EB-2017-0364

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*;
AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to s. 92 of the *Act* for an order or Orders granting leave to construct new transmission facilities ("Lake Superior Link") in northwestern Ontario;

AND IN THE MATTER OF an Application by Hydro One Networks Inc. pursuant to s. 97 of the *Act* for an Order granting approval of the forms of the agreement offered or to be offered to affected landowners.

BOOK OF AUTHORITIES OF BIINJITIWAABIK ZAAGING ANISHINAABEK MOTION HEARD JUNE 4th and 5th

ESQUEGA LAW OFFICE
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FAX: 1-866-391-3102

ETIENNE ESQUEGA
LAWYERS FOR BIINJITIWAABIK ZAAGING ANISHINAABEK

CONTENTS

Ontario Statutes
Ontario Energy Board Act, 1998
Part II — The Board (ss. 4-35)

Most Recently Cited in: Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board), 2010 ONCA 284, 2010 CarswellOnt 2353, 68 B.L.R. (4th) 159, 317 D.L.R. (4th) 247, 261 O.A.C. 306, 99 O.R. (3d) 481, 187 A.C.W.S. (3d) 567 | (Ont. C.A., Apr 20, 2010)

S.O. 1998, c. 15, Sched. B, s. 23

s 23.

Currency

23.

23(1)Conditions of orders

The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application.

23(2) [Repealed 2003, c. 3, s. 22.]

Amendment History

2002, c. 1, Sched. B, s. 4; 2003, c. 3, s. 22

Currency

Ontario Current to Gazette Vol. 151:18 (May 5, 2018)

First Session, Forty-second Parliament,
64-65-66-67 Elizabeth II, 2015-2016-2017-2018

HOUSE OF COMMONS OF CANADA

BILL C-262

An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples

AS PASSED

BY THE HOUSE OF COMMONS

MAY 30, 2018

Première session, quarante-deuxième législature,
64-65-66-67 Elizabeth II, 2015-2016-2017-2018

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-262

Loi visant à assurer l'harmonie des lois fédérales avec la Déclaration des Nations Unies sur les droits des peuples autochtones

ADOPTÉ

PAR LA CHAMBRE DES COMMUNES

LE 30 MAI 2018

421013

SUMMARY

This enactment requires the Government of Canada to take all measures necessary to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples.

SOMMAIRE

Le texte exige du gouvernement du Canada qu'il prenne toutes les mesures nécessaires pour assurer l'harmonie des lois fédérales avec la Déclaration des Nations Unies sur les droits des peuples autochtones.

Available on the House of Commons website at the following address:
www.ourcommons.ca

Disponible sur le site Web de la Chambre des communes à l'adresse suivante :
www.noscommunes.ca

1st Session, 42nd Parliament,
64-65-66-67 Elizabeth II, 2015-2016-2017-2018

HOUSE OF COMMONS OF CANADA

BILL C-262

An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples

Preamble

Whereas the Parliament of Canada recognizes that the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples should be enshrined in the laws of Canada;

Whereas, in the outcome document of the high-level plenary meeting of the General Assembly of the United Nations known as the World Conference on Indigenous Peoples, Canada and other states worldwide reaffirmed their solemn commitment to respect, promote and advance the rights of indigenous peoples and to uphold the principles of the United Nations Declaration on the Rights of Indigenous Peoples;

Whereas, in its document entitled *Calls to Action*, the Truth and Reconciliation Commission of Canada is calling upon the federal government and other governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation;

Whereas indigenous peoples have suffered historic injustices as a result of, *inter alia*, their colonization and dispossession from their lands, territories and resources;

Whereas all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust;

Whereas, in regard to indigenous peoples, it is important for Canada to reject colonialism and engage in a contemporary approach based on good faith and on principles of justice, democracy, equality,

1re session, 42e législature,
64-65-66-67 Elizabeth II, 2015-2016-2017-2018

CHAMBRE DES COMMUNES DU CANADA

PROJET DE LOI C-262

Loi visant à assurer l'harmonie des lois fédérales avec la Déclaration des Nations Unies sur les droits des peuples autochtones

Préambule

Attendu :

que le Parlement du Canada reconnaît que les principes établis dans la Déclaration des Nations Unies sur les droits des peuples autochtones devraient être inscrits dans les lois fédérales;

que, dans le document final produit à l'issue de la réunion plénière de haut niveau de l'Assemblée générale des Nations Unies appelée Conférence mondiale sur les peuples autochtones, le Canada et d'autres États du monde ont réaffirmé leur engagement solennel à respecter, promouvoir et favoriser les droits des peuples autochtones et à faire respecter les principes de la Déclaration des Nations Unies sur les droits des peuples autochtones;

que la Commission de vérité et réconciliation du Canada, dans le document intitulé *Appels à l'action*, demande au gouvernement fédéral et à d'autres gouvernements d'adopter et de mettre en œuvre la Déclaration des Nations Unies sur les droits des peuples autochtones et d'en faire le cadre de la réconciliation;

que les peuples autochtones ont subi des injustices historiques à cause, entre autres, de leur colonisation et de la dépossession de leurs terres, territoires et ressources;

que toutes les doctrines, politiques et pratiques qui invoquent ou prônent la supériorité de peuples ou d'individus en se fondant sur des différences d'ordre national, racial, religieux, ethnique ou culturel sont racistes, scientifiquement fausses, juridiquement sans valeur, moralement condamnables et socialement injustes;

que le Canada doit rejeter toute forme de colonialisme à l'égard des peuples autochtones et adopter

421013

non-discrimination, good governance and respect for human rights;

Whereas Canada is committed to taking appropriate measures — including legislative, policy and administrative measures — at the national and international level, in consultation and cooperation with indigenous peoples, to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples and to follow up on its effectiveness;

Whereas protection of existing Aboriginal and treaty rights is an underlying principle and value of Canada's Constitution;

Whereas human rights, the rule of law and democracy are interlinked and mutually reinforcing and are underlying principles of that Constitution;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

Short title

1 This Act may be cited as the *United Nations Declaration on the Rights of Indigenous Peoples Act*.

Interpretation

Aboriginal and treaty rights

2 (1) For greater certainty, nothing in this Act is to be construed so as to diminish or extinguish existing aboriginal or treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in section 35 of the *Constitution Act, 1982*.

Declaration

(2) Nothing in this Act is to be construed as delaying the application of the United Nations Declaration on the Rights of Indigenous Peoples in Canadian law.

un modèle contemporain fondé sur la bonne foi et sur les principes de justice, de démocratie, d'égalité, de non-discrimination, de bonne gouvernance et de respect des droits de l'homme;

que le Canada s'est engagé à prendre les mesures appropriées — législatives, politiques et administratives, entre autres — à l'échelle nationale et internationale, en consultation et en coopération avec les peuples autochtones, afin d'atteindre les objectifs énoncés dans la Déclaration des Nations Unies sur les droits des peuples autochtones et à s'assurer de son efficacité;

que la protection des droits ancestraux ou issus de traités des peuples autochtones représente une valeur et un principe sous-jacents de la Constitution canadienne;

que les droits de la personne, la primauté du droit et la démocratie sont des principes interdépendants qui se renforcent mutuellement, en plus d'être des principes sous-jacents de cette Constitution,

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

Titre abrégé

Titre abrégé

1 *Loi relative à la Déclaration des Nations Unies sur les droits des peuples autochtones*.

Interprétation

Droits ancestraux ou issus de traités

2 (1) Il est entendu que la présente loi ne peut être interprétée comme entraînant la diminution ou l'extinction des droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada qui sont reconnus et confirmés à l'article 35 de la *Loi constitutionnelle de 1982*.

Déclaration

(2) La présente loi n'a pas pour effet de retarder l'application en droit canadien de la Déclaration des Nations Unies sur les droits des peuples autochtones.

United Nations Declaration on the Rights of Indigenous Peoples

United Nations Declaration on the Rights of Indigenous Peoples

3 The United Nations Declaration on the Rights of Indigenous Peoples that was adopted by the General Assembly of the United Nations as General Assembly Resolution 61/295 on September 13, 2007, and that is set out in the schedule, is hereby affirmed as a universal international human rights instrument with application in Canadian law.

Consistency

4 The Government of Canada, in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

National action plan

5 The Government of Canada must, in consultation and cooperation with indigenous peoples, develop and implement a national action plan to achieve the objectives of the United Nations Declaration on the Rights of Indigenous Peoples.

Report to Parliament

Annual report to Parliament

6 The Minister of Indian Affairs and Northern Development must, within 60 days after the first day of April of every year including and occurring between the years 2017 and 2037, submit a report to each House of Parliament on the implementation of the measures referred to in section 4 and the plan referred to in section 5 for the relevant period.

Déclaration des Nations Unies sur les droits des peuples autochtones

Déclaration des Nations Unies sur les droits des peuples autochtones

3 La Déclaration des Nations Unies sur les droits des peuples autochtones adoptée par l'Assemblée générale des Nations Unies le 13 septembre 2007 par sa résolution 61/295 et dont le texte est reproduit à l'annexe constitue un instrument universel garantissant les droits internationaux de la personne et trouve application au Canada.

Compatibilité

4 Le gouvernement du Canada, en consultation et en coopération avec les peuples autochtones du Canada, prend toutes les mesures nécessaires pour veiller à ce que les lois fédérales soient compatibles avec la Déclaration des Nations Unies sur les droits des peuples autochtones.

Plan d'action national

5 Le gouvernement du Canada, en consultation et en coopération avec les peuples autochtones, élabore et met en œuvre un plan d'action national afin d'atteindre les objectifs énoncés dans la Déclaration des Nations Unies sur les droits des peuples autochtones.

Rapport au Parlement

Rapport annuel au Parlement

6 Dans les soixante jours suivant le premier avril de chaque année de 2017 à 2037 inclusivement, le ministre des Affaires indiennes et du Nord canadien remet à chaque chambre du Parlement un rapport sur la mise en œuvre des mesures visées à l'article 4 et du plan visé à l'article 5 pendant la période écoulée.

SCHEDULE

(Section 2)

United Nations Declaration on the Rights of Indigenous Peoples

Resolution adopted by the General Assembly

[*without reference to a Main Committee (A/61/L.67 and Add.1)*]

61/295. United Nations Declaration on the Rights ofIndigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,[1] by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

[1] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53* (A/61/53), part one, chap. II, sect. A.

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

ANNEXE

(article 2)

Déclaration des Nations Unies sur les droits des peuples autochtones

Résolution adoptée par l'Assemblée générale

[*sans renvoi à une grande commission (A/61/L.67 et Add.1)*]

61/295. Déclaration des Nations Unies sur les droits des peuples autochtones

L'Assemblée générale,

Prenant note de la recommandation faite par le Conseil des droits de l'homme dans sa résolution 1/2 du 29 juin 2006[1], par laquelle il a adopté le texte de la Déclaration des Nations Unies sur les droits des peuples autochtones,

Rappelant sa résolution 61/178 du 20 décembre 2006, par laquelle elle a décidé, d'une part, d'attendre, pour examiner la Déclaration et prendre une décision à son sujet, d'avoir eu le temps de tenir des consultations supplémentaires sur la question et, de l'autre, de finir de l'examiner avant la fin de sa soixante et unième session,

Adopte la Déclaration des Nations Unies sur les droits des peuples autochtones dont le texte figure en annexe à la présente résolution.

107e séance plénière
13 septembre 2007

[1] Voir *Documents officiels de l'Assemblée générale, soixante et unième session, Supplément nº 53* (A/61/53), première partie, chap. II, sect. A.

Annexe

Déclaration des Nations Unies sur les droits des peuples autochtones

L'Assemblée générale,

Guidée par les buts et principes énoncés dans la Charte des Nations Unies et convaincue que les États se conformeront aux obligations que leur impose la Charte,

Affirmant que les peuples autochtones sont égaux à tous les autres peuples, tout en reconnaissant le droit de tous les peuples d'être différents, de s'estimer différents et d'être respectés en tant que tels,

Affirmant également que tous les peuples contribuent à la diversité et à la richesse des civilisations et des cultures, qui constituent le patrimoine commun de l'humanité,

Affirmant en outre que toutes les doctrines, politiques et pratiques qui invoquent ou prônent la supériorité de peuples ou d'individus en se fondant sur des différences d'ordre national, racial, religieux, ethnique ou culturel sont racistes, scientifiquement fausses, juridiquement sans valeur, moralement condamnables et socialement injustes,

Réaffirmant que les peuples autochtones, dans l'exercice de leurs droits, ne doivent faire l'objet d'aucune forme de discrimination,

Préoccupée par le fait que les peuples autochtones ont subi des injustices historiques à cause, entre autres, de la colonisation et de la dépossession de leurs terres, territoires et

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and theInternational Covenant on Civil and Political Rights,[2] as well as the Vienna Declaration and Programme of Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

[2] See resolution 2200 A (XXI), annex.

[3] A/CONF.157/24 (Part I), chap. III.

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

ressources, ce qui les a empêchés d'exercer, notamment, leur droit au développement conformément à leurs propres besoins et intérêts,

Consciente de la nécessité urgente de respecter et de promouvoir les droits intrinsèques des peuples autochtones, qui découlent de leurs structures politiques, économiques et sociales et de leur culture, de leurs traditions spirituelles, de leur histoire et de leur philosophie, en particulier leurs droits à leurs terres, territoires et ressources,

Consciente également de la nécessité urgente de respecter et de promouvoir les droits des peuples autochtones affirmés dans les traités, accords et autres arrangements constructifs conclus avec les États,

Se félicitant du fait que les peuples autochtones s'organisent pour améliorer leur situation sur les plans politique, économique, social et culturel et mettre fin à toutes les formes de discrimination et d'oppression partout où elles se produisent,

Convaincue que le contrôle, par les peuples autochtones, des événements qui les concernent, eux et leurs terres, territoires et ressources, leur permettra de perpétuer et de renforcer leurs institutions, leur culture et leurs traditions et de promouvoir leur développement selon leurs aspirations et leurs besoins,

Considérant que le respect des savoirs, des cultures et des pratiques traditionnelles autochtones contribue à une mise en valeur durable et équitable de l'environnement et à sa bonne gestion,

Soulignant la contribution de la démilitarisation des terres et territoires des peuples autochtones à la paix, au progrès économique et social et au développement, à la compréhension et aux relations amicales entre les nations et les peuples du monde,

Considérant en particulier le droit des familles et des communautés autochtones de conserver la responsabilité partagée de l'éducation, de la formation, de l'instruction et du bien-être de leurs enfants, conformément aux droits de l'enfant,

Estimant que les droits affirmés dans les traités, accords et autres arrangements constructifs entre les États et les peuples autochtones sont, dans certaines situations, des sujets de préoccupation, d'intérêt et de responsabilité à l'échelle internationale et présentent un caractère international,

Estimant également que les traités, accords et autres arrangements constructifs, ainsi que les relations qu'ils représentent, sont la base d'un partenariat renforcé entre les peuples autochtones et les États,

Constatant que la Charte des Nations Unies, le Pacte international relatif aux droits économiques, sociaux et culturels[2] et le Pacte international relatif aux droits civils et politiques[2], ainsi que la Déclaration et le Programme d'action de Vienne[3], affirment l'importance fondamentale du droit de tous les peuples de disposer d'eux-mêmes, droit en vertu duquel ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel,

[2] Voir résolution 2200 A (XXI), annexe.

[3] A/CONF.157/24 (Part I), chap. III.

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights[4] and international human rights law.

[4] Resolution 217 A (III).

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Consciente qu'aucune disposition de la présente Déclaration ne pourra être invoquée pour dénier à un peuple quel qu'il soit son droit à l'autodétermination, exercé conformément au droit international,

Convaincue que la reconnaissance des droits des peuples autochtones dans la présente Déclaration encouragera des relations harmonieuses et de coopération entre les États et les peuples autochtones, fondées sur les principes de justice, de démocratie, de respect des droits de l'homme, de non-discrimination et de bonne foi,

Encourageant les États à respecter et à mettre en œuvre effectivement toutes leurs obligations applicables aux peuples autochtones en vertu des instruments internationaux, en particulier ceux relatifs aux droits de l'homme, en consultation et en coopération avec les peuples concernés,

Soulignant que l'Organisation des Nations Unies a un rôle important et continu à jouer dans la promotion et la protection des droits des peuples autochtones,

Convaincue que la présente Déclaration est une nouvelle étape importante sur la voie de la reconnaissance, de la promotion et de la protection des droits et libertés des peuples autochtones et dans le développement des activités pertinentes du système des Nations Unies dans ce domaine,

Considérant et réaffirmant que les autochtones sont admis à bénéficier sans aucune discrimination de tous les droits de l'homme reconnus en droit international, et que les peuples autochtones ont des droits collectifs qui sont indispensables à leur existence, à leur bien-être et à leur développement intégral en tant que peuples,

Considérant que la situation des peuples autochtones n'est pas la même selon les régions et les pays, et qu'il faut tenir compte de l'importance des particularités nationales ou régionales, ainsi que de la variété des contextes historiques et culturels,

Proclame solennellement la Déclaration des Nations Unies sur les droits des peuples autochtones, dont le texte figure ci-après, qui constitue un idéal à atteindre dans un esprit de partenariat et de respect mutuel :

Article premier

Les peuples autochtones ont le droit, à titre collectif ou individuel, de jouir pleinement de l'ensemble des droits de l'homme et des libertés fondamentales reconnus par la Charte des Nations Unies, la Déclaration universelle des droits de l'homme[4] et le droit international relatif aux droits de l'homme.

