré de celui d'Alcan et [TRADUCTION] « utilisant des données jugées acceptables par les deux parties, qui sont tenues de se montrer raisonnables » (clause 4.17).

[89] La question est celle de savoir si ces clauses équivalent à autoriser des modifications d'ordre organisationnel qui sont susceptibles d'avoir un effet préjudiciable sur des intérêts autochtones. La Commission ne le croit manifestement pas. Or, il nous faut examiner cette conclusion et nous demander si elle est raisonnable eu égard à l'approche généreuse qui s'impose relativement à l'obligation de consulter, laquelle a pour assise l'honneur de la Couronne.

[90] À supposer que la création du comité conjoint et du modèle d'exploitation du réservoir existant puissent être considérés comme des modifications d'ordre organisationnel apportées par le CAÉ de 2007, la question est celle de savoir si ces dernières sont susceptibles d'avoir un effet préjudiciable sur les revendications ou les droits des Premières nations du CTCS. Lorsqu'il est établi que l'effet préjudiciable faisant naître l'obligation de consulter résulte d'une modification de l'organisation, notamment celle du pouvoir, c'est généralement parce que la décision opérationnelle en cause risque dès lors d'empêcher la Couronne d'agir honorablement à l'égard des intérêts autochtones. Ainsi, dans l'affaire *Nation Haïda*, la Couronne projetait la conclusion avec Weyerhaeuser d'un contrat à long terme de vente de bois d'œuvre. En concluant le contrat, la Couronne réduisait sa maîtrise de l'exploitation forestière, notamment dans certaines vieilles forêts, et, partant, sa faculté d'exercer son pouvoir décisionnel en la matière de façon conforme à l'honneur de la Couronne. La ressource aurait été

constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive.

[91] By contrast, in this case, the Crown remains present on the Joint Operating Committee and as a participant in the reservoir operating model. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The CSTC First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require BC Hydro to give the CSTC First Nations notice of any decisions under the 2007 EPA that have the potential to adversely affect their claims or rights.

[92] This ongoing right to consultation on future changes capable of adversely impacting Aboriginal rights does not undermine the validity of the Commission's decision on the narrow issue before it: whether approval of the 2007 EPA could have an adverse impact on claims or rights of the CSTC First Nations. The Commission correctly answered that question in the negative. The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA is approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it, as is their entitlement under Final Water Licence No. 102324 and the 1987 Agreement on waterflows. Moreover, although the Commission did not advert to it, BC Hydro, as a participant on the Joint Operating Committee and the resevoir management team, must in the future consult with the CSTC First Nations on any decisions that may adversely impact their claims or rights. On this evidence, it was not unreasonable for the Commission to conclude that the 2007 EPA will not adversely affect the claims and rights

exploitée sans que la Couronne ne se soit acquittée au préalable de l'obligation de consulter que commande l'honneur de la Couronne. Le peuple Haïda aurait été dépouillé de son droit constitutionnel. Difficile de concevoir un effet préjudiciable plus manifeste sur un intérêt autochtone.

[91] En l'espèce, par contre, la Couronne demeure un membre du comité conjoint d'exploitation et un participant en ce qui concerne le modèle d'exploitation du réservoir. Comme ils ont l'obligation d'agir conformément à l'honneur de la Couronne, les représentants de BC Hydro devront tenir compte des groupes autochtones touchés et les consulter au besoin lorsqu'une décision ultérieure sera susceptible d'avoir un effet préjudiciable sur eux. Le droit des Premières nations du CTCS d'être consultées sur toute décision susceptible de compromettre leurs revendications ou leurs droits est préservé. J'ajoute que l'honneur de la Couronne oblige BC Hydro à les informer de toute décision prise en application du CAÉ de 2007 qui est susceptible d'avoir un effet préjudiciable sur leurs revendications ou leurs droits.

[92] Ce droit permanent qu'ont les Premières nations du CTCS d'être consultées pour toute modification ultérieure susceptible d'avoir un effet préjudiciable sur leurs droits ancestraux ne remet pas en cause le bien-fondé de la décision rendue par la Commission relativement à la seule question dont elle était saisie : l'approbation du CAÉ de 2007 pouvait-elle avoir un effet préjudiciable sur leurs revendications ou leurs droits? La Commission a eu raison de répondre par la négative. La preuve non contredite établissait qu'Alcan continuerait de produire la même quantité d'électricité, *que le CAÉ de 2007 soit approuvé ou non*, et qu'elle trouverait un autre acheteur si BC Hydro déclinait l'offre, comme l'y autorisaient le permis d'exploitation hydraulique permanent nº 102324 et l'accord de 1987 sur les niveaux d'eau. De plus, bien que la Commission n'en fasse pas mention, BC Hydro, en tant que membre du comité conjoint d'exploitation et de l'équipe de gestion du réservoir, doit dorénavant consulter les Premières nations du CTCS sur toute décision susceptible d'avoir un effet préjudiciable sur leurs revendications ou leurs droits. À la

currently under negotiation of the CSTC First Nations.

[93] I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

E. *The Commission's Decision That Approval of the 2007 EPA Was in the Public Interest*

[94] The attack on the Commission's decision to approve the 2007 EPA was confined to the Commission's failure to consider the issue of adequate consultation over the affected interests of the CSTC First Nations. The conclusion that the Commission did not err in rejecting the application to consider this matter removes this objection. It follows that the argument that the Commission acted unreasonably in approving the 2007 EPA fails.

V. Disposition

[95] I would allow the appeal and confirm the decision of the British Columbia Utilities Commission approving the 2007 EPA. Each party will bear their costs.

Appeal allowed; British Columbia Utilities Commission's approval of 2007 Energy Purchase Agreement confirmed.

lumière de cette preuve, il n'est pas déraisonnable que la Commission conclue que le CAÉ de 2007 n'aura pas d'effet préjudiciable sur les revendications et les droits de ces Premières nations qui faisaient alors l'objet de négociations.

[93] J'arrive à la conclusion que la Commission a bien interprété le droit en ce qui concerne l'obligation de consulter et, par conséquent, la question qu'elle était appelée à trancher pour statuer sur la demande de révision. Elle a bien cerné la question principale dont elle était saisie, à savoir si le CAÉ de 2007 pouvait avoir un effet préjudiciable sur les revendications et les droits des Premières nations du CTCS. Elle a ensuite examiné la preuve pertinente. Elle a considéré les répercussions organisationnelles du CAÉ de 2007 et les changements physiques qui pouvaient en résulter. Elle a conclu que ces modifications ne risquaient pas de compromettre les revendications ou les droits en cause. Il n'a pas été établi qu'elle a agi de manière déraisonnable en tirant ces conclusions.

E. *La décision de la Commission portant que l'approbation du CAÉ de 2007 était dans l'intérêt public*

[94] Le seul motif de contestation de la décision d'approuver le CAÉ de 2007 était l'omission de la Commission d'examiner la question du caractère adéquat de la consultation portant sur les intérêts en cause des Premières nations du CTCS. La conclusion que la Commission n'a pas eu tort de rejeter la demande d'examen de cette question écarte ce motif de contestation. Ainsi, la thèse selon laquelle la Commission a agi de manière déraisonnable en approuvant le CAÉ de 2007 ne saurait être retenue.

V. Dispositif

[95] Je suis d'avis d'accueillir le pourvoi et de confirmer la décision de la Commission approuvant le CAÉ de 2007. Chacune des parties paie ses propres frais de justice.

Pourvoi accueilli; décision de la British Columbia Utilities Commission approuvant le contrat d'achat d'électricité de 2007 confirmée.

Solicitors for the appellant Rio Tinto Alcan Inc.: Bull, Housser & Tupper, Vancouver.

Solicitors for the appellant the British Columbia Hydro and Power Authority: Lawson Lundell, Vancouver.

Solicitors for the respondent: Ratcliff & Company, North Vancouver.

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

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

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the British Columbia Utilities Commission: Boughton Law Corporation, Vancouver.

Solicitors for the interveners the Mikisew Cree First Nation and the Lakes Division of the Secwepemc Nation: Janes Freedman Kyle Law Corporation, Victoria.

Solicitors for the intervener the Moosomin First Nation: Rath & Company, Priddis, Alberta.

Solicitor for the intervener Nunavut Tunngavik Inc.: Richard Spaulding, Ottawa.

Solicitors for the interveners the Nlaka'pamux Nation Tribal Council, the Okanagan Nation Alliance and the Upper Nicola Indian Band: Mandell Pinder, Vancouver.

Solicitors for the intervener the Assembly of First Nations: Hutchins Légal inc., Montréal.

Procureurs de l'appelante Rio Tinto Alcan Inc. : Bull, Housser & Tupper, Vancouver.

Procureurs de l'appelante British Columbia Hydro and Power Authority : Lawson Lundell, Vancouver.

Procureurs de l'intimé : Ratcliff & Company, North Vancouver.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante British Columbia Utilities Commission : Boughton Law Corporation, Vancouver.

Procureurs des intervenantes la Première nation crie Mikisew et la Division des Grands lacs de la nation Secwepemc : Janes Freedman Kyle Law Corporation, Victoria.

Procureurs de l'intervenante la Première nation de Moosomin : Rath & Company, Priddis, Alberta.

Procureur de l'intervenante Nunavut Tunngavik Inc. : Richard Spaulding, Ottawa.

Procureurs des intervenants le Conseil tribal de la nation Nlaka'pamux, l'Alliance des nations de l'Okanagan et la Bande indienne d'Upper Nicola : Mandell Pinder, Vancouver.

Procureurs de l'intervenante l'Assemblée des Premières Nations : Hutchins Légal inc., Montréal.

Solicitors for the intervener the Standing Buffalo Dakota First Nation: Phillips & Co., Regina.

Solicitors for the intervener the First Nations Summit: Pape Salter Teillet, Vancouver.

Solicitors for the interveners the Duncan's First Nation and the Horse Lake First Nation: Woodward & Company, Victoria.

Solicitors for the intervener the Independent Power Producers Association of British Columbia: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener Enbridge Pipelines Inc.: McCarthy Tétrault, Toronto.

Solicitors for the intervener the TransCanada Keystone Pipeline GP Ltd.: Blake, Cassels & Graydon, Calgary.

Procureurs de l'intervenante la Première nation Standing Buffalo Dakota : Phillips & Co., Regina.

Procureurs de l'intervenant le Sommet des Premières nations : Pape Salter Teillet, Vancouver.

Procureurs des intervenantes la Première nation Duncan's et la Première nation de Horse Lake : Woodward & Company, Victoria.

Procureurs de l'intervenante Independent Power Producers Association of British Columbia : Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intervenante Enbridge Pipelines Inc. : McCarthy Tétrault, Toronto.

Procureurs de l'intervenante TransCanada Keystone Pipeline GP Ltd. : Blake, Cassels & Graydon, Calgary.

TAB 5

2009 CarswellNat 1339, 2009 FC 484, 44 C.E.L.R. (3d) 1, [2009] 3 C.N.L.R. 36, 345 F.T.R. 119 (Eng.)

2009 CarswellNat 1339, 2009 FC 484, 44 C.E.L.R. (3d) 1, [2009] 3 C.N.L.R. 36, 345 F.T.R. 119 (Eng.)

Brokenhead Ojibway Nation v. Canada (Attorney General)

Brokenhead Ojibway Nation, Long Plain First Nation, Swan Lake First Nation, Fort Alexander First Nation, also known as "Sagkeeng First Nation", Roseau River Anishinabe First Nation, Peguis First Nation and Sandy Bay First Nation, known collectively as the Treaty One First Nations (Applicants) and The Attorney General of Canada, The National Energy Board and TransCanada Keystone Pipeline GP Ltd. (Respondents)

Brokenhead Ojibway Nation, Long Plain First Nation, Swan Lake First Nation, Fort Alexander First Nation, also known as "Sagkeeng First Nation", Roseau River Anishinabe First Nation, Peguis First Nation and Sandy Bay First Nation, known collectively as the Treaty One First Nations (Applicants) and The Attorney General of Canada, The National Energy Board and Enbridge Pipelines Inc. (Respondents)

Federal Court

R.L. Barnes J.

Heard: September 2-4, 2008; January 16, 2009
Judgment: May 12, 2009
Docket: T-225-08, T-921-08, T-925-08

Counsel: Peter W. Hutchins, Jameela Jeeroburkhan, David Kalmakoff, Wina Sioui for Applicants

Harry Glinter, Dayna Anderson for Respondent, Attorney General of Canada

Maria Yuzda for Respondent, National Energy Board

Laurent Fortier for Respondent, TransCanada Keystone Pipeline GP Inc.

Steven Mason, Harry Underwood for Respondent, Enbridge Pipelines Inc.

Lewis L. Manning for Intervenor

Subject: Public; Property; Natural Resources

Aboriginal law --- Reserves and real property — Miscellaneous

First Nations were successors to predecessor First Nation — Predecessor signed treaty with federal government in 1871 granting inherent rights and indigenous cultural rights over wide expanse of land — Respondent com-

panies applied to energy board for approval of pipeline projects that spanned 1,235 kilometres — Respondents made some efforts to engage First Nations potentially affected by project — Board issued Order-in-Council approving project — Board was satisfied that First Nations were provided with opportunity to participate fully in approval and **consultation** process — First Nations brought application for progressive relief against respondents — Application dismissed — **Consultation** duty owed by Crown to First Nations was met — Impact pipeline projects had upon any land claims was negligible — Projects would be built almost completely over existing rights-of-way and on privately owned and actively utilized land not now nor likely in future to be available for land claims settlement — Pipelines in question were largely below ground and were reasonably unobtrusive.

Cases considered by *R.L. Barnes J.*:

Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans) (2007), 2007 FC 567, 2007 CarswellNat 1597, [2007] 4 C.N.L.R. 1, 2007 CF 567, 2007 CarswellNat 4308, 313 F.T.R. 247 (Eng.) (F.C.) — referred to

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

Chicot v. Canada (Attorney General) **(2007), 30 C.E.L.R. (3d) 166,** *(sub nom. Ka'a'Gee Tu First Nation v. Canada (Attorney General))* **314 F.T.R. 178 (Eng.), 2007 FC 763, 2007 CarswellNat 2067,** *(sub nom. Ka'a'Gee Tu First Nation v. Canada (Attorney General))* **[2007] 4 C.N.L.R. 102, 2007 CarswellNat 5817, 2007 CF 763** (F.C.) — followed

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

Hupacasath First Nation v. British Columbia (Minister of Forests) (2005), 2005 BCSC 1712, 2005 CarswellBC 2936, [2006] 1 C.N.L.R. 22, 51 B.C.L.R. (4th) 133, 41 Admin. L.R. (4th) 179 (B.C. S.C.) — referred to

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

Standing Buffalo Dakota First Nation v. Canada (Attorney General) (2008), 2008 FCA 222, 2008 CarswellNat 2616, 2008 CAF 222, 2008 CarswellNat 4906 (F.C.A.) — considered

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

Thorne's Hardware Ltd. v. R. (1983), 1983 CarswellNat 530F, [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577, 46 N.R. 91, 1983 CarswellNat 530 (S.C.C.) — followed

Tzeachten First Nation v. Canada (Attorney General) (2008), 2008 FC 928, 2008 CarswellNat 3001, 297 D.L.R. (4th) 300, 2008 CF 928, [2008] 4 C.N.L.R. 293, 2008 CarswellNat 4647, 334 F.T.R. 169 (Eng.), 83 Admin. L.R. (4th) 45 (F.C.) — followed

Statutes considered:

National Energy Board Act, R.S.C. 1985, c. N-7

s. 52 — referred to

Treaties considered:

Treaty No. 1, 1871 (Between Her Majesty the Queen and the Chippewa and Cree Indians of Manitoba)

Generally — referred to

APPLICATION by First Nations for progressive relief against respondents.

***R.L. Barnes J.*:**

1 The Applicants are the seven First Nations who are the successors to those Ojibway First Nations who entered into what is known as Treaty One with the federal Crown on August 3, 1871[FN1] . They are today organized collectively as the Treaty One First Nations and they assert treaty, treaty-protected inherent rights and indigenous cultural rights over a wide expanse of land in southern Manitoba. By these applications the Treaty One First Nations seek declaratory and other prerogative relief against the Respondents in connection with three decisions of the Governor in Council (GIC) to approve the issuance by the National Energy Board (NEB) of Certificates of Public Convenience and Necessity for the construction respectively of the Keystone Pipeline Project, the Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project (collectively, "the Pipeline Projects"). All of the Pipeline Projects involve the use or taking up of land in southern Manitoba for pipeline construction by the corporate Respondents. Because the material facts and the legal principles that apply are the same for all three of the decisions under review, it is appropriate to issue a single set of reasons.

I. Regulatory Background

The Keystone Pipeline Project

2 On December 12, 2006 TransCanada Keystone Pipeline GP Ltd. (Keystone) applied to the NEB for approvals related to the construction and operation of the Keystone Pipeline Project (the Keystone Project).

3 The Keystone Project consists of a 1235 kilometer pipeline running from Hardisty, Alberta to a location near Haskett, Manitoba on the Canada-United States border. In Manitoba all new pipeline construction is on privately owned land with the balance of 258 kilometers running over existing rights-of-way (including 4 kilometers on leased Crown land and 2 kilometers on unoccupied Crown land). The width of the permanent easement in Manitoba is 20 metres and the pipeline is buried.

4 During its hearings, the NEB considered submissions from Standing Buffalo First Nation near Fort Qu'Appelle, Saskatchewan and from five First Nations in southern Manitoba known collectively as the Dakota Nations of Manitoba. Keystone also engaged a number of Aboriginal communities located within 50 kilometers of the pipeline right-of-way including Long Plain First Nation, Swan Lake First Nation and the Roseau River Anishinabe First Nation.

5 In its Reasons for Decision dated September 6, 2007 the NEB approved the Keystone Project subject to conditions. Included in those reasons are the following findings concerning project impacts on Aboriginal peoples:

> Although discussions with Standing Buffalo and the Dakota Nations of Manitoba began somewhat later than they could have, overall, the Board is satisfied that Keystone meaningfully engaged Aboriginal groups potentially impacted by the Project. Aboriginal groups were provided with details of the Project as well as an opportunity to express their concerns to Keystone regarding Project impacts. Keystone considered the concerns and made Project modifications where appropriate. Keystone also worked within established agreements which TransCanada had with Aboriginal groups in the area of the Project and persisted in its attempts to engage certain Aboriginal groups. The Board is also satisfied that Keystone has committed to ongoing **consultation** through TransCanada.
>
> The evidence before the Board is that TransCanada, on behalf of Keystone, was not aware that Standing Buffalo and the Dakota Nations of Manitoba had asserted claims to land in the Project area. The Board is of the view that, since TransCanada has a long history of working in the area of the Keystone Project, it should have known or could have done more due diligence to determine claims that may exist in the area of the Keystone Project. The Board acknowledges that as soon as Keystone became aware that Standing Buffalo and the Dakota Nations of Manitoba had an interest in the Project area, it did take action and initiated **consultation** activities. The Board further notes that **consultation** with Carry the Kettle and Treaty 4 was based upon TransCanada's established protocol agreements and that Keystone is willing to establish similar agreements and work plans with other Aboriginal groups, including Standing Buffalo and the Dakota Nations of Manitoba.
>
> Once an application is filed, all interested parties, including Aboriginal persons, have the opportunity to participate in the Board's processes to make their views known so they can be factored into the decision-making. With respect to the Keystone Project, the Board notes that Standing Buffalo and the Dakota Nations of Manitoba took the opportunity to participate in the proceeding and the Board undertook efforts to facilitate their application. The Board agreed to late filings by Standing Buffalo and the Elders had an opportunity to provide oral testimony in their own language at the hearing. In addition, the Board held two hearing days in Regina to facilitate the participation of Standing Buffalo and was prepared to consider hearing time in Winnipeg for the benefit of the Dakota Nations of Manitoba. The Board notes it undertook to ensure it understood the concerns of Standing Buffalo by hearing the testimony of the Elders, making an Information Request and asking questions at the hearing.
>
> The Board is satisfied that Standing Buffalo and the Dakota Nations of Manitoba were provided with an opportunity to participate fully in its process and to bring to the Board's attention all their concerns. The hearing process provided all parties with a forum in which they could receive further information, were able to question and challenge the evidence put forward by the parties, and present their own views and concerns with respect to the Keystone Project. Standing Buffalo and the Dakota Nations of Manitoba had the oppor-

tunity to present evidence, including any evidence of potential infringement the Project could have on their rights and interests. The Dakota Nations of Manitoba did not provide evidence at the hearing.

Standing Buffalo filed affidavit evidence and gave oral evidence at the hearing, which was carefully considered by the Board in the decision-making process. Standing Buffalo also suggested that the Project would further limit the Crown lands that would be available to meet the terms of its flood compensation agreement and any Treaty claim. In the Board's view, the evidence on this point is too speculative to warrant the Board's consideration of it as an impact given there are Crown lands available for selection and private lands available for purchase within the traditional territory claimed by Standing Buffalo.

It is not within the jurisdiction of the Board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it is of limited probative value to the consideration of the application before the Board.

Standing Buffalo presented evidence of a general nature as to the existence of sacred sites along the existing and proposed RoW. The Board notes Keystone's commitment to discuss with Standing Buffalo the potential for the Project to impact sacred sites, develop a work plan and incorporate mitigation to address specific impacts to sacred sites into its Environment Protection Plan. The Board would encourage Standing Buffalo to bring to the attention of TransCanada its concerns with respect to impacts to sacred sites from existing projects and to involve their Elders in these discussions.

The Board notes that almost all the lands required for the Project are previously disturbed, are generally privately owned and are used primarily for ranching and agricultural purposes. Project impacts are therefore expected to be minimal and the Board is satisfied that potential impacts identified by Standing Buffalo which can be considered in respect of this application will be appropriately mitigated.

With respect to the request by the Dakota Nations of Manitoba for additional conditions, the Board notes that Keystone and the Dakota Nations of Manitoba have initiated **consultations** and that both parties have committed to continue these discussions. In addition, the Board notes Keystone's commitment to address concerns that are raised through all its ongoing **consultation** activities and its interest in developing agreements and work plans with Aboriginal groups in the area of the Project. The Board strongly supports the development of such arrangements and encourages project proponents to build relationships with Aboriginal groups with interests in the area of their projects. Given the commitments both parties have made to ongoing dialogue, the Board does not see a need to impose the conditions as outlined.

6 On the recommendation of the NEB the GIC issued Order in Council No. P.C. 2007-1786 dated November 22, 2007 approving the issuance of a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Keystone Project. This is the decision which is the subject of the Applicants' claim for relief in T-225-08.

The Southern Lights Pipeline Project and the Alberta Clipper Pipeline Expansion Project

7 In March 2007 and May 2007 respectively, Enbridge applied to the NEB for approval of the Southern Lights Pipeline Project (Southern Lights Project) and the Alberta Clipper Pipeline Expansion Project (Alberta Clipper Project). These two projects are related. The Alberta Clipper Project consists of 1078 kilometers of new oil pipeline beginning at Hardisty, Alberta and ending at the Canada-United States border near Gretna, Man-

itoba.

8 The Southern Lights Project uses the same corridor as the Alberta Clipper Project. Both are constructed within or contiguous to existing pipeline rights-of-way which run almost entirely over private and previously disturbed land[FN2].

9 The record discloses that Enbridge **consulted** widely with interested Aboriginal communities about their project concerns. This included communities located within an 80-kilometer radius of the pipeline right-of-way and, where other interest was expressed, beyond that limit. There were discussions with Long Plain First Nation, Swan Lake First Nation, Roseau River Anishinabe First Nation and collectively with the Treaty One First Nations. Enbridge also provided funding to the Treaty One First Nations to facilitate the **consultation** process.

10 Furthermore, the NEB received representations from interested Aboriginal parties during its hearings. This included discussions with Standing Buffalo First Nation, the Dakota Nations of Manitoba, Roseau River Anishinabe First Nation and Peepeekisis First Nation. Among other concerns, Standing Buffalo raised the issue of unresolved land claims which the NEB characterized as follows:

> Chief Redman stated in his written evidence that Standing Buffalo has been involved in extensive meetings with the Government of Canada and the Office of the Treaty Commissioner regarding outstanding issues concerning unextinguished Aboriginal title and governance rights of the Dakota/Lakota. Chief Redman also stated that there have been 70 meetings and yet the Government of Canada has not acknowledged its lawful obligation and continues to discriminate against Standing Buffalo regarding its lawful obligations concerning Aboriginal title, sovereign rights and allyship status by failing to resolve these outstanding issues.
>
> Despite sending a number of letters to the Government of Canada "regarding the discussions with the Government of Canada concerning the Board interventions and how they relate to outstanding Dakota/Lakota issues," Chief Redman stated that he has received no response.
>
> Chief Redman alleges the **consultation** listed in the Applicants' evidence relates to the Alida to Cromer Capacity Expansion hearing and the Applicants and Canada have failed to **consult** Standing Buffalo in breach of lawful obligation to the First Nation. He stated that the route of the pipeline is through traditional territories of Standing Buffalo and suggested that the Project would further limit the Crown lands that would be available to meet the terms of its flood compensation agreement and any Treaty claim. Standing Buffalo also presented evidence of a general nature as to the existence of sacred sites along the existing and proposed RoW for the Project.

11 The NEB's Reasons for Decision by which it approved the Alberta Clipper Project include the following findings:

> In the case of the Project, the Board notes that fourteen Aboriginal groups participated in various ways in the proceeding. The Board is satisfied that the Aboriginal groups were provided with an opportunity to participate fully in its process, and bring their concerns to the Board's attention.
>
> A number of Aboriginal intervenors expressed concerns regarding how the proposed Project could impact undiscovered historical, archaeological and sacred burial sites. The Board notes Enbridge's commitments to work with Aboriginal communities in the event that such sites are discovered and the implementation of a Heritage Resource Discovery Contingency Plan which includes specific procedures for the discovery and

protection of archaeological, palaeontological and historical sites including the evaluation and implementation of appropriate mitigation measures. The Board also notes Enbridge's decision to route the pipeline path to avoid the Thornhill Burial Mounds site. However, in view of the importance of these sites, should the Project be approved, the Board would include a condition to direct Enbridge to immediately cease all work in the area of any archaeological discoveries and to contact the responsible provincial authorities. This would ensure the protection and proper handling of any archaeological discoveries and potential impacts to traditional use. If the Project were to be approved, the Board would also direct Enbridge to file with the Board, and make available on its website, reports on its **consultation** with Aboriginal groups concerning the Thornhill Burial Mounds.

In terms of the potential adverse impacts of the Project to current traditional use, the Board notes that there were suggestions of current traditional use over the proposed route, but no specific evidence was provided. The large majority of the facilities would be buried and would be completed within a short construction window and a large majority of the land required for the Project has been previously disturbed and is generally privately owned and used for agricultural purposes. In view of these facts and Enbridge's commitment to ongoing **consultation** with Aboriginal people throughout the life cycle of the Project, the Board is of the view that potential Project impacts to Aboriginal interests, particularly with regard to traditional use over the RoW would be minimal and would be appropriately mitigated. The Board is satisfied that ongoing discussions between the Applicant and Aboriginal people, together with the Heritage Resource Discovery Contingency Plan, would minimize potential impacts to traditional use sites, if encountered.

The Board considers that Enbridge's Aboriginal engagement program was appropriate to the nature and scope of the Project. In view of Enbridge's demonstrated understanding that Aboriginal engagement is an ongoing process, its commitments and the proposed conditions, the Board finds that Enbridge's Aboriginal engagement program would fulfill the **consultation** requirements for Alberta Clipper.

12 The NEB's findings concerning the impact of the Southern Lights Project on Aboriginal peoples included the following:

The Applicants indicated that they were not aware of any potential impacts on Aboriginal interests that had not been identified in the Southern Lights applications or subsequent filings. The Applicants submitted that, in the event that there are more interests that are identified that may be impacted, they would meet with the Aboriginal organization or community that has identified an interest and work with that community to jointly develop a course of action.

The Board is of the view that those Aboriginal people with an interest in the Southern Lights applications were provided with the details of the Project and were given the opportunity to make their views known to the Board in a timely manner so that they could be factored into the decision-making process.

Further, the Board is of the view that the Applicants' **consultation** program was effective in identifying the impacts of the Project on Aboriginal people.

The Project would involve a relatively brief window of construction, with the vast majority of the facilities being buried. As almost all the lands required for the Project are previously disturbed, are generally privately owned, are used primarily for agricultural purposes and are adjacent to an existing pipeline RoW, the Board is of the view that potential Project impacts on Aboriginal interests could be appropriately mitigated. The Board is therefore of the view that impacts on Aboriginal interests are likely to be minimal.

13 On the recommendation of the NEB the GIC issued Order in Council Nos. P.C. 2008-856 and P.C. 2008-857, both dated May 8, 2008, approving the issuance of Certificates of Public Convenience and Necessity authorizing the construction and operation respectively of the Southern Lights Project and the Alberta Clipper Project. These are the decisions which are the subject of the Applicants' claims for relief in T-921-08 and in T-925-08.

14 In 2006 and 2007 the Treaty One First Nations attempted to directly engage the federal Crown in "a meaningful **consultation** and accommodation" concerning the Pipeline Projects and their impact upon their "constitutionally protected Aboriginal and Treaty rights and title" but those efforts were ignored.

II. Issues

15 It is the position of the Treaty One First Nations in these proceedings that the federal Crown failed to fulfill its legal obligations of **consultation** and accommodation before granting the necessary approvals for the construction of the Pipeline Projects in their traditional territory. Although the Treaty One First Nations acknowledge that the corporate Respondents and the NEB have engaged in **consultations** in connection with the Pipeline Projects and have accommodated some of their concerns, those efforts they say, are not a substitute for the larger obligations of the Crown. Indeed, while the NEB and the corporate Respondents appear to have been quite attentive to the remediation of Aboriginal construction or project-related concerns, they acknowledge an inability to resolve outstanding land claims[FN3].

16 At the root of these proceedings is the issue of the Treaty One First Nations' outstanding land claims in southern Manitoba. The primary issue before the Court is whether the Pipeline Projects have a sufficient impact on the interests of the Treaty One First Nations such that a duty to **consult** on the part of the Crown was engaged. If a duty to **consult** was engaged, the Court must also determine its content and consider whether and to what extent the duty may be fulfilled by the NEB acting essentially as a surrogate for the Crown.

III. Analysis

Standard of Review

17 With respect to the issue of the standard of review that applies in these proceedings, I would adopt the view of my colleague Justice Danièle Tremblay-Lamer in *Tzeachten First Nation v. Canada (Attorney General)*, 2008 FC 928, 297 D.L.R. (4th) 300 (F.C.) at paras. 23-24:

> 23 In *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763, 315 F.T.R. 178 at paras. 91-93, my colleague Justice Edmond Blanchard, following the general principles espoused in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at paras. 61-63, indicated that a question as to the existence and content of the duty to **consult** and accommodate is a question of law reviewable on the standard of correctness and further that a question as to whether the Crown discharged this duty to **consult** and accommodate is reviewable on the standard of reasonableness.
>
> 24 Accordingly, when it falls to determine whether the duty to **consult** is owed and the content of that duty, no deference will be afforded. However, where a determination as to whether that duty was discharged is required, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] [...] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para.

47).

Also see: *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722 (F.C.A.) at paras. 33 and 34.

18 In the result the question of the existence and content of a Crown duty to **consult** in this case will be assessed on the basis of correctness. The question of whether any such duty or duties were discharged by the Crown will be determined on a standard of reasonableness.

To What Extent Was the Crown on Notice of the Applicants' Concerns?

19 The Crown makes the preliminary point that much of the evidence tendered in this proceeding to establish a foundation for the asserted duty to **consult** was not placed before the GIC by the Treaty One First Nations. While that is true, the GIC was made aware and must be taken to have known of the Treaty One First Nations' primary concern that the Pipeline Projects traversed land that was at one time within their traditional territory and, as well, that the Treaty One First Nations have asserted a long-standing claim to additional land in southern Manitoba. In addition, the Crown is always presumed to know the content of its treaties: see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.) at para. 34.

20 The record before me establishes very clearly that the Treaty One First Nations diligently attempted to directly engage the Crown in a dialogue about the impact of the Pipeline Projects on their unresolved treaty claims. Over several months in 2007 letters were sent from Treaty One First Nations' Chiefs to the Prime Minister, to the Minister of Indian Affairs, to other Ministers, and to the Secretary to the GIC seeking **consultation**, but their letters were never answered even to the extent of a simple acknowledgement. The frustration engendered by the Crown's refusal to open a dialogue with the Treaty One First Nations prior to the commencement of this litigation is reflected in the following passage from the affidavit of Chief Dennis Meeches of the Long Plain First Nation Reserve:

> 38. As Chief, I had been conducting myself under the belief that the federal government, on behalf of Her Majesty the Queen in Right of Canada, has a legal duty to **consult** with my First Nation before making any decisions related to lands in our traditional territory inside the boundaries of Treaty 1. I know also the Crown has a Duty to seek workable accommodations of our concerns and protect our interests, title, and rights.
>
> 39. I have no doubt that throughout all this time, the federal government, acting on behalf of the crown, has been aware of the existence of my First Nation's rights, title, and interests in the (*sic*) our traditional territory. I have brought this to the attention of federal ministers and the Canadian public many times over the years, and particularly in relation to the proposed construction of pipelines through our Territory.
>
> 40. The events in this process regarding **consultation** on pipeline construction have added to my serious concerns about the Federal Government's respect for me, our First Nation, my people, and our Treaty. We raised concerns about the pipelines crossing our territory and our rights, title, and interest being affected. We asked to be **consulted** about these matters, we told the government we would suffer serious adverse effects if the pipelines were constructed without accommodating our interests and rights. We warned that if the pipelines proceeded without our being **consulted**, we would have no alternative except to appeal to the Courts for relief, and that this could cause unfortunate delays with the potential to cause damages for the companies involved and the Canadian economy in general. Nonetheless the federal Ministers have ignored

> us to this day, and with respect to the Keystone pipeline, made their decision without any **consultation** whatsoever. I feel frustrated, angry, saddened and disappointed about being ignored and treated this way.

To the extent noted above the GIC was well aware of the Treaty One First Nations' broad concerns about the potential impact of the Pipeline Projects. From the NEB Reasons for Decision issued in connection with the Pipeline Projects, the GIC was also aware of the specific concerns of the Aboriginal peoples who were either **consulted** or who made representations at the NEB hearings. Against this evidentiary background, it is disingenuous for the Crown to assert that it was unaware of the concerns raised by the Treaty One First Nations in these proceedings. The evidence the Crown objects to adds nothing of significance to what it already knew or would be taken to have understood.

Duty to Consult — Legal Principles

21 For the sake of argument, I am prepared to accept that an approval given by the GIC under s. 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (NEB Act) may, in an appropriate context, be open to judicial review in accordance with the test established in *Thorne's Hardware Ltd. v. R.*, [1983] 1 S.C.R. 106, [1983] S.C.J. No. 10 (S.C.C.) on the basis of a failure to **consult**. It is enough for present purposes to say that where a duty to **consult** arises in connection with projects such as these it must be fulfilled at some point before the GIC has given its final approval for the issuance of a Certificate of Public Convenience and Necessity by the NEB.

22 The Crown's duties to **consult** and accommodate were thoroughly discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) and in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.). More recently in *Chicot v. Canada (Attorney General)*, **2007 FC 763**, [**2007] F.C.J. No. 1006** (F.C.), Justice Edmond Blanchard provided the following helpful summary of those and other relevant authorities:

> 94 The duty to **consult** was first held to arise from the fiduciary duty owed by the Crown toward Aboriginal peoples (see *Guerin v. Canada*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075). In more recent cases, the Supreme Court has held that the duty to **consult** and accommodate is founded upon the honour of the Crown, which requires that the Crown, acting honourably, participate in processes of negotiation with the view to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake (see *Haida Nation*, supra; *Taku River Tlingit First Nation*, supra, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] S.C.J. No. 71).
>
> 95 In *Haida Nation*, Chief Justice McLachlin sets out the circumstances which give rise to the duty to **consult**. At paragraph 35 of the reasons for decision, she wrote:
>
> > But, when precisely does a duty to **consult** arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C), at p. 71, per Dorgan J.
>
> 96 For the duty to arise there must, first, be either an existing or potentially existing Aboriginal right or title that might be adversely affected by the Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and that the contemplated con-

duct might adversely affect those rights. While the facts in *Haida Nation* did not concern treaties, there is nothing in that decision which would indicate that the same principles would not find application in Treaty cases. Indeed in *Mikisew*, the Supreme Court essentially decided that the *Haida* principles apply to Treaties.

97 While knowledge of a credible but unproven claim suffices to trigger a duty to **consult** and, if appropriate, accommodate, the content of the duty varies with the circumstances. Precisely what is required of the government may vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. However, at a minimum, it must be consistent with the honour of the Crown. At paragraph 37 of *Haida Nation*, the Chief Justice wrote:

> ...Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. Hence, unlike the question of whether there is or is not a duty to **consult**, which attracts a yes or no answer, the question of what this duty consists, is inherently variable. Both the strength of the right asserted and the seriousness of the potential impact on this right are the factors used to determine the content of the duty to **consult**.

98 At paragraphs 43 to 45, the Chief Justice invokes the concept of a spectrum to assist in determining the kind of duties that may arise in different situations.

> Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]**onsultation**' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to **Consult** Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.
>
> At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep **consultation**, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the **consultation** required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision- making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of **consultation** required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement,

> the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.
>
> 99 The kind of duty and level of **consultation** will therefore vary in different circumstances.

23 These are the general principles by which the issues raised in these proceeding must be determined. Of particular importance in this case is the principle that the content of the duty to **consult** with First Nations is proportionate to both the potential strength of the claim or right asserted and the anticipated impact of a development or project on those asserted interests.

Was a Duty to Consult Engaged and, if so, Was that Obligation Fulfilled?

24 I do not intend nor do I need to determine the validity of the Treaty One First Nations' outstanding treaty claims and on a historical and evidentiary record as limited as this one, it would be inappropriate to do so: see *Ka'a'Gee*, above, at para. 107. Suffice it to say that I do not agree with Enbridge when it states that "Treaty One is clear on its terms that the Aboriginal parties cede all lands except those specifically set aside for reserves". The exercise of treaty interpretation is not constrained by a strict literal approach to the text or by rigid rules of construction. What the Court must look for is the natural common understanding of the parties at the time the treaty was entered into which may well be informed by evidence extraneous to the text: see *Mikisew*, above, at paras. 28-32. From the evidence before me there could well have been an understanding or expectation at the time of signing Treaty One that the First Nations' parties would continue to enjoy full access to unallocated land beyond the confines of the reserves, that additional reserve lands would be later made available and that further large scale immigrant encroachment on those lands was not contemplated. I am proceeding on the assumption, therefore, that the Applicants' claim to additional treaty lands and the right to continued traditional use of those lands within Manitoba is credible. The more significant issue presented by this case concerns the impact of the Pipeline Projects on the interests and claims asserted by the Treaty One First Nations and the extent to which those concerns were adequately addressed through the NEB regulatory processes.

25 In determining whether and to what extent the Crown has a duty to **consult** with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal **consultation** that are available within the existing processes for regulatory or environmental review: *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712, 51 B.C.L.R. (4th) 133 (B.C. S.C.) at para. 272. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to **consult** but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated: see *Haida*, above, at para. 53 and *Taku*, above, at para. 40.

26 The NEB process appears well-suited to address mitigation, avoidance and environmental issues that are site or project specific. The record before me establishes that the specific project concerns of the Aboriginal groups who were **consulted** by the corporate Respondents or who made representations to the NEB (including, to some extent, the Treaty One First Nations) were well-received and largely resolved.

27 These regulatory processes appear not to be designed, however, to address the larger issue of unresolved land claims. As already noted in these reasons, the NEB and the corporate Respondents have acknowledged that

obvious limitation.

28 From the perspective of the Treaty One First Nations, the remediation of their project specific concerns may not answer the problem presented by the incremental encroachment of development upon lands which they claim or which they have enjoyed for traditional purposes. While the environmental footprint of any one project might appear quite modest, the eventual cumulative impact of development on the rights and traditional interests of Aboriginal peoples can be quite profound.

29 It follows from this that the NEB process may not be a substitute for the Crown's duty to **consult** where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.

30 The fundamental problem with the claims advanced in these proceedings by the Treaty One First Nations is that the evidence to support them is expressed in generalities. Except for the issue of their unresolved land claims in southern Manitoba that evidence fails to identify any interference with a specific or tangible interest that was not capable of being resolved within the regulatory process. Even to the extent that cultural, environmental and traditional land use issues were raised in the evidence, they were not linked specifically to the projects themselves. This is not surprising because the evidence was clear that the Pipeline Projects were constructed on land that had been previously exploited and which was almost all held under private ownership. For example, the evidence is clear that the Alberta Clipper and Southern Lights projects will have negligible, if any, impact upon the Treaty One First Nations outstanding land claims in southern Manitoba. The Southern Lights Pipeline uses the same corridor as the Alberta Clipper Pipeline. Both are constructed within or contiguous to existing pipeline rights-of-way which run almost entirely over private and previously disturbed land. With the exception of 700 meters of pipeline corridor crossing the Swan Lake Reserve (with that Band's consent) the Aboriginal representatives **consulted** by Enbridge indicated that the affected lands were not the subject of any land claim or the site of any traditional activity[FN4].

31 Although Enbridge and the NEB did receive representations from Aboriginal leaders about specific impacts upon known and unidentified archaeological, sacred, historical, and paleontological sites, the record indicates that those concerns were considered and accommodated including, in one instance, the relocation of the right-of-way to protect a burial ground. The level of engagement between Enbridge and Aboriginal communities and Band Councils (including the Treaty One First Nations) was, in fact, extensive and quite thorough. The NEB findings in relation to the Aboriginal concerns raised before it are reasonably supported by the record before me and the Treaty One First Nations have not argued otherwise except to say that they do not necessarily agree.

32 The NEB findings concerning the Keystone Pipeline were to the same general effect and are reasonably supported by the evidence in that record. In fact, the Treaty One First Nations do not dispute the NEB findings that the land affected by the Keystone Pipeline was almost all in private ownership and previously utilized for pipeline, agricultural and ranching purposes[FN5]. Once buried it is reasonable to conclude that this pipeline would have a minimal impact on the surrounding environment.

33 The inability of the Treaty One First Nations to make a case for a substantial interference with a treaty or a traditional land use claim around these projects becomes evident from the affidavits they submitted. The affidavit of Chief Terrance Nelson offers one example of this at paras. 29-34:

> 29. We are located near the proposed pipeline, maybe 18 miles away. Our traditional community are very concerned that their culture, which involves the use of traditional herbs and medicines, will be affected by

the pipeline. They are worried about spiritual aspects of having a pipeline running through the ground.

30. The rivers are already quite polluted, and our people are concerned about further pollution if there would be a leak of the pipeline that would spread through the water ways in this low and flat area. There are tributaries of the Red River which flow south and then flow back north into Lake Winnipeg.

31. Our people do considerable hunting. There is a concern that the pipelines could affect animal migration, or that animals would abandon the area completely.

32. Our people have been in this are for centuries. There are numerous burial sites in the area. Our elders also know of sacred sites. Our people engage in many traditional activities throughout the year. They gather many herbs, and many plants are becoming very scarce and are at risk.

33. Our First Nation has no knowledge that at any time any Treaty One First Nation, including our own First Nation, has surrendered our Treaty, Treaty-protected inherent rights or title to our traditional territory within the boundaries of Treaty 1. Our only agreement was to share lands for "immigration and settlement".

34. As Chief, I had been conducting myself under the belief that the federal government, on behalf of Her Majesty the Queen in Right of Canada, has a legal duty to **consult** with my First Nation before making any decisions related to lands in our traditional territory inside the boundaries of Treaty 1. I know also the federal government, on behalf of the Crown, has a Duty to seek workable accommodations of our concerns and protect our interests, title, and rights.

34 I do not question that the above statements reflect a profoundly held concern not only of Chief Nelson but of others in the Manitoba Aboriginal community. The problem is that to establish a procedural breach around projects such as these there must be some evidence presented which establishes both an adverse impact on a credible claim to land or to Aboriginal rights accompanied by a failure to adequately **consult**. The Treaty One First Nations are simply not correct when they assert in their evidence that a duty to **consult** is engaged whenever the Government of Canada makes "any decision related to lands in our traditional territory inside the boundaries of Treaty 1"[FN6]. There is no at-large duty to **consult** that is triggered solely by the development of land for public purposes. There must be some unresolved non-negligible impact arising from such a development to engage the Crown's duty to **consult**.

35 Moreover, in a number of respects, the arguments advanced by Treaty One First Nations for a duty to **consult** outside of the NEB process exceeded the scope of the evidence they adduced in support.

36 For example, the Treaty One First Nations assert that, had the Crown engaged in a separate **consultation**, it would have been told that the Pipeline Projects would disrupt "their ongoing harvesting activities" and that they were also concerned about "environmental pollution". The Treaty One First Nations also claim that they needed to be **consulted** about previously unidentified sacred or cultural sites which might have been threatened by the Pipeline Projects. At the same time they acknowledge that these were matters that were brought before the NEB or raised with the corporate Respondents and largely accommodated or mitigated. The advantage of a separate **consultation** with the Crown about such matters is not explained beyond making the point that where mitigation measures are adequate but unilaterally imposed there must still be a **consultation** to meet the goal of reconciliation. This argument effectively ignores the fact that the mitigatory measures adopted here by the NEB were not unilaterally created but were the product of an extensive dialogue with interested Aboriginal communities including some of the Treaty One First Nations.

37 The Treaty One First Nations maintain that there must always be an overarching **consultation** regardless of the validity of the mitigation measures that emerge from a relevant regulatory review. This duty is said to exist notwithstanding the fact that Aboriginal communities have been given an unfettered opportunity to be heard. This assertion seems to me to represent an impoverished view of the **consultation** obligation because it would involve a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the NEB and not in a collateral discussion with either the GIC or some arguably relevant Ministry.

38 The authorities relied upon by the Treaty One First Nations to support their separate argument for a duty to **consult** with respect to their land claims are distinguishable because each of those cases involved fresh impacts that were, to use the words of Justice Ian Binnie in *Mikisew*, above, "clear, established and demonstrably adverse" to the rights in issue. That cannot be fairly said of the relationship between the Pipeline Projects and the Treaty One First Nations' land claims in this case where no meaningful linkage is apparent on the evidence before me.

39 This is not a case like *Mikisew* where there was compelling evidence of injurious affection to the interests of local hunters and trappers notwithstanding the limited footprint of the proposed winter road. This is made clear at para. 55 of the decision:

> 55 The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must **consult** with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to **consult** is, as stated in Haida Nation, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

Even though the project considered in *Mikisew* involved direct and immediate interference with identified Aboriginal interests, the Court said that the Crown's **consultation** duty was at the lower end of the spectrum requiring notice to the Mikisew and the careful consideration of their concerns with a view to minimizing adverse impacts.

40 The development that was of concern in *Taku*, above, similarly involved the construction of an access road. Although the road was said to represent a small intrusion relative to the size of the outstanding land claim it would nonetheless "pass through an area critical to the [Taku River First Nation's] domestic economy". This was held sufficient to trigger a duty to **consult** that was significantly deeper than minimum requirement. Because the environmental assessment for the road mandated **consultation** with affected Aboriginal peoples and because the Taku River First Nation was **consulted** throughout the certification process, the Crown's duty was found to have been met.

41 In *Ka'a'Gee*, above, Justice Blanchard dealt with an application for judicial review from a decision by the federal Crown to approve an oil and gas development in the Northwest Territories. That project was extensive and involved the drilling of up to 50 wells, the excavation of 733 kilometers of seismic lines, the construc-

tion of temporary camps, the use of water from area lakes and the disposal of drill waste. Justice Blanchard found that the project would have significant and lasting impact on an area over which the affected First Nation asserted Aboriginal title and where they carried out harvesting activity. This, he said, triggered a duty to **consult** that was higher than the minimum described in *Mikisew*. Up to a point, Justice Blanchard was satisfied that the comprehensive regulatory process was sufficient to fulfill the Crown's duty to **consult**. It was only when the Crown unilaterally modified the process and made fundamental changes to important recommendations that had come out of the earlier **consultations** that the duty to **consult** was found to have been breached.

42 I am satisfied that the process of **consultation** and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete **consultation** with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to **consult** where they have failed to avail themselves of reasonable avenues for seeking relief. That is so because the **consultation** process is reciprocal and cannot be frustrated by the refusal of either party to meet or participate: see *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2008 FCA 212, [2008] F.C.J. No. 946 (F.C.A.) at paras. 52-53. This presupposes, of course, that available regulatory processes are accessible, adequate and provide First Nations an opportunity to participate in a meaningful way.

43 It cannot be seriously disputed that the Pipeline Projects have been built on rights-of-way that are not legally or practically available for the settlement of any outstanding land claims in southern Manitoba. Even the Treaty One First Nations acknowledge that the additional lands they claim were intended to be taken from those lands not already taken up by settlement and immigration[FN7]. In the result, if the Crown had any duty to **consult** with the Treaty One First Nations with respect to the impact of the Pipeline Projects on their unresolved land claims, it was at the extreme low end of the spectrum involving a peripheral claim attracting no more than an obligation to give notice: see *Haida Nation*, above, at para. 37. Here the relationship between the land claims and the Pipeline Projects is simply too remote to support anything more: also see *Ahousaht Indian Band v. Canada (Minister of Fisheries & Oceans)*, 2007 FC 567, [2007] F.C.J. No. 827 (F.C.) at para. 32, aff'd 2008 FCA 212, [2008] F.C.J. No. 946 (F.C.A.) at para. 37.

44 I have no doubt, however, that had any of the Pipeline Projects crossed or significantly impacted areas of unallocated Crown land which formed a part of an outstanding land claim a much deeper duty to **consult** would have been triggered. Because this is also the type of issue that the NEB process is not designed to address, the Crown would almost certainly have had an independent obligation to **consult** in such a context.

IV. Conclusion

45 The **consultation** duty owed by the Crown to the Treaty One First Nations has been met. This is not to say that the Treaty One First Nations do not have a credible land claim but only that the impact these Pipeline Projects have upon those claims is negligible. The Pipeline Projects have been built almost completely over existing rights-of-way and on privately owned and actively utilized land not now nor likely in the future to be available for land claims settlement. The pipelines in question are also largely below ground and are reasonably unobtrusive. There is no evidence before me or, more importantly that was before the NEB or the GIC, to prove that the Pipeline Projects would be likely to interfere with traditional Aboriginal land use or would represent a

meaningful interference with the future settlement of outstanding land claims in southern Manitoba. To the extent that any duty to **consult** was engaged, it was fulfilled by the notices that were provided to the Treaty One First Nations and to other Aboriginal communities in the context of the NEB proceedings and by the opportunities that were afforded there for **consultation** and accommodation.

46 These applications are, accordingly, dismissed. If any of the Respondents are seeking costs against the Applicants, I will receive further submissions in that regard. Any such submissions shall not exceed 5 pages in length and must be submitted within 7 days of this Judgment. I will then allow the Applicants an additional 10 days to respond with their own submissions which individually shall not exceed 5 pages in length.

Judgment

THIS COURT ADJUDGES that these applications are dismissed with the matter of costs to be reserved pending further submissions, if any, from the parties.

Application dismissed.

FN1 Treaty One was the first of several treaties entered into from 1871 to 1877 between the federal Crown and the First Nations peoples who then occupied much of the lands of the southern prairies and the south-western corner of what is now Ontario.

FN2 See Affidavit of Lyle Neis sworn September 19, 2008 at paras. 6 to 9.

FN3 The NEB Reasons for Decision by which the Keystone Pipeline Project was approved clearly acknowledge this limitation in the following passage: "It is not within the jurisdiction of the Board to deal with land claim matters. Accordingly, to the extent that the evidence provided by Standing Buffalo relates to its asserted land claim rather than the effects of this particular Project on its interests, it is of limited probative value to the consideration of the application before the Board." The same limitation was noted by the Federal Court of Appeal in *Standing Buffalo Dakota First Nation v. Canada (Attorney General)*, 2008 FCA 222 (F.C.A.) at para. 15.

FN4 See affidavit of Lyle Neis sworn September 19, 2008 at paras. 36-37.

FN5 Paragraph 4 of the Applicants' Memorandum of Fact and Law in T-225-08 states: "While the lands required for the project are generally 'previously disturbed' agricultural lands and generally privately owned, the NEB determined that the project 'has the potential to adversely affect several components of the environment, as detailed in the ESR'". An almost identical passage is set out at para. 12 of the Applicants' Memorandum of Fact and Law in T-921-08.

FN6 See affidavit of Chief Francine Meeches at para. 36.

FN7 See para. 52 of the Applicants' Memorandum of Fact and Law in T-225-08.

END OF DOCUMENT

TAB 6

Mikisew Cree First Nation *Appellant*

v.

Sheila Copps, Minister of Canadian Heritage, and Thebacha Road Society *Respondents*

and

Attorney General for Saskatchewan, Attorney General of Alberta, Big Island Lake Cree Nation, Lesser Slave Lake Indian Regional Council, Treaty 8 First Nations of Alberta, Treaty 8 Tribal Association, Blueberry River First Nations and Assembly of First Nations *Interveners*

Première nation crie Mikisew *Appelante*

c.

Sheila Copps, ministre du Patrimoine canadien, et Thebacha Road Society *Intimées*

et

Procureur général de la Saskatchewan, procureur général de l'Alberta, Nation crie de Big Island Lake, Lesser Slave Lake Indian Regional Council, Premières nations de l'Alberta signataires du Traité nº 8, Treaty 8 Tribal Association, Premières nations de Blueberry River et Assemblée des Premières Nations *Intervenants*

INDEXED AS: MIKISEW CREE FIRST NATION *v.* CANADA (MINISTER OF CANADIAN HERITAGE)

Neutral citation: 2005 SCC 69.

File No.: 30246.

2005: March 14; 2005: November 24.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

RÉPERTORIÉ : PREMIÈRE NATION CRIE MIKISEW *c.* CANADA (MINISTRE DU PATRIMOINE CANADIEN)

Référence neutre : 2005 CSC 69.

Nº du greffe : 30246.

2005 : 14 mars; 2005 : 24 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella et Charron.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Indians — Treaty rights — Crown's duty to consult — Crown exercising its treaty right and "taking up" surrendered lands to build winter road to meet regional transportation needs — Proposed road reducing territory over which Mikisew Cree First Nation would be entitled to exercise its treaty rights to hunt, fish and trap — Whether Crown had duty to consult Mikisew — If so, whether Crown discharged its duty — Treaty No. 8.

Crown — Honour of Crown — Duty to consult and accommodate Aboriginal peoples.

Appeal — Role of intervener — New argument.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Indiens — Droits issus de traités — Obligation de consultation de la Couronne — Exercice par la Couronne du droit issu du traité et « prise » de terres cédées afin de construire une route d'hiver pour répondre aux besoins régionaux en matière de transport — Route proposée réduisant le territoire sur lequel la Première nation crie Mikisew aurait le droit d'exercer ses droits de chasse, de pêche et de piégeage issus du traité — La Couronne avait-elle l'obligation de consulter les Mikisew? — Dans l'affirmative, la Couronne s'est-elle acquittée de cette obligation? — Traité nº 8.

Couronne — Honneur de la Couronne — Obligation de consulter et d'accommoder les peuples autochtones.

Appel — Rôle de l'intervenant — Nouvel argument.

Under Treaty 8, made in 1899, the First Nations who lived in the area surrendered to the Crown 840,000 square kilometres of what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories, an area whose size dwarfs France, exceeds Manitoba, Saskatchewan and Alberta and approaches the size of British Columbia. In exchange for this surrender, the First Nations were promised reserves and some other benefits including, most importantly to them, the rights to hunt, trap and fish throughout the land surrendered to the Crown except "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes".

The Mikisew Reserve is located within Treaty 8 in what is now Wood Buffalo National Park. In 2000, the federal government approved a winter road, which was to run through the Mikisew's reserve, without consulting them. After the Mikisew protested, the road alignment was modified (but without consultation) to track around the boundary of the reserve. The total area of the road corridor is approximately 23 square kilometres. The Mikisew's objection to the road goes beyond the direct impact of closure to hunting and trapping of the area covered by the winter road and included the injurious affection it would have on their traditional lifestyle which was central to their culture. The Federal Court, Trial Division set aside the Minister's approval based on breach of the Crown's fiduciary duty to consult with the Mikisew adequately and granted an interlocutory injuction against constructing the winter road. The court held that the standard public notices and open houses which were given were not sufficient and that the Mikisew were entitled to a distinct consultation process. The Federal Court of Appeal set aside the decision and found, on the basis of an argument put forward by an intervener, that the winter road was properly seen as a "taking up" of surrendered land pursuant to the treaty rather than an infringement of it. This judgment was delivered before the release of this Court's decisions in *Haida Nation* and *Taku River Tlingit First Nation*.

Held: The appeal should be allowed. The duty of consultation, which flows from the honour of the Crown, was breached.

Aux termes du Traité nº 8 signé en 1899, les premières nations qui vivaient dans la région ont cédé à la Couronne 840 000 kilomètres carrés de terres situées dans ce qui est maintenant le nord de l'Alberta, le nord-est de la Colombie-Britannique, le nord-ouest de la Saskatchewan et la partie sud des Territoires du Nord-Ouest, une superficie de très loin supérieure à celle de la France, qui excède celle du Manitoba, de la Saskatchewan ou de l'Alberta et qui équivaut presque à celle de la Colombie-Britannique. En contrepartie de cette cession, on a promis aux premières nations des réserves et certains autres avantages, les plus importants pour eux étant les droits de chasse, de pêche et de piégeage sur tout le territoire cédé à la Couronne à l'exception de « tels terrains qui de temps à autre pourront être requis ou pris pour des fins d'établissements, de mine, d'opérations forestières, de commerce ou autres objets ».

La réserve des Mikisew se trouve sur le territoire visé par le Traité nº 8 dans ce qui est maintenant le parc national Wood Buffalo. En 2000, le gouvernement fédéral a approuvé la construction d'une route d'hiver, qui devait traverser la réserve des Mikisew, sans consulter ceux-ci. À la suite des protestations des Mikisew, le tracé de la route a été modifié (mais sans consultation) de manière à ce qu'il longe la limite de la réserve. La superficie totale du corridor de la route est d'environ 23 kilomètres carrés. L'objection des Mikisew à la construction de la route va au-delà de l'effet direct qu'aurait l'interdiction de chasser et de piéger dans le secteur visé par la route d'hiver et porte sur le préjudice causé au mode de vie traditionnel qui est essentiel à leur culture. La Section de première instance de la Cour fédérale a annulé l'approbation de la ministre en se fondant sur la violation de l'obligation de fiduciaire de la Couronne de consulter adéquatement les Mikisew et a accordé une injonction interlocutoire interdisant la construction de la route d'hiver. La cour a conclu que les avis publics types et la tenue de séances portes ouvertes n'étaient pas suffisants et que les Mikisew avaient droit à un processus de consultation distinct. La Cour d'appel fédérale a annulé cette décision et a conclu, en s'appuyant sur un argument présenté par un intervenant, que la route d'hiver constituait plus justement une « prise » de terres cédées effectuée conformément au traité plutôt qu'une violation de celui-ci. Cette décision a été rendue avant que notre Cour se prononce dans les affaires *Nation Haïda* et *Première nation Tlingit de Taku River*.

Arrêt : Le pourvoi est accueilli. L'obligation de consultation qui découle du principe de l'honneur de la Couronne n'a pas été respectée.