[4] Résolution 217 A (III).

Article 2

Les autochtones, peuples et individus, sont libres et égaux à tous les autres et ont le droit de ne faire l'objet, dans l'exercice de leurs droits, d'aucune forme de discrimination fondée, en particulier, sur leur origine ou leur identité autochtones.

Article 3

Les peuples autochtones ont le droit à l'autodétermination. En vertu de ce droit, ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel.

Article 4
Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5
Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6
Every indigenous individual has the right to a nationality.

Article 7
1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8
1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(*a*) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(*c*) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(*d*) Any form of forced assimilation or integration;

(*e*) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11
1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 4
Les peuples autochtones, dans l'exercice de leur droit à l'autodétermination, ont le droit d'être autonomes et de s'administrer eux-mêmes pour tout ce qui touche à leurs affaires intérieures et locales, ainsi que de disposer des moyens de financer leurs activités autonomes.

Article 5
Les peuples autochtones ont le droit de maintenir et de renforcer leurs institutions politiques, juridiques, économiques, sociales et culturelles distinctes, tout en conservant le droit, si tel est leur choix, de participer pleinement à la vie politique, économique, sociale et culturelle de l'État.

Article 6
Tout autochtone a droit à une nationalité.

Article 7
1. Les autochtones ont droit à la vie, à l'intégrité physique et mentale, à la liberté et à la sécurité de la personne.

2. Les peuples autochtones ont le droit, à titre collectif, de vivre dans la liberté, la paix et la sécurité en tant que peuples distincts et ne font l'objet d'aucun acte de génocide ou autre acte de violence, y compris le transfert forcé d'enfants autochtones d'un groupe à un autre.

Article 8
1. Les autochtones, peuples et individus, ont le droit de ne pas subir d'assimilation forcée ou de destruction de leur culture.

2. Les États mettent en place des mécanismes de prévention et de réparation efficaces visant :

a) Tout acte ayant pour but ou pour effet de priver les autochtones de leur intégrité en tant que peuples distincts, ou de leurs valeurs culturelles ou leur identité ethnique;

b) Tout acte ayant pour but ou pour effet de les déposséder de leurs terres, territoires ou ressources;

c) Toute forme de transfert forcé de population ayant pour but ou pour effet de violer ou d'éroder l'un quelconque de leurs droits;

d) Toute forme d'assimilation ou d'intégration forcée;

e) Toute forme de propagande dirigée contre eux dans le but d'encourager la discrimination raciale ou ethnique ou d'y inciter.

Article 9
Les autochtones, peuples et individus, ont le droit d'appartenir à une communauté ou à une nation autochtone, conformément aux traditions et coutumes de la communauté ou de la nation considérée. Aucune discrimination quelle qu'elle soit ne saurait résulter de l'exercice de ce droit.

Article 10
Les peuples autochtones ne peuvent être enlevés de force à leurs terres ou territoires. Aucune réinstallation ne peut avoir lieu sans le consentement préalable — donné librement et en connaissance de cause — des peuples autochtones concernés et un accord sur une indemnisation juste et équitable et, lorsque cela est possible, la faculté de retour.

Article 11
1. Les peuples autochtones ont le droit d'observer et de revivifier leurs traditions culturelles et leurs coutumes. Ils ont notamment le droit de conserver, de protéger et de développer les manifestations passées, présentes et futures de leur culture, telles que les sites archéologiques et historiques,

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

l'artisanat, les dessins et modèles, les rites, les techniques, les arts visuels et du spectacle et la littérature.

2. Les États doivent accorder réparation par le biais de mécanismes efficaces — qui peuvent comprendre la restitution — mis au point en concertation avec les peuples autochtones, en ce qui concerne les biens culturels, intellectuels, religieux et spirituels qui leur ont été pris sans leur consentement préalable, donné librement et en connaissance de cause, ou en violation de leurs lois, traditions et coutumes.

Article 12

1. Les peuples autochtones ont le droit de manifester, de pratiquer, de promouvoir et d'enseigner leurs traditions, coutumes et rites religieux et spirituels; le droit d'entretenir et de protéger leurs sites religieux et culturels et d'y avoir accès en privé; le droit d'utiliser leurs objets rituels et d'en disposer; et le droit au rapatriement de leurs restes humains.

2. Les États veillent à permettre l'accès aux objets de culte et aux restes humains en leur possession et/ou leur rapatriement, par le biais de mécanismes justes, transparents et efficaces mis au point en concertation avec les peuples autochtones concernés.

Article 13

1. Les peuples autochtones ont le droit de revivifier, d'utiliser, de développer et de transmettre aux générations futures leur histoire, leur langue, leurs traditions orales, leur philosophie, leur système d'écriture et leur littérature, ainsi que de choisir et de conserver leurs propres noms pour les communautés, les lieux et les personnes.

2. Les États prennent des mesures efficaces pour protéger ce droit et faire en sorte que les peuples autochtones puissent comprendre et être compris dans les procédures politiques, juridiques et administratives, en fournissant, si nécessaire, des services d'interprétation ou d'autres moyens appropriés.

Article 14

1. Les peuples autochtones ont le droit d'établir et de contrôler leurs propres systèmes et établissements scolaires où l'enseignement est dispensé dans leur propre langue, d'une manière adaptée à leurs méthodes culturelles d'enseignement et d'apprentissage.

2. Les autochtones, en particulier les enfants, ont le droit d'accéder à tous les niveaux et à toutes les formes d'enseignement public, sans discrimination aucune.

3. Les États, en concertation avec les peuples autochtones, prennent des mesures efficaces pour que les autochtones, en particulier les enfants, vivant à l'extérieur de leur communauté, puissent accéder, lorsque cela est possible, à un enseignement dispensé selon leur propre culture et dans leur propre langue.

Article 15

1. Les peuples autochtones ont droit à ce que l'enseignement et les moyens d'information reflètent fidèlement la dignité et la diversité de leurs cultures, de leurs traditions, de leur histoire et de leurs aspirations.

2. Les États prennent des mesures efficaces, en consultation et en coopération avec les peuples autochtones concernés, pour combattre les préjugés et éliminer la discrimination et pour promouvoir la tolérance, la compréhension et de bonnes relations entre les peuples autochtones et toutes les autres composantes de la société.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be

Article 16

1. Les peuples autochtones ont le droit d'établir leurs propres médias dans leur propre langue et d'accéder à toutes les formes de médias non autochtones sans discrimination aucune.

2. Les États prennent des mesures efficaces pour faire en sorte que les médias publics reflètent dûment la diversité culturelle autochtone. Les États, sans préjudice de l'obligation d'assurer pleinement la liberté d'expression, encouragent les médias privés à refléter de manière adéquate la diversité culturelle autochtone.

Article 17

1. Les autochtones, individus et peuples, ont le droit de jouir pleinement de tous les droits établis par le droit du travail international et national applicable.

2. Les États doivent, en consultation et en coopération avec les peuples autochtones, prendre des mesures visant spécifiquement à protéger les enfants autochtones contre l'exploitation économique et contre tout travail susceptible d'être dangereux ou d'entraver leur éducation ou de nuire à leur santé ou à leur développement physique, mental, spirituel, moral ou social, en tenant compte de leur vulnérabilité particulière et de l'importance de l'éducation pour leur autonomisation.

3. Les autochtones ont le droit de n'être soumis à aucune condition de travail discriminatoire, notamment en matière d'emploi ou de rémunération.

Article 18

Les peuples autochtones ont le droit de participer à la prise de décisions sur des questions qui peuvent concerner leurs droits, par l'intermédiaire de représentants qu'ils ont eux-mêmes choisis conformément à leurs propres procédures, ainsi que le droit de conserver et de développer leurs propres institutions décisionnelles.

Article 19

Les États se concertent et coopèrent de bonne foi avec les peuples autochtones intéressés — par l'intermédiaire de leurs propres institutions représentatives — avant d'adopter et d'appliquer des mesures législatives ou administratives susceptibles de concerner les peuples autochtones, afin d'obtenir leur consentement préalable, donné librement et en connaissance de cause.

Article 20

1. Les peuples autochtones ont le droit de conserver et de développer leurs systèmes ou institutions politiques, économiques et sociaux, de disposer en toute sécurité de leurs propres moyens de subsistance et de développement et de se livrer librement à toutes leurs activités économiques, traditionnelles et autres.

2. Les peuples autochtones privés de leurs moyens de subsistance et de développement ont droit à une indemnisation juste et équitable.

Article 21

1. Les peuples autochtones ont droit, sans discrimination d'aucune sorte, à l'amélioration de leur situation économique et sociale, notamment dans les domaines de l'éducation, de l'emploi, de la formation et de la reconversion professionnelles, du logement, de l'assainissement, de la santé et de la sécurité sociale.

2. Les États prennent des mesures efficaces et, selon qu'il conviendra, des mesures spéciales pour assurer une

paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands,territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure

amélioration continue de la situation économique et sociale des peuples autochtones. Une attention particulière est accordée aux droits et aux besoins particuliers des anciens, des femmes, des jeunes, des enfants et des personnes handicapées autochtones.

Article 22

1. Une attention particulière est accordée aux droits et aux besoins spéciaux des anciens, des femmes, des jeunes, des enfants et des personnes handicapées autochtones dans l'application de la présente Déclaration.

2. Les États prennent des mesures, en concertation avec les peuples autochtones, pour veiller à ce que les femmes et les enfants autochtones soient pleinement protégés contre toutes les formes de violence et de discrimination et bénéficient des garanties voulues.

Article 23

Les peuples autochtones ont le droit de définir et d'élaborer des priorités et des stratégies en vue d'exercer leur droit au développement. En particulier, ils ont le droit d'être activement associés à l'élaboration et à la définition des programmes de santé, de logement et d'autres programmes économiques et sociaux les concernant, et, autant que possible, de les administrer par l'intermédiaire de leurs propres institutions.

Article 24

1. Les peuples autochtones ont droit à leur pharmacopée traditionnelle et ils ont le droit de conserver leurs pratiques médicales, notamment de préserver leurs plantes médicinales, animaux et minéraux d'intérêt vital. Les autochtones ont aussi le droit d'avoir accès, sans aucune discrimination, à tous les services sociaux et de santé.

2. Les autochtones ont le droit, en toute égalité, de jouir du meilleur état possible de santé physique et mentale. Les États prennent les mesures nécessaires en vue d'assurer progressivement la pleine réalisation de ce droit.

Article 25

Les peuples autochtones ont le droit de conserver et de renforcer leurs liens spirituels particuliers avec les terres, territoires, eaux et zones maritimes côtières et autres ressources qu'ils possèdent ou occupent et utilisent traditionnellement, et d'assumer leurs responsabilités en la matière à l'égard des générations futures.

Article 26

1. Les peuples autochtones ont le droit aux terres, territoires et ressources qu'ils possèdent et occupent traditionnellement ou qu'ils ont utilisés ou acquis.

2. Les peuples autochtones ont le droit de posséder, d'utiliser, de mettre en valeur et de contrôler les terres, territoires et ressources qu'ils possèdent parce qu'ils leur appartiennent ou qu'ils les occupent ou les utilisent traditionnellement, ainsi que ceux qu'ils ont acquis.

3. Les États accordent reconnaissance et protection juridiques à ces terres, territoires et ressources. Cette reconnaissance se fait en respectant dûment les coutumes, traditions et régimes fonciers des peuples autochtones concernés.

Article 27

Les États mettront en place et appliqueront, en concertation avec les peuples autochtones concernés, un processus équitable, indépendant, impartial, ouvert et transparent prenant dûment en compte les lois, traditions, coutumes et régimes

systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands,territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

fonciers des peuples autochtones, afin de reconnaître les droits des peuples autochtones en ce qui concerne leurs terres, territoires et ressources, y compris ceux qu'ils possèdent, occupent ou utilisent traditionnellement, et de statuer sur ces droits. Les peuples autochtones auront le droit de participer à ce processus.

Article 28

1. Les peuples autochtones ont droit à réparation, par le biais, notamment, de la restitution ou, lorsque cela n'est pas possible, d'une indemnisation juste, correcte et équitable pour les terres, territoires et ressources qu'ils possédaient traditionnellement ou occupaient ou utilisaient et qui ont été confisqués, pris, occupés, exploités ou dégradés sans leur consentement préalable, donné librement et en connaissance de cause.

2. Sauf si les peuples concernés en décident librement d'une autre façon, l'indemnisation se fait sous forme de terres, de territoires et de ressources équivalents par leur qualité, leur étendue et leur régime juridique, ou d'une indemnité pécuniaire ou de toute autre réparation appropriée.

Article 29

1. Les peuples autochtones ont droit à la préservation et à la protection de leur environnement et de la capacité de production de leurs terres ou territoires et ressources. À ces fins, les États établissent et mettent en œuvre des programmes d'assistance à l'intention des peuples autochtones, sans discrimination d'aucune sorte.

2. Les États prennent des mesures efficaces pour veiller à ce qu'aucune matière dangereuse ne soit stockée ou déchargée sur les terres ou territoires des peuples autochtones sans leur consentement préalable, donné librement et en connaissance de cause.

3. Les États prennent aussi, selon que de besoin, des mesures efficaces pour veiller à ce que des programmes de surveillance, de prévention et de soins de santé destinés aux peuples autochtones affectés par ces matières, et conçus et exécutés par eux, soient dûment mis en œuvre.

Article 30

1. Il ne peut y avoir d'activités militaires sur les terres ou territoires des peuples autochtones, à moins que ces activités ne soient justifiées par des raisons d'intérêt public ou qu'elles n'aient été librement décidées en accord avec les peuples autochtones concernés, ou demandées par ces derniers.

2. Les États engagent des consultations effectives avec les peuples autochtones concernés, par le biais de procédures appropriées et, en particulier, par l'intermédiaire de leurs institutions représentatives, avant d'utiliser leurs terres et territoires pour des activités militaires.

Article 31

1. Les peuples autochtones ont le droit de préserver, de contrôler, de protéger et de développer leur patrimoine culturel, leur savoir traditionnel et leurs expressions culturelles traditionnelles ainsi que les manifestations de leurs sciences, techniques et culture, y compris leurs ressources humaines et génétiques, leurs semences, leur pharmacopée, leur connaissance des propriétés de la faune et de la flore, leurs traditions orales, leur littérature, leur esthétique, leurs sports et leurs jeux traditionnels et leurs arts visuels et du spectacle. Ils ont également le droit de préserver, de contrôler, de protéger et de développer leur propriété intellectuelle collective de ce patrimoine culturel, de ce savoir traditionnel et de ces expressions culturelles traditionnelles.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples,shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples

2. En concertation avec les peuples autochtones, les États prennent des mesures efficaces pour reconnaître ces droits et en protéger l'exercice.

Article 32

1. Les peuples autochtones ont le droit de définir et d'établir des priorités et des stratégies pour la mise en valeur et l'utilisation de leurs terres ou territoires et autres ressources.

2. Les États consultent les peuples autochtones concernés et coopèrent avec eux de bonne foi par l'intermédiaire de leurs propres institutions représentatives, en vue d'obtenir leur consentement, donné librement et en connaissance de cause, avant l'approbation de tout projet ayant des incidences sur leurs terres ou territoires et autres ressources, notamment en ce qui concerne la mise en valeur, l'utilisation ou l'exploitation des ressources minérales, hydriques ou autres.

3. Les États mettent en place des mécanismes efficaces visant à assurer une réparation juste et équitable pour toute activité de cette nature, et des mesures adéquates sont prises pour en atténuer les effets néfastes sur les plans environnemental, économique, social, culturel ou spirituel.