The government's approach, rather than advancing the process of reconciliation between the Crown and the Treaty 8 First Nations, undermined it. [4]

When the Crown exercises its Treaty 8 right to "take up" land, its duty to act honourably dictates the content of the process. The question in each case is to determine the degree to which conduct contemplated by the Crown would adversely affect the rights of the aboriginal peoples to hunt, fish and trap so as to trigger the duty to consult. Accordingly, where the court is dealing with a proposed "taking up", it is not correct to move directly to a *Sparrow* justification analysis even if the proposed measure, if implemented, would infringe a First Nation treaty right. The Court must first consider the process and whether it is compatible with the honour of the Crown. [33-34] [59]

The Crown, while it has a treaty right to "take up" surrendered lands, is nevertheless under the obligation to inform itself on the impact its project will have on the exercise by the Mikisew of their treaty hunting, fishing and trapping rights and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew in good faith and with the intention of substantially addressing their concerns. The duty to consult is triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the content of the Crown's duty. Under Treaty 8, the First Nation treaty rights to hunt, fish and trap are therefore limited not only by geographical limits and specific forms of government regulation, but also by the Crown's right to take up lands under the treaty, subject to its duty to consult and, if appropriate, to accommodate the concerns of the First Nation affected. [55-56]

Here, the duty to consult is triggered. The impacts of the proposed road were clear, established, and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question. Contrary to the Crown's argument, the duty to consult was not discharged in 1899 by the pre-treaty negotiations. [54-55]

However, given that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew treaty rights are expressly subject to the

La démarche adoptée par le gouvernement a nui au processus de réconciliation entre la Couronne et les premières nations signataires du Traité n° 8 plutôt que de le faire progresser. [4]

Lorsque la Couronne exerce son droit issu du Traité n° 8 de « prendre » des terres, son obligation d'agir honorablement dicte le contenu du processus. La question dans chaque cas consiste à déterminer la mesure dans laquelle les dispositions envisagées par la Couronne auraient un effet préjudiciable sur les droits de chasse, de pêche et de piégeage des Autochtones de manière à rendre applicable l'obligation de consulter. Par conséquent, dans les cas où la Cour est en présence d'une « prise » projetée, il n'est pas indiqué de passer directement à une analyse de la justification fondée sur l'arrêt *Sparrow* même si on a conclu que la mesure envisagée, si elle était mise en œuvre, porterait atteinte à un droit issu du traité de la première nation. La Cour doit d'abord examiner le processus et se demander s'il est compatible avec l'honneur de la Couronne. [33-34] [59]

Même si le traité lui accorde un droit de « prendre » des terres cédées, la Couronne a néanmoins l'obligation de s'informer de l'effet qu'aura son projet sur l'exercice, par les Mikisew, de leurs droits de chasse, de pêche et de piégeage et de leur communiquer ses constatations. La Couronne doit alors s'efforcer de traiter avec les Mikisew de bonne foi et dans l'intention de tenir compte réellement de leurs préoccupations. L'obligation de consultation est vite déclenchée, mais l'effet préjudiciable et l'étendue du contenu de l'obligation de la Couronne sont des questions de degré. En vertu du Traité n° 8, les droits de chasse, de pêche et de piégeage issus du traité de la première nation sont par conséquent restreints non seulement par des limites géographiques et des mesures spécifiques de réglementation gouvernementale, mais aussi le droit pour la Couronne de prendre des terres aux termes du traité, sous réserve de son obligation de tenir des consultations et, s'il y a lieu, de trouver des accommodements aux intérêts de la première nation. [55-56]

En l'espèce, l'obligation de consultation est déclenchée. Les effets de la route proposée étaient clairs, démontrés et manifestement préjudiciables à l'exercice ininterrompu des droits de chasse et de piégeage des Mikisew sur les terres en question. Contrairement à ce qu'elle prétend, la Couronne ne s'est pas acquittée de l'obligation de consultation en 1899 lors des négociations qui ont précédé le traité. [54-55]

Cependant, étant donné que la Couronne se propose de construire une route d'hiver relativement peu importante sur des terres cédées où les droits issus du

"taking up" limitation, the content of the Crown's duty of consultation in this case lies at the lower end of the spectrum. The Crown is required to provide notice to the Mikisew and to engage directly with them. This engagement should include the provision of information about the project, addressing what the Crown knew to be the Mikisew's interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown must also solicit and listen carefully to the Mikisew's concerns, and attempt to minimize adverse impacts on its treaty rights. [64]

The Crown did not discharge its obligations when it unilaterally declared the road re-alignment would be shifted from the reserve itself to a track along its boundary. It failed to demonstrate an intention of substantially addressing aboriginal concerns through a meaningful process of consultation. [64-67]

The Attorney General of Alberta did not overstep the proper role of an intervener when he raised before the Federal Court of Appeal a fresh argument on the central issue of whether the Minister's approval of the winter road infringed Treaty 8. It is always open to an intervener to put forward any legal argument in support of what it submits is the correct legal conclusion on an issue properly before the court provided that in doing so its legal argument does not require additional facts not proven in evidence at trial, or raise an argument that is otherwise unfair to one of the parties. [40]

Cases Cited

Considered: *R. v. Badger*, [1996] 1 S.C.R. 771; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; **distinguished:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; **referred to:** *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [2005] 2 S.C.R. 220, 2005 SCC 43; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. v. Morgentaler*, [1993] 1 S.C.R. 462; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, 2002 SCC 19; *Province of Ontario v. Dominion of*

traité des Mikisew sont expressément assujettis à la restriction de la « prise », le contenu de l'obligation de consultation de la Couronne se situe plutôt au bas du continuum. La Couronne doit aviser les Mikisew et nouer un dialogue directement avec eux. Ce dialogue devrait comporter la communication de renseignements au sujet du projet traitant des intérêts des Mikisew connus de la Couronne et de l'effet préjudiciable que le projet risquait d'avoir, selon elle, sur ces intérêts. La Couronne doit aussi demander aux Mikisew d'exprimer leurs préoccupations et les écouter attentivement, et s'efforcer de réduire au minimum les effets préjudiciables du projet sur les droits issus du traité des Mikisew. [64]

La Couronne n'a pas respecté ses obligations lorsqu'elle a déclaré unilatéralement que le tracé de la route serait déplacé de la réserve elle-même à une bande de terre à la limite de celle-ci. Elle n'a pas réussi à démontrer qu'elle avait l'intention de tenir compte réellement des préoccupations des Autochtones dans le cadre d'un véritable processus de consultation. [64-67]

Le procureur général de l'Alberta n'a pas outrepassé le rôle d'un intervenant lorsqu'il a soulevé devant la Cour d'appel fédérale un nouvel argument pertinent à la question qui était au cœur du litige, à savoir si l'approbation de la route d'hiver par la ministre violait le Traité nº 8. Un intervenant peut toujours présenter un argument juridique à l'appui de ce qu'il prétend être la bonne conclusion juridique à l'égard d'une question dont la cour est régulièrement saisie pourvu que son argument juridique ne fasse pas appel à des faits additionnels qui n'ont pas été prouvés au procès, ou qu'il ne soulève pas un argument qui est par ailleurs injuste pour l'une des parties. [40]

Jurisprudence

Arrêts examinés : *R. c. Badger*, [1996] 1 R.C.S. 771; *Nation Haïda c. Colombie-Britannique (Ministre des Forêts)*, [2004] 3 R.C.S. 511, 2004 CSC 73; *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, [2004] 3 R.C.S. 550, 2004 CSC 74; **distinction d'avec l'arrêt :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; **arrêts mentionnés :** *R. c. Sioui*, [1990] 1 R.C.S. 1025; *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. Marshall*, [2005] 2 R.C.S. 220, 2005 CSC 43; *Halfway River First Nation c. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470; *R. c. Morgentaler*, [1993] 1 R.C.S. 462; *Lamb c. Kincaid* (1907), 38 R.C.S. 516; *Athey c. Leonati*, [1996] 3 R.C.S. 458; *Performance Industries Ltd. c. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 R.C.S. 678, 2002 CSC 19; *Province of*

violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.

58 *Sparrow* holds not only that rights protected by s. 35 of the *Constitution Act, 1982* are not absolute, but also that their breach may be justified by the Crown in certain defined circumstances. The Mikisew rights under Treaty 8 are protected by s. 35. The Crown does not seek to justify in *Sparrow*-terms shortcomings in its consultation in this case. The question that remains, therefore, is whether what the Crown did here complied with its obligation to consult honourably with the Mikisew First Nation.

(3) Was the Process Followed by the Minister Through Parks Canada in This Case Sufficient?

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

60 I should state at the outset that the winter road proposed by the Minister was a permissible purpose for "taking up" lands under Treaty 8. It is obvious that the listed purposes of "settlement, mining, lumbering" and "trading" all require suitable transportation. The treaty does not spell out permissible "other purposes" but the term should not be read restrictively: *R. v. Smith*, [1935] 2 W.W.R. 433

d'hiver sans consultation adéquate, elle aurait violé ses obligations *procédurales*, outre le fait que les Mikisew auraient peut-être pu établir que la route d'hiver violait en plus les obligations *substantielles* que le traité impose à la Couronne.

Selon l'arrêt *Sparrow*, non seulement les droits protégés par l'art. 35 de la *Loi constitutionnelle de 1982* ne sont pas absolus, mais leur violation peut être justifiée par la Couronne dans certaines circonstances précises. Les droits que le Traité nº 8 confère aux Mikisew sont protégés par l'art. 35. La Couronne ne cherche pas à justifier au sens de l'arrêt *Sparrow* les lacunes de sa consultation en l'espèce. Il reste donc à répondre à la question de savoir si, dans les mesures qu'elle a prises, la Couronne a respecté son obligation de consulter honorablement la Première nation Mikisew.

(3) Le processus suivi en l'espèce par la ministre, par l'intermédiaire de Parcs Canada, était-il suffisant?

Dans les cas où, comme en l'espèce, la Cour est en présence d'une « prise » *projetée*, il n'est pas indiqué (même si on a conclu que la mesure envisagée, *si elle était mise en œuvre*, porterait atteinte aux droits de chasse et de piégeage issus du traité) de passer directement à une analyse fondée sur l'arrêt *Sparrow*. La Cour doit d'abord examiner le *processus* selon lequel la « prise » doit se faire, et se demander si ce processus est compatible avec l'honneur de la Couronne. Dans la négative, la première nation peut obtenir l'annulation de l'ordonnance de la ministre en se fondant sur le motif relatif au processus, peu importe que les faits de l'affaire justifient par ailleurs une conclusion que les droits de chasse, de pêche et de piégeage ont été violés.

Je précise d'entrée de jeu que la construction de la route d'hiver proposée par la ministre est une fin qui lui permettait de « prendre » des terres aux termes du Traité nº 8. Il est évident que les fins [TRADUCTION] « d'établissements, de mine, d'opérations forestières » et de [TRADUCTION] « commerce » nécessitent toutes un transport convenable. Le traité ne définit pas les [TRADUCTION] « autres

(Sask. C.A.), at pp. 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to "travel".

The question is whether the Minister and her staff pursued the permitted purpose of regional transportation needs in accordance with the Crown's duty to consult. The answer turns on the particulars of that duty shaped by the circumstances here. In *Delgamuukw*, the Court considered the duty to consult and accommodate in the context of an infringement of aboriginal title (at para. 168):

In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. [Emphasis added.]

In *Haida Nation*, the Court pursued the kinds of duties that may arise in pre-proof claim situations, and McLachlin C.J. used the concept of a spectrum to frame her analysis (at paras. 43-45):

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. . . .

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high

objets » qui permettent de prendre des terres, mais cette expression ne doit pas recevoir une interprétation restrictive : *R. c. Smith*, [1935] 2 W.W.R. 433 (C.A. Sask.), p. 440-441. Quoi qu'il en soit, comme je l'ai déjà mentionné, on parle de « voyages » dans le préambule du Traité n° 8.

61 La question est de savoir si la ministre et son personnel ont tenté de parvenir à la fin autorisée que constituent les besoins en matière de transport régional en respectant l'obligation de consultation de la Couronne. La réponse dépend du contenu de cette obligation, lequel est tributaire des circonstances de l'espèce. Dans l'arrêt *Delgamuukw*, la Cour a examiné l'obligation de consultation et d'accommodement dans le contexte d'une atteinte au titre aborigène (par. 168) :

Occasionnellement, lorsque le manquement est moins grave ou relativement mineur, il ne s'agira de rien de plus que la simple obligation de discuter des décisions importantes qui seront prises au sujet des terres détenues en vertu d'un titre aborigène. Évidemment, même dans les rares cas où la norme minimale acceptable est la consultation, celle-ci doit être menée de bonne foi, dans l'intention de tenir compte réellement des préoccupations des peuples autochtones dont les terres sont en jeu. Dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Certaines situations pourraient même exiger l'obtention du consentement d'une nation autochtone, particulièrement lorsque des provinces prennent des règlements de chasse et de pêche visant des territoires autochtones. [Je souligne.]

62 Dans l'arrêt *Nation Haïda*, la Cour a examiné les types d'obligations qui peuvent découler de différentes situations dans le contexte de revendications non encore prouvées, et la juge en chef McLachlin a utilisé la notion de continuum comme fondement de son analyse (par. 43-45) :

À une extrémité du continuum se trouvent les cas où la revendication de titre est peu solide, le droit ancestral limité ou le risque d'atteinte faible. Dans ces cas, les seules obligations qui pourraient incomber à la Couronne seraient d'aviser les intéressés, de leur communiquer des renseignements et de discuter avec eux des questions soulevées par suite de l'avis. . .

À l'autre extrémité du continuum on trouve les cas où la revendication repose sur une preuve à première vue solide, où le droit et l'atteinte potentielle sont d'une

significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. . . .

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. . . . [Emphasis added.]

63 The determination of the content of the duty to consult will, as *Haida Nation* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance. Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation. Another factor in a non-treaty case, as *Haida Nation* points out, will be the strength of the aboriginal claim. The history of dealings between the Crown and a particular First Nation may also be significant. Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the

haute importance pour les Autochtones et où le risque de préjudice non indemnisable est élevé. Dans de tels cas, il peut s'avérer nécessaire de tenir une consultation approfondie en vue de trouver une solution provisoire acceptable. Quoique les exigences précises puissent varier selon les circonstances, la consultation requise à cette étape pourrait comporter la possibilité de présenter des observations, la participation officielle à la prise de décisions et la présentation de motifs montrant que les préoccupations des Autochtones ont été prises en compte et précisant quelle a été l'incidence de ces préoccupations sur la décision. Cette liste n'est pas exhaustive et ne doit pas nécessairement être suivie dans chaque cas. . .

Entre les deux extrémités du continuum décrit précédemment, on rencontrera d'autres situations. Il faut procéder au cas par cas. Il faut également faire preuve de souplesse, car le degré de consultation nécessaire peut varier à mesure que se déroule le processus et que de nouveaux renseignements sont mis au jour. La question décisive dans toutes les situations consiste à déterminer ce qui est nécessaire pour préserver l'honneur de la Couronne et pour concilier les intérêts de la Couronne et ceux des Autochtones. . . [Je souligne.]

Comme l'indique l'arrêt *Nation Haïda*, la détermination du contenu de l'obligation de consultation sera fonction du contexte. La spécificité des promesses faites sera une des variables prises en compte. Si, par exemple, un traité exige la fourniture de biens ou le paiement de sommes d'argent par la Couronne, ou si une entente récente sur les revendications territoriales impose aux Autochtones des obligations spécifiques relativement à des ressources données, l'importance de la consultation peut être assez limitée. Si les obligations respectives sont claires, les parties devraient les exécuter. Un autre facteur contextuel sera la gravité de l'incidence qu'auront sur le peuple autochtone les mesures que propose la Couronne. Plus la mesure aura d'incidence, plus la consultation prendra de l'importance. S'il n'y a pas de traité, la solidité de la revendication autochtone sera un autre facteur, comme le signale l'arrêt *Nation Haïda*. L'historique des relations entre la Couronne et une première nation peut aussi être un facteur important. En l'espèce, le facteur contextuel le plus important est le fait que le Traité n° 8 offre un cadre permettant de gérer les changements constants à l'utilisation des terres déjà prévus en 1899 et qui, on le sait

overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. The Crown did not discharge this obligation when it unilaterally declared the road realignment would be shifted from the reserve itself to a track along its boundary. I agree on this point with what Finch J.A. (now C.J.B.C.) said in *Halfway River First Nation*, at paras. 159-60:

> The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
>
> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [Emphasis added.]

maintenant, vont se poursuivre encore longtemps. Dans ce contexte, la consultation est un facteur clé pour parvenir à la réconciliation, l'objectif global du droit moderne des traités et des droits autochtones.

64 L'obligation en l'espèce comporte des éléments informationnels et des éléments de solution. Dans cette affaire, étant donné que la Couronne se propose de construire une route d'hiver relativement peu importante sur des terres *cédées* où les droits de chasse, de pêche et de piégeage des Mikisew sont expressément assujettis à la restriction de la « prise », j'estime que l'obligation de la Couronne se situe plutôt au bas du continuum. La Couronne devait aviser les Mikisew et nouer un dialogue directement avec eux (et non, comme cela semble avoir été le cas en l'espèce, après coup lorsqu'une consultation publique générale a été tenue auprès des utilisateurs du parc). Ce dialogue aurait dû comporter la communication de renseignements sur le projet traitant des intérêts des Mikisew connus de la Couronne et de l'effet préjudiciable que le projet risquait d'avoir, selon elle, sur ces intérêts. La Couronne devait demander aux Mikisew d'exprimer leurs préoccupations et les écouter attentivement, et s'efforcer de réduire au minimum les effets préjudiciables du projet sur les droits de chasse, de pêche et de piégeage des Mikisew. Elle n'a pas respecté cette obligation lorsqu'elle a déclaré unilatéralement que le tracé de la route serait déplacé de la réserve elle-même à une bande de terre à la limite de celle-ci. Sur ce point, je souscris à l'opinion exprimée par le juge Finch (maintenant Juge en chef de la C.-B.) dans *Halfway River First Nation*, par. 159-160 :

> [TRADUCTION] Ce n'est pas parce qu'on a donné un avis suffisant d'une décision envisagée qu'on a aussi respecté l'exigence de la consultation suffisante.
>
> L'obligation de consultation de la Couronne lui impose le devoir concret de veiller raisonnablement à ce que les Autochtones disposent en temps utile de toute l'information nécessaire pour avoir la possibilité d'exprimer leurs intérêts et leurs préoccupations, et de faire en sorte que leurs observations sont prises en considération avec sérieux et, lorsque c'est possible, sont intégrées d'une façon qui puisse se démontrer dans le plan d'action proposé. [Je souligne.]

65 It is true, as the Minister argues, that there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution. In this case, however, consultation never reached that stage. It never got off the ground.

66 Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections. We do not know, and the Minister cannot know in the absence of consultation, what such changes might be.

67 The trial judge's findings of fact make it clear that the Crown failed to demonstrate an "'intention of substantially addressing (Aboriginal) concerns' . . . through a meaningful process of consultation" (*Haida Nation*, at para. 42). On the contrary, the trial judge held that

> [i]n the present case, at the very least, this [duty to consult] would have entailed a response to Mikisew's October 10, 2000 letter, and a meeting with them to ensure that their concerns were addressed early in the planning stages of the project. At the meetings that were finally held between Parks Canada and Mikisew, a decision had essentially been made, therefore, the meeting could not have been conducted with the genuine intention of allowing Mikisew's concerns to be integrated with the proposal. [para. 154]

The trial judge also wrote:

> . . . it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a

Il est vrai, comme le prétend la ministre, que les Mikisew ont l'obligation réciproque de faire leur part en matière de consultation, de faire connaître leurs préoccupations, de supporter les efforts du gouvernement en vue de tenir compte de leurs préoccupations et suggestions, et de tenter de trouver une solution mutuellement satisfaisante. En l'espèce, cependant, la consultation n'a jamais atteint ce stade. Elle n'a jamais pris son essor.

Le processus de consultation, s'il avait suivi son cours, n'aurait pas conféré aux Mikisew un droit de veto sur le tracé de la route. Comme on le souligne dans l'arrêt *Nation Haïda*, la consultation n'entraîne pas toujours un accommodement, et l'accommodement ne se traduit pas toujours par une entente. On aurait toutefois peut-être pu apporter au tracé ou à la construction de la route des modifications qui permettraient de répondre, dans une large mesure, aux objections des Mikisew. Nous ne savons pas ce que pourraient être ces modifications et, en l'absence de consultation, la ministre ne peut pas le savoir non plus.

Il ressort clairement des conclusions de fait de la juge de première instance que la Couronne n'a pas réussi à démontrer qu'elle avait « "l'intention de tenir compte réellement des préoccupations (des Autochtones)" [. . .] dans le cadre d'un véritable processus de consultation » (*Nation Haïda*, par. 42). Au contraire, la juge de première instance a estimé que,

> [e]n l'espèce, il aurait donc au moins fallu répondre à la lettre des Mikisews du 10 octobre 2000 et rencontrer ceux-ci pour prendre leurs préoccupations en considération au début de la planification du projet. Lorsque des rencontres ont finalement eu lieu entre Parcs Canada et les Mikisews, la décision était pour ainsi dire prise, et elles ne pouvaient donc se tenir dans l'intention véritable de permettre la prise en compte de leurs préoccupations. [par. 154]

La juge de première instance a également écrit ceci :

> . . . l'honneur de la Couronne, en sa qualité de fiduciaire, ne saurait permettre qu'une décision portant atteinte à

First Nation prior to making a decision that infringes on constitutionally protected treaty rights. [para. 157]

I agree, as did Sharlow J.A., dissenting in the Federal Court of Appeal. She declared that the mitigation measures were adopted through a process that was "fundamentally flawed" (para. 153).

In the result I would allow the appeal, quash the Minister's approval order, and remit the winter road project to the Minister to be dealt with in accordance with these reasons.

V. Conclusion

Costs are sought by the Mikisew on a solicitor and client basis but there are no exceptional circumstances to justify such an award. The appeal is therefore allowed and the decision of the Court of Appeal is set aside, all with costs against the respondent Minister in this Court and in the Federal Court of Appeal on a party and party basis. The costs in the Trial Division remain as ordered by the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: Rath & Co., Priddis, Alberta.

Solicitor for the respondent Sheila Copps, Minister of Canadian Heritage: Attorney General of Canada, Vancouver.

Solicitors for the respondent the Thebacha Road Society: Ackroyd Piasta Roth & Day, Edmonton.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Big Island Lake Cree Nation: Woloshyn & Company, Saskatoon.

des droits issus de traité et jouissant d'une protection constitutionnelle soit prise sans que la Première nation concernée soit consultée. [par. 157]

68 Comme la juge Sharlow, dissidente en Cour d'appel fédérale, je suis de cet avis. Cette dernière a affirmé que les mesures d'atténuation avaient été élaborées par suite d'un processus qui était « fondamentalement vicié » (par. 153).

69 En définitive, je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance d'approbation de la ministre et de lui renvoyer le dossier du projet de route d'hiver pour qu'elle prenne une décision conforme aux présents motifs.

V. Conclusion

70 Les Mikisew ont demandé les dépens sur une base avocat-client, mais aucune circonstance exceptionnelle ne justifie cette demande. En conséquence, le pourvoi est accueilli et la décision de la Cour d'appel fédérale est annulée, le tout avec dépens entre parties contre la ministre intimée dans notre Cour et dans la Cour d'appel fédérale. L'ordonnance relative aux dépens rendue par la juge en Section de première instance est maintenue.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Rath & Co., Priddis, Alberta.

Procureur de l'intimée Sheila Copps, ministre du Patrimoine canadien : Procureur général du Canada, Vancouver.

Procureurs de l'intimée Thebacha Road Society : Ackroyd Piasta Roth & Day, Edmonton.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante la Nation crie de Big Island Lake : Woloshyn & Company, Saskatoon.

TAB 7

Her Majesty the Queen v. Jacob et al.*

[Indexed as: R. v. Jacob]

Court of Appeal for Ontario, O'Connor A.C.J.O., MacPherson and Juriansz JJ.A. January 27, 2009

Aboriginal peoples — Hunting rights — Aboriginal defendants properly convicted of hunting at night despite fact that they were beneficiaries of Treaty 9 rights and were hunting within area covered by Treaty 9 — Aboriginal right to fish and hunt in Treaty 9 subject to exception for "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" — Defendants hunting on road which was used by lumber company's employees and general public — Hunting on road visibly incompatible with use to which road had been put for many years — Defendants' hunting on road excluded from treaty protection by "lands taken up" limitation in Treaty 9.

Criminal law — Provincial offences — Fish and wildlife — Gravel road which was commonly used by lumber company's employees and by general public constituting "right of way for public vehicular traffic" within meaning of s. 17(1)(e) of Fish and Wildlife Conservation Act — Crown not required to prove that provincial government or someone else with legal authority granted public right to use land by way of dedication or other legal process — Defendant who fired shots across road guilty of discharging firearm across road contrary to s. 17(1)(e) of Act — Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41, s. 17(1)(e).

The aboriginal defendants were hunting moose from a van on a gravel road at night. They were charged with hunting at night contrary to s. 20(1)(*a*) of the *Fish and Wildlife Conservation Act, 1997* and one of them was also charged with discharging a firearm across a road contrary to s. 17(1)(*e*) of the Act. The justice of the peace rejected the defendants' argument that they had a defence to the charges because they were exercising their right to hunt under Treaty 9 at the relevant time. The defendants were convicted, and their conviction was affirmed by the summary conviction appeal judge. The defendants appealed.

Held, the appeal should be dismissed.

Section 17(1)(*e*) of the Act makes it an offence to "discharge a firearm in or across the travelled portion of a right of way for public vehicular traffic". In order to establish that the land in question is a "right of way for public vehicular traffic", the Crown is not required to prove that the provincial government or someone else with legal authority has granted the public the right to use the land by way of dedication or other legal process. One of the purposes of s. 17(1)(*e*) is to protect members of the public who are travelling in vehicles from the dangers arising from the discharge of firearms. That purpose can best be achieved by interpreting the phrase "a right of way for public vehicular traffic" broadly so as to protect members of the public driving on all lands that are open to public use in vehicles. There was evidence that the road in this case was a roadway used by the public. The defendant was properly convicted of the offence under s. 17(1)(*e*).

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* Vous trouverez la traduction française à la p. 690, *post.*

The aboriginal right to fish and hunt in Treaty 9 is subject to an exception for "such tracts as may be required or taken up form time to time for settlement, mining, lumbering, trading or other purposes". The test for determining whether lands are "taken up" is whether the use being made of the land is visibly incompatible with the exercise of the treaty right. Whether or not land has been taken up is a question of fact that must be resolved on a case-by-case basis. Hunting on the road in question in this case was visibly incompatible with the use to which the road had been put for many years. It was a well-established primary haul road used both by lumber company employees and the public. Roadways used by the public are incompatible with hunting. The defendants knew about the uses to which the road was put. They were properly convicted of hunting at night.

R. v. Badger, [1996] 1 S.C.R. 771, [1996] S.C.J. No. 39, 133 D.L.R. (4th) 324, 195 N.R. 1, [1996] 4 W.W.R. 457, J.E. 96-737, 37 Alta. L.R. (3d) 153, 181 A.R. 321, 105 C.C.C. (3d) 289, [1996] 2 C.N.L.R. 77, 30 W.C.B. (2d) 211, **apld**

R. v. Morris, [2006] 2 S.C.R. 915, [2006] S.C.J. No. 59, 2006 SCC 59, 274 D.L.R. (4th) 193, 355 N.R. 86, [2007] 3 W.W.R. 34, J.E. 2007-52, 234 B.C.A.C. 1, 62 B.C.L.R. (4th) 1, 215 C.C.C. (3d) 289, [2007] 1 C.N.L.R. 303, 71 W.C.B. (2d) 591, EYB 2006-111894, **distd**

Other cases referred to

BellExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; *R. v. Bernard*, [2002] N.S.J. No. 15, 2002 NSCA 5, 200 N.S.R. (2d) 352, [2002] 2 C.N.L.R. 200, 52 W.C.B. (2d) 342; *R. v. Brertton*, [1999] A.J. No. 1152, 1999 ABCA 285, 244 A.R. 355, [2000] 1 C.N.L.R. 201, 44 W.C.B. (2d) 13 (C.A.) [Leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 594]; *R. v. Fox*, [1994] O.J. No. 667, 71 O.A.C. 50, [1994] 3 C.N.L.R. 132, 23 W.C.B. (2d) 279 (C.A.); *R. v. Mousseau*, [1980] 2 S.C.R. 89, [1980] S.C.J. No. 44, 111 D.L.R. (3d) 443, 31 N.R. 620, [1980] 4 W.W.R. 24, 3 Man. R. (2d) 338, 52 C.C.C. (2d) 140, [1980] 3 C.N.L.R. 63, 4 W.C.B. 404; *R. v. Therriault*, [1999] O.J. No. 5428 (C.J.)

Statutes referred to

First Nations Fiscal and Statistical Management Act, S.C. 2005, c. 9, s. 151
Fish and Wildlife Conservation Act, 1997, S.O. 1997, c. 41, ss. 1, 17, 20(1)(*a*), 119(1)
Game and Fish Act, R.S.O. 1990, c. G.1 [rep.], ss. 20-23
Indian Act, R.S.C. 1985, c. I-5, s. 88
Wildlife Act, R.S.B.C. 1996, c. 488

Authorities referred to

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 257 (December 8, 1997)
Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Butterworths, 2008)
Youngblood, James (Sákéj) Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thompson Canada Ltd., 2007)

APPEAL from the dismissal of an appeal by Petit-Baig J. and the decision of Justice of the Peace Leaman reported at [2004] O.J. No. 5055, 2004 ONCJ 318 (C.J.); [2001] O.J. No. 6217 (C.J.); and [2002] O.J. No. 2382, 54 W.C.B. (2d) 339 (C.J.) affirming

convictions for offences under the *Fish and Wildlife Conservation Act, 1997*.

Francis J. Thatcher and *Mary D. Bird*, for appellants.
E. Ria Tzimas and *Michael E. Burke*, for respondent.
Brian D. Wilkie, for Ministry of Natural Resources.

The judgment of the court was delivered by

O'CONNOR A.C.J.O.: —

I. *Overview*

[1] This is an appeal from the decision of Petit-Baig J. upholding the appellants' convictions by a justice of the peace for hunting at night contrary to s. 20(1)(*a*) of the *Fish and Wildlife Conservation Act, 1997*, S.O. 1997, c. 41 ("*FWCA*"), and discharging a firearm across a road (Jacob only) contrary to s. 17(1)(*e*) of the *FWCA*.[1]

[2] The main issue on this appeal is whether the appellants, who are members of the Aroland First Nation, had a defence to the charges because they were exercising a right to hunt under Treaty 9. In my view, they did not. They were hunting on Greta Road, which is excluded from treaty protection by the "lands taken up" limitation in Treaty 9.

II. *Facts*

(i) *The events*

[3] After dark on October 8, 1999, the appellants were hunting moose from a van driven by Stewart Yapput on Greta Road, a lumbering road outside of Geraldton, Ontario. At approximately 9:00 p.m., they passed a moose decoy that had been set up by conservation officers on the east side of the road as part of an enforcement operation to catch illegal hunters.

[4] As they passed the decoy, Stewart Yapput slowed the vehicle and shone a spotlight at the decoy from the driver's side across the roof of the van. As he was doing that, a large logging truck approached from behind and he drove off.

[5] In a few minutes, the van returned and stopped across from the decoy. Stewart Yapput shone the spotlight out of the driver's window, illuminating the decoy. The appellant, Jacob, got out of the van, loaded his .303 rifle and, while standing on

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1 The appellant, Perry Yapput, died on August 18, 2008.

Greta Road, fired four shots at the decoy. The conservation officers, who observed these events, charged the appellants with the two offences that underlie this appeal.

(ii) *Greta Road*

[6] Greta Road is a gravel road. It is a primary haul road used by Kimberly Clark in its forest operations. Kimberly Clark produces a map for the public indicating the locations where it has active forest harvesting operations. The map shows a number of roads, including Greta Road, and states that roads are "generally open to the public" although they may be closed at times to protect employees and equipment. The text accompanying the map includes a warning: "never shoot along or across a main haul road".

[7] The speed limit on Greta Road is 80 kilometres per hour. The road has the normal traffic signs indicating the speed limit as well as stop signs and yield signs. Employees of Kimberly Clark are the most common users, but the road is also driven frequently by members of the public, including hunters, fishermen, trappers, blueberry pickers, snowmobilers and cross-country skiers. The appellants were using the road as members of the public. There is a subdivision at the southern end of Greta Road not far from where it joins a main highway. In addition to the logging truck mentioned above, the conservation officers' vehicles, the appellants' van and other vehicles were on Greta Road on the night of the incident.

[8] There was no evidence about when Greta Road was first built, however, one of the conservation officers testified that it had been in use for at least the 12 years that he had worked in the area.

(iii) *Treaty 9*

[9] Treaty 9 was made in 1905 and 1906. Also described as the *James Bay Treaty*, it resulted in the surrender of the Aboriginal interests throughout a substantial part of Northern Ontario. The ceded territory covers approximately 90,000 square miles of the lands drained by the Albany and Moose River systems, together with the portions of the Northwest Territories lying between the Albany River, the district of Keewatin and Hudson's Bay.

[10] It is common ground that the appellants are beneficiaries of Treaty 9 rights and they were hunting within the area covered by Treaty 9.

[11] Treaty 9 provides the signatories and their descendants with the right to hunt, fish and trap throughout the Treaty 9 area. The treaty sets out two limitations on those rights — one relating to government regulation and the other relating to

areas in which the rights would not apply. The relevant provision reads as follows:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

(iv) *The traditional practices*

[12] Isaak Magiskan, an elder from the Aroland First Nation, the First Nation to which the appellants belong, testified that he was taught as a child and a young man that he had the treaty right to hunt at night. His father, who was born in 1908, three years after Treaty 9 was made, and his uncle were hunters and taught him about the night hunting practices.

[13] Mr. Magiskan explained there were a number of reasons why moose moved more frequently during night hours and were thus considerably easier to locate. The reasons included the amount of human traffic during the daytime, the fact that moose feed at night and the beginning of the rutting season in September and early October. Mr. Magiskan considered that night hunting was preferable to day hunting. He explained that his father had hunted at night and knew where the moose came to feed in the rivers at night.

[14] Mr. Magiskan testified that there would be a negative impact on his community's ability to feed itself should the members of the community not be allowed to hunt at night.

(v) *The relevant legislation*

[15] The *FWCA* provides a provincial statutory scheme aimed at ensuring the conservation of fish and wildlife in Ontario and safe hunting practices.

[16] The relevant sections of the *FWCA* provide as follows:

> 17(1) A person who is in an area usually inhabited by wildlife or who is on the way to or from an area usually inhabited by wildlife shall not,
>
> . . . . .
>
> (*e*) in a part of Ontario to which clause (*d*) does not apply, discharge a firearm in or across the travelled portion of a right of way for public vehicular traffic.
>
> . . . . .

> 20(1) A person shall not, during the period from half an hour after sunset to half an hour before sunrise,
>
> (*a*) hunt wildlife;

[17] Section 88 of the *Indian Act*, R.S.C. 1985, c. I-5 provides that provincial laws of general application apply to Aboriginal persons. However, it specifically provides that provincial laws are subject to the terms of any treaty. At the relevant time, the section read as follows:

> 88. *Subject to the terms of any treaty and any other Act* of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act.[2]

(Emphasis added)

III. *The Reasons Below*

(i) *The trial judgment*

[18] The justice of the peace decided the issues before him in two separate sets of reasons. The first was released on April 27, 2001. In those reasons, the justice of the peace dealt first with the charge against Jacob under s. 17(1)(*e*) of the *FWCA* of shooting across a public roadway. He found that Greta Road is "a right of way for public vehicular traffic" within the meaning of s. 17(1)(*e*). He held that Greta Road constituted "lands taken up" within the meaning of Treaty 9 and that, as such, Greta Road is not a location from which the appellants may claim a treaty right to hunt. On the basis of this reasoning, he convicted Jacob of the charge.

[19] With respect to the charges under s. 20(1)(*a*) of the *FWCA*, the justice of the peace held that the appellants had established a treaty right to hunt "at this location, at this time of day" and that s. 20(1)(*a*) of the *FWCA* imposes an undue hardship on this preferred method of hunting.

[20] The justice of the peace went on to find that the appellants had made a "*prima facie* case that they have a treaty right" to hunt at night. He indicated that the Crown should have the opportunity to lead evidence on the issue of the safety of hunting at night. After hearing that evidence, he would decide if the

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2 Section 88 of the *Indian Act* was amended in 2005 to make laws of general application subject to the *First Nations Fiscal and Statistical Management Act*, S.C. 2005, c. 9: see s. 151.

Crown had justified the infringement of the appellants' treaty rights on the basis of safety.

[21] After hearing the evidence relating to safety, the justice of the peace issued a second set of reasons dated April 8, 2002. In those reasons, he reversed his earlier conclusion that the appellants had a treaty right to hunt at night. He reached this decision in part on the basis of cases such as *R. v. Bernard*, [2002] N.S.J. No. 15, 200 N.S.R. (2d) 352 (C.A.), in which provincial laws banning night hunting had been upheld.

[22] In addition, the justice of the peace concluded that the appellants had not demonstrated that night hunting "was integral to the distinctive culture of the group claiming the right to hunt at night". He went on to hold that the limitation imposed by s. 20(1)(*a*) of the *FWCA* against night hunting was not unreasonable and, as such, did not infringe the appellants' right to hunt.

[23] The justice of the peace therefore convicted the appellants of the charges of night hunting contrary to s. 20(1)(*a*) of the *FWCA*.

(ii) *The summary conviction appeal*

[24] The appellants appealed the convictions under both sections. With respect to Jacob's appeal of the conviction under s. 17(1)(*e*), the summary conviction appeal judge said that the justice of the peace had considered the appropriate law when he found that Greta Road constituted "lands taken up". She therefore upheld the conviction.

[25] As to the convictions under s. 20(1)(*a*), the summary conviction appeal judge held that the overwhelming authorities held that treaty rights to hunt must be exercised with due concern for safety and that safety is an important purpose of the prohibition against night hunting.

[26] The summary conviction appeal judge accepted the justice of the peace's conclusion that reasonable regulations aimed at safety do not infringe Aboriginal treaty rights.

[27] She therefore dismissed the appeal.

IV. *Issues*

[28] The only issues that I find necessary to address in order to decide this appeal are the following:

(1) Did the justice of the peace err in concluding [[2001] O.J. No. 6217 (C.J.), at para. 2] that Greta Road was a "right of way for public vehicular traffic" within the meaning of s. 17(1)(*e*) of the *FWCA*?

(2) Did the justice of the peace err in concluding that Greta Road constituted "lands taken up" within the meaning of Treaty 9?

(3) If the answers to issues 1 and 2 are no, were the appellants hunting on Greta Road?

(4) What effect, if any, does the Supreme Court of Canada decision in *R. v. Morris*, [2006] 2 S.C.R. 915, [2006] S.C.J. No. 59, have on this case?

[29] Given my conclusions on these issues, I do not find it necessary to address the appellants' fresh evidence application or their argument about constitutional estoppel.

V. *Analysis*

Issue #1: Subsection 17(1)(e) of the FWCA

[30] The appellant, Jacob, argues that this court should set aside his conviction and enter an acquittal on the charge under s. 17(1)(*e*) of the *FWCA* because the justice of the peace erred in concluding that Greta Road was a "right of way for public vehicular traffic" as required by the subsection. I do not accept this argument. In my view, there was ample evidence to support the justice of the peace's conclusion.

[31] For convenience, I repeat s. 17(1)(*e*). It reads:

> 17(1) A person who is in an area usually inhabited by wildlife or who is on the way to or from an area usually inhabited by wildlife shall not,
>
> . . . . .
>
> (*e*) in a part of Ontario to which clause (*d*) does not apply, discharge a firearm in or across the travelled portion of *a right of way for public vehicular traffic*.

(Emphasis added)

[32] The phrase "right of way for public vehicular traffic" is not defined in the legislation nor has it been interpreted by this court.

[33] The appellant, Jacob, argues that the phrase requires the Crown to prove that the land on which vehicles travel is a "lawful right of way" for public use. By that, the appellant means that it is necessary that the provincial government or someone else with legal authority have granted the public the right to use the land by way of dedication or other legal process.

[34] In response, the Crown argues that the purpose of the subsection is to protect the public. Thus, the subsection is aimed at prohibiting discharging firearms in or across places where the public drives vehicles. The requirement that there be a "right of

way" for public use does not refer to a formal or legal grant of a right of way to the public. Rather, the requirement is focused on the public's actual use of the land in question. The subsection applies if it can be shown that the public uses the land with the permission of the person who controls its use whether that person is a government authority, private individual or company.

[35] The well-established approach to statutory interpretation is set out by the Supreme Court of Canada in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26, as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[36] This approach to statutory interpretation — sometimes referred to as the textual, contextual and purposive approach — requires an examination of three factors: the language of the provision, the context in which the language is used and the purpose of the legislation or statutory scheme in which the language is found.

[37] I start by looking at the language. It seems to me the phrase "a right of way for public vehicular traffic" is open to either of the interpretations urged by the parties. I do not think that the language of the subsection standing alone does much to advance the resolution of the issue.

[38] However, in my view, the context of s. 17(1)(*e*) and most importantly its purpose, point strongly towards the broader interpretation urged by the Crown.

[39] As to the context of the subsection, it is relevant to look to the legislative history.[3] As stated by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Butterworths, 2008), at pp. 577-78:

> It is well established that the legislative evolution of provisions may be relied on by the courts to assist interpretation. As Pigeon J. wrote in *Gravel v. St. Léonard (City)*:
>
> > Legislative history may be used to interpret a statute because prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to it.

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3 See p. 573 of Sullivan, which provides: "In modern interpretive practice, courts have become accustomed to reading legislative texts in a broad context. Increasingly this context includes extrinsic aids that formerly were considered inadmissible . . . . Legislative evolution and legislative history are relied on as both direct and indirect evidence of legislative intent."

. . . . . .

> The interpreter then examines the changes made to the provision by each subsequent amendment and determines the significance of each. A change may be merely formal, to improve the formulation of the law without changing its substance, or it may be substantial, designed to change the content of the law.

(Footnotes omitted)

[40] The prior legislative formulation of s. 17 of the *FWCA* was s. 21 of the *Game and Fish Act*, R.S.O. 1990, c. G.1.[4] The relevant part of s. 21 read:

> 21(1) No person, while engaged in hunting or trapping game or while going to or returning from a hunting camp or locality in which game may be found, shall,
>
> . . . . . .
>
> (*c*) in any part of Ontario that is not a county or regional municipality designated in the regulations, discharge a firearm from or across the travelled portion of a highway, road, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, *used or intended for use* by the public for the passage of vehicles.

(Emphasis added)

[41] Subsection 21(1)(*c*) did not require that the land on which the public travelled be dedicated by government or even intended for public travel. Nor did it require that there be a legal grant authorizing the use by the public. Use by the public, nothing more, was sufficient to attract the protection afforded by the subsection. In addition, the wording of s. 21(1)(*c*) was sufficiently broad to include a privately owned or privately maintained roadway if it was used by the public. Some of the roadways listed (*e.g.*, driveways, squares and places) could be owned and/or maintained by private individuals.

[42] I am satisfied that one of the purposes of s. 21(1)(*c*) was public safety. It may be argued that the subsection was also directed at ensuring the sportsman's ethic of providing wildlife with a sporting chance.[5] However, the focus of the subsection is

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4 The *Game and Fish Act* was amended to include the phrase "a right of way for public vehicular traffic" in 1994, c. 27, s. 129(4). In 1997, the *Game and Fish Act* was repealed and replaced by the *FWCA*: see *FWCA*, s. 119(1)1.

5 In *R. v. Fox*, [1994] O.J. No. 667, [1994] 3 C.N.L.R. 132 (C.A.), this court considered s. 21(2) of the *Game and Fish Act*, which prohibited discharging a firearm from a power boat. In doing so, the court made generalized comments about the purpose of ss. 20 to 23 of that Act. It said, at p. 137 C.N.L.R.: "Sections 20 to 23, on the other hand, seem to be directed towards limiting the effectiveness of the ability to hunt rather than

on thoroughfares that are used or intended for use by the public. It is self evident that discharging a firearm from or across such a thoroughfare could constitute a serious risk to public safety. Undoubtedly, the subsection was aimed in part at least at protecting against such a risk.

[43] In my view, the change in the wording from s. 21(1)(*c*) to s. 17(1)(*c*) in the *FWCA* is not "substantial" so as to suggest a change in the content of the law. It seems to me that the use of the new phrase "a right of way for public vehicular traffic" is consistent with an effort to improve the formulation of the subsection, not change its intent. It simplifies the list of potential thoroughfares to which the subsection applies and removes the possibility that the previous list was not sufficiently inclusive. Moreover, there is nothing in the *Hansard Debates* leading up to the enactment of the current provision to suggest that the revision in the wording of the subsection was intended to bring about substantial change. I would be hesitant to read into the new subsection an intention to narrow the public safety protection that existed in the predecessor subsection.

[44] In my view, it seems likely that the change from s. 21(1)(*c*) to s. 17(1)(*c*) was stylistic and the intent of the previous subsection was not narrowed.

[45] This view is consistent with the third prong of the statutory interpretation test, the purpose of the provision. One of the purposes of s. 17(1)(*e*) is to protect the public who is travelling in vehicles from the dangers arising from the discharge of firearms. David Ramsay, MPP, Timiskaming-Cochrane, described one of the purposes behind the *FWCA* as follows: "Safety in methods: It refers to things like unsafe areas for hunting and hunter clothing and the careless use of firearms and new penalties for that, which is very important, bringing that up to today; ways that I suppose in the old days we used to accept in hunting animals": see Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 257 (December 8, 1997), at 1930 (David Ramsay). It would be inconsistent with this purpose to interpret s. 17(1)(*e*) as excluding some roadways on which the public lawfully travels because of the nature of the underlying authority permitting the travel. The purpose of the provision is to prohibit discharging a firearm across lands over which the public drives vehicles with permission. That purpose can best be achieved by interpreting the

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prescribing regulations to ensure that hunting is carried out safely." That statement as it applied to sections other than s. 21(2) was *obiter* to the decision in *Fox*. I do not think the statement is accurate as to the purpose of s. 21(1)(*c*).

phrase "a right of way for public vehicular traffic" broadly so as to protect the members of the public driving on all lands that are open to public use in vehicles.

[46] In this case, there was substantial evidence that Greta Road is commonly used by the public. Kimberly Clark maintains Greta Road so that it can be used easily by those who want to travel on it. Kimberly Clark grades the road, removes snow and maintains the culverts. Kimberly Clark employees use the road for lumbering purposes. In addition, Kimberly Clark invites the public to use the road. Its map states that its roads are "generally open to the public". Members of the public use it frequently for a wide variety of recreational activities. Indeed, on the night the appellants were hunting on Greta Road, the video taken by the conservation officers showed that there were other vehicles using it.

[47] Thus, the evidence established that Greta Road is a roadway used by the public.

[48] The appellant, Jacob, argued that even if it is shown that Greta Road is used by the public, there is no evidence that the provincial Crown granted to Kimberly Clark an interest in the land that became known as "Greta Road". Thus, it has not been shown that Kimberly Clark had any authority to grant the public "a right of way" to use the road.

[49] I do not accept this argument. It takes an overly technical view of s. 17(1)(*e*). While it is true that the Crown did not lead evidence about the legal authority pursuant to which Kimberly Clark uses and maintains Greta Road, the uncontradicted evidence is that Greta Road is a well established and maintained road. It has been in use for at least 12 years and is one of the primary haul roads for Kimberly Clark's lumbering operations. In the absence of some evidence suggesting otherwise, I see no reason to question Kimberly Clark's authority for operating the road.

[50] In any event, whatever authority Kimberly Clark may have for using and maintaining the road, the evidence shows that Kimberly Clark's employees and the public routinely do in fact use Greta Road. It is that use that s. 17(1)(*e*) is intended to protect. I see no merit to this argument.

Issue #2: "Lands taken up"

[51] As a defence to both charges, the appellants argue that at the time they were hunting, they were exercising a right to hunt at night pursuant to Treaty 9.

[52] Treaty 9 contains a geographic limitation to the areas in which the beneficiaries have a right to hunt. The limiting clause reads as follows:

> . . . saving and accepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.
>
> This is frequently referred to as the "lands taken up" limitation.

[53] Throughout this proceeding, the Crown has taken the position that the appellants were not exercising a treaty right because they were hunting on Greta Road, which constituted "lands taken up" within the treaty limitation.

[54] The test for determining whether lands are considered to be "taken up" is whether the use being made of the land is visibly incompatible with the exercise of the treaty right, in this case, night hunting. The leading case is the decision of the Supreme Court of Canada in *R. v. Badger*, [1996] 1 S.C.R. 771, [1996] S.C.J. No. 39. Justice Cory said the following, at para. 58:

> Accordingly, the oral promises made by the Crown's representatives and the Indians' own oral history indicate that it was understood that land would be taken up and occupied in a way which precluded hunting when it was put to a visible use that was incompatible with hunting. Turning to the case law, it is clear that the courts have also accepted this interpretation and have concluded that whether or not land has been taken up or occupied is a question of fact that must be resolved on a case-by-case basis.

[55] In *R. v. Brertton*, [1999] A.J. No. 1152, 244 A.R. 355 (C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 594, the Alberta Court of Appeal found that the "visible, incompatible" test in *Badger* is a subjective/objective test. The court stated, at para. 4:

> We are of the opinion that the Summary Conviction Judge made no error in her statement of the "visible, incompatible use" test in *Badger* as a "subjective/objective" test. As stated by Moreau J., at p. 241: "the test is not what a particular hunter saw, but what signs of visible, incompatible use could be viewed from his vantage point if exercising due diligence". We adopt her reasons on this issue. This view finds support from the application of the test by Cory J. in *Badger* itself.

[56] *Badger* involved interpreting a geographic limitation clause in Treaty 8, not Treaty 9. However, the relevant language in the two treaties is the same. I recognize that the objective in interpreting the language in treaties is to determine the intentions of the parties at the time the treaty was made. There was no evidence in this case with respect to the intention of the parties in regard to the "lands taken up" provision at the time they entered into Treaty 9. However, given that the language in the two treaties is the same, I see no

reason why the provision in Treaty 9 should be interpreted differently than the same language in Treaty 8. Indeed, there was no argument on this appeal that this court should not use the *Badger* test of visible, incompatible use in interpreting and applying the provision.

[57] The "visible, incompatible" test is a reflection of the shared concern between the Crown and the First Nations for public safety. In *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Canada Ltd., 2007), James (Sákéj) Youngblood Henderson states, at p. 727:

> This test [the visible, incompatible test] is a manifestation of the public safety issue shared by the First Nations people and the Crown. It reflects the commitment not to hunt in certain places in a way that may threaten humans. If Treaty Indians are hunting in a manner that threatens humans or harms the environment or violates the Treaty avocation, then the Treaty justice clause gives shared authority to the Chiefs and the Crown to provide justice and punishment.

[58] The determination of whether particular land constitutes "lands taken up" is a factual determination to be made on a case-by-case basis: *Badger*, at para. 58.

[59] I am satisfied that the justice of the peace had regard to the proper principles in concluding that Greta Road was "lands taken up" and that there was evidence to support his conclusion. In determining that Greta Road constituted "lands taken up", the justice of the peace said the following [[2001] O.J. No. 6217 (C.J.), at paras. 3-4]:

> For reasons I stated in the *Therriault* case, following the reasoning of the Supreme Court of Canada in *Mousseau*, I find on the evidence that Greta Road constituted "lands taken up" for the purpose of uses, namely a public road for transportation and logging, which are incompatible with hunting.
>
> With respect to the defendant Jacob's right to hunt from the location which he did, I find the reasoning of the Supreme Court of Canada in *Badger*, at paragraph 50, helpful, where Cory J. stated, "everyone can travel on public highways, but this general right of access cannot be read as conferring upon Indians a right to hunt on public highways."

[Citations omitted]

[60] *R. v. Therriault*, [1999] O.J. No. 5428 (C.J.) and *R. v. Mousseau*, [1980] 2 S.C.R. 89, [1980] S.C.J. No. 44 were cases in which the Aboriginal accused persons were hunting on public highways. The defendants in those cases argued that they had a treaty right, or its equivalent in *Mousseau*, to hunt on a public highway because they had a right of access to the highway. The Supreme Court in *Mousseau* rejected this argument holding that hunting is not one of the purposes for which roads are made available and accessible for use by the public.

[61] The justice of the peace specifically referred to the incompatibility of the use made of Greta Road with hunting. He was also alive to the *Badger* case. Importantly, in my view, the evidence in this case strongly supports the conclusion that hunting on Greta Road is visibly incompatible with the use to which the road has been put for many years. As described above, Greta Road was a well-established primary haul road used both by Kimberly Clark employees for lumbering purposes and the public for a wide range of recreational activities. Roadways used by the public are incompatible with hunting.

[62] Moreover, the incompatibility of the use of Greta Road was visible to those, such as the appellants, who use the road. Vehicles use it frequently. It was well maintained and travelled. The appellants knew about the road, the uses to which it was put and that the Kimberly Clark maps invited the public to use it.

[63] Finally, in my view, it does not matter that the Crown has not established who owns the land on which Greta Road is situate or under what authority Kimberly Clark operates and maintains the road. The Supreme Court of Canada in *Badger* made it clear that the "visible, incompatible use" test applied to both Crown land and privately owned lands. Rather than focusing on ownership, the court considered the compatibility of hunting to the actual use being made of the land. The court said the following, at paras. 65-66:

> The "visible, incompatible use" approach, which focuses upon the use being made of the land, is appropriate and correct. Although it requires that the particular land use be considered in each case, this standard is neither unduly vague nor unworkable. . . .
>
> Where lands are privately owned, it must be determined on a case-by-case basis whether they are "other lands" to which Indians had a "right of access" under the Treaty. If the lands are occupied, that is, put to visible use which is incompatible with hunting, Indians will not have a right of access. Conversely, if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No. 8, will have a right of access in order to hunt for food.

[64] In *Badger*, the court made no mention of considering the historical ownership of the land but rather emphasized that the "appropriate and correct" test "focuses upon the use being made of the land".

[65] It is important to note that unlike Treaties 4 and 7, Treaties 8 and 9 do not have process clauses. Treaties 4 and 7 expressly include the concept of delegated Crown grants or rights that take up tracts given by Her Majesty's governments:

> Her Majesty agrees that Her said Indians shall have right to pursue their avocations of hunting, trapping and fishing through the tract surrendered, . . . and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining or other purposes, *under grant or other right given by Her Majesty's said Government.*[6]

(Emphasis added)

[66] In the result, I am of the view that the justice of the peace did not err in concluding that Greta Road constituted lands taken up within the meaning of Treaty 9.

Issue #3: Were the appellants hunting on Greta Road?

[67] I am satisfied that the only available conclusion on the record in this case is that both appellants were hunting on Greta Road.

[68] First, the appellants admitted they were hunting on Greta Road. The agreed statement of facts at trial stated, "On the evening of October 8, 1999, the defendants were driving north on the Greta Road in a van, hunting for moose."

[69] Moreover, the uncontradicted evidence leads inevitably to the same conclusion.

[70] The definition of hunting [s. 1] in the *FWCA* is as follows:

> "hunting" includes,
>
> (*a*) lying in wait for, search for, being on a trail of, pursuing, chasing or shooting at wildlife, whether or not the wildlife is killed, injured, captured or harassed, . . .

[71] Clearly, the appellant, Jacob, was hunting on Greta Road when he shot at the decoy while standing on the road.

[72] More broadly, the actions of both appellants throughout the time they were on Greta Road constituted hunting. It was the appellant, Yapput's, idea to go hunting on Greta Road. The appellants drove north on Greta Road looking for moose. They had a spotlight and gun in the van to be used if they saw a moose. When they did see the decoy, the driver shone the spotlight from the van which was on the road and the appellant, Jacob, got out of the van, and while standing on the road, fired four shots at the decoy. Those actions constitute hunting under the *FWCA*.

Issue #4: The effect of Morris

[73] The appellants argue that this court should set aside the convictions and enter acquittals on the night hunting charge based on the decision of the Supreme Court of Canada in *Morris*,

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6 See Henderson, at pp. 731-32.

which held that the prohibition against night hunting in the British Columbia *Wildlife Act*, R.S.B.C. 1996, c. 488 did not apply to the appellants in that case because they had a treaty right to hunt at night.

[74] I do not accept this argument. The geographic limitations in the two treaties are significantly different. The North Saanich Treaty in *Morris* limited the treaty right to hunt on "unoccupied lands". In *Morris*, the majority of the Supreme Court of Canada seems to have accepted that the lands upon which the appellants were hunting were "unoccupied lands" within the meaning of the treaty. There did not appear to be any issue that the treaty right to hunt at night did not apply to the area where the appellants in that case were hunting.

[75] As I have concluded above, the "lands taken up" geographic limitation in Treaty 9 applies to Greta Road where the appellants were hunting. That conclusion distinguishes this case from *Morris*.

VI. *Disposition*

[76] In the result, I would dismiss the appeals.

Appeal dismissed.

Sa Majesté la Reine c. Jacob et al.*

[Répertorié : R. c. Jacob]

Cour d'appel de l'Ontario, le juge en chef adjoint O'Connor et les juges MacPherson et Juriansz. Le 27 janvier 2009

Peuples autochtones — Droits de chasse — Défendeurs autochtones déclarés à bon droit coupables de chasse nocturne malgré le fait qu'ils étaient bénéficiaires de droits accordés par le Traité n° 9 et qu'ils chassaient dans la zone visée par ce traité — Droit ancestral de pêcher et de chasser accordé par le Traité n° 9 faisant l'objet d'une exception visant les « portions de terre qui pourraient être employées pour la colonisation, l'industrie minière et forestière, le commerce, etc. » — Défendeurs chassant sur un chemin utilisé par les employés d'une société forestière et par le grand public — La chasse sur le chemin est de toute évidence incompatible avec l'utilisation à laquelle ce chemin a été affecté pendant plusieurs

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* Version française réalisée par le Centre de traduction et de documentation jurdiques (CTDJ) à l'Université d'Ottawa.

TAB 8

David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy, Mines and Resources, Minister of Energy, Mines and Resources, and Government of Yukon *Appellants/Respondents on cross-appeal*

v.

Little Salmon/Carmacks First Nation and Johnny Sam and Eddie Skookum, on behalf of themselves and all other members of the Little Salmon/Carmacks First Nation *Respondents/Appellants on cross-appeal*

and

Attorney General of Canada, Attorney General of Quebec, Attorney General of Newfoundland and Labrador, Gwich'in Tribal Council, Sahtu Secretariat Inc., Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority, Council of Yukon First Nations, Kwanlin Dün First Nation, Nunavut Tunngavik Inc., Tlicho Government, Te'Mexw Nations and Assembly of First Nations *Interveners*

David Beckman, en sa qualité de directeur, Direction de l'agriculture, ministère de l'Énergie, des Mines et des Ressources, Ministre de l'Énergie, des Mines et des Ressources, et gouvernement du Yukon *Appelants/Intimés au pourvoi incident*

c.

Première nation de Little Salmon/Carmacks et Johnny Sam et Eddie Skookum, en leur propre nom et au nom de tous les autres membres de la Première nation de Little Salmon/Carmacks *Intimés/Appelants au pourvoi incident*

et

Procureur général du Canada, procureur général du Québec, procureur général de Terre-Neuve-et-Labrador, Conseil tribal des Gwich'in, Sahtu Secretariat Inc., Grand conseil des Cris (Eeyou Istchee)/Administration régionale crie, Conseil des Premières nations du Yukon, Première nation de Kwanlin Dün, Nunavut Tunngavik Inc., gouvernement tlicho, Nations Te'Mexw et Assemblée des Premières Nations *Intervenants*

INDEXED AS: BECKMAN *v.* LITTLE SALMON/CARMACKS FIRST NATION

2010 SCC 53

File No.: 32850.

2009: November 12; 2010: November 19.

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

ON APPEAL FROM THE COURT OF APPEAL FOR THE YUKON TERRITORY

Constitutional law — Aboriginal peoples — Aboriginal rights — Land claims — Duty of Crown to consult

RÉPERTORIÉ : BECKMAN *c.* PREMIÈRE NATION DE LITTLE SALMON/CARMACKS

2010 CSC 53

N° du greffe : 32850.

2009 : 12 novembre; 2010 : 19 novembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DU YUKON

Droit constitutionnel — Autochtones — Droits ancestraux — Revendications territoriales — Obligation de la

and accommodate in the context of a modern comprehensive land claims treaty — Treaty provides Aboriginal right of access for hunting and fishing for subsistence in their traditional territory — Application by non-Aboriginal for an agricultural land grant within territory approved by Crown — Whether Crown had duty to consult and accommodate Aboriginal peoples — If so, whether Crown discharged its duty — Constitution Act, 1982, s. 35.

Crown law — Honour of the Crown — Duty to consult and accommodate Aboriginal peoples — Whether Crown has duty to consult and accommodate prior to making decisions that might adversely affect Aboriginal rights and title claims.

Administrative law — Judicial review — Standard of review — Whether decision maker had duty to consult and accommodate — If so, whether decision maker discharged this duty — Lands Act, R.S.Y. 2002, c. 132; Territorial Lands (Yukon) Act, S.Y. 2003, c. 17.

Little Salmon/Carmacks entered into a land claims agreement with the governments of Canada and the Yukon Territory in 1997, after 20 years of negotiations. Under the treaty, Little Salmon/Carmacks members have a right of access for hunting and fishing for subsistence in their traditional territory, which includes a parcel of 65 hectares for which P submitted an application for an agricultural land grant in November 2001. The land applied for by P is within the trapline of S, who is a member of Little Salmon/Carmacks.

Little Salmon/Carmacks disclaim any allegation that a grant to P would violate the treaty, which itself contemplates that surrendered land may be taken up from time to time for other purposes, including agriculture. Nevertheless, until such taking up occurs, the members of Little Salmon/Carmacks attach importance to their ongoing treaty interest in surrendered Crown lands (of which the 65 acres forms a small part). Little Salmon/Carmacks contend that in considering the grant to P the territorial government proceeded without proper consultation and without proper regard to relevant First Nation's concerns.

The Yukon government's Land Application Review Committee ("LARC") considered P's application at a

Couronne de consulter et d'accommoder les Autochtones dans le contexte d'un traité récent relatif à des revendications territoriales globales — Traité accordant aux Autochtones l'accès à leur territoire traditionnel pour y pratiquer la chasse et la pêche de subsistance — Approbation, par la Couronne, d'une demande de concession de terres agricoles dans ce territoire présentée par un non-Autochtone — La Couronne avait-elle l'obligation de consulter et d'accommoder les Autochtones? — Si oui, la Couronne s'est-elle acquittée de cette obligation? — Loi constitutionnelle de 1982, art. 35.

Droit de la Couronne — Honneur de la Couronne — Obligation de consulter et d'accommoder les Autochtones — La Couronne a-t-elle l'obligation de consulter et d'accommoder les Autochtones avant de prendre des décisions susceptibles d'avoir des conséquences négatives sur leurs revendications de titre et de droits?

Droit administratif — Contrôle judiciaire — Norme de contrôle — Le décideur avait-il l'obligation de consulter et d'accommoder les Autochtones? — Si oui, s'est-il acquitté de cette obligation? — Loi sur les terres, L.R.Y. 2002, ch. 132; Loi du Yukon sur les terres territoriales, L.Y. 2003, ch. 17.

En 1997, après 20 ans de négociations, la Première nation Little Salmon/Carmacks a conclu avec les gouvernements du Canada et du Territoire du Yukon un accord sur les revendications territoriales. Aux termes du traité, les membres de la première nation possèdent, à des fins de chasse et de pêche de subsistance, un droit d'accès à leur territoire traditionnel qui englobe une parcelle de 65 hectares à l'égard de laquelle P a fait une demande de concession de terres agricoles en novembre 2001. La parcelle visée par la demande de P se trouve dans le territoire de piégeage de S, un membre de la première nation.

La première nation rejette toute allégation que la concession d'une parcelle à P violerait le traité, qui prévoit lui-même que des terres cédées peuvent à l'occasion être prises à d'autres fins, notamment à des fins agricoles. Mais jusqu'à ce que des terres aient été ainsi prises, les membres de la première nation accordent de l'importance à l'intérêt qu'ils conservent sur les terres cédées à la Couronne (dont les 65 hectares forment une petite partie). La première nation soutient qu'en examinant la demande de concession de P, le gouvernement territorial a agi sans tenir la consultation requise et sans prendre en compte les préoccupations pertinentes de la première nation.

Le Comité d'examen des demandes d'aliénation de terres (« CEDAT ») du gouvernement du Yukon a

meeting to which it invited Little Salmon/Carmacks. The latter submitted a letter of opposition to P's application prior to the meeting, but did not attend. At the meeting, LARC recommended approval of the application and, in October 2004, the Director, Agriculture Branch, Yukon Department of Energy, Mines and Resources, approved it. Little Salmon/Carmacks appealed the decision to the Assistant Deputy Minister, who rejected its review request. On judicial review, however, the Director's decision was quashed and set aside. The chambers judge held that the Yukon failed to comply with the duty to consult and accommodate. The Court of Appeal allowed the Yukon's appeal.

Held: The appeal and cross-appeal should be dismissed.

Per McLachlin C.J. and Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ.: When a modern land claim treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. While consultation may be shaped by agreement of the parties, the Crown cannot contract out of its duty of honourable dealing with Aboriginal people — it is a doctrine that applies independently of the intention of the parties as expressed or implied in the treaty itself.

In this case, a continuing duty to consult existed. Members of Little Salmon/Carmacks possessed an express treaty right to hunt and fish for subsistence on their traditional lands, now surrendered and classified as Crown lands. While the Treaty did not prevent the government from making land grants out of the Crown's holdings, and indeed it contemplated such an eventuality, it was obvious that such grants might adversely affect the traditional economic and cultural activities of Little Salmon/Carmacks, and the Yukon was required to consult with Little Salmon/Carmacks to determine the nature and extent of such adverse effects.