Article 33

1. Les peuples autochtones ont le droit de décider de leur propre identité ou appartenance conformément à leurs coutumes et traditions, sans préjudice du droit des autochtones d'obtenir, à titre individuel, la citoyenneté de l'État dans lequel ils vivent.

2. Les peuples autochtones ont le droit de déterminer les structures de leurs institutions et d'en choisir les membres selon leurs propres procédures.

Article 34

Les peuples autochtones ont le droit de promouvoir, de développer et de conserver leurs structures institutionnelles et leurs coutumes, spiritualité, traditions, procédures ou pratiques particulières et, lorsqu'ils existent, leurs systèmes ou coutumes juridiques, en conformité avec les normes internationales relatives aux droits de l'homme.

Article 35

Les peuples autochtones ont le droit de déterminer les responsabilités des individus envers leur communauté.

Article 36

1. Les peuples autochtones, en particulier ceux qui vivent de part et d'autre de frontières internationales, ont le droit d'entretenir et de développer, à travers ces frontières, des contacts, des relations et des liens de coopération avec leurs propres membres ainsi qu'avec les autres peuples, notamment des activités ayant des buts spirituels, culturels, politiques, économiques et sociaux.

2. Les États prennent, en consultation et en coopération avec les peuples autochtones, des mesures efficaces pour faciliter l'exercice de ce droit et en assurer l'application.

Article 37

1. Les peuples autochtones ont droit à ce que les traités, accords et autres arrangements constructifs conclus avec des États ou leurs successeurs soient reconnus et effectivement appliqués, et à ce que les États honorent et respectent lesdits traités, accords et autres arrangements constructifs.

2. Aucune disposition de la présente Déclaration ne peut être interprétée de manière à diminuer ou à nier les droits des

contained in treaties, agreements and other constructive arrangements.

Article 38
States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39
Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40
Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42
The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43
The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44
All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45
Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46
1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

peuples autochtones énoncés dans des traités, accords et autres arrangements constructifs.

Article 38
Les États prennent, en consultation et en coopération avec les peuples autochtones, les mesures appropriées, y compris législatives, pour atteindre les buts de la présente Déclaration.

Article 39
Les peuples autochtones ont le droit d'avoir accès à une assistance financière et technique, de la part des États et dans le cadre de la coopération internationale, pour jouir des droits énoncés dans la présente Déclaration.

Article 40
Les peuples autochtones ont le droit d'avoir accès à des procédures justes et équitables pour le règlement des conflits et des différends avec les États ou d'autres parties et à une décision rapide en la matière, ainsi qu'à des voies de recours efficaces pour toute violation de leurs droits individuels et collectifs. Toute décision en la matière prendra dûment en considération les coutumes, traditions, règles et systèmes juridiques des peuples autochtones concernés et les normes internationales relatives aux droits de l'homme.

Article 41
Les organes et les institutions spécialisées du système des Nations Unies et d'autres organisations intergouvernementales contribuent à la pleine mise en œuvre des dispositions de la présente Déclaration par la mobilisation, notamment, de la coopération financière et de l'assistance technique. Les moyens d'assurer la participation des peuples autochtones à l'examen des questions les concernant doivent être mis en place.

Article 42
L'Organisation des Nations Unies, ses organes, en particulier l'Instance permanente sur les questions autochtones, les institutions spécialisées, notamment au niveau des pays, et les États favorisent le respect et la pleine application des dispositions de la présente Déclaration et veillent à en assurer l'efficacité.

Article 43
Les droits reconnus dans la présente Déclaration constituent les normes minimales nécessaires à la survie, à la dignité et au bien-être des peuples autochtones du monde.

Article 44
Tous les droits et libertés reconnus dans la présente Déclaration sont garantis de la même façon à tous les autochtones, hommes et femmes.

Article 45
Aucune disposition de la présente Déclaration ne peut être interprétée comme entraînant la diminution ou l'extinction de droits que les peuples autochtones ont déjà ou sont susceptibles d'acquérir à l'avenir.

Article 46
1. Aucune disposition de la présente Déclaration ne peut être interprétée comme impliquant pour un État, un peuple, un groupement ou un individu un droit quelconque de se livrer à une activité ou d'accomplir un acte contraire à la Charte des Nations Unies, ni considérée comme autorisant ou encourageant aucun acte ayant pour effet de détruire ou d'amoindrir, totalement ou partiellement, l'intégrité territoriale ou l'unité politique d'un État souverain et indépendant.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

2. Dans l'exercice des droits énoncés dans la présente Déclaration, les droits de l'homme et les libertés fondamentales de tous sont respectés. L'exercice des droits énoncés dans la présente Déclaration est soumis uniquement aux restrictions prévues par la loi et conformes aux obligations internationales relatives aux droits de l'homme. Toute restriction de cette nature sera non discriminatoire et strictement nécessaire à seule fin d'assurer la reconnaissance et le respect des droits et libertés d'autrui et de satisfaire aux justes exigences qui s'imposent dans une société démocratique.

3. Les dispositions énoncées dans la présente Déclaration seront interprétées conformément aux principes de justice, de démocratie, de respect des droits de l'homme, d'égalité, de non-discrimination, de bonne gouvernance et de bonne foi.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Yahey v. British Columbia | 2015 BCSC 1302, 2015 CarswellBC 2110, [2015] 4 C.N.L.R. 1, 257 A.C.W.S. (3d) 251, [2015] B.C.W.L.D. 6412, [2015] B.C.W.L.D. 6678 | (B.C. S.C., Jul 27, 2015)

2004 SCC 73, 2004 CSC 73
Supreme Court of Canada

Haida Nation v. British Columbia (Minister of Forests)

2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 2004 CSC 73, [2004] 3 S.C.R. 511, [2004] S.C.J. No. 70, [2005] 1 C.N.L.R. 72, [2005] 3 W.W.R. 419, 11 C.E.L.R. (3d) 1, 135 A.C.W.S. (3d) 2, 19 Admin. L.R. (4th) 195, 206 B.C.A.C. 52, 245 D.L.R. (4th) 33, 26 R.P.R. (4th) 1, 327 N.R. 53, 338 W.A.C. 52, 36 B.C.L.R. (4th) 282, J.E. 2004-2156, REJB 2004-80383

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)

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, British Columbia Cattlemen's Association and Village of Port Clements (Interveners)

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

Heard: March 24, 2004
Judgment: November 18, 2004
Docket: 29419

Proceedings: reversing in part *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.); additional reasons at *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 462, 2002 CarswellBC 2067, 216 D.L.R. (4th) 1, 5 B.C.L.R. (4th) 33, [2002] 10 W.W.R. 587, [2002] 4 C.N.L.R. 117, 172 B.C.A.C. 75, 282 W.A.C. 75 (B.C. C.A.); reversing *Haida Nation v. British Columbia (Minister of Forests)* (2000), 2000 BCSC 1280, 2000 CarswellBC 2434, 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83 (B.C. S.C.)

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Subject: Natural Resources; Public; Property; Civil Practice and Procedure; Environmental; Constitutional

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s. 35 — considered

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Generally — referred to

APPEAL by Government and logging company from judgment reported at *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.), allowing Indian band's appeal from dismissal of application to set aside timber licence.

POURVOI du gouvernement et de la compagnie d'exploitation du bois à l'encontre de l'arrêt publié à *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.), qui a accueilli le pourvoi de la bande indienne à l'encontre du rejet de sa demande d'annulation du permis de coupe de bois.

***McLachlin C.J.C.*:**

I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.

3 The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second-growth forest. In some areas, old-growth forests can still be found.

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.S. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

5 In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land — title which they are in the process of trying to prove — and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: (2000), [2001] 2 C.N.L.R. 83, 2000 BCSC 1280 (B.C. S.C.). The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147 (B.C. C.A.),

with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462 (B.C. C.A.).

10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

A. Does the Law of Injunctions Govern this Situation?

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of

Crown-Aboriginal relations, as set out in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J.J.L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

15 I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

B. The Source of a Duty to Consult and Accommodate

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.), at para. 41; *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.). It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. 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. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Vanderpeet*, *supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of

the Crown gives rise to a fiduciary duty: *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Roberts*, at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

> ..."fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship .... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

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

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

21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow*, *supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented".

22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.), where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement" (para. 110).

23 In the companion case of *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), Lamer C.J. referred to the need for "consultation and compensation", and to consider "how the government has accommodated different aboriginal rights in a particular fishery ... how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users" (para. 64).

24 The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation..." on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

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

C. When the Duty to Consult and Accommodate Arises

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably,

cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only a broad, common law "duty of fairness", based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), at p. 653; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be "sound practical and policy reasons" to do so.

29 The government cites both authority and policy in support of its position. It relies on *Sparrow*, *supra*, at pp. 1110-13 and 1119, where the scope and content of the right were determined and infringement established, prior to consideration of whether infringement was justified. The government argues that its position also finds support in the perspective of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), which held that "what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1)..." (para. 120).

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government's arguments do not withstand scrutiny. Neither the authorities nor

practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that 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*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, 2001 SCC 33 (S.C.C.), at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation..." (emphasis added).

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

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

35 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 (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C. S.C.), at p. 71, *per* Dorgan J.

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall*, *supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will 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.

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.

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 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

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

40 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.

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 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.

44 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.

45 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.

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* (1998) provides insight:

> 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 ... (at s. 2.0 of Executive Summary)
>
> ...genuine consultation means a process that involves...:
>
> • gathering information to test policy proposals
>
> • putting forward proposals that are not yet finalized
>
> • 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. (at s. 2.2 of Deciding)

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

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

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

50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.), 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 *R. c. Côté*, [1996] 3 S.C.R. 139 (S.C.C.), 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.

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. c. Adams*, [1996] 3 S.C.R. 101 (S.C.C.), 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.

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

52 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.

53 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.

54 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. As noted earlier, the Court cautioned in *Roberts* 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. R.*, [1984] 2 S.C.R. 335 (S.C.C.), 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 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 (B.C. C.A.), at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

56 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

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

58 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 so, it argues, would "undermine the balance of federalism" (Crown's factum, at para. 96).

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same". The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catharines Milling & Lumber Co. v. R.* (1888), (1889) L.R. 14 App. Cas. 46 (Canada P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p.59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw*, *supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catharines Milling & Lumber Co.*, *supra*. There is therefore no foundation to the Province's argument on this point.

G. Administrative Review

60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55 (S.C.C.). On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. 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. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.); *Paul*, *supra*. 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 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: *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.).

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play.... So long as every reasonable effort is made to inform and to consult, such efforts would suffice...". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. Application to the Facts

(1) Existence of the Duty

64 The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. On the evidence before the Court in this matter, the answer must unequivocally be "yes".

65 The Haida have claimed title to all of Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 "[s]ince 1994, and probably much earlier". The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

66 The Province raises concerns over the breadth of the Haida's claims, observing that "[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space.... The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space" (Crown's factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title

and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

67 The chambers judge ascertained that the Province knew that the potential Aboriginal right and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. On this basis, the honour of the Crown mandated consultation prior to making a decision that might adversely affect the claimed Aboriginal title and rights.

(2) Scope of the Duty

68 As discussed above, the scope of the consultation required will be 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.

(i) Strength of the case

69 On the basis of evidence described as "voluminous," the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

70 The chambers judge's thorough assessment of the evidence distinguishes between the various Haida claims relevant to Block 6. On the basis of a thorough survey of the evidence, he found, at para. 47:

> (1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;
>
> (2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it "fair to say that the Haida claim goes far beyond the mere

'assertion' of Aboriginal title" (para. 50).

71 The chambers judge's findings grounded the Court of Appeal's conclusion that the Haida claims to title and Aboriginal rights were "supported by a good *prima facie* case" (para. 49 (c)). The strength of the case goes to the extent of the duty that the Province was required to fulfill. In this case the evidence clearly supports a conclusion that, pending a final resolution, there was a *prima facie* case in support of Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

(ii) Seriousness of the potential impact

72 The evidence before the chambers judge indicated that red cedar has long been integral to Haida culture. The chambers judge considered that there was a "reasonable probability" that the Haida would be able to establish infringement of an Aboriginal right to harvest red cedar "by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply" (para. 48). The prospect of continued logging of a resource in limited supply points to the potential impact on an Aboriginal right of the decision to replace T.F.L. 39.

73 Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that "it [is] apparent that large areas of Block 6 have been logged off" (para. 59(b)). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

74 To the Province's credit, the terms of T.F.L. 39 impose requirements on Weyerhaeuser with respect to Aboriginal peoples. However, more was required. Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence (T.F.L.), or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal

right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut (A.A.C.) for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida 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 well require significant accommodation to preserve the Haida interest pending resolution of their claims.

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

> [O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39.

In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that "[t]he Haida were and are consulted with respect to forest development plans and cutting permits.... Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting..." (Crown's factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions.

79 It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.

III. Conclusion

80 The Crown's appeal is dismissed and Weyerhaeuser's appeal is allowed. The British Columbia Court of Appeal's order is varied so that the Crown's obligation to consult does not extend to Weyerhaeuser. The Crown has agreed to pay the costs of the respondents regarding the application for leave to appeal and the appeal. Weyerhaeuser shall be relieved of any obligation to pay the costs of the Haida in the courts below. It is not necessary to answer the constitutional question stated in this appeal.

Order accordingly.
Ordonnance en conséquence.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Yahey v. British Columbia | 2015 BCSC 1302, 2015 CarswellBC 2110, [2015] 4 C.N.L.R. 1, 257 A.C.W.S. (3d) 251, [2015] B.C.W.L.D. 6412, [2015] B.C.W.L.D. 6678 | (B.C. S.C., Jul 27, 2015)

2014 SCC 44, 2014 CSC 44
Supreme Court of Canada

Tsilhqot'in Nation v. British Columbia

2014 CarswellBC 1814, 2014 CarswellBC 1815, 2014 SCC 44, 2014 CSC 44, [2014] 2 S.C.R. 257, [2014] 3 C.N.L.R. 362, [2014] 7 W.W.R. 633, [2014] B.C.W.L.D. 3975, [2014] B.C.W.L.D. 3976, [2014] B.C.W.L.D. 3977, [2014] B.C.W.L.D. 3978, [2014] B.C.W.L.D. 3979, [2014] B.C.W.L.D. 3980, [2014] B.C.W.L.D. 3981, [2014] B.C.W.L.D. 3982, [2014] B.C.W.L.D. 3983, [2014] B.C.W.L.D. 3984, [2014] B.C.W.L.D. 3985, [2014] B.C.W.L.D. 3986, [2014] B.C.W.L.D. 3987, [2014] B.C.W.L.D. 3992, [2014] B.C.W.L.D. 3995, [2014] B.C.W.L.D. 3996, [2014] B.C.W.L.D. 4006, [2014] B.C.W.L.D. 4007, [2014] B.C.W.L.D. 4011, [2014] B.C.W.L.D. 4012, [2014] B.C.W.L.D. 4147, [2014] S.C.J. No. 44, 241 A.C.W.S. (3d) 2, 312 C.R.R. (2d) 309, 356 B.C.A.C. 1, 374 D.L.R. (4th) 1, 43 R.P.R. (5th) 1, 459 N.R. 287, 58 B.C.L.R. (5th) 1, 610 W.A.C. 1, J.E. 2014-1148

Roger William, on his own behalf, 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, Appellant and Her Majesty The Queen in Right of the Province of British Columbia, Regional Manager of the Cariboo Forest Region and Attorney General of Canada, Respondents and Attorney General of Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Te'mexw Treaty Association, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assembly of First Nations, Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf

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McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: November 7, 2013
Judgment: June 26, 2014
Docket: 34986

Proceedings: reversing *Xeni Gwet'in First Nations v. British Columbia* (2012), *(*sub nom. *William v. British Columbia)* 551 W.A.C. 214, 324 B.C.A.C. 214, [2012] 10 W.W.R. 639, 33 B.C.L.R. (5th) 260, [2012] B.C.J. No. 1302, 2012 CarswellBC 1860, 2012 BCCA 285, 26 R.P.R. (5th) 67, [2012] 3 C.N.L.R. 333, Groberman J.A., Levine J.A., Tysoe J.A. (B.C. C.A.); additional reasons at *Xeni Gwet'in First Nations v. British Columbia* (2013), *(*sub nom. *William v. British Columbia)* 571 W.A.C. 85, 333 B.C.A.C. 78, [2013] 3 W.W.R. 79, 2013 BCCA 1, 2013 CarswellBC 1, 33 C.P.C. (7th) 235, 38 B.C.L.R. (5th) 124, Groberman J.A., Levine J.A., Tysoe J.A. (B.C. C.A.); affirming *Xeni Gwet'in First Nations v. British Columbia* (2007), 2007 CarswellBC 2741, 2007 BCSC 1700, [2007] B.C.J. No. 2465, 65 R.P.R. (4th) 1, *(*sub nom. *Tsilhqot'in Nation v. British Columbia)* [2008] 1 C.N.L.R. 112, D.H. Vickers J. (B.C. S.C.)