The treaty itself set out the elements the parties regarded as an appropriate level of consultation (where the treaty requires consultation) including proper notice of a matter to be decided in sufficient form and detail to allow that party to prepare its view on the matter; a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged

examiné la demande de P lors d'une réunion à laquelle étaient invités les représentants de la première nation. Cette dernière ne s'est pas fait représenter à la réunion mais avait présenté une lettre d'opposition à la demande de P. À la réunion, le CEDAT a recommandé l'approbation de la demande, et le directeur de la Direction de l'agriculture du ministère de l'Énergie, des Mines et des Ressources du Yukon l'a approuvée au mois d'octobre 2004. La première nation a fait appel de la décision auprès du sous-ministre adjoint, qui a rejeté la demande de révision. À l'issue du contrôle judiciaire toutefois, la décision du directeur a été annulée. Le juge siégeant en cabinet a conclu que le Yukon n'avait pas respecté son obligation de consulter et d'accommoder. La Cour d'appel a accueilli l'appel du Yukon.

Arrêt : Le pourvoi et le pourvoi incident sont rejetés.

La juge en chef McLachlin et les juges Binnie, Fish, Abella, Charron, Rothstein et Cromwell : Lorsqu'un traité récent relatif aux revendications territoriales a été conclu, la première étape consiste à en examiner les dispositions et à tenter de déterminer les obligations respectives des parties et l'existence, dans le traité lui-même, d'une forme quelconque de consultation. Les parties peuvent s'entendre sur les modalités de la consultation, mais la Couronne ne peut se soustraire à son obligation de traiter honorablement avec les Autochtones — il s'agit d'une doctrine qui s'applique indépendamment de l'intention des parties, que cette intention soit expresse ou implicite dans le traité lui-même.

En l'espèce, l'obligation de consulter était permanente. Les membres de la première nation possédaient un droit, prévu expressément au traité, de pratiquer la chasse et la pêche de subsistance sur leur territoire traditionnel qui a maintenant été cédé et est considéré comme des terres de la Couronne. Même si le traité n'empêchait pas le gouvernement de concéder des terres de la Couronne, cette possibilité y était même prévue, il était évident que cela risquait d'avoir des conséquences négatives sur les activités économiques et culturelles traditionnelles de la première nation, et le Yukon était tenu de consulter cette dernière afin de déterminer la nature et l'étendue de ces conséquences négatives.

Le traité lui-même précise les éléments considérés par les parties comme constituant une consultation appropriée (lorsqu'une consultation est nécessaire). Ces éléments comprennent un avis suffisamment détaillé concernant la question à trancher afin de permettre à la partie consultée de préparer sa position sur la question, un délai suffisant pour permettre à la partie devant être consultée de préparer sa position sur la question ainsi

to consult; and full and fair consideration by the party obliged to consult of any views presented.

The actual treaty provisions themselves did not govern the process for agricultural grants at the time. However, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more elaborate consultation process in the Treaty itself, the scope of the duty of consultation in this situation was at the lower end of the spectrum.

Accordingly, the Director was required, as a matter of compliance with the legal duty to consult based on the honour of the Crown, to be informed about and consider the nature and severity of any adverse impact of the proposed grant before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate. The purpose of consultation was not to re-open the Treaty or to re-negotiate the availability of the lands for an agricultural grant. Such availability was already established in the Treaty. Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown and promoted the objective of reconciliation.

In this case, the duty of consultation was discharged. Little Salmon/Carmacks acknowledges that it received appropriate notice and information. The Little Salmon/Carmacks objections were made in writing and they were dealt with at a meeting at which Little Salmon/Carmacks was entitled to be present (but failed to attend). Both Little Salmon/Carmacks' objections and the response of those who attended the meeting were before the Director when, in the exercise of his delegated authority, he approved P's application. Neither the honour of the Crown nor the duty to consult required more.

Nor was there any breach of procedural fairness. While procedural fairness is a flexible concept, and takes into account the Aboriginal dimensions of the decision facing the Director, it is nevertheless a doctrine that applies as a matter of administrative law to regulate relations between the government decision makers and all residents of the Yukon, Aboriginal as well as non-Aboriginal.

While the Yukon had a duty to consult, there was no further duty of accommodation on the facts of this case. Nothing in the treaty itself or in

que l'occasion de présenter cette position à la partie obligée de tenir la consultation, et un examen complet et équitable de toutes les positions présentées, par la partie obligée de tenir la consultation.

Le processus de concession de terres à des fins agricoles n'était pas régi à l'époque par les dispositions elles-mêmes du traité. Cependant, étant donné l'existence de la cession opérée par le traité et les textes législatifs adoptés en vue de la mise en œuvre de celui-ci, ainsi que la décision des parties de ne pas incorporer dans le traité lui-même un processus de consultation plus élaboré, la portée de l'obligation de consultation dans une telle situation se situait au bas du continuum.

Par conséquent, le directeur était tenu, pour se conformer à l'obligation juridique de consulter fondée sur l'honneur de la Couronne, d'être informé de la nature et de la gravité de toute incidence négative de la concession projetée et d'en tenir compte avant de prendre une décision, pour déterminer (entre autres choses) si des accommodements étaient nécessaires ou appropriés. La consultation n'avait pas pour objet de rouvrir le traité ou de renégocier la possibilité de concéder les terres à des fins agricoles. Cette possibilité était déjà prévue au traité. La consultation était requise afin de faciliter la gestion de la relation importante entre le gouvernement et la communauté autochtone en conformité avec la préservation de l'honneur de la Couronne et la réalisation de l'objectif de réconciliation.

En l'espèce, l'obligation de consultation a été respectée. La première nation reconnaît avoir reçu un avis suffisant et l'information utile. Elle a communiqué ses objections par écrit, et celles-ci ont été étudiées lors d'une réunion à laquelle la première nation avait le droit d'assister (mais à laquelle elle ne s'est pas fait représenter). Le directeur avait pris connaissance des objections de la première nation et de la réponse fournie par les personnes présentes à la réunion lorsque, dans l'exercice de son pouvoir délégué, il a approuvé la demande de P. L'honneur de la Couronne et l'obligation de consultation n'exigeaient rien de plus.

Il n'y a eu non plus aucun manquement à l'équité procédurale. Si l'équité procédurale est une notion souple et prend en compte les aspects qui, dans la décision que doit prendre le directeur, touchent directement les Autochtones, il n'en demeure pas moins que cette doctrine s'applique en droit administratif pour encadrer les relations entre les décideurs gouvernementaux et tous les habitants du Yukon, Autochtones comme non-Autochtones.

Si le Yukon avait une obligation de consultation, les faits de l'espèce ne donnent lieu à aucune autre obligation d'accommodement. Le traité lui-même ou

the surrounding circumstances gave rise to such a requirement.

In exercising his discretion in this case, as in all others, the Director was required to respect legal and constitutional limits. The constitutional limits included the honour of the Crown and its supporting doctrine of the duty to consult. The standard of review in that respect, including the adequacy of the consultation, is correctness. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness.

In this case, the Director did not err in law in concluding that the level of consultation that had taken place was adequate. The advice the Director received from his officials after consultation is that the impact of the grant of 65 hectares would not be significant. There is no evidence that he failed to give full and fair consideration to the concerns of Little Salmon/Carmacks. The material filed by the parties on the judicial review application does not demonstrate any palpable error of fact in his conclusion. Whether or not a court would have reached a different conclusion is not relevant. The decision to approve or not to approve the grant was given by the legislature to the Minister who, in the usual way, delegated the authority to the Director. His disposition was reasonable in the circumstances.

Per LeBel and Deschamps JJ.: Whereas past cases have concerned unilateral actions by the Crown that triggered a duty to consult for which the terms had not been negotiated, in the case at bar, the parties have moved on to another stage. Formal consultation processes are now a permanent feature of treaty law, and the Little Salmon/Carmacks Final Agreement affords just one example of this. To give full effect to the provisions of a treaty such as the Final Agreement is to renounce a paternalistic approach to relations with Aboriginal peoples. It is a way to recognize that Aboriginal peoples have full legal capacity. To disregard the provisions of such a treaty can only encourage litigation, hinder future negotiations and threaten the ultimate objective of reconciliation.

To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation

l'ensemble des circonstances ne donnent en aucun cas ouverture à une telle obligation.

Dans l'exercice de son pouvoir discrétionnaire dans ce cas, comme dans tous les autres cas, le directeur devait respecter des limites légales et constitutionnelles. Les limites constitutionnelles incluaient l'honneur de la Couronne et le principe de l'obligation de consulter qui l'appuie. La norme de contrôle à cet égard, y compris à l'égard du caractère adéquat de la consultation, est celle de la décision correcte. Dans les limites établies par le droit et la Constitution, toutefois, la décision du directeur doit être examinée selon la norme de la raisonnabilité.

En l'espèce, le directeur n'a pas commis d'erreur de droit en concluant que la consultation menée était adéquate. Selon l'avis reçu de ses fonctionnaires par le directeur après la consultation, les incidences de la concession de 65 hectares de terres ne seraient pas importantes. Rien n'indique que les préoccupations de la première nation n'ont pas fait l'objet d'un examen complet et équitable de sa part. Les documents déposés par les parties lors de la demande de contrôle judiciaire ne révèlent l'existence d'aucune erreur de fait manifeste dans sa conclusion. Le fait qu'un tribunal judiciaire aurait éventuellement pu arriver à une conclusion différente n'est pas pertinent. La décision d'approuver ou de ne pas approuver la concession de la parcelle de terre a été confiée par l'assemblée législative au ministre qui, de la façon habituelle, a délégué ce pouvoir au directeur. La décision prise par ce dernier était raisonnable dans les circonstances.

Les juges LeBel et Deschamps : Si, jusqu'ici, les litiges ont mis en cause une action unilatérale de la Couronne qui déclenchait une obligation de consulter dont les modalités n'avaient pas été négociées, le présent dossier indique que les parties sont maintenant passées à une autre étape. Les processus formels de consultation font maintenant résolument partie de l'univers juridique des traités. L'Entente définitive de Little Salmon/Carmacks n'en est qu'un exemple. Donner leur plein effet aux stipulations d'un traité comme l'Entente définitive c'est renoncer à toute approche paternaliste à l'égard des peuples autochtones. Il s'agit d'une façon de reconnaître leur pleine capacité juridique. Méconnaître les stipulations d'un tel traité ne peut qu'encourager le recours aux tribunaux, nuire aux négociations futures et compromettre la réalisation de l'objectif ultime de réconciliation.

Permettre à une partie de revenir unilatéralement sur son engagement constitutionnel en y superposant des droits et obligations additionnels portant sur des matières déjà prévues au traité risque de se traduire par un mépris juridique paternaliste, de compromettre le

process and frustrate the ultimate objective of reconciliation. This is the danger of what seems to be an unfortunate attempt to take the constitutional principle of the honour of the Crown hostage together with the principle of the duty to consult Aboriginal peoples that flows from it.

In concluding a treaty, the Crown does not act dishonourably in agreeing with an Aboriginal community on an elaborate framework involving various forms of consultation with respect to the exercise of that community's rights. Nor does the Crown act dishonourably if it requires the Aboriginal party to agree that no parallel mechanism relating to a matter covered by the treaty will enable that party to renege on its undertakings. Legal certainty is the primary objective of all parties to a comprehensive land claim agreement.

Legal certainty cannot be attained if one of the parties to a treaty can unilaterally renege on its undertakings with respect to a matter provided for in the treaty where there is no provision for its doing so in the treaty. This does not rule out the possibility of there being matters not covered by a treaty with respect to which the Aboriginal party has not surrendered possible Aboriginal rights. Nor does legal certainty imply that an equitable review mechanism cannot be provided for in a treaty.

Thus, it should be obvious that the best way for a court to contribute to ensuring that a treaty fosters a positive long relationship between Aboriginal and non-Aboriginal communities consists in ensuring that the parties cannot unilaterally renege on their undertakings. And once legal certainty has been pursued as a common objective at the negotiation stage, it cannot become a one-way proposition at the stage of implementation of the treaty. On the contrary, certainty with respect to one party's rights implies that the party in question must discharge its obligations and respect the other party's rights. Having laboured so hard, in their common interest, to substitute a well-defined legal system for an uncertain normative system, both the Aboriginal party and the Crown party have an interest in seeing their efforts bear fruit.

It is in fact because the agreement in issue does provide that the Aboriginal party has a right to various forms of consultation with respect to the rights the Crown wishes to exercise in this case that rights and obligations foreign to the mechanism provided for in the treaty must not be superimposed on it, and not simply because this is a "modern" treaty constituting a land claims agreement.

processus national de négociation de traités et de nuire à la poursuite de l'objectif ultime de réconciliation. Voilà le péril auquel nous expose ce qui semble être une malheureuse prise en otage du principe constitutionnel d'honneur de la Couronne et du principe en découlant, l'obligation de consulter les Autochtones.

Dans le cadre de la conclusion d'un traité, il n'y a rien de déshonorant pour la Couronne à s'entendre avec une communauté autochtone sur un régime détaillé et multiforme de consultation relative à l'exercice des droits de cette communauté. Il n'y a rien non plus de déshonorant de la part de la Couronne à exiger de la partie autochtone qu'aucun régime parallèle relatif à une matière prévue au traité ne permette à celle-ci de revenir sur ses engagements. En effet, la sécurité juridique est l'objectif premier de toutes les parties à un accord portant règlement de revendication territoriale globale.

Il ne saurait y avoir de sécurité juridique si une des parties à un traité pouvait — unilatéralement et sans que cela ne soit prévu au traité — revenir sur ses engagements à l'égard d'une matière prévue à ce traité. Cela ne veut pas dire qu'il ne peut pas exister de matières dont les parties n'auront pas traité et à l'égard desquelles la partie autochtone pourra ne pas avoir renoncé à d'éventuels droits ancestraux. La sécurité juridique n'exclut pas non plus la possibilité de prévoir, dans un traité, un mécanisme équitable de réexamen.

En ce sens, il devrait être évident que la meilleure façon pour les tribunaux de contribuer à ce qu'un traité favorise une longue relation positive entre parties autochtone et étatique consiste à s'assurer que les parties ne puissent revenir unilatéralement sur leurs engagements. Et il se trouve que, en aval de sa poursuite en tant qu'objectif partagé à l'étape de la négociation, la sécurité juridique ne saurait, à l'étape de la mise en œuvre d'un traité, opérer à sens unique. Au contraire, la sécurité des droits d'une partie implique nécessairement que celle-ci s'acquitte de ses obligations et respecte les droits de l'autre partie. S'étant toutes deux échinées, dans leur intérêt commun, à substituer un système juridique précis à un régime normatif incertain, la partie autochtone et la partie étatique ont toutes deux intérêt à ce que leur œuvre produise ses effets.

En l'espèce, c'est justement parce que l'accord en cause traite bel et bien des différentes formes de consultation auxquelles a droit la partie autochtone concernant les droits que la Couronne veut exercer qu'il faut se garder de superposer à ce régime des droits et obligations qui lui sont étrangers, et non pas simplement parce qu'il s'agit d'un traité « moderne » constituant un accord portant règlement de revendications territoriales.

Even when the treaty in issue is a land claims agreement, the Court must first identify the common intention of the parties and then decide whether the common law constitutional duty to consult applies to the Aboriginal party. Therefore, where there is a treaty, the common law duty to consult will apply only if the parties to the treaty have failed to address the issue of consultation.

The consultation that must take place if a right of the Aboriginal party is impaired will consist in either: (1) the measures provided for in the treaty in this regard; or (2) if no such measures are provided for in the treaty, the consultation required under the common law framework.

Where a treaty provides for a mechanism for consultation, what it does is to override the common law duty to consult Aboriginal peoples; it does not affect the general administrative law principle of procedural fairness, which may give rise to a duty to consult rights holders individually.

The courts are not blind to omissions, or gaps left in the treaty, by the parties with respect to consultation, and the common law duty to consult could always be applied to fill such a gap. But no such gap can be found in this case.

These general considerations alone would form a sufficient basis for dismissing the appeal.

But the provisions of the Final Agreement also confirm this conclusion. The Final Agreement includes general and interpretive provisions that are reproduced from the Umbrella Agreement. More precisely, this framework was first developed by the parties to the Umbrella Agreement, and was then incorporated by the parties into the various final agreements concluded under the Umbrella Agreement. Where there is any inconsistency or conflict, the rules of this framework prevail over the common law principles on the interpretation of treaties between governments and Aboriginal peoples.

These general and interpretive provisions also establish certain rules with respect to the relationships of the Umbrella Agreement and any final agreement concluded under it, not only the relationship between them, but also that with the law in general. These rules can be summarized in the principle that the Final Agreement prevails over any other non-constitutional legal rule, subject to the requirement that its provisions not be so construed as to affect the rights of "Yukon Indian people" as Canadian citizens and their entitlement to

Même lorsque le traité en cause est un accord portant règlement de revendications territoriales, la Cour doit d'abord dégager l'intention commune des parties, elle se prononcera ensuite sur l'application, à la partie autochtone, du régime jurisprudentiel relatif à l'obligation constitutionnelle de consultation. Par conséquent, en présence d'un traité, l'obligation jurisprudentielle de consultation ne s'appliquera qu'en cas d'omission des parties au traité d'avoir prévu cette matière.

La consultation requise lorsqu'il y a atteinte à un droit des Autochtones comportera : (1) soit les mesures prévues par le traité à cet égard; (2) soit, à défaut de telles mesures dans le traité, un degré de consultation que le régime jurisprudentiel établit.

Lorsqu'un traité établit des mesures de consultation, ce que le traité a pour effet d'écarter dans un tel cas est bien l'obligation jurisprudentielle de consultation des peuples autochtones, non pas toute obligation de consulter individuellement le titulaire d'un droit pouvant découler du principe général du droit administratif qu'est l'équité procédurale.

Les tribunaux ne sont pas aveugles aux omissions ou lacunes des parties au traité en matière de consultation et l'obligation jurisprudentielle de consultation pourrait toujours s'appliquer pour combler cette lacune. Mais aucune lacune de ce genre ne peut être constatée dans la présente affaire.

Il serait possible, sur la seule base de ces considérations d'ordre général, de rejeter l'appel principal.

Cependant, les dispositions de l'Entente définitive confirment elles aussi cette conclusion. L'Entente définitive comporte des dispositions générales et interprétatives qui ont été reprises de l'Accord-cadre. Plus exactement, ce régime a d'abord été élaboré par les parties à l'Accord-cadre, puis repris par les parties aux différentes ententes définitives conclues conformément aux stipulations de cet accord. Advenant toute incompatibilité, ce régime l'emporte sur les principes dégagés par la jurisprudence en matière d'interprétation de traités conclus par les gouvernements et les peuples autochtones.

Ces dispositions interprétatives et générales posent aussi certaines normes relatives aux rapports qu'entretiennent l'Accord-cadre et toute entente définitive conclue conformément à ses stipulations, non seulement entre eux, mais avec le reste du droit également. Ces normes peuvent être résumées par le principe selon lequel l'Entente définitive l'emporte sur toute autre règle de droit infraconstitutionnel, sous réserve du fait que ses dispositions ne doivent pas être interprétées d'une manière portant atteinte aux droits des Indiens du Yukon en tant

all the rights, benefits and protections of other citizens. In short, therefore, with certain exceptions, the treaty overrides Aboriginal rights related to the matters to which it applies, and in cases of conflict or inconsistency, it prevails over all other non-constitutional law.

Regarding the relationship between the treaty in issue and the rest of our constitutional law other than the case law on Aboriginal rights, such a treaty clearly cannot on its own amend the Constitution of Canada. In other words, the Final Agreement contains no provisions that affect the general principle that the common law duty to consult will apply only where the parties have failed to address the issue of consultation. This will depend on whether the parties have come to an agreement on this issue, and if they have, the treaty will — unless, of course, the treaty itself provides otherwise — override the application to the parties of any parallel framework, including the common law framework.

In this case, the parties included provisions in the treaty that deal with consultation on the very question of the Crown's right to transfer Crown land upon an application like the one made by P.

P's application constituted a project to which the assessment process provided for in Chapter 12 of the Final Agreement applied. Although that process had not yet been implemented, Chapter 12, including the transitional legal rules it contains, had been. Under those rules, any existing development assessment process would remain applicable. The requirements of the processes in question included not only consultation with the First Nation concerned, but also its participation in the assessment of the project. Any such participation would involve a more extensive consultation than would be required by the common law duty in that regard. Therefore, nothing in this case can justify resorting to a duty other than the one provided for in the Final Agreement.

Moreover, the provisions of Chapter 16 on fish and wildlife management establish a framework under which the First Nations are generally invited to participate in the management of those resources at the pre-decision stage. In particular, the invitation they receive to propose fish and wildlife management plans can be regarded as consultation.

The territorial government's conduct raises questions in some respects. In particular, there is the fact that the Director did not notify the First Nation of his decision of October 18, 2004 until July 27, 2005.

que citoyens canadiens ni à leur droit de jouir de tous les droits, avantages et protections reconnus aux autres citoyens. En somme, donc, sauf exception le traité se substitue aux droits ancestraux relativement aux matières dont il dispose et il a préséance, en cas d'incompatibilité, sur le reste du droit infraconstitutionnel.

En ce qui a trait à la relation entre le traité en cause et le reste de notre droit constitutionnel au-delà du seul régime jurisprudentiel des droits ancestraux, un tel traité ne saurait évidemment à lui seul modifier la Constitution du Canada. Autrement dit, l'Entente définitive ne contient pas de dispositions qui auraient une incidence sur le principe général selon lequel l'obligation de consultation de régime jurisprudentiel ne s'appliquera qu'en cas d'omission des parties au traité d'avoir prévu cette matière. En effet, tout dépendra de ce que les parties auront ou non convenu sur la question, auquel cas le traité, sauf bien sûr renvoi à l'effet contraire dans celui-ci, aura écarté l'application entre les parties de tout régime parallèle, y compris le régime jurisprudentiel.

En l'espèce, les parties ont prévu, dans le traité des dispositions concernant la consultation sur la question précise du droit de la Couronne de céder de ses terres à la suite d'une demande comme celle de P.

La demande de P constituait un projet soumis au processus d'évaluation prévu au chapitre 12 de l'Entente définitive. Ce processus n'avait pas été mis en œuvre, mais le chapitre 12 l'avait été, y compris les règles de droit provisoire y figurant. En vertu de ces règles, tout processus existant d'évaluation des activités de développement demeurait en vigueur. Ces processus prévoyaient non seulement la consultation de la nation autochtone concernée, mais aussi sa participation à l'évaluation du projet. Une telle participation impliquait un niveau de consultation supérieur à celui qui aurait été fondé sur l'obligation faite par la jurisprudence à cet égard. En conséquence, rien, en l'espèce, ne saurait justifier le recours à une obligation externe à celle prévue par l'Entente définitive.

De plus, les dispositions du chapitre 16 qui concernent la gestion des ressources halieutiques et fauniques instaurent un régime par lequel les premières nations sont généralement invitées à participer à la gestion de ces ressources sur une base prédécisionnelle. Notamment, l'invitation qui leur est faite de proposer des plans de gestion des ressources halieutiques et fauniques peut être considérée comme une consultation.

À certains égards, la conduite des autorités territoriales soulève des interrogations. C'est notamment le cas en ce qui a trait au fait que le directeur n'a signifié que le 27 juillet 2005 à la première nation sa décision

Under s. 81(1) of the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*"), the "designated office" and, if applicable, the executive committee of the Yukon Development Assessment Board would have been entitled to receive copies of that decision and, one can only assume, to receive them within a reasonable time. Here, the functional equivalent of the designated office is the Land Application Review Committee ("LARC"). Even if representatives of the First Nation did not attend the August 13, 2004 meeting, it would be expected that the Director would inform that First Nation of his decision within a reasonable time. Nonetheless, the time elapsed after the decision did not affect the quality of the prior consultation.

The territorial government's decision to proceed with P's application at the "prescreening" stage despite the requirement of consultation in the context of the First Nation's fish and wildlife management plan was not an exemplary practice either. However, the First Nation did not express concern about this in its letter of July 27, 2004 to Yukon's Lands Branch. And as can be seen from the minutes of the August 13, 2004 meeting, the concerns of the First Nation with respect to resource conservation were taken into consideration. Also, the required consultation in the context of the fish and wildlife management plan was far more limited than the consultation to which the First Nation was entitled in participating in LARC, which was responsible for assessing the specific project in issue in this appeal. Finally, the First Nation, the renewable resources council and the Minister had not agreed on a provisional suspension of the processing of applications for land in the area in question.

Despite these aspects of the handling of P's application that are open to criticism, it can be seen from the facts as a whole that the respondents received what they were entitled to receive from the appellants where consultation as a First Nation is concerned. In fact, in some respects they were consulted to an even greater extent than they would have been under the *YESAA*.

The only right the First Nation would have had under the *YESAA* was to be heard by the assessment district office as a stakeholder. That consultation would have been minimal, whereas the First Nation was invited to participate directly in the assessment of P's application as a member of LARC.

du 18 octobre 2004. En vertu du par. 81(1) de la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*, L.C. 2003, ch. 7, (« *LÉESY* »), le « bureau désigné » et, le cas échéant, le comité de direction de la Commission d'évaluation des activités de développement du Yukon auraient eu droit de recevoir une copie de cette décision, et ce, on peut le supposer, à l'intérieur d'un délai raisonnable. L'équivalent fonctionnel du bureau désigné est ici le Comité d'examen des demandes d'aliénation de terres (« CEDAT »). Même si les représentants de la première nation ne se sont pas présentés à la réunion du 13 août 2004, on se serait attendu à ce que le directeur informe cette première nation de sa décision dans un délai raisonnable. Ce délai, survenu après la décision, n'a cependant pas affecté la qualité de la consultation préalable.

La décision qu'a prise l'administration territoriale, au terme de l'examen préalable, de poursuivre le traitement de la demande de P malgré la consultation qui avait cours dans le cadre du plan de gestion des ressources halieutiques et fauniques de la première nation n'est pas davantage un exemple de bonne pratique. Cependant, la première nation n'a pas exprimé cette préoccupation dans sa lettre du 27 juillet 2004 à la Direction des Terres du Yukon. De plus, comme le démontre le procès-verbal de la réunion du 13 août 2004, les préoccupations de la première nation concernant la conservation des ressources ont été prises en considération. Au surplus, la consultation qui avait cours dans le cadre du plan de gestion des ressources halieutiques et fauniques était beaucoup plus limitée que celle à laquelle donnait droit la participation de la première nation au CEDAT qui était chargé d'évaluer le projet spécifique faisant l'objet du présent pourvoi. De surcroît, la première nation, le conseil des ressources renouvelables et le ministre ne s'étaient pas entendus sur la suspension provisoire du traitement de toute demande d'aliénation de terres dans la région visée.

Au-delà de ces aspects critiquables du cheminement de la demande de P, l'ensemble des faits révèle que les intimés ont reçu des appelants ce à quoi ils avaient droit de la part de ceux-ci en matière de consultation à titre de première nation. En réalité, ils ont même obtenu à certains égards davantage que ce que leur aurait procuré la *LÉESY*.

Le seul droit qu'aurait obtenu la première nation en vertu de la *LÉESY* est celui d'être entendue à titre de personne intéressée par le bureau de circonscription. Il s'agissait là d'une consultation minimale, alors que la première nation a été invitée à participer directement, à titre d'évaluateur membre du CEDAT, à l'évaluation de la demande de P.

It is true that the First Nation's representatives did not attend the August 13, 2004 meeting. They did not notify the other members of LARC that they would be absent and did not request that the meeting be adjourned, but they had already submitted comments in a letter.

Thus, the process that led to the October 18, 2004 decision on P's application was consistent with the transitional law provisions of Chapter 12 of the Final Agreement. There is no legal basis for finding that the Crown breached its duty to consult.

Cases Cited

By Binnie J.

Considered: *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Badger*, [1996] 1 S.C.R. 771; **applied:** *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557; **referred to:** *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227, leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256.

By Deschamps J.

Considered: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; **referred to:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Reference*

Il est vrai que les représentants de la première nation ne se sont pas présentés à la réunion du 13 août 2004. Cela est survenu sans qu'ils ne préviennent au préalable les autres membres du CEDAT et sans demander l'ajournement de la réunion mais alors qu'ils avaient fait des commentaires par lettre.

Par conséquent, le processus qui a mené à la décision du 18 octobre 2004 relativement à la demande de P respectait les dispositions de droit provisoire prévues au chapitre 12 de l'Entente définitive. Il n'existe aucun motif juridique permettant de conclure que l'obligation de consultation de la Couronne a été violée.

Jurisprudence

Citée par le juge Binnie

Arrêts examinés : *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. Badger*, [1996] 1 R.C.S. 771; **arrêts appliqués :** *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388; *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Québec (Procureur général) c. Moses*, 2010 CSC 17, [2010] 1 R.C.S. 557; **arrêts mentionnés :** *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004] 3 R.C.S. 550; *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483; *R. c. Taylor* (1981), 62 C.C.C. (2d) 227, autorisation d'appel refusée, [1981] 2 R.C.S. xi; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Nikal*, [1996] 1 R.C.S. 1013; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, 2000 CSC 69, [2000] 2 R.C.S. 1120; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3; *Multani c. Commission scolaire Marguerite-Bourgeoys*, 2006 CSC 6, [2006] 1 R.C.S. 256.

Citée par la juge Deschamps

Arrêt examiné : *Première nation crie Mikisew c. Canada (Ministre du Patrimoine canadien)*, 2005 CSC 69, [2005] 3 R.C.S. 388; **arrêts mentionnés :** *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Nation haïda c. Colombie-Britannique (Ministre des Forêts)*, 2004 CSC 73, [2004] 3 R.C.S. 511; *Première nation Tlingit de Taku River c. Colombie-Britannique (Directeur d'évaluation de projet)*, 2004 CSC 74, [2004]

D. *The Role and Function of the LSCFN Treaty*

[49] The territorial government and the LSCFN have very different views on this point. This difference lies at the heart of their opposing arguments on the appeal.

[50] The territorial government regards the role of the LSCFN Treaty as having nailed down and forever settled the rights and obligations of the First Nation community as Aboriginal people. The treaty recognized and affirmed the Aboriginal rights surrendered in the land claim. From 1997 onwards, the rights of the Aboriginal communities of the LSCFN, in the government's view, were limited to the treaty. To put the government's position simplistically, what the First Nations negotiated as terms of the treaty is what they get. Period.

[51] The LSCFN, on the other hand, considers as applicable to the Yukon what was said by the Court in *Mikisew Cree*, at para. 54:

> Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.

And so it is, according to the First Nation, with the treaty-making process in the Yukon that led in 1997 to the ratification of the LSCFN Treaty.

[52] I agree with the territorial government that the LSCFN Treaty is a major advance over what happened in Fort Chipewyan in 1899, both in the modern treaty's scope and comprehensiveness, and in the fairness of the procedure that led up to it. The eight pages of generalities in Treaty No. 8 in 1899 is not the equivalent of the 435 pages of the LSCFN Treaty almost a century later. The LSCFN Treaty provides a solid foundation for reconciliation, and the territorial government is quite correct that the LSCFN Treaty should not simply set the stage for further negotiations from ground zero. Nor is that

D. *Le rôle et la fonction du traité PNLSC*

[49] Le gouvernement territorial et la PNLSC ont des points de vue très différents sur cette question. Cette divergence d'opinion se retrouve au centre même des arguments opposés qu'ils ont invoqués dans le cadre du pourvoi.

[50] Pour le gouvernement territorial, le traité PNLSC a fixé de façon définitive les droits et les obligations de la première nation en tant que peuple autochtone. Le traité a reconnu et confirmé les droits ancestraux cédés dans le cadre de la revendication territoriale. À partir de 1997, les droits des communautés autochtones de la PNLSC, selon le gouvernement, ont été limités à ce qui est prévu par le traité. Pour exprimer en termes simplistes la position du gouvernement, les premières nations obtiennent ce qu'elles ont négocié comme termes des traités, un point c'est tout.

[51] La PNLSC, pour sa part, juge applicable au Yukon ce que la Cour a écrit dans *Première nation crie Mikisew*, par. 54 :

> La conclusion de traités est une étape importante du long processus de réconciliation, mais ce n'est qu'une étape. Ce qui s'est passé à Fort Chipewyan en 1899 ne constituait pas un accomplissement parfait de l'obligation découlant de l'honneur de la Couronne, mais une réitération de celui-ci.

Il en va de même, selon la première nation, du processus de conclusion de traités relatifs au Yukon qui a conduit en 1997 à la ratification du traité PNLSC.

[52] Je suis d'accord avec le gouvernement territorial lorsqu'il dit que le traité PNLSC marque un progrès majeur par rapport à ce qui s'est produit à Fort Chipewyan en 1899, tant pour la portée et le caractère global du traité récent que pour la justesse de la procédure qui y a mené. Les huit pages de considérations générales du Traité n^{o} 8 de 1899 ne peuvent équivaloir aux 435 pages du traité PNLSC conclu près d'un siècle plus tard. Le traité PNLSC procure une assise solide à la réconciliation, et le gouvernement territorial a tout à fait raison de soutenir que ce traité ne devrait pas simplement préparer le

the First Nation's position. It simply relies on the principle noted in *Haida Nation* that "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples" (para. 16 (emphasis added)). Reconciliation in the Yukon, as elsewhere, is not an accomplished fact. It is a work in progress. The "complete code" position advocated by the territorial government is, with respect, misconceived. As the Court noted in *Mikisew Cree*: "The duty to consult is grounded in the honour of the Crown .... The honour of the Crown exists as a source of obligation independently of treaties as well, of course" (para. 51).

[53] On this point, *Haida Nation* represented a shift in focus from *Sparrow*. Whereas the Court in *Sparrow* had been concerned about sorting out the consequences of infringement, *Haida Nation* attempted to head off such confrontations by imposing on the parties a duty to consult and (if appropriate) accommodate in circumstances where development might have a significant impact on Aboriginal rights when and if established. In *Mikisew Cree*, the duty to consult was applied to the management of an 1899 treaty process to "take up" (as in the present case) ceded Crown lands for "other purposes". The treaty itself was silent on the process. The Court held that on the facts of that case the content of the duty to consult was at "the lower end of the spectrum" (para. 64), but that nevertheless the Crown was wrong to act unilaterally.

[54] The difference between the LSCFN Treaty and Treaty No. 8 is not simply that the former is a "modern comprehensive treaty" and the latter is more than a century old. Today's modern treaty will become tomorrow's historic treaty. The distinction lies in the relative precision and sophistication of the modern document. Where adequately resourced and professionally represented parties have sought to order their own affairs, and have

terrain pour d'autres négociations qu'on reprendrait à partir de zéro. Telle n'est pas du reste la position défendue par la première nation. Elle s'appuie simplement sur le principe signalé dans *Nation haïda*, soit que « [l]'honneur de la Couronne est toujours en jeu lorsque cette dernière transige avec les peuples autochtones » (par. 16 (je souligne)). La réconciliation, au Yukon comme ailleurs, n'est pas un fait accompli, mais un chantier permanent. La thèse du « code complet » avancée par le gouvernement territorial est, à mon avis, mal fondée. Comme l'a observé la Cour dans *Première nation crie Mikisew* : « L'obligation de consultation repose sur l'honneur de la Couronne [. . .] L'honneur de la Couronne existe également en tant que source d'obligation indépendante des traités, bien entendu » (par. 51).

[53] Sur cette question, *Nation haïda* marquait un changement de perspective par rapport à *Sparrow*. Alors que dans *Sparrow*, la Cour s'était employée à dégager les conséquences de la violation, elle a tenté dans *Nation haïda* de prévenir de tels affrontements en imposant aux parties une obligation de consulter et (au besoin) d'accommoder, dans des circonstances où le développement est susceptible d'avoir des conséquences importantes sur les droits ancestraux lorsque ceux-ci ont été établis. Dans *Première nation crie Mikisew*, l'obligation de consulter a été appliquée à la gestion d'un processus prévu par un traité de 1899, concernant la « prise » (comme dans la présente espèce) pour d'« autres objets », de terres cédées à la Couronne. Le traité lui-même ne mentionnait aucunement le processus en question. La Cour a conclu que si, d'après les faits de l'espèce, le contenu de l'obligation de consulter se situait « au bas du continuum » (par. 64), la Couronne n'en avait pas moins eu tort d'agir de façon unilatérale.

[54] La différence entre le traité PNLSC et le Traité nº 8 ne tient pas uniquement au fait que le premier est un « traité récent global » tandis que le second a été conclu il y a plus d'un siècle. Le traité récent d'aujourd'hui deviendra le traité historique de demain. La distinction réside plutôt dans la précision et la complexité relatives du document récent. Lorsque des parties bénéficiant de ressources suffisantes et de l'aide de professionnels ont tenté de

given shape to the duty to consult by incorporating consultation procedures into a treaty, their efforts should be encouraged and, subject to such constitutional limitations as the honour of the Crown, the Court should strive to respect their handiwork: *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557.

[55] However, the territorial government presses this position too far when it asserts that unless consultation is specifically required by the Treaty it is excluded by negative inference. Consultation in some meaningful form is the necessary foundation of a successful relationship with Aboriginal people. As the trial judge observed, consultation works "to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address" (para. 82).

[56] The territorial government would have been wrong to act unilaterally. The LSCFN had existing treaty rights in relation to the land Paulsen applied for, as set out in s. 16.4.2 of the LSCFN Treaty:

> Yukon Indian People shall have the right to harvest for Subsistence within their Traditional Territory . . . all species of Fish and Wildlife for themselves and their families at all seasons of the year and in any numbers on Settlement Land and on Crown Land to which they have a right of access pursuant to 6.2.0, subject only to limitations prescribed pursuant to Settlement Agreements.

The Crown land was subject to being taken up for other purposes (as in *Mikisew Cree*), including agriculture, but in the meantime the First Nation had a continuing treaty interest in Crown lands to which their members continued to have a treaty right of access (including but not limited to the Paulsen plot). It was no less a treaty interest because it was defeasible.

mettre de l'ordre dans leurs propres affaires et ont donné forme à l'obligation de consulter en incorporant dans un traité la procédure de consultation, il convient d'encourager leurs efforts et, sous réserve des limitations constitutionnelles comme le principe de l'honneur de la Couronne, la Cour devrait essayer de respecter le fruit de leur travail : *Québec (Procureur général) c. Moses*, 2010 CSC 17, [2010] 1 R.C.S. 557.

[55] Cependant, le gouvernement territorial pousse trop loin cette thèse lorsqu'il prétend que la consultation qui n'est pas spécifiquement requise par le traité est exclue par inférence négative. Une consultation digne de ce nom demeure le fondement nécessaire d'une relation réussie avec les peuples autochtones. Comme le juge de première instance l'a pertinemment fait remarquer, la consultation permet [TRADUCTION] « d'éviter l'indifférence et le manque de respect susceptibles d'anéantir le processus de réconciliation que l'entente définitive est censée établir » (par. 82).

[56] Le gouvernement territorial aurait eu tort d'agir de façon unilatérale. La PNLSC avait des droits existants issus d'un traité à l'égard de la parcelle visée par la demande de M. Paulsen, comme l'indique l'art. 16.4.2 du traité PNLSC :

> Les Indiens du Yukon ont le droit de récolter, à des fins de subsistance, dans les limites de leur territoire traditionnel [. . .] toute espèce de poisson et d'animal sauvage, pour eux-mêmes et pour leur famille, en toute saison et sans limite de prises, sur des terres visées par un règlement et sur des terres de la Couronne où ils bénéficient d'un droit d'accès conformément à la section 6.2.0, sous réserve seulement des limites prévues par les ententes portant règlement.

Les terres de la Couronne pouvaient être prises à d'autres fins (comme dans *Première nation crie Mikisew*) et notamment à des fins d'agriculture, mais entre-temps, la première nation conservait un intérêt issu d'un traité sur les terres de la Couronne à l'égard desquelles ses membres avaient toujours un droit d'accès issu d'un traité (y compris la parcelle de M. Paulsen). La possibilité que cet intérêt soit supprimé n'en faisait pas moins un intérêt issu d'un traité.

[57] The decision maker was required to take into account the impact of allowing the Paulsen application on the concerns and interests of members of the First Nation. He could not take these into account unless the First Nation was consulted as to the nature and extent of its concerns. Added to the ordinary administrative law duties, of course, was the added legal burden on the territorial government to uphold the honour of the Crown in its dealings with the First Nation. Nevertheless, given the existence of the treaty surrender and the legislation in place to implement it, and the decision of the parties not to incorporate a more general consultation process in the LSCFN Treaty itself, the content of the duty of consultation (as found by the Court of Appeal) was at the lower end of the spectrum. It was not burdensome. But nor was it a mere courtesy.

E. *The Source of the Duty to Consult Is External to the LSCFN Treaty*

[58] The LSCFN Treaty dated July 21, 1997, is a comprehensive lawyerly document. The territorial government argues that the document refers to the duty to consult in over 60 different places but points out that none of them is applicable here (although the implementation of Chapter 12, which was left to subsequent legislative action, did not foreclose the possibility of such a requirement).

[59] There was considerable discussion at the bar about whether the duty to consult, if it applies at all, should be considered an implied term of the LSCFN Treaty or a duty externally imposed as a matter of law.

[60] The territorial government takes the view that terms cannot be implied where the intention of the parties is plainly inconsistent with such an outcome. In this case, it says, the implied term is negated by the parties' treatment of consultation throughout the treaty and its significant absence

[57] Le décideur était tenu de prendre en compte les conséquences qu'aurait le fait d'accorder la demande de M. Paulsen sur les préoccupations et les intérêts des membres de la première nation. Or, il ne pouvait pas le faire sans que la première nation ne soit consultée au sujet de la nature et de la portée de ses préoccupations. S'ajoutait bien sûr aux obligations habituelles ressortissant au droit administratif, l'obligation légale du gouvernement territorial de préserver l'honneur de la Couronne dans ses relations avec la première nation. Néanmoins, étant donné l'existence de la cession opérée par le traité et les textes législatifs adoptés en vue de la mise en œuvre de celui-ci, ainsi que la décision des parties de ne pas incorporer dans le traité PNLSC lui-même un processus de consultation d'un caractère plus général, le contenu de l'obligation de consultation se situait (comme l'a conclu la Cour d'appel) au bas du continuum. Il ne s'agissait pas d'une obligation exigeante. Mais ce n'était pas non plus une simple affaire de courtoisie.

E. *La source de l'obligation de consulter est extrinsèque au traité PNLSC*

[58] Le traité PNLSC, daté du 21 juillet 1997, est un document à caractère juridique des plus détaillé. Le gouvernement territorial fait valoir qu'il est fait mention de l'obligation de consulter à plus de 60 endroits différents dans ce document, mais qu'aucun de ces cas n'est applicable en l'espèce (même si la mise en œuvre du chapitre 12, laissée en suspens dans l'attente d'une mesure législative, n'écartait pas la possibilité d'une telle obligation).

[59] On a longuement débattu, à l'audience, la question de savoir si l'obligation de consulter, à supposer qu'elle soit applicable d'une quelconque façon, devrait être considérée comme une clause implicite du traité PNLSC ou comme une obligation juridique extérieure au traité.

[60] Pour le gouvernement territorial, il ne saurait y avoir de clause implicite qui serait à l'évidence incompatible avec l'intention des parties. En l'espèce, plaide-t-il, la clause implicite est contredite par la manière dont les parties ont abordé la consultation dans l'ensemble du traité et par l'absence

in the case of land grants. The necessary "negative inference", argues the territorial government, is that failure to include it was intentional.

[61] I think this argument is unpersuasive. The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.

[62] The argument that the LSCFN Treaty is a "complete code" is untenable. For one thing, as the territorial government acknowledges, nothing in the text of the LSCFN Treaty authorizes the making of land grants on Crown lands to which the First Nation continues to have treaty access for subsistence hunting and fishing. The territorial government points out that authority to alienate Crown land exists in the general law. This is true, but the general law exists outside the treaty. The territorial government cannot select from the general law only those elements that suit its purpose. The treaty sets out rights and obligations of the parties, but the treaty is part of a special relationship: "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably" (*Haida Nation*, at para. 17 (emphasis added)). As the text of s. 35(3) makes clear, a modern comprehensive land claims agreement is as much a treaty in the eyes of the Constitution as are the earlier pre- and post-Confederation treaties.

[63] At the time the Paulsen application was pending, the implementation of the LSCFN Treaty was in transition. It contemplates in Chapter 12

significative de celle-ci dans le cas de la concession de terres. La nécessaire « inférence négative », soutient le gouvernement territorial, est que le fait de ne pas prévoir la consultation était intentionnel.

[61] Cet argument ne me paraît pas convaincant. L'obligation de consulter est considérée, dans la jurisprudence, comme un moyen de préserver l'honneur de la Couronne (lorsque cela s'avère indiqué). Les parties ont la possibilité de s'entendre sur les modalités de la consultation, mais la Couronne ne peut pas se soustraire à son obligation de traiter honorablement avec les Autochtones. Cette doctrine, comme nous l'avons affirmé dans *Nation haïda* et confirmé dans *Première nation crie Mikisew*, s'applique indépendamment de l'intention expresse ou implicite des parties.

[62] L'argument suivant lequel le traité PNLSC est un « code complet » ne tient pas. D'une part, comme le reconnaît le gouvernement territorial, le texte du traité PNLSC n'autorise d'aucune manière l'octroi de terres de la Couronne à l'égard desquelles la première nation continue de jouir, en vertu du traité, d'un droit d'accès à des fins de chasse et de pêche de subsistance. Le gouvernement territorial souligne que le pouvoir d'aliéner des terres de la Couronne existe selon le droit commun. C'est vrai, mais le droit commun existe à l'extérieur du traité. Le gouvernement territorial ne peut pas retenir uniquement, dans le droit commun, les éléments qui lui conviennent. Le traité énonce les droits et les obligations des parties, tout en s'inscrivant dans une relation spéciale : « Dans tous ses rapports avec les peuples autochtones, qu'il s'agisse de l'affirmation de sa souveraineté, du règlement de revendications ou de la mise en œuvre de traités, la Couronne doit agir honorablement » (*Nation haïda*, par. 17 (je souligne)). Comme il ressort clairement du texte du par. 35(3), une entente récente relative à des revendications globales constitue, du point de vue de la Constitution, un traité au même titre que les anciens traités conclus avant et après la Confédération.

[63] Au moment où la demande de M. Paulsen était à l'étude, la mise en œuvre du traité PNLSC était dans une phase de transition. Le chapitre 12

the enactment of a "development assessment process" to implement the treaty provisions. This was ultimately carried into effect in the *Yukon Environmental and Socio-economic Assessment Act*, S.C. 2003, c. 7 ("*YESAA*"). The territorial government acknowledges that the *YESAA* would have applied to the Paulsen application. Part 2 of the Act (regarding the assessment process) did not come into force until after the Paulsen application was approved (s. 134). The treaty required the government to introduce the law within two years of the date of the settlement legislation (s. 12.3.4). This was not done. The subsequent legislative delay did not empower the territorial government to proceed without consultation.

[64] The purpose of the *YESAA* is broadly stated to "[give] effect to provisions of the Umbrella Final Agreement respecting assessment of environmental and socio-economic effects" by way of a "comprehensive, neutrally conducted assessment process" (s. 5) where "an authorization or the grant of an interest in land" would be required (s. 47(2)(*c*)). The neutral assessor is the Yukon Environmental and Socio-economic Assessment Board, to which (excluding the chair) the Council for Yukon Indians would nominate half the members and the territorial government the other half. The Minister, after consultation, would appoint the chair.

[65] The territorial government contends that this new arrangement is intended to satisfy the requirement of consultation on land grants in a way that is fair both to First Nations and to the other people of the Yukon. Assuming (without deciding) this to be so, the fact remains that no such arrangement was in place at the relevant time.

[66] In the absence of the agreed arrangement, consultation was necessary in this case to uphold the honour of the Crown. It was therefore imposed as a matter of law.

envisage l'adoption d'un « processus d'évaluation des activités de développement » en vue de la mise en œuvre des dispositions du traité. Cette mise en œuvre a finalement été accomplie par la *Loi sur l'évaluation environnementale et socioéconomique au Yukon*, L.C. 2003, ch. 7 (« *LÉESY* »). Le gouvernement territorial reconnaît que la *LÉESY* se serait appliquée à la demande de M. Paulsen. La partie 2 de cette loi (concernant le processus d'évaluation) n'est entrée en vigueur qu'après l'approbation de la demande en question (art. 134). Le gouvernement était tenu, aux termes du traité, d'édicter une mesure législative dans les deux ans suivant l'entrée en vigueur de la loi de mise en œuvre (art. 12.3.4). Il ne l'a pas fait. Le retard législatif subséquent ne donnait pas au gouvernement territorial le pouvoir d'agir sans consultation.

[64] La *LÉESY* vise d'une manière générale à « met[tre] en œuvre diverses dispositions de l'accord-cadre relatives à l'évaluation des effets sur l'environnement ou la vie socioéconomique » par l'instauration d'un « processus complet et impartial d'évaluation » (art. 5) lorsque « l'autorisation [. . .] ou l'attribution [. . .] de droits fonciers » serait nécessaire (al. 47(2)*c*)). L'évaluateur neutre est l'Office d'évaluation environnementale et socioéconomique du Yukon, dont les membres (sauf le président) seraient nommés pour moitié par le Conseil des Indiens du Yukon et pour l'autre moitié par le gouvernement territorial. Le ministre nommerait le président après consultation.

[65] Selon le gouvernement territorial, ce nouveau régime vise à répondre à l'exigence de consultation au sujet de la concession de terres d'une façon équitable à la fois pour les premières nations et pour les autres habitants du Yukon. En supposant que tel soit le cas (je ne me prononce pas sur la question), il n'en demeure pas moins que le régime en question n'était pas en vigueur à l'époque en cause.

[66] En l'absence du régime sur lequel on s'était entendu, la consultation était nécessaire en l'espèce pour préserver l'honneur de la Couronne. Elle était donc imposée par le droit.

F. *The LSCFN Treaty Does Not Exclude the Duty to Consult and, if Appropriate, Accommodate*

[67] When a modern treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. If a process of consultation has been established in the treaty, the scope of the duty to consult will be shaped by its provisions.

[68] The territorial government argues that a mutual objective of the parties to the LSCFN Treaty was to achieve certainty, as is set out in the preamble:

> . . . the parties to this Agreement wish to achieve certainty with respect to the ownership and use of lands and other resources of the Little Salmon/Carmacks First Nation Traditional Territory;
>
> the parties wish to achieve certainty with respect to their relationships to each other . . . .

Moreover the treaty contains an "entire agreement" clause. Section 2.2.15 provides that

> Settlement Agreements shall be the entire agreement between the parties thereto and there shall be no representation, warranty, collateral agreement or condition affecting those Agreements except as expressed in them.

[69] However, as stated, the duty to consult is not a "collateral agreement or condition". The LSCFN Treaty *is* the "entire agreement", but it does not exist in isolation. The duty to consult is imposed as a matter of law, irrespective of the parties' "agreement". It does not "affect" the agreement itself. It is simply part of the essential legal framework within which the treaty is to be interpreted and performed.

[70] The First Nation points out that there is an express exception to the "entire agreement" clause in the case of "existing or future constitutional rights", at s. 2.2.4:

> Subject to 2.5.0, 5.9.0, 5.10.1 and 25.2.0, Settlement Agreements shall not affect the ability of aboriginal

F. *Le traité PNLSC n'exclut pas l'obligation de consulter et, au besoin, d'accommoder*

[67] Lorsqu'un traité récent a été conclu, la première étape consiste à en examiner les dispositions et à tenter de déterminer les obligations respectives des parties et l'existence, dans le traité lui-même, d'une forme quelconque de consultation. Si un processus de consultation a été établi dans le traité, les dispositions du traité indiqueront la portée de l'obligation de consulter.

[68] Le gouvernement territorial plaide que la certitude constituait un objectif mutuel des parties au traité PNLSC, comme l'indique le préambule :

> . . . les parties à la présente entente désirent définir avec certitude les droits de propriété et d'utilisation des terres et autres ressources du territoire traditionnel de la première nation de Little Salmon/Carmacks;
>
> les parties à la présente entente désirent définir avec certitude leurs rapports les unes avec les autres . . .

Qui plus est, le traité renferme une clause du type « intégralité de l'entente », soit l'art. 2.2.15 :

> Chaque entente portant règlement constitue l'entente complète intervenue entre les parties à cette entente et il n'existe aucune autre assertion, garantie, convention accessoire ou condition touchant cette entente que celles qui sont exprimées dans cette dernière.

[69] Toutefois, l'obligation de consulter ne constitue pas, comme je l'ai indiqué, une « convention accessoire ou condition ». Le traité PNLSC *constate* effectivement l'« entente complète », mais il n'existe pas isolément. L'obligation de consulter est imposée par le droit sans égard à l'« entente » conclue entre les parties. Elle ne « touche » pas l'entente elle-même. Elle fait simplement partie du cadre juridique essentiel dans lequel le traité doit être interprété et exécuté.

[70] La première nation souligne qu'une exception à la clause de l'« entente complète » est expressément prévue à l'art. 2.2.4, pour les « droits constitutionnels — existants ou futurs » :

> Sous réserve des sections 2.5.0, 5.9.0 et 25.2.0 et de l'article 5.10.1, les ententes portant règlement n'ont pas pour

people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them.

Section 2.2.4 applies, the LSCFN argues, because the duty of consultation is a new constitutional duty and should therefore be considered a "future" constitutional right within the scope of the section.

[71] As discussed, the applicable "existing or future *constitutional* right" is the right of the Aboriginal parties to have the treaty performed in a way that upholds the honour of the Crown. That principle is readily conceded by the territorial government. However, the honour of the Crown may not *always require consultation*. The parties may, in their treaty, negotiate a different mechanism which, nevertheless, in the result, upholds the honour of the Crown. In this case, the duty applies, the content of which will now be discussed.

G. *The Content of the Duty to Consult*

[72] The adequacy of the consultation was the subject of the First Nation's cross-appeal. The adequacy of what passed (or failed to pass) between the parties must be assessed in light of the role and function to be served by consultation on the facts of the case and whether that purpose was, on the facts, satisfied.

[73] The Yukon *Lands Act* and the *Territorial Lands (Yukon) Act* created a discretionary authority to make grants but do not specify the basis on which the discretion is to be exercised. It was clear that the Paulsen application might *potentially* have an adverse impact on the LSCFN Treaty right to have access to the 65 hectares for subsistence "harvesting" of fish and wildlife, and that such impact would include the First Nation's beneficial use of the surrounding Crown lands to which its members have a continuing treaty right of access. There was at least the possibility that the impact would be significant in economic and cultural terms. The Director was then required, as a matter of both

effet de porter atteinte à la capacité des peuples autochtones du Yukon d'exercer des droits constitutionnels — existants ou futurs — qui sont reconnus aux peuples autochtones et qui s'appliquent à eux ou de tirer parti de tels droits.

L'article 2.2.4 s'applique, soutient la PNLSC, parce que l'obligation de consultation est une nouvelle obligation constitutionnelle et devrait donc être considérée comme un droit constitutionnel « futur » tombant dans le champ d'application de cet article.

[71] Comme nous l'avons vu, le « droit *constitutionnel* existant ou futur » applicable est le droit des parties autochtones à ce que le traité soit exécuté d'une manière propre à préserver l'honneur de la Couronne. Ce principe est admis volontiers par le gouvernement territorial. Toutefois, l'honneur de la Couronne peut ne pas *toujours exiger la consultation*. Les parties peuvent, dans leur traité, négocier un mécanisme différent qui permet malgré tout, dans son résultat, de préserver l'honneur de la Couronne. En l'espèce, l'obligation s'applique, et j'en viens maintenant à l'examen de son contenu.

G. *Le contenu de l'obligation de consulter*

[72] Le pourvoi incident de la première nation porte sur le caractère adéquat de la consultation. Ce qui s'est passé (ou ne s'est pas passé) entre les parties doit être évalué à la lumière du rôle et de la fonction de la consultation au regard des faits de l'espèce, et de la question de savoir si cet objectif a été rempli au regard des faits.

[73] La *Loi sur les terres* du Yukon et la *Loi du Yukon sur les terres territoriales* ont institué un pouvoir discrétionnaire de concession de terres, mais sans préciser la base sur laquelle ce pouvoir discrétionnaire doit être exercé. Il ne faisait de doute que la demande de M. Paulsen était *susceptible* d'avoir des incidences négatives sur le droit d'accès aux 65 hectares conféré par le traité PNLSC pour la « récolte » de poissons et d'animaux sauvages à des fins de subsistance, incidences comprenant l'usage bénéficiaire par la première nation des terres de la Couronne avoisinantes auxquelles ses membres continuent d'avoir un droit d'accès en vertu du traité. Il existait au moins une possibilité que ces

compliance with the legal duty to consult based on the honour of the Crown *and* procedural fairness to be informed about the nature and severity of such impacts before he made a decision to determine (amongst other things) whether accommodation was necessary or appropriate. The purpose of consultation was not to reopen the LSCFN Treaty or to renegotiate the availability of the lands for an agricultural grant. Such availability was already established in the Treaty. Consultation was required to help manage the important ongoing relationship between the government and the Aboriginal community in a way that upheld the honour of the Crown.

[74] This "lower end of the spectrum" approach is consistent with the LSCFN Treaty itself which sets out the elements the parties themselves regarded as appropriate regarding consultation (where consultation is required) as follows:

"Consult" or "Consultation" means to provide:

(a) to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter;

(b) a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obliged to consult; and

(c) full and fair consideration by the party obliged to consult of any views presented.

(LSCFN Treaty, Chapter 1)

At the hearing of this appeal, counsel for the First Nation contended that the territorial government has "to work with the Aboriginal people to understand what the effect will be, and then they have to try and minimize it" (transcript, at p. 48 (emphasis added)). It is true that these treaties were negotiated prior to *Haida Nation* and *Mikisew Cree*, but it must have been obvious to the negotiators that

incidences soient importantes sur les plans économique et culturel. Le directeur était par conséquent tenu, pour se conformer à l'obligation juridique de consulter fondée sur l'honneur de la Couronne *et* au nom de l'équité procédurale, d'être informé de la nature et de la gravité de telles incidences avant de prendre une décision, pour déterminer (entre autres choses) si des accommodements étaient nécessaires ou appropriés. La consultation n'avait pas pour objet de rouvrir le traité PNLSC ou de renégocier la possibilité de concéder les terres à des fins agricoles. Cette possibilité était déjà prévue au traité. La consultation était requise afin de faciliter la gestion de la relation importante entre le gouvernement et la communauté autochtone en conformité avec la préservation de l'honneur de la Couronne.

[74] Cette approche au « bas du continuum » est conforme au traité PNLSC lui-même, qui précise les éléments considérés par les parties elles-mêmes comme constituant une consultation appropriée (lorsqu'une consultation est nécessaire) :

« consulter » ou « consultation » La procédure selon laquelle :

a) un avis suffisamment détaillé concernant la question à trancher doit être communiqué à la partie devant être consultée afin de lui permettre de préparer sa position sur la question;

b) la partie devant être consultée doit se voir accorder un délai suffisant pour lui permettre de préparer sa position sur la question, ainsi que l'occasion de présenter cette position à la partie obligée de tenir la consultation;

c) la partie obligée de tenir la consultation doit procéder à un examen complet et équitable de toutes les positions présentées.

(Traité PNLSC, chapitre 1)

Lors de l'audition du pourvoi, l'avocat de la première nation a soutenu que le gouvernement territorial doit [TRADUCTION] « s'efforcer, de concert avec les peuples autochtones, de comprendre quels seront les effets, et ensuite il doit essayer de les réduire au minimum » (transcription, p. 48 (je souligne)). Il est vrai que ces traités ont été négociés avant les arrêts *Nation haïda* et *Première nation crie Mikisew*, mais

there is a substantial difference between imposing on a decision maker a duty to provide "full and fair consideration" of the First Nation's "views" and (on the other hand) an obligation to try "to understand what the effect will be, and then . . . to try and minimize it". It is the former formulation which the parties considered sufficient and appropriate. Even in the absence of treaty language, the application of *Haida Nation* and *Mikisew Cree* would have produced a similar result.

[75] In my view, the negotiated definition is a reasonable statement of the content of consultation "at the lower end of the spectrum". The treaty does not apply directly to the land grant approval process, which is not a treaty process, but it is a useful indication of what the parties themselves considered fair, and is consistent with the jurisprudence from *Haida Nation* to *Mikisew Cree.*

H. *There Was Adequate Consultation in This Case*

[76] The First Nation acknowledges that it received appropriate notice and information. Its letter of objection dated July 27, 2004, set out its concerns about the impact on Trapline #143, a cabin belonging to Roger Rondeau (who was said in the letter to have "no concerns with the application") as well as Johnny Sam's cabin, and "potential areas of heritage and cultural interest" that had not however "been researched or identified". The letter recommended an archaeological survey for this purpose (this was subsequently performed *before* the Paulsen application was considered and approved by the Director). Nothing was said in the First Nation's letter of objection about possible inconsistency with the FWMP, or the need to preserve the 65 hectares for educational purposes.

il devait être évident pour les négociateurs qu'il existe une différence substantielle entre, d'une part, le fait d'imposer à un décideur une obligation de procéder à « un examen complet et équitable » des « positions » de la première nation, et, d'autre part, une obligation de s'efforcer [TRADUCTION] « de comprendre quels seront les effets, et ensuite [. . .] essayer de les réduire au minimum ». C'est la première de ces obligations que les parties ont considérée comme suffisante et appropriée. Même en l'absence de clauses au traité, l'application des arrêts *Nation haïda* et *Première nation crie Mikisew* aurait produit un résultat semblable.

[75] À mon avis, la définition négociée constitue un énoncé raisonnable du contenu de la consultation « au bas du continuum ». Le traité ne régit pas directement le processus d'approbation des concessions de terres, qui ne relève pas d'un traité, mais il indique de façon utile ce que les parties elles-mêmes jugeaient équitable, et il est conforme à la jurisprudence des arrêts *Nation haïda* et *Première nation crie Mikisew.*

H. *Il y a eu une consultation adéquate en l'espèce*

[76] La première nation reconnaît avoir reçu un avis suffisant et l'information utile. Sa lettre d'opposition datée du 27 juillet 2004 faisait état de ses préoccupations au sujet des incidences de la concession de la parcelle sur le territoire de piégeage n° 143, sur une cabane appartenant à Roger Rondeau (chez qui, d'après la lettre, [TRADUCTION] « la demande [ne suscitait] aucune inquiétude ») ainsi que sur la cabane de Johnny Sam, et sur [TRADUCTION] « des zones pouvant présenter un intérêt patrimonial et culturel » mais qui n'avaient pas « été identifiées » ou n'avaient pas « fait l'objet de recherches ». La lettre recommandait qu'on procède à cette fin à une reconnaissance archéologique (reconnaissance qui a eu lieu par la suite, *avant* l'examen et l'approbation, par le directeur, de la demande de M. Paulsen). Nulle part dans la lettre d'opposition de la première nation n'était-il fait mention d'une possible non-conformité avec le PGRHF, ou de la nécessité de préserver les 65 hectares à des fins éducatives.

[77] The concerns raised in the First Nation's letter of objection dated July 27, 2004, were put before the August 13, 2004 meeting of LARC (which the First Nation did not attend) and, for the benefit of those not attending, were essentially reproduced in the minutes of that meeting. The minutes noted that "[t]here will be some loss of wildlife habitat in the area, but it is not significant." The minutes pointed out that Johnny Sam was entitled to compensation under the LSCFN Treaty to the extent the value of Trapline #143 was diminished. The minutes were available to the LSCFN as a member of LARC.

[78] The First Nation complains that its concerns were not taken seriously. It says, for example, the fact that Johnny Sam is eligible for compensation ignores the cultural and educational importance of Trapline #143. He wants the undiminished trapline, not compensation. However, Larry Paulsen also had an important stake in the outcome. The Director had a discretion to approve or not to approve and he was not obliged to decide this issue in favour of the position of the First Nation. Nor was he obliged as a matter of law to await the outcome of the FWMP. The Director had before him the First Nation's concerns and the response of other members of LARC. He was entitled to conclude that the impact of the Paulsen grant on First Nation's interests was not significant.

[79] It is important to stress that the First Nation does not deny that it had full notice of the Paulsen application, and an opportunity to state its concerns through the LARC process to the ultimate decision maker in whatever scope and detail it considered appropriate. Moreover, unlike the situation in *Mikisew Cree*, the First Nation here was consulted *as a First Nation* through LARC and not as members of the general public. While procedural fairness is a flexible concept and takes into account the

[77] Les préoccupations soulevées dans la lettre d'opposition de la première nation datée du 27 juillet 2004 ont été évoquées lors de la réunion du CEDAT tenue le 13 août 2004 (à laquelle la première nation n'était pas représentée) et ont été décrites, pour l'essentiel, dans le procès-verbal de cette réunion, à l'intention des personnes qui étaient absentes. Il est mentionné dans le procès-verbal qu'[TRADUCTION] « [i]l y aura une certaine perte au plan de l'habitat faunique dans la région, mais elle n'est pas importante. » Il y est également souligné que Johnny Sam avait droit à une indemnisation en vertu du traité PNLSC dans la mesure où la valeur du territoire de piégeage n° 143 se trouvait diminuée. La PNLSC, en tant que membre du CEDAT, pouvait consulter le procès-verbal.

[78] La première nation se plaint de ce que ses préoccupations n'aient pas été prises au sérieux. Elle dit par exemple que le fait que Johnny Sam ait droit à une indemnisation témoigne d'une incompréhension de l'importance du territoire de piégeage n° 143 aux plans culturel et éducatif. Il veut conserver le territoire de piégeage dans son intégralité, et non toucher une indemnisation. L'enjeu était cependant important pour Larry Paulsen également. Le directeur avait le pouvoir discrétionnaire d'approuver ou de ne pas approuver sa demande et il n'était pas obligé de trancher la question en faveur de la position défendue par la première nation. Il n'était pas non plus légalement tenu d'attendre le résultat du PGRHF. Le directeur connaissait les préoccupations de la première nation et la réponse des autres membres du CEDAT. Il était en droit de conclure que la concession à M. Paulsen de la parcelle en question n'avait pas d'incidences importantes sur les intérêts de la première nation.

[79] Il importe de signaler que la première nation ne nie pas avoir reçu un avis suffisant de la demande de M. Paulsen, et avoir eu l'occasion d'exposer, dans toute l'ampleur et la précision jugées appropriées, ses préoccupations au décideur ultime dans le cadre des procédures du CEDAT. De plus, contrairement à la situation en cause dans l'affaire *Première nation crie Mikisew*, la première nation en l'espèce a été consultée dans le cadre du CEDAT *en tant que première nation* et non en tant que membre du grand

Aboriginal dimensions of the decision facing the Director, it is nevertheless a doctrine that applies as a matter of administrative law to regulate relations between the government decision makers and all residents of the Yukon, Aboriginal as well as non-Aboriginal, Mr. Paulsen as well as the First Nation. On the record, and for the reasons already stated, the requirements of procedural fairness were met, as were the requirements of the duty to consult.

[80] It is impossible to read the record in this case without concluding that the Paulsen application was simply a flashpoint for the pent-up frustration of the First Nation with the territorial government bureaucracy. However, the result of disallowing the application would simply be to let the weight of this cumulative problem fall on the head of the hapless Larry Paulsen (who still awaits the outcome of an application filed more than eight years ago). This would be unfair.

I. *The Duty to Accommodate*

[81] The First Nation's argument is that in this case the legal requirement was not only procedural consultation but substantive accommodation. *Haida Nation* and *Mikisew Cree* affirm that the duty to consult *may* require, in an appropriate case, accommodation. The test is not, as sometimes seemed to be suggested in argument, a duty to accommodate to the point of undue hardship for the non-Aboriginal population. Adequate consultation having occurred, the task of the Court is to review the exercise of the Director's discretion taking into account all of the relevant interests and circumstances, including the First Nation entitlement and the nature and seriousness of the impact on that entitlement of the proposed measure which the First Nation opposes.

[82] The 65-hectare plot had already been reconfigured at government insistence to accommodate

public. Si l'équité procédurale est une notion souple et prend en compte les aspects qui, dans la décision que doit prendre le directeur, touchent directement les Autochtones, il n'en demeure pas moins que cette doctrine s'applique en droit administratif pour encadrer les relations entre les décideurs gouvernementaux et tous les habitants du Yukon, Autochtones comme non-Autochtones, et M. Paulsen comme la première nation. Au vu du dossier et pour les raisons exposées précédemment, les exigences de l'équité procédurale ont été respectées, tout comme celles de l'obligation de consulter.

[80] Il est impossible de parcourir le dossier de cette affaire sans voir dans la demande de M. Paulsen la petite étincelle qui allait faire éclater le mécontentement accumulé par la première nation face à la bureaucratie du gouvernement territorial. Le rejet de cette demande, cependant, ferait simplement porter le poids de ce problème cumulatif à l'infortuné Larry Paulsen (qui attend toujours l'issue d'une demande présentée il y a plus de huit ans). Ce résultat serait injuste.

I. *L'obligation d'accommoder*

[81] La première nation avance que dans la présente affaire, il y avait une obligation juridique non seulement de tenir une consultation au plan procédural, mais d'offrir des mesures concrètes d'accommodement. Il est précisé dans *Nation haïda* et dans *Première nation crie Mikisew* que l'obligation de consulter *peut*, dans certains cas, exiger des accommodements. Le critère ne consiste pas, comme on a parfois semblé le soutenir dans l'argumentation, dans une obligation d'accommoder jusqu'au point où la population non autochtone subit une contrainte excessive. Une consultation adéquate ayant eu lieu, il incombe à la Cour d'examiner la façon dont le directeur a exercé son pouvoir discrétionnaire, compte tenu de l'ensemble des circonstances et des intérêts pertinents, y compris les droits de la première nation ainsi que la nature et la gravité de l'incidence, sur ces droits, de la mesure proposée à laquelle la première nation s'oppose.

[82] La parcelle de 65 hectares avait déjà été redélimitée à la demande pressante du gouvernement

TAB 9

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky et Robert Zilcosky *Appelants*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureur général du Québec, procureur général de la Saskatchewan, procureur général de l'Alberta, Première nation Tsawwassen, Nation Haisla, bande indienne des Songhees, Première nation Malahat, Première nation des T'Sou-ke, Première nation Snaw-naw-as (Nanoose) et bande indienne de Beecher Bay (collectivement appelées Nations Te'mexw), Nation Heiltsuk, bande indienne des Musqueams, tribus Cowichan, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United

Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshaht First Nation and Assembly of First Nations *Interveners*

Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, bande indienne Nee Tahi Buhn, Première nation Tseshaht et Assemblée des Premières nations *Intervenants*

INDEXED AS: R. v. KAPP

Neutral citation: 2008 SCC 41.

File No.: 31603.

2007: December 11; 2008: June 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

RÉPERTORIÉ : R. c. KAPP

Référence neutre : 2008 CSC 41.

N° du greffe : 31603.

2007 : 11 décembre; 2008 : 27 juin.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to equality — Affirmative action programs — Relationship between s. 15(1) and s. 15(2) of Canadian Charter of Rights and Freedoms — Ambit and operation of s. 15(2) — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether program protected by s. 15(2) of Charter.

Constitutional law — Charter of Rights — Aboriginal rights and freedoms not affected by Charter — Right to equality — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether s. 25 of Canadian Charter of Rights and Freedoms applicable to insulate program from discrimination charge.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Charte des droits — Droit à l'égalité — Programmes de promotion sociale — Lien entre les art. 15(1) et 15(2) de la Charte canadienne des droits et libertés — Portée et application de l'art. 15(2) — Permis de pêche communautaire délivré en vertu d'un programme pilote de vente et accordant aux membres de trois bandes autochtones le droit exclusif de pêcher le saumon pendant une période de 24 heures — Pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant cette période, alléguant l'existence d'une atteinte à leurs droits à l'égalité en raison d'une mesure discriminatoire fondée sur la race — Le programme en cause est-il protégé par l'art. 15(2) de la Charte?

Droit constitutionnel — Charte des droits — Maintien des droits et libertés des Autochtones — Droit à l'égalité — Permis de pêche communautaire délivré en vertu d'un programme pilote de vente et accordant aux membres de trois bandes autochtones le droit exclusif de pêcher le saumon pendant une période de 24 heures — Pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant cette période, alléguant l'existence d'une atteinte à leurs droits à l'égalité en raison d'une mesure discriminatoire fondée sur la race — L'article 25 de la Charte canadienne des droits et libertés soustrait-il le programme en cause à l'accusation de discrimination?

Fisheries — Commercial fishery — Aboriginal Fisheries Strategy — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether licence constitutional — Canadian Charter of Rights and Freedoms, s. 15.

The federal government's decision to enhance aboriginal involvement in the commercial fishery led to the Aboriginal Fisheries Strategy. A significant part of the Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of a communal fishing licence to three aboriginal bands, permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal, excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At their trial, they argued that the communal fishing licence discriminated against them on the basis of race. The trial judge found that the licence granted to the three bands was a breach of the appellants' equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms* that was not justified under s. 1 of the *Charter*. Proceedings on all the charges were stayed. A summary convictions appeal by the Crown was allowed. The stay of proceedings was lifted and convictions were entered against the appellants. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed. The communal fishing licence was constitutional.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.: The communal fishing licence falls within the ambit of s. 15(2) of the *Charter*, and the appellants' claim of a violation of s. 15 cannot succeed. [3]

Section 15(1) and s. 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. The focus of s. 15(1) is on preventing

Pêche — Pêche commerciale — Stratégie relative aux pêches autochtones — Permis de pêche communautaire délivré en vertu d'un programme pilote de vente et accordant aux membres de trois bandes autochtones le droit exclusif de pêcher le saumon pendant une période de 24 heures — Pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant cette période, alléguant l'existence d'une atteinte à leurs droits à l'égalité en raison d'une mesure discriminatoire fondée sur la race — Le permis était-il conforme à la Constitution? — Charte canadienne des droits et libertés, art. 15.

La décision du gouvernement fédéral de favoriser la participation des Autochtones à la pêche commerciale est à l'origine de la Stratégie relative aux pêches autochtones. Cette stratégie a, dans une large mesure, consisté à établir trois programmes pilotes de vente, dont l'un a donné lieu à la délivrance, aux trois bandes autochtones, d'un permis de pêche communautaire autorisant les pêcheurs désignés par ces bandes à pêcher le saumon à l'embouchure du fleuve Fraser pendant une période de 24 heures, de même qu'à vendre leurs prises. Les appelants, tous des pêcheurs commerciaux, pour la plupart non autochtones, qui se sont vu interdire de pêcher pendant cette période de 24 heures, ont participé à une pêche de protestation et ont été accusés d'avoir pêché pendant une période interdite. Lors de leur procès, ils ont fait valoir que le permis de pêche communautaire était discriminatoire à leur égard en raison de leur race. Le juge de première instance a conclu que le permis délivré aux trois bandes portait atteinte aux droits à l'égalité garantis aux appelants par le par. 15(1) de la *Charte canadienne des droits et libertés*, et que cette atteinte n'était pas justifiée au regard de l'article premier de la *Charte*. Il a ordonné l'arrêt des procédures relatives à toutes les accusations. L'appel de la Couronne contre les déclarations sommaires de culpabilité a été accueilli. L'arrêt des procédures a été levé et des déclarations de culpabilité ont été inscrites contre les appelants. La Cour d'appel a maintenu cette décision.

Arrêt : Le pourvoi est rejeté. Le permis de pêche communautaire était conforme à la Constitution.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein : Le permis de pêche communautaire relève du par. 15(2) de la *Charte* et l'allégation des appelants voulant qu'il y ait eu violation de l'art. 15 ne saurait être retenue. [3]

Les paragraphes 15(1) et 15(2) ont pour effet combiné de promouvoir l'idée d'égalité réelle qui sous-tend l'ensemble de l'art. 15. Le paragraphe 15(1) a pour objet

governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on enabling governments to pro-actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs without fear of challenge under s. 15(1). It is thus open to the government, when faced with a s. 15 claim, to establish that the impugned program falls under s. 15(2) and is therefore constitutional. If the government fails to do so, the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory. [16] [37] [40]

A distinction based on an enumerated or analogous ground in a government program will not constitute discrimination under s. 15 if, under s. 15(2): (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. Given the language of the provision and its purpose, legislative goal is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. The program's ameliorative purpose need not be its sole object. [41] [44] [48] [50] [57]

The government program at issue here is protected by s. 15(2) of the *Charter*. The communal fishing licence was issued pursuant to an enabling statute and regulations and qualifies as a "law, program or activity" within the meaning of s. 15(2). The program also "has as its object the amelioration of conditions of disadvantaged individuals or groups". The Crown describes numerous objectives for the program, which include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. The Crown has thus established a credible ameliorative purpose for the program. The program also targets a disadvantaged group identified by the enumerated or analogous grounds. The bands granted the benefit were disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage

d'empêcher les gouvernements d'établir des distinctions fondées sur des motifs énumérés ou analogues ayant pour effet de perpétuer un désavantage ou un préjugé, ou d'imposer un désavantage fondé sur l'application de stéréotypes. Le paragraphe 15(2) vise à permettre aux gouvernements de combattre de manière proactive la discrimination au moyen de programmes destinés à aider des groupes défavorisés à améliorer leur situation. Grâce au par. 15(2), la *Charte* protège le droit des gouvernements de mettre en œuvre de tels programmes sans s'exposer à des contestations fondées sur le par. 15(1). Lorsqu'il fait face à une allégation fondée sur l'art. 15, le gouvernement peut établir que le programme contesté relève du par. 15(2) et est donc conforme à la Constitution. Si le gouvernement ne le fait pas, le programme doit alors être assujetti à un examen approfondi au regard du par. 15(1) afin de déterminer s'il a un effet discriminatoire. [16] [37] [40]

La distinction fondée sur un motif énuméré ou analogue qu'établit un programme gouvernemental n'est pas discriminatoire au sens de l'art. 15 si, au regard du par. 15(2), ce programme (1) a un objet améliorateur ou réparateur et (2) vise un groupe défavorisé caractérisé par un motif énuméré ou analogue. Compte tenu du libellé et de l'objet de la disposition, l'objectif législatif est la considération primordiale pour déterminer si un programme peut bénéficier de la protection du par. 15(2). Il n'est pas nécessaire que le programme vise uniquement un objet améliorateur. [41] [44] [48] [50] [57]

Le programme gouvernemental en cause dans la présente affaire est protégé par le par. 15(2) de la *Charte*. Le permis de pêche communautaire a été délivré conformément à une loi habilitante et à son règlement d'application, et il constitue une « lo[i], [un] programm[e] ou [une] activit[é] » au sens du par. 15(2). Le programme est aussi « destin[é] à améliorer la situation d'individus ou de groupes défavorisés ». La Couronne associe maints objectifs au programme, dont ceux consistant à parvenir à des solutions négociées relativement aux revendications de droits de pêche des peuples autochtones et à donner des possibilités de développement économique aux bandes autochtones afin de favoriser leur accession à l'autosuffisance. Les moyens choisis pour réaliser cet objectif (l'attribution aux collectivités autochtones de privilèges spéciaux en matière de pêche qui constituent un avantage) ont un lien rationnel avec la poursuite de cet objectif. La Couronne a donc prouvé que le programme avait un objet améliorateur crédible. Le programme vise également un groupe défavorisé caractérisé par un motif énuméré ou analogue. Les bandes qui se sont vu accorder l'avantage en question étaient défavorisées sur les plans du revenu et de l'éducation, et à maints autres égards.

suffered by band members. It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*. [30] [57-59] [61]

With respect to s. 25 of the *Charter*, it is not clear that the communal fishing licence at issue lies within the provision's compass. The wording of s. 25 and the examples given therein suggest that only rights of a constitutional character are likely to benefit from s. 25. A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights. Prudence suggests that these issues, which raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians, are best left for resolution on a case-by-case basis as they arise. [63-65]

Per Bastarache J.: Section 25 of the *Charter* operates to bar the appellants' constitutional challenge under s. 15. Although there is agreement with the restatement of the test for the application of s. 15 of the *Charter* set out in the main opinion, there is no need to go through a full s. 15 analysis before considering whether s. 25 applies. It is sufficient to establish the existence of a potential conflict between the pilot sales program and s. 15. [75] [77] [108]

Section 25 is not a mere canon of interpretation. It serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group. This is consistent with the wording and history of the provision. The s. 25 shield against the intrusion of the *Charter* upon native rights or freedoms is restricted by s. 28 of the *Charter*, which provides for gender equality "[n]otwithstanding anything in this Charter". It is also restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives. [80-81] [89] [93] [97]

Ce désavantage historique perdure de nos jours. Le fait que certains membres des bandes ne soient pas nécessairement personnellement défavorisés n'annule pas le désavantage dont sont collectivement victimes les membres de ces bandes. Il s'ensuit que le programme ne porte pas atteinte au droit à l'égalité garanti par l'art. 15 de la *Charte*. [30] [57-59] [61]

En ce qui concerne l'art. 25 de la *Charte*, il n'est pas certain que le permis de pêche communautaire en cause tombe sous le coup de cet article. Le libellé de l'art. 25 et les exemples qu'on y trouve indiquent que seuls les droits de nature constitutionnelle sont susceptibles de bénéficier de la protection de l'art. 25. Même dans l'hypothèse où le permis de pêche relèverait effectivement de l'art. 25, la deuxième question est de savoir si la demande des appelants fondée sur l'art. 15 serait totalement irrecevable, contrairement à ce qui se produirait dans le cas d'une disposition servant à interpréter des droits garantis par la *Charte* qui sont susceptibles d'entrer en conflit. Il serait plus prudent que ces questions — qui soulèvent des considérations complexes extrêmement importantes pour que les droits des Autochtones puissent être conciliés de manière pacifique avec les intérêts de tous les Canadiens — soient tranchées au fur et à mesure qu'elles seront soulevées dans des cas particuliers. [63-65]

Le juge Bastarache : L'article 25 de la *Charte* fait obstacle à la contestation constitutionnelle des appelants fondée sur l'art. 15. Bien que la réaffirmation du critère adopté dans les motifs principaux à l'égard de l'application de l'art. 15 de la *Charte* soit acceptée, il n'est pas nécessaire de procéder à une analyse complète au regard de l'art. 15 avant de se demander si l'art. 25 s'applique. Il suffit d'établir l'existence d'un conflit potentiel entre le programme pilote de vente et l'art. 15. [75] [77] [108]

L'article 25 n'est pas une simple norme d'interprétation. Il a pour objectif de protéger les droits des peuples autochtones lorsque l'application des protections établies dans la *Charte* à l'endroit des individus diminuerait l'identité distinctive, collective et culturelle d'un groupe autochtone. Cette interprétation s'accorde avec la formulation et l'historique de la disposition. L'article 25 qui sert de bouclier contre les incidences de la *Charte* sur les droits et les libertés des peuples autochtones est restreint par l'art. 28 de la *Charte*, qui établit l'égalité des sexes « [i]ndépendamment des autres dispositions de la présente charte ». Il est également limité à son objet, les droits et libertés garantis par la *Charte* étant juxtaposés aux droits et libertés des peuples autochtones. Cela signifie, pour l'essentiel, que seules les lois qui portent véritablement atteinte à des droits des peuples autochtones seront prises en considération, et non celles qui ont uniquement des effets accessoires sur les Autochtones. [80-81] [89] [93] [97]

The reference to "aboriginal and treaty rights" in s. 25 suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. Legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny. Laws adopted under the power set out in s. 91(24) of the *Constitution Act, 1867* would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" in s. 25 comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected. Section 25 reflects the imperative need to accommodate, recognize and reconcile aboriginal interests. [103] [105-106]

La mention à l'art. 25 des « droits ou libertés ancestraux et issus de traités » indique que la disposition est axée sur le caractère tout à fait particulier des personnes ou des collectivités mentionnées dans la Constitution; les droits protégés sont ceux qui leur sont propres en raison de leur statut spécial. Un texte législatif qui fait une distinction entre Autochtones et non-Autochtones afin de protéger des intérêts liés à la culture, au territoire ou à la souveraineté autochtones, ou au processus des traités, mérite d'être soustrait à l'examen fondé sur la *Charte*. Les lois adoptées en vertu de la compétence établie au par. 91(24) de la *Loi constitutionnelle de 1867* feraient normalement partie de cette catégorie, cette compétence concernant les peuples autochtones en tant que tels, mais pas les lois visées par l'art. 88 de la *Loi sur les Indiens*, puisqu'il s'agit par définition de lois d'application générale. Sont compris dans les droits et libertés « autres » à l'art. 25 les droits d'origine législative qui visent à protéger des intérêts liés à la culture, au territoire et à l'autonomie gouvernementale des Autochtones, ainsi que les accords de règlement qui remplacent des droits ancestraux ou issus de traités. Mais les droits privés dont jouissent les Autochtones sur le plan individuel, à titre privé, en tant que citoyens canadiens comme les autres, ne seraient pas protégés. L'article 25 traduit la nécessité impérative de trouver des accommodements aux intérêts des peuples autochtones, de les reconnaître et de les concilier. [103] [105-106]

There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right. [111]

L'application de l'art. 25 comporte trois étapes. La première exige une évaluation de la revendication afin d'établir la nature du droit fondamental garanti par la *Charte* et de déterminer si le bien-fondé de la revendication a été établi à première vue. La deuxième étape consiste à évaluer le droit autochtone afin de déterminer s'il relève de l'art. 25. La troisième étape consiste à déterminer s'il existe un conflit véritable entre le droit garanti par la *Charte* et le droit autochtone. [111]

Here, there is a *prima facie* case of discrimination pursuant to s. 15(1). The right given by the pilot sales program is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. The native right falls under s. 25. The unique relationship between British Columbia aboriginal communities and the fishery should be enough to draw a link between the right to fish given to Aboriginals pursuant to the pilot sales program and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions. Furthermore, the Crown itself argued that these rights to fish were a first step in establishing

En l'espèce, il existe une preuve *prima facie* de discrimination selon le par. 15(1). Le droit conféré par le programme pilote de vente est limité aux Autochtones et a un effet préjudiciable aux pêcheurs commerciaux non autochtones actifs dans la même région que les bénéficiaires du programme. Il est clair aussi que le désavantage est lié à des différences raciales. Le droit autochtone est visé par l'art. 25. Le rapport tout à fait particulier des communautés autochtones de la Colombie-Britannique avec la pêche devrait suffire à établir un lien entre le droit de pêche donné aux Autochtones en vertu du programme pilote de vente et les droits envisagés à l'art. 25. Le droit de pêche a constamment fait l'objet de revendications fondées sur les droits ancestraux et les droits issus de traités, soit les termes énumérés dans les dispositions. En outre, la Couronne elle-même a prétendu

a treaty right and s. 25 reflects the notions of reconciliation and negotiation present in the treaty process. Finally, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867*, which deals with Indians. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1 of the *Charter*. Section 25 is a necessary partner to s. 35(1) of the *Constitution Act, 1982*; it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation. There is also a real conflict here, since the right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales program. Section 25 of the *Charter* accordingly applies in the present situation and provides a full answer to the claim. [116] [119-123]

Cases Cited

By McLachlin C.J. and Abella J.

Considered: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1981] 1 S.C.R. 699; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; *Manitoba Rice Farmers Association v. Human Rights Commission (Man.)* (1987), 50 Man. R. (2d) 92, rev'd in part (1988), 55 Man. R. (2d) 263; *R. v. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, rev'd (1990), 68 Man. R. (2d) 203; *Re Rebic and The Queen* (1985), 20 C.C.C. (3d) 196, aff'd (1986), 28 C.C.C. (3d) 154; *Re M and The Queen* (1985), 21 C.C.C. (3d) 116; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

By Bastarache J.

Referred to: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Bill 30, An Act to amend the Education*

que ces droits constituaient une première étape vers la constitution d'un droit issu d'un traité et l'art. 25 reflète les notions de réconciliation et de négociation présentes dans le processus des traités. Enfin, le droit dont il est question en l'espèce dépend entièrement de l'exercice des pouvoirs conférés au Parlement par le par. 91(24) de la *Loi constitutionnelle de 1867*, qui concerne les Indiens. On ne peut interpréter la *Charte* comme si elle rendait inconstitutionnel l'exercice de pouvoirs conformes aux objectifs du par. 91(24), et il n'est pas logique de croire que tout exercice de la compétence établie au par. 91(24) exige une justification en vertu de l'article premier de la *Charte*. L'article 25 est un compagnon indissociable du par. 35(1) de la *Loi constitutionnelle de 1982*; il protège les objectifs du par. 35(1) et accroît la portée des mesures nécessaires pour que soit remplie la promesse de réconciliation. Il existe également un conflit véritable en l'espèce puisque l'application du droit à l'égalité reconnu à tous en vertu de l'art. 15 n'est pas compatible avec les droits des pêcheurs autochtones titulaires de permis dans le cadre du programme pilote de vente. Par conséquent, l'art. 25 de la *Charte* s'applique en l'espèce et constitue une réponse complète à la revendication. [116] [119-123]

Jurisprudence

Citée par la juge en chef McLachlin et la juge Abella

Arrêts examinés : *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; **arrêts mentionnés :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Athabasca Tribal Council c. Compagnie de pétrole Amoco Canada Ltée*, [1981] 1 R.C.S. 699; *Lovelace c. Ontario*, [2000] 1 R.C.S. 950, 2000 CSC 37; *Manitoba Rice Farmers Association c. Human Rights Commission (Man.)* (1987), 50 Man. R. (2d) 92, inf. en partie par (1988), 55 Man. R. (2d) 263; *R. c. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, inf. par (1990), 68 Man. R. (2d) 203; *Re Rebic and The Queen* (1985), 20 C.C.C. (3d) 196, conf. par (1986), 28 C.C.C. (3d) 154; *Re M and The Queen* (1985), 21 C.C.C. (3d) 116; *Miron c. Trudel*, [1995] 2 R.C.S. 418; *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203.

Citée par le juge Bastarache

Arrêts mentionnés : *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; *R. c. Ulybel Enterprises Ltd.*, [2001] 2 R.C.S. 867, 2001 CSC 56; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *Renvoi relatif au projet de loi 30, An Act to amend the Education Act*

an example (at pp. 11-12) that is highly reminiscent of the present matter to demonstrate that there is a serious difficulty in finding that s. 25 is a mere canon of interpretation. If a provincial Act were to establish that "[n]o Indian shall hunt (or fish) except for his own personal consumption unless he has first obtained a licence", and that no treaty or aboriginal right to this exemption existed, then a non-Indian hunter or fisherman would say that the statute violated s. 15(1) of the *Charter*. Indians would have a right to hunt or fish for personal consumption denied to others. The statutory right given to the Indians would be an "other righ[t] or freedo[m]" under s. 25. The court would then be forced to choose between vindicating the equality right or the right protected by s. 25. If the real effect of s. 25 is to protect native rights and freedoms from erosion based on the *Charter*, the conflict should be resolved by refusing to apply s. 15 in these circumstances.

[81] I agree that giving primacy to s. 25 is what was clearly intended. As will be seen, this is consistent with the wording and history of the provision. It is also consistent with the declarations of the then Deputy Minister of Justice, Roger Tassé, and with those of the Minister of Justice at the time of the 1983 amendment, Justice Minister Mark MacGuigan.

2.1.1 Interpretative Approach

[82] Our Court has given great importance to the need for purposeful interpretations. In *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, Iacobucci J. gives a detailed explanation of the rules of statutory interpretation, showing that one must first consider the wording of the Act, then the legislative history, the scheme of the Act, and the legislative context. Consequently, I will examine the manner in which s. 25 addresses the tension between individual and group rights with reference to all of the above.

[83] In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 82, this Court stated:

démontrer que la thèse selon laquelle l'art. 25 est une simple norme d'interprétation se heurte à une sérieuse difficulté, donne (aux p. 11-12) un exemple qui présente de grandes similitudes avec la présente affaire. Si une loi provinciale interdisait [TRADUCTION] « aux Indiens de chasser (ou de pêcher) autrement que pour leur consommation personnelle à moins d'avoir au préalable obtenu un permis » et qu'il n'existait à l'appui de cette exemption aucun droit ancestral ou issu d'un traité, un chasseur ou un pêcheur non indien pourrait faire valoir que la loi en question est contraire au par. 15(1) de la *Charte*. Les Indiens auraient un droit de chasse ou de pêche pour leur consommation personnelle qui est refusé aux autres. Le droit conféré aux Indiens par le texte législatif serait un des « droits ou libertés [. . .] autres » dont il est question à l'art. 25. Le tribunal serait alors forcé de faire prévaloir soit le droit à l'égalité, soit le droit protégé par l'art. 25. Si l'art. 25 a pour véritable effet de protéger les droits et libertés des peuples autochtones contre une érosion découlant de la *Charte*, il faudrait résoudre le conflit en refusant d'appliquer l'art. 15 dans un tel cas.

[81] J'estime moi aussi que l'intention était manifestement de donner la primauté à l'art. 25. Comme nous le verrons, cette interprétation s'accorde avec la formulation et l'historique de la disposition. Elle s'accorde également avec les déclarations du sous-ministre de la Justice à l'époque, Roger Tassé, et avec celles de Mark MacGuigan, le ministre de la Justice au moment de la modification de 1983.

2.1.1 Méthode d'interprétation

[82] Notre Cour a accordé une grande importance à la nécessité d'interpréter les lois en fonction de leur objet. Dans *R. c. Ulybel Enterprises Ltd.*, [2001] 2 R.C.S. 867, 2001 CSC 56, le juge Iacobucci explique dans le détail les règles d'interprétation des lois. Il indique qu'il faut tout d'abord examiner le libellé de la loi, puis son historique, le régime qu'elle établit, et enfin le contexte législatif. C'est donc en me référant à tous ces éléments que j'étudierai la façon dont la tension entre droits individuels et droits collectifs est résolue à l'art. 25.

[83] Dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217, par. 82, la Cour a écrit :

"Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples." Clearly, this Court has held that a generous interpretation is mandated.

2.1.2 Textual and Structural Analysis

[84] First, let us consider the terms of s. 25:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

[85] Here we have an Act that is clear in its French version and ambiguous in its English version. Other provisions of the *Charter* provide the statutory context for the interpretation of s. 25. Section 21 provides that nothing in ss. 16 to 20 "abrogates or derogates from any right, privilege or obligation with respect to the English and French languages". Section 29 provides that nothing in the *Charter* "abrogates or derogates from any rights or privileges guaranteed by or under the Constitution

« Conformément à cette longue tradition de respect des minorités, qui est au moins aussi ancienne que le Canada lui-même, les rédacteurs de la *Loi constitutionnelle de 1982* ont ajouté à l'art. 35 des garanties expresses relatives aux droits existants — ancestraux ou issus de traités — des autochtones, et à l'art. 25 une clause de non-atteinte aux droits des peuples autochtones. » De toute évidence, la Cour a jugé qu'une interprétation généreuse s'impose.

2.1.2 Analyse textuelle et structurelle

[84] Examinons tout d'abord le libellé de l'art. 25 :

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

[85] Voilà un texte qui est clair dans sa version française et ambigu dans sa version anglaise. D'autres dispositions de la *Charte* indiquent le contexte législatif de l'interprétation de l'art. 25. L'article 21 précise que les art. 16 à 20 « n'ont pas pour effet, en ce qui a trait à la langue française ou anglaise ou à ces deux langues, de porter atteinte aux droits, privilèges ou obligations ». Aux termes de l'art. 29, les dispositions de la *Charte* « ne portent pas atteinte aux droits ou privilèges garantis

TAB 10

T-2983-74

Union Gas Limited, Minister of Energy for Ontario and the Consumers' Gas Company (*Applicants*)

v.

TransCanada PipeLines Limited, the National Energy Board, Greater Winnipeg Gas Company, Gaz Metropolitain, Inc., Alberta Gas Trunk Line Company Limited, Pan-Alberta Gas Limited, Saskatchewan Power Corporation, Rio Algom Mines Limited, The Attorney General of Manitoba and The Attorney General of Quebec (*Respondents*)

Trial Division, Mahoney J.—Ottawa, August 19, 20 and 21, 1974.

Extraordinary remedies—Motion to quash interim rulings of Board—Certiorari not appropriate— National Energy Board Act, R.S.C. 1970, c. N-6, ss. 20, 44(a)-(d)—Federal Court Act, ss. 18, 28.

The applicants sought orders by way of *certiorari* to quash two rulings of the National Energy Board during the hearing of an application by the respondent TransCanada PipeLines Limited for a certificate under section 44 of the *National Energy Board Act*.

Held, dismissing the application, the Board's first ruling, determining the order in which it would receive evidence and permit cross-examination of witnesses, was obviously within its powers. As for the second ruling, limiting the scope of the Board's inquiry under section 44 of the *National Energy Board Act*, *certiorari* was not the appropriate remedy to deal with an interim determination such as the one in issue, however appropriate it might be to deal with the decision the Board is required to make. The Board had authority to determine in good faith to narrow the scope of its inquiry; it acted in good faith in making that determination; and *certiorari* was inappropriate in respect of such determination.

In re Anti-Dumping Act and in Danmor Shoe Company Ltd. [1974] 1 F.C. 22, applied. *Canadian National Railways v. Canada Steamship Lines, Limited* [1945] A.C. 204 and *Toronto Newspaper Guild v. Globe Printing Company* [1953] 2 S.C.R. 18, considered.

APPLICATION.

COUNSEL:

David W. Scott and *George Hunter* for applicant Union Gas Limited.
Robin Scott, Q.C., and *D. Rogers* for applicant Minister of Energy for Ontario.

T-2983-74

Union Gas Limited, le ministre de l'Énergie de l'Ontario et The Consumers' Gas Company (*Requérants*)

c.

TransCanada PipeLines Limited, l'Office national de l'énergie, Greater Winnipeg Gas Company, Gaz Métropolitain, Inc., Alberta Gas Trunk Line Company Limited, Pan-Alberta Gas Limited, Saskatchewan Power Corporation, Rio Algom Mines Limited, le procureur général du Manitoba et le procureur général du Québec (*Intimés*)

Division de première instance, le juge Mahoney—Ottawa, les 19, 20 et 21 août 1974.

Recours extraordinaires—Requête en annulation des décisions provisoires de l'Office—Bref de certiorari inadéquat— Loi sur l'Office national de l'énergie, S.R.C. 1970, c. N-6, art. 20, 44a) à d)—Loi sur la Cour fédérale, art. 18 et 28.

Les requérants cherchent à obtenir des ordonnances par voie de *certiorari* pour faire annuler deux décisions de l'Office national de l'énergie rendues au cours de l'audition d'une demande déposée par l'intimée, la TransCanada PipeLines Limited en vue d'obtenir un certificat prévu à l'article 44 de la *Loi sur l'Office national de l'énergie*.

Arrêt: la demande est rejetée; de toute évidence, la première décision de l'Office, visant à déterminer l'ordre dans lequel il entendrait les témoignages et autoriserait le contre-interrogatoire des témoins, relève de ses fonctions. Quant à la seconde décision, qui restreignait la portée de l'enquête de l'Office prévue à l'article 44 de la *Loi sur l'Office national de l'énergie*, le bref de *certiorari* n'est pas le recours approprié pour traiter une décision provisoire comme celle en cause, si applicable soit-il à la décision que l'Office doit rendre. L'Office avait le pouvoir de décider de bonne foi de restreindre la portée de son enquête; il a agi de bonne foi en rendant cette décision; le *certiorari* est inadéquat à l'égard d'une telle décision.

Arrêt appliqué: *In re la Loi antidumping et in re Danmor Shoe Company Ltd.* [1974] 1 C.F. 22. Arrêts examinés: *La Compagnie des chemins de fer nationaux du Canada c. Canada Steamship Lines, Limited* [1945] A.C. 204 et *Toronto Newspaper Guild c. Globe Printing Company* [1953] 2 R.C.S. 18.

DEMANDE.

AVOCATS:

David W. Scott et *George Hunter* pour la requérante, Union Gas Limited.
Robin Scott, c.r., et *D. Rogers* pour le requérant, le ministre de l'Énergie de l'Ontario.

R. A. Smith, Q.C., and *Jerry H. Farrell* for applicant Consumers' Gas Company.

L. H. Pilon for respondent TransCanada PipeLines Limited.

F. H. Lamar, Q.C., and *I. Blue* for respondent National Energy Board.

Charles Gonthier, Q.C., and *Michael Cuddihy* for respondent Gaz Metropolitain, Inc.

A. Lorne Campbell, Q.C., and *M. E. Rothstein* for respondent Greater Winnipeg Gas Company.

G. J. Gorman, Q.C., for respondents Alberta Gas Trunk Line Company Limited and Pan-Alberta Gas Ltd.

John Sopinka and *R. W. Cosman* for respondent Rio Algom Mines Limited.

T. J. Waller for respondent Saskatchewan Power Commission.

J. F. Sherwood for respondent Attorney General of Manitoba.

Robert Dulude, Q.C., and *Pierre R. Fortin* for respondent Attorney General of Quebec.

SOLICITORS.

Scott & Aylen, Ottawa, for applicant Union Gas Limited.

Legal Dept., Minister of Energy for Ontario and *Thompson, Rogers*, Toronto, for applicant Minister of Energy for Ontario.

Smith, Lyons and Associates, Toronto, for applicant The Consumers' Gas Company.

Legal Dept., TransCanada PipeLines Limited, Toronto, for respondent TransCanada Pipelines Limited.

Legal Dept., National Energy Board, for respondent National Energy Board.

Laing, Weldon and Associates, Montreal, for respondent Gaz Metropolitain, Inc.

Aikins, MacAulay and Thorvaldson, Winnipeg, for respondent Greater Winnipeg Gas Company.

R. A. Smith, c.r., et *Jerry H. Farrell* pour la requérante, The Consumers' Gas Company.

L. H. Pilon pour l'intimée, TransCanada PipeLines Limited.

F. H. Lamar, c.r., et *I. Blue* pour l'intimé, l'Office national de l'énergie.

Charles Gonthier, c.r., et *Michael Cuddihy* pour l'intimée, Gaz Métropolitain, Inc.

A. Lorne Campbell, c.r., et *M. E. Rothstein* pour l'intimée, Greater Winnipeg Gas Company.

G. J. Gorman, c.r., pour les intimées, Alberta Gas Trunk Line Company Limited et Pan-Alberta Gas Ltd.

John Sopinka et *R. W. Cosman* pour l'intimée, Rio Algom Mines Limited.

T. J. Waller pour l'intimée, Saskatchewan Power Commission.

J. F. Sherwood pour l'intimé, le procureur général du Manitoba.

Robert Dulude, c.r., et *Pierre R. Fortin* pour l'intimé, le procureur général du Québec.

PROCUREURS:

Scott & Aylen, Ottawa, pour la requérante, Union Gas Limited.

Contentieux, le ministre de l'Énergie de l'Ontario et *Thompson, Rogers*, Toronto, pour le requérant, le ministre de l'Énergie de l'Ontario.

Smith, Lyons et Associés, Toronto, pour la requérante, The Consumers' Gas Company.

Contentieux, TransCanada PipeLines Limited, Toronto, pour l'intimée, TransCanada PipeLines Limited.

Contentieux, Office national de l'énergie, pour l'intimé, l'Office national de l'énergie.

Laing, Weldon et Associés, Montréal, pour l'intimée, Gaz Métropolitain, Inc.

Aikins, MacAulay et Thorvaldson, Winnipeg, pour l'intimée, Greater Winnipeg Gas Company.

Honeywell, Wotherspoon, Ottawa, for respondents Alberta Gas Trunk Line Company Limited and Pan-Alberta Gas Ltd.

Fasken and Calvin, Toronto, for respondent Rio Algom Mines Limited.

Griffin, Beke and Associates, Regina, for respondent Saskatchewan Power Commission.

Legal Dept., Attorney General of Manitoba, Winnipeg, for respondent Attorney General of Manitoba.

Geoffrion & Prud'homme, Montreal, and *Dept. of Natural Resources for Quebec* for respondent Attorney General of Quebec.

Honeywell, Wotherspoon, Ottawa, pour les intimées, Alberta Gas Trunk Line Company Limited et Pan-Alberta Gas Ltd.

Fasken & Calvin, Toronto, pour l'intimée, Rio Algom Mines Limited.

Griffin, Beke et Associés, Régina, pour l'intimée, Saskatchewan Power Commission.

Contentieux, le procureur général du Manitoba, Winnipeg, pour l'intimé, le procureur général du Manitoba.

Geoffrion & Prud'homme, Montréal et *le ministère des Richesses naturelles du Québec* pour l'intimé, le procureur général du Québec.

The following were served with the originating notice of motion, but were not named as parties and were not represented at the hearing:

Consolidated Natural Gas Limited and

Consolidated Pipelines Company.

Northern and Central Gas Corporation, Limited.

Industrial Gas Users Association.

Les parties suivantes ont reçu signification de la requête introductive d'instance, mais n'ont pas été désignées comme parties et elles n'étaient pas représentées à l'audience:

Consolidated Natural Gas Limited et

Consolidated Pipelines Company.

Northern and Central Gas Corporation Limited.

Industrial Gas Users Association.

The following are the reasons for judgment delivered in English by

MAHONEY J.: This application for orders by way of *certiorari* arises as a result of two rulings made by the National Energy Board (hereinafter called "the Board") during the course of its hearing of an application by TransCanada PipeLines Limited (hereinafter called "TCPL") for a certificate under section 44 of the *National*

Ce qui suit est la version française des motifs du jugement prononcés par

LE JUGE MAHONEY: La présente demande visant l'obtention d'ordonnances par voie de bref de *certiorari* résulte de deux décisions rendues par l'Office national de l'énergie (ci-après appelé «l'Office») au cours de l'audition d'une demande déposée par la TransCanada PipeLines Limited (ci-après appelée «TCPL») en vue d'ob-

Energy Board Act[1] in respect of proposed additions to its system.

At the beginning of the hearing on August 7, 1974, the Board directed that the evidence-in-chief of the applicant, TCPL, and the various interveners before it and the cross-examination of witness be conducted in a certain order. This direction, which I shall, for convenience, refer to as "the August 7 ruling" had the effect of permitting proponents of the application to cross-examine the witnesses of other proponents and, because of the order established, permitting that cross-examination, to take place after the witnesses had been cross-examined by those in opposition. Objection was taken to the ruling and argument was heard following which the Board ruled:

Mr. Rogers, the Board sees no reason to chance [*sic*] the sequence of appearances. The sequence was chosen by the Board for the convenience of the Board and bearing in mind our impression at the time as to when the evidence would all be in. As to the cross-examination of witnesses, we feel that that should proceed. You, of course, are free to object, Mr. McOuat is free to object, and all counsel are free to object to any question which you think is self-serving or detrimen-

[1] R.S.C. 1970, c. N-6.

44. The Board may, subject to the approval of the Governor in Council, issue a certificate in respect of a pipeline or an international power line if the Board is satisfied that the line is and will be required by the present and future public convenience and necessity, and, in considering an application for a certificate, the Board shall take into account all such matters as to it appear to be relevant, and without limiting the generality of the foregoing, the Board may have regard to the following:

(*a*) the availability of oil or gas to the pipeline, or power to the international power line, as the case may be;

(*b*) the existence of markets, actual or potential;

(*c*) the economic feasibility of the pipeline or international power line;

(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the line and the extent to which Canadians will have an opportunity of participating in the financing, engineering and construction of the line; and

(*e*) any public interest that in the Board's opinion may be affected by the granting or the refusing of the application.

tenir un certificat visé à l'article 44 de la *Loi sur l'Office national de l'énergie*[1] portant sur des additions projetées à son réseau.

Au début de l'audience du 7 août 1974, l'Office ordonna que les dépositions principales des témoins de la requérante, la TCPL, et des différents intervenants qui ont comparu devant lui ainsi que leur contre-interrogatoire se déroulent suivant un certain ordre. Cette directive, que j'appellerai à toutes fins utiles «la décision du 7 août», avait pour effet de permettre aux auteurs de la demande de contre-interroger les témoins des co-auteurs de la demande et, en raison de l'ordre ainsi établi, de permettre que ce contre-interrogatoire ait lieu après le contre-interrogatoire des témoins par les parties qui s'opposent à la demande. On s'est objecté à la décision et l'Office a entendu l'argumentation, après quoi il a décidé:

[TRADUCTION] Me Rogers, l'Office ne voit aucune raison de modifier l'ordre des comparutions. L'Office a choisi cet ordre parce qu'il lui est commode, en gardant à l'esprit l'impression que nous avions alors quant au moment où toute la preuve serait rassemblée. Quant au contre-interrogatoire des témoins, nous croyons qu'il faut y procéder. Vous êtes évidemment libre de vous objecter, Me McOuat est libre de s'objecter et tous les avocats sont libres de s'objecter à

[1] S.R.C. 1970, c. N-6.

44. Sous réserve de l'approbation du gouverneur en conseil, l'Office peut délivrer un certificat à l'égard d'une pipeline ou d'une ligne internationale de transmission de force motrice si l'Office est convaincu que la commodité et la nécessité publiques requièrent présentement et requerront à l'avenir la canalisation ou la ligne internationale de transmission et, en étudiant une demande de certificat, celui-ci doit tenir compte de toutes les données qui lui semblent pertinentes, et, sans limiter la généralité de ce qui précède, peut considérer ce qui suit:

a) l'accessibilité du pétrole ou du gaz au pipe-line, ou de la force motrice à la ligne internationale de transmission de force motrice, selon le cas;

b) l'existence de marchés, effectifs ou possibles;

c) la praticabilité économique du pipe-line ou de la ligne internationale de transmission de force motrice;

d) la responsabilité et la structure financières de l'auteur de la demande, les méthodes de financement de la canalisation ou de la ligne internationale de transmission, ainsi que la mesure dans laquelle les Canadiens auront l'occasion de participer au financement, à l'organisation et à la construction du pipe-line ou de la ligne internationale de transmission de force motrice; et

e) tout intérêt public qui, de l'avis de l'Office, peut être atteint par l'octroi ou le rejet de la demande.

tal to your position.[2]

The order sought in respect of the August 7 ruling, in the alternative to an order quashing the proceedings to date, was an order quashing that ruling and directing the Board to treat certain interveners, namely Gaz Metropolitain Inc., Greater Winnipeg Gas Company and Pan-Alberta Gas Limited as co-applicants with TCPL to the extent necessary to deny to those interveners the right to cross-examine TCPL's witnesses and those of each other.

The parties, other than TCPL, were before the Board as a result of determinations made pursuant to section 45 of the Act.[3] The right of the Board to determine the order in which it will receive evidence and permit cross-examination of witnesses, regardless of how anomalous the result may be when the proceedings are viewed as adversary proceedings, seems so clear to me that I dismissed this aspect of the application from the bench at the conclusion of the hearing. I mention it briefly now only with a view to recording my views.

The other ruling, made August 9 (hereinafter referred to as "the August 9 ruling") was attacked with arguments of considerably more substance. Its effect is said by the applicants herein to have deprived them of the right to cross-examine a witness and to introduce evidence-in-chief on a material subject with which TCPL had been permitted to deal in its evidence-in-chief. A general background is essential to an appreciation of their position.

The application before the Board embraced the proposed construction, before the coming winter, of 15.5 miles of loopline in Saskatchewan and Manitoba and 43 miles of loopline in

[2] Transcript, p. 88. Mr. Rogers was counsel for the Minister of Energy for Ontario; Mr. McOuat was counsel for Union Gas Limited.

[3] **45.** Upon an application for a certificate the Board shall consider the objections of any interested person, and the decision of the Board as to whether a person is or is not an interested person for the purpose of this section is conclusive.

toute question que vous croyez avantageuse ou préjudiciable à votre point de vue.[2]

L'ordonnance demandée à l'égard de la décision du 7 août, subsidiairement à une ordonnance portant annulation des procédures intentées jusqu'à maintenant, visait à annuler cette décision et à enjoindre l'Office de considérer certains intervenants, savoir la Gaz Métropolitain Inc., la Greater Winnipeg Gas Company et la Pan-Alberta Gas Limited, comme co-requérantes au même titre que la TCPL, dans la mesure où cela permettait de refuser à ces intervenants le droit de contre-interroger les témoins de la TCPL et les témoins cités par l'une ou l'autre d'entre elles.

Les parties, autres que la TCPL, doivent leur présence devant l'Office à des décisions prises en application de l'article 45 de la Loi.[3] Le droit de l'Office de déterminer l'ordre dans lequel il entendra les témoignages et permettra le contre-interrogatoire des témoins, si exceptionnel que puisse en être le résultat lorsque les procédures sont considérées comme des procédures contentieuses, me semble tellement manifeste que j'ai rejeté cet aspect de la demande immédiatement à la fin de l'audience. Je le mentionne brièvement ici uniquement pour consigner mes opinions.

On a avancé contre l'autre décision, rendue le 9 août (ci-après appelée «la décision du 9 août»), des arguments beaucoup mieux fondés. Les requérants en l'espèce affirment qu'elle a pour effet de les priver du droit de contre-interroger les témoins et de présenter des témoins sur une question importante dont la TCPL a été autorisée de traiter lors des dépositions de ses témoins. Il est essentiel de brosser un tableau général pour juger de leur point de vue.

La demande déposée dont l'Office était saisi comprenait le projet de construction, avant la venue de l'hiver, d'une ligne d'évitement de 15.5 milles en Saskatchewan et au Manitoba et d'une

[2] Transcription, page 88. Me Rogers représentait le ministre de l'Énergie de l'Ontario; Me McOuat représentait l'Union Gas Limited.

[3] **45.** Lors d'une demande de certificat, l'Office doit étudier les objections de toute personne intéressée, et la décision de l'Office sur la question de savoir si une personne est intéressée ou non, pour les objets du présent article, est péremptoire.

Ontario between Toronto and Montreal to provide transportation for gas purchased by Greater Winnipeg Gas Company and Gaz Metropolitain, Inc., in Alberta for delivery in their respective market areas, namely Winnipeg and Montreal and their environs. The application also embraced an additional 7.8 miles of loop-line in Ontario, apparently having nothing in particular to do with Gaz Metropolitain's requirements, being essentially to secure alternate facilities in case of main line interruption. The application was unique in so far as TCPL was concerned inasmuch as it was the first time that it proposed to construct facilities to meet the transportation requirements of others. Heretofore, TCPL has purchased gas in Alberta, taken delivery at the Alberta border, transported it to the market areas of its various customers and sold it to them there. For the first time, it proposed to act only as a carrier. As one result, TCPL, in its application to the Board, did not itself propound present and future public convenience and necessity but stated:

13. Evidence that the additional pipeline facilities are and will be required by the present and future public convenience and necessity will be submitted by Gaz Metropolitain, inc. and Greater Winnipeg Gas Company, respectively.

The evidence as to future gas supply included in TCPL's application would appear to have been less than fully supportive of the proposition that the new facilities would meet the test of future public necessity if the "future" began anything more than a year or two hence. The witness put forward by TCPL to testify on this aspect of their material was subjected to vigorous cross-examination by counsel for Pan-Alberta Gas, Consumers' Gas, Union Gas, the Minister of Energy for Ontario, Gaz Metropolitain and, finally, the Board. Pan-Alberta is the vendor to Gaz Metropolitain of the gas proposed to be transported and it is, I think, fair to say that their cross-examination was intended to attack the validity of TCPL's supply projection in that they contend it is understated. As TCPL customers without other suppliers, Union and Consumers', both Ontario distributors, support-

autre de 43 milles en Ontario, entre Toronto et Montréal, afin d'assurer le transport de gaz acheté en Alberta par la Greater Winnipeg Gas Company et la Gaz Métropolitain, Inc., et destiné à être livré sur leurs territoires de vente respectifs, savoir Winnipeg, Montréal et leurs environs. La demande comprenait également une ligne d'évitement additionnelle de 7.8 milles en Ontario, n'ayant, semble-t-il, aucun rapport avec les exigences de la Gaz Métropolitain; elle visait essentiellement à fournir des installations subsidiaires au cas d'interruption de la ligne principale. Il s'agissait, quant à la TCPL, d'une demande sans précédent dans la mesure où c'était la première fois qu'elle projetait de construire des installations dans le but de satisfaire aux exigences de transport d'autres compagnies. Jusqu'à maintenant, la TCPL achetait du gaz en Alberta, en prenait livraison aux frontières de l'Alberta, le transportait sur les territoires de vente de ses différents clients et là, le leur vendait. Pour la première fois, elle projetait d'agir uniquement à titre de transporteur. Cette demande déposée devant l'Office a eu pour conséquence que la TCPL n'a pas évoqué elle-même la commodité et la nécessité publiques présentes et futures mais a déclaré:

[TRADUCTION] 13. La Gaz Métropolitain Inc. et la Greater Winnipeg Gas Company, respectivement, prouveront que la commodité et la nécessité publiques requièrent présentement et requerront à l'avenir des installations supplémentaires de pipe-lines.

La preuve quant à l'approvisionnement en gaz pour l'avenir que comportait la demande de la TCPL n'appuierait que très peu, semble-t-il, la proposition selon laquelle les nouvelles installations rencontreraient le critère de la nécessité publique pour l'avenir, si «l'avenir» commençait dans plus d'une année ou deux. La personne citée par la TCPL pour témoigner sur cet aspect de leur preuve fit l'objet d'un contre-interrogatoire vigoureux de la part des avocats de la Pan-Alberta Gas, de la Consumers' Gas, de l'Union Gas, du ministre de l'Énergie de l'Ontario, de la Gaz Métropolitain et, enfin, de l'Office. La Pan-Alberta vend à la Gaz Métropolitain le gaz dont on projette le transport et je pense qu'il est juste d'affirmer que leur contre-interrogatoire avait pour but d'attaquer la validité du projet d'approvisionnement de la TCPL, en ce sens qu'ils prétendent qu'il ne correspond

ed by the Ontario Minister, cross-examined from a different point of view. The questioning and the evidence-in-chief dealt not only with TCPL's committed and probable supply but with the entire supply available from Alberta for British Columbia as well as points east.

On August 9 a panel of witnesses was called by Gaz Metropolitain. Included on the panel was the manager of gas supply for Pan-Alberta Gas who had, coincidentally, previously occupied a senior position with Westcoast Transmission Company Limited, TCPL's counterpart in the movement of gas west of Alberta. His evidence-in-chief was limited to the gas reserves committed to Gaz Metropolitain under the contract between the two companies. On cross-examination counsel for Union Gas entered upon a line of questioning relative to new facilities required in Alberta to service the contract and, after objection, the Board ruled:

THE CHAIRMAN: Mr. McOuat, the Board is of the view that what it is charged with finding here is the public interest and convenience of the facilities applied for, which are facilities to be constructed by TransCanada PipeLines, and we find that the line of questioning upon which you have begun to embark was not of sufficient relevance to warrant us an excursion in there, and did not contribute materially to the finding the Board must make in respect to public convenience on TransCanada's facilities.

MR. MCOUAT: Thank you.[4]

Cross-examination continued and, at page 407 of the transcript, referring to a matter raised by counsel for Pan-Alberta in argument on a motion to adjourn the proceeding presented August 7 on behalf of the Minister of Energy for Ontario, asked whether the witness was aware of "any specific shortfall in British Columbia reserve ability to meet British Columbia markets". Counsel for Pan-Alberta objected immediately. Argument was heard during which it became clear that the scope of

[4] Transcript p. 402.

pas à la réalité. A titre de clientes de la TCPL, sans autres fournisseurs, l'Union et la Consumers', deux distributrices ontariennes, bénéficiant de l'appui du Ministre ontarien, ont mené le contre-interrogatoire d'un point de vue différent. L'interrogatoire et la déposition principale concernaient non seulement l'approvisionnement garanti et possible provenant de la TCPL, mais aussi l'ensemble de l'approvisionnement disponible en Alberta à l'intention de la Colombie-Britannique et des autres territoires situés à l'est.

Le 9 août, la Gaz Métropolitain a cité un groupe de témoins. Faisait partie du groupe, le directeur du service d'approvisionnement en gaz de la Pan-Alberta Gas qui, par coïncidence, avait antérieurement occupé un poste de cadre à la Westcoast Transmission Company Limited, contrepartie de la TCPL dans le transport du gaz effectué à l'ouest de l'Alberta. Sa déposition principale s'est limitée aux réserves de gaz promises à la Gaz Métropolitain en vertu du contrat intervenu entre les deux compagnies. En contre-interrogatoire, l'avocat de l'Union Gas a commencé à poser des questions portant sur les nouvelles installations en Alberta qui étaient nécessaires à l'exécution du contrat et, après objection, l'Office a décidé:

[TRADUCTION] LE PRÉSIDENT: Me McOuat, l'Office est d'avis qu'il a pour mandat en l'espèce de trouver quels sont l'intérêt public et la commodité des installations demandées que la TransCanada PipeLines doit construire; nous concluons que l'interrogatoire dans lequel vous vous engagez n'est pas suffisamment pertinent pour nous autoriser à le poursuivre et n'apporte rien à la décision que l'Office doit rendre à l'égard de la commodité publique résultant des installations de la TransCanada.

Me MCOUAT: Merci.[4]

Le contre-interrogatoire s'est poursuivi et, à la page 407 de la transcription, se référant à une question soulevée par l'avocat de la Pan-Alberta au cours du débat sur une requête d'ajournement de la procédure présentée le 7 août au nom du ministre ontarien de l'Énergie, il demanda si le témoin était au courant «d'une insuffisance particulière des réserves de la Colombie-Britannique destinées à satisfaire la demande dans cette province». L'avocat de la Pan-Alberta s'objecta immédiatement. On a

[4] Transcription, page 402.

the hearing and not just the relevance or materiality of the particular question was in the forefront of the minds of those participating in the argument. For the proponents, counsel for Gaz Metropolitain said, in part:

> . . . this application is an application for a certain very limited facility to transport a quantity of gas . . . that is de minimis in relation to the overall supply, and the only real issue before this Board is whether there is a public interest and need to transport this available contracted supply to Montreal at this time. That is the issue. To try and transform this hearing into a hearing on overall Canadian supply and requirements, or overall need of transmission facilities in Canada I think is trying to attribute to it some importance that it just does not have . . . .[5]

For the opponents, counsel for Union Gas replied, in part:

> . . . what Gaz Metropolitain is asking for here, . . . is to approve expansion to enable them to buy a gas supply which may well be required to maintain deliverability on their existing contracts as well as existing contracts of others . . . . That issue then goes to the capability of Alberta supply to meet all Canadian markets, including TransCanada's existing contracts and including any proposed extension or expansion . . . . If you are going to go to the capability of that Alberta supply, the issue of either [sic] further Canadian demands now being imposed on that supply is entirely relevant.[6]

Counsel for the Board, after references to particular sections of the Act, advised:

> . . . the pipeline we are talking about is the particular facilities being applied for by TransCanada and the only thing that concerns this Board is the supply available to that pipeline, the markets to be served by that pipeline and the economic justification for that pipeline. So I would submit that getting into the question of gas supply is not relevant.

MR. EDGE: On a point of clarification Mr. Blue, what does your statement, or what relation does that have to the evidence put in by Mr. Larson?

MR. BLUE: I was not asked my opinion in reference to Mr. Larson's evidence, Mr. Chairman.

MR. GIBBS: I think also, Mr. Chairman, that Mr. Larson's evidence went in because nobody objected. When those questions were asked we sat quietly because it seemed it

[5] Transcript p. 409.
[6] Transcript p. 410.

entendu l'argumentation et il devint alors manifeste que ceux qui y prenaient part s'intéressaient principalement à la portée de l'audience et non seulement à la pertinence ou à l'importance de ladite question. Au nom des auteurs de la demande, l'avocat de la Gaz Métropolitain dit notamment:

> [TRADUCTION] . . . cette demande vise certains moyens très limités de transport d'une quantité de gaz . . . qui est bien minime par rapport à l'ensemble des approvisionnements; la seule véritable question soumise à cet Office consiste à déterminer si le transport à Montréal de cet approvisionnement disponible faisant l'objet d'un engagement répond présentement à un intérêt public et à une nécessité. Voilà la question. Transformer cette audience de façon à la faire porter sur l'ensemble des approvisionnements et des besoins canadiens ou sur l'ensemble des besoins d'installations de transmission au Canada est, je pense, tenter de lui attribuer une importance qu'elle n'a tout simplement pas . . . .[5]

Au nom des opposants, l'avocat de l'Union Gas répondit notamment:

> [TRADUCTION] . . . ce que réclame la Gaz Métropolitain en l'espèce, . . . est l'approbation de plans d'expansion qui lui permette d'acheter un approvisionnement en gaz pouvant fort bien s'avérer nécessaire au maintien de leurs possibilités de livraison aux termes de leurs contrats actuels de même que des contrats actuels appartenant à d'autres . . . . Cette question porte alors sur la capacité des approvisionnements albertains de satisfaire tous les marchés canadiens, y compris les contrats actuels de la TransCanada et y compris tout projet d'extension ou d'expansion . . . . Si vous devez envisager la capacité de cet approvisionnement albertain, le problème des demandes canadiennes supplémentaires que subit maintenant cet approvisionnement est tout à fait pertinent.[6]

Après avoir cité certains articles de la Loi, l'avocat de l'Office a déclaré:

> [TRADUCTION] . . . le pipe-line dont nous parlons est précisément l'installation faisant l'objet de la demande de la TransCanada et la seule préoccupation de cet office porte sur l'approvisionnement disponible pour ce pipe-line, les marchés qu'il doit approvisionner et sa justification économique. Je soumets donc qu'il n'est pas pertinent de discuter cette question d'approvisionnement en gaz.

M. EDGE: A titre de précision, Me Blue, sur quoi votre déclaration porte-t-elle ou quel rapport a-t-elle avec le témoignage de M. Larson?

Me BLUE: On ne m'a pas demandé mon opinion sur le témoignage de M. Larson, M. le Président.