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Subject: Civil Practice and Procedure; Constitutional; Natural Resources; Property; Public

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APPEAL by former chief of Aboriginal band on behalf of First Nation and band from judgment reported at *Xeni Gwet'in First Nations v. British Columbia* (2012), 2012 BCCA 285, 2012 CarswellBC 1860, [2012] 3 C.N.L.R. 333, 33 B.C.L.R. (5th) 260, [2012] B.C.J. No. 1302, [2012] 10 W.W.R. 639, 324 B.C.A.C. 214, 551 W.A.C. 214, 26 R.P.R. (5th) 67 (B.C. C.A.), dismissing their appeal from judgment dismissing their claim for declaration of Aboriginal title.

POURVOI formé par un ex-chef d'une bande autochtone au nom d'une Première Nation et de la bande à l'encontre d'un jugement publié à *Xeni Gwet'in First Nations v. British Columbia* (2012), 2012 BCCA 285, 2012 CarswellBC 1860, [2012] 3 C.N.L.R. 333, 33 B.C.L.R. (5th) 260, [2012] B.C.J. No. 1302, [2012] 10 W.W.R. 639, 324 B.C.A.C. 214, 551 W.A.C. 214, 26 R.P.R. (5th) 67 (B.C. C.A.), ayant rejeté l'appel qu'ils avaient interjeté à l'encontre d'un jugement ayant rejeté leur demande de jugement déclaratoire relativement à un titre ancestral.

McLachlin C.J.C. **(LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 What is the test for Aboriginal title to land? If title is established, what rights does it confer? Does the British Columbia *Forest Act*, R.S.B.C. 1996, c. 157, apply to land covered by Aboriginal title? What are the constitutional constraints on provincial regulation of land under Aboriginal title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? These are among the important questions raised by this appeal.

2 These reasons conclude:

- Aboriginal title flows from occupation in the sense of regular and exclusive use of land.

- In this case, Aboriginal title is established over the area designated by the trial judge.

- Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.

- Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.

- Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling

and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.

• In this case, the Province's land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people.

II. The Historic Backdrop

3 For centuries, people of the Tsilhqot'in Nation — a grouping of six bands sharing common culture and history — have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.

4 Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

5 The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xeni Gwet'in First Nations government (one of the six bands that make up the Tsilhqot'in Nation) objected and sought a declaration prohibiting commercial logging on the land. The dispute led to the blockade of a bridge the forest company was upgrading. The blockade ceased when the Premier promised that there would be no further logging without the consent of the Xeni Gwet'in. Talks between the Ministry of Forests and the Xeni Gwet'in ensued, but reached an impasse over the Xeni Gwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people.

6 The claim is confined to approximately five percent of what the Tsilhqot'in — a total of about 3,000 people — regard as their traditional territory. The area in question is sparsely populated. About 200 Tsilhqot'in people live there, along with a handful of non-indigenous people who support the Tsilhqot'in claim to title. There are no adverse claims from other indigenous groups. The federal and provincial governments both oppose the title claim.

7 In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the

Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons which are no longer relied on by the Province, he refused to make a declaration of title (2007 BCSC 1700, [2008] 1 C.N.L.R. 112 (B.C. S.C.)).

8 In 2012, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed. For the rest of the claimed territory, the Tsilhqot'in were confined to Aboriginal rights to hunt, trap and harvest (2012 BCCA 285, 33 B.C.L.R. (5th) 260 (B.C. C.A.)).

9 The Tsilhqot'in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding, affirm their title to the area he designated, and confirm that issuance of forestry licences on the land unjustifiably infringed their rights under that title.

III. The Jurisprudential Backdrop

10 In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise: *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 (S.C.C.). Although the majority in *Calder* divided on whether title had been extinguished, its affirmation of Aboriginal rights to land led the Government of Canada to begin treaty negotiations with First Nations without treaties — mainly in British Columbia — resuming a policy that had been abandoned in the 1920s: P. W. Hogg, "The Constitutional Basis of Aboriginal Rights", M. Morellato, ed., in *Aboriginal Law Since Delgamuukw* (2009), 3.

11 Almost a decade after *Calder*, the enactment of s. 35 of the *Constitution Act, 1982* "recognized and affirmed" existing Aboriginal rights, although it took some time for the meaning of this section to be fully fleshed out.

12 In *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), this Court confirmed the potential for Aboriginal title in ancestral lands. The actual dispute concerned government conduct with respect to reserve lands. The Court held that the government had breached a fiduciary duty to the Musqueam Indian Band. In a concurring opinion, Justice Dickson (later Chief Justice) addressed the theory underlying Aboriginal title. He held that the Crown acquired radical or

underlying title to all the land in British Columbia at the time of sovereignty. However, this title was burdened by the "pre-existing legal right" of Aboriginal people based on their use and occupation of the land prior to European arrival (pp. 379-82). Dickson J. characterized this Aboriginal interest in the land as "an independent legal interest" (at p. 385), which gives rise to a *sui generis* fiduciary duty on the part of the Crown.

13 In 1990, this Court held that s. 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.). The Court held that under s. 35, legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a "compelling and substantial" purpose and account for the "priority" of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (at pp. 1113-19).

14 The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.). This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.

15 The Court in *Delgamuukw* summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, "[A]boriginal 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 [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures" (para. 117). Negatively, the "protected uses must not be irreconcilable with the nature of the group's attachment to that land" (ibid.) — that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

16 The Court in *Delgamuukw* confirmed that infringements of Aboriginal title can be justified under s. 35 of the *Constitution Act, 1982* pursuant to the *Sparrow* test and described this as a "necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part" (at para. 161), quoting *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), at para. 73. While *Sparrow* had spoken of *priority* of Aboriginal rights infringed by regulations over non-aboriginal interests, *Delgamuukw* articulated the "different" (at para. 168) approach of involvement of Aboriginal peoples — varying depending on the severity of the infringement — in decisions taken with respect to their lands.

17 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R.

511 (S.C.C.), the Court applied the *Delgamuukw* idea of involvement of the affected Aboriginal group in decisions about its land to the situation where development is proposed on land over which Aboriginal title is asserted but has not yet been established. The Court affirmed a spectrum of consultation. The Crown's duty to consult and accommodate the asserted Aboriginal interest "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" (para. 24). Thus, the idea of proportionate balancing implicit in *Delgamuukw* reappears in *Haida.* The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.

18 The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.

- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.

- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.

- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.

- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

IV. Pleadings in Aboriginal Land Claims Cases

19 The Province, to its credit, no longer contends that the claim should be barred because of defects in the pleadings. However, it may be useful to address how to approach pleadings in land claims, in view of their importance to future land claims.

20 I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor

defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.

21 First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.

22 Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified. The Court of Appeal correctly recognized that determining whether Aboriginal title is made out over a pleaded area is not an "all or nothing" proposition (at para. 117):

> The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. ... [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]

23 Third, cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

V. Is Aboriginal Title Established?

A. The Test for Aboriginal Title

24 How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

25 As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

26 The test was set out in *Delgamuukw*, *per* Lamer C.J., at para. 143:

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

27 The trial judge in this case held that "occupation" was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.

28 The Court of Appeal disagreed and applied a narrower test for Aboriginal title — site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

29 For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

30 Against this backdrop, I return to the requirements for Aboriginal title: sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

31 Should the three elements of the *Delgamuukw* test be considered independently, or as related aspects of a single concept? The High Court of Australia has expressed the view that there is little merit in considering aspects of occupancy separately. In *Western Australia v. Ward* (2002), 213 C.L.R. 1 (Australia H.C.), the court stated as follows, at para 89:

> The expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of

> possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

32 In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

1. Sufficiency of Occupation

33 The first requirement — and the one that lies at the heart of this appeal — is that the occupation be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?

34 The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.).

35 The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (*Delgamuukw*, at para. 148). In considering this perspective for the purpose of Aboriginal title, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 758, quoted with approval in *Delgamuukw*, at para. 149.

36 The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.

37 Sufficiency of occupation is a context-specific inquiry. "[O]ccupation 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" (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only

about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

38 To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

39 In *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78 (N.S. C.A.), at paras. 135-38, Cromwell J.A (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain. Cromwell J.A. cites (at para. 136) the following extract from K. McNeil, *Common Law Aboriginal Title* (1989), at pp. 198-200:

> What, then, did one have to do to acquire a title by occupancy? ... [I]t appears ... that ... a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts "being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider". There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation — it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the vacant estate, for the law cast it upon him by virtue of his occupation alone....
>
> Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to

> such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used.
>
> [Emphasis added.]

40 Cromwell J.A. in *Marshall* went on to state that this standard is different from the doctrine of constructive possession. The goal is not to *attribute* possession in the absence of physical acts of occupation, but to define the quality of the physical acts of occupation that demonstrate possession at law (para. 137). He concluded:

> I would adopt, in general terms, Professor McNeil's analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner.... Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly ... it is impossible to confine the evidence to the very precise spot on which the cutting was done: Pollock and Wright at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant. [para. 138]

41 In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.

42 There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

43 The Province argues that this Court in *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220

(S.C.C.) [hereinafter referred to as *Marshall; Bernard*], rejected a territorial approach to title, relying on a comment by Professor K. McNeil that the Court there "appears to have rejected the territorial approach of the Court of Appeal" ("Aboriginal Title and the Supreme Court: What's Happening?" (2006), 69 *Sask. L. Rev.* 281, cited in British Columbia factum, para. 100). In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be "proof of sufficiently regular and exclusive use" of the land in question, a requirement established in *Delgamuukw*.

44 The Court in *Marshall; Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. While "[n]ot every nomadic passage or use will ground title to land", the Court confirmed that *Delgamuukw* contemplates that "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation is a "question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used" (*ibid.*).

2. Continuity of Occupation

45 Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises — continuity between present and pre-sovereignty occupation.

46 The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet*, at para. 65). The same applies to Aboriginal title. Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

3. Exclusivity of Occupation

47 The third requirement is *exclusive* occupation of the land at the time of sovereignty. The Aboriginal group must have had "the intention and capacity to retain exclusive control" over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

48 Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate

exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

49 As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. The Court in *Delgamuukw* explained as follows, at para. 157:

> A consideration of the [A]boriginal perspective may also lead to the conclusion that trespass by other [A]boriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the [A]boriginal group asserting title. For example, the [A]boriginal group asserting the claim to [A]boriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, [A]boriginal laws under which permission may be granted to other [A]boriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the [A]boriginal nations in question, those treaties would also form part of the [A]boriginal perspective.

4. Summary

50 The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

B. Was Aboriginal Title Established in this Case?

51 The trial judge applied a test of regular and exclusive use of the land. This is consistent with the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case.

52 Whether the evidence in a particular case supports Aboriginal title is a question of fact for the trial judge: *Marshall; Bernard*. The question therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.

53 I approach the question through the lenses of sufficiency, continuity and exclusivity discussed above.

54 I will not repeat my earlier comments on what is required to establish sufficiency of occupation. Regular use of the territory suffices to establish sufficiency; the concept is not confined to continuously occupied village sites. The question must be approached from the perspective of the Aboriginal group as well as the common law, bearing in mind the customs of the people and the nature of the land.

55 The evidence in this case supports the trial judge's conclusion of sufficient occupation. While the population was small, the trial judge found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in. The Court of Appeal did not take serious issue with these findings.

56 Rather, the Court of Appeal based its rejection of Aboriginal title on the legal proposition that regular use of territory could not ground Aboriginal title — only the regular presence on or intensive occupation of particular tracts would suffice. That view, as discussed earlier, is not supported by the jurisprudence; on the contrary, *Delgamuukw* affirms a territorial use-based approach to Aboriginal title.

57 This brings me to continuity. There is some reliance on present occupation for the title claim in this case, raising the question of continuity. The evidence adduced and later relied on in parts 5-7 of the trial judge's reasons speak of events that took place as late as 1999. The trial judge considered this direct evidence of more recent occupation alongside archeological evidence, historical evidence, and oral evidence from Aboriginal elders, all of which indicated a continuous Tsilhqot'in presence in the claim area. The geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic occupation existed, further supported an inference of continuous occupation. Paragraph 945 states, under the heading of "Continuity", that the "Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion". I see no reason to disturb this

finding.

58 Finally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.

59 The Province goes on to argue that the trial judge's conclusions on how particular parts of the land were used cannot be sustained. The Province says:

> • The boundaries drawn by the trial judge are arbitrary and contradicted by some of the evidence (factum, at paras. 141 and 142).
>
> • The trial judge relied on a map the validity of which the Province disputes (para. 143).
>
> • The Tsilhqot'in population, that the trial judge found to be 400 at the time of sovereignty assertion, could not have physically occupied the 1,900 sq. km of land over which title was found (para. 144).
>
> • The trial judge failed to identify specific areas with adequate precision, instead relying on vague descriptions (para. 145).
>
> • A close examination of the details of the inconsistent and arbitrary manner in which the trial judge defined the areas subject to Aboriginal title demonstrates the unreliability of his approach (para. 147).

60 Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. The concern with the small size of the Tsilhqot'in population in 1846 makes sense only if one assumes a narrow test of intensive occupation and if one ignores the character of the land in question which was mountainous and could not have sustained a much larger population. The alleged failure to identify particular areas with precision likewise only makes sense if one assumes a narrow test of intensive occupation. The other criticisms amount to pointing out conflicting evidence. It was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error.

61 The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. The trial judge was faced with the herculean task of drawing conclusions from a huge body of evidence produced over 339 trial days spanning a five-year period. Much

of the evidence was historic evidence and therefore by its nature sometimes imprecise. The trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used. Absent demonstrated error, his findings should not be disturbed.

62 This said, I have accepted the Province's invitation to review the maps and the evidence and evaluate the trial judge's conclusions as to which areas support a declaration of Aboriginal title. For ease of reference, I attach a map showing the various territories and how the trial judge treated them (Appendix; see Appellant's factum, "Appendix A"). The territorial boundaries drawn by the trial judge and his conclusions as to Aboriginal title appear to be logical and fully supported by the evidence.

63 The trial judge divided the claim area into six regions and then considered a host of individual sites within each region. He examined expert archeological evidence, historical evidence and oral evidence from Aboriginal elders referring to these specific sites. At some of these sites, although the evidence did suggest a Tsilhqot'in presence, he found it insufficient to establish regular and exclusive occupancy. At other sites, he held that the evidence did establish regular and exclusive occupancy. By examining a large number of individual sites, the trial judge was able to infer the boundaries within which the Tsilhqot'in regularly and exclusively occupied the land. The trial judge, in proceeding this way, made no legal error.

64 The Province also criticises the trial judge for offering his opinion on areas outside the claim area. This, the Province says, went beyond the mandate of a trial judge who should pronounce only on pleaded matters.

65 In my view, this criticism is misplaced. It is clear that no declaration of title could be made over areas outside those pleaded. The trial judge offered his comments on areas outside the claim area, not as binding rulings in the case, but to provide assistance in future land claims negotiations. Having canvassed the evidence and arrived at conclusions on it, it made economic and practical sense for the trial judge to give the parties the benefit of his views. Moreover, as I noted earlier in discussing the proper approach to pleadings in cases where Aboriginal title is at issue, these cases raise special considerations. Often, the ambit of a claim cannot be drawn with precision at the commencement of proceedings. The true state of affairs unfolds only gradually as the evidence emerges over what may be a lengthy period of time. If at the end of the process the boundaries of the initial claim and the boundaries suggested by the evidence are different, the trial judge should not be faulted for pointing that out.

66 I conclude that the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, which was additionally buttressed by evidence of more recent continuous occupation.

VI. What Rights Does Aboriginal Title Confer?

67 As we have seen, *Delgamuukw* establishes that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" (at para. 117), including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

68 I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

A. The Legal Characterization of Aboriginal Title

69 The starting point in characterizing the legal nature of Aboriginal title is Justice Dickson's concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* (*1763*), R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

70 The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the *Constitution Act, 1867*; *Delgamuukw*. As we have seen, *Delgamuukw* establishes that Aboriginal title gives "the right to exclusive use and occupation of the land ... for a variety of purposes", not confined to traditional or "distinctive" uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.

71 What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements — a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act*, 1982.

72 The characteristics of Aboriginal title flow from the special relationship between the

Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts".

B. The Incidents of Aboriginal Title

73 Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

74 Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

75 The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other land-owners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.

76 The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

C. Justification of Infringement

77 To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.

78 The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

79 The degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*. In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right. "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties" (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

80 Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

81 I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in *Gladstone*, at para. 72:

> [T]he objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown.
>
> [Emphasis added.]

82 As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

83 What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para 165]

84 If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal people.

85 The Crown's fiduciary duty in the context of justification merits further discussion. The Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group. This impacts the justification process in two ways.

86 First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

87 Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida*'s insistence that the Crown's duty to consult and accommodate at the claims stage "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" (para. 39).

88 In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

D. Remedies and Transition

89 Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), at para. 37.

90 After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

91 The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

92 Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. What Duties Were Owed by the Crown at the Time of the Government Action?

93 Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

94 With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

VII. Breach of the Duty to Consult

95 The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that

the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

96 The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

97 I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

VIII. Provincial Laws and Aboriginal Title

98 As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal.

99 However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

100 The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how?; (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title?; and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?

101 Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

102 As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

103 Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act*, 1982. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

104 This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (at p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. As stated in *Gladstone:*

> Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [p.43]

105 It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

106 Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

B. Does the Forest Act on its Face Apply to Aboriginal Title Land?

107 Whether a statute of general application such as the *Forest Act* was *intended* to apply to lands subject to Aboriginal title — the question at this point — is always a matter of statutory interpretation.

108 The basic rule of statutory interpretation is that "the words of an Act are to be read in

their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

109 Under the *Forest Act*, the Crown can only issue timber licences with respect to "Crown timber". "Crown timber" is defined as timber that is on "Crown land", and "Crown land" is defined as "land, whether or not it is covered by water, or an interest in land, vested in the Crown." (s. 1). The Crown is not empowered to issue timber licences on "private land", which is defined as anything that is not Crown land. The Act is silent on Aboriginal title land, meaning that there are three possibilities: (1) Aboriginal title land is "Crown land"; (2) Aboriginal title land is "private land"; or (3) the *Forest Act* does not apply to Aboriginal title land at all. For the purposes of this appeal, there is no practical difference between the latter two.

110 If Aboriginal title land is "vested in the Crown", then it falls within the definition of "Crown land" and the timber on it is "Crown timber".

111 What does it mean for a person or entity to be "vested" with property? In property law, an interest is vested when no condition or limitation stands in the way of enjoyment. Property can be vested in possession or in interest. Property is vested in possession where there is a present entitlement to enjoyment of the property. An example of this is a life estate. Property is vested in interest where there is a fixed right to taking possession in the future. A remainder interest is vested in interest but not in possession: B. Ziff, *Principles of Property Law* (5th ed. 2010), at p. 245; *Black's Law Dictionary*, (9th ed. 2009), *sub verbo* "vested".

112 Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown's underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.

113 The second consideration in statutory construction is more equivocal. Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida.* At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.

114 It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain "Crown land" under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands of hectares and represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words "vested in the Crown" to cover at least lands to which Aboriginal title had not yet been confirmed.

115 I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order*. To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are "vested" in the Aboriginal group and the lands are no longer Crown lands.

116 Applied to this case, this means that as a matter of statutory construction, the lands in question were "Crown land" under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.

C. Is the Forest Act Ousted by the Constitution?

117 The next question is whether the provincial legislature lacks the constitutional power to legislate with respect to forests on Aboriginal title land. Currently, the *Forest Act* applies to lands under claim, but not to lands over which Aboriginal title has been confirmed. However, the provincial legislature could amend the Act so as to explicitly apply to lands over which title has been confirmed. This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands is ousted by the Constitution.

1. Section 35 of the Constitution Act, 1982

118 Section 35 of the *Constitution Act, 1982* represents "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights" (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.

119 Section 35(1) states that existing Aboriginal rights are hereby "recognized and affirmed". In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. "[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights" (*Sparrow*, at p. 1109). Dickson C.J. and La Forest J. elaborated on this purpose as follows, at p. 1110:

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

120 Where legislation affects an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, two inquires are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

121 A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (*Delgamuukw*, at para. 166).

122 Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone*. As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (at p. 1112).

123 General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it

will be reasonable, not impose undue hardships, and not deny the holder of the right their preferred means of exercising it. In such cases, no infringement will result.

124 General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

125 As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the rights holder and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

126 While unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties going forward. I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province — the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation — were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle.

127 Before the Court of Appeal, the Province no longer argued that the forestry activities were undertaken to combat the mountain pine beetle, but maintained the position that the trial judge's findings on economic viability were unreasonable, because unless logging was economically viable, it would not have taken place. The Court of Appeal rejected this argument on two grounds: (1) levels of logging must sometimes be maintained for a tenure holder to keep logging rights, even if logging is not economically viable; and (2) the focus is the economic value of logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder. In short, the Court of Appeal found no error in the trial judge's reasoning on this point. I would agree. Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

2. The Division of Powers

128 The starting point, as noted, is that, as a general matter, the regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. To put it in constitutional terms, regulation of forestry is in "pith and substance" a provincial matter. Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.

129 "Indians, and Lands reserved for the Indians" falls under federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. As such, forestry on Aboriginal title land falls under both the provincial power over forestry in the province and the federal power over "Indians". Thus, for constitutional purposes, forestry on Aboriginal title land possesses a double aspect, with both levels of government enjoying concurrent jurisdiction. Normally, such concurrent legislative power creates no conflicts — federal and provincial governments cooperate productively in many areas of double aspect such as, for example, insolvency and child custody. However, in cases where jurisdictional disputes arise, two doctrines exist to resolve them.

130 First, the doctrine of paramountcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament's power over "Indians", the latter would trump the former. No such inconsistency is alleged in this case.

131 Second, the doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government. Interjurisdictional immunity is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the other level may not intrude. In considering whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity, the court must ask two questions: first, does the provincial legislation touch on a protected core of federal power; and second, would application of the provincial law significantly trammel or impair the federal power: *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) (*"COPA"*).

132 The trial judge held that interjurisdictional immunity rendered the provisions of the *Forest Act* inapplicable to land held under Aboriginal title because provisions authorizing management, acquisition, removal and sale of timber on such lands affect the core of the federal power over "Indians". He placed considerable reliance on *R. v. Morris*

S.C.R. 915 (S.C.C.), in which this Court held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of the federal power over "Indians". It follows, the trial judge reasoned, that, since Aboriginal rights are akin to treaty rights, the Province has no power to legislate with respect to forests on Aboriginal title land.

133 The reasoning accepted by the trial judge is essentially as follows. Aboriginal rights fall at the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. Interjurisdictional immunity applies to matters at the core of s. 91(24). Therefore, provincial governments are constitutionally prohibited from legislating in a way that limits Aboriginal rights. This reasoning leads to a number of difficulties.

134 The critical aspect of this reasoning is the proposition that Aboriginal rights fall at the core of federal regulatory jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

135 The jurisprudence on whether s. 35 rights fall at the core of the federal power to legislate with respect to "Indians" under s. 91(24) is somewhat mixed. While no case has held that Aboriginal rights, such as Aboriginal title to land, fall at the core of the federal power under s. 91(24), this has been stated in *obiter dicta*. However, this Court has also stated in *obiter dicta* that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s. 35 of the *Constitution Act, 1982* — this latter proposition being inconsistent with the reasoning accepted by the trial judge.

136 In *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.), this Court suggested that interjurisdictional immunity did not apply where provincial legislation conflicted with treaty rights. Rather, the s. 35 *Sparrow* framework was the appropriate tool with which to resolve the conflict:

> [T]he federal and provincial governments [have the authority] within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives .... [para. 24]

137 More recently however, in *Morris*, this Court distinguished *Marshall* on the basis that the treaty right at issue in *Marshall* was a commercial right. The Court in *Morris* went on to hold that interjurisdictional immunity prohibited any provincial infringement of the non-commercial treaty right in that case, whether or not such an infringement could be justified under s. 35 of the *Constitution Act, 1982*.

138 Beyond this, the jurisprudence does not directly address the relationship between interjurisdictional immunity and s. 35 of the *Constitution Act, 1982*. The ambiguous state of the

jurisprudence has created unpredictability. It is clear that where valid *federal* law interferes with an Aboriginal or treaty right, the s. 35 *Sparrow* framework governs the law's applicability. It is less clear, however, that it is so where valid *provincial* law interferes with an Aboriginal or treaty right. The jurisprudence leaves the following questions unanswered: does interjurisdictional immunity prevent provincial governments from ever limiting Aboriginal rights even if a particular infringement would be justified under the *Sparrow* framework?; is provincial interference with Aboriginal rights treated differently than treaty rights?; and, are commercial Aboriginal rights treated differently than non-commercial Aboriginal rights? No case has addressed these questions explicitly, as I propose to do now.

139 As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.

140 What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*? The answer is none.

141 The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

142 The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government's powers.

143 An analogy with *Charter* jurisprudence may illustrate the point. Parliament enjoys exclusive jurisdiction over criminal law. However, its criminal law power is circumscribed by s. 11 of the *Charter* which guarantees the right to a fair criminal process. Just as Aboriginal rights are fundamental to Aboriginal law, the right to a fair criminal process is fundamental to criminal law. But we do not say that the right to a fair criminal process under s. 11 falls at the core of Parliament's criminal law jurisdiction. Rather, it is a *limit* on Parliament's criminal law

jurisdiction. If s. 11 rights were held to be at the core of Parliament's criminal law jurisdiction such that interjurisdictional immunity applied, the result would be absurd: provincial breaches of s. 11 rights would be judged on a different standard than federal breaches, with only the latter capable of being saved under s. 1 of the *Charter*. This same absurdity would result if interjurisdictional immunity were applied to Aboriginal rights.

144 The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers; it does so by carving out areas of exclusive jurisdiction for each level of government. But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.

145 Moreover, application of interjurisdictional immunity in this area would create serious practical difficulties.

146 First, application of interjurisdictional immunity would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights. Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified pursuant to s. 35 of the *Constitution Act, 1982*. Pursuant to interjurisdictional immunity, provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable. The result would be dueling tests directed at answering the same question: how far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?

147 Second, in this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as pests and fires, a situation desired by neither level of government.

148 Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not

impair the core of federal jurisdiction over "Indians" and would also have to scrutinize any federal legislation to ensure that it did not impair the core of the province's power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

149 This Court has recently stressed the limits of interjurisdictional immunity. "[C]onstitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'" and as such "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at paras. 24 and 37 (emphasis deleted)). Because of this, interjurisdictional immunity is of "limited application" and should be applied "with restraint" (paras. 67 and 77). These propositions have been confirmed in more recent decisions: *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.); *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.).

150 *Morris*, on which the trial judge relied, was decided prior to this Court's articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* and *COPA*, and so is of limited precedential value on this subject as a result (see *Marine Services*, at para. 64). To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

151 For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

152 The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of

government — an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

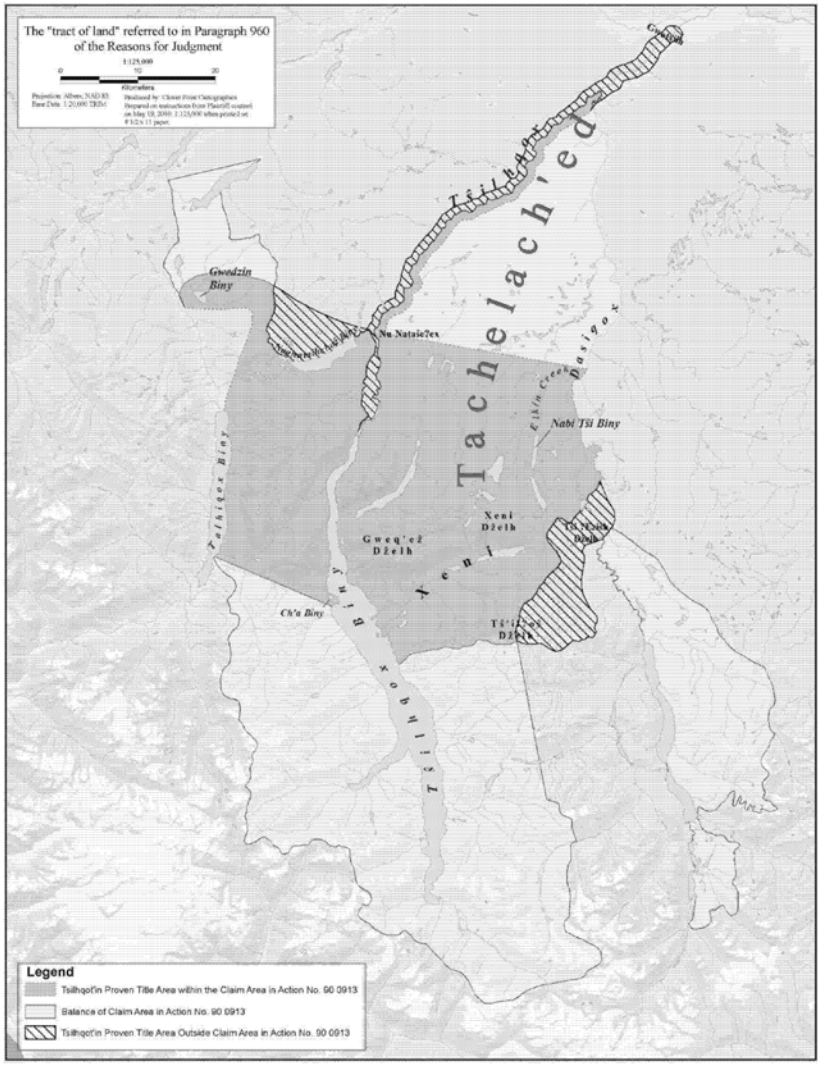
IX. Conclusion

153 I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

Appeal allowed.
Pourvoi accueilli.

Appendix

Proven Title Area — Visual Aid



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2017 SCC 40, 2017 CSC 40
Supreme Court of Canada

Clyde River (Hamlet) v. Petroleum Geo-Services Inc.

2017 CarswellNat 3470, 2017 CarswellNat 3471, 2017 SCC 40, 2017 CSC 40, [2017] 1 S.C.R. 1069, [2017] 3 C.N.L.R. 65, [2017] S.C.J. No. 40, 10 C.E.L.R. (4th) 1, 22 Admin. L.R. (6th) 181, 281 A.C.W.S. (3d) 4, 411 D.L.R. (4th) 571

Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization - Clyde River and Jerry Natanine (Appellants) and Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-Nopec Geophysical Company ASA (TGS) and Attorney General of Canada (Respondents) and Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Nunavut Wildlife Management Board, Inuvialuit Regional Corporation and Chiefs of Ontario (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 30, 2016
Judgment: July 26, 2017
Docket: 36692

Proceedings: reversing *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA* (2015), 94 C.E.L.R. (3d) 1, 2015 FCA 179, 2015 CarswellNat 3750, 2015 CarswellNat 12196, [2016] 3 F.C.R. 167, 2015 CAF 179, [2015] F.C.J. No. 991, 474 N.R. 96, Eleanor R. Dawson J.A., M. Nadon J.A., Richard Boivin J.A. (F.C.A.)

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Kate Darling, Lorraine Land, Matt McPherson, Krista Nerland, for Intervener, Inuvialuit Regional Corporation
Maxime Faille, Jaimie Lickers, Guy Régimbald, for Intervener, Chiefs of Ontario

Subject: Civil Practice and Procedure; Constitutional; Environmental; Natural Resources; Public

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s. 3 — referred to

s. 5(1)(a) — referred to

s. 5(1)(b) — considered

s. 5(4) — referred to

s. 5(5) — referred to

s. 5.002 [en. 2015, c. 4, s. 7] — referred to

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s. 12(2) — referred to

National Energy Board Act, S.C. 1959, c. 46
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Nunavut Land Claims Agreement Act, S.C. 1993, c. 29
Generally — referred to

Words and phrases considered:

Crown

In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (McAteer v. Canada (Attorney General), 2014 ONCA 578, 121 O.R. (3d) 1, at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, Liability of the Crown (4th ed. 2011), at pp. 11-12; but see Carrier Sekani, at para. 44). For this reason, the term "Crown" is commonly used to symbolize and denote executive power.