Me GIBBS: Je pense également, M. le Président, que M. Larson a témoigné parce que personne ne s'est objecté. Lorsqu'on a posé ces questions, nous sommes demeurés

[5] Transcription, page 409.
[6] Transcription, p. 410.

had no relevance . . . .[7]

THE CHAIRMAN: . . . we will hear any remarks that others wish to make on this point, as we are engaged in discussion about the scope of the hearing, ...[8]

Following conclusion of argument on the point, the hearing was adjourned for noon and, when it resumed the Chairman read the following statement:

Gentlemen, the Board is prepared to rule on Mr. Gibbs' objection on the relevancy of the question of Mr. McOuat put to the witness concerning the witness' knowledge of Westcoast Transmission's gas supply.

In so doing the Board also wishes to deal with the arguments as to the relevancy of the effects of the facilities being applied for on the availability of Alberta natural gas to TransCanada and TransCanada's existing customers in the future.

Before the Board can issue a certificate, it must find that the applied for facilities are and will be required by the present and future public convenience and necessity. In so doing the Board is expressly required to take into consideration all matters which to it appear to be relevant and in addition it may take into account the matters listed in paragraphs (a) to (d) of Section 44 of the Act.

The question of shortfalls of Westcoast Transmission's supply and its implications on the availability of Alberta gas to TransCanada's customers are not matters which the Board considers relevant in this hearing.

Further, the Board does not, in the circumstances of this application and in view of the amounts of gas involved, attach great weight to the assertion that TransCanada's supply situation may or may not be adequate to serve customers to whom it sells gas.

This is so because in terms of TransCanada's deliverability problem the total gas to be sold to Gaz Metro and Greater Winnipeg are de minimus and, therefore, the public convenience and necessity does not warrant going into these questions here. The Board feels that the time and trouble it would take to explore these questions in all the ramifications outweighs the probative value such evidence would have to the determination it must make in this application, and the objection to Mr. McOuat's question is therefore allowed.

[7] Transcript pp. 411-2. Mr. Edge is a member of the Board, Mr. Blue its counsel and Mr. Gibbs counsel for Pan-Alberta Gas. Mr. Larson was the TCPL witness previously referred to.

[8] Transcript p. 414.

silencieux parce que son témoignage ne semblait pas pertinent . . . .[7]

LE PRÉSIDENT: . . . nous entendrons toutes remarques que d'autres désirent faire sur ce point, puisque nous sommes engagés dans une discussion sur la portée de l'audience, ...[8]

Après discussion sur ce sujet, on a ajourné l'audience à midi et, à la reprise, le Président a lu la déclaration suivante:

[TRADUCTION] Messieurs, l'Office est disposé à se prononcer sur l'objection de Me Gibbs portant sur la pertinence de la question posée par Me McOuat au témoin au sujet de la connaissance de ce dernier de l'approvisionnement en gaz de la Westcoast Transmission.

Ce faisant, l'Office désire également examiner les arguments portant sur la pertinence des conséquences des installations demandées sur la disponibilité du gaz naturel albertain pour la TransCanada et ses clients présents et futurs.

Avant de pouvoir délivrer un certificat, l'Office doit arriver à la conclusion que la commodité et la nécessité publiques requièrent présentement et requerront à l'avenir les installations dont on fait la demande. Ce faisant, l'Office est expressément tenu de prendre en considération toutes les questions qui lui semblent pertinentes et il peut en outre tenir compte des questions énumérées aux alinéas a) à d) de l'article 44 de la Loi.

La question de l'insuffisance de l'approvisionnement de la Westcoast Transmission et ses implications sur la disponibilité du gaz albertain pour les clients de la TransCanada ne sont pas des questions que l'Office juge pertinentes en l'espèce.

En outre, compte tenu des circonstances de cette demande et des quantités de gaz impliquées, l'Office n'attache pas une grande importance à l'affirmation selon laquelle l'approvisionnement de la TransCanada peut ou non suffir à approvisionner les clients à qui elle vend du gaz.

Il en est ainsi parce que considérant le problème de la possibilité de livraison de la TransCanada, l'ensemble du gaz destiné à être vendu à la Gaz Métro et à la Greater Winnipeg est minime et, par conséquent, la commodité et la nécessité publiques ne justifient pas l'examen de ces questions en l'espèce. L'Office estime que le temps requis pour fouiller ces questions dans toutes leurs ramifications et les inconvénients que cela impliquerait dépassent la valeur probante que ce témoignage aurait sur la décision qu'il doit rendre dans cette demande, et l'objection à la question de Me McOuat est donc maintenue.

[7] Transcription, pp. 411 et 412. Me Edge est un membre de l'Office, Me Blue représente ce dernier et Me Gibbs représente la Pan-Alberta Gas. M. Larson était le témoin de la TCPL susmentionné.

[8] Transcription, p. 414.

Of course, these witnesses may be examined on all aspects of Pan Alberta's ability to meet its contractual commitments to Gaz Metro. Thank you.[9]

In addition to ruling the particular question regarding Westcoast Transmission out of order, the Board did, at this point limit the scope of its inquiry under section 44 of the Act in respect of the application before it to the particular facilities proposed to be built, to the availability of gas for those facilities, the existence of markets for that gas and the economic viability of those facilities. It declined to receive further evidence or to permit cross-examination of witnesses on the broader subjects of national gas supply or of TCPL's own supply for its present customers. That is what was understood by the parties before it to be the effect of the ruling and I am satisfied that is what was intended notwithstanding later protestations to the contrary.

In respect of the August 9th ruling, the applicants herein seek an order by way of *certiorari* quashing the proceedings to date or, in the alternative, quashing the ruling and directing the Board to receive evidence relating to the effect of the proposal on future gas supply to its existing customers.

The issue in this case is, except for some of the parties, in no way similar to that considered by my brother Cattanach in *The Attorney General of Manitoba v. The National Energy Board.*[10] In that matter the issue on which the applicants were successful was whether, in conducting the hearing in the manner it did, the Board had conducted the hearing it was required to conduct by section 20 of the Act. That is not alleged here.

It is desirable here to repeat the essential portions of section 44 of the Act

44. The Board may . . . issue a certificate in respect of a pipeline . . . if the Board is satisfied that the line is and will be required by the present and future public convenience and necessity, and, in considering an application for a cer-

[9] Transcript pp. 423-4.

[10] An as yet unreported decision dated August 9, 1974. Court No. T-2669-74.

De toute évidence, ces témoins peuvent être interrogés sur tous les aspects afférents à la possibilité qu'a la Pan Alberta de respecter ses engagements contractuels envers la Gaz Métro. Merci.[9]

En plus de déclarer irrecevable la question particulière relative à la Westcoast Transmission, l'Office a, à ce stade, restreint la portée de son enquête en vertu de l'article 44 de la Loi portant sur la demande dont elle était saisie, aux installations dont on projetait la construction, à la disponibilité du gaz pour ces installations, à l'existence de marchés pour ce gaz et à la viabilité économique de ces installations. Il a refusé d'entendre d'autres témoignages ou d'autoriser le contre-interrogatoire de témoins sur les questions plus vastes de l'approvisionnement en gaz à l'échelle nationale ou l'approvisionnement de la TCPL pour ses clients actuels. C'est la portée que les parties ont attribuée à cette décision et je suis convaincu que c'est ce qu'elles avaient à l'esprit malgré les protestations subséquentes au contraire.

Quant à la décision du 9 août, les requérants en l'espèce demandent une ordonnance par voie de *certiorari* annulant les procédures intentées à date ou, subsidiairement, annulant la décision et enjoignant l'Office d'entendre les témoignages portant sur les conséquences du projet sur l'approvisionnement futur en gaz de ses clients actuels.

Sauf pour certaines parties, le problème en l'espèce ne ressemble aucunement à celui que mon collègue le juge Cattanach a étudié dans l'arrêt: *Le procureur général du Manitoba c. L'Office national de l'énergie.*[10] Dans cette affaire, le point litigieux sur lequel les requérants ont eu gain de cause, consistait à déterminer si l'Office, en dirigeant l'audience comme il l'a fait, s'est conformé à l'article 20 de la Loi. Cela n'est pas allégué en l'espèce.

Il convient de reprendre ici les parties essentielles de l'article 44 de la Loi:

44. . . . l'Office peut délivrer un certificat à l'égard d'un pipe-line . . . si l'Office est convaincu que la commodité et la nécessité publiques requièrent présentement et requerront à l'avenir la canalisation ou la ligne internationale de trans-

[9] Transcription, pp. 423 et 424.

[10] Décision non encore publiée, rendue le 9 août 1974. N° du greffe: T-2669-74.

tificate, the Board shall take into account all such matters as to it appear to be relevant, and without limiting the generality of the foregoing, the Board may have regard to . . . .

There follow the five paragraphs (*a*) to (*e*) that are set out in footnote 1 hereto. The emphasis is mine.

In *Canadian National Railways v. Canada Steamship Lines, Limited*[11] the Privy Council considered a provision of *The Transport Act*, 1938[12] authorizing The Board of Transport Commissioners for Canada to entertain applications to approve and to continue or withdraw its approval of agreed charges and to fix charges in certain circumstances.

35. (13) On any application under this section, the Board shall have regard to all considerations which appear to it to be relevant and, in particular, to the effect which the making of the agreed charge or the fixing of a charge is likely to have, or has had, on,—

(*a*) the net revenue of the carrier; and

(*b*) the business of any shipper . . . .

The emphasis, again, is mine. In dealing with the section their Lordships held, at page 211:

It would be difficult to conceive a wider discretion than is conferred on the board as to the considerations to which it is to have regard . . . Not only is it not precluded negatively from having regard to any considerations, but it is enjoined positively to have regard to every consideration which in its opinion is relevant. So long as that discretion is exercised in good faith the decision of the board as to what considerations are relevant would appear to be unchallengeable.

I cannot say, on the material before me, that the Board's decision to limit the scope of its inquiry during the course of the hearing was made in bad faith. It is a matter of record that, commencing September 3, the Board will hold hearings on the overall gas supply of Canada. It also appears that the gas and the facilities encompassed in the present application involve in the order of one per cent of TCPL's volume and of the value of its system. That is not to say that in changing the scope in mid-stream, the Board is not, in a practical sense, exposing itself

[11] [1945] A.C. 204.

[12] 2 Geo. VI, c. 53.

mission et, en étudiant une demande de certificat, celui-ci doit tenir compte de toutes les données qui lui semblent pertinentes, et, sans limiter la généralité de ce qui précède, peut considérer . . . .

Y font suite les alinéas *a*) à *e*) qui sont cités au renvoi des présents motifs. C'est moi qui ai souligné.

Dans l'arrêt *La Compagnie des chemins de fer nationaux du Canada c. Canada Steamship Lines, Limited*[11], le Conseil Privé a examiné une disposition de la *Loi sur les transports* de 1938[12] qui autorisait la Commission des transports du Canada à entendre des demandes visant à faire approuver, à proroger ou retirer son approbation de taxes convenues et de fixer des taxes dans certains cas.

35. (13) Lorsqu'une demande est formulée sous le régime du présent article, la Commission doit tenir compte de toutes les considérations qui lui paraissent pertinentes et, en particulier, de l'effet que l'établissement de la taxe convenue ou la fixation d'une taxe peut vraisemblablement avoir ou a eu sur

a) Le revenu net du voiturier, et

b) Les affaires d'un expéditeur . . . .

C'est moi, à nouveau, qui ai souligné. En examinant l'article, leurs Seigneuries ont déclaré à la page 211:

[TRADUCTION] Il serait difficile de concevoir une plus grande discrétion que celle qui est conférée à la Commission sur les considérations dont elle doit tenir compte . . . Non seulement n'est-elle pas empêchée, du point de vue négatif, de tenir compte de toutes considérations, mais on l'enjoint, du point de vue positif, de tenir compte de chacune des considérations qu'elle juge pertinente. Pour autant que cette discrétion est exercée de bonne foi, la décision de la Commission sur la pertinence des considérations semblerait être inattaquable.

Je ne peux pas dire, d'après la preuve qui m'est soumise, que l'Office était de mauvaise foi en décidant, en cours d'audience, de restreindre la portée de son enquête. Il est officiel qu'à partir du 3 septembre, l'Office tiendra des audiences portant sur l'ensemble des approvisionnements en gaz au Canada. Il appert également que le gaz et les installations qui font l'objet de la présente demande affectent un pour cent du volume de la TCPL et de la valeur de son réseau. Cela ne signifie pas qu'en modifiant la portée de cette audience durant son cours,

[11] [1945] A.C. 204.

[12] 2 George VI, c. 53.

to review by appropriate proceedings in a superior court.

The fact that the ruling sought to be quashed is not the decision which the Board is authorized by section 44 to make but rather a ruling as to what it would consider in arriving at its decision under section 44 is crucial. No precedent for the granting of an order in the nature of *certiorari* in respect of such a ruling was cited to me. There are, of course, numerous instances, such as the *Globe Printing* case[13], where a ruling made during the course of a hearing has been the basis for the quashing of the ultimate decision by *certiorari*.

In view of considerations of time of which all parties are aware, I do not intend to expand on this matter on this occasion; however, I am of the view that the opinion expressed by the Chief Justice in the penultimate and antepenultimate paragraphs of the decision of the Federal Court of Appeal in the recent *Danmor Shoe* case[14], with appropriate changes, is as relevant to an application for a writ of *certiorari* under section 18 of the *Federal Court Act*[15] as to a section 28 application. *Certiorari* is not the appropriate remedy to deal with an interim determination such as the one in issue however appropriate it might be to deal with the final decision the Board is required to make under section 44.

Finding that the Board had the authority under section 44, during the course of the hearing, to determine in good faith to narrow the scope of its inquiry, that it did act in good faith in making that determination and that an application for *certiorari* is inappropriate in respect of such a determination, the application is dismissed. There will be no order as to costs.

[13] *Toronto Newspaper Guild v. Globe Printing Company* [1953] 2 S.C.R. 18.

[14] In re the *Anti-Dumping Act*, etc. [1974] 1 F.C. 22 at pp. 30 and 31.

[15] R.S.C. 1970 (2nd Supp.), c. 10.

l'Office ne s'expose pas, du point de vue pratique, à une révision au moyen de procédures appropriées engagées devant une cour supérieure.

La décision que l'on veut faire annuler n'est pas le jugement que l'Office est autorisé à rendre en vertu de l'article 44; elle porte plutôt, et cela constitue un fait déterminant, sur les considérations dont il doit tenir compte pour parvenir à sa décision finale en vertu de l'article 44. On ne m'a cité aucune jurisprudence établissant l'octroi d'une ordonnance de la nature d'un bref de *certiorari* relativement à une telle décision. Il existe, évidemment, plusieurs exemples, comme l'affaire *Globe Printing*[13], où une décision rendue au cours d'une audience a constitué le fondement de l'annulation de la décision finale au moyen d'un bref de *certiorari*.

A cause du facteur temps dont toutes les parties sont conscientes, je n'ai pas l'intention de m'étendre sur ce sujet maintenant; cependant, je suis d'avis que l'opinion exprimée par le juge en chef aux deux avant-derniers paragraphes de la décision récente de la Cour d'appel fédérale dans l'affaire *Danmor Shoe*[14] s'applique *mutatis mutandis*, autant à une demande visant l'obtention d'un bref de *certiorari* en vertu de l'article 18 de la *Loi sur la Cour fédérale*[15] qu'à une demande faite en vertu de l'article 28. Le bref de *certiorari* n'est pas le recours approprié pour disposer d'une décision provisoire comme celle en l'espèce, si applicable soit-il à la décision finale que l'Office doit rendre en vertu de l'article 44.

Ayant conclu que l'Office avait le pouvoir, en vertu de l'article 44, de décider de bonne foi, au cours de l'audience, de restreindre la portée de son enquête, qu'il a agi de bonne foi en rendant cette décision et qu'une demande visant l'obtention d'un bref de *certiorari* n'est pas un recours approprié contre une telle décision, la demande est rejetée. Il n'y aura pas adjudication de dépens.

[13] *Toronto Newspaper Guild c. Globe Printing Company* [1953] 2 R.C.S. 18.

[14] *In re la Loi antidumping*, etc. [1974] 1 C.F. 22 aux pp. 30 et 31.

[15] S.R.C. 1970 (2e Supp.), c. 10.

TAB 11

H. L. (E.)
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v.
COGGINS & GRIFFITH (LIVERPOOL), LD.

LORD SIMONDS. My Lords, I concur. My noble and learned friend, Lord Porter, has asked me to say that he concurs also.

Appeal dismissed.

Solicitors for appellant: *J. H. Milner & Son, for Silverman & Livermore, Liverpool.*

Solicitors for respondents: *P. F. Walker, for Weightman, Pedder & Co., Liverpool.*

J. C.*
1945
Apr. 16.

[PRIVY COUNCIL.]

CANADIAN NATIONAL RAILWAYS AND OTHERS . . . . . } APPELLANTS;

AND

CANADA STEAMSHIP LINES, LIMITED AND OTHERS . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Carriage of goods—Agreed charges—Approval by Board of Transport Commissioners—Relevant considerations—Effect on business or revenues of other carriers—The Transport Act, 1938 (2 *Geo.* 6, *c.* 53), *s.* 3, *sub-s.* 2; *ss.* 35, 36.

On an application to the Board of Transport Commissioners under s. 35 of The Transport Act, 1938, for the approval of a charge agreed between a shipper and competing carriers by rail, the Board is not precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business or revenues of other carriers concerned in the traffic affected.

The circumstance that the general words in sub-s. 13 of s. 35, "on any application under this section, the Board shall have "regard to all considerations which appear to it to be relevant," are followed by a specific direction to the Board to have regard in particular to two specified matters, in no way derogates from the generality of their discretion, and the mention of the two particular topics as matters to be considered does not justify any inference that consideration of the revenue or business of an objecting carrrier is excluded.

Dictum of Lord Cave L.C. in *Ambatielos* v. *Anton Jurgens Margarine Works* [1923] A. C. 175, at p. 183, referred to.

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* *Present:* VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ROCHE and LORD SIMONDS.

The provision in s. 3, sub-s. 2, of The Transport Act, that "it "shall be the duty of the Board to perform the functions vested "in the Board by this Act and by the Railway Act with the object "of co-ordinating and harmonizing the operations of all carriers "engaged in transport . . . ." applies to all the Board's functions, including that of approving agreed charges.

Judgment of the Supreme Court of Canada [1943] S. C. R. (Can.) 333, affirmed.

APPEAL (No. 18 of 1944), by special leave, from a judgment and order of the Supreme Court of Canada (May 4, 1943), which by a majority answered in the negative a question of law submitted for its opinion by the Board of Transport Commissioners for Canada.

This appeal arose out of an application made to the Board of Transport Commissioners by the appellants, certain Canadian railways, under s. 35 of The Transport Act, 1938, for the approval by the board of charges agreed between the railways and certain shippers (traders). The application was opposed by the respondents, steamship companies operating on the Lakes, on the ground, mainly, that the agreed charges, if sanctioned, would have the effect of depriving them of the whole or a large part of their share of the traffic, and would prejudicially affect their business and revenues. The railways contended that the board was precluded from considering an objection made on that ground. The board refused to approve the agreed charges, and the railways having applied to the board for a review and rehearing, the board stated a case for the opinion of the Supreme Court on the following question of law: "On an application to the board under s. 35 of The Transport "Act, 1938, for the approval of an agreed charge between a "shipper and competing carriers by rail, is the board precluded "from regarding as relevant considerations the effects which "the making of the agreed charge is likely to have on the "business or revenues of other carriers?"

By s. 35, sub-s. 13: "On any application under this section, "the Board shall have regard to all considerations which "appear to it to be relevant and, in particular, to the effect "which the making of the agreed charge or the fixing of a "charge is likely to have, or has had, on—(*a*) the net revenue "of the carrier; and (*b*) the business of any shipper by whom, "or in whose interests, objection is made to approval being "given to an agreed charge, or application is made for approval "to be withdrawn."

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The Supreme Court (Davis, Kerwin and Hudson JJ., Duff C.J. and Rinfret J. dissenting) answered the question submitted in the negative.

1945. Mar. 7, 8. *Pritt K.C.* and *B. MacKenna* for the appellants. The question, which turns primarily on the construction of the Transport Act, 1938, is whether the Board of Transport Commissioners, in deciding whether to approve certain agreed charges, is to consider the adverse effect of the operation of those charges on somebody who, at first sight, appears to have nothing to do with the matter, namely, carriers of another kind who may get some of the traffic if the agreed charges are not approved. In substance, the question is whether they have the right to have their interests considered by way of intervention. It is contended that the respondents' argument—that their revenue will be effected—cannot be considered at all by the Board of Transport Commissioners. The two vital sections of the Transport Act are s. 35 and s. 36, and the whole of the argument for the appellants is really based on the latter section (1) read with s. 35. Parliament has made special provision in s. 36 for the investigation of complaints that agreed charges adversely affect the business of competing carriers, and it is not competent for the Board of Transport to hold an investigation of such complaints except in the circumstances and under the conditions prescribed by s. 36, and, in particular, the duty imposed on the board by s. 35, sub-s. 13, to have regard to all considerations which appear to it to be relevant, cannot be read so widely as to empower the board by implication to hold such an investigation otherwise than under the provisions and conditions of s. 36.

(1) By s. 36, sub-s. 1, of the Transport Act, 1938: "Upon "complaint to the Minister by any "representative body of carriers "which, in the opinion of the "Minister, is properly representa- "tive of the interests of persons "engaged in the kind of business "(transport by water, rail or air, "as the case may be) repre- "sented by such body that any "existing agreed charge places "such kind of business at an "undue or unfair disadvantage, "the Minister may, if satisfied that "in the national interest the "complaint should be investi- "gated, refer such complaint to "the Board for investigation, and "if the Board after hearing finds "that the effect of such agreed "charge upon such kind of "business is undesirable in the "national interest, the Board "may make an order varying or "cancelling the agreed charge "complained of or may make such "other order as in the circum- "stances it deems proper."

If Parliament had intended that an agreed charge should not be approved if it would, or might, prejudicially affect the business of any competing carrier, it is reasonable to suppose that Parliament would either have expressly provided in s. 35 that the board should not so approve or would have provided in some other way in that section for the protection of the interests of competing carriers. No provision is made in s. 35 directing the board to have regard to the effect which the making of the agreed charge is likely to have, or has had, on the net revenue of a person who is not *the carrier* but another, a competing carrier. The only authority which, even by analogy, has any bearing on the matter is *Great Western Ry. Co.* v. *Chamber of Shipping of the United Kingdom* (1), but in the end the matter comes back to the question of construction. It should not lightly be said that carriers may be opposed by consideration of the profit and advantage of other persons, unless there is something positive in the section authorizing their consideration. There is nothing in ss. 35 and 36 which expressly, or even indirectly, gives the power to consider the interests of rival carriers. On the true construction of those sections the board, on an application for the approval of an agreed charge between a shipper and competing rail carriers, is precluded from regarding as relevant considerations the effects which the making of an agreed charge is likely to have on the business and revenues of other carriers.

B. MacKenna followed. When s. 36 contains elaborate provision for dealing with the kind of complaint therein referred to, it is a reasonable inference that the legislature did not intend that that kind of complaint should be investigated without regard to those restrictions. Those restrictions are thus imposed on the scope and activities of the board under sub-s. 13 of s. 35. *Great Western Ry. Co.* v. *Chamber of Shipping of the United Kingdom* (1) is closely analogous to this case, but here the appellants submit that the Board of Transport Commissioners are not merely not bound to consider the effect on other carriers, but have no power to take that into account.

Sir Walter Monckton K.C. and *Gahan* for the respondents. Sub-section 13 of s. 35 expressly empowers and directs the board to have regard to all considerations which appear to the board to be relevant, and they are thereby empowered to determine what considerations are or are not relevant, subject

(1) [1937] 2 K. B. 36.

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to the direction that they must not overlook the two features (*a*) and (*b*) in sub-s. 13. The effects which the making of an agreed charge is likely to have on the business and revenues of other carriers as defined in the Act are in fact relevant considerations on the question of approval of such agreed charge, particularly having regard to the express injunction of sub-s. 2 of s. 3 of the Act (1). The duty imposed by s. 3, sub-s. 2, is one in respect of all the board's functions, including those which it has to perform under s. 35—the approving of agreed charges. Under sub-ss. 1 and 13 of s. 35 the board is given an absolute discretion in the matter of approving or not approving agreed charges, and having regard to the effect which the making of an approved charge is likely to have on other regulated carriers is a proper exercise of that discretion. Where Parliament, in conferring the power of approval or disapproval, has seen fit to lay down two specific cases in which such approval may not be granted, the obvious implication would be that the board's discretion is to be unfettered in all other cases. Sub-section 13 of s. 35 confers the discretion in the widest possible language, by which the board is directed not only to have regard to all relevant considerations, but is also given power to decide what is and what is not relevant. Sub-section 5 of s. 35 makes express provision for opposition to the approval of agreed charges by individual carriers, and if the question referred to the Supreme Court is answered in the affirmative the right of opposition thus given would be nullified. Section 36 cannot help in interpreting s. 35; it deals with a different matter.

Pritt K.C. replied.

Apr. 16. The judgment of their Lordships was delivered by LORD MACMILLAN. This appeal arises from an application presented to the Board of Transport Commissioners for Canada by the Canadian National Railways, the Canadian Pacific Railway Company and other Canadian Railways, under s. 35

(1) By s. 3, sub-s. 2, of the Transport Act: "It shall be the "duty of the Board to perform "the functions vested in the "Board by this Act and by the "Railway Act with the object of "co-ordinating and harmonizing "the operations of all carriers "engaged in transport by railways, "ships and aircraft and the "Board shall give to this Act and "to the Railway Act such fair "interpretation as will best attain "the object aforesaid."

of The Transport Act, 1938, for the approval by the board of charges agreed between the railways and certain shippers—or "traders" as they would be termed in English railway parlance. The agreed charges were for the carriage by rail in carloads between eastward and westward points in Canada of specified goods which up to that time had been carried for a portion of the route by water transportation on the Great Lakes. In two of the cases the agreed charges affected 85 per cent. and 95 per cent. respectively of the traffic, and in the two other cases 100 per cent.

The application was opposed by steamship companies operating on the Lakes on the ground, mainly, that the agreed charges, if sanctioned, would have the effect of depriving them of the whole or a large part of their share of the traffic, and would prejudicially affect their business and revenues. On behalf of the railways it was contended that the board was precluded from considering an objection by the steamship companies on this ground. The board refused to approve the agreed charges, Deputy Chief Commissioner Garceau dissenting. The opinion of the majority is thus expressed by Chief Commissioner Cross:—"I think, therefore, that the effect the agreements "will have on the objecting carriers' business and revenues is a "relevant consideration and that approval and the putting "into effect of the said agreed charge agreements would likely "be unduly prejudicial to the objecting water-carriers who have "participated in the carriage of the traffic and place them and "their business at an undue or unfair disadvantage."

An application having been made to the board on behalf of the railways for a review and rehearing, the board, in pursuance of the power conferred on it by s. 43 of the Railway Act (R.S.C. 1927, c. 170) and s. 4 of the Transport Act, stated a case for the opinion of the Supreme Court of Canada on the following question of law:—"On an application to the board under s. 35 "of the Transport Act, 1938, for the approval of an agreed "charge between a shipper and competing carriers by rail, is the "board precluded from regarding as relevant considerations the "effects which the making of the agreed charge is likely to have "on the business or revenues of other carriers?"

The Supreme Court by a majority (Davis, Kerwin and Hudson JJ.) answered the question in the negative, Duff C.J. and Rinfret J. dissenting. Special leave having been granted to the railways to appeal to His Majesty in Council, their Lordships have now in turn to consider the question.

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The legislation on the subject of agreed charges is contained in Part V. of The Transport Act, which for the first time sanctioned the making of such charges. Part V. consists of five sections, of which only ss. 35 and 36 need be considered. Section 35, sub-s. 1, empowers a carrier to make such charges for the transport of the goods of any shipper as may be agreed between the carrier and that shipper, provided that the agreed charges are approved by the board. By s. 2 of the Act "carrier" means any person engaged in the transport of goods or passengers for hire or reward to whom the Act applies; "shipper" means a person sending or receiving or desiring to send or receive goods by means of any carrier to whom the Act applies; and "transport" means the transport of goods or passengers whether by air, by water or by rail, for hire or reward to which the provisions of the Act apply. In two cases the board is directed not to approve of an agreed charge, namely (1.) if in its opinion the object of the agreed charge can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff of tolls under the Railway Act or the Transport Act; and (2.) when the transport is by rail from or to a competitive point or between competitive points on the lines of two or more carriers by rail, unless the competing carriers by rail join in making the agreed charge.

Sub-section 5 of s. 35 confers on inter alios "any carrier" the right to object and to be heard in opposition to an application for the approval of an agreed charge. Sub-section 9 authorizes inter alios "any carrier" to apply after a year for the withdrawal by the board of its approval to an agreed charge. Sub-section 13, on the interpretation of which the question at issue turns, must be quoted in full. [His Lordship read the sub-section and continued:] "The carrier" here mentioned is the carrier with whom the charge has been agreed. It will be observed that sub-s. 13 applies to any application under s. 35, and is therefore applicable not only to the initial sanctioning of an agreed charge under sub-s. 5, but also to a subsequent application under sub-s. 9 for the withdrawal of the board's approval. The agreed charges may have been agreed between a shipper and any carrier whether by air, water or rail. An affirmative answer to the question propounded would thus preclude the present appellants from objecting to the approval of a charge agreed between a shipper and the respondent shipping companies for the carriage of goods by water on the ground of the effects which the making of the agreed charge

would be likely to have on the business or revenues of the railways.

It would be difficult to conceive a wider discretion than is conferred on the board as to the considerations to which it is to have regard in disposing of an application for the approval of an agreed charge. It is to have regard to "all considerations "which appear to it to be relevant." Not only is it not precluded negatively from having regard to any considerations, but it is enjoined positively to have regard to every consideration which in its opinion is relevant. So long as that discretion is exercised in good faith the decision of the board as to what considerations are relevant would appear to be unchallengeable. The circumstance that the general words are followed by a specific direction to the board to have regard in particular to two specified topics in no way derogates from the generality of their discretion. It is not a case to which the ejusdem generis rule applies, for the general words do not follow on an enumeration of particular instances but precede the particular instances. "I know of no authority," said Lord Cave L.C., "for applying that rule to . . . a case where, to begin "with, the whole clause is governed by the initial general "words": *Ambatielos* v. *Anton Jurgens Margarine Works* (1). Nor is the maxim expressio unius est exclusio alterius applicable to such a case as the present. In their Lordships' view the mention of the particular matters of (*a*) the net revenue of the carrier who has agreed the charge, and (*b*) the business of the objecting shipper, as matters to be considered, does not justify any inference that consideration of the revenue or business of an objecting carrier is excluded.

If the objecting carrier in resisting the approval of a charge agreed between a rival carrier and a shipper were to be precluded from referring to its probable effect on his own business it is not easy to see on what other grounds of objection he could rely. According to Rinfret J., one of the two learned judges in the minority in the Supreme Court (2), "the right of any "carrier to be heard in opposition to an application for the "approval of an agreed charge, which is given by sub-s. 5, "must be limited to the consideration of one of the two circum-"stances included in the proviso of sub-s. 1 of s. 35," being one of the two cases in which the board is directed not to approve of an agreed charge. With all respect, their Lordships find themselves unable to agree with this view. The proviso in sub-s. 1

(1) [1923] A. C. 175, 183. (2) [1943] S. C. R. (Can.) 342.

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excepts two cases from the power of the board to approve agreed charges, and to that extent limits its jurisdiction. To hold the objecting carrier restricted to objections based on that proviso would be to limit his challenge to questions of the board's competency, and would preclude him altogether from advancing any objections on the merits. It is only in the case of an application which the board can competently entertain and grant, that is, one not excluded by the proviso in sub-s. 1, that the board is to have regard to all considerations which appear to it to be relevant. In giving to "any carrier" the right to be heard in opposition to any agreed charge the Act means that he shall be heard in opposition to any agreed charge which the board may competently approve. Permissible opposition is not confined to the competency of the board to approve a particular agreed charge, but includes all considerations on the merits which to the board appear relevant. Moreover, sub-s. 13 applies not only to applications for approval of an agreed charge under sub-s. 5, but also to applications under sub-s. 9 for the withdrawal of the approval given by the board to an agreed charge, that is to say, to an agreed charge of which it must have had jurisdiction to approve in the first instance. It is thus plain that the considerations to which the board may, at the instance of "any carrier," have regard in disposing of an application for the withdrawal of their previous approval of an agreed charge cannot be confined to objections based on the proviso in sub-s. 1. There can be no reason for holding that a carrier should have a more limited scope in objecting to the initial approval of an agreed charge than he has in applying for the withdrawal of the approval previously given to an agreed charge.

The learned Chief Justice gives quite a different reason for answering the question in the affirmative. He refers to s. 36, which reads as follows. [His Lordship read the section and continued:] This section, in the opinion of the Chief Justice, "points unmistakably to the conclusion that the statute does "not contemplate the rejection of an application for the "approval of an agreed charge on the ground that the establish-"ment of such a charge will prejudicially affect the business and "revenues of competing carriers. The proper inference, I "think, from that section is that the effect of the agreed charge "upon competing carriers is not a relevant consideration "within the meaning of s. 35, sub-s. 13" (1). By this the Chief

(1) [1943] S. C. R. (Can.) 336.

Justice must be taken to mean that the board are not entitled to treat it as a relevant consideration. Rinfret J., while agreeing with the Chief Justice that the question propounded should be answered in the affirmative, disagrees with him as to the bearing of s. 36 on the question. He regards the section, and in their Lordships' opinion rightly regards it, as dealing "with "an entirely different matter." Section 36 can be invoked only by a representative body of carriers; a complaint under it is addressed to the Minister, not to the board; it involves consideration of the national interest and of kinds of businesses; it assumes that a charge has been competently agreed and approved and is in existence and operation. Section 35 is concerned with quite different topics arising at a different stage. An individual carrier may have interests distinct from, and possibly even opposed to, the national interest. He cannot at his own hand invoke s. 36; it is to his rights under s. 35 that he must look for his protection.

There are wider considerations which lend support to the view which has commended itself to the majority of the learned judges of the Supreme Court and which commends itself to their Lordships. The Act of 1938 introduces important extensions and innovations in the transport law of Canada. It provides for the first time for the control of rates for transport by water and transport by air, as well as providing for the first time for agreed charges. The extension of the board's jurisdiction is not only signalized by the change in its name, but is accompanied by a special injunction addressed to it by Parliament as to the administration of its enlarged functions. Section 3, sub-s. 2, of the Act thus exhorts the board—"It shall be the duty of the "Board to perform the functions vested in the Board by this "Act and by the Railway Act with the object of co-ordinating "and harmonizing the operations of all carriers engaged in "transport by railways, ships and aircraft and the Board "shall give to this Act and to the Railway Act such fair "interpretation as will best attain the object aforesaid." It would be strange if, in attempting to co-ordinate and harmonize the operations of all carriers by rail, water and air, the board were to be precluded, when performing their new and important duty of scrutinizing agreed charges, from considering their effect on the businesses of all carriers concerned in the traffic affected. Rinfret J. draws attention to the opening words of s. 35—"notwithstanding anything in the "Railway Act, or in this Act"—and apparently takes the

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view that these words absolve the board when dealing with agreed charges from the duty enjoined by s. 3, sub-s. 2, of co-ordinating and harmonizing the operations of all carriers by rail, water and air. This is a misapprehension. The exhortation in s. 3, sub-s. 2, applies to all the board's functions, including that of approving agreed charges. The opening words of s. 35, sub-s. 1, are intended only to indicate that agreed charges may be sanctioned notwithstanding the general provisions as to the universality of charges.

Reference was incidentally made to *Great Western Ry. Co.* v. *Chamber of Shipping of the United Kingdom* (1). In the Supreme Court judgments it is mentioned only in the judgment of Kerwin J., concurred in by Hudson J., and there only to observe that it is of no assistance in the present case. Their Lordships agree. That case arose on an imperial statute confined in its operation to railways, and turned on different language and different considerations from those with which the present case is concerned.

Their Lordships will humbly advise His Majesty that the appeal be dismissed and the judgment of the Supreme Court be affirmed. The appellants will pay the respondents' costs of the appeal.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

(1) [1937] 2 K. B. 30.

J. C.*
1945
Apr. 18.

[PRIVY COUNCIL.]

SHAFIQA BINT JAMAL EDDIN DASUKI APPELLANT;
AND
SADR EDDIN ET-TIBI AND ANOTHER . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Admissions—Binding validity—Opposite party's decisive oath that admission was true—Mejelle (Tyser's translation), arts. 79, 1588, 1589—Evidence Ordinance, 1924, s. 14.

A power of attorney, executed by the appellant and her sister before the notary public, and appointing three persons as their

* *Present:* LORD WRIGHT, SIR MADHAVAN NAIR and SIR JOHN BEAUMONT.

TAB 12

1958

MEMORIAL GARDENS ASSOCIATION (CANADA) LIMITED ..... APPELLANT;

*Feb. 3, 4
Apr. 22

AND

COLWOOD CEMETERY COMPANY, BOARD OF CEMETERY TRUSTEES OF GREATER VICTORIA, CORPORATION OF THE DISTRICT OF SAANICH, THE CORPORATION OF THE CITY OF VICTORIA, EDWIN J. FREEMAN, HELEN J. FREEMAN, A. C. KINNERSLEY, LOLA KINNERSLEY, H. M. PALSSON, JEAN LABAN, C. J. LABAN, SHIRLEY R. CROCKETT, B. I. CROCKETT, F. A. KINNERSLEY, VERNICE ROCKWELL, PETER C. SHARP, L. H. SHARP AND ALEXANDER HORBATUK AND PUBLIC UTILITIES COMMISSION ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public utilities—"Public convenience and necessity"—Meaning of phrase—Review of decision of Commission—The Public Utilities Act, R.S.B.C. 1948, c. 277, ss. 58, 72, 75, 100—The Cemeteries Act, R.S.B.C. 1948, c. 41, ss. 2, 3, as enacted by 1955, c. 7, s. 3.

Per Kerwin C.J. and Taschereau, Cartwright and Abbott JJ.: It is impracticable and undesirable to attempt a precise definition of the phrase "public convenience and necessity". It is clear from the American decisions that the word "necessity" as here used does not bear its strict dictionary meaning. Its meaning must be ascertained in each case by reference to the context and to the objects and purpose of the statute in which it is found; in particular, it has been held that the word is not restricted to present needs but includes provision for the future. *Wabash, C. & W. Ry. Co. v. Commerce Commission* (1923), 141 N.E. 212, referred to.

The Public Utilities Commission of British Columbia granted a certificate of public convenience and necessity to the appellant company for the operation, through a subsidiary company, of a cemetery on Vancouver Island. This certificate was set aside by the Court of Appeal.

Held: The judgment of the Court of Appeal should be set aside and the certificate should be restored.

Per Kerwin C.J. and Taschereau, Cartwright and Abbott JJ.: The Commission's decision that public convenience and necessity required the establishment of a new cemetery was not one of fact but was predominantly the formulation of an opinion based upon the facts established before the Commission. There was evidence to support

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.

1958

MEM. GARDENS ASSN. LTD. v. COLWOOD CEMETERY Co. *et al.*

the findings of fact made by the Commission and its exercise of administrative discretion based on those findings should not be interfered with by the Courts. *Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited,* [1957] S.C.R. 185, applied.

Subsidiary grounds of attack on the Commission's decision should be disposed of as follows: (1) the fact that the appellant proposed to operate the cemetery by means of a subsidiary company to which the Commission agreed to grant a second certificate on incorporation was not an objection to the grant of the certificate to the appellant; (2) the fact that the appellant held only an option on the lands in question was not a ground for refusing the certificate, since the option, assuming it to be enforceable, made the appellant an "owner" within the meaning of the statute; (3) there was no ground, in the circumstances of the case, for saying that the Commission had unjustifiably received evidence without permitting the respondents to see it, thus preventing cross-examination and violating the rule *audi alteram partem. Toronto Newspaper Guild v. Globe Printing Company,* [1953] 2 S.C.R. 18, distinguished.

Per Locke J.: The option was produced for examination by the Commission with the express consent of counsel for the parties who now objected, and they should not now be heard to allege that the proceedings were invalidated by this circumstance. *Scott v. The Fernie Lumber Company, Limited* (1904), 11 B.C.R. 91 at 96, approved and applied. In other respects, the appeal failed for the reasons given by Sheppard J.A. in his dissenting judgment in the Court of Appeal.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], setting aside a certificate of public convenience and necessity granted by the Public Utilities Commission. Appeal allowed.

Alan B. MacFarlane and *E. A. Popham,* for the appellant.

D. M. Gordon, Q.C., for the respondents.

The judgment of Kerwin C.J. and Taschereau, Cartwright and Abbott JJ. was delivered by

ABBOTT J.:—The question raised on this appeal is whether a certificate of public convenience and necessity issued by the Public Utilities Commission of British Columbia, under the provisions of the *Public Utilities Act,* R.S.B.C. 1948, c. 277, as amended, was authorized in law.

By the *Cemeteries Act Amendment Act, 1955* (B.C.), c. 7, cemeteries in British Columbia were brought under the jurisdiction of the Public Utilities Commission as constituted under the *Public Utilities Act,* the relevant

[1] (1957), 22 W.W.R. 348, 9 D.L.R. (2d) 653, 75 C.R.T.C. 292.

sections of the *Cemeteries Act*, R.S.B.C. 1948, c. 41, as enacted by s. 3 of the 1955 statute, reading as follows:

Regulation of Cemeteries, Crematoria, and Columbaria.

2. A cemetery shall not be established or enlarged until the Minister of Health and Welfare has approved of the site of the cemetery as a fit and proper place for the interment of the dead and the owner thereof has obtained from the Commission a certificate of public convenience and necessity under the "Public Utilities Act."

3. (1) The Commission shall have jurisdiction over all cemeteries, columbaria, and crematoria, and the owners thereof, and shall exercise with respect thereto all the powers, duties, and functions relating to public utilities conferred or imposed by the "Public Utilities Act" on the Commission, to the extent to which such powers, duties, and functions are exercisable, and the provisions of the "Public Utilities Act" (other than Part IV thereof), so far as appropriate, shall aply to cemeteries, columbaria, crematoria, and the owners thereof.

(2) Without limiting the generality of subsection (1) and notwithstanding the provisions of the "Cemetery Companies Act," the "Cremation Act," or the "Municipal Cemeteries Act," the Commission may, with the approval of the Lieutenant-Governor in Council, make regulations:

(*a*) Respecting the burial, disinterment, removal, and disposal of the bodies or other remains of deceased persons;

(*b*) Respecting the plans, survey, arrangement, condition, care, sale, and conveyancing of lots, plots, and other cemetery grounds and property;

(*c*) Respecting the erection, arrangement, and removal of tombs, vaults, monuments, gravestones, markers, copings, fences, hedges, shrubs, plants, and trees in cemeteries;

(*d*) Respecting charges for the sale and care of lots and plots;

(*e*) Respecting the collection, amounts to be collected, and investment of funds for perpetual care and maintenance of cemeteries;

(*f*) Requiring the filing or registration of plans of cemeteries and prescribing the contents and details of such plans, and requiring that burials be made in accordance with such plans;

and such regulations may be general in their application or may be made applicable specially to any particular locality or cemetery.

(3) Every person who fails or refuses to obey a regulation of the Commission made under this section is guilty of an offence and liable, on summary conviction, to a penalty of not less than ten dollars and not more than five hundred dollars.

The appellant proposed to establish and operate a new cemetery in the vicinity of Victoria and, as required by the statute, applied to the Public Utilities Commission for a certificate of public convenience and necessity. There were at the time two cemeteries in the area, one, the Colwood Cemetery, operated by a privately-owned company, the other, the Royal Oak Cemetery, a municipally-operated cemetery controlled by the City of Victoria and the Municipality of Saanich. Appellant's application was

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opposed by those in control of the two existing cemeteries and by certain owners of property adjoining the site of the proposed new cemetery.

After a hearing at which evidence was taken as to the need for cemeteries in the Victoria area, both present and future, the Commission issued the certificate requested. Under s. 100 of the *Public Utilities Act* an appeal from a decision of the Commission lies to the Court of Appeal, by leave, only upon a question of law or as to the jurisdiction of the Commission. Appeal was taken to the Court of Appeal for British Columbia and by a majority decision the Court of Appeal[1] allowed the appeal and held that the certificate should be set aside. The present appeal is from that judgment. Sheppard J. A., while dissenting on the main issues raised, would have referred the matter back to the Commission for a rehearing on one matter.

The term "public convenience and necessity" appears to have been brought into the statute law in Canada from the United States and a great many decisions were cited to us indicating the meaning given to the term in that country. It is clear from these decisions that the word "necessity" as contained in these American statutes cannot be given its dictionary meaning in the strict sense: *Canton-East Liverpool Coach Co. et al. v. Public Utilities Commission of Ohio*[2]; *Wisconsin Telephone Co. v. Railroad Commission of Wisconsin et al.*[3]; *Wabash, C. & W. Ry. Co. v. Commerce Commission*[4]; *San Diego & Coronado Ferry Co. v. Railroad Commission of California et al.*[5] The meaning in a given case must be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.

The term "necessity" has also been held to be not restricted to present needs but to include provision for the future: *Wabash, C. & W. Ry. Co. v. Commerce Commission, supra,* at p. 215, and this indeed would seem to follow from s. 12 of the *Public Utilities Act,* which provides that the certificate may issue where public convenience and necessity "require or *will require*" such construction or operation.

[1] (1957), 22 W.W.R. 348, 9 D.L.R. (2d) 653, 75 C.R.T.C. 292.
[2] (1930), 174 N.E. 244.
[3] (1916), 156 N.W. 615.
[4] (1923), 141 N.E. 212 at 214.
[5] (1930), 292 P. 640 at 643.

It is obvious I think, that the phrase "public convenience and necessity" when applied to cemeteries cannot be given precisely the same connotation as when it is applied to those operations more commonly looked upon as public utilities, such as electric power services, water-distribution systems, railway lines and the like, and this is borne out both by the terms of the statute which I have quoted and by the decisions of the American Courts to which we were referred.

The phrase also appears in *The Municipal Franchises Act*, R.S.O. 1950, c. 249 (considered by this Court in *Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited*[1]), in the *Aeronautics Act*, R.S.C. 1952, c. 2, and I have no doubt in other provincial and federal statutes, and it would, I think, be both impracticable and undesirable to attempt a precise definition of general application of what constitutes public convenience and necessity. As has been frequently pointed out in the American decisions, the meaning in a given case should be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.

As this Court held in the *Union Gas* case, *supra*, the question whether public convenience and necessity requires a certain action is not one of fact. It is predominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, in the public interest, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

The findings of fact made by the Commission have been concisely set forth by Sheppard J.A. in his reasons[2], and are in part as follows:

(1) That there are two established cemeteries in the district in question, namely, Royal Oak and Colwood, and these have vacant space adequate for immediate needs;

[1] [1957] S.C.R. 185, 7 D.L.R. (2d) 65, 75 C.R.T.C. 1.

[2] 22 W.W.R. at p. 362.

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(2) That the services proposed by the appellant company are similar to those now available at Royal Oak; that Colwood is not a modern, but an older, type of cemetery; that Colwood has proposed modernizing but that may be reconsidered if the respondent [now appellant] company is permitted to establish a cemetery;

(3) That the established cemeteries, Royal Oak and Colwood, are not adequate for the future; that the available space at Royal Oak will be filled in 10 to 15 years; that the need for the future is recognized by both these cemeteries in that both are presently negotiating for additional land;

(4) That vacant cemetery spaces will be needed for the future; that the modern-type cemetery may, by reducing the public demand for cremation, increase the rate at which the available space will be filled.

There was evidence before the Commission upon which it could make the findings of fact which it did. In my opinion the majority of the Court of Appeal in holding that in law the Commission could not find necessity upon the facts recited in its judgment was merely substituting its opinion for that of the Commission. As this Court held in the *Union Gas* case, *supra*, this is not a question of law upon which an appeal is given, and the Court below was therefore without jurisdiction. It would have been otherwise if it had been shown that the Commission had given a meaning to the words of the statute which as a matter of law they could not bear.

Three subsidiary points were raised by respondents. As set out in their factum these are as follows:

1. The Commission went beyond the authority given by the statute by granting the appellant a certificate, though the appellant was not meant to establish or operate the cemetery itself, but to form a subsidiary to do that, to which the Commission bound themselves to give a second certificate;

2. The appellant had no basis for its application for a certificate except an option to buy a site, and the statute required it to be an "owner";

3. The Commission unjustifiably received evidence of the option without permitting the respondents to see it, thus preventing cross-examination and infringing the *audi alteram partem* rule.

As to points 1 and 2, I agree with the views expressed by Sheppard J.A. that the certificate appears to be within the powers conferred by the statute and that the option held by appellant, assuming it to be enforceable, did enable appellant to obtain and assert a control sufficient to constitute appellant an owner within the meaning of the statute.

As to the third point, at the hearing before the Commission appellant called as witnesses the persons from whom the option referred to had been obtained, and the

option itself was filed with the Commission. Appellant was apparently unwilling to exhibit the document to respondents at that time since this would have involved disclosing the purchase-price and the transcript of evidence on this point reads in part as follows:

Mr. GORDON: Just one point, since the option itself has been the subject-matter of considerable discussion. I wonder if it might be produced for examination by the Commission? There have been certain representations regarding it as to detail, as to length of time and certain questions have now arisen. Could the Commission have it produced, merely to verify statements that have been made?

Mr. MACFARLANE: I am prepared to produce it to the Commission but not to my learned friends. Now, I state that that option has been executed by these people, Mr. and Mrs. Turner. These people have sworn under oath here to-day that they executed such an option. I state that the option is in favor of James H. Edwards, the President of Memorial Gardens Association of Canada Limited. They swear the property that it covers and they swear the expiry date. I have the option here but I am not going to tell my learned friends the price that Memorial Gardens Association Limited is paying for this property, which they would dearly like to know and which is Mr. and Mrs. Turner's private business. The company doesn't care if everybody knows but Mr. and Mrs. Turner are selling it for a price, it is up to them.

Mr. GORDON: It is essential to the jurisprudence to produce the document about which you are discussing. It is the document, the very basis of the matter which we are dealing with. Simply to make an oath on something when—

The CHAIRMAN: I think the document should be produced to the Commission, whose officers are under oath not to disclose confidential information, but if the document itself does contain certain information that is confidential, it needn't be disclosed to the public.

Mr. MACFARLANE: That is my point. I am quite happy to disclose the information to the Commission but I don't feel it is such that should be disclosed—

Mr. GORDON: May I just simply add this, that in respect to this option, certain statements were made as to when it was entered into, as to what period it was extended to, asking the Commission to make a hurried decision in order to meet with its requirements. If these things are all in the option, we know at least that is *bona fide* but having sworn statements made without the basic documents there at least to the Commission, is of little value.

The CHAIRMAN: The Commission will have the opportunity of comparing the statements with the document.

Mr. GORDON: Well, that is perfectly satisfactory to me.

It does not appear from the record that any person opposing the application other than Mr. Gordon asked for the production of the option and Mr. Gordon stated that he was satisfied with the procedure proposed by the Commission. These circumstances clearly distinguish this case

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from that of *Toronto Newspaper Guild v. Globe Printing Company*[1]. In these circumstances and in view of the provisions of ss. 58, 72 and 75 of the *Public Utilities Act* in my opinion this third point does not avail the respondents.

For the reasons which I have given, as well as for those of Sheppard J.A. as to the main issue, with which I am in substantial agreement, I would allow the appeal with costs here and below and restore the certificate.

LOCKE J.:—With the exception hereinafter mentioned, I agree with the reasons for judgment delivered by Mr. Justice Sheppard.

While the record does not disclose the fact, I assume that Mr. Gordon, who cross-examined certain of the witnesses on behalf of the Colwood Cemetery Company, is a member of the bar of British Columbia and that he acted in that capacity at the hearing before the Public Utilities Commission. We were informed at the hearing of this appeal that the person referred to was not Mr. D. M. Gordon, Q.C., who appeared for the respondents before us.

The passage from the transcript quoted in the reasons of my brother Abbott, which I have had the advantage of reading, shows that Mr. Gordon asked that the option might be produced for examination by the Commission "merely to verify statements that have been made". The chairman ruled that this should be done and counsel for the appellant at once agreed that the information should be disclosed to the Commission. When the chairman said that the Commission would have the opportunity of comparing the statements that had been made with the document, Mr. Gordon said that that was perfectly satisfactory. None of the other parties represented before the Commission appear to have evidenced any interest in the nature of the option. Having thus led the members of the Commission to understand that the course proposed was satisfactory to his clients, they should not now be heard to allege that the proceedings were invalidated by the

[1] [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561, 106 C.C.C. 225.

very course of conduct that they assented to: *Scott v. The Fernie Lumber Company, Limited*[1].

I would allow this appeal with costs in this Court and in the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellant: Clay, MacFarlane, Ellis & Popham, Victoria.

Solicitors for the respondent Colwood Cemetery Company: Crease & Co., Victoria.

Solicitors for the respondent cemetery trustees: Gregory, Grant, Cox & Harvey, Victoria.

Solicitors for the respondent District of Saanich: Manzer, Wootton & Drake, Victoria.

Solicitor for the respondent District of Victoria: T. P. O'Grady, Victoria.

Solicitor for the individual respondents: A. J. Patt[illegible] Victoria.

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*Feb. 5, 6
Apr. 22

EARL F. WAKEFIELD COMPANY (*Plaintiff*) ..... APPELLANT;

AND

OIL CITY PETROLEUMS (LEDUC) LTD., PONOKA-CALMAR OILS LTD., AMERICAN LEDUC PETROLEUMS LIMITED, HARRY SZPILAK, KASPER HALWA, ALVIN M. DAVIS, PETER MATVICHUK, ALVIN M. BERG, JACOB B. GAUFF AND ALEX JOHN PYRCH (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Mechanics' liens—Arising of lien—Drilling of oil well—Proceedings to enforce lien—Appointment of receiver—Charge on moneys in receiver's hands—Effect of failure to file renewal statement—The Mechanics' Lien Act, R.S.A. 1955, c. 197, ss. 2(g), 29(7), 49-55.

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*PRESENT: Kerwin C.J. and Rand, Locke, Fauteux and Abbott JJ.

[1] (1904), 11 B.C.R. 91 at 96.

TAB 13

Delgamuukw, also known as Earl Muldoe, suing on his own behalf and on behalf of all the members of the Houses of Delgamuukw and Haaxw (and others suing on their own behalf and on behalf of thirty-eight Gitksan Houses and twelve Wet'suwet'en Houses as shown in Schedule 1) *Appellants/ Respondents on the cross-appeal*

v.

Her Majesty The Queen in Right of the Province of British Columbia *Respondent/ Appellant on the cross-appeal*

and

The Attorney General of Canada *Respondent*

and

The First Nations Summit, the Musqueam Nation *et al.* (as shown in Schedule 2), the Westbank First Nation, the B.C. Cattlemen's Association *et al.* (as shown in Schedule 3), Skeena Cellulose Inc., Alcan Aluminum Ltd. *Interveners*

INDEXED AS: DELGAMUUKW *v.* BRITISH COLUMBIA

File No.: 23799.

1997: June 16, 17; 1997: December 11.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka,* Cory, McLachlin and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Aboriginal rights — Aboriginal land title — Claim made for large tract — Content of aboriginal title — How aboriginal title protected by s. 35(1) of Constitution Act, 1982 — What required to

*Sopinka J. took no part in this judgment.

Delgamuukw, connu également sous le nom d'Earl Muldoe, en son propre nom et au nom de tous les membres des maisons Delgamuukw et Haaxw (et d'autres personnes en leur propre nom et au nom des membres de trente-huit maisons Gitksan et de douze maisons Wet'suwet'en, selon ce qui est indiqué à l'annexe 1) *Appelants/ Intimés dans le pourvoi incident*

c.

Sa Majesté la Reine du chef de la province de la Colombie-Britannique *Intimée/ Appelante dans le pourvoi incident*

et

Le procureur général du Canada *Intimé*

et

Le First Nations Summit, la Nation Musqueam et autres (selon ce qui est indiqué à l'annexe 2), la Première nation de Westbank, la B.C. Cattlemen's Association et autres (selon ce qui est indiqué à l'annexe 3), Skeena Cellulose Inc., Alcan Aluminium Ltée *Intervenants*

RÉPERTORIÉ: DELGAMUUKW *c.* COLOMBIE-BRITANNIQUE

N° du greffe: 23799.

1997: 16 et 17 juin; 1997: 11 décembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka*, Cory, McLachlin et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Droits ancestraux — Titre aborigène sur des terres — Revendication d'un vaste territoire — Contenu du titre aborigène — Comment l'art. 35(1) de la Loi constitutionnelle de 1982 protège-

*Le juge Sopinka n'a pas pris part au jugement.

prove aboriginal title — Whether claim to self-government made out — Whether province could extinguish aboriginal rights after 1871, either under own jurisdiction or through the operation of s. 88 of the Indian Act (incorporating provincial laws of general application by reference) — Constitution Act, 1982, s. 35(1) — Indian Act, R.S.C., 1985, c. I-5, s. 88.

Constitutional law — Aboriginal rights — Aboriginal land title — Evidence — Oral history and native law and tradition — Weight to be given evidence — Ability of Court to interfere with trial judge's factual findings.

Courts — Procedure — Land claims — Aboriginal title and self-government — Claim altered but no formal amendments to pleadings made — Whether pleadings precluded the Court from entertaining claims.

The appellants, all Gitksan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their "Houses", claimed separate portions of 58,000 square kilometres in British Columbia. For the purpose of the claim, this area was divided into 133 individual territories, claimed by the 71 Houses. This represents all of the Wet'suwet'en people, and all but 12 of the Gitksan Houses. Their claim was originally for "ownership" of the territory and "jurisdiction" over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.) British Columbia counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants' cause of action ought to be for compensation from the Government of Canada.

At trial, the appellants' claim was based on their historical use and "ownership" of one or more of the territories. In addition, the Gitksan Houses have an "adaawk" which is a collection of sacred oral tradition about their ancestors, histories and territories. The Wet'suwet'en each have a "kungax" which is a spiritual song or dance or performance which ties them to their land. Both of these were entered as evidence on behalf of the appellants. The most significant evidence of spiritual connection between the Houses and their territory

t-il le titre aborigène? — Quels sont les éléments de preuve requis pour établir le titre aborigène? — Le bien-fondé de la revendication de l'autonomie gouvernementale a-t-il été établi? — La province pouvait-elle, après 1871, éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la Loi sur les Indiens (qui incorpore par renvoi les lois provinciales d'application générale)? — Loi constitutionnelle de 1982, art. 35(1) — Loi sur les Indiens, L.R.C. (1985), ch. I-5, art. 88.

Droit constitutionnel — Droits ancestraux — Titre aborigène sur des terres — Preuve — Récits oraux et règles de droit et traditions autochtones — Poids à donner aux éléments de preuve — Pouvoir d'intervention de la Cour quant aux conclusions de fait du juge de première instance.

Tribunaux — Procédure — Revendications territoriales — Titre aborigène et autonomie gouvernementale — Revendication modifiée mais sans modification formelle des actes de procédure — Les actes de procédure empêchent-ils la Cour d'entendre les revendications?

Les appelants, tous des chefs héréditaires Wet'suwet'en ou Gitksan, revendiquent tant en leur propre nom qu'au nom de leurs «maisons» des parties distinctes d'un territoire de 58 000 kilomètres carrés situé en Colombie-Britannique. Aux fins de la revendication, ce grand territoire a été divisé en 133 territoires distincts, revendiqués par les 71 maisons. Y sont représentés tous les Wet'suwet'en et toutes les maisons Gitksan, à l'exception de 12. Initialement, les appelants revendiquaient la «propriété» du territoire et la «compétence» sur celui-ci. (Devant la Cour, cette revendication a changé et est devenue principalement la revendication d'un titre aborigène sur le territoire en question.) La Colombie-Britannique a présenté une demande reconventionnelle dans laquelle elle sollicite une déclaration portant que les appelants n'ont aucun droit ou intérêt dans le territoire, ou, subsidiairement, que la cause d'action des appelants devrait être l'obtention d'une indemnité de la part du gouvernement du Canada.

Au procès, les appelants ont fondé leur revendication sur la «propriété» et l'utilisation historiques d'un ou de plusieurs des territoires. En outre, les maisons Gitksan ont un «adaawk», c'est-à-dire un ensemble de traditions orales sacrées au sujet de leurs ancêtres, de leur histoire et de leurs territoires. Chaque maison Wet'suwet'en possède un «kungax», c'est-à-dire un chant, une danse ou une représentation spirituelle qui les rattache à leur territoire. Ces deux éléments ont été déposés en preuve au nom des appelants. Le signe le plus important du lien

was a feast hall where the Gitksan and Wet'suwet'en peoples tell and retell their stories and identify their territories to remind themselves of the sacred connection that they have with their lands. The feast has a ceremonial purpose but is also used for making important decisions.

spirituel entre les différentes maisons et leur territoire est la salle des célébrations. C'est là que les Wet'suwet'en et les Gitksan disent et redisent leurs récits et identifient leurs territoires afin de se rappeler le lien sacré qu'ils entretiennent avec leurs terres. Ces célébrations ont une fin rituelle, mais elles sont aussi l'occasion de prise de décisions importantes.

The trial judge did not accept the appellants' evidence of oral history of attachment to the land. He dismissed the action against Canada, dismissed the plaintiffs' claims for ownership and jurisdiction and for aboriginal rights in the territory, granted a declaration that the plaintiffs were entitled to use unoccupied or vacant land subject to the general law of the province, dismissed the claim for damages and dismissed the province's counterclaim. No order for costs was made. On appeal, the original claim was altered in two different ways. First, the claims for ownership and jurisdiction were replaced with claims for aboriginal title and self-government, respectively. Second, the individual claims by each House were amalgamated into two communal claims, one advanced on behalf of each nation. There were no formal amendments to the pleadings to this effect. The appeal was dismissed by a majority of the Court of Appeal.

Le juge de première instance n'a pas accepté les récits oraux que les appelants présentaient comme éléments de preuve de leur attachement au territoire. Il a rejeté l'action contre le Canada, il a rejeté les revendications, par les demandeurs, de la propriété du territoire, de la compétence sur celui-ci ou de droits ancestraux à son égard, il a accordé une déclaration portant que les demandeurs avaient le droit d'utiliser toute terre inoccupée ou vacante, sous réserve du respect des lois d'application générale de la province, il a rejeté la demande de dommages-intérêts et il a rejeté la demande reconventionnelle de la province. Il n'a rendu aucune ordonnance concernant les dépens. En appel, la revendication initiale a été modifiée de deux façons. Premièrement, les revendications relatives à la propriété des territoires et à la compétence sur ceux-ci ont été remplacées respectivement par la revendication du titre aborigène et la revendication de l'autonomie gouvernementale. Deuxièmement, les revendications individuelles présentées par chaque maison ont été fusionnées en deux revendications collectives, une au nom de chaque nation. Aucune modification en ce sens n'a été apportée formellement aux actes de procédure. L'appel a été rejeté par la Cour d'appel à la majorité.