National Energy Board

The NEB is a federal administrative tribunal and regulatory agency established by the *National Energy Board Act*, R.S.C. 1985, c. N-7 (NEB Act). In this case, it is the final decision maker for issuing an authorization under s. 5(1)(b) of COGOA [<EM>Canada Oil and Gas Operations Act,/EM>, R.S.C. 1985, c. O-7].

reasons

Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation" (*Kainaiwa/Blood Tribe v. Alberta*

(Energy),, **2017** ABQB 107, at para. 117.

Termes et locutions cités:

Couronne

En un sens, la « Couronne » s'entend de la personnification de Sa Majesté de l'État canadien dans l'exercice des prérogatives et des privilèges qui lui sont réservés. Cependant, la Couronne désigne aussi la souveraine dans l'exercice de son rôle législatif officiel (lorsqu'elle sanctionne les projets de loi, qu'elle refuse de les 3 Loi sur l'Office national de l'énergie, S.C. 1959, c. 46. sanctionner ou qu'elle réserve sa décision), et en tant que chef du pouvoir exécutif (*McAteer c. Canada (Attorney General)*, 2014 ONCA 578, 121 OR (3d) 1, par. 51; P. W. Hogg, P. J. Monahan et W. K. Wright, *Liability of the Crown* (4e éd., 2011), p. 11-12; mais voir [*Rio Tinto Alcan Inc. c. Conseil tribal Carrier Sekani*, 2010 CSC 43, [2010] 2 R.C.S. 650], par. 44). Pour cette raison, le mot « Couronne » est couramment employé comme symbole du pouvoir exécutif et pour désigner ce pouvoir.

Office national de l'énergie

L'[Office national de l'énergie] est un tribunal administratif fédéral et un organisme de réglementation établi par la *Loi sur l'Office national de l'énergie*, L.R.C. (1985), c. N-7 [...]. En l'espèce, c'est lui qui prend en dernier ressort la décision d'accorder ou non l'autorisation prévue à l'al. 5(1)b) de la [*Loi sur les opérations pétrolières au Canada*, L.R.C. 1985, c. O-7].

motifs

Des motifs constituent [TRADUCTION] « une marque de respect [...] [qui] démontre la courtoisie dont doit faire preuve la Couronne en tant que souverain envers une nation qui occupait le territoire avant elle » (*Kainaiwa/Blood Tribe c. Alberta (Energy)*, **2017** ABQB 107, par. 117).

APPEAL from judgment reported at ***Clyde River (Hamlet)*** *v. TGS-NOPEC Geophysical Co. ASA* (2015), 2015 FCA 179, 2015 CarswellNat 3750, 94 C.E.L.R. (3d) 1, 474 N.R. 96, [2015] F.C.J. No. 991, [2016] 3 F.C.R. 167, 2015 CAF 179, 2015 CarswellNat 12196 (F.C.A.), dismissing application for judicial review of authorization of underwater seismic testing in area where Inuit hold treaty rights to marine mammals.

POURVOI formé à l'encontre d'un jugement publié à ***Clyde River (Hamlet)*** *v. TGS-NOPEC Geophysical Co. ASA* (2015), 2015 FCA 179, 2015 CarswellNat 3750, 94 C.E.L.R. (3d) 1, 474 N.R. 96, [2015] F.C.J. No. 991, [2016] 3 F.C.R. 167, 2015 CAF 179, 2015 CarswellNat 12196 (F.C.A.), ayant rejeté une demande visant à obtenir le contrôle judiciaire d'une décision autorisant la tenue de tests sismiques sous-marins dans un lieu où les Inuits possédaient des

droits issus de traités relativement à des mammifères marins.

Karakatsanis, Brown JJ. **(McLachlin C.J.C. and Abella, Moldaver, Wagner, Gascon, Côté and Rowe JJ. concurring):**

I. Introduction

1 This Court has on several occasions affirmed the role of the duty to consult in fostering reconciliation between Canada's Indigenous peoples and the Crown. In this appeal, and its companion *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, **2017** SCC 41 (S.C.C.), we consider the Crown's duty to consult with Indigenous peoples before an independent regulatory agency authorizes a project which could impact upon their rights. The Court's jurisprudence shows that the substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.

2 The **Hamlet** of **Clyde River** lies on the northeast coast of Baffin Island, in Nunavut. The community is situated on a flood plain between Patricia Bay and the Arctic Cordillera. Most residents of **Clyde River** are Inuit, who rely on marine mammals for food and for their economic, cultural, and spiritual well-being. They have harvested marine mammals for generations. The bowhead whale, the narwhal, the ringed, bearded, and harp seals, and the polar bear are of particular importance to them. Under the *Nunavut Land Claims Agreement* (1993), the Inuit of **Clyde River** ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including **Clyde River**, in exchange for defined treaty rights, including the right to harvest marine mammals.

3 In 2011, the respondents TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As and **Petroleum Geo-Services** Inc. (the proponents) applied to the National Energy Board (NEB) to conduct offshore seismic testing for oil and gas resources. It is undisputed that this testing could negatively affect the harvesting rights of the Inuit of **Clyde River**. After a period of consultation among the project proponents, the NEB, and affected Inuit communities, the NEB granted the requested authorization.

4 While the Crown may rely on the NEB's process to fulfill its duty to consult, considering the importance of the established treaty rights at stake and the potential impact of the seismic testing on those rights, we agree with the appellants that the consultation and accommodation efforts in this case were inadequate. For the reasons set out below, we would therefore allow the appeal and quash the NEB's authorization.

II. Background

A. Legislative Framework

5 The *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (*COGOA*), aims, in part, to promote responsible exploration for and exploitation of oil and gas resources (s. 2.1). It applies to exploration and drilling for the production, conservation, processing, and transportation of oil and gas in certain designated areas, including Nunavut (s. 3). Engaging in such activities is prohibited without an operating licence under s. 5(1)(a) or an authorization under s. 5(1)(b).

6 The NEB is a federal administrative tribunal and regulatory agency established by the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*). In this case, it is the final decision maker for issuing an authorization under s. 5(1)(b) of *COGOA*. The NEB has broad discretion to impose requirements for authorization under s. 5(4), and can ask parties to provide any information it deems necessary to comply with its statutory mandate (s. 5.31).

B. The Seismic Testing Authorization

7 In May 2011, the proponents applied to the NEB for an authorization under s. 5(1)(b) of *COGOA* to conduct seismic testing in Baffin Bay and Davis Strait, adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing contemplated towing airguns by ship through a project area. These airguns produce underwater sound waves, which are intended to find and measure underwater geological resources such as **petroleum**. The testing was to run from July through November, for five successive years.

8 The NEB launched an environmental assessment of the project.[1]

9 **Clyde River** opposed the seismic testing, and filed a petition against it with the NEB in May 2011. In 2012, the proponents responded to requests for further information from the NEB. They held meetings in communities that would be affected by the testing, including **Clyde River**.

10 In April and May 2013, the NEB held meetings in Pond Inlet, **Clyde River**, Qikiqtarjuaq, and Iqaluit to collect comments from the public on the project. Representatives of the proponents attended these meetings. Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them. For example, in Pond Inlet, a community member asked the proponents which marine mammals would be affected by the survey. The proponents answered: “That’s a very difficult question to answer because we’re not the core experts” (A.R., vol. III, at p. 541). Similarly, in **Clyde River**, a community member asked how the testing would affect marine

mammals. The proponents answered:

> ... a lot of work has been done with seismic surveys in other places and a lot of that information is used in doing the environmental assessment, the document that has been submitted by the companies to the National Energy Board for the approval process. It has a section on, you know, marine mammals and the effects on marine mammals.
>
> (A.R., vol. III, at p. 651)

11 These are but two examples of multiple instances of the proponents' failure to offer substantive answers to basic questions about the impacts of the proposed seismic testing. That failure led the NEB, in May 2013, to suspend its assessment. In August 2013, the proponents filed a 3,926 page document with the NEB, purporting to answer those questions. This document was posted on the NEB website and delivered to the **hamlet** offices. The vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.

12 Throughout the environmental assessment process, **Clyde River** and various Inuit organizations filed letters of comment with the NEB, noting the inadequacy of consultation and expressing concerns about the testing.

13 In April 2014, organizations representing the appellants and Inuit in other communities wrote to the Minister of Aboriginal Affairs and Northern Development and to the NEB, stating their view that the duty to consult had not been fulfilled in relation to the testing. This could be remedied, they said, by completing a strategic environmental assessment[2] before authorizing any seismic testing. In May, the Nunavut Marine Council also wrote to the NEB, with a copy to the Minister, asking that any regulatory decisions affecting the Nunavut Settlement Area's marine environment be postponed until completion of the strategic environmental assessment. This assessment was necessary, in the Council's view, to understand the baseline conditions in the marine environment and to ensure that seismic tests are properly regulated.

14 In June 2014, the Minister responded to both letters, "disagree[ing] with the view that seismic exploration of the region should be put on hold until the completion of a strategic environmental assessment" (A.R., vol. IV, at p. 967). A Geophysical Operations Authorisation letter from the NEB soon followed, advising that the environmental assessment report was completed and that the authorization had been granted.

15 In its environmental assessment (EA) report, the NEB discussed consultation with, and the participation of, Aboriginal groups in the NEB process. It concluded that the proponents "made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address

concerns raised" and that "Aboriginal groups had an adequate opportunity to participate in the NEB's EA process" (A.R., vol. I, at p. 24). It also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including bowhead whales and narwhals, which are both identified as being of "Special Concern" by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that the proponents would implement.

C. The Judicial Review Proceedings

16 **Clyde River** applied to the Federal Court of Appeal for judicial review of the NEB's decision to grant the authorization. Dawson J.A. (Nadon and Boivin JJ.A. concurring) found that the duty to consult had been triggered because the NEB could not grant the authorization without the minister's approval (or waiver of the requirement for approval) of a benefits plan for the project, pursuant to s. 5.2(2) of *COGOA* (2015 FCA 179, [2016] 3 F.C.R. 167 (F.C.A.)). The Federal Court of Appeal characterized the degree of consultation owed in the circumstances as deep, as that concept was discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at para. 44, and found that the Crown was entitled to rely on the NEB to undertake such consultation.

17 The Court of Appeal also concluded that the Crown's duty to consult had been satisfied by the nature and scope of the NEB's processes. The conditions upon which the authorization had been granted showed that the interests of the Inuit had been sufficiently considered and that further consultation would be expected to occur were the proposed testing to be followed by further development activities. In the circumstances, a strategic environmental assessment report was not required.

III. Analysis

18 The following issues arise in this appeal:

1. Can an NEB approval process trigger the duty to consult?

2. Can the Crown rely on the NEB's process to fulfill the duty to consult?

3. What is the NEB's role in considering Crown consultation before approval?

4. Was the consultation adequate in this case?

A. The Duty to Consult — General Principles

19 The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.), at para. 6; *Carrier Sekani Tribal Council*, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (*Kapp*, at para. 6). This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.), at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida Nation*, at para. 53).

20 The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Each case must be considered individually. Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida Nation*, at paras. 39 and 43-45).

21 This Court has affirmed that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult (*Carrier Sekani Tribal Council*, at para. 56; *Haida Nation*, at para. 51). The appellants argue that a regulatory process alone cannot fulfill the duty to consult because at least some direct engagement between "the Crown" and the affected Indigenous community is necessary.

22 In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Practically speaking, this does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to consult has been satisfied, or must directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments (see e.g. *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100 (Y.T. C.A.)). Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner

(since parties to treaties are obliged to act diligently to advance their respective interests) (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 (S.C.C.), at para. 12).

23 Further, because the honour of the Crown requires a meaningful, good faith consultation process (*Haida Nation*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

24 Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. Consultation is, after all, "[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani Tribal Council*, at para. 38, quoting D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida Nation*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests" (para. 14). No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.

B. Can an NEB Approval Process Trigger the Duty to Consult?

25 The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct (*Haida Nation*, at para. 35; *Carrier Sekani Tribal Council*, at para. 31). Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible. (*Carrier Sekani Tribal Council*, at paras. 45-46).

26 In this appeal, all parties agreed that the Crown's duty to consult was triggered, although agreement on *just what* Crown conduct triggered the duty has proven elusive. The Federal Court

of Appeal saw the trigger in *COGOA*'s requirement for ministerial approval (or waiver of the requirement for approval) of a benefits plan for the testing. In the companion appeal of *Chippewas of the Thames First Nation*, the majority of the Federal Court of Appeal concluded that it was not necessary to decide whether the duty to consult was triggered since the Crown was not a party before the NEB, but suggested the only Crown action involved might have been the 1959 enactment of the *NEB Act*[3] (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96 (F.C.A.)). In short, the Federal Court of Appeal in both cases was of the view that only action by a minister of the Crown or a government department, or a Crown corporation, can constitute Crown conduct triggering the duty to consult. And, before this Court in *Chippewas of the Thames First Nation*, the Attorney General of Canada argued that the duty was triggered by the NEB's approval of the pipeline project, because it was state action with the potential to affect Aboriginal or treaty rights.

27 Contrary to the Federal Court of Appeal's conclusions on this point, we agree that the NEB's approval process, in this case, as in *Chippewas of the Thames First Nation*, triggered the duty to consult.

28 It bears reiterating that the duty to consult is owed by the Crown. In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1 (Ont. C.A.), at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani Tribal Council*, at para. 44). For this reason, the term "Crown" is commonly used to symbolize and denote executive power. This was described by Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of Environment* (1977), [1978] A.C. 359 (U.K. H.L.), at p. 397:

> The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown; so that by the 13th century crimes were committed not only against the king's peace but also against "his crown and dignity": *Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. I, p. 525. The term "the Crown" is therefore used in constitutional law to denote the collection of such of those powers as remain extant (the royal prerogative), together with such other powers as have been expressly conferred by statute on "the Crown."

29 By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown's ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p.

465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani Tribal Council* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames First Nation*, "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action.

C. Can the Crown Rely on the NEB's Process to Fulfill the Duty to Consult?

30 As we have said, while ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the Crown is capable of doing so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstances (*Carrier Sekani Tribal Council*, at paras. 55 and 60). In the NEB's case, therefore, the question is whether the NEB is able, to the extent it is being relied on, to provide an appropriate level of consultation and, where necessary, accommodation to the Inuit of **Clyde River** in respect of the proposed testing.

31 We note that the NEB and *COGOA* each predate judicial recognition of the duty to consult. However, given the flexible nature of the duty, a process that was originally designed for a different purpose may be relied on by the Crown so long as it affords an appropriate level of consultation to the affected Indigenous group (*Beckman*, at para. 39; *Taku **River** Tlingit First Nation*, at para. 22). Under *COGOA*, the NEB has a significant array of powers that permit extensive consultation. It may conduct hearings, and has broad discretion to make orders or elicit information in furtherance of *COGOA* and the public interest (ss. 5.331, s. 5.31(1) and s. 5.32). It can also require studies to be undertaken and impose preconditions to approval (s. 5(4)). In the case of designated projects, it can also (as here) conduct environmental assessments, and establish participant funding programs to facilitate public participation (s. 5.002).

32 *COGOA* also grants the NEB broad powers to accommodate the concerns of Indigenous groups where necessary. The NEB can attach any terms and conditions it sees fit to an authorization issued under s. 5(1)(b), and can make such authorization contingent on their performance (ss. 5(4) and 5.36(1)). Most importantly, the NEB may require accommodation by

exercising its discretion to deny an authorization or by reserving its decision pending further proceedings (s. 5(1)(b), s. 5(5) and s. 5.36(2)).

33 The NEB has also developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project's potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.

34 In sum, the NEB has (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult. Whether the NEB's process did so in this case, we consider below.

D. What Is the NEB's Role in Considering Crown Consultation Before Approval?

35 The appellants argue that, as a tribunal empowered to decide questions of law, the NEB *must* exercise its decision-making authority in accordance with s. 35(1) of the *Constitution Act, 1982* by evaluating the adequacy of consultation before issuing an authorization for seismic testing. In contrast, the proponents submit that there is no basis in this Court's jurisprudence for imposing this obligation on the NEB. Although the Attorney General of Canada agrees with the appellants that the NEB has the legal capacity to decide constitutional questions when doing so is necessary to its decision-making powers, she argues that the NEB's environmental assessment decision in this case appropriately considered the adequacy of the proponents' consultation efforts.

36 Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "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" (*Carrier Sekani Tribal Council*, at para. 69). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.), at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* (*Carrier Sekani Tribal Council*, at para. 72).