The principal issues on the appeal, some of which raised a number of sub-issues, were as follows: (1) whether the pleadings precluded the Court from entertaining claims for aboriginal title and self-government; (2) what was the ability of this Court to interfere with the factual findings made by the trial judge; (3) what is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof; (4) whether the appellants made out a claim to self-government; and, (5) whether the province had the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*.

Les principales questions dans le pourvoi sont les suivantes: (1) Les actes de procédure empêchent-ils la Cour d'examiner les revendications relatives au titre aborigène et à l'autonomie gouvernementale? (2) Quel pouvoir notre Cour a-t-elle de modifier les conclusions de fait du juge de première instance? (3) Quel est le contenu du titre aborigène, comment est-il protégé par le par. 35(1) de la *Loi constitutionnelle de 1982* et comment fait-on la preuve de son existence? (4) Les appelants ont-ils établi le bien-fondé de leur revendication de l'autonomie gouvernementale? (5) La province avait-elle, après 1871, le pouvoir d'éteindre des droits ancestraux soit par l'exercice de sa propre compétence soit par l'effet de l'art. 88 de la *Loi sur les Indiens*?

Held: The appeal should be allowed in part and the cross-appeal should be dismissed.

Arrêt: Le pourvoi est accueilli en partie et le pourvoi incident est rejeté.

Whether the Claims Were Properly Before the Court

Per Lamer C.J. and Cory, McLachlin, and Major JJ.: The claims were properly before the Court. Although the pleadings were not formally amended, the trial judge did allow a *de facto* amendment to permit a claim for aboriginal rights other than ownership and jurisdiction. The respondents did not appeal this *de facto* amendment and the trial judge's decision on this point must accordingly stand.

No amendment was made with respect to the amalgamation of the individual claims brought by the individual Gitksan and Wet'suwet'en Houses into two collective claims, one by each nation, for aboriginal title and self-government. The collective claims were simply not in issue at trial and to frame the case on appeal in a different manner would retroactively deny the respondents the opportunity to know the appellants' case.

A new trial is necessary. First, the defect in the pleadings prevented the Court from considering the merits of this appeal. The parties at a new trial would decide whether any amendment was necessary to make the pleadings conform with the other evidence. Then, too, appellate courts, absent a palpable and overriding error, should not substitute their own findings of fact even when the trial judge misapprehended the law which was applied to those facts. Appellate intervention is warranted, however, when the trial court fails to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when applying the rules of evidence and interpreting the evidence before it.

Per La Forest and L'Heureux-Dubé JJ.: The amalgamation of the appellants' individual claims technically prevents a consideration of the merits. However, there is a more substantive problem with the pleadings. The appellants sought a declaration of "aboriginal title" but attempted, in essence, to prove that they had complete control over the territory. It follows that what the appellants sought by way of declaration and what they set out

La Cour était-elle régulièrement saisie des revendications?

Le juge en chef Lamer et les juges Cory, McLachlin et Major: La Cour était régulièrement saisie des revendications. Même si les actes de procédure n'ont pas été formellement modifiés, le juge de première instance a bel et bien accepté une modification *de facto* pour permettre la revendication de droits ancestraux autres que la propriété et la compétence. Les intimés n'ont pas interjeté appel contre cette modification *de facto* et la décision du juge de première instance sur ce point doit être maintenue.

Aucune modification n'a été apportée en ce qui a trait à la fusion des revendications individuelles présentées par les maisons Wet'suwet'en et Gitksan en deux revendications collectives, une pour chaque nation, sollicitant un titre aborigène et l'autonomie gouvernementale. Les revendications collectives n'étaient tout simplement pas en litige en première instance, et redéfinir le litige en appel aurait pour effet de nier rétroactivement aux intimés la possibilité de savoir quelle est la cause des appelants.

Il est nécessaire de tenir un nouveau procès. Premièrement, le vice dans les actes de procédure a empêché la Cour d'examiner le fond du pourvoi. Il reviendra aux parties à un nouveau procès de se demander si une modification est nécessaire pour rendre les actes de procédure conformes à la preuve. En outre, sauf erreur manifeste et dominante, les cours d'appel ne devraient pas substituer leurs propres conclusions de fait à celles du juge de première instance, même lorsque ce dernier a mal saisi le droit qu'il a appliqué aux faits en question. Par contre, une cour d'appel est justifiée d'intervenir dans le cas où le juge de première instance n'a pas tenu compte des difficultés de preuve inhérentes à l'examen des revendications de droits ancestraux, lorsqu'il a appliqué les règles de preuve et a interprété la preuve qui lui était présentée.

Les juges La Forest et L'Heureux-Dubé: La fusion des revendications individuelles des appelants a empêché, sur le plan de la forme, la Cour d'examiner le fond de l'affaire. Cependant, les actes de procédure posent un problème encore plus substantiel. Même si les appelants ont sollicité un jugement déclarant l'existence d'un «titre aborigène», ils ont essentiellement tenté d'établir qu'ils exerçaient un contrôle complet sur le territoire en question. Il s'ensuit que ce que les appelants ont demandé à la Cour de leur reconnaître, par voie de jugement déclaratoire, et ce qu'ils se sont efforcés d'établir

to prove by way of the evidence were two different matters. A new trial should be ordered.

McLachlin J. was in substantial agreement.

The Ability of the Court to Interfere with the Trial Judge's Factual Findings

Per Lamer C.J. and Cory, McLachlin and Major JJ.: The factual findings made at trial could not stand because the trial judge's treatment of the various kinds of oral histories did not satisfy the principles laid down in *R. v. Van der Peet*. The oral histories were used in an attempt to establish occupation and use of the disputed territory which is an essential requirement for aboriginal title. The trial judge refused to admit or gave no independent weight to these oral histories and then concluded that the appellants had not demonstrated the requisite degree of occupation for "ownership". Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different.

The Content of Aboriginal Title, How It Is Protected by s. 35(1) of the Constitution Act, 1982, and the Requirements Necessary to Prove It

Per Lamer C.J. and Cory, McLachlin and Major JJ.: Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be irreconcilable with the nature of the group's attachment to that land.

Aboriginal title is *sui generis*, and so distinguished from other proprietary interests, and characterized by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown. Another dimension of aboriginal title is its sources: its recognition by the *Royal Proclamation, 1763* and the relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing assertion of British sovereignty. Finally, aboriginal title is held communally.

par la preuve, étaient deux choses différentes. La tenue d'un nouveau procès doit être ordonnée.

Le juge McLachlin est largement en accord avec ces motifs.

Le pouvoir de la Cour de modifier les conclusions de fait du juge de première instance

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Les conclusions de fait tirées en première instance ne pouvaient être maintenues en raison du fait que le traitement accordé aux divers types de récits oraux par le juge de première instance ne respecte pas les principes établis dans *R. c. Van der Peet*. Ces récits ont été invoqués pour tenter d'établir l'occupation et l'utilisation du territoire contesté, condition essentielle à l'existence du titre aborigène. Après avoir refusé d'admettre ces récits oraux ou de leur accorder quelque valeur probante indépendante que ce soit, le juge de première instance est arrivé à la conclusion que les appelants n'avaient pas démontré l'existence du degré d'occupation requis du territoire pour fonder la «propriété» de celui-ci. Si le juge du procès avait apprécié correctement les récits oraux, ses conclusions sur ces questions de fait auraient pu être très différentes.

Le contenu du titre aborigène, la façon dont il est protégé par le par. 35(1) de la Loi constitutionnelle de 1982 et les exigences en matière de preuve de son existence

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour différentes fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante d'une culture autochtone distinctive. Ces utilisations protégées ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour ces terres.

Le titre aborigène est un droit *sui generis*; il se distingue de ce fait des autres intérêts de propriété et est caractérisé par différentes dimensions. Le titre aborigène est inaliénable et ne peut être transféré, cédé ou vendu à personne d'autre que la Couronne. Les origines du titre aborigène constituent une autre dimension de celui-ci: sa reconnaissance par la *Proclamation royale de 1763* et le rapport entre la common law, qui reconnaît l'occupation comme preuve de la possession en droit, et les systèmes juridiques autochtones qui existaient avant l'affirmation de la souveraineté britannique. Finalement, le titre aborigène est détenu collectivement.

The exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group's distinctive aboriginal culture. Canadian jurisprudence on aboriginal title frames the "right to occupy and possess" in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom or tradition. The nature of the Indian interest in reserve land which has been found to be the same as the interest in tribal lands is very broad and incorporates present-day needs. Finally, aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. Such a use is certainly not a traditional one.

The content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This inherent limit arises because the relationship of an aboriginal community with its land should not be prevented from continuing into the future. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. Land held by virtue of aboriginal title may not be alienated because the land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value. Finally, the importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration. On the contrary, the idea of surrender reinforces the conclusion that aboriginal title is limited. If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

Aboriginal title at common law was recognized well before 1982 and is accordingly protected in its full form by s. 35(1). The constitutionalization of common law aboriginal rights, however, does not mean that those rights exhaust the content of s. 35(1). The existence of an aboriginal right at common law is sufficient, but not

Le droit exclusif d'utiliser les terres ne comprend pas simplement le droit d'exercer des activités qui sont des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante de la culture distinctive du groupe autochtone qui revendique le droit. La jurisprudence canadienne relative au titre aborigène définit le «droit d'occuper et de posséder» en termes généraux et, fait important, ne l'assortit pas d'une réserve le limitant aux utilisations liées à des coutumes, pratiques ou traditions. La nature du droit des Indiens sur les terres des réserves, qui a été déclaré être le même que leur droit sur les terres tribales, est très générale et intègre les besoins actuels des collectivités autochtones. Finalement, le titre aborigène comprend les droits miniers, et les terres détenues en vertu d'un titre aborigène devraient pouvoir être exploitées pour ces ressources, ce qui ne constitue certes pas une utilisation traditionnelle.

Le contenu du titre aborigène comporte une limite intrinsèque, savoir que les terres détenues en vertu d'un titre aborigène ne peuvent pas être utilisées d'une manière incompatible avec la nature de l'attachement qu'ont les revendicateurs pour ces terres. Cette limite intrinsèque découle du fait que rien ne devrait empêcher ce rapport de continuer dans le futur. L'occupation est définie en fonction des activités qui ont été exercées sur les terres et des utilisations qui ont été faites de celles-ci par le groupe en question. Si des terres font l'objet d'une telle occupation, il existera entre ce groupe et les terres visées un lien spécial tel que les terres feront partie intégrante de la définition de la culture distinctive du groupe. Les terres détenues en vertu d'un titre aborigène sont inaliénables parce qu'elles ont en elles-mêmes une valeur intrinsèque et unique dont jouit la collectivité qui possède le titre aborigène sur celles-ci. La collectivité ne peut pas faire de ces terres des utilisations qui détruiraient cette valeur. Enfin, l'importance de la continuité du rapport qu'entretient une collectivité autochtone avec ses terres et la valeur non économique ou intrinsèque de celles-ci ne devraient pas être considérées comme faisant obstacle à la possibilité d'une cession à la Couronne moyennant contrepartie de valeur. Au contraire, l'idée de cession renforce la conclusion que le titre aborigène est limité. Si les autochtones désirent utiliser leurs terres d'une manière que ne permet pas le titre, ils doivent alors les céder et les convertir en terres non visées par un titre aborigène.

Le titre aborigène a été reconnu en common law bien avant 1982 et est par conséquent protégé dans sa forme complète par le par. 35(1). Toutefois, la constitutionnalisation par le par. 35(1) des droits ancestraux reconnus en common law ne signifie pas que ces droits épuisent le contenu du par. 35(1). L'existence d'un droit ancestral

necessary, for the recognition and affirmation of that right by s. 35(1).

Constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At the one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title to the land. In the middle are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. At the other end of the spectrum is aboriginal title itself which confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities.

Aboriginal title is a right to the land itself. That land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title. Section 35(1), since its purpose is to reconcile the prior presence of aboriginal peoples with the assertion of Crown sovereignty, 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.

The test for the identification of aboriginal rights to engage in particular activities and the test for the identification of aboriginal title, although broadly similar, are

reconnu en common law est donc suffisante, mais pas nécessaire, pour la reconnaissance et la confirmation de ce droit par le par. 35(1).

Les droits ancestraux reconnus et confirmés par le par. 35(1) s'étalent le long d'un spectre, en fonction de leur degré de rattachement avec le territoire visé. À une extrémité du spectre, il y a le cas des droits ancestraux qui sont des coutumes, pratiques et traditions faisant partie intégrante de la culture autochtone distinctive du groupe qui revendique le droit en question mais où l'occupation et l'utilisation du territoire sur lequel l'activité est pratiquée sont insuffisantes pour étayer la revendication du titre sur celui-ci. Au milieu du spectre, on trouve les activités qui, par nécessité, sont pratiquées sur le territoire et, de fait, pourraient même être étroitement rattachées à une parcelle de terrain particulière. Bien qu'un groupe autochtone puisse être incapable de démontrer l'existence d'un titre sur le territoire, il peut quand même avoir le droit — spécifique à un site — de s'adonner à une activité particulière. À l'autre extrémité du spectre, il y a le titre aborigène proprement dit, qui confère quelque chose de plus que le droit d'exercer des activités spécifiques à un site qui sont des aspects de coutumes, pratiques et traditions de cultures autochtones distinctives. L'existence de droits spécifiques à un site peut être établie même si l'existence d'un titre ne peut pas l'être. Étant donné que les droits ancestraux peuvent varier en fonction de leur degré de rattachement au territoire, il est possible que certains groupes autochtones soient incapables d'établir le bien-fondé de leur revendication d'un titre, mais qu'ils possèdent néanmoins des droits ancestraux reconnus et confirmés par le par. 35(1), notamment des droits spécifiques à un site d'exercer des activités particulières.

Le titre aborigène est le droit au territoire lui-même. Sous réserve des limites inhérentes au titre aborigène, ce territoire peut être utilisé pour diverses activités, dont aucune ne doit nécessairement être protégée individuellement en tant que droit ancestral prévu au par. 35(1). Ces activités sont des parasites du titre sous-jacent. Comme l'objet du par. 35(1) est de concilier la présence antérieure des peuples autochtones en Amérique du Nord avec l'affirmation de la souveraineté de la Couronne, cette disposition doit reconnaître et confirmer les deux aspects de cette préexistence, savoir l'occupation du territoire, d'une part, et l'organisation sociale antérieure et les cultures distinctives des peuples autochtones habitant ce territoire, d'autre part.

Bien que le critère applicable pour déterminer l'existence de droits ancestraux autorisant l'exercice d'activités particulières et le critère applicable pour détermi-

distinct in two ways. First, under the test for aboriginal title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy. Second, whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.

In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title. In the context of aboriginal title, sovereignty is the appropriate time period to consider for several reasons. First, from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. The Crown, however, did not gain this title until it asserted sovereignty and it makes no sense to speak of a burden on the underlying title before that title existed. Aboriginal title crystallized at the time sovereignty was asserted. Second, aboriginal title does not raise the problem of distinguishing between distinctive, integral aboriginal practices, customs and traditions and those influenced or introduced by European contact. Under common law, the act of occupation or possession is sufficient to ground aboriginal title and it is not necessary to prove that the land was a distinctive or integral part of the aboriginal society before the arrival of Europeans. Finally, the date of sovereignty is more certain than the date of first contact.

Both the common law and the aboriginal perspective on land should be taken into account in establishing the proof of occupancy. At common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land. Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources. In considering whether occupation sufficient

ner l'existence d'un titre aborigène comportent de grandes similitudes, ils se distinguent l'un de l'autre de deux façons: premièrement, dans le cadre du critère relatif au titre aborigène, l'exigence que le territoire fasse partie intégrante de la culture distincte des demandeurs est subsumée sous l'exigence d'occupation; deuxièmement, alors que c'est le moment du premier contact avec les Européens qui est le moment pertinent pour la détermination des droits ancestraux, dans le cas du titre aborigène, c'est le moment de l'affirmation par la Couronne de sa souveraineté sur le territoire.

Pour établir le bien-fondé de la revendication d'un titre aborigène, le groupe autochtone qui revendique le titre doit démontrer qu'il occupait les terres en question au moment où la Couronne a affirmé sa souveraineté sur ces terres. Lorsqu'il est question de titre aborigène, la période de l'affirmation de la souveraineté est celle qui doit être prise en considération, et ce pour plusieurs raisons. Premièrement, d'un point de vue théorique, le titre aborigène découle de l'occupation antérieure du territoire par les peuples autochtones et du rapport entre la common law et les régimes juridiques autochtones préexistants. Le titre aborigène grève le titre sous-jacent de la Couronne. Cependant, celle-ci n'a acquis ce titre qu'à compter du moment où elle a affirmé sa souveraineté sur le territoire en question et il serait absurde de parler d'une charge grevant le titre sous-jacent avant que celui-ci ait existé. Le titre aborigène s'est cristallisé au moment de l'affirmation de la souveraineté. Deuxièmement, le titre aborigène ne soulève pas le problème que pose la distinction entre les coutumes, pratiques et traditions distinctives faisant partie intégrante d'une société autochtone et celles qui ont été introduites par suite du contact avec les Européens ou influencées par celui-ci. En vertu de la common law, le fait de l'occupation ou de la possession suffit pour fonder un titre aborigène, et il n'est pas nécessaire de prouver que le territoire en question faisait partie intégrante de la société autochtone visée avant l'arrivée des Européens ou qu'il était un élément distinctif de celle-ci. Finalement, la date de l'affirmation de la souveraineté a un caractère plus certain que celle du premier contact avec les Européens.

Tant la common law que le point de vue des autochtones à l'égard du territoire devraient être pris en compte dans la démonstration de l'occupation. En common law, l'occupation physique fait preuve de la possession en droit, fait qui à son tour fondera le droit au titre sur les terres. L'occupation physique peut être prouvée par différents faits, allant de la construction de bâtiments à l'utilisation régulière de secteurs bien définis du territoire pour y pratiquer la chasse, la pêche ou d'autres types d'exploitation de ses ressources, en pas-

to ground title is established, the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed must be taken into account. Given the occupancy requirement, it was not necessary to include as part of the test for aboriginal title whether a group demonstrated a connection with the piece of land as being of central significance to its distinctive culture. Ultimately, the question of physical occupation is one of fact to be determined at trial.

If present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation. Since conclusive evidence of pre-sovereignty occupation may be difficult, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. An unbroken chain of continuity need not be established between present and prior occupation. The fact that the nature of occupation has changed would not ordinarily preclude a claim for aboriginal title, as long as a substantial connection between the people and the land is maintained. The only limitation on this principle might be that the land not be used in ways which are inconsistent with continued use by future generations of aboriginals.

At sovereignty, occupation must have been exclusive. This requirement flows from the definition of aboriginal title itself, which is defined in terms of the right to exclusive use and occupation of land. The test must take into account the context of the aboriginal society at the time of sovereignty. The requirement of exclusive occupancy and the possibility of joint title can be reconciled by recognizing that joint title can arise from shared exclusivity. As well, shared, non-exclusive aboriginal rights short of aboriginal title but tied to the land and permitting a number of uses can be established if exclusivity cannot be proved. The common law should develop to recognize aboriginal rights as they were rec-

sant par la délimitation et la culture de champs. Dans l'examen de la question de savoir si on a fait la preuve d'une occupation suffisante pour fonder un titre aborigène, il faut tenir compte de la taille, du mode de vie, des ressources matérielles et des habiletés technologiques du groupe concerné, ainsi que de la nature des terres revendiquées. Compte tenu de l'exigence d'occupation, il n'est pas nécessaire d'inclure dans le critère relatif au titre aborigène la question de savoir si le groupe concerné a démontré que le lien qui le rattache au territoire visé est d'une importance fondamentale pour sa culture distinctive. En définitive, la preuve de l'occupation physique est une question de fait à trancher au procès.

Si l'occupation actuelle est invoquée comme preuve de l'occupation antérieure à l'affirmation de la souveraineté, il faut qu'il y ait une continuité entre l'occupation antérieure à l'affirmation de la souveraineté et l'occupation actuelle. Étant donné qu'il peut s'avérer difficile d'apporter des éléments de preuve concluants d'une occupation antérieure à l'affirmation de la souveraineté, une collectivité autochtone peut produire, au soutien de la revendication d'un titre aborigène, des éléments de preuve de l'occupation actuelle comme preuve de l'occupation antérieure à l'affirmation de la souveraineté. Il n'est pas nécessaire de faire la preuve d'une continuité parfaite entre l'occupation actuelle et l'occupation antérieure. Le fait que la nature de l'occupation ait changé ne fera généralement pas obstacle à la revendication d'un titre aborigène, dans la mesure où un lien substantiel entre le peuple et le territoire en question a été maintenu. La seule restriction à ce principe pourrait être qu'il ne soit pas fait du territoire des utilisations incompatibles avec son usage continu par les générations autochtones futures.

L'occupation doit avoir été exclusive au moment de l'affirmation de la souveraineté. Cette exigence d'exclusivité découle de la définition même du titre aborigène, défini comme étant le droit d'utiliser et d'occuper de façon exclusive les terres visées. Le critère doit prendre en compte le contexte de la société autochtone au moment de l'affirmation de la souveraineté. Il est possible de concilier l'exigence d'occupation exclusive et l'existence possible d'un titre conjoint en reconnaissant qu'un titre conjoint peut découler d'une exclusivité partagée. De même, l'existence de droits ancestraux non exclusifs partagés ne constituant pas un titre, mais par ailleurs liés au territoire et permettant certaines utilisations, peut être établie, même si l'exclusivité ne peut être prouvée. La common law doit évoluer pour reconnaître les droits ancestraux qui étaient reconnus soit par

ognized by either *de facto* practice or by aboriginal systems of governance.

Per La Forest and L'Heureux-Dubé JJ.: "Aboriginal title" is based on the continued occupation and use of the land as part of the aboriginal peoples' traditional way of life. This *sui generis* interest is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts. It is personal in that it is generally inalienable except to the Crown and, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat the aboriginal peoples fairly. There is reluctance to define more precisely the right of aboriginal peoples to live on their lands as their forefathers had lived.

The approach to defining the aboriginal right of occupancy is highly contextual. A distinction must be made between (1) the recognition of a general right to occupy and possess ancestral lands and (2) the recognition of a discrete right to engage in an aboriginal activity in a particular area. The latter has been defined as the traditional use, by a tribe of Indians, that has continued from pre-contact times of a particular area for a particular purpose. By contrast, a general claim to occupy and possess vast tracts of territory is the right to use the land for a variety of activities related to the aboriginal society's habits and mode of life. As well, in defining the nature of "aboriginal title", reference need not be made to statutory provisions and regulations dealing with reserve lands.

In defining the nature of "aboriginal title", reference need not be made to statutory provisions and regulations dealing specifically with reserve lands. Though the interest of an Indian band in a reserve has been found to be derived from, and to be of the same nature as, the interest of an aboriginal society in its traditional tribal lands, it does not follow that specific statutory provisions governing reserve lands should automatically apply to traditional tribal lands.

The "key" factors for recognizing aboriginal rights under s. 35(1) are met in the present case. First, the nature of an aboriginal claim must be identified precisely with regard to particular practices, customs and traditions. When dealing with a claim of "aboriginal

une pratique *de facto*, soit par un régime de gestion autochtone.

Les juges La Forest et L'Heureux-Dubé: Le «titre aborigène» se fonde sur l'occupation et l'utilisation ininterrompues des terres visées par le peuple autochtone dans le cadre de son mode de vie traditionnel. Ce droit *sui generis* n'équivaut pas à la propriété en fief simple et il ne peut pas non plus être décrit au moyen des concepts traditionnels du droit des biens. Il est personnel en ce sens qu'il est généralement inaliénable, sauf en faveur de la Couronne qui, dans ses opérations concernant un tel droit, est assujettie à une obligation de fiduciaire, savoir celle de traiter équitablement les peuples autochtones. On hésite à définir avec plus de précision le droit des peuples autochtones de continuer à vivre sur leurs terres comme l'avaient fait leurs ancêtres.

Le point de vue adopté pour définir le droit d'occupation ancestral est éminemment contextuel. Il est nécessaire de faire la distinction entre les deux aspects suivants: (1) la reconnaissance d'un droit général d'occuper et de posséder des terres ancestrales; (2) la reconnaissance d'un droit distinct d'exercer une activité autochtone dans une région particulière. Ce dernier aspect a été défini comme étant l'utilisation traditionnelle — remontant avant l'arrivée des Européens — que fait une tribu indienne d'un territoire donné, à une fin particulière. À l'opposé, une revendication générale visant le droit d'occuper et de posséder de vastes étendues de territoire concerne le droit d'utiliser ces terres pour y exercer différentes activités liées aux habitudes et au mode de vie de la société autochtone concernée. En outre, en définissant la nature du «titre aborigène», il n'est pas nécessaire de se référer aux dispositions législatives et réglementaires concernant les terres des réserves.

En définissant la nature du «titre aborigène», il n'est pas nécessaire de se référer aux dispositions législatives et réglementaires visant spécifiquement les terres des réserves. Même s'il a été jugé que le droit que possède une bande indienne sur une réserve découle du droit de la société autochtone sur ses terres tribales traditionnelles, il ne s'ensuit aucunement que les dispositions législatives particulières régissant les terres des réserves s'appliquent automatiquement aux terres tribales traditionnelles.

Il est satisfait, dans le présent pourvoi, aux facteurs «clés» permettant de reconnaître des droits ancestraux en vertu du par. 35(1). Premièrement, la nature d'une revendication autochtone doit être rattachée précisément à des coutumes, pratiques et traditions particulières. Le

title", the court will focus on the occupation and use of the land as part of the aboriginal society's traditional way of life.

Second, an aboriginal society must specify the area that has been continuously used and occupied by identifying general boundaries. Exclusivity means that an aboriginal group must show that a claimed territory is indeed its ancestral territory and not the territory of an unconnected aboriginal society. It is possible that two or more aboriginal groups may have occupied the same territory and therefore a finding of joint occupancy would not be precluded.

Third, the aboriginal right of possession is based on the continued occupation and use of traditional tribal lands since the assertion of Crown sovereignty. However, the date of sovereignty may not be the only relevant time to consider. Continuity may still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area. Also, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, it is not necessary to establish an unbroken chain of continuity.

Fourth, if aboriginal peoples continue to occupy and use the land as part of their traditional way of life, the land is of central significance to them. Aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas but also to the use of adjacent lands and even remote territories used to pursue a traditional mode of life. Occupancy is part of aboriginal culture in a broad sense and is, therefore, absorbed in the notion of distinctiveness. The *Royal Proclamation, 1763* supports this approach to occupancy.

McLachlin J. was in substantial agreement.

Infringements of Aboriginal Title: The Test of Justification

Per Lamer C.J. and Cory, McLachlin and Major JJ.: Constitutionally recognized aboriginal rights are not absolute and may be infringed by the federal and pro-

tribunal qui examine la revendication d'un «titre aborigène» se demande principalement si l'occupation et l'utilisation des terres visées faisaient partie du mode de vie traditionnel de la société autochtone concernée.

Deuxièmement, la société autochtone doit spécifier le territoire qui a été utilisé et occupé de façon ininterrompue en en indiquant les limites générales. L'exclusivité signifie que le groupe autochtone doit établir que le territoire qu'il revendique est, en fait, son territoire ancestral et non celui d'une autre société autochtone avec laquelle il n'a aucun lien. Comme il est possible que deux groupes autochtones ou plus aient occupé le même territoire, il est donc possible de conclure à l'existence d'une occupation conjointe.

Troisièmement, le droit de possession ancestral se fonde sur l'occupation et l'utilisation ininterrompues de terres tribales traditionnelles depuis l'affirmation par la Couronne de sa souveraineté. Cependant, il est possible que la date de l'affirmation de la souveraineté ne soit pas le seul moment pertinent dont il faille tenir compte. Il peut encore y avoir continuité lorsque l'occupation actuelle d'une région est liée à l'occupation d'une autre région avant l'affirmation de la souveraineté. En outre, les peuples autochtones qui revendiquent un droit de possession peuvent présenter des éléments de preuve de l'occupation actuelle du territoire visé pour établir son occupation antérieure. De plus, il n'est pas nécessaire de faire la preuve d'une continuité parfaite.

Quatrièmement, si des peuples autochtones continuent d'occuper et d'utiliser le territoire visé dans le cadre de leur mode de vie traditionnel, ce territoire a une importance fondamentale pour eux. La notion d'occupation d'un territoire par des autochtones ne s'entend pas seulement de la présence de peuples autochtones dans des villages ou des établissements permanents, mais également de l'utilisation de terres adjacentes et même de territoires éloignés dans le cadre d'un mode de vie traditionnel. L'occupation constitue un aspect de la culture autochtone prise dans un sens large et s'intègre, par conséquent, à la notion de caractère distinctif. Cette approche relative à la nature de l'occupation est étayée par la *Proclamation royale de 1763*.

Le juge McLachlin est largement en accord avec ces motifs.

Les atteintes au titre aborigène: le critère de justification

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Les droits ancestraux reconnus et confirmés par la Constitution ne sont pas absolus, et tant le gouver-

vincial governments if the infringement (1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples. The development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims, are objectives consistent with this purpose. Three aspects of aboriginal title are relevant to the second part of the test. First, the right to exclusive use and occupation of land is relevant to the degree of scrutiny of the infringing measure or action. Second, the right to choose to what uses 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, 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 and, in most cases, the duty will be significantly deeper than mere consultation. And third, lands held pursuant to aboriginal title have an inescapable economic component which suggests that compensation is relevant to the question of justification as well. Fair compensation will ordinarily be required when aboriginal title is infringed.

nement fédéral que les gouvernements provinciaux peuvent y porter atteinte si (1) l'atteinte au droit ancestral visé se rapporte à la poursuite d'un objectif législatif impérieux et réel; (2) l'atteinte est compatible avec les rapports spéciaux de fiduciaire qui existent entre la Couronne et les peuples autochtones. L'extension de l'agriculture, de la foresterie, de l'exploitation minière et de l'énergie hydroélectrique, le développement économique général de l'intérieur de la Colombie-Britannique, la protection de l'environnement et des espèces menacées d'extinction, ainsi que la construction des infrastructures et l'implantation des populations requises par ces fins, sont des types d'objectifs compatibles avec cet objet. Trois aspects du titre aborigène sont pertinents quant à la deuxième étape du critère. Premièrement, le droit d'utiliser et d'occuper de façon exclusive les terres visées est pertinent pour ce qui est du degré d'examen auquel est soumis la mesure ou l'acte qui porte atteinte au titre. Deuxièmement, le droit de choisir les utilisations qui peuvent être faites de ces terres, sous réserve de la restriction ultime que ces usages ne sauraient détruire la capacité de ces terres d'assurer la subsistance des générations futures de peuples autochtones, indique qu'il est possible de respecter les rapports de fiduciaire entre la Couronne et les peuples autochtones en faisant participer les peuples autochtones à la prise des décisions concernant leurs terres. Il y a toujours obligation de consultation et, dans la plupart des cas, l'obligation exigera beaucoup plus qu'une simple consultation. Troisièmement, les terres détenues en vertu d'un titre aborigène ont une composante économique inéluctable qui montre que l'indemnisation est également un facteur pertinent à l'égard de la question de la justification. Il sera généralement nécessaire de verser une juste indemnité en cas d'atteinte à un titre aborigène.

Per La Forest and L'Heureux-Dubé JJ.: Rights that are recognized and affirmed are not absolute. Government regulation can therefore infringe upon aboriginal rights if it meets the test of justification under s. 35(1). The approach is highly contextual.

Les juges La Forest et L'Heureux-Dubé: Les droits qui sont reconnus et confirmés ne sont pas absolus. Des mesures de réglementation prises par le gouvernement peuvent porter atteinte aux droits ancestraux si elles satisfont au critère de justification des atteintes aux droits visés au par. 35(1). La méthode adoptée est éminemment contextuelle.

The general economic development of the interior of British Columbia, through agriculture, mining, forestry and hydroelectric power, as well as the related building of infrastructure and settlement of foreign populations, are valid legislative objectives that, in principle, satisfy the first part of the justification analysis. Under the second part, these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with

Le développement économique général de l'intérieur de la Colombie-Britannique par l'agriculture, l'exploitation minière, la foresterie et l'énergie hydroélectrique, ainsi que la construction des infrastructures et l'implantation des populations requises par ce développement sont des objectifs législatifs réguliers qui, en principe, satisfont au premier volet du critère de justification. Dans le cadre du second volet de ce critère, ces objectifs législatifs doivent tenir compte des intérêts des peuples

the honour and good faith of the Crown. One aspect of accommodation of "aboriginal title" entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect is fair compensation.

McLachlin J. was in substantial agreement.

Self-Government

Per The Court: The errors of fact made by the trial judge, and the resultant need for a new trial, made it impossible for this Court to determine whether the claim to self-government had been made out.

Extinguishment

Per Lamer C.J. and Cory, McLachlin and Major JJ.: Section 91(24) of the *Constitution Act, 1867* (the federal power to legislate in respect of Indians) carries with it the jurisdiction to legislate in relation to aboriginal title, and by implication, the jurisdiction to extinguish it. The ownership by the provincial Crown (under s. 109) of lands held pursuant to aboriginal title is separate from jurisdiction over those lands. Notwithstanding s. 91(24), provincial laws of general application apply *proprio vigore* to Indians and Indian lands.

A provincial law of general application cannot extinguish aboriginal rights. First, a law of general application cannot, by definition, meet the standard "of clear and plain intention" needed to extinguish aboriginal rights without being *ultra vires* the province. Second, s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on "Indianness" or the "core of Indianness".

Provincial laws which would otherwise not apply to Indians *proprio vigore* are allowed to do so by s. 88 of the *Indian Act* which incorporates by reference provincial laws of general application. This provision, however, does not "invigorate" provincial laws which are invalid because they are in relation to Indians and Indian lands.

autochtones. Cette prise en compte doit toujours être faite conformément à l'obligation de la Couronne d'agir honorablement et de bonne foi. L'un des aspects de cette prise en compte, dans un tel contexte, consiste à informer et à consulter les peuples autochtones relativement au développement du territoire visé. Un autre aspect de la prise en compte est la question de la juste indemnisation.

Le juge McLachlin est largement en accord avec ces motifs.

L'autonomie gouvernementale

La Cour: En raison des erreurs de fait commises par le juge de première instance et de la nécessité de tenir un nouveau procès qui en a découlé, il est impossible pour la Cour de décider si le bien-fondé de la revendication de l'autonomie gouvernementale a été établi.

L'extinction

Le juge en chef Lamer et les juges Cory, McLachlin et Major: Le paragraphe 91(24) de la *Loi constitutionnelle de 1867* (le pouvoir du fédéral de légiférer sur les Indiens) emporte le pouvoir de légiférer relativement au titre aborigène et par implication, celui d'éteindre ce titre. Le droit de propriété de la province sur les terres détenues en vertu d'un titre aborigène (en vertu de l'art. 109) est distinct de la compétence exercée à l'égard de ces terres. Malgré le par. 91(24), les lois provinciales d'application générale s'appliquent *proprio vigore* (d'elles-mêmes) aux Indiens et aux terres indiennes.

Une loi provinciale d'application générale ne peut pas éteindre des droits ancestraux. Premièrement, par définition, une loi provinciale d'application générale ne peut pas, sans être *ultra vires*, respecter la norme de l'«intention claire et expresse» établie à l'égard de l'extinction des droits ancestraux. Deuxièmement, le par. 91(24) protège le fondement de la compétence du fédéral, même contre les lois provinciales d'application générale, par l'application du principe de l'exclusivité des compétences. Il a été dit que ce fondement se rapporte à des questions touchant à la «quiddité indienne», ou indianité, ou à l'«essentiel de l'indianité».

Des règles de droit provinciales qui autrement ne s'appliqueraient pas d'elles-mêmes aux Indiens peuvent le faire par l'effet de l'art. 88 de la *Loi sur les Indiens*, qui incorpore par renvoi les lois provinciales d'application générale. Cependant, cette disposition ne «revigore» pas des règles de droit provinciales qui sont invalides parce qu'elles se rapportent aux Indiens et aux terres indiennes.

Per La Forest and L'Heureux-Dubé JJ.: The province had no authority to extinguish aboriginal rights either under the *Constitution Act, 1867* or by virtue of s. 88 of the *Indian Act*.

McLachlin J. was in substantial agreement.

Cases Cited

By Lamer C.J.

Considered: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *R. v. Adams*, [1996] 3 S.C.R. 101; *R. v. Côté*, [1996] 3 S.C.R. 139; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, aff'g *sub nom. St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577; *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Baker Lake v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; **referred to:** *R. v. Pamajewon*, [1996] 2 S.C.R. 821; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Mabo v. Queensland* (1992), 107 A.L.R. 1; *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031; *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802; *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474; *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *R. v. Taylor* (1981), 62 C.C.C. (2d) 227; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Uukw v. R.*, [1987] 6 W.W.R. 155; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Roberts v. Canada*, [1989] 1 S.C.R. 322; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657; *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *R. v. Sutherland*, [1980] 2 S.C.R. 451; *R. v. Francis*, [1988] 1 S.C.R. 1025; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285.

By La Forest J.

Considered: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *R. v. Van der Peet*, [1996] 2 S.C.R.

Les juges La Forest et L'Heureux-Dubé: La province n'avait pas le pouvoir d'éteindre des droits ancestraux en vertu de la *Loi constitutionnelle de 1867* ni par l'effet de l'art. 88 de la *Loi sur les indiens*.

Le juge McLachlin est largement en accord avec ces motifs.

Jurisprudence

Citée par le juge en chef Lamer

Arrêts examinés: *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *R. c. N.T.C. Smokehouse Ltd.*, [1996] 2 R.C.S. 672; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *R. c. Adams*, [1996] 3 R.C.S. 101; *R. c. Côté*, [1996] 3 R.C.S. 139; *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 A.C. 46, conf. *sub nom. St. Catharines Milling and Lumber Co. c. The Queen* (1887), 13 R.C.S. 577; *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Baker Lake c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; **arrêts mentionnés:** *R. c. Pamajewon*, [1996] 2 R.C.S. 821; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *Mabo c. Queensland* (1992), 107 A.L.R. 1; *Four B Manufacturing Ltd. c. Travailleurs unis du vêtement d'Amérique*, [1980] 1 R.C.S. 1031; *Parents naturels c. Superintendent of Child Welfare*, [1976] 2 R.C.S. 751; *Dick c. La Reine*, [1985] 2 R.C.S. 309; *Stein c. Le navire «Kathy K»*, [1976] 2 R.C.S. 802; *N.V. Bocimar S.A. c. Century Insurance Co. of Canada*, [1987] 1 R.C.S. 1247; *Schwartz c. Canada*, [1996] 1 R.C.S. 254; *Chartier c. Procureur général du Québec*, [1979] 2 R.C.S. 474; *Kruger c. La Reine*, [1978] 1 R.C.S. 104; *R. c. Taylor* (1981), 62 C.C.C. (2d) 227; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *Uukw c. R.*, [1987] 6 W.W.R. 155; *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *Roberts c. Canada*, [1989] 1 R.C.S. 322; *Bande indienne de la rivière Blueberry c. Canada (Ministère des Affaires indiennes et du Nord canadien)*, [1995] 4 R.C.S. 344; *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85; *Bande indienne de St. Mary's c. Cranbrook (Ville)*, [1997] 2 R.C.S. 657; *United States c. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941); *R. c. Sutherland*, [1980] 2 R.C.S. 451; *R. c. Francis*, [1988] 1 R.C.S. 1025; *Derrickson c. Derrickson*, [1986] 1 R.C.S. 285.

Citée par le juge La Forest

Arrêts examinés: *Calder c. Procureur général de la Colombie-Britannique*, [1973] R.C.S. 313; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *R. c. Van der Peet*, [1996] 2

into the Constitution by s. 35(1). In order to give guidance to the judge at the new trial, it is to this issue that I will now turn.

les parties ont un désaccord plus fondamental à propos du contenu du titre aborigène lui-même, et de sa réception dans la Constitution par le par. 35(1). Afin d'éclairer le juge qui instruira le nouveau procès, je vais maintenant examiner cette question.

110 I set out these opposing positions by way of illustration and introduction because I believe that all of the parties have characterized the content of aboriginal title incorrectly. The appellants argue that aboriginal title is tantamount to an inalienable fee simple, which confers on aboriginal peoples the rights to use those lands as they choose and which has been constitutionalized by s. 35(1). The respondents offer two alternative formulations: first, that aboriginal title is no more than a bundle of rights to engage in activities which are themselves aboriginal rights recognized and affirmed by s. 35(1), and that the *Constitution Act, 1982*, merely constitutionalizes those individual rights, not the bundle itself, because the latter has no independent content; and second, that aboriginal title, at most, encompasses the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves, and that s. 35(1) constitutionalizes this notion of exclusivity.

Afin d'illustrer le problème, je vais, en guise d'introduction, exposer les thèses opposées des parties, car j'estime que toutes les parties ont décrit incorrectement le contenu du titre aborigène. Les appelants soutiennent que le titre aborigène équivaut à un fief simple inaliénable, qu'il confère aux peuples autochtones le droit d'utiliser les terres visées comme ils l'entendent et qu'il a été constitutionnalisé par le par. 35(1). Les intimés avancent deux définitions: premièrement, le titre aborigène n'est rien de plus qu'un faisceau de droits autorisant l'exercice d'activités qui sont elles-mêmes des droits ancestraux reconnus et confirmés par le par. 35(1), et la *Loi constitutionnelle de 1982* ne fait que constitutionnaliser ces droits individuels et non le faisceau lui-même, parce que celui-ci n'a aucun contenu indépendant; deuxièmement, le titre aborigène comprend, au plus, le droit exclusif d'utiliser et d'occuper des terres pour y exercer des activités qui sont elles-mêmes des droits ancestraux, et le par. 35(1) constitutionnalise cette notion d'exclusivité.

111 The content of aboriginal title, in fact, lies somewhere in between these positions. Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in

En fait, le contenu du titre aborigène se situe quelque part entre ces deux thèses. Le titre aborigène est un droit foncier et, en tant que tel, il est quelque chose de plus que le droit d'exercer certaines activités précises, qui peuvent elles-mêmes être des droits ancestraux. Il confère plutôt le droit d'utiliser des terres pour y exercer différentes activités qui ne doivent pas nécessairement toutes être des aspects de coutumes, pratiques et traditions faisant partie intégrante des cultures distinctives des sociétés autochtones. Ces activités ne constituent pas le droit en soi; elles sont plutôt des parasites du titre sous-jacent. Toutefois, ces différents usages sont subordonnés à la restriction suivante: ils ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour le territoire visé et qui constitue le fondement de son

land, and is one way in which aboriginal title is distinct from a fee simple.

(2) Aboriginal Title at Common Law

(a) *General Features*

The starting point of the Canadian jurisprudence on aboriginal title is the Privy Council's decision in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, which described aboriginal title as a "personal and usufructuary right" (at p. 54). The subsequent jurisprudence has attempted to grapple with this definition, and has in the process demonstrated that the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.

The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal" in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot

titre aborigène sur ce territoire. Cette limite intrinsèque, qui sera expliquée plus longuement ci-après, découle du fait que le titre aborigène est défini comme un droit foncier *sui generis*, et elle est un aspect qui différencie le titre aborigène du fief simple.

(2) Le titre aborigène en common law

a) *Caractéristiques générales*

112 Le point de départ de la jurisprudence canadienne sur le titre aborigène est la décision du Conseil privé dans l'affaire *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 A.C. 46, dans laquelle le titre aborigène a été décrit comme étant un [TRADUCTION] «droit personnel, de la nature d'un usufruit» (à la p. 54). Par la suite, les tribunaux ont tenté de s'accommoder de cette définition, mais il ressort de leurs décisions que les termes choisis par le Conseil privé ne sont pas particulièrement utiles pour expliquer les différentes dimensions du titre aborigène. Le Conseil privé a cherché à rendre l'idée que le titre aborigène est un intérêt foncier *sui generis*. On a qualifié le titre aborigène de droit *sui generis* afin de le différencier des intérêts de propriété «ordinaires» comme le fief simple. Toutefois, comme je vais maintenant l'expliciter, on le qualifie également de droit *sui generis*, dans la mesure où il est impossible d'expliquer entièrement ses caractéristiques en fonction soit des règles du droit des biens en common law soit des règles relatives à la propriété prévues par les régimes juridiques autochtones. Tout comme d'autres droits ancestraux, le titre aborigène doit être défini en tenant compte à la fois de la common law et du point de vue des autochtones.

113 L'idée que le titre aborigène a un caractère *sui generis* est le principe unificateur qui sous-tend les différentes dimensions de ce titre. L'une de ces dimensions est l'inaliénabilité du titre aborigène. Les terres détenues en vertu d'un titre aborigène ne peuvent être transférées, vendues ou cédées à personne d'autre que la Couronne, et elles sont par conséquent inaliénables. Notre Cour s'est efforcée de préciser que c'est uniquement dans ce sens que le titre aborigène est un droit «personnel», et que cela ne veut pas dire qu'il ne s'agit pas d'un intérêt

compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.

114 Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine's Milling*. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, *Common Law Aboriginal Title* (1989), at p. 7. Thus, in *Guerin*, *supra*, Dickson J. described aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands". What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty" (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title — the relationship between common law and pre-existing systems of aboriginal law.

115 A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that

de propriété, qui ne représente rien de plus qu'une autorisation d'utiliser et d'occuper les terres visées et qui ne peut pas concurrencer sur un pied d'égalité d'autres droits de propriété: *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654, à la p. 677.

Une autre dimension du titre aborigène est son origine. On a d'abord cru que la source du titre aborigène au Canada était la *Proclamation royale de 1763*: voir *St. Catherine's Milling*. Cependant, il ne fait maintenant aucun doute que, même si le titre aborigène a été reconnu par la *Proclamation*, il découle de l'occupation antérieure du Canada par les peuples autochtones. Toutefois, cette occupation antérieure est pertinente à deux points de vue, qui illustrent tous deux le caractère *sui generis* du titre aborigène. Il y a d'abord le fait physique de l'occupation, qui découle du principe de common law selon lequel l'occupation prouve la possession en droit: voir Kent McNeil, *Common Law Aboriginal Title* (1989), à la p. 7. Ainsi, dans *Guerin*, précité, le juge Dickson a qualifié le titre aborigène, à la p. 376, de «droit, en *common law*, découlant de l'occupation et de la possession historiques par les Indiens de leurs terres tribales». Le titre aborigène a un caractère *sui generis* parce qu'il découle d'une possession antérieure à l'affirmation de la souveraineté britannique, tandis que les domaines ordinaires, comme le fief simple, ont pris naissance par la suite: voir Kent McNeil, «The Meaning of Aboriginal Title», dans Michael Asch, dir., *Aboriginal and Treaty Rights in Canada* (1997), 135, à la p. 144. Cette idée a été précisée dans *Roberts c. Canada*, [1989] 1 R.C.S. 322, où notre Cour a unanimement statué, à la p. 340, que le «titre aborigène existait avant la colonisation par les Britanniques et a continué d'exister après les revendications de souveraineté britanniques» (voir aussi *Guerin* à la p. 378). Ces affirmations indiquent que le titre aborigène a une autre origine — soit le rapport entre la common law et les régimes juridiques autochtones préexistants.

Une dimension supplémentaire du titre aborigène est le fait qu'il est détenu collectivement. Le titre aborigène ne peut pas être détenu par un autochtone en particulier; il est un droit foncier collectif, détenu par tous les membres d'une nation

land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

(b) *The Content of Aboriginal Title*

Although cases involving aboriginal title have come before this Court and Privy Council before, there has never been a definitive statement from either court on the content of aboriginal title. In *St. Catherine's Milling*, the Privy Council, as I have mentioned, described the aboriginal title as a "personal and usufructuary right", but declined to explain what that meant because it was not "necessary to express any opinion upon the point" (at p. 55). Similarly, in *Calder*, *Guerin*, and *Paul*, the issues were the extinguishment of, the fiduciary duty arising from the surrender of, and statutory easements over land held pursuant to, aboriginal title, respectively; the content of title was not at issue and was not directly addressed.

Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land. For the sake of clarity, I will discuss each of these propositions separately.

Aboriginal title encompasses the right to use the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, cultures and traditions

autochtone. Les décisions relatives aux terres visées sont également prises par cette collectivité. Il s'agit d'une autre caractéristique *sui generis* du titre aborigène, qui le différencie des intérêts de propriété ordinaires.

b) *Le contenu du titre aborigène*

Bien que notre Cour et le Conseil privé aient été saisis par le passé d'affaires relatives au titre aborigène, ni l'un ni l'autre ne se sont jamais prononcés d'une manière définitive sur le contenu du titre aborigène. Comme je l'ai indiqué, le Conseil privé, dans *St. Catherine's Milling*, a qualifié le titre aborigène de [TRADUCTION] «droit personnel, de la nature d'un usufruit», mais il a refusé d'expliquer ce que cela voulait dire, parce qu'il n'était pas «nécessaire d'exprimer une opinion sur ce point» (à la p. 55). De même, dans les arrêts *Calder*, *Guerin* et *Paul*, les questions litigieuses étaient respectivement l'extinction du titre aborigène, l'obligation de fiduciaire découlant de la cession de terres détenues en vertu d'un titre aborigène et les servitudes d'origine législative sur des terres ainsi détenues; le contenu du titre n'était pas en cause et n'a pas été abordé directement. 116

Même si les tribunaux n'ont pas été très explicites, je suis arrivé à la conclusion que le contenu du titre aborigène peut être résumé au moyen de deux énoncés: premièrement, le titre aborigène comprend le droit d'utiliser et d'occuper de façon exclusive les terres détenues en vertu de ce titre pour diverses fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions autochtones faisant partie intégrante d'une culture autochtone distinctive; deuxièmement, ces utilisations protégées ne doivent pas être incompatibles avec la nature de l'attachement qu'a le groupe concerné pour ces terres. Pour plus de clarté, je vais examiner chacun de ces énoncés séparément. 117

Le titre aborigène comprend le droit d'utiliser le territoire détenu en vertu de ce titre pour diverses fins qui ne doivent pas nécessairement être des aspects de coutumes, pratiques et traditions

TAB 14

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Xeni Gwet'in First Nations v. British Columbia

Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the **Tsilhqot'in** Nation (Plaintiff) and Her Majesty the Queen in Right of the Province of British Columbia, the Regional Manager of the Cariboo Forest Region and The Attorney General of Canada (Defendants)

British Columbia Supreme Court

D.H. Vickers J.

Heard: November 18, 2002 - April 11, **2007**
Judgment: November 20, **2007**
Docket: Victoria 90-0913

Counsel: J. Woodward, D. Rosenberg, P. Hutchings, P. Rosenberg, M. Browne, D.M. Robbins, G.S. Campo, H. Mahony, M. Couling, S. Nixon, M. Haddock, J. Nelson, G. Reed, D. Mildon, for Plaintiff

P.G. Foy, Q.C., T. Leadem, Q.C., G.J. Underwood, K.J. Tyler, K.E. Gillese, J.G. Penner, E. Christie, S. Lysyk, J.Z. Murray, for British Columbia (Forestry)

G. Donegan, Q.C., B. McLaughlin, M.P. Doherty, J. Chow, C. Cameron, J. Blackhawk, I. Jackson, for Attorney General of Canada

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

Civil practice and procedure --- Judgments and orders — For relief other than relief claimed

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — In reply arguments, plaintiff took position that court had jurisdiction to find that portions of claim area qualified for declaration of Aboriginal title — Action allowed in part — Declaration of Aboriginal title to smaller areas included within whole claim area could not be made because they were not separately pleaded — Plain reading of pleadings showed plaintiff claimed Aboriginal title over all of lands — In prayer for relief, plaintiff

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did not seek declaration that Tsilhqot'in people had existing Aboriginal title to claim area "or any portions thereof" — Plaintiff had to set out in his pleadings exactly what declaration he sought — To allow plaintiff to seek declarations over portions of claim area would be prejudicial to defendants — While much of claim area was not occupied to extent required to ground declaration of Aboriginal title, there were areas inside and outside claim area that qualified for finding of Aboriginal title — This view of Aboriginal title was not binding on parties but was expressed to assist parties to achieve fair and lasting resolution of issues — Declaration of Aboriginal rights and title could not be made in relation to private lands in claim area since only infringements pleaded were those infringements raised by forestry legislation, which does not regulate activities on private land.

Aboriginal law --- Practice and procedure — Pleadings — General principles

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — In reply arguments, plaintiff took position that court had jurisdiction to find that portions of claim area qualified for declaration of Aboriginal title — Action allowed in part — Declaration of Aboriginal title to smaller areas included within whole claim area could not be made because they were not separately pleaded — Plain reading of pleadings showed plaintiff claimed Aboriginal title over all of lands — In prayer for relief, plaintiff did not seek declaration that Tsilhqot'in people had existing Aboriginal title to claim area "or any portions thereof" — Plaintiff had to set out in his pleadings exactly what declaration he sought — To allow plaintiff to seek declarations over portions of claim area would be prejudicial to defendants — While much of claim area was not occupied to extent required to ground declaration of Aboriginal title, there were areas inside and outside claim area that qualified for finding of Aboriginal title — This view of Aboriginal title was not binding on parties but was expressed to assist parties to achieve fair and lasting resolution of issues — Declaration of Aboriginal rights and title could not be made in relation to private lands in claim area since only infringements pleaded were those infringements raised by forestry legislation, which does not regulate activities on private land.

Aboriginal law --- Practice and procedure — Evidence — General principles

Oral tradition evidence consists of verbal messages from past beyond present generation — Rejecting oral tradition evidence because of absence of corroboration from outside sources offends directions of Supreme Court of Canada — Oral tradition evidence, where appropriate, can be given independent weight.

Aboriginal law --- Practice and procedure — Parties — General principles

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Action allowed in part — Proper rights holder of Aboriginal title and rights was community of Tsilhqot'in people, not band — Aboriginal rights of individuals or subgroups within First Nation were derived from collective actions, shared language, traditions and shared historical experiences of members of First Nation — Individual community members identified as Tsilhqot'in people first, rather than as band members — Members of band were viewed amongst Tsilhqot'in people as caretakers of land in and about reserve, but any Tsilhqot'in person could hunt or fish anywhere inside Tsilhqot'in territory — Creation of bands did not alter true identity of people.

Aboriginal law --- Constitutional issues — Reserves and real property — Rights and title — Miscellaneous is- sues

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Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Action allowed in part — There were areas inside and outside claim area where use and occupation by Tsilhqot'in people at time of sovereignty assertion was sufficient to warrant finding of Aboriginal title — Much of claim area was not occupied to extent required to ground declaration of Aboriginal title — Declaration of Aboriginal title to smaller areas included within whole claim area could not be made because they were not separately pleaded — While view of Aboriginal title was not binding on parties, it was expressed to assist parties to achieve fair and lasting resolution of issues — Tsilhqot'in people were present in claim area at time of sovereignty assertion, in 1846, date of Oregon Boundary Treaty — As semi-nomadic people, Tsilhqot'in people derived subsistence from every quarter of claim area — Village, hunting, fishing and gathering sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in to extent sufficient to warrant finding of Aboriginal title — At time of sovereignty assertion, Tsilhqot'in people had exclusive control over those lands which they used regularly and continuously occupied — Province's forest development activities unjustifiably infringed Aboriginal title — Provincial Forest Act did not apply to those areas that met test for Aboriginal title — If provincial forestry scheme applied to Aboriginal title land, then such application constituted prima facie infringement or denial of Aboriginal title triggering need for justification — There was potential for substantial interference with Aboriginal title at every stage of government land use planning with respect to Aboriginal title lands — Province failed to establish that it had compelling and substantial legislative objective for forestry activities in claim area because there was no evidence that logging in area was viable, or that it was necessary to deter spread of mountain pine beetle infestation — Province did not consider how its proposed forestry activities might result in infringement of Aboriginal title and rights — Although considerable effort was made to engage Tsilhqot'in people in forestry proposals and land use planning in claim area, province failed in its obligation to consult by failing to recognize and accommodate claims for Aboriginal title and rights.

Aboriginal law --- Constitutional issues — Reserves and real property — Application of provincial or territorial statutes

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized timber harvesting in Tsilhqot'in traditional territory under authority of Forest Act — Plaintiff brought action for declaration of Tsilhqot'in Aboriginal rights and title relating to land in central region of BC — Issues arose as to whether or not provincial Forest Act and Limitation Act applied — Action allowed in part — Forest Act did not apply to those areas that met test for Aboriginal title because, under Forest Act, granting of rights to harvest timber was limited to Crown timber on Crown land — Where Aboriginal title lands have been clearly defined, those lands are not "Crown lands" as defined by Forest Act — Even if definition of "Crown timber" includes timber situated on Aboriginal title lands, provisions of Forest Act do not apply to Aboriginal title land under doctrine of interjurisdictional immunity — Aboriginal rights are part of core of federal jurisdiction under s. 91 ¶ 24 of Constitution Act, 1867, such that provincial legislation cannot extinguish them — While exercise of provisions of Forest Act do not extinguish Aboriginal title, their exercise goes to core of Aboriginal title — Legislation that authorizes granting of rights to harvest timber to third parties strikes at very core of Aboriginal title — Section 88 of Indian Act does not invigorate provincial legislation in its application to Aboriginal title lands because it is directed only to "Indians" — Provisions of Forest Act did not go to core of Tsilhqot'in Aboriginal rights other than Aboriginal title, but any infringement of these rights had to be justified by province — Pursuant to s. 88 of Indian Act, Limitation Act applied to claims of unjustified infringement of Aboriginal rights other than Aboriginal title — To conclude that Limitation Act applied to claim for Aboriginal title would mean that with passage of time

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and application of provisions of Act, province could effectively extinguish Aboriginal title.

Aboriginal law --- Constitutional issues — Aboriginal rights to natural resources — General principles

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Defendants admitted existence of Aboriginal right to hunt and trap birds and animals throughout claim area, but not right to capture horses or right to trade in skins and pelts — Action allowed in part — Proper rights holder for purposes of Aboriginal rights was Tsilhqot'in Nation, not band, since all Tsilhqot'in were entitled to utilize entire Tsilhqot'in territory — Date of contact with Europeans in New Caledonia was 1793, when Alexander Mackenzie and Captain George Vancouver completed journeys through mainland BC — Aboriginal right included use of wild horses, since Tsilhqot'in people used wild horses in pre-contact times — Even if wild horses were not in claim area in pre-contact times, their capture and use was contemporary extension of pre-contact right to use plants and hunt and trap animals for subsistence and livelihood — Aboriginal right existed to trade skins and pelts as means to secure moderate livelihood — Traditional Tsilhqot'in pattern of survival included trading skins and pelts with Aboriginal neighbours for salmon resources, particularly during years when salmon fishery failed — Trading practice at time of first contact and continuing into twentieth century was more than sufficient to meet tests of cultural integrality — Province's forestry legislation was constitutionally applicable to land over which Tsilhqot'in people had Aboriginal rights to hunt, trap and trade, but application of that legislation infringed those rights — Forest harvesting activities reduced diversity and abundance of wildlife species through direct mortality, imposition of roads and destruction of habitat — In absence of information to allow proper assessment of impact on wildlife in area, forestry activities were unjustified infringement of Tsilhqot'in Aboriginal rights in claim area — Consultation did not justify infringement of those rights because province did not acknowledge Aboriginal rights during consultation.

Aboriginal law --- Constitutional issues — Fiduciary duty

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Appeal allowed in part — Issue of breach of fiduciary duty not considered — It was sufficient to go no further than consideration of duty to consult, grounded in honour of Crown — In pre-proof stage, where Aboriginal rights and title were not yet proven, Aboriginal interest in question was insufficiently specific for honour of Crown to mandate that Crown act in Aboriginal group's best interest as fiduciary.

Aboriginal law --- Practice and procedure — Miscellaneous issues

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to two areas of land in central region of BC — Action allowed in part — Provincial Limitation Act applied to claims of unjustified infringement of Aboriginal rights other than Aboriginal title — Provincial laws that affect Aboriginal title lands go to core of Indianness and do not apply to those lands — To conclude that Limitation Act applied to claim for Aboriginal title would mean that with passage of time and application of provisions of Act, province could effectively extinguish Aboriginal title — Pursuant to s. 88 of Indian Act, Limitation Act applied to claims of unjustified infringement of Aboriginal rights

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other than Aboriginal title — Limitation period of six years began to run from date of Supreme Court of Canada's decision in R. v. Sparrow, May 31, 1990, when party would have become aware of cause of action — Claims advanced in relation to one area of land were not statute barred because action was brought before expiration of limitation period — Since action regarding second area of land was commenced on December 18, 1998, any claim for unjustified infringement of Aboriginal rights in that area that arose prior to December 17, 1992 were statute barred — Province's plea of laches could not succeed — Plaintiff did not engage in prolonged, inordinate or inexcusable delay, acquiesce in abandonment of Aboriginal title, or give any grounds for belief that Aboriginal title was abandoned — There was no evidence of prejudice to province occasioned by anything said or done by plaintiff in relation to Aboriginal title.

Civil practice and procedure --- Limitation of actions — Actions involving Crown — Miscellaneous actions

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to two areas of land in central region of BC — Action allowed in part — Provincial Limitation Act applied to claims of unjustified infringement of Aboriginal rights other than Aboriginal title — Provincial laws that affect Aboriginal title lands go to core of Indianness and do not apply to those lands — To conclude that Limitation Act applied to claim for Aboriginal title would mean that with passage of time and application of provisions of Act, province could effectively extinguish Aboriginal title — Pursuant to s. 88 of Indian Act, Limitation Act applied to claims of unjustified infringement of Aboriginal rights other than Aboriginal title — Limitation period of six years began to run from date of Supreme Court of Canada's decision in R. v. Sparrow, May 31, 1990, when party would have become aware of cause of action — Claims advanced in relation to one area of land were not statute barred because action was brought before expiration of limitation period — Since action regarding second area of land was commenced on December 18, 1998, any claim for unjustified infringement of Aboriginal rights in that area that arose prior to December 17, 1992 were statute barred.

Civil practice and procedure --- Limitation of actions — Actions involving Crown — Laches and acquiescence

Plaintiff was member of Tsilhqot'in First Nation and Chief of band — Province authorized logging activities in Tsilhqot'in traditional territory — Plaintiff brought action on behalf of all members of band and First Nation for declaration of Aboriginal rights and title relating to land in central region of BC — Action allowed in part — Province's plea of laches could not succeed — Plaintiff did not engage in prolonged, inordinate or inexcusable delay, acquiesce in abandonment of Aboriginal title, or give any grounds for belief that Aboriginal title was abandoned — There was no evidence of prejudice to province occasioned by anything said or done by plaintiff in relation to Aboriginal title.

Cases considered by *D.H. Vickers J.*:

> *Apsassin v. Canada (Department of Indian Affairs & Northern Development)* (1995), (sub nom. *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development))* 130 D.L.R. (4th) 193, (sub nom. *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development))* [1995] 4 S.C.R. 344, (sub nom. *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development))* [1996] 2 C.N.L.R. 25, (sub nom. *Blueberry River Indian Band v. Canada (Minister of Indian Affairs & Northern Development))* 190 N.R. 89, (sub nom. *Blueberry River Indian Band v. Canada (Minister of Indian Affairs & Northern Development))* 102 F.T.R. 160 (note), 1995 CarswellNat

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- A Story About an Owl;
- Two Sisters and the Stars; and,
- Frog Steals a Baby.

434 This is not a complete list but it is representative of the legends I heard. Each carries with it an underlying message or moral that is intended to instruct and inform Tsilhqot'in people in the way they are to lead their lives. They set out the rules of conduct, a value system passed from generation to generation.

435 I distinguish legends from stories. Stories are recordings of actual events in an historical period of time. Often they are of deaths or loss of children. For example, the story of Child Got Lost is about a child who went missing in the northern part of Tachelach'ed. Stories are told to remind people of significant events and are not necessarily designed to carry a life directing message.

k. Summary

436 In the early nineteenth century, Tsilhqot'in people lived in a semi-nomadic hunter, gatherer society in a harsh environment. They were a rule ordered society, tied by language, kinship and customs. Reverence for the land that supported and nourished them continues to the present generation. Tsilhqot'in people no longer live as their forefathers at the time of sovereignty assertion. However, the land continues as a central theme in their lives, providing continuity and stability from generation to generation.

8. Aboriginal Group

a. The Proper Rights Holder

437 Aboriginal rights are communal rights. They arise out of the existence and practices of a contemporary community with historical roots. When making a declaration of Aboriginal rights, the court must identify which present group or community holds those rights. The plaintiff and Canada assert that the proper rights holder is the community of Tsilhqot'in people. British Columbia says that the proper rights holder is the community of Xeni Gwet'in people.

438 Most of the cases that touch on this issue are regulatory cases in which individuals claim Aboriginal rights that belong to a larger collective. In many of these circumstances it is not necessary to identify with precision the appropriate collective. The Supreme Court of Canada has offered some guidance on how to identify and define the distinctive societies that hold Aboriginal rights.

439 This inquiry is primarily a matter of fact to be determined on the whole of the evidence relating to the specific society or culture. One factor to consider is who made decisions about land use and occupation in the historic Aboriginal culture. The Supreme Court of Canada considered this factor in *Delgamuukw* at para. 115:

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.

440 In *Bernard*, the Court related the identification of the proper group to the continuity requirement.

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McLachlin C.J.C. stated the following at para. 67:

> The requirement of continuity in its most basic sense simply means that claimants must establish they are right holders. Modern-day claimants must establish a connection with the pre-sovereignty group upon whose practices they rely to assert title or claim to a more restricted aboriginal right. The right is based on pre-sovereignty aboriginal practices. To claim it, a modern people must show that the right is the descendant of those practices. Continuity may also be raised in this sense. To claim title, the group's connection with the land must be shown to have been "of a central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance": *Delgamuukw*, *per* Lamer C.J.C., at paras. 150-51.

441 In *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 (S.C.C.), the Court considered a claim to Métis rights under s. 35(1). In order to identify the proper rights holder, the Court undertook a two stage process. The first stage was to identify the historic community that exercised the right. The second stage was to identify the contemporary rights-bearing community.

442 When identifying the historic rights-bearing community, the Court reviewed the historical evidence including demographic evidence contained in Hudson's Bay Company journals. The Supreme Court of Canada noted several other factors in *Powley* at para. 23:

> In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific aboriginal rights claim ...

443 After finding the existence of an historic rights-bearing community, the Court went on to consider the claimant's ancestrally based membership in the present community. The Court noted at para. 34:

> It is important to remember that, no matter how a contemporary community defines membership, only those members with a demonstrable ancestral connection to the historic community can claim a s. 35 right. Verifying membership is crucial, since individuals are only entitled to exercise Métis aboriginal rights by virtue of their ancestral connection to and current membership in a Métis community.

444 In my view, the tests for demonstrating the existence of an Aboriginal community that can support the claim to s. 35(1) rights in this case can be no different than those required of a Métis community. I add to the analysis the view that identification as a member of a community is not external. Membership is identified by the community. It should always be the particular Aboriginal community that determines its own membership.

445 No matter how a contemporary community defines membership, a critical inquiry for the purposes of s. 35(1) rights is an ancestral connection to the relevant community extant at contact in the case of rights, or at sovereignty, in the case of title. In all of the Aboriginal rights and title decisions I have reviewed, the relevant historic community has been the larger First Nation that existed at the time of contact or sovereignty.

446 Aboriginal people, like people in societies everywhere, typically belong to more than one group that helps to define their identities. In both historical and contemporary times, an individual can simultaneously be a

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member of a family, a clan or descent group, a hunting party, a band, and a nation.

447 Of interest in the passage from para. 115 of *Delgamuukw* (S.C.C.) is the observation that Aboriginal title is held by all members of the Aboriginal nation. British Columbia submits that in *R. v. Marshall*, [2002] 3 C.N.L.R. 176, 2002 NSSC 57 (N.S. S.C.), the summary conviction appeal judge, Scanlan J., found the rights holder group to be the band rather than the larger Mi'kmaq Nation. At para. 84, Scanlan J. said:

> Occupancy necessary to establish Aboriginal possession is a question of fact and Aboriginal title should be determined on the facts pertinent to the band and not on a global basis. That is especially important in this case owing to the fact that Mi'kmaq were organized largely at the band level.

448 In the trial court, (*R. v. Marshall*, [2001] 2 C.N.L.R. 256, 2001 NSPC 2 (N.S. Prov. Ct.)), Curran P.C.J. made a number of findings at para. 5, including:

> a) all the defendants, except perhaps Roger Ward [Mr. Ward was a member of a New Brunswick Band], are entitled to exercise whatever remains of any aboriginal title or any treaty rights the Mi'kmaq of Nova Scotia had in the 18th century;
>
> b) the Mi'kmaq of mainland Nova Scotia in the 18th century likely had aboriginal title to lands around some bays and rivers;
>
> c) the Mi'kmaq did not have aboriginal title to any part of Cape Breton Island;
>
> d) 18th century Mi'kmaq might have had some claim to coastal lands from Musquodoboit to the Strait of Canso.

449 Thus, Curran P.C.J. found the rights holder group to be the Mi'kmaq of Nova Scotia. Curran P.C.J. made some findings about band level organization, but the above remarks of Scanlan J. seem to be entirely the views of that jurist on the summary conviction appeal. In addition, Scanlan J. concluded at para. 117 that "there is evidence to support the Trial Judge in his conclusions" and then went on to cite the findings of the trial judge noted above. The Supreme Court of Canada restored the trial judgment, thereby rejecting the view of Scanlan J. concerning the band as the rights holder.

450 British Columbia argues that the proper historic and modern rights holder group here should be found at the band level. They support this argument by referring to the evidence that, among the historic community of Tsilhqot'in people, decisions about the uses of particular locations were made at the band or encampment level. Thus, it was a group of Tsilhqot'in people, subsequently known as the Alexandria Band, rather than all Tsilhqot'in people, who decided to take up permanent residence near Fort Alexandria in 1860. Similarly, British Columbia points out that when reserves were set aside for the various Tsilhqot'in Bands commencing in the 1880's, decisions concerning the desired locations appear to have been made by individual bands or chiefs, rather than by any pan-Tsilhqot'in institution.

451 In my view, British Columbia places too much emphasis on the notion of a single decision-making body at the time reserves were established. The use of a small decision-making body for one particular purpose is not necessarily the hallmark of a community.

452 As an historical footnote on the growth of the concept of Aboriginal title in Canada, it is worth noting that in *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs & Northern Development)* (1979), [1980] 1

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F.C. 518 (Fed. T.D.), Mahoney J. found that the Inuit people comprised a sufficiently "organized society" to hold rights in the land at common law, notwithstanding their nomadic, widely scattered population and the absence of any overarching social or political organization.

453 The search for a pan-Tsilhqot'in decision-making institution is not unlike the *Baker Lake* test for an "organized society". Such an approach is weighed down with superficial value judgments about Aboriginal ways of life. The need to measure traditional Aboriginal societies against the legal ideals and institutions of a "civilized society" has passed. As Hall J. (dissenting) said in *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 (S.C.C.), at p. 346:

> The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species ...

454 In setting out the test for Aboriginal title in *Delgamuukw* (S.C.C.), the Court made no reference for the need to find an "organized society". Lamer C.J.C. referred to the *Baker Lake* test at para. 21 but later ignored this element in the test for Aboriginal title set out in his judgment.

455 Bands are defined by the *Indian Act* but are not expressly made legal persons by that statute. While they have an existence separate from that of their members, they lack many of the abilities of natural persons, corporations, municipalities and even unincorporated associations: see *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)*, [2001] 4 F.C. 451, 2001 FCA 67 (Fed. C.A.), at para. 15 *et seq.*

456 There is no legal entity that represents all Tsilhqot'in people. The Tsilhqot'in National Government, a federally incorporated legal entity, only represents five of the seven Tsilhqot'in communities. It does not represent either the Toosey/Tletinqox-tin Band or Tsilhqot'in people who are members of the Ulkatcho Band at Nagwentl'un (Anahim Lake). It seems to me that the search for a legal entity does not assist in the effort to define the proper rights holder.

457 The recognition by the Supreme Court of Canada in *Powley* at para. 23 that "different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification" applies equally to Tsilhqot'in people. The political structures may change from time to time. Self identification may shift from band identification to cultural identification depending on the circumstances. What remains constant are the common threads of language, customs, traditions and a shared history that form the central "self" of a Tsilhqot'in person. The Tsilhqot'in Nation is the community with whom Tsilhqot'in people are connected by those four threads.

458 Aboriginal nations are characterized as such in the same way that French speaking Canadians are viewed as a nation. Nations in this sense are a group of people sharing a common language, culture and historical experience. They are a culturally homogeneous collective of people, larger than a clan, tribe or band. A nation state is a self-governing political entity that has sovereignty and external recognition. First Nations are not nation states; they are nations or culturally homogeneous groups of people within the larger nation state of Canada, sharing a common language, traditions, customs and historical experience.

459 Tsilhqot'in people make no distinction amongst themselves at the band level as to their individual right

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to harvest resources. The evidence is that, as between Tsilhqot'in people, any person in the group can hunt or fish anywhere inside Tsilhqot'in territory. The right to harvest resides in the collective Tsilhqot'in community. Individual community members identify as Tsilhqot'in people first, rather than as band members.

460 When Simon Fraser first met with Tsilhqot'in people on the banks of the Fraser River in 1808, he described them as "Chilk hodins". On his return trip later that year, he again met with people he described as Chilk-hodins, "a tribe of the Carriers". The next reference to Tsilhqot'in people is in the journals of the HBC following the establishment of Fort Alexandria.

461 It is significant that the HBC journals and census documents between 1822-1838 refer to Tsilhqot'in people belonging to certain chiefs. These records provide repeated references to Tsilhqot'in people, with variations on spelling. There is no reference to Xeni Gwet'in people in these documents.

462 Nobili's journals refer to visits to Tsilhqot'in villages. His contact with Tsilhqot'in people included the ancestors of people who today describe themselves as Xeni Gwet'in people.

463 Marcus Smith makes reference to the "Stone Indians" in his 1872 journal when talking about his travels among the Tsilhqot'in people. He wrote that his party had camped "by the margin of Tatla lake not far from the camp of Keogh, the chief of a small band of Indians who subsist by fishing on the lakes and hunting on the slopes of the Cascade mountains, from which they have the local name of "Stone Indians". The Xeni Gwet'in people are the descendants of these people.

464 When reserves were set aside in the "Nemaiah Valley" by A. W. Vowell in 1899, there was no reference to Xeni Gwet'in people. The minutes of his decision to set aside Chilco Lake, Garden, Fishery and Meadow Reserves dated September 20, 1899 refer to the "Nemaiah Valley Indians".

465 The laying aside of these reserves appears to have followed a request made by Hewitt Bostock, M.P. to James A. Smart, Deputy Superintendent General of Indian Affairs, in a letter dated July 27, 1899. I have already noted in my historical summary that Bostock referred to the people living in Xeni as "a number of Indians who have belonged to different tribes in that part of the country but who for one reason or another have left their own reservation or tribe and have gone to live in this valley". I conclude that the people from "different tribes" were all Tsilhqot'in people who are the ancestors of the modern day Xeni Gwet'in.

466 For decades, the people who have lived on these reserves were known as the Nemiah Valley Indian Band. This was the name given to them by the Federal Department of Indian Affairs. The Tsilhqot'in words Xeni Gwet'in translates to "people of the Nemiah Valley". The Xeni Gwet'in people officially changed the name of their band to the Xeni Gwet'in First Nations Government in 1995.

467 At the time reserves were fixed, tribes, clans or families of Tsilhqot'in people lived in different locations across a vast territory. The creation of reserves was a consequence of requests made by these clans or families through their chiefs. Prior to and after the allocation of reserves, Tsilhqot'in people watched as Europeans preempted land that was a part of Tsilhqot'in territory. The requests for reserves were as much a part of self-preservation as anything else; a way of protecting some smaller part of the whole from pre-emption by others.

468 In the modern Tsilhqot'in political structure, Xeni Gwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xeni, including Tachelach'ed. Other bands are considered to be the caretakers of the lands that surround their reserves. Still, the caretakers have no more rights to the land or

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the resources than any other Tsilhqot'in person.

469 The setting aside of reserves and the establishment of bands was a convenience to government at both levels. The creation of bands did not alter the true identity of the people. Their true identity lies in their Tsilhqot'in lineage, their shared language, customs, traditions and historical experiences. While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people.

470 I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other subgroup within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.

471 This conclusion accords with Professor Slattery's view of the law of Aboriginal title. In his article entitled "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 745, Professor Slattery stated:

> What role, then, does native custom play in this scheme? The answer lies in the fact that, while the doctrine of aboriginal land rights governs the title of a native group considered as a collective unit, it does not regulate the rights of group members among themselves. Subject, always, to valid legislation, the latter are governed by rules peculiar to the group, as laid down by custom or internal governmental organs.
>
> Thus, the doctrine of aboriginal land rights attributes to native groups a collective title with certain general features. The character of this collective title is not governed by traditional notions or practices, and so does not vary from group to group. However, the rights of individuals and other entities within the group are determined *inter se*, not by the doctrine of aboriginal title, but by internal rules founded on custom. These rules dictate the extent to which any individual, family, lineage, or other sub-group has rights to possess and use lands and resources vested in the entire group. The rules have a customary base, but they are not for that reason necessarily static. Except to the extent they may be otherwise regulated by statute, they are open to both formal and informal change, in accordance with shifting group attitudes, needs, and practices.
>
> [Footnotes omitted].

472 Almost 20 years later, Professor Slattery's view has not altered. In B. Slattery, "The Metamorphosis of Aboriginal Title", (2006) 85, Can. Bar Rev. 255, he discusses Aboriginal title as a *sui generis* right at common law and says, in part, at p. 270:

> According to this theory, aboriginal title is not grounded in English property law, nor is it based on the customary laws of particular Indigenous groups. It is a distinctive form of title — a *sui generis* right — that gives an Indigenous group the exclusive right to possess and use its traditional lands for such purposes as it sees fit, subject to the restriction that the lands cannot be transferred to outsiders but may only be ceded to or shared with the Crown, which holds an underlying title to the land.
>
> Viewed *externally*, aboriginal title is a uniform right, which does not differ from group to group. Viewed *internally*, it delimits a sphere within which the customary legal system of each group continues to operate, regulating the manner in which the lands are used by group members and evolving to take account of new

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needs and circumstances.

9. Aboriginal Title

a. Nature of Aboriginal Title

473 The origin and nature of Aboriginal title in Canada has been the subject of great debate both inside and outside the courts. Canadian courts began to outline and define Aboriginal title (also referred to as Indian title or native title) in *St. Catharines Milling & Lumber Co. v. R.* (1888), (1889) L.R. 14 App. Cas. 46 (Ontario P.C.). That case arose out of a timber licensing dispute in the Province of Ontario and did not directly involve Aboriginal people. In 1873 the Saulteaux Tribe ceded certain lands to the federal Crown when they entered into Treaty 3. The company claimed it had a right to log on those lands pursuant to a licence issued by the Canadian government. The Province argued it had the sole authority to license pursuant to s. 109 of the *British North America Act*.

474 The case was ultimately decided by the Privy Council who made several significant findings. The first was that Indian title to lands in Ontario originated from the *Royal Proclamation* (1763), R.S.C. 1985, App. II, No. 1. Lord Watson, speaking for the Court, expressed the view that the land "tenure of the Indians was a personal and usufructuary right, dependant upon the good will of the Sovereign": *St. Catharines Milling*, p. 54.

475 A usufruct is a legal right to use, benefit from and derive profit from property belonging to another person, provided the property is not damaged or altered in any way. According to this concept of title, the Aboriginal occupants have the right to live on the lands but they are prevented from doing anything that would affect the underlying title held by the Crown.

476 The Privy Council also found that the Crown "all along had a present proprietary estate in the land, upon which the Indian title was a mere burden": *St. Catharines Milling* at p. 58. The personal usufructuary right held by the Saulteaux people disappeared when the lands were surrendered to the Crown under the 1873 treaty. The Court held that the federal government ceased to have jurisdiction over the lands pursuant to s. 91(24) of the *BNA Act* because the entire beneficial interest passed to the Province of Ontario under s. 109.

477 The Privy Council later qualified its description of the Aboriginal interest as a personal right. The Court explained that "personal" meant the land was "inalienable except by surrender to the Crown": *Quebec (Attorney General) v. Canada (Attorney General)* (1920), [1921] 1 A.C. 401 (Quebec P.C.), pp. 410-411 (the *Star Chrome* case). The right was thought to be held at the pleasure of the Crown and could be extinguished at any time.

478 The description of Aboriginal title as a usufructuary right was favoured by the Supreme Court of Canada into the 1980's: see, for example, *R. v. Smith*, [1983] 1 S.C.R. 554 (S.C.C.), at pp. 561-2; *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), per Dickson J. at p. 379 and p. 382. Viewed through a more contemporary lens, it is not surprising the Supreme Court of Canada has found that describing Aboriginal title as a usufructuary right is "not particularly helpful": *Delgamuukw* (S.C.C.) at para. 112. Given the nature of Aboriginal title as now defined by the jurisprudence, it is fair to say that it can no longer be characterized as a usufructuary right.

479 The historical view of Aboriginal title grew out of Canada's colonial past, what Professor Slattery calls "the Imperial Model of the Constitution": Slattery, B. "The Organic Constitution: Aboriginal Peoples And The Evolution of Canada" (1995) 34 Osg. Hall. L.J. 101 at p.103. This concept of the Constitution is constructed upon British law, primarily consisting of statutes passed by the Imperial Parliament. From this perspective Ab-

TAB 15

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2006 CarswellBC 2514, 2006 BCSC 1517, [2006] B.C.W.L.D. 6454, [2007] 1 C.N.L.R. 286, 55 Admin. L.R. (4th) 236

Komoyue Heritage Society v. British Columbia (Attorney General)

In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209

And In the Matter of the Environmental Assessment Act, S.B.C. 2002, c. 43

And In the Matter of the Granting of Environmental Assessment Certificate MO5-01

Komoyue Heritage Society and Rita Hazel Hunt on their own behalf and on behalf of all members of the Queackar-Komoyue Nation (Petitioners) And The Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia, Orca Sand & Gravel Ltd., Orca — Sand & Gravel Limited Partnership, Kwakiutl Band Council, 'Namgis First Nation, The Attorney General of Canada on behalf of Her Majesty the Queen in Right of Canada, Minister of Environment on behalf of Her Majesty the Queen in Right of the Province of British Columbia, British Columbia Environmental Assessment Office, Minister of Energy, Mining & Petroleum Resources on behalf of Her Majesty the Queen in Right of the Province of British Columbia, Minister of Agriculture and Lands on behalf of Her Majesty the Queen in Right of the Province of British Columbia, Integrated Land Bureau, formerly Land and Water British Columbia Inc., Western Forest Products Ltd. (Respondents)

British Columbia Supreme Court

B.M. Davies J.

Heard: September 5-8, 2006
Judgment: October 16, 2006[FN*]
Docket: Victoria 05 5216

Counsel: K. Doyle for Petitioners

G.R. Thompson, M.C. Akey for Respondent, Attorney General of British Columbia

C.F. Willms, K. O'Callaghan for Respondents, Orca Sand & Gravel Ltd., Orca — Sand & Gravel Limited Partnership

M. Barr for Respondent, Kwakiutl Band Council

S. Ashcroft for Respondent, 'Namgis First Nation

S. Gaudet for Respondent, Attorney General of Canada

No one for Western Forest Products Inc.

Subject: Public; Civil Practice and Procedure; Property

Aboriginal law --- Practice and procedure — Parties — Representative or class actions

First Nation signed treaty in 1851 with Crown which surrendered certain lands, subject to ongoing reservation of certain rights — Company proposed sand and gravel project on land covered by treaty — Aboriginal band was identified as descendents of First Nation signatory to treaty — Ministry entered into extensive consultation and negotiation process with band council — Band majority approved project — Petitioner group came forward claiming to be other descendents of signatory of original treaty, and demanded consultation rights on project — Minister issued environmental assessment certificate on behalf of project and construction commenced — Petitioners brought petition challenging issuance of assessment certificate — Petition dismissed — Petitioners did not have standing to serve as representatives in proceedings — Petitioners offered no evidentiary support for claim of special status as descendents of original signatories — Aboriginal rights and treaty rights were communal in nature and could not be assigned, transferred, surrendered or sold to any entity other than Crown — Petitioners included former chief of Aboriginal band which was involved in consultation process — Chief had serious conflicts of interest which precluded her acting as representative — Chief continued to be politically active in band and in former capacity had engaged in previous discussions regarding project.

Cases considered by *B.M. Davies J.*:

Anishinaabeg of Kabapikotawangag Resource Council Inc. v. Canada (Attorney General) (1998), 53 C.R.R. (2d) 183, 1998 CarswellOnt 2139, [1998] 4 C.N.L.R. 1, 66 O.T.C. 378 (Ont. Gen. Div.) — considered

Barlow v. Canada (2000), 2000 CarswellNat 372, 186 F.T.R. 194 (Fed. T.D.) — referred to

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

Gitxsan Houses v. British Columbia (Minister of Forests) (2005), 2005 BCSC 994, 2005 CarswellBC 1640 (B.C. S.C.) — considered

Horne v. Canada (Attorney General) (1995), 1995 CarswellPEI 39, 39 C.P.C. (3d) 38, 129 Nfld. & P.E.I.R. 109, 402 A.P.R. 109 (P.E.I. T.D.) — referred to

Marshall v. Canada (1999), *(*sub nom. *R. v. Marshall)* 179 D.L.R. (4th) 193, 1999 CarswellNS 349, 1999 CarswellNS 350, *(*sub nom. *R. v. Marshall)* [1999] 4 C.N.L.R. 301, *(*sub nom. *R. v. Marshall)* 139 C.C.C. (3d) 391, *(*sub nom. *R. v. Marshall)* 247 N.R. 306, *(*sub nom. *R. v. Marshall)* [1999] 3 S.C.R. 533, *(*sub nom. *R. v. Marshall)* 179 N.S.R. (2d) 1, *(*sub nom. *R. v. Marshall)* 553 A.P.R. 1 (S.C.C.) — considered

McKenzie c. Québec (Procureur général) (1997), *(*sub nom. *McKenzie v. Quebec (Attorney General))* [1997] 4 C.N.L.R. 99, 1997 CarswellQue 1636 (Que. S.C.) — not followed

McKenzie c. Québec (Procureur général) (1998), 1998 CarswellQue 371, (sub nom. *McKenzie v. Quebec (Attorney General))* [1998] 3 C.N.L.R. 112 (Que. C.A.) — referred to

Metera v. Financial Planning Group (2003), 2003 CarswellAlta 516, 2003 ABQB 326, [2003] 10 W.W.R. 367, 332 A.R. 244, 12 Alta. L.R. (4th) 120, 36 C.P.C. (5th) 284 (Alta. Q.B.) — considered

Metlakatla Indian Band v. Leighton (2006), (sub nom. *Ryan v. Leighton)* [2006] 3 C.N.L.R. 350, 2006 BCSC 278, 2006 CarswellBC 372 (B.C. S.C.) — considered

Native Council of Nova Scotia v. Canada (Attorney General) (2002), 2002 CarswellNat 18, 2002 FCT 6 (Fed. T.D.) — referred to

Papaschase Indian Band No. 136 v. Canada (Attorney General) (2004), 2004 ABQB 655, 2004 CarswellAlta 1170, 43 Alta. L.R. (4th) 41, [2004] 4 C.N.L.R. 110, [2005] 8 W.W.R. 442, (sub nom. *Lameman v. Canada (Attorney General))* 365 A.R. 1 (Alta. Q.B.) — considered

Pasco v. Canadian National Railway (1989), (sub nom. *Oregon Jack Creek Indian Band v. Canadian National Railway)* 56 D.L.R. (4th) 404, (sub nom. *Oregon Jack Creek Indian Band v. Canadian National Railway)* 34 B.C.L.R. (2d) 344, (sub nom. *Oregon Jack Creek Indian Band v. Canadian National Railway)* [1990] 2 C.N.L.R. 85, 1989 CarswellBC 21 (B.C. C.A.) — considered

Pasco v. Canadian National Railway (1989), 1989 CarswellBC 718, 1989 CarswellBC 748, 43 B.C.L.R. (2d) xxxvi (note), (sub nom. *Oregon Jack Creek Indian Band v. Canadian National Railway)* 102 N.R. 76, [1990] 2 C.N.L.R. 96, [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607 (S.C.C.) — referred to

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

R. v. Bartleman (1984), 55 B.C.L.R. 78, [1984] 3 C.N.L.R. 114, 1984 CarswellBC 205, 13 C.C.C. (3d) 488, 12 D.L.R. (4th) 73 (B.C. C.A.) — considered

R. v. Chevrier (1988), [1989] 1 C.N.L.R. 128, 1988 CarswellOnt 784 (Ont. Dist. Ct.) — considered

R. v. Simon (1985), 171 A.P.R. 15, 1985 CarswellNS 226F, [1985] 2 S.C.R. 387, 62 N.R. 366, [1986] 1 C.N.L.R. 153, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 23 C.C.C. (3d) 238, 1985 CarswellNS 226 (S.C.C.) — considered

R. v. Sundown (1999), 1999 CarswellSask 94, 132 C.C.C. (3d) 353, 236 N.R. 251, 170 D.L.R. (4th) 385, 1999 CarswellSask 95, [1999] 1 S.C.R. 393, 177 Sask. R. 1, 199 W.A.C. 1, [1999] 2 C.N.L.R. 289, [1999] 6 W.W.R. 278 (S.C.C.) — considered

R. v. Trotchie (2002), [2003] 3 W.W.R. 510, 2002 SKPC 99, 2002 CarswellSask 624, [2003] 1 C.N.L.R. 288, 225 Sask. R. 187 (Sask. Prov. Ct.) — considered

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

507, (sub nom. *R. v. Van der Peet)* [1996] 4 C.N.L.R. 177, (sub nom. *R. v. Van der Peet)* 130 W.A.C. 81, 1996 CarswellBC 2309, 1996 CarswellBC 2310 (S.C.C.) — referred to

Sawridge Band v. R. (2001), (sub nom. *Sawridge Indian Band v. Canada)* 216 F.T.R. 162 (note), 2001 FCA 339, 2001 CarswellNat 2525, (sub nom. *Sawridge Indian Band v. Canada)* 283 N.R. 112 (Fed. C.A.) — considered

Western Canadian Shopping Centres Inc. v. Dutton (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)* 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — followed

Statutes considered:

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

Generally — referred to

s. 17 — referred to

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

Generally — referred to

Rules considered:

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

Generally — referred to

R. 5(11) — referred to

R. 42 — referred to

PETITION by First Nation members to determine standing to challenge issuance of environmental assessment certificate.

***B.M. Davies J.*:**

Introduction

1 This judgment concerns the petitioners' standing to challenge the issuance of Environmental Assessment Certificate MO5-01 (the "Certificate") by the British Columbia Minister of the Environment through the Environmental Assessment Office on July 8, 2005.

2 The Certificate was issued with respect to a sand and gravel project (the "Project") under development by the respondents Orca Sand & Gravel Ltd. and Orca — Sand & Gravel Limited Partnership (collectively "Orca"). The Project will include a sand and gravel quarry, processing plant and dedicated marine loading facility all in the vicinity of Port McNeill, British Columbia.

3 Some or all of the land required for the development of the Project is subject to two Douglas Treaties (the "Queackar-Douglas Treaty" and the "Quakeolth-Douglas Treaty") that were entered into in 1851 by the Hudson's Bay Company with the "chiefs and peoples" of those two named aboriginal tribes.

4 In addition, the respondent 'Namgis First Nation which is one of the limited partners in the Project claims at least some of the land on which the Project will be situated as part of its traditional territory.

Issues

5 It is common ground that the Quakeolth-Douglas Treaty was made with the forebears of the aboriginal peoples now known as the Kwakiutl, represented in this proceeding by the respondent, Kwakiutl Band Council.

6 In dispute is whether the Queackar-Komoyue First Nation ("Q-KFN") whom the petitioners purport to represent are the descendants of the signatories of the Queackar-Douglas Treaty and, if so, whether in all of the circumstances the respondent Attorney General and the other respondent Ministries of the Province of British Columbia (collectively the "Province"), the respondent Attorney General of Canada on behalf of the Government of Canada ("Canada"), and Orca were obligated to consult with and accommodate the interests of the Q-KFN before the Certificate could be issued.

7 The petitioners seek various forms of relief under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, including orders quashing the decision of the Minister of Environment issuing the Certificate and an injunction to prevent the continuation of the Project. Counsel for the petitioners has acknowledged that all of the relief sought arises solely as a consequence of the alleged failure of the Province, Canada and Orca to consult with the Q-KFN as the descendants of the signatories of the Queackar-Douglas Treaty.

8 On May 2, 2006, as the judge appointed to hear this petition, I ordered that issues concerning the standing of the petitioners be determined prior to any hearing of the petition on its merits. I also ordered that all evidence upon which the petitioners and respondents would intend to rely (not only on the standing issues but also concerning the merits of the petition) be delivered prior to the hearing of the standing application. With the agreement of the parties, I allowed approximately four months for that exchange of evidence.

9 The standing issues that arise for determination are:

(1) whether the petitioners have (or should be granted) standing to bring this petition as a representative proceeding; and

(2) whether the petitioner, Rita Hazel Hunt, is estopped from bringing this petition by reason of her conduct as a former Chief Councillor of the Kwakiutl Band Council with whom Orca consulted.

Background

10 In 1851, when the Queackar-Douglas Treaty and the Quakeolth-Douglas Treaty were made, the two identified tribes occupied much of the same land. Evidence of that historical fact lies in the undisputed evidence that each tribe surrendered the same lands to the Hudson's Bay Company subject to the reservation of identical rights. Further, while the consideration paid for each surrender was slightly different, the books of account of the Hudson's Bay Company record the two purchases as one.

11 The petitioners have filed contested evidence alleging that the signatories of the Queackar-Douglas

Treaty were members of what is now identified by the petitioners as the Queackar-Komoyue tribe.

12 Although counsel for Orca submitted that the petition should be dismissed for lack of standing because the petitioners have failed to sufficiently establish that the self-identified Q-KFN is in fact comprised of descendants of the signatories of the Queackar-Douglas Treaty, I decline to do so. The resolution of that question is not necessary to my decision on standing and may have ramifications beyond the scope of this litigation that should not be determined summarily. Given that conclusion, I have also determined that it is unnecessary to rule upon Orca's applications concerning the ultimate admissibility of the opinions of Ms. Linda Vanden Berg upon which the petitioners rely.

13 I also need not decide, for the purposes of this judgment, whether the original signatories of the Queackar-Douglas Treaty were representatives of a clan, sub-tribe, "numayma", or "sept" along with three or more similar groups, which were all part of a larger "super-tribe" identified as the Kwakiutl tribe or were, in reality, part of a different and distinct tribe.

14 I have concluded that I do not have to decide that very interesting ethnological issue since:

> (1) By 1904 the Queackar peoples were amalgamated with other Kwakiutl people as one Indian Band under the provisions of the *Indian Act* (R.S.C. 1985, c. I-5) [R.S.C. 1886, c. 43 as it then was] and have, since that amalgamation, been known as the Kwakiutl Indian Band.
>
> (2) The petitioners have admitted the fact of that amalgamation and while alleging that it was non-consensual, have also admitted that:
>
> > (a) any issues concerning "de-amalgamation" are not before the Court in this petition; and
> >
> > (b) it is their intention to pursue those issues "in another forum".

15 In that regard, I also note that although inquiries were made in June of 2002 by Mr. Alfred "Hutch" Hunt (one of the directors of the Komoyue Heritage Society and asserted by the petitioners to be the hereditary Chief of the Q-KFN) into the possibility of de-amalgamation under s. 17 of the current *Indian Act*, no formal de-amalgamation proceedings have been initiated.

16 Between early 2001 and July 14, 2005, when the Certificate was issued, the Province, Canada and Orca entered into an extensive consultation and negotiation process with the Kwakiutl Indian Band Council as well as the councillors of the 'Namgis First Nation concerning the development of the Project.

17 That process also included consultation with the members of the Kwakiutl Indian Band, the majority of whom approved the development of the Project by a ratification vote held in late February 2005.

18 While the petitioners assert unfairness and irregularities in that ratification process, they also acknowledge that those disputes should be resolved "in other forums" and thus are not issues before the Court in this proceeding.

19 On May 20, 2005 as well as in late June 2005, representatives of the alleged descendants of the signatories of the Queackar-Douglas Treaty, including Mr. Alfred "Hutch" Hunt, began to publicly assert the "re-affirmation of their Queackar Komoyue heritage".

20 In addition, six days after the issuance of the Certificate, counsel for the petitioners wrote to representatives of the Province and Canada asserting (for the first time to both governments) that they each owed a separate duty of consultation and accommodation to the "descendants of the Komoyue signatories of the Queackar Treaty".

21 Subsequent to that assertion, the Komoyue Heritage Society was incorporated in August 2005. It alleges in the petition that it is "the official representative" of the Q-KFN "pursuant to the agreement between" it and the Q-KFN. That agreement has, however, not been produced and the members of the Q-KFN who allegedly entered into the alleged agreement with the Komoyue Heritage Society have not been identified.

22 The five recorded directors of the Komoyue Heritage Society are Mr. Alfred "Hutch" Hunt, the petitioner Ms. Rita Hazel Hunt, Mr. Wilfred Hunt, and Ms. Rachel Hunt, who are all members of the Kwakiutl Indian Band, as well as Ms. Maggie Sedgemore who is a member of the 'Namgis First Nation.

23 The development of the Project has continued notwithstanding the petitioners' assertions of a right to independent consultation and accommodation and the filing of this petition in November 2005.

24 I have been informed that to date, Orca has expended in excess of $27 million of a committed $44 million in the construction of the Project and that construction of the Project facilities are nearing completion.

25 The petitioners have submitted that the value of the gravel that may be available for extraction by Orca is in the billions of dollars.

Analysis and Discussion

26 Issues of standing arise in this case because of the representative nature of the proceeding and the status of the petitioners in relation to the proposed representative class. Further, the conduct of the petitioner, Rita Hazel Hunt, in relation to the Project from the time of its inception, gives rise to questions concerning whether she is precluded from now seeking the relief sought.

Issue #1: Should these petitioners be entitled to bring this petition as a representative proceeding?

27 The petitioners' claims are founded upon alleged aboriginal treaty rights which they seek to assert on behalf of the Q-KFN as the alleged descendants of the signatories of the Queackar-Douglas Treaty. Since aboriginal treaty rights are communal and are, in this case, asserted on behalf of all alleged rights-holders, the petitioners' claims can only proceed as a representative proceeding.

28 Rule 5(11) of the *Rules of Court* provides the authority for the bringing of representative actions. The relevant portions of that Rule provide:

> Where numerous persons have the same interest in a proceeding ... the proceeding may be commenced and, unless the court otherwise orders, continued by or against one or more of them as representing all or as representing one or more of them.

29 In *Gitxsan Houses v. British Columbia (Minister of Forests)* (2005), 141 A.C.W.S. (3d) 188, 2005 BCSC 994 (B.C. S.C.) at ¶ 89 [*Gitxsan*]; Halfyard J. succinctly summarized the four criteria enunciated by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 (S.C.C.) [*Western Canadian Shopping*] that must be satisfied before a representative action will be allowed to

proceed. They are:

> (1) The class of plaintiffs must be capable of clear definition;
>
> (2) There must be issues of fact or law common to all class members;
>
> (3) Success for one class member on the common issues, must mean success for all; and
>
> (4) The class representative must adequately represent the class ... the court should be satisfied ... that the proposed representative will vigorously and capably prosecute the interests of the class.

30 Although *Western Canadian Shopping* spoke in terms of "class" actions, it was based upon the consideration by the Supreme Court of Canada of Rule 42 of the *Alberta Rules of Court*, Alta. Reg. 390/68 which authorizes such actions in language which is very similar in substance to that contained in our Rule 5(11). In those circumstances I am satisfied that the criteria established by the Supreme Court of Canada in *Western Canadian Shopping* are equally applicable to representative actions brought under our *Rules of Court* and should thus inform the necessary standing analysis in this case.

31 As I have noted above, it is not contested by the petitioners that aboriginal rights, including treaty rights, are communal rights.

32 Notwithstanding that concession, however, the petitioners assert that individual interested aboriginal persons have, in the past, and should in this case, be granted standing to assert such rights on behalf of the aboriginal community. In making that submission, the petitioners rely principally upon the decisions in *Pasco v. Canadian National Railway* (1989), 34 B.C.L.R. (2d) 344 (B.C. C.A.), aff'd [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607 (S.C.C.) [*Oregon Jack*]; *Sawridge Band v. R.* (2001), 283 N.R. 112, 2001 FCA 339 (Fed. C.A.) [*Sawridge*]; *Marshall v. Canada*, [1999] 3 S.C.R. 533, [1999] 4 C.N.L.R. 301 (S.C.C.) [*Marshall*]; *R. v. Chevrier* (1988), [1989] 1 C.N.L.R. 128, 6 W.C.B. (2d) 43 (Ont. Dist. Ct.) [*Chevrier*]; *R. v. Trotchie* (2002), 225 Sask. R. 187, 2002 SKPC 99, [2003] 3 W.W.R. 510 (Sask. Prov. Ct.), [*Trotchie*]; *R. v. Simon*, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153 (S.C.C.) [*Simon*]; *R. v. Bartleman* (1984), 55 B.C.L.R. 78, 12 D.L.R. (4th) 73 (B.C. C.A.) [*Bartleman*] and *McKenzie c. Québec (Procureur général)*, [1997] 4 C.N.L.R. 99, [1997] A.Q. No. 4550 (Que. S.C.) [*McKenzie*].

33 My review of those authorities leads me to conclude that most are either entirely distinguishable from the case advanced by the petitioners or do not support the propositions advanced by them. Others stand for far narrower propositions than those advanced by the petitioners and one, *McKenzie*, has been overtaken by later decisions of courts of higher authority.

34 More specifically:

> (1) *Oregon Jack* was concerned with the standing of thirty-six Indian Chiefs who commenced representative actions on behalf of themselves and the members of their respective bands. The Chiefs were all duly authorized representatives of their Bands which were also clearly ascertainable.
>
> (2) In *Sawridge*, an aboriginal band member brought a representative action on behalf of a Band but the Band subsequently filed a notice of discontinuance. The Crown successfully applied to strike the individual Band member's claim and the Federal Court of Appeal upheld the case management judge's decision. In doing so, however, Rothstein J.A. (as he then was) for the Court stated at ¶ 10:

> While the evidence before me might be stronger, the fact that it is wholly uncontradicted, that the Band on behalf of whom Mr. Roan seeks to assert rights has specifically resiled from participation in the action, and that the rights themselves which are asserted are communal rights which are not susceptible of individual exercise and, indeed, are not asserted as such in the statement of claim, leads me to the conclusion that, indeed, Mr. Roan is not a proper party to be a plaintiff in this action and that to allow him to continue as such would be an abuse of the process of the Court.
>
> [Emphasis added]

Similarly, in this case, it is uncontradicted that the Kwakiutl Indian Band through its Council opposes the relief sought by the petitioners. While the cases are different to the extent that the petitioners in this case do assert communal rights, the fact remains that such rights are not susceptible of individual exercise. To that extent *Sawridge* is more supportive of the respondents' submissions on standing than those of the petition- ers.

(3) *Marshall*, *Chevrier*, *Trotchie*, *Simon* and *Bartleman* were all cases in which accused aboriginals asserted a communal aboriginal right under a treaty as a defence to alleged criminal conduct that was otherwise prohibited. There was no assertion by the accused aboriginal individuals of any aboriginal rights on behalf of the community, only a claim of entitlement to avail themselves of those rights. In my view, that is an entirely different proposition from that advanced by the petitioners. The distinction was aptly put by Wright D.C.J. in *Chevrier* who stated at ¶ 24:

> In this case the Provincial Court Judge erred in holding that the accused's right to hunt was a community right that could only be upheld by representative action. In my opinion there is a difference between one who passively raises such a right as a defence and one who actively seeks to assert an alleged right in order to secure a benefit under the treaty.

(4) In *McKenzie*, the plaintiffs, who were individual aboriginals, applied for an injunction and declaratory judgment seeking to halt a mining project on what they claimed were traditional lands. The Innu Band Council supported many of the claims made by the plaintiffs but wanted to continue negotiations. To that end the Band brought an application to intervene in the plaintiff's action primarily to obtain an order suspending that action. The Innu Band Council asserted, among other things, that aboriginal title constituted a communal right which belonged to all members collectively and that the interests of the collective take precedence over the interests of the individual plaintiffs. The Government of the Province of Quebec brought an application to dismiss the plaintiffs' action arguing that they had neither sufficient interest nor legal capacity to bring the proceeding. Tannenbaum J. dismissed the Band Council's intervener application in part because no basis in law existed for the relief that it sought (the suspension of the plaintiffs' action) and because negotiations could continue notwithstanding the action. He also dismissed the Province of Quebec's application to dismiss the action and, in doing so, at p. 4 stated:

> The Court does not understand the position taken by the Attorney General of Quebec when he argues the plaintiffs who are Indians, Aboriginals, and members of a First Nation, do not have the right personally to claim an Indian title as well as Aboriginal rights.

The Quebec Court of Appeal dismissed the appeals of those decisions (See: *McKenzie c. Québec (Procureur général)*, [1998] 3 C.N.L.R. 112, 80 A.C.W.S. (3d) 240 (Que. C.A.)) but for the purposes of this application it is significant that it did so on the basis that Tannenbaum J. had correctly applied the rules of civil proced-

ure and the relevant public law. The Court also, however, stated at ¶ 24:

> Subject to these reservations and comments, the respondents, the McKenzies, have the fundamental right to appear before the Court and to be heard, which the order sought would deny. We would add that no one has completely challenged their capacity to initiate the proceedings they brought, although one might raise questions as to their interest in those rights that are collective in the strict sense. However, their Aboriginal rights cannot be described solely as having a collective dimension, as appears from *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [[1998] 1 C.N.L.R. 14], but they may have individual aspects which can be invoked by individuals (see *loc. cit.*, pp. 1093 to 1095 [S.C.R.; pp. 66-67 C.N.L.R.]; also *R. v. Adams*, [1996] 3 S.C.R. 101, p. 119 [138 D.L.R. (4th) 657, [1996] 4 C.N.L.R. 1 at 12, 110 C.C.C. (3d) 97, 202 N.R. 89]). Moreover, the respondents' recourse to the courts is also based on legislation of general application, notably environmental legislation.
>
> [Emphasis added]

Accordingly, in my view, the Quebec Court of Appeal's decision sounds a cautionary note concerning the correctness of Tannenbaum J.'s conclusions in *McKenzie*. It also highlights the difference between individual and collective aboriginal rights and, as I have previously noted, this case deals only with alleged collective rights.

Also important to that concern are the observations of Cory J. for the Supreme Court of Canada in *R. v. Sundown*, [1999] 1 S.C.R. 393, [1999] 6 W.W.R. 278 (S.C.C.) (decided after *McKenzie*) in which at ¶ 35 and 36 he stated:

> ... Aboriginal and treaty rights cannot be defined in a manner which would accord with common law concepts of title to land or the right to use another's land. Rather, they are the right of aboriginal people in common with other aboriginal people to participate in certain practices traditionally engaged in by particular aboriginal nations in particular territories.
>
> Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional expeditionary method of hunting. It belongs to the Band as a whole and not to Mr. Sundown or any individual member of the Joseph Bighead First Nation. It would not be possible, for example, for Mr. Sundown to exclude other members of this First Nation who have the same treaty right to hunt in Meadow Lake Provincial Park.
>
> [Emphasis added]

Further, in *Marshall* at ¶ 17, the Court stated:

> ... the treaty rights do not belong to the individual, but are exercised by authority of the local community to which the accused belongs, and their exercise is limited to the purpose of obtaining from the identified resources the wherewithal to trade for "necessaries".

I am accordingly satisfied that it would be wrong to rely upon *McKenzie* to allow the continuation of this petition as a representative proceeding and I decline to do so.

35 After having considered the totality of the evidence and the submissions of all counsel, I have concluded that the decided case law does not support the petitioners' assertion that self-appointed aboriginal persons have,

in the past, and should in this case, be allowed standing as individuals to assert collective treaty or other collective aboriginal rights on behalf of an aboriginal community. In my view, the weight of authority is to the contrary and underlies the reason why representative proceedings will only be sanctioned when the putative representative proceeding and representative plaintiff meet the four criteria established by the Supreme Court of Canada in *Western Canadian Shopping.*

36 I will accordingly address whether either of the petitioners have, or should be entitled to standing to bring these representative aboriginal claims by reference to those four criteria.

1. Is the class of petitioners which the petitioners seek to represent capable of clear definition?

37 In *Western Canadian Shopping*, Chief Justice McLachlin stated at ¶ 38:

> Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

38 The petitioners submit that the class they represent are those who are the descendants of the signatories of the Queackar-Douglas Treaty. They have adduced contested genealogical evidence prepared by Ms. Linda Vanden Berg and her associates that supports the allegation that Mr. Alfred "Hutch" Hunt is such a descendant.

39 There is, however, no such evidence to support the assertion that any other individual is a descendant as alleged.

40 On the other hand, what can be ascertained from the genealogy material is that some of the alleged descendants of the signatories of the Queackar-Douglas Treaty are members of the Kwakiutl Indian Band and some are members of the 'Namgis First Nation, all of whom enjoy rights of membership in their respective Bands.

41 What is also plainly obvious from the entirety of the evidence submitted by the petitioners is that while it may be theoretically possible to establish (by genealogical evidence) that a particular individual may be a descendant of a signatory of the Queackar-Douglas treaty, the interrelationship of all of the successor groups to those whom the original signatories represented will make it virtually impossible to ascertain whether that descendant is one who now supports the objectives of the petitioners or, indeed, favours the positions advanced by the Band of which he or she is a member. That is especially so given that the collective membership of both the Kwakiutl Indian Band and the 'Namgis First Nation voted to ratify the Project.

42 The question that arises from that difficulty is this: if the Province, Canada and Orca are obligated to consult and accommodate the interests of the descendants of the signatories of the Queackar-Douglas Treaty with whom do they consult?

43 On the basis of the evidence before me it is, in fact, far more likely than not, that consultation to date by the Province, Canada and Orca concerning the Project (involving, as it has, the members of both the Kwakiutl Band and the 'Namgis First Nation) has also been consultation with any identifiable remaining descendants of

the original signatories of the Queackar-Douglas Treaty.

44 Also, given the obvious interrelationship for more than 100 years of all of the successor groups to these two Douglas Treaties, it would be virtually impossible (and likely an entirely inappropriate enquiry into a democratic process such as the ratification votes conducted by the Kwakiutl Band and the 'Namgis First Nation) to determine whether a person who may be a descendant of a signatory of the Queackar-Douglas Treaty supports the objectives of the petitioners.

45 I am accordingly satisfied that the class identified by the petitioners as those entitled to assert rights under the Queackar-Douglas Treaty or other aboriginal rights relating to the lands that are the subject of the Project is for practical purposes not determinable by stated, objective criteria. The petition should therefore be dismissed as a representative proceeding.

46 Notwithstanding that conclusion, however, I believe that in the circumstances of this case and the issues raised by the petition, it is also appropriate to consider the other criteria enunciated in *Western Canadian Shop- ping.*

2. Are there issues of fact or law common to all class members? and

3. Will success for one class member on the common issues mean success for all?

47 Assuming as I must for the purposes of this analysis that the descendants of the signatories of the Queackar-Douglas Treaty are objectively determinable, the problem that still arises is that some or all of such descendants are members of either the Kwakiutl Indian Band or the 'Namgis First Nation, the majority of the members of both of which have voted in favour of the Project.

48 In *Western Canadian Shopping* at ¶ 40 McLachlin C.J. stated:

> ... success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.
>
> [Emphasis added]

49 In this case, it is obvious that success for one (those who assert a right to special or additional consultation and accommodation) will not be success for others (who assert that they have already been appropriately consulted and accommodated).

4. Can the petitioners adequately represent the class?

50 Assuming for the purposes of this discussion that the descendants of the signatories of the Queackar-Douglas Treaty are objectively determinable, I have little doubt that the petitioners would vigorously seek to represent what they perceive to be the interests of that class

51 Having said that, however, it seems to me that there are fundamental issues concerning the status of the petitioners that make it entirely inappropriate for them to be allowed to continue in any representational role. Those fundamental issues relate to:

(1) the legal status of the Komoyue Heritage Society;

(2) the status of Rita Hazel Hunt as a member and former chief of the Kwakiutl Indian Band; and

(3) the inherent conflict of interest between the positions advanced by the petitioners and the actions taken to date by the Kwakiutl Band Council concerning the Project.

52 I will now address each concern in turn.

The status of an incorporated entity to pursue aboriginal claims

53 As noted above, the Komoyue Heritage Society was incorporated in August 2005. Four of its directors are members of the Kwakiutl Indian Band and one is a member of the 'Namgis First Nation. Although it asserts that it is the "official representative" of the Q-KFN, it has provided no evidentiary support for that assertion.

54 In my opinion, the Komoyue Heritage Society has no status to bring this petition either in its own right or as a representative petitioner. I reach that conclusion for the following reasons:

(1) Aboriginal rights and treaty rights are communal in nature and cannot be assigned, transferred, surrendered or sold to any entity other than the Crown: See: *R. v. Vanderpeet*, [1996] 2 S.C.R. 507, 23 B.C.L.R. (3d) 1 (S.C.C.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 66 B.C.L.R. (3d) 285 (S.C.C.) [*Delgamuukw*]; *Marshall* (at ¶ 17); *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324 (S.C.C.).

(2) If a group of individuals allegedly possessing legal rights incorporate a body for the purpose of promoting those rights, the incorporated body does not automatically have capacity in its own name to pursue litigation involving a breach of those rights. As a minimum precondition, the rights must be vested in the incorporated entity.

(3) A full discussion of those issues in the context of the assignment of aboriginal rights is found in *Anishinaabeg of Kabapikotawangag Resource Council Inc. v. Canada (Attorney General)*, [1998] 4 C.N.L.R. 1, 66 O.T.C. 378 (Ont. Gen. Div.) in which McCartney J. said at ¶ 12 and 13:

> So in summary what the Chief Justice [in ***Delgamuukw***] is saying is as follows:
>
> (a) Aboriginal rights are *sui generis* i.e. they are particular kinds of rights which can only be understood by reference to both common law and Aboriginal perspectives.
>
> (b) As such they are inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown.
>
> (c) Aboriginal rights have their source in the prior occupation of the country i.e. prior to the introduction of the European society.
>
> (d) Aboriginal title or Aboriginal rights are held communally and cannot be held by individual aboriginal persons i.e. "Aboriginal title is a collective right to land held by all members of an aboriginal nation."
>
> It is quite evident to me, therefore, considering the above description of this very unique right, that it is

> and must continue to be a collective right of the aboriginal community which holds it, and cannot be transferred to anyone else, even if the purported transferee were a corporate body purportedly controlled by the Aboriginal community.

(4) I agree with that analysis.

(5) Since no alleged aboriginal rights could be transferred to the Komoyue Heritage Society by any members of the alleged Q-KFN or any of the alleged descendants of the signatories of the Queackar-Douglas Treaty, they are not a necessary party to this proceeding. See also: *Barlow v. Canada* (2000), 186 F.T.R. 194, 95 A.C.W.S. (3d) 787 (Fed. T.D.), *Native Council of Nova Scotia v. Canada (Attorney General)* (2002), 111 A.C.W.S. (3d) 36, 2002 FCT 6 (Fed. T.D.).

(6) It follows that the Komoyue Heritage Society lacks capacity to act as a representative petitioner.

The status of Rita Hazel Hunt as a member and former chief of the Kwakiutl Indian Band to act as a representative plaintiff

55 In *Papaschase Indian Band No. 136 v. Canada (Attorney General)* (2004), [2005] 8 W.W.R. 442, 2004 ABQB 655 (Alta. Q.B.), the Court decided that it was not possible for a person to be a member of two aboriginal bands at one time, or in other words, have "dual citizenship" in two Bands.

56 The evidence filed by the petitioners and Canada establishes that since 1904 the descendants of the signatories of the Queackar-Douglas Treaty have, for all purposes, been members of the Kwakiutl Indian Band, the legal representation of which lies in its Band Council.

57 That leads to what is, in my opinion, the most obvious and fundamental reason why Ms. Hunt should not be allowed to continue as a representative petitioner.

58 Although the genealogical evidence does not establish that Ms. Hunt is a descendant of any of the signatories of the Queackar-Douglas Treaty, it is possible that such evidence could be adduced. What cannot, however, be overcome is the inherent conflict of interest in the positions she seeks to advance on behalf of the alleged descendants of the signatories of the Queackar-Douglas Treaty and the formal position adopted by the Kwakiutl Indian Band and the Kwakiutl Band Council concerning the Project.

59 In order to "adequately represent the class" a representative plaintiff must be free of conflicts of interest with members of the class that he or she seeks to represent. See: *Horne v. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109, 39 C.P.C. (3d) 38 (P.E.I. T.D.) at ¶ 24; *Metera v. Financial Planning Group* (2003), 12 Alta. L.R. (4th) 120, 2003 ABQB 326, [2003] 10 W.W.R. 367 (Alta. Q.B.) [*Metera*] and *Metlakatla Indian Band v. Leighton*, [2006] 3 C.N.L.R. 350, 2006 BCSC 278 (B.C. S.C.) [*Ryan*].

60 In *Metera* at ¶ 56, the Court stated:

> Conflicts of interest within the class tend to destroy the commonality of the interest. However, there is a more practical reason for this test. The representative class will be represented by one counsel, and that counsel is put in an impossible situation if he or she is required to represent competing interests.

61 In *Ryan* at ¶ 18, Satanove J. stated:

> Similarly, in *Mack v. Mack*, [1994] B.C.J. No. 1000 (S.C.), Cowan J. disallowed the representative action of the plaintiffs on behalf of the Toquaht Nation Indian Band when he added the Band as a defendant to the proceedings. Unfortunately his reasons for judgment were not made available, but it is a matter of logic that the Band could not be both a plaintiff and defendant in the same proceeding.

62 In this proceeding, the position advanced by the petitioners is antithetical not only to that advanced by the Kwakiutl Band Council but also to a majority of the members of the Kwakiutl Indian Band of which she is a member.

63 That problem is exacerbated by the fact that Ms. Hunt has been very politically active as a member of the Kwakiutl Indian Band and is a former Chief Councillor of the Kwakiutl Indian Band. In that capacity she was, in fact, engaged in early discussions on behalf of the Kwakiutl Band with Orca concerning the Project.

64 The evidence also establishes that not only Ms. Hunt but also her fellow directors of the Komoyue Heritage Society, Ms. Rachel Hunt and Mr.Wilfred Hunt, had and exercised the opportunity to vote in the ratification process relating to the Kwakiutl Band Council's approval of the Project. Although Mr. Alfred "Hutch" Hunt also had that opportunity, he apparently did not participate to the extent of voting.

65 In those circumstances, I fail to see how Ms. Hunt can qualify as a representative petitioner when the interests she purports to represent are in conflict with the wishes of the authorized representatives of the Kwakiutl Indian Band and the majority of its members. I also cannot fathom how it can be alleged that she was not consulted concerning the Project and on that basis alone I am satisfied that she should be denied standing as a representative petitioner.

Issue #2: Is the petitioner, Rita Hazel Hunt, estopped from bringing this petition by reason of her conduct as a former Chief Councillor of the respondent Kwakiutl Band Council with whom Orca consulted?

66 Concerns related to Ms. Hunt's past conduct with respect to the Project have been considered by me in determining that in all of the circumstances neither Ms. Hunt nor the Komoyue Heritage Society has the capacity as a representative petitioner to advance the treaty or other aboriginal rights claimed in the petition.

67 I am also satisfied that, in all of the circumstances, her actions in consulting with Orca during the early stages of the Project without specifically advising Orca's representatives of her intent to assert rights under the Queackar-Douglas Treaty independent of those asserted by her as the authorized representative of the Kwakiutl Indian Band equally deny her the right to now advance those claims.

68 In reaching that conclusion, I recognize that Ms. Hunt has sworn that she told Orca's representatives at some unspecified time that they "would have to deal with the Komoyue". While that evidence is denied by Mr. Marco Romero, Orca's Project representative, even if Ms. Hunt's evidence were to be accepted, it was at best an imprecise statement made without reference to any historical facts made while she was actively representing the Kwakiutl Indian Band.

69 I am satisfied that even if such a declaration was made, it was entirely insufficient notice of any aboriginal claims by a separate and allegedly distinct aboriginal group. In the face of her having failed to withdraw from negotiations on behalf of the Kwakiutl Indian Band, such alleged notice of a vague independent claim cannot be relied upon as notice giving rise to a duty of independent consultation and accommodation. In those circumstances I find that Ms. Hunt is now estopped from bringing this proceeding.

70 To rule otherwise would provide Ms. Hunt (and those of like mind whom she seeks to represent) a forum in which to circumvent the de-amalgamation process that would be required under the *Indian Act* to, in any way, modify the existing collective rights of all of the members of the Kwakiutl Indian Band. Such a determination would also provide an *ex post facto* veto to dissident members of the Kwakiutl Indian Band over the actions of the majority of the members of the Kwakiutl Indian Band who approved the Project in the ratification vote.

71 It is obvious to me that the issues raised by this proceeding are in substance matters concerning the internal affairs and governance of the Kwakiutl Indian Band that do not and should not involve Orca, the Province, Canada or the 'Namgis First Nation or any of the other respondents.

72 The petition is accordingly dismissed.

Petition dismissed.

FN* A corrigendum issued by the Court on October 27, 2006 has been incorporated herein.

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TAB 16

1998 CarswellOnt 2139, 53 C.R.R. (2d) 183, [1998] 4 C.N.L.R. 1, 4 C.N.L.R. 1, 66 O.T.C. 378

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1998 CarswellOnt 2139, 53 C.R.R. (2d) 183, [1998] 4 C.N.L.R. 1, 4 C.N.L.R. 1, 66 O.T.C. 378

Anishinaabeg of Kabapikotawangag Resource Council Inc. v. **Canada** (Attorney General)

The **Anishinaabeg** of Kabapikotawangag Resource Council Inc., Plaintiff(s) (Respondent) and Attorney General of **Canada**, Defendant (Applicant)

Ontario Court of Justice (General Division)

McCartney J.

Judgment: April 24, **1998**
Docket: Thunder Bay 97-0451

Counsel: *Donald R. Colborne*, Counsel for the Plaintiff.

Charlotte Bell, Q.C., Counsel for the Defendant.

Subject: Civil Practice and Procedure; Constitutional

Native law --- Practice and procedure — Pleadings and parties

Plaintiff incorporated by seven First Nations for purpose of prosecuting action against defendant alleging breach by defendant of special fiduciary responsibility in regard to aboriginal fishing rights — Defendant moved to strike plaintiff from title of proceedings on basis that statement of claim showed no reasonable cause of action relative to plaintiff — Aboriginal, Charter and treaty rights of seven incorporating First Nations had not been vested in plaintiff by transfer or assignment — Plaintiff did not have capacity to prosecute in its own right action alleging breach of those rights — Plaintiff ordered stricken from proceedings and replaced by seven incorporating First Nations — Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), c. 11.

Cases considered by *McCartney, O.C.J.*:

Delgamuukw v. British Columbia, 153 D.L.R. (4th) 193, 220 N.R. 161, 99 B.C.A.C. 161, 162 W.A.C. 161, [1997] 3 S.C.R. 1010, [1998] 1 C.N.L.R. 14 (S.C.C.) — considered

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

507, [1996] 9 W.W.R. 1, 23 B.C.L.R. (3d) 1, (sub nom. *R. v. Van der Peet)* [1996] 4 C.N.L.R. 177 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 24(1) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 5.04(3) — referred to

MOTION to strike plaintiff from title of proceedings.

***McCartney, O.C.J.*:**

1 This is a motion brought by the applicant (THE ATTORNEY GENERAL OF CANADA) to strike the respondent (THE ANISHINAABEG OF KABAPIKOTAWANGAG RESOURCE COUNCIL INC.) from the title of the proceedings on the basis that the statement of claim commencing the proceedings shows no reasonable cause of action relative to the corporate plaintiff. Hereafter I will refer to the respondent as the plaintiff and the applicant as the defendant.

Background:

2 An explanation of some of the background will be helpful. The plaintiff was incorporated on March 12, 1997. It's incorporators comprise seven First Nations all bordering on Lake of the Woods in Northwestern Ontario. There is little doubt that the corporate plaintiff was established for the purpose prosecuting this action.

3 The plaintiff in it's Statement of Claim alleges that the defendant has a special fiduciary responsibility in regard to the aboriginal fishing rights of the plaintiff in the Lake of the Woods, and a breach of that relationship has resulted in a breach of the plaintiff's aboriginal, treaty and charter rights in the fishery. The main thrust of the plaintiff's case is that the defendant, in attempting to fulfil it's obligations to support aboriginal fishing, has discriminated against the plaintiff, in that it has set up a program known as *The Aboriginal Fishing Strategy* (*AFS*), to which it has allotted $140,000,000.00, but which excludes the plaintiff and apparently all aboriginals in inland provinces from participating. Damages are claimed for what the plaintiff believes is it's fair share of the monies in question, namely, $7,000,000.00.

4 On March 12, 1998 a Statement of Claim was issued in a Class Action Suit, naming both the defendant herein as well as the Province of Ontario as a co-defendant. If successful, the class action suit will involve at least the seven First Nations who are members of the plaintiff corporation herein. The relief claimed in the class action suit is for damages for breach of fiduciary obligations relating to aboriginal fishing rights.