37 The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law (*NEB Act*, s. 12(2); *COGOA*, s. 5.31(2)). No provision in

either statute suggests an intention to withhold from the NEB the power to decide the adequacy of consultation. And, in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (S.C.C.), this Court concluded that NEB decisions must conform to s. 35(1) of the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty to consult has been fulfilled.

38 We note that the majority at the Federal Court of Appeal in *Chippewas of the Thames First Nation* considered that this issue was not properly before the NEB. It distinguished*Carrier Sekani Tribal Council* on the basis that the Crown was not a party to the NEB hearing in *Chippewas of the Thames First Nation*, while the Crown (in the form of B.C. Hydro, a Crown corporation) was a party in the utilities commission proceedings in *Carrier Sekani Tribal Council*. Based on the authority of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500 (F.C.A.), the majority of the Federal Court of Appeal in *Chippewas of the Thames First Nation* reasoned that the NEB is not required to evaluate whether the Crown's duty to consult had been triggered (or whether it was satisfied) before granting a resource project authorization, except where the Crown is a party before the NEB.

39 The difficulty with this view, however, is that — as we have explained — action taken by the NEB in furtherance of its powers under s. 5(1)(b) of *COGOA* to make final decisions is *itself* Crown conduct which triggers the duty to consult. Nor, respectfully, can we agree with the majority of the Federal Court of Appeal in *Chippewas of the Thames First Nation* that an NEB decision will comply with s. 35(1) of the *Constitution Act, 1982* so long as the NEB ensures the proponents engage in a "dialogue" with potentially affected Indigenous groups (para. 62). If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval (*Haida Nation*, at para. 67). Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under *COGOA* remains unfulfilled, the NEB must withhold project approval. And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 (S.C.C.), at para. 78).

40 Some commentators have suggested that the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights and assess the Crown's duty to consult (see R. Freedman and S. Hansen, "Aboriginal Rights vs. The Public Interest", prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online), at pp. 4 and 14). We do not, however, see the public interest and the duty to consult as operating in conflict. As this Court explained in *Carrier Sekani Tribal Council*, the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public

interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*ibid.*).

41 This leaves the question of what a regulatory agency must do where the adequacy of Crown consultation is raised before it. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida Nation*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida Nation*, at para. 44). Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation" (*Kainaiwa/Blood Tribe v. Alberta*, **2017** ABQB 107 (Alta. Q.B.), at para. 117 (CanLII)). Written reasons also promote better decision making (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 39).

42 This does not mean, however, that the NEB is always required to review the adequacy of Crown consultation by applying a formulaic "*Haida* analysis", as the appellants suggest. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case. But where deep consultation is required and the affected Indigenous peoples have made their concerns known, the honour of the Crown will usually oblige the NEB, where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns.

E. Was the Consultation Adequate in This Case?

43 The Crown acknowledges that deep consultation was required in this case, and we agree. As this Court explained in *Haida Nation*, deep consultation is required "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" (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being (para. 2). Jerry Natanine, the former mayor of **Clyde River**, explained that hunting marine mammals "provides us with nutritious food; enables us to take part in practices we have maintained for generations; and enables us to maintain close relationships with each other through the sharing of what we call 'country food'" (A.R., vol. II, at p. 197). The importance of these rights was also recently recognized by the Nunavut Court of Justice:

> The Inuit right which is of concern in this matter is the right to harvest marine mammals. Many Inuit in Nunavut rely on country food for the majority of their diet. Food costs are very high and many would be unable to purchase food to replace country food if country food were unavailable. Country food is recognized as being of higher nutritional value than purchased food. But the inability to harvest marine mammals would impact more than ... just the diet of Inuit. The cultural tradition of sharing country food with others in the community would be lost. The opportunity to make traditional clothing would be impacted. The opportunity to participate in the hunt, an activity which is fundamental to being Inuk, would be lost. The Inuit right which is at stake is of high significance. This suggests a significant level of consultation and accommodation is required.
>
> (*Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263 (Nun. C.J.), at para. 25)

44 The risks posed by the proposed testing to these treaty rights were also high. The NEB's environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum.

45 Bearing this in mind, the consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. No consideration was given in the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.

46 Furthermore, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. The significance of the process was not adequately explained to them.

47 Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida Nation*, at para. 44). Despite the NEB's broad powers under *COGOA* to afford those advantages, limited opportunities for participation and consultation were made available to the appellants. Unlike many NEB proceedings, including

the proceedings in *Chippewas of the Thames First Nation*, there were no oral hearings. Although the appellants submitted scientific evidence to the NEB, this was done without participant funding. Again, this stands in contrast to *Chippewas of the Thames First Nation*, where the consultation process was far more robust. In that case, the NEB held oral hearings, the appellants received funding to participate in the hearings, and they had the opportunity to present evidence and a final argument. While these procedural protections are characteristic of an adversarial process, they may be required for meaningful consultation (*Haida Nation*, at para. 41) and do not transform its underlying objective: fostering reconciliation by promoting an ongoing relationship (*Carrier Sekani Tribal Council*, at para. 38).

48 The consultation in this case also stands in contrast to *Taku **River** Tlingit First Nation* where, despite its entitlement to consultation falling only at the midrange of the spectrum (para. 32), the Taku **River** Tlingit First Nation, with financial assistance (para. 37), fully participated in the assessment process as a member of the project committee, which was "the primary engine driving the assessment process" (paras. 3, 8 and 40).

49 While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. Although the appellants had the opportunity to question the proponents about the project during the NEB meetings in the spring of 2013, the proponents were unable to answer many questions, including basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the NEB. This document was posted on the NEB website and delivered to the **hamlet** offices in Pond Inlet, **Clyde** **River**, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of **Clyde** **River** deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. "'[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). No mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations — could possibly have emerged from what occurred here.

50 The fruits of the Inuit's limited participation in the assessment process here are plain in considering the accommodations recorded by the NEB's environmental assessment report. It noted changes made to the project as a result of consultation, such as a commitment to ongoing consultation, the placement of community liaison officers in affected communities, and the design of an Inuit Qaujimajatuqangit (Inuit traditional knowledge) study. The proponents also committed to installing passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals.

51 These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it is a requirement of the Statement of Canadian Practice With Respect to the Mitigation of Seismic Sound in the Marine Environment which provides "minimum standards, which will apply in all non-ice covered marine waters in Canada" (A.R., vol. I, at p. 40), and which would be included in virtually all seismic testing projects. None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights*, rather than as an afterthought to the assessment of environmental concerns.

52 The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.

IV. Conclusion

53 For the foregoing reasons, we conclude that the Crown breached its duty to consult the appellants in respect of the proposed testing. We would allow the appeal with costs to the appellants, and quash the NEB's authorization.

Appeal allowed.
Pourvoi accueilli.

Footnotes

1 This assessment was initially required under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Since its repeal and replacement by the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the NEB has continued to conduct environmental assessments in relation to proposed projects, taking the position that it is still empowered to do so under *COGOA*.

2 At the time, the Department of Aboriginal Affairs and Northern Development was preparing a strategic environmental assessment — specifically, the "Eastern Arctic Strategic Environmental Assessment" — for Baffin Bay and Davis Strait, meant to examine "all aspects of future oil and gas development." Once complete, it would "inform policy decisions around if, when, and where oil and gas companies may be invited to bid on parcels of land for exploration drilling rights in Baffin Bay/Davis Strait" (Letter to Cathy Towtongie et al. from the Honourable Bernard Valcourt, A.R., vol. IV, at pp. 966-67).

3 *National Energy Board Act*, S.C. 1959, c. 46.

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2017 SCC 41, 2017 CSC 41
Supreme Court of Canada

Chippewas of the **Thames** First Nation v. **Enbridge** Pipelines Inc.

2017 CarswellNat 3468, 2017 CarswellNat 3469, 2017 SCC 41, 2017 CSC 41, [2017] 1 S.C.R. 1099, [2017] 3 C.N.L.R. 45, [2017] S.C.J. No. 41, 10 C.E.L.R. (4th) 55, 22 Admin. L.R. (6th) 234, 280 A.C.W.S. (3d) 676, 411 D.L.R. (4th) 596

Chippewas of the Thames First Nation (Appellant) and Enbridge Pipelines Inc., National Energy Board and Attorney General of Canada (Respondents) and Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Wildlife Management Board, Suncor Energy Marketing Inc., Mohawk Council of Kahnawà:ke, Mississaugas of the New Credit First Nation and Chiefs of Ontario (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 30, 2016
Judgment: July 26, 2017
Docket: 36776

Proceedings: affirming *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* (2015), [2016] 1 C.N.L.R. 18, 2015 CarswellNat 10332, 2015 CAF 222, 479 N.R. 220, 390 D.L.R. (4th) 735, [2016] 3 F.C.R. 96, 2015 FCA 222, 2015 CarswellNat 5511, Donald J. Rennie J.A., Ryer J.A., Webb J.A. (F.C.A.)

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Subject: Civil Practice and Procedure; Constitutional; Natural Resources; Property; Public

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Generally — referred to

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s. 3 — considered

s. 22(1) — considered

s. 30(1) — considered

s. 52 — considered

s. 52(1) — considered

s. 52(2) — considered

s. 54(1) — considered

s. 58 — considered

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Oil Pipeline Uniform Accounting Regulations, C.R.C. 1978, c. 1058

Generally — referred to

APPEAL by First Nation from judgment reported at ***Chippewas*** *of the* ***Thames*** *First Nation v.* ***Enbridge*** *Pipelines Inc.* (2015), 2015 FCA 222, 2015 CarswellNat 5511, 390 D.L.R. (4th) 735, 479 N.R. 220, 2015 CAF 222, 2015 CarswellNat 10332, [2016] 3 F.C.R. 96, [2016] 1 C.N.L.R. 18 (F.C.A.), dismissing its appeal from decision by National Energy Board approving application for modification of pipeline.

POURVOI formé par un groupe autochtone à l'encontre d'une décision publiée à ***Chippewas*** *of the* ***Thames*** *First Nation v.* ***Enbridge*** *Pipelines Inc.* (2015), 2015 FCA 222, 2015 CarswellNat 5511, 390 D.L.R. (4th) 735, 479 N.R. 220, 2015 CAF 222, 2015 CarswellNat 10332, [2016] 3 F.C.R. 96, [2016] 1 C.N.L.R. 18 (F.C.A.), ayant rejeté l'appel qu'il a interjeté à l'encontre de la décision de l'Office national de l'énergie d'approuver une demande de modification d'une canalisation.

Karakatsanis, Brown JJ. **(McLachlin C.J.C. and Abella, Moldaver, Wagner, Gascon, Côté and Rowe JJ. concurring):**

I. Introduction

1 In this appeal and in its companion, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (S.C.C.), this Court must consider the Crown's duty to consult with Indigenous peoples prior to an independent regulatory agency's approval of a project that could impact their rights. As we explain in the companion case, the Crown may rely on regulatory processes to partially or completely fulfill its duty to consult.

2 These cases demonstrate that the duty to consult has meaningful content, but that it is limited in scope. The duty to consult is rooted in the need to avoid the impairment of asserted or recognized rights that flows from the implementation of the specific project at issue; it is not

about resolving broader claims that transcend the scope of the proposed project. That said, the duty to consult requires an informed and meaningful opportunity for dialogue with Indigenous groups whose rights may be impacted.

3 The **Chippewas** of the **Thames** First Nation has historically resided near the **Thames** River in southwestern Ontario, where its members carry out traditional activities that are central to their identity and way of life. **Enbridge** Pipelines Inc.'s Line 9 pipeline crosses their traditional territory.

4 In November 2012, **Enbridge** applied to the National Energy Board (NEB) for approval of a modification of Line 9 that would reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude. These changes would increase the assessed risk of spills along the pipeline. The **Chippewas** of the **Thames** requested Crown consultation before the NEB's approval, but the Crown signalled that it was relying on the NEB's public hearing process to address its duty to consult.

5 The NEB approved **Enbridge's** proposed modification. The **Chippewas** of the **Thames** then brought an appeal from that decision to the Federal Court of Appeal, arguing that the NEB had no jurisdiction to approve the Line 9 modification in the absence of Crown consultation. The majority of the Federal Court of Appeal dismissed the appeal, and the **Chippewas** of the **Thames** brought an appeal from that decision to this Court. For the reasons set out below, we would dismiss the appeal. The Crown is entitled to rely on the NEB's process to fulfill the duty to consult. In this case, in light of the scope of the project and the consultation process afforded to the **Chippewas** of the **Thames** by the NEB, the Crown's duty to consult and accommodate was fulfilled.

II. Background

A. The Chippewas of the Thames First Nation

6 The **Chippewas** of the **Thames** are the descendants of a part of the Anishinaabe Nation that lived along the shore of the **Thames** River in southwestern Ontario prior to the arrival of European settlers in the area at the beginning of the 18th century. Their ancestors' lifestyle involved hunting, fishing, trapping, gathering, growing corn and squash, performing ceremonies at sacred sites, and collecting animals, plants, minerals, maple sugar and oil in their traditional territory.

7 The **Chippewas** of the **Thames** assert that they have a treaty right guaranteeing their exclusive use and enjoyment of their reserve lands. They also assert Aboriginal harvesting rights as well as the right to access and preserve sacred sites in their traditional territory. Finally, they claim Aboriginal title to the bed of the **Thames** River, its airspace, and other lands throughout

their traditional territory.

B. Legislative Scheme

8 The NEB is a federal administrative tribunal and regulatory agency established under s. 3 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*), whose functions include the approval and regulation of pipeline projects. The *NEB Act* prohibits the operation of a pipeline unless a certificate of public convenience and necessity has been issued for the project and the proponent has been given leave under Part III to open the pipeline (s. 30(1)).

9 The NEB occupies an advisory role with respect to the issuance of a certificate of public convenience and necessity. Under ss. 52(1) and 52(2), it can submit a report to the Minister of Natural Resources setting out: (i) its recommendation on whether a certificate should be issued based on its consideration of certain criteria; and (ii) the terms and conditions that it considers necessary or desirable in the public interest to be attached to the project should the certificate be issued. The Governor in Council may then direct the NEB either to issue the certificate or to dismiss the application (s. 54(1)).

10 Under s. 58 of the *NEB Act*, however, the NEB may make orders, on terms and conditions that it considers proper, exempting smaller pipeline projects or project modifications from various requirements that would otherwise apply under Part III, including the requirement for the issuance of a certificate of public convenience and necessity. Consequently, as in this case, smaller projects and amendments to existing facilities are commonly sought under s. 58. The NEB is the final decision maker on s. 58 exemptions.

C. The Line 9 Pipeline and the Project

11 The Line 9 pipeline, connecting Sarnia to Montreal, opened in 1976 with the purpose of transporting crude oil from western Canada to eastern refineries. Line 9 cuts through the **Chippewas** of the **Thames**' traditional territory and crosses the **Thames** River. It was approved and built without any consultation of the **Chippewas** of the **Thames**.

12 In 1999, following NEB approval, Line 9 was reversed to carry oil westward. In July 2012, the NEB approved an application from **Enbridge**, the current operator of Line 9, for the re-reversal (back to eastward flow) of the westernmost segment of Line 9, between Sarnia and North Westover, called "Line 9A".

13 In November 2012, **Enbridge** filed an application under Part III of the *NEB Act* for a modification to Line 9. The project would involve reversing the flow (to eastward) in the remaining 639-kilometre segment of Line 9, called "Line 9B", between North Westover and

Montreal; increasing the annual capacity of Line 9 from 240,000 to 300,000 barrels per day; and allowing for the transportation of heavy crude. While the project involved a significant increase of Line 9's throughput, virtually all of the required construction would take place on previously disturbed lands owned by **Enbridge** and on **Enbridge's** right of way.

14 **Enbridge** also sought exemptions under s. 58 from various filing requirements which would otherwise apply under Part III of the *NEB Act*, the *Oil Pipeline Uniform Accounting Regulations*, C.R.C., c. 1058, and the NEB's Filing Manual. The most significant requested exemption was to dispense with the requirement for a certificate of public convenience and necessity, which as explained above is subject to the Governor in Council's final approval under s. 52 of the *NEB Act*. Without the need for a Governor in Council-approved certificate, the NEB would have the final word on the project's approval.

15 In December 2012, the NEB, having determined that **Enbridge's** application was complete enough to proceed to assessment, issued a hearing order, which established the process for the NEB's consideration of the project. This process culminated in a public hearing, the purpose of which was for the NEB to gather and review information that was relevant to the assessment of the project. Persons or organizations interested in the outcome of the project, or in possession of relevant information or expertise, could apply to participate in the hearing. The NEB accepted the participation of 60 interveners and 111 commenters.