The issue:

5 The defendant brings this motion on the basis that the plaintiff is not the proper party to prosecute this suit i.e. that it lacks the capacity to do so, since it has no rights in the aboriginal fishery which could be affected by any action on the part of the defendant. The plaintiff, on the other hand, argues that it is really a matter of standing that is being argued here, and cites several decisions in which corporate bodies such as the plaintiff have been granted standing to promote aboriginal rights.

6 In situations such as this the issue of standing normally arises where the plaintiff seeks some form of declaratory relief in the nature of a declaration of aboriginal rights, or a declaration of the invalidity of legislation as being contrary to the *Canadian Charter of Rights and Freedoms*. In such a case, the Court applies the rules respecting standing to determine whether it should exercise it's discretion and grant the plaintiff standing in the case. Here, the plaintiff makes no such request, since that is not what this suit is all about.

7 First Nations claiming damages for breaches of aboriginal, charter and treaty rights in their ancestral lands clearly have standing. The question is therefore whether the form they have chosen to represent them i.e. the corporate form is appropriate.

8 So the issue on this motion, as I see it, is simply this - is the corporate plaintiff the proper and necessary party to bring the suit, and if it is not, who is?

9 If a group of individuals possessing certain legal rights incorporate a body for the purpose of promoting those rights, as has been done here, does it automatically have capacity, in it's own name, to prosecute an action alleging breach of those rights? I think not. At the very least, as a pre-condition to such an action, those rights must be vested in the corporation. Since no attempt has been made, either by transfer or assignment, to vest the rights of the incorporators in the plaintiff herein, that should end the matter. However, as a matter of expediency, it should still be determined who are the proper and necessary parties to prosecute this matter, in order to avoid yet another motion.

The Transfer or Assignment of Rights:

10 I will discuss the ability to assign or transfer rights herein under the following headings:

a) **Assignment of Aboriginal Rights**

b) **Assignment of Treaty Rights**

c) **Assignment of Charter Rights**

a) Assignment of Aboriginal Rights:

A full discussion of the transfer or assignment of aboriginal title was undertaken in the case of *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.). Aboriginal title being a sub-category of aboriginal rights dealing solely with land claims. (see *R. v Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.)) then the same principles apply to both. Regarding those principles -Chief Justice Lamer had the following to say at pg. 241.

> 113 The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its *inalienability*. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to any one other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal in this sense, and does not mean that

aboriginal title is a non-proprietary interest which amounts to no more than a license to use and occupy the land and cannot compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at p. 677, 53 D.L.R. (4th) 487."

114 Another dimension of aboriginal title is its *source*. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine's Milling*. However, it is now clear that although aboriginal title was recognized by the Proclamation, it arises from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law: see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at p.7. Thus, in *Guerin, supra*, Dickson J. Described aboriginal title, at p. 376, as a legal right derived from the Indians historic occupation and possession of the tribal lands". What makes aboriginal title *sui generis* is that it arises form possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: U.B.C. Press 1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, 57 D.L.R. (4th) 197, whereas this Court unanimously held at p. 340 that aboriginal title pre-dated colonization by the British and survived British claims to sovereignty (also see *Guerin, supra* , at p. 378). What he suggests is a second source for aboriginal title the relationship between common law and pre-existing systems of aboriginal law.

115 A further dimension of aboriginal title is the fact that it is held *communally*. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal titled which is *sui generis* and distinguishes it from normal property interests.

11 So in summary what the Chief Justice is saying is as follows:

a) Aboriginal Rights are *Sui Generis* i.e. they are particular kinds of rights which can only be understood by reference to both common law and aboriginal perspectives.

b) As such they are inalienable and cannot be transferred sold or surrendered to anyone other than the Crown.

c) Aboriginal rights have their source in the prior occupation of the country i.e. prior to the introduction of the European society.

d) Aboriginal title or aboriginal rights are held communally and cannot be held by individual aboriginal persons i.e. "Aboriginal title is a collective right to land held by all members of an aboriginal nation."

12 It is quite evident to me, therefore, considering the above description of this very unique right, that it is and must continue to be a collective right of the aboriginal community which holds it, and cannot be transferred to anyone else, even if the purported transferee were a corporate body purportedly controlled by the aboriginal community.

b) Assignment of Treaty Rights:

Black's Law Dictionary, 6th edition, defines Treaty as follows:

> A compact made between two or more independent nations with a view to the public welfare.

Such a compact obviously carries with it rights as well as duties as between the nations involved. It is quite inconceivable that rights and responsibilities of one of the parties could be assigned to a third party. In any event, since it is quite clear that aboriginal rights are "inalienable", it would be contradictory to refuse to allow their transfer or assignment standing on their own, but allow them to be transferred after having been enshrined in a treaty.

c) Assignment of Charter Rights:

The plaintiff corporation, in it's Statement of Claim, claims a myriad of charter violations, and in that regard the plaintiff's claims is also based on *section 24 (1)* of the Charter which reads as follows

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

The wording of this section is clear - only individuals whose rights, or freedoms have been affected by the Charter can apply to the Court for a remedy. Furthermore, as in the situation where treaty rights are involved, the alleged charter violations, in one way or another, are all related to violations of aboriginal fishing rights, and for the same reasons set out in 'b)', above, the Charter Rights herein must be considered inalienable and not capable of assignment or transfer to third parties.

13 Conclusion:

Based on the above, it is the decision of this Court that the plaintiff herein *THE ANISHINAABEG OF KABAPIKOTAWANGAG RESOURCE COUNCIL INC.* is not the proper party to prosecute this action, and is therefore to be stricken from these proceedings and replaced by the following First Nations communities as plaintiffs:

1) WAUZHUSHK ONIGUM FIRST NATION

2) WHITEFISH BAY FIRST NATION

3) OJIBWAYS OF ONIGAMING FIRST NATION

4) MISHKOSIIMIINIIZIIBING FIRST NATION (Big Grassy)

5) BIG ISLAND FIRST NATION

6) NORTHWEST ANGLE #33

7) NORTHWEST ANGLE #37

In this regard, it should be noted that the plaintiff's counsel has indicated he has the authority to consent to the addition of the named plaintiffs, if required. (see Rule 5.04(3)) of *The Rules of Civil Procedure.*

14 No arguments were presented with respect to the costs of the motion, and if the parties cannot agree that the costs should follow the result, then they may speak to me in that regard within the next 10 days.

Motion granted.

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TAB 17

2000 CarswellNat 372, 186 F.T.R. 194, [2000] F.C.J. No. 282, 95 A.C.W.S. (3d) 787

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2000 CarswellNat 372, 186 F.T.R. 194, [2000] F.C.J. No. 282, 95 A.C.W.S. (3d) 787

Barlow v. Canada

Ken **Barlow** and the Union of New Brunswick Indians, Applicants, and Her Majesty the Queen in Right of **Canada**, The Attorney General of **Canada** and The Minister of Fisheries and Oceans, Respondents

Federal Court of Canada — Trial Division

Teitelbaum J.

Judgment: March 3, **2000**
Heard: January 10, **2000**
Heard: January 11, **2000**
Docket: T-1876-99

Counsel: *Mr. Henry J. Bear* and *Mr. Harold L. Doherty*, for Applicants.

Mr. Harry J. Wruck, Q.C., for Respondents.

Subject: Civil Practice and Procedure; Public

Native law --- Practice and procedure — Pleadings — Striking out

K and union of Indian chiefs brought application seeking declaration that Crown and Minister breached first nation's treaty rights by seizing lobster traps — Minister brought motion to strike application, or in alternative to bifurcate, to adjourn, and to convert application to action — Motion granted in part — Application was not bereft of any possibility of success — Application would determine whether lobster traps of K were seized, and whether seizure of traps breached K's constitutional or treaty rights — No rule existed permitting bifurcation of issues — Application could be adjourned to allow those directly affected to be served if first issue of whether traps were seized was answered in affirmative — Judicial review was intended to be speedy remedy and bifurcation would delay proceedings — Application was to be converted to action as affidavit evidence would be inadequate to resolve issues — Issue of breach of treaty rights would require oral history and expert evidence — Determination of whether there was seizure could not be adequately addressed through affidavits.

Practice --- Parties — Standing

K and union of Indian chiefs brought application seeking declaration that Crown and Minister breached first nation's treaty rights by seizing lobster traps — Application would first determine whether lobster traps of K were

seized, and then whether seizure of traps breached K's constitutional or treaty rights — Minister brought motion to strike application, or in alternative to bifurcate, to adjourn, and to convert application to action — Minister challenged union's standing to bring representative application as it did not represent all first nations communities benefiting from treaty — Federal Court Rule 114 provided representative claim could not be made except where parties have same interest — Union was not incorporated body representing first nation's peoples and did not have same rights as individual applicant — As first issue raised in application affected only those named in notice of application, no need to adjourn existed until and unless first question was answered in affirmative — Union lacked standing to bring application as it was not party to treaty — Federal Court Rules, 1998, SOR/98-106, Rule 114.

Native law --- Practice and procedure — Parties — Representative or class actions

K and union of Indian chiefs brought application seeking declaration that Crown and Minister breached first nation's treaty rights by seizing lobster traps — Application would first determine whether lobster traps of K were seized, and then whether seizure of traps breached K's constitutional or treaty rights — Minister brought motion to strike application, or in alternative to bifurcate, to adjourn, and to convert application to action — Minister challenged union's standing to bring representative application as it did not represent all first nations communities benefiting from treaty — Federal Court Rule 114 provided representative claim could not be made except where parties have same interest — Union was not incorporated body representing first nation's peoples and did not have same rights as individual applicant — As first issue raised in application affected only those named in notice of application, no need to adjourn existed until and unless first question was answered in affirmative — Union lacked standing to bring application as it was not party to treaty — Federal Court Rules, 1998, SOR/98-106, Rule 114.

Cases considered by *Teitelbaum J.*:

Assn. of Canadian Distillers v. Canada (Minister of Health) (1998), 148 F.T.R. 215 (Fed. T.D.) — applied

Duke of Bedford v. Ellis (1900), [1901] A.C. 1 (U.K. H.L.) — applied

MacInnis v. Canada (Attorney General), 166 N.R. 57, 113 D.L.R. (4th) 529, 76 F.T.R. 67 (note), [1994] 2 F.C. 464, 25 Admin. L.R. (2d) 294 (Fed. C.A.) — applied

Marshall v. Canada, (sub nom. *R. v. Marshall)* [1999] 3 S.C.R. 456, (sub nom. *R. v. Marshall)* 177 D.L.R. (4th) 513, (sub nom. *R. v. Marshall)* 246 N.R. 83, (sub nom. *R. v. Marshall)* 138 C.C.C. (3d) 97, (sub nom. *R. v. Marshall)* [1999] 4 C.N.L.R. 161, (sub nom. *R. v. Marshall)* 178 N.S.R. (2d) 201, (sub nom. *R. v. Marshall)* 549 A.P.R. 201 (S.C.C.) — considered

Marshall v. Canada, (sub nom. *R. v. Marshall)* [1999] 3 S.C.R. 533, (sub nom. *R. v. Marshall)* [1999] 4 C.N.L.R. 301, (sub nom. *R. v. Marshall)* 247 N.R. 306, (sub nom. *R. v. Marshall)* 179 D.L.R. (4th) 193, (sub nom. *R. v. Marshall)* 139 C.C.C. (3d) 391, (sub nom. *R. v. Marshall)* 179 N.S.R. (2d) 1, (sub nom. *R. v. Marshall)* 553 A.P.R. 1 (S.C.C.) — referred to

Naken v. General Motors of Canada Ltd., [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385, 46 N.R. 139, 32 C.P.C. 138 (S.C.C.) — applied

Pharmacia Inc. v. Canada (Minister of National Health & Welfare) (1994), 58 C.P.R. (3d) 209, (sub nom.

David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.) 176 N.R. 48, (sub nom. *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.)* [1995] 1 F.C. 588 (Fed. C.A.) — applied

Prince Edward Island (Potato Board) v. Canada (Minister of Agriculture) (1992), 56 F.T.R. 150 (Fed. T.D.) — applied

Vancouver Island Peace Society v. Canada, [1992] 3 F.C. 42, (sub nom. *Vancouver Island Peace Society v. Canada (Minister of National Defence))* 53 F.T.R. 300 (Fed. T.D.) — referred to

Statutes considered:

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

s. 35 — referred to

Federal Court Act, R.S.C. 1985, c. F-7

s. 18.1(1) [en. 1990, c. 8, s. 5] — referred to

s. 18.4(1) [en. 1990, c. 8, s. 5] — considered

s. 18.4(2) [en. 1990, c. 8, s. 5] — considered

Rules considered:

Federal Court Rules, C.R.C. 1978, c. 663

R. 419 — considered

Federal Court Rules, 1998, SOR/98-106

R. 4 — referred to

R. 8 — considered

R. 35 — considered

R. 36 — considered

R. 53 — pursuant to

R. 54 — pursuant to

R. 81 — considered

R. 107 — pursuant to

R. 114 — considered

R. 221 — pursuant to

R. 303(1)(a) — considered

R. 316 — pursuant to

Rules of Practice, R.R.O. 1980, Reg. 540

R. 75 — referred to

Treaties considered:

Treaty of Peace and Friendship, 1760

Generally — considered

MOTION by Minister to strike application for judicial review, or in alternative, to adjourn, bifurcate and convert to action.

***Teitelbaum J.*:**

Reasons for Order

1 The Minister of Fisheries and Oceans seeks an order striking out the judicial review application filed by Ken Barlow and the Union of New Brunswick Indians. This motion is brought pursuant to rules 4, 81 and 221 of the *Federal Court Rules, 1998* for an order striking out:

(1) the Notice of Application;

(2) the affidavits of Ken Barlow, sworn on the 27th day of October, 1999;

(3) the affidavits of Gerard Hare, sworn on the 30th day of November, 1999;

(4) the second affidavit of Ken Barlow sworn on the 29th day of November, 1999;

(5) the affidavit of Joey Francis sworn on the 29th day of November, 1999; and

(6) an Order dismissing this proceeding.

2 In the alternative, pursuant to rules 4, 53, 54, 107, and 316 of the *Federal Court Rules, 1998* the respondents seek an Order that the factual issue of whether or not the respondents seized 60 lobster traps purportedly belonging to the applicant be determined in advance of the constitutional and treaty issues raised on this judicial review application, namely, whether or not the respondents breached the applicants' treaty and constitutional right to fish lobster and to trade the produce of that fishing, and an Order giving directions concerning the procedure to be followed.

3 Pursuant to rules 8, 35, and 36 of the *Federal Court Rules, 1998* the respondents seek an Order that the Orders of the Honourable Justice MacKay dated November 24, 1999 and November 30, 1999 be varied so as to adjourn generally the following matters:

(1) the time for serving and filing the respondents' affidavits;

(2) the time for completing cross-examinations on the affidavits of the applicants and the respondents;

(3) the time for serving and filing the applicants' record;

(4) the time for serving and filing the respondents' record;

(5) the hearing of this application for judicial review.

4 In the alternative, pursuant to subsection 18.4(2) of the *Federal Court Act*, R.S.C. 1985, c. F-7, the respondents seek to convert the within application into an action.

5 In the further alternative, the respondents seek an order pursuant to rules 8, 35 and 36 that the Orders of the Honourable Justice MacKay dated November 24, 1999 and November 30, 1999 be varied as follows:

(1) the time for serving and filing the respondents' affidavits be extended until April 10, 2000;

(2) the time for completing cross-examinations on the affidavits of the applicants and the respondents be extended until May 10, 2000;

(3) the time for serving and filing the applicants' record be extended until May 27, 2000;

(4) the time for serving and filing the respondents' record be extended until June 7, 2000;

(5) the hearing of the application be heard from June 26 to 30, 2000.

Factual Background to this Motion

6 The applicant, Union of New Brunswick Indians, is an incorporated association of elected chiefs, or so it is alleged as no evidence of this was produced, representing Mi'kmaq and Maliseet First Nations in New Brunswick.

7 The applicant, Ken Barlow, is a Mi'kmaq Indian living at Indian Island Indian Reserve in Kent County in the Province of New Brunswick. He provides the necessaries of life for himself and his two children by fishing lobster and selling the product of that fishing.

8 The Indian Island Indian Reserve is an offshoot of the Big Cove Indian Reserve. The Mi'kmaq of Indian Island and Big Cove are the descendants of the Richibucto Mi'kmaq who signed the "Richibucto" treaty of March 10, 1760. This treaty was recently interpreted by the Supreme Court of Canada in *Marshall v. Canada* (S.C.C. unreported) File No. 26014, decision issued on September 17, 1999 [reported (1999), 177 D.L.R. (4th) 513 (S.C.C.)].

9 The "Richibucto" treaty applies to the Mi'Kmaq living at Indian Island and Big Cove as descendants of the Richibucto Mi'kmaq.

10 The applicants allege that on or about October 22, 1999 at Miramichi Bay, officers of the respondent Minister of Fisheries and Oceans seized approximately 60 lobster traps belonging to the applicant Ken Barlow.

11 By Notice of Application dated October 27, 1999 the applicants, Ken Barlow and the Union of New

Brunswick Indians seek a declaration that the respondents breached Mr. Barlow's treaty rights under the 1760 Treaty of Peace and Friendship with the Mi'kmaq people. This treaty was not filed into the Court Record.

12 It is alleged this treaty is protected by section 35 of the *Constitution Act 1982* and has been recently interpreted in Supreme Court decision in *Marshall v. Canada* (#1) dated September 17, 1999 (S.C.C. unreported).

13 The applicant Ken Barlow alleges that the lobster traps have not been returned to him and he has thereby been deprived of his ability to provide the necessities of life and earn a moderate livelihood for himself and his two children.

14 On November 10th, 1999, the applicants served a Notice of Motion for an interlocutory injunction and a writ of *mandamus* directing the respondents to return all lobster traps seized from the applicant Ken Barlow.

15 On November 24th, 1999, the Honourable Mr. Justice MacKay dismissed the motion for interlocutory relief. In addition, it was ordered by Mr. Justice MacKay that the hearing of this matter be set down for April 11, 2000 in Fredericton, New Brunswick for one day.

16 Upon review of the Order issued on November 24th, 1999 and realizing that it contained a clerical error, the Honourable Justice MacKay made a subsequent order on November 30th, 1999 substituting the following therefor:

> Hearing of this matter is set down for April 11, 2000 in Fredericton, New Brunswick, commencing at 10:00 a.m. at the Federal Court, for one day. If more than a day is anticipated to be required by counsel for the hearing, they shall advise the Court on or before March 31, 2000 and the hearing will then commence at 2:00 p.m. on April 10 and continue on the following day.

17 On December 24, 1999, the respondents filed a Notice of Motion to bring this motion to this Court on January 10, 2000.

The Grounds for the Motion

18 The respondents submit the following grounds for this motion:

(a) The proceedings are a nullity in that the necessary facts to support the declarations sought by the applicants have not been made out in that the affidavits filed by the applicants are defective and fail to comply with rule 81 of the *Federal Court Rules, 1998*. Furthermore, expert evidence is not admissible on judicial review application. Accordingly, there is no basis upon which the court can grant the relief sought.

(b) The essential factual underpinnings of the matter from which the applicants seek relief pursuant to section 18.1(1) of the *Federal Court Act* are based on the validity of the applicants' claim that the lobster traps of the applicant Ken Barlow were seized by the respondents, which the respondents deny. Accordingly, if the applicants are unable to establish that the respondents seized their lobster traps the declarations that the applicants seek in relation to the complex constitutional and treaty right issues become moot and need not be considered by this Court.

(c) The time deadlines for filing materials should be adjourned generally on the ground that the issues raised in this proceeding will be rendered moot if the applicants are unable to establish that their lobster traps were seized by the respondents.

(d) This proceeding is far too complex from an evidentiary perspective to permit it to proceed by judicial review. This is because this proceeding raises issues which cannot be satisfactorily established or weighed through affidavit evidence, and instead requires the adducing of oral history relating to aboriginal traditions, expert historical evidence, expert biological evidence respecting conservation issues and public policy issues relating to the historical participation of non natives in the lobster fishery as well as issues relating to the Burnt Church crisis. This, therefore, necessitates that this judicial review proceeding be converted into a trial of an action.

Statutory Provisions

Federal Court Act, R.S.C. 1985, c. I-2

Hearings in summary way

18.4 (1) Subject to subsection (2), an application or reference to the Trial Division under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

18.4(2) Exception

(2) The Trial Division may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

Procédure sommaire d'audition

18.4 (1) Sous réserve du paragraphe (2), la Section de première instance statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.

18.4(2) Exception

(2) La Section de première instance peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

Federal Court Rules, 1998

Rule 8. Extension or abridgement

(1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.

(2) When motion may be brought — A motion for an extension of time may be brought before or after the end of the period sought to be extended.

(3) Motions for extension in Court of Appeal — Unless the Court directs otherwise, a motion to the Court of Appeal for an extension of time shall be brought in accordance with rule 369.

Rule 35. Hearing dates

(1) Subject to rule 298 and paragraph 385(1)(b), motions that can conveniently be heard at the General Sittings of the Trial Division may be made returnable accordingly.

(2) Special hearing dates — A request may be made informally to the Judicial Administrator for an appointment of a special time and place

(a) for sittings of the Court of Appeal or of a judge of the Court of Appeal to hear a motion; or

(b) for sittings of a judge of the Trial Division or of a prothonotary to hear a motion that is likely to be lengthy or a motion to be heard other than at General Sittings.

Rule 36. Adjournment

(1) A hearing may be adjourned by the Court from time to time on such terms as the Court considers just.

(2) Adjournment to fixed day — Where a hearing is adjourned to a fixed day, a party who appeared at the hearing is deemed to have had notice of the adjournment.

(3) Notice dispensed with — Where a party has failed to appear at a hearing, that party need not be served with notice of an adjournment of the hearing.

Rule 81. Content of affidavits

(1) Affidavits shall be confined to facts within the personal knowledge of the deponent, except on motions in which statements as to the deponent's belief, with the grounds therefor, may be included.

(2) Affidavits on belief — Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of material facts.

Rule 114. Representative proceedings

(1) Where two or more persons have the same interest in a proceeding, the proceeding may be brought by or against any one or more of them as representing some or all of them.

(2) Motion to appoint representative — At any time, the Court may, on motion, appoint a person to represent some or all of the parties in a proceeding referred to in subsection (1).

(3) Where representative not a party — Where under subsection (2) the Court appoints a person not named as a party to the proceeding, it shall make an order adding that person as a party.

(4) Order binding on represented persons — An order in a proceeding referred to in subsection (1) is binding on all represented parties, but shall not be enforced against them without leave of the Court.

Rule 303. Respondents

(1) Subject to subsection (2), an applicant shall name as a respondent every person

(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or

Règle 8. Délai prorogé ou abrégé

(1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par or-

donnance.

(2) Moment de la présentation de la requête — La requête visant la prorogation d'un délai peut être présentée avant ou après l'expiration du délai.

(3) Requête présentée à la Cour d'appel — Sauf directives contraires de la Cour, la requête visant la prorogation d'un délai qui est présentée à la Cour d'appel doit l'être selon la règle 369.

Règle 35. Présentation des requêtes

(1) Sous réserve de la règle 298 et de l'alinéa 385(1)b), les requêtes qui peuvent être commodément entendues à une séance générale de la Section de première instance peuvent être présentées à une telle séance.

(2) Requêtes non présentées à une séance générale — Une demande d'audience peut être faite, sans formalité, à l'administrateur judiciaire pour fixer les date, heure et lieu:

a) de l'audition d'une requête par la Cour d'appel ou l'un de ses juges;

b) de l'audition, par un juge de la Section de première instance ou un protonotaire, d'une requête qui sera vraisemblablement de longue durée ou qu'il est indiqué d'entendre à un autre moment que pendant une séance générale.

Règle 36. Ajournement

(1) La Cour peut ajourner une audience selon les modalités qu'elle juge équitables.

(2) Date déterminée — Lorsqu'une audience est ajournée pour reprendre à une date déterminée, toutes les parties qui ont comparu à l'audience sont réputées en avoiré té avisées.

(3) Dispense de signification — Nul n'est tenu de donner avis de l'ajournement d'une audience à une partie qui n'a pas comparu à celle-ci.

Règle 81. Contenu

(1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête, auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

(2) Poids de l'affidavit — Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

Règle 114. Recours collectif

(1) Lorsque des personnes ont un intérêt commun dans une instance, celle-ci peut être engagée par ou contre l'une ou plusieurs de ces personnes au nom de toutes celles-ci ou de certaines d'entre elles.

(2) Représentant désigné sur requête — Dans une instance visée au paragraphe (1), la Cour peut, à tout moment, sur requête, désigner une personne en tant que représentant de toutes les parties ou de certaines d'entre

elles.

(3) Constitution en partie — Si la personne désignée aux termes du paragraphe (2) n'est pas une partie, la Cour rend une ordonnance constituant cette personne partie à l'instance.

(4) Effet de l'ordonnance — L'ordonnance rendue dans une instance visée au paragraphe (1) lie toutes les personnes représentées, mais ne peut être exécutée contre celles-ci sans la permission de la Cour.

Règle 303. Défendeurs

(1) Sous réserve du paragraphe (2), le demandeur désigneà titre de défendeur:

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

Respondents' Submissions

(1) Striking Out Application

19 At the outset, the respondents seek an order striking out the application for judicial review on the basis that the affidavits filed do not comply with rule 81 as they fail to establish the factual underpinnings upon which the declaratory relief is sought.

20 In addition, the respondents argue that the Union of New Brunswick Indians lacks standing to bring this application.

(2) Bifurcation of the Two Issues Raised by this Application

21 There are two issues to be determined in this application: (1) whether officers of the Department of Fisheries and Oceans (DFO) seized the lobster traps of the applicant Ken Barlow on or about October 22, 1999, and (2) whether the seizure of the applicant Ken Barlow's lobster traps breached his constitutional or treaty rights.

22 It is submitted by the respondents that the applicants are not entitled to the complex constitutional and treaty right relief that they seek unless they can satisfy the Court that officers of the DFO actually seized Ken Barlow's lobster traps.

23 The respondents argue that the portion of the judicial review application relating to the applicants' constitutional and treaty rights should be adjourned pending a determination on the preliminary issue of whether Ken Barlow's lobster traps were seized by the respondents.

(3) Failure to Name as a Respondent Persons Directly Affected by the Order Sought

24 The respondents submit that the applicants failed to comply with rule 303(1)(a) in that they did not name as respondents at least four persons who are directly affected by the order sought in the notice of application, namely:

(1) the Burnt Church Indian Band who are Mi'kmaq people but are not members of the Union of New Brunswick Indians;

(2) the Big Cove Indian Band who are Mi'kmaq people but are also not members of the Union of New Brunswick Indians;

(3) the MAWIW Council of First Nations, a not-for-profit company under the *New Brunswick's Companies Act R.S.N.B. 1973*, c. c-13 incorporated in February, 1992. In 1996, MAWIW became the political and provincial representative for the Tobique, Big Cove and Burnt Church First Nations following the withdrawal of those communities from the Union of New Brunswick Indians.

25 The respondents submit that the remainder of the judicial review application should be adjourned in order to permit all persons directly affected by the order sought by the applicants to file materials and ensure their interests are before the Court.

(4) Conversion of the Application into a Trial of an Action

26 It is the submission of the respondents that this Court should grant an order pursuant to subsection 18.4(2) of the *Federal Court Act* that this application be converted into an action on the basis that the issues raised cannot be satisfactorily established or weighed through affidavit evidence, but rather, the Court should have the opportunity to observe the demeanor and credibility of witnesses.

27 Furthermore, the respondents argue that evidence adduced through witnesses is necessary on the following matters:

(a) oral history relating to treaties, aboriginal traditions and territories;

(b) expert historical evidence;

(c) expert biological evidence respecting conservation issues and evidence relating to the historical participation of non-natives in the lobster fishery in Miramichi Bay;

(d) regional and economic fairness issues; and

(e) evidence relating to the need to avoid the type of civil unrest that took place in New Brunswick between September 17 and October 22, 1999.

(5) Extension of Time

28 In the alternative, the respondents seek an order pursuant to rules 8, 35 and 36 of the *Federal Court Rules* that the terms of the Orders of Mr. Justice MacKay dated November 24, 1999 and November 30, 1999 be varied as follows:

(1) the time for serving and filing the respondents' affidavits be extended until April 13, 2000;

(2) the time for completing cross-examinations on the affidavits of the applicants and the respondents be extended until May 10, 2000;

(3) the time for serving and filing the applicants' record be extended until May 27, 2000;

(4) the time for serving and filing the respondents' record be extended until June 7, 2000;

(5) the hearing of this application be heard from June 26 to 30, 2000.

29 The respondents submit that these extensions of time are required if they are to meet the evidence proffered by the applicants in this proceeding.

Applicants' Submissions

(1) Striking out the Application

30 The applicants submit that the proper way to contest an originating notice of motion is to appear and argue at the hearing of the motion itself: *Pharmacia Inc. v. Canada (Minister of National Health & Welfare)* (1994), [1995] 1 F.C. 588 (Fed. C.A.).

31 The applicants argue that this is not a case where the notice of application is so bereft of any possibility of success which would warrant summary dismissal by this Court.

32 With respect to the argument by the respondents that the notice of application should be struck by striking the supporting affidavits for non-compliance, the applicants argue that the reference by Ken Barlow to legal counsel in his affidavit simply provides context and does not usurp the Court's jurisdiction to determine the issue as the respondents suggest in their written submissions.

33 Further, the applicants submit that if this Court deems it appropriate to strike this reference to advice received by counsel, then this could be done without striking the entire affidavit.

34 The applicants submit that the respondents incorrectly interpret the Supreme Court decision in *Marshall, supra* (#2) [*Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.)] as stating that treaty rights do not belong to the individual but are exercised by the community. It is submitted that the Court indicated that the rights are community based but exercised by individuals.

Issue II: Standing

35 In reply to the respondents' submission that the Union of New Brunswick Indians lacks standing, the applicants state that the Union has a lengthy history of litigation in which they have tried to protect the rights of natives in New Brunswick and Prince Edward Island. More specifically, the Union intervened in *Marshall, supra.*

36 With respect to the argument that all parties directly affected must be named, the applicants argue that "parties directly affected" by an application for judicial review has previously been interpreted by this Court to refer to parties who were participants in the proceedings before the tribunal or decision maker with respect to the decision at issue. It is submitted that none of the parties that the respondents indicated participated in the proceedings before the decision maker.

37 Further, the applicants submit that "directly affected by" refers to being directly affected legally not commercially. In the present case, it is the applicants' position that the current respondents represent the public interest in these proceedings.

Issue III: Bifurcation of Issues

38 The applicants submit that there is no rule which would permit this Court to bifurcate the proceedings as proposed by the respondents. Furthermore, the applicants argue that the issue of the seizure of the traps relates to the merits of the case and therefore should not be separated from the second issue raised by the application.

39 The applicants argue that the respondents have failed to produce any direct evidence by DFO officers who were at Miramichi Bay on October 22, 1999 which would serve to rebut the evidence of Ken Barlow and Joey Francis. It is submitted that the only evidence offered by the respondents in this regard is that eleven days after the raid on October 22, 1999 in Miramichi Bay, DFO officers were unable to find traps with Ken Barlow's tags on them.

40 In addition, the applicants emphasize that no specific evidence has been provided about what types of control or accounting procedures were in place on October 22, 1999, nor is there any evidence offered by the respondents as to what security measures were in place where the traps were stored between October 22, 1999 and November 2, 1999.

41 The applicants request that this Court dismiss with costs the application to bifurcate the proceedings.

Issue IV: Conversion of the Application into an Action

42 The applicants submit that the respondents refer to an "alleged" treaty right to fish lobster in Miramichi Bay, and in doing so, ignore their own affidavit evidence and written representations that the Big Cove Mi'kmaq traditionally fished for lobster in Miramichi Bay and that the Indian Island Mi'kmaq of which Ken Barlow is a member, are an offshoot of the Big Cove band.

43 In addition, the applicants argue that the respondents ignore their own evidence from Steven Patterson, which is supported by the Supreme Court decision in *Marshall, supra* (#1), that the Big Cove and Indian Island Mi'kmaq," the Richibucto Mi'kmaq", are covered by the March 10, 1760 treaty. It is this treaty which the applicants argue was breached by DFO officers in seizing Ken Barlow's lobster traps.

44 The applicants submit that the request for conversion be dismissed with costs.

Issue V: Extension of Time

45 The applicants submit that the respondents have been aware of the issues raised by this application since they were served with the Notice of Application on October 27, 1999. Secondly, there has already been one hearing on November 18, 1999 and a resulting order. Thirdly, the applicants argue that no information is provided by the respondents to explain when or why Dr. Patterson was retained or why he simply cannot his affidavit until two days after the scheduled hearing date in this matter.

46 The applicants request that the respondents' motion be dismissed with costs.

Analysis

Issue I: Striking the Application

47 The issue of whether an application to strike an originating notice of motion could be brought under

former rule 419, now rule 221 was considered by the Federal Court of Appeal in *Pharmacia Inc. v. Canada (Minister of National Health & Welfare)* (1994), [1995] 1 F.C. 588 (Fed. C.A.). The motions judge, Noël J., dismissed the application to strike on the basis that rule 419 was not applicable to originating notices of motion. The Court of Appeal affirmed this decision, stating the following at page 596 and 597 of their reasons:

> The basic explanation for the lack of a provision in the Federal Court Rules for striking out notices of motion can be found in the differences between actions and other proceedings. An action involves, once the pleadings are filed, discovery of documents, examinations for discovery, and then trials with viva voce evidence. It is obviously important that parties not be put to the delay and expense involved in taking a matter to trial if it is "plain and obvious" (the test for striking out pleadings) that the pleading in question cannot amount to a cause of action or a defence to a cause of action. Even though it is important both to the parties and the Court that futile claims or defences not be carried forward to trial, it is still the rare case where a judge is prepared to strike out a pleading under rule 419. Further, the process of striking out is much more feasible in the case of actions because there are numerous rules which require precise pleadings as to the nature of the claim or the defence and the facts upon which it is based. There are no comparable rules with respect to notices of motion. Both Rule 319(1) [as am. By SOR/88-221, s. 4], the general provision with respect to applications to the Court, and Rule 1602(2) [as enacted by SOR/92-43, s. 19], the relevant rule in the present case which involves an application for judicial review, merely require that the notice of motion identify "the precise relief" being sought, and" the grounds intended to be argued." The lack of requirements for precise allegations of fact in notices of motion would make it far more risky for a Court to strike such documents. Further, the disposition of an application commenced by originating notice of motion does not involve discovery and trial, matters which can be avoided in actions by a decision to strike. In fact, the disposition of an originating notice of motion proceeds in the same way that an application to strike the notice of motion would proceed: on the basis of affidavit evidence and argument before a single judge of the Court. Thus the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself.

48 Strayer J. then went on to state at page 600:

> This is not to say that there is no jurisdiction in the Court either inherent or through Rule 5 by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success. Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motions.

49 This approach was applied by Nadon J. in the 1998 case of *Assn. of Canadian Distillers v. Canada (Minister of Health)* (1998), 148 F.T.R. 215 (Fed. T.D.) where he reasoned at paragraph 8 of his decision that the notice of motion was not so improper as to be bereft *of any possibility* of success and therefore should not be struck. The Court noted that the motion itself could have been heard in the time that it took to hear the motion to strike.

50 Applying these principles, I am of the view that while the applicants may not establish the facts which are at the core of this proceeding in their notice of motion, the application *is not bereft of any possibility of success*. This is not to say that the applicants have a strong case but merely that it is not completely void of any possibility of success.

51 For these reasons, I find that this is not an exceptional case which would warrant this Court to strike the

originating notice of motion.

Issue II: Standing

52 As a preliminary matter, it appears that the issue of standing and the fourth issue raised by the respondents, the failure of the plaintiffs to name all persons directly affected in the originating notice of motion, are closely related and therefore I shall deal with them together.

53 The respondents claim that the Union of New Brunswick Indians lacks standing to bring this application by virtue of the fact that this applicant cannot in law hold the treaty right that it claims by reason that it has not alleged or established that it held a treaty right.

54 Further, the respondents refer to the decision of the Supreme Court in *Marshall, supra* where they articulated that treaty rights do not belong to the individual but rather are exercised by authority of the local community. It is submitted that at no time does Ken Barlow or the Union of New Brunswick Indians allege that the Union has a treaty right which was breached. The respondents argue that the Union is not a community and thus cannot hold a treaty right.

55 Lastly, the respondents state that Rule 114 requires that a representative claim cannot be made by the Union on behalf of Ken Barlow and the Mi'kmaq people unless the Union has the same interest in the proceeding as the person whom it represents. It is argued that the Union cannot have the same interest as Ken Barlow as it does not have a treaty right. Thus, the Union cannot bring such a representative proceeding.

56 Rule 114 states:

> **Rule 114. Representative proceedings**
>
> (1) Where two or more persons have the same interest in a proceeding, the proceeding may be brought by or against any one or more of them as representing some or all of them.
>
> (2) Motion to appoint representative — At any time, the Court may, on motion, appoint a person to represent some or all of the parties in a proceeding referred to in subsection (1).
>
> (3) Where representative not a party — Where under subsection (2) the Court appoints a person not named as a party to the proceeding, it shall make an order adding that person as a party.
>
> (4) Order binding on represented persons — An order in a proceeding referred to in subsection (1) is binding on all represented parties, but shall not be enforced against them without leave of the Court.
>
> **Règle 114. Recours collectif**
>
> (1) Lorsque des personnes ont un intérêt commun dans une instance, celle-ci peut être engagée par ou contre l'une ou plusieurs de ces personnes au nom de toutes celles-ci ou de certaines d'entre elles.
>
> (2) Représentant désigné sur requête — Dans une instance visée au paragraphe (1), la Cour peut, à tout moment, sur requête, désigner une personne en tant que représentant de toutes les parties ou de certaines d'entre elles.
>
> (3) Constitution en partie — Si la personne désignée aux termes du paragraphe (2) n'est pas une partie, la

Cour rend une ordonnance constituant cette personne partie à l'instance.

(4) Effet de l'ordonnance — L'ordonnance rendue dans une instance visée au paragraphe (1) lie toutes les personnes représentées, mais ne peut être exécutée contre celles-ci sans la permission de la Cour.

57 The necessary elements for a representative proceeding were originally articulated in *Duke of Bedford v. Ellis* (1900), [1901] A.C. 1 (U.K. H.L.) as follows: (1) the parties must have the same interest, (2) the grievance must be common, and (3) the relief must be beneficial to all. Lord McNaughton stated at page 8 of his reasons:

Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.

58 These requirements were considered by the Supreme Court in the 1983 case of *Naken v. General Motors of Canada Ltd.*, [1983] 1 S.C.R. 72 (S.C.C.) as they interpreted rule 75 of the *Supreme Court of Ontario Rules of Practice.* The Court held that the respondent's action could not properly be conducted within rule 75 on the grounds that rule 75 required plaintiffs and those they represent to have the same interest and it was not enough that the group share a similar interest.

59 In that case, the plaintiffs had varying contractual arrangements giving rise to similar but different claims in contract although they all related to the same model of car. The action was commenced by four individuals suing for themselves and for others for damages suffered due to the purchase of automobiles.

60 The respondent refers to this case as support for their assertion that the Union of New Brunswick Indians does not have the same interest in this proceeding as Ken Barlow and lacks standing to bring the application.

61 After a careful consideration of the principles governing class and representative proceedings, I find I am in agreement with the submissions of the respondents. The applicants have failed to make evidence that the Union of New Brunswick Indians is an incorporated body representing the first nation peoples and clearly does not have the same rights as Ken Barlow.

62 With respect to the question of whether the plaintiffs failed to name all persons directly affected in the notice of motion, the respondents submit that all persons directly affected by the order must be before the Court when the application is heard.

63 I am in agreement that it is incumbent upon the plaintiff to name every person directly affected by the order in the notice of motion. This is not in dispute. However, the first issue raised by this application does not directly affect any other party than those named in the notice of application.

64 The respondents now submit that the remainder of the judicial review application should be adjourned in order to permit all persons affected to file materials and present their interests to the Court.

65 In my view, given the complexity of the second issue and the fact that any consideration of this issue is dependent on an affirmative response to the first question, it is not necessary at this stage of the proceeding to decide whether other respondents must be named.

66 Upon hearing the submissions of the parties on the first issue and determining whether a seizure did in fact occur, the judge hearing the application will then ascertain whether an amendment is required to add other respondents who are directly affected by the order. At that time, whether an adjournment of the proceedings is

necessary shall be determined by the judge hearing the application.

Issue III: Bifurcation of the Factual Issue from the Constitutional and Treaty Issues

67 The respondent submits that *the first issue raised by this application, namely the factual question of whether officers of the Minister of Fisheries and Oceans seized the applicant's, Ken Barlow's, lobster traps, should be dealt with in advance of the broader constitutional and treaty issues.* This submission is based on the assumption that if the first question is answered in the negative then it will not be necessary for the Court to address the second question.

68 Before embarking on a consideration of this point, it is important to note that there is no rule of this Court which would permit me to bifurcate the first issue from the second. The respondents point to the fact that this Court has inherent jurisdiction to control is own proceedings, and in the interest of judicial resources, the factual issue ought to be heard separately from the constitutional and treaty issues.

69 With all due respect to the respondent, I am unable to see why it is necessary to bifurcate the two issues before the hearing of the application. Judicial review is intended to be a speedy remedy and to separate issues can only delay the proceedings.

70 Should the first question be answered affirmatively, the judge will move on to the second issue. The hearing may be adjourned to allow for other persons directly affected to be served with the notice of application and the supporting affidavits relied on by the applicants. Therefore, the two issues may necessarily be separated if it is determined that they affect different parties.

Issue IV: Conversion of the Application into a Trial of an Action

71 The respondents submit that this application for judicial review should be converted into an action on the grounds that there are many complex legal and factual issues which cannot be satisfactorily determined through affidavit evidence.

72 Section 18.4(2) of the *Federal Court Act* reads as follows:

> 18.4(2) Exception
>
> (2) The Trial Division may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.
>
> 18.4(2) Exception
>
> (2) La Section de première instance peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

73 This provision of the Act was considered shortly after its coming into force in 1992 by Mr. Justice Strayer, as he then was, in *Vancouver Island Peace Society v. Canada* (1992), 53 F.T.R. 300 (Fed. T.D.) and subsequently by Mr. Justice Muldoon in the 1993 decision in *Prince Edward Island (Potato Board) v. Canada (Minister of Agriculture)* (1992), 56 F.T.R. 150 (Fed. T.D.).

74 In the *Prince Edward Island Potato Board* case, Mr. Justice Muldoon considered an application by the

Minister of Agriculture to convert the application into an action by reason of the complexity of the scientific considerations involved. It is clear from the judgment that it was the view of Mr. Justice Muldoon that the judicial review provisions in the Act be applied so as to allow the matter to proceed as expeditiously as possible. He stated at page 152 of his reasons:

> Section 18.4(2) of the Federal Court Act makes it clear that, as a general rule, an application for judicial review or a reference to the Trial Division shall be proceeded with as a motion. The section dictates that such matters be heard and determined "without delay and in a summary way". As an exception to the general rule, provision is made in s. 18.4(2) for an application for judicial review to be proceeded with as an action. The new and preferred course of procedure, however, is by way of motion and that course should not be departed from except in the clearest of circumstances.

75 This reasoning was affirmed by the Federal Court of Appeal in the 1994 case of *MacInnis v. Canada (Attorney General)* (1994), 166 N.R. 57 (Fed. C.A.) where it was noted that Parliament intended judicial review to be a rapid remedy, stating the following at page 60:

> It is, in general, only where facts or whatever cannot be satisfactorily established or weighed through affidavit evidence that consideration should be given to using s. 18.4(2) of the Act. One should not lose sight of the clear intention of Parliament to have applications for judicial review determined whenever possible with as much speed and as little encumbrances and delays of the kind associated with trials as are possible. The" clearest of circumstances", to use the words of Muldoon J., where that subsection may be used, is where there is a need for viva voce evidence, either to assess demeanour and credibility of witnesses or to allow the court to have a full grasp of the whole of the evidence whenever it feels the case cries out for the full panoply of a trial...

76 The test to be applied in assessing whether an application should be converted into an action was articulated by the Court of Appeal at page 6 of their reasons as follows:

> ... the key test is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior.

77 This test was articulated in the context of expert affidavit material and is therefore highly relevant to the facts of this case. The respondents submit that the oral history evidence of the Mi'kmaq people living in Atlantic Canada and of the persons who signed the treaty on behalf of the Mi'kmaq communities in question cannot be adequately conveyed through affidavit evidence.

78 I am in agreement that the second issue raised by this application is a highly complex and historical one which would be difficult to present in affidavit form. However, as I have stated earlier, this evidence only becomes relevant if the first question is answered in the affirmative but, nevertheless, I am satisfied the entire matter should be heard at the same time and the constitutional issue cannot be dealt with on affidavit evidence, especially as it relates to oral history.

79 In terms of the evidence required to determine whether or not there was a seizure by officers of the DFO of the applicant Ken Barlow's lobster traps, I am also convinced that affidavit evidence would be inadequate.

80 It appears to me, at this time, that from my reading of the affidavit evidence, the lobster traps belonging to the applicant Barlow were seized by DFO representatives.

81 This matter should be determined after an oral hearing.

82 Clearly, it is in the best interests of all parties involved to have these questions fully answered particularly where there would be no prejudice to the applicant Barlow. I am told he will be permitted to fish for lobster in the next lobster season.

83 Thus, I hereby order that the application for judicial review be converted into a trial of an action.

Issue V: Extension of Time

84 In that the present application is converted into a trial of an action, I need not discuss the issue of extension of time.

85 The application of the respondents is allowed, in that the application for judicial review is converted into an action so as to allow a Court to determine the issue of whether or not Barlow's lobster traps were seized and the constitutional issue involved in allowing Mi'kmaq and Maliseet First Nations in New Brunswick to fish for lobster.

86 Another reason for my conclusion to convert the judicial review application into a trial is that the affidavit evidence of the applicants does not make it clear as to which treaty they refer to. Do they refer only to a treaty of March10, 1760 or a treaty of 1760-61 or a 1761 treaty.

87 I am satisfied that the applicants have the obligation to be precise. It is not sufficient for the applicants to say "we are speaking of the treaty or treaties mentioned in *Marshall v. Canada* (S.C.C. unreported file 26014 decision issued on September 17, 1999) without producing the treaty or treaties relied upon or if not, at least by stating, in writing, what are the treaties relied upon.

Conclusion

88 For all of the above reasons, I only allow the respondents' request that the judicial review application be converted into an action.

89 Costs in the cause.

Motion granted in part.

END OF DOCUMENT

TAB 18

TAB 19

C

2002 CarswellNat 18, 2002 FCT 6, 111 A.C.W.S. (3d) 36

Native Council of Nova **Scotia** v. **Canada** (Attorney General)

The **Native Council** of Nova **Scotia**, a society registered under the laws of Nova **Scotia**, and Lorraine Cook, Tim Martin and Elsie Ramey, on behalf of all members and constituents of the **Native Council** of Nova **Scotia** (Plaintiffs) and The Attorney General **of Canada**, and The Minister of Fisheries and Oceans, The Minister of Indian and Northern Affairs and The Interlocutor for Metis and Non-Status Indians (Defendants)

Federal Court of Canada — Trial Division

Blanchard J.

Heard: October 10, 2001
Judgment: January 4, **2002**
Docket: T-689-01

Counsel: *Mr. Michael J. Wood, Mr. Kenneth Winch*, for Plaintiff / Applicant

Mr. Michael Donovan, for Defendant / Respondent

Subject: Public; Civil Practice and Procedure; Constitutional

Native law --- Practice and procedure — Pleadings — Striking out

Plaintiff off-reserve Indians brought action against defendants for breach of duty to consult them during negotiation of fishing agreements — Defendants brought motion to strike claim as disclosing no reasonable cause of action — Motion granted in part — Test is whether it is plain and obvious that claim discloses no reasonable cause of action — Statement of claim must be read as generously as possible — Aboriginal law in state of rapid evolution and change — Summary disposition not appropriate for issue of duty to consult off-reserve Indians — Pleadings lacked proper factual foundations and were struck with leave to amend.

Native law --- Practice and procedure — Parties — Representative or class actions

Individual plaintiffs were off-reserve Indians who were members of plaintiff council — Plaintiffs brought action against defendants for breach of duty to consult them during negotiation of fishing agreements — Defendants brought motion to prevent council from acting as plaintiff — Motion granted — Council was registered organization without treaty rights so did not have same interest as individuals and could not bring representative action — Duty to consult did not relate to council itself and its participation was not required to settle any issues.

Constitutional law --- Procedure in constitutional challenges — Notice to Attorney General

Plaintiff off-reserve Indians brought action against defendants for breach of duty to consult them during negotiation of fishing agreements — Defendants brought motion to compel plaintiffs to serve notice of constitutional question — Motion dismissed — Notice was not required until 10 days prior to hearing — Constitutionality was not yet at issue and hearing was not imminent.

Cases considered by *Blanchard J.*:

Barlow v. Canada, 2000 CarswellNat 372, 186 F.T.R. 194 (Fed. T.D.) — considered

Hunt v. T & N plc, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.) — followed

Maurice v. Canada (Minister of Indian Affairs & Northern Development), 1999 CarswellNat 2769, 183 F.T.R. 9 (Fed. T.D.) — followed

Perera v. Canada, 97 C.L.L.C. 230-016, 1997 CarswellNat 273 (Fed. T.D.) — considered

Shubenacadie Indian Band v. Canada (Attorney General), 2001 FCT 181, 2001 CarswellNat 443 (Fed. T.D.) — considered

Steiner v. R., (sub nom. *Steiner v. Canada)* 122 F.T.R. 187, 1996 CarswellNat 1742 (Fed. T.D.) — con- sidered

Vojic v. Minister of National Revenue, 87 D.T.C. 5384, [1987] 2 C.T.C. 203, 1987 CarswellNat 462 (Fed. C.A.) — considered

Statutes considered:

Federal Court Act, R.S.C. 1985, c. F-7

s. 57 — considered

s. 57(1) — considered

s. 57(2) — considered

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 114 — referred to

R. 181(2) — referred to

R. 221 — pursuant to

MOTION by defendants for order striking out statement of claim, removing one plaintiff from action, and requiring plaintiffs to serve notice of constitutional question on each province.

***Blanchard J.*:**

1 The defendants bring this motion pursuant to Rule 221 of the *Federal Court Rules, 1998*, SOR/98-106, to strike out the plaintiffs' statement of claim and alternatively seek the following relief:

i. That either all, or some, of the paragraphs 1-19, 24-25 and 27 to 34 of the Statement of Claim be struck out;

ii. That the Native Council of Nova Scotia cease to be a party to this action;

iii. That the Plaintiffs be required to give Notice of Constitutional Question to the Attorneys General of each Province;

iv. An extension to the time for filing of Defence until 10 days after the Court's ruling on this motion.; and

v. The costs of this motion.

2 The plaintiffs seek leave to amend the pleadings as necessary, should the Court find that all or some of the pleadings contained in the plaintiffs' statement of claim are defective.

3 In the underlying action, the individual plaintiffs are "off reserve" Indians, two of which are status Indians, one not. The plaintiffs claim that the respondent breached a duty to consult owed to them with regards to certain agreements between the defendants, the Province of Nova Scotia and the 13 Indian Act Chiefs in Nova Scotia. The agreements in question deal with the negotiation and implementation of aboriginal, treaty and land claim rights in Nova Scotia with specific reference to 1999/2000 and 2000/2001 fishing agreements. The plaintiffs seek interlocutory and injunctive relief.

4 The defendants submit that, if all or substantially all of their objections to the statement of claim raised in this motion are accepted by the Court as well founded, what would then be left of the statement of claim would not disclose a reasonable cause of action, and an order striking out the statement of claim would be justified.

5 The threshold for striking a statement of claim is a very high one and the statement of claim must be read as generously as possible. [*Perera v. Canada*, [1997] F.C.J. No. 199 (Fed. T.D.), page 4 at paragraphs 21-25.] The test is whether it is plain and obvious that the claim discloses no reasonable cause of action. [*Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at p. 980.] A statement of claim must disclose material facts instead of bare assertions in order to disclose a cause of action. [*Vojic v. Minister of National Revenue* (1987), 87 D.T.C. 5384 (Fed. C.A.) at p. 5385.] When there is no rational argument based on evidence, the claim may be struck as being frivolous and vexatious. [*Steiner v. R.* (1996), 122 F.T.R. 187 (Fed. T.D.), p. 189-191 at paragraphs 7 to 10 and 16.]

6 I am of the view that the defendants have not met the heavy burden to have the statement of claim struck out. This is not a case where it can be said beyond doubt that the case could not succeed at trial.

7 In *Shubenacadie Indian Band v. Canada (Attorney General)*, 2001 FCT 181 (Fed. T.D.) , online: QL, at

paragraph 5, Mr. Justice Hugessen stated:

> I turn now to the second aspect of the motion which is to strike out the Statement of Claim as disclosing no reasonable cause of action. The principle is well established that a party bringing a motion of this sort has a heavy burden and must show that indeed it is beyond doubt that the case could not succeed at trial. Furthermore, the Statement of Claim is to be read generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted. [Emphasis mine.]

8 The defendants' argument that the entire statement of claim should be struck out is based on the contention that all of their objections, taken collectively, would leave the statement of claim gutted without a reasonable cause of action. I do not accept this contention. I have carefully reviewed the statement of claim and, in my view, it is not plain and obvious that the claim discloses no reasonable cause of action. The issues raised in the statement of claim are in the field of aboriginal law, a field that is in a state of rapid evolution and change in recent years. Whether a duty to consult exists with respect to off-reserve status and/or non-status Indians and the extent to which such a duty applies in the context of this case are issues that should not be disposed of in an interlocutory proceeding.

9 Although I have determined that the defendants have not met the onus required to have the claim struck out, I am nevertheless satisfied that the statement of claim is deficient in a number of respects that will be considered more particularly later in these reasons when I address each of the defendant's objections. Since it is not for this Court to re-draft the statement of claim, I will strike the entire statement of claim with leave to the plaintiffs to serve and file an amended statement of claim in accordance with these reasons.

10 At the hearing of this motion the parties agreed that the Native Council of Nova Scotia (NCNS) is not a proper representative party in these proceedings. The plaintiffs, however, submit that the NCNS should remain as a party to the action arguing that the NCNS would be an appropriate vehicle through which the defendant can effect proper consultation with off reserve status Indians in Nova Scotia.

[1]

11 The jurisprudence of this Court has dealt with the status of incorporated bodies representing aboriginals. In *Barlow v. Canada* (2000), 186 F.T.R. 194 (Fed. T.D.), at paragraph 61, Mr. Justice Teitelbaum stated that an incorporated body representing aboriginals does not have treaty rights and, since it does not have the same interests in the proceeding as individuals, it cannot bring a representative action.

12 In *Maurice v. Canada (Minister of Indian Affairs & Northern Development)* (1999), 183 F.T.R. 9 (Fed. T.D.), Madam Justice Reed had to decide whether or not the "Metis Society of Saskatchewan Sapwagamik Local 176 Inc." should be removed as a plaintiff. At paragraphs 6 and 14 of her reasons, Justice Reed stated:

> In the Statement of Claim, the Society is described as representing the interests of the Metis persons who reside in or near the community of Sapwagamik in northern Saskatchewan. The relief sought relates to the constitutional, fiduciary, statutory, common law and equitable obligations owed by the defendants to the

plaintiffs. As such, the relief sought relates only to the individual plaintiffs. The Society per se, as a corporation, will not be owed those obligations, although its members may.

...

What constitutes a necessary party to litigation was discussed in *Parker v. Stevens*, [1998] 4 F.C. 125 (F.C.A.) at page 137. The Court quoted from the decision in *Amon v. Raphael Truck & Sons Ltd.*, [1956] 1 Q.B. 357 at 380:

> The person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the construction of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle of discretion by which some could be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it is necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party. [Emphasis mine.]

13 In my opinion, the NCNS should be removed as a party. The NCNS, just as the Metis Society of Saskatchewan Sapwagamik Local 176 Inc., is a registered society and, as a result, does not have the same interest as the individual plaintiffs. The relief sought by the individual plaintiffs relates to the duty of consultation owed to them by the defendants. As stated by Justice Reed in *Maurice* , *supra*, the NCNS would not be owed this duty even if its members might be. I am also of the view that the NCNS is not a necessary party to these proceedings since it would not be bound by the result and its participation is not required to settle the issue before the Court.

14 For the above reasons, the plaintiff NCNS will therefore be removed as a party to these proceedings and the statement of claim should be amended accordingly.

15 Paragraph 24 of the statement of claim states, *inter alia*, that the individual plaintiffs bring this action as a representative action on behalf of all members and constituents of the NCNS. Rule 114 of the *Federal Court Rules, 1998* provides for a representative proceeding so long as the party purporting to represent others has the same interests in the proceeding. There is a need, in an amended statement of claim, to establish the factual foundation to show that the individual plaintiffs have the same interest with respect to aboriginal and treaty rights as all other off-reserve Mi'kmaq.

16 Paragraphs 1 through 16 of the statement of claim describe the NCNS, its corporate status, its membership, the interests it purports to represent as well as the programs and services it offers. These paragraphs also set out in some detail the agreements, processes and protocols entered into by the NCNS with various departments of government, both federal and provincial. The allegations contained in paragraphs 1 through 16 of the statement of claim deal with allegations about the NCNS representing Mi'kmaq people in a variety of contexts and are, in my view, prolix and unnecessary. Having determined that the NCNS is not a proper party to these

proceedings, the facts pleaded in these paragraphs do not disclose facts that are material to this claim.

17 With regards to paragraph 34 of the statement of claim, I am of the view that the affirmations by the Mi'kmaq Grand Council regarding the allegations in support of the NCNS's claim to representative status should be struck.

18 The defendants seek to have paragraphs 17, 18 and 19 of the statement of claim struck. The defendants argue that the plaintiffs' claim is founded upon "...the aboriginal and treaty rights of the Mi'kmaq nation." The defendants' position is that the jurisprudence makes it clear that these rights are rights of "specific aboriginal communities" and that there is no such thing as the "aboriginal and treaty rights of the Mi'kmaq nation." The defendants further argue that paragraphs 17, 18 and 19 of the statement of claim do not make any factual allegations which, if assumed to be true, could lead to the conclusion of law pleaded.

19 Earlier in these reasons I have concluded that it can not be said beyond doubt that this case could not succeed at trial. I am satisfied that there may well be a cause of action but there is not, in my view, sufficient material facts pleaded. In an amended statement of claim, the plaintiffs should plead the material facts to support the conclusion of law alleged in paragraphs 17 and 19 of the statement of claim.

20 With respect to paragraphs 27 and 28 of the statement of claim, the plaintiffs claim that the duty to consult was breached with regards to a fishing agreement. The defendants argue that if the claim is based on treaty rights, then it is necessary that the statement of claim identify a specific treaty with any Mi'kmaq community that is alleged to include a right to fish lobster in a location covered by the fishing agreements, facts connecting the plaintiffs to such a community, specific allegations as to how the fishing agreements have infringed that right and in the case of the individual plaintiffs suing in their own right, an allegation that they have been authorized by their community to exercise that community's treaty rights. The defendants further argue that if the claim is based on aboriginal rights, then the statement of claim should reflect allegations identifying a community whose historic way of life prior to European contact involved the fishing of lobster in a location covered by the fishing agreements such that the community could be entitled to an aboriginal right to continue this fishery and facts connecting the plaintiffs to such a community.

21 Paragraphs 27 and 28 of the statement of claim appear to allege that the fishing agreements infringe a right enjoyed by certain Mi'kmaq people by virtue of aboriginal or treaty rights, to engage in a food, social and ceremonial fishery for lobster. The claim appears to allege that lack of consultation makes this infringement unjustifiable. I am of the view that, in order for the defendants to be able to defend the action, the plaintiffs must set forth in an amended statement of claim the material facts that establish the bases for the right(s) claimed and how the right(s) is/are said to be infringed.

Notice of Constitutional Question to the Attorneys General of each Province

22 The defendants seek an order requiring the plaintiffs to give notice of this action to the Attorney General of each province because there are allegations in the statement of claim that put in issue the applicability or operability of federal and provincial legislation vis-à-vis the off reserve Mi'kmaq. Essentially, the statement of claim in paragraphs 36 and 37 allege that the duty to consult is a condition precedent to enacting or enforcing against them legislation affecting their aboriginal or treaty rights. Paragraph 38 of the statement of claim alleges that this required consultation has not occurred.

23 Subsections 57(1) and 57(2) of the *Federal Court Act*, R.S.C. 1985, c. F-7 provide as follows:

[1]

57(1) Constitutional questions -

Where the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of any province, or of regulations thereunder, is in question before the Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be adjudged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).

57(1) Questions constitutionnelles -

Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

(2) Time of notice - Except where otherwise ordered by the Court or the federal board, commission or other tribunal, the notice referred to in subsection (1) shall be served at least ten days before the day on which the constitutional question described in that subsection is to be argued.

(2) Formule et délai de l'avis -

L'avis est, sauf ordonnance contraire de la Cour ou de l'office fédéral en cause, signifié au moins dix jours avant la date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue.

24 The plaintiffs allege that they should not be required to give notice since they do not seek to have any act or regulation declared to be invalid, inapplicable or inoperable. The plaintiffs claim that they are simply seeking a declaration, injunction, certiorari or mandamus to compel the defendants to comply with the duty to consult with them prior to taking any legislative or executive step which affects their aboriginal or treaty rights.

25 I am of the view that that issue need not be determined at this point in the proceedings. The statement of defence has not been filed yet and the "alleged" constitutional question is not about to be argued. Subsection 57(2) of the *Federal Court Act* only requires the "notice" to be given 10 days before the day the "question" is to be argued. Any party could yet file such a notice. I also note that section 57 does not impose an obligation for any party to serve a notice of a constitutional question, rather the section provides that there can be no consequence on an impugned Act or regulation if the notice is not given. In any event, I conclude that it would be improper to order the plaintiffs, at this time, to give notice of constitutional question pursuant to section 57 of the *Federal Court Act*.

26 In accordance with the above reasons, I will order the statement of claim struck out with leave to the plaintiffs to serve and file an amended statement of claim consistent with these reasons no later than February 1, 2002.

[1]

27 The defendants will have thirty (30) days from the filing of the amended statement of claim to file their defence.

ORDER

THIS COURT ORDERS that:

1. The Native Council of Nova Scotia be struck as plaintiffs.

2. The statement of claim is struck in its entirety with leave to the plaintiffs to serve and file an amended statement of claim in accordance with these reasons no later than February 1, 2002.

3. Subject to Rule 181(2) of the *Federal Court Rules, 1998*, the defendants will have thirty (30) days from filing of the amended statement of claim to file their defence.

4. There will be no costs on this motion.

Motion granted in part.

END OF DOCUMENT

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B, and in particular, Section 90 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Ear Falls and the Municipality of Red Lake, both in the District of Kenora;

EB-2011-0040
EB-2011-0041
EB-2011-0042

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