D. Indigenous Consultation on the Project

16 In February 2013, after **Enbridge** filed its application and several months before the hearings, the NEB issued notice to 19 potentially affected Indigenous groups, including the **Chippewas** of the **Thames**, informing them of the project, the NEB's role, and the NEB's upcoming hearing process. Between April and July 2013, it also held information meetings in three communities upon their request.

17 In September 2013, prior to the NEB hearing, the Chiefs of the **Chippewas** of the **Thames** and the Aamjiwnaang First Nation wrote a joint letter to the Prime Minister, the Minister of Natural Resources, and the Minister of Aboriginal Affairs and Northern Development. The letter described the asserted Aboriginal and treaty rights of both groups and the project's potential impact on them. The Chiefs noted that no Crown consultation with any affected Indigenous groups had taken place with respect to the project's approval, and called on the Ministers to initiate Crown consultation. No response arrived until after the conclusion of the NEB hearing.

18 In the meantime, the NEB's process unfolded. The **Chippewas** of the **Thames** were granted funding to participate as an intervener, and they filed evidence and delivered oral argument at the hearing delineating their concerns that the project would increase the risk of

pipeline ruptures and spills along Line 9, which could adversely impact their use of the land and the **Thames** River for traditional purposes.

19 In January 2014, after the NEB's hearing process had concluded, the Minister of Natural Resources responded to the September 2013 letter. The response acknowledged the Government of Canada's commitment to fulfilling its duty to consult where it exists, and stated that the "[NEB's] regulatory review process is where the Government's jurisdiction on a pipeline project is addressed. The Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate" (A.R., vol. VI, at p. 47). In sum, the Minister indicated that he would be relying solely on the NEB's process to fulfill the Crown's duty to consult Indigenous peoples on the project.

III. The Decisions Below

A. The NEB's Decision, 2014 LNCNEB 4 (QL)

20 The NEB approved the project, finding that it was in the public interest and consistent with the requirements in the *NEB Act*. It explained that the approval "enables **Enbridge** to react to market forces and provide benefits to Canadians, while at the same time implementing the Project in a safe and environmentally sensitive manner" (para. 20). The NEB imposed conditions on the project related to pipeline integrity, safety, environmental protection, and the impact of the project on Indigenous communities.

21 In its discussion of Aboriginal Matters (Section 7 of the NEB's reasons), the NEB explained that it "interprets its responsibilities, including those outlined in section 58 of the NEB Act, in a manner consistent with the *Constitution Act, 1982*, including section 35" (para. 293). It noted that proponents are required to make reasonable efforts to consult with Indigenous groups, and that the NEB hearing process is part of the consultative process. In deciding whether a project is in the public interest, the NEB "considers all of the benefits and burdens associated with the project, balancing the interests and concerns of Aboriginal groups with other interests and factors" (para. 301).

22 The NEB noted that, in this case, the scope of the project was limited. It was not an assessment of the current operating Line 9, but rather of the modifications required to increase the capacity of Line 9, transport heavy crude on Line 9, and reverse the flow of Line 9B. **Enbridge** would not need to acquire any new permanent land rights for the project. Most work would take place within existing **Enbridge** facilities and its existing right of way. Given the limited scope of the project, the NEB was satisfied that potentially affected Indigenous groups had received adequate information about the project. It was also satisfied that potentially affected Indigenous groups had the opportunity to share their views about the project through the NEB hearing process and through discussions with **Enbridge**. The NEB expected that

Enbridge would continue consultations after the project's approval.

23 While **Enbridge** acknowledged that the project would increase the assessed risk for some parts of Line 9, the NEB found that "any potential Project impacts on the rights and interests of Aboriginal groups are likely to be minimal and will be appropriately mitigated" (para. 343) given the project's limited scope, the commitments made by **Enbridge**, and the conditions imposed by the NEB. While the project would occur on lands used by Indigenous groups for traditional purposes, those lands are within **Enbridge's** existing right of way. The project was therefore unlikely to impact traditional land use. The NEB acknowledged that a spill on Line 9 could impact traditional land use, but it was satisfied that "**Enbridge** will continue to safely operate Line 9, protect the environment, and maintain comprehensive emergency response plans" (*ibid.*).

24 The NEB imposed three conditions on the project related to Indigenous communities. Condition 6 required **Enbridge** to file an Environmental Protection Plan for the project including an Archaeological Resource Contingency plan. Condition 24 required **Enbridge** to prepare an Ongoing Engagement Report providing details on its discussions with Indigenous groups going forward. Condition 26 "directs **Enbridge** to include Aboriginal groups in **Enbridge's** continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness and response" (*ibid.*).

B. Appeal to the Federal Court of Appeal, 2015 FCA 222, [2016] 3 F.C.R. 96 (F.C.A.)

25 The **Chippewas** of the **Thames** brought an appeal from the NEB's decision to the Federal Court of Appeal pursuant to s. 22(1) of the *NEB Act*. They argued that the decision should be quashed, as the NEB was "without jurisdiction to issue exemptions and authorizations to [**Enbridge**] prior to the Crown fulfilling its duty to consult and accommodate" (para. 2).

26 The majority of the Federal Court of Appeal (Ryer and Webb JJ.A.) dismissed the appeal. It concluded that the NEB was not required to determine, as a condition of undertaking its mandate with respect to **Enbridge's** application, whether the Crown had a duty to consult under *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 512 (S.C.C.), and, if so, whether the Crown had fulfilled this duty.

27 The majority also concluded that the NEB did not have a duty to consult the **Chippewas** of the **Thames**. It noted that while the NEB is required to carry out its mandate in a manner that respects s. 35(1) of the *Constitution Act, 1982*, the NEB had adhered to this obligation by requiring **Enbridge** to consult extensively with the **Chippewas** of the **Thames** and other First Nations.

28 Rennie J.A. dissented. He would have allowed the appeal. In his view, the NEB was

required to determine whether the duty to consult had been triggered and fulfilled. Given that the NEB is the final decision maker for s. 58 applications, it must have the power and duty to assess whether consultation is adequate, and to refuse a s. 58 application where consultation is inadequate.

IV. Analysis

A. Crown Conduct Triggering the Duty to Consult

29 In the companion case to this appeal, *Clyde River (Hamlet)*, we outline the principles which apply when an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights. In these circumstances, the NEB's decision would itself be Crown conduct that implicates the Crown's duty to consult (*Clyde River (Hamlet)*, at para. 29). A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), at para. 31; *Clyde River (Hamlet)*, at para. 25).

30 We do not agree with the suggestion that because the Crown, in the form of a representative of the relevant federal department, was not a party before the NEB, there may have been no Crown conduct triggering the duty to consult (see C.A. reasons, at paras. 57 and 69-70).

31 As the respondents conceded before this Court, the NEB's contemplated decision on the project's approval would amount to Crown conduct. When the NEB grants an exemption under s. 58 of the *NEB Act* from the requirement for a certificate of public convenience and necessity, which otherwise would be subject to Governor in Council approval, the NEB effectively becomes the final decision maker on the entire application. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving **Enbridge's** application. Because the authorized work — the increase in flow capacity and change to heavy crude — could potentially adversely affect the **Chippewas** of the **Thames**' asserted Aboriginal and treaty rights, the Crown had an obligation to consult with respect to **Enbridge's** project application.

B. Crown Consultation Can Be Conducted Through a Regulatory Process

32 The **Chippewas** of the **Thames** argue that meaningful Crown consultation cannot be carried out wholly through a regulatory process. We disagree. As we conclude in *Clyde River (Hamlet)*, the Crown may rely on steps taken by an administrative body to fulfill its duty to

consult (para. 30). The Crown may rely on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Carrier Sekani Tribal Council*, at para. 60; *Clyde River (Hamlet)*, at para. 30). However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval. Otherwise, the regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed on judicial review or appeal.

33 The majority of the Federal Court of Appeal in this case expressed concern that a tribunal like the NEB might be charged with both carrying out consultation on behalf of the Crown and then adjudicating on the adequacy of these consultations (para. 66). A similar concern was expressed in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (S.C.C.), where, in a pre-*Haida Nation* decision, the Court held that quasi-judicial tribunals like the NEB do not owe Indigenous peoples a heightened degree of procedural fairness. The Court reasoned that imposition of such an obligation would risk compromising the independence of quasi-judicial bodies like the NEB (pp. 183-84).

34 In our view, these concerns are answered by recalling that while it is the *Crown* that owes a constitutional obligation to consult with potentially affected Indigenous peoples, the NEB is tasked with making legal decisions that comply with the Constitution. When the NEB is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution. Regulatory agencies often carry out different, overlapping functions without giving rise to a reasonable apprehension of bias. Indeed this may be necessary for agencies to operate effectively and according to their intended roles (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (S.C.C.), at para. 41). Furthermore, the Court contemplated this very possibility in *Carrier Sekani Tribal Council*, when it reasoned that tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation (para. 58).

C. The Role of a Regulatory Tribunal When the Crown Is Not a Party

35 At the Federal Court of Appeal, the majority and dissenting justices disagreed over whether the NEB was empowered to decide whether the Crown's consultation was adequate in the absence of the Crown participating in the NEB process as a party. The disagreement stems from differing interpretations of*Carrier Sekani Tribal Council* and whether it overruled *Standing Buffalo Dakota First Nation v. **Enbridge** Pipelines Inc.*, 2009 FCA 308, [2010] 4

F.C.R. 500 (F.C.A.). In *Standing Buffalo Dakota First Nation*, the Federal Court of Appeal held that the NEB was not required to consider whether the Crown's duty to consult had been discharged before approving a s. 52 pipeline application when the Crown did not formally participate in the NEB's hearing process. The majority in this case held that the principle from *Standing Buffalo Dakota First Nation* applied here. Because the Crown (meaning, presumably, a relevant federal ministry or department) had not participated in the NEB's hearing process, the majority reasoned that the NEB was under no obligation to consider whether the Crown's duty to consult had been discharged before it approved **Enbridge's** s. 58 application (para. 59). In dissent, Rennie J.A. reasoned that *Standing Buffalo Dakota First Nation* had been overtaken by this Court's decision in *Carrier Sekani Tribal Council*. Even in the absence of the Crown's participation as a party before the NEB, he held that the NEB was *required* to consider the Crown's duty to consult before approving **Enbridge's** application (para. 112).

36 We agree with Rennie J.A. that a regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 (S.C.C.), at para. 78).

37 As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River (Hamlet)*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River (Hamlet)*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.), at para. 77).

D. Scope of the Duty to Consult

38 The degree of consultation required depends on the strength of the Aboriginal claim, and the seriousness of the potential impact on the right (*Haida Nation*, at paras. 39 and 43-45).

39 Relying on *Carrier Sekani Tribal Council*, the Attorney General of Canada asserts that the duty to consult in this case "is limited to the [p]roject" and "does not arise in relation to claims for past infringement such as the construction of a pipeline under the **Thames** River in 1976" (R.F., vol. I, at para. 80).

40 While the **Chippewas** of the **Thames** identify new impacts associated with the s. 58

application that trigger the duty to consult and delimit its scope [AF, at para. 62], they also note that "[t]he potential adverse impacts to [the asserted] Aboriginal rights and title resulting from approval of **Enbridge's** application for modifications to Line 9 are cumulative and serious and could even be catastrophic in the event of a pipeline spill" (A.F., at para. 57). Similarly, the Mississaugas of the New Credit First Nation, an intervener, argued in the hearing that, because s. 58 is frequently applied to discrete pipeline expansion and redevelopment projects, there are no high-level strategic discussions or consultations about the broader impact of pipelines on the First Nations in southern Ontario.

41 The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances. In *Carrier Sekani Tribal Council*, this Court explained that the Crown is required to consult on "adverse impacts flowing from the specific Crown proposal at issue — not [on] 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" (*Carrier Sekani Tribal Council*, at para. 53 (emphasis in original)). *Carrier Sekani Tribal Council* also clarified that "[a]n order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights" (para. 54).

42 That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context (J. Woodward, *Native Law* (loose-leaf), vol. 1, at pp. 5-107 to 5-108). Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234 (B.C. C.A.), at para. 117). This is not "to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the project (*West Moberly First Nations*, at para. 119).

43 Neither the Federal Court of Appeal nor the NEB discussed the degree of consultation required. That said, and as we will explain below, even taking the strength of the **Chippewas** of the **Thames**' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate.

E. Was There Adequate Notice That the Crown Was Relying on the NEB's Process in This Case?

44 As indicated in the companion case *Clyde River (Hamlet)* , the Crown may rely on a regulatory body such as the NEB to fulfill the duty to consult. However, where the Crown intends to do so, it should be made clear to the affected Indigenous group that the Crown is relying on the regulatory body's processes to fulfill its duty (*Clyde River (Hamlet)*, at para. 23). The Crown's constitutional obligation requires a meaningful consultation process that is carried

out in good faith. Obviously, notice helps ensure the appropriate participation of Indigenous groups, because it makes clear to them that consultation is being carried out through the regulatory body's processes (see *ibid.*).

45 In this case, the **Chippewas** of the **Thames** say they did not receive explicit notice from the Crown that it intended to rely on the NEB's process to satisfy the duty. In September 2013, the **Chippewas** of the **Thames** wrote to the Prime Minister, the Minister of Natural Resources and the Minister of Aboriginal Affairs and Northern Development requesting a formal Crown consultation process in relation to the project. It was not until January 2014, after the NEB's hearing process was complete, that the Minister of Natural Resources responded to the **Chippewas** of the **Thames** on behalf of the Crown advising them that it relied on the NEB's process. At the hearing before this Court, the **Chippewas** of the **Thames** conceded that the Crown may have been entitled to rely on the NEB to carry out the duty had they received the Minister's letter indicating the Crown's reliance prior to the NEB hearing (transcript, at pp. 34-35). However, having not received advance notice of the Crown's intention to do so, the **Chippewas** of the **Thames** maintain that consultation could not properly be carried out by the NEB.

46 In February 2013, the NEB contacted the **Chippewas** of the **Thames** and 18 other Indigenous groups to inform them of the project and of the NEB's role in relation to its approval. The Indigenous groups were given early notice of the hearing and were invited to participate in the NEB process. The **Chippewas** of the **Thames** accepted the invitation and appeared before the NEB as an intervener. In this role, they were aware that the NEB was the final decision maker under s. 58 of the *NEB Act*. Moreover, as is evidenced from their letter of September 2013, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. In our view, the circumstances of this case made it sufficiently clear to the **Chippewas** of the **Thames** that the NEB process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice, its consultation obligation was met.

F. Was the Crown's Consultation Obligation Fulfilled?

47 When deep consultation is required, the duty to consult may be satisfied if there is "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" (*Haida Nation*, at para. 44). As well, this Court has recognized that the Crown may wish to "adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers" (*ibid.*). This list is neither exhaustive nor mandatory. As we indicated above, neither the NEB nor the Federal Court of Appeal assessed the depth of consultation required in this case. However, the Attorney General of Canada submitted before this Court that the NEB's statutory powers were capable of satisfying

the Crown's constitutional obligations in this case, accepting the rights as asserted by the **Chippewas** of the **Thames** and the potential adverse impact of a spill. With this, we agree.

48 As acknowledged in its reasons, the NEB, as a quasi-judicial decision maker, is required to carry out its responsibilities under s. 58 of the *NEB Act* in a manner consistent with s. 35 of the *Constitution Act, 1982*. In our view, this requires it to take the rights and interests of Indigenous groups into consideration before it makes a final decision that could impact them. Given the NEB's expertise in the supervision and approval of federally regulated pipeline projects, the NEB is particularly well positioned to assess the risks posed by such projects to Indigenous groups. Moreover, the NEB has broad jurisdiction to impose conditions on proponents to mitigate those risks. Additionally, its ongoing regulatory role in the enforcement of safety measures permits it to oversee long-term compliance with such conditions. Therefore, we conclude that the NEB's statutory powers under s. 58 are capable of satisfying the Crown's duty to consult in this case.

49 However, a finding that the NEB's statutory authority allowed for it to satisfy the duty to consult is not determinative of whether the Crown's constitutional obligations were upheld in this case. The **Chippewas** of the **Thames** maintain that the process carried out by the NEB was not an adequate substitute for Crown consultation. In particular, the **Chippewas** of the **Thames** argue that the NEB's regulatory process failed to engage affected Indigenous groups in a "meaningful way in order for adverse impacts to be understood and minimized" (A.F., at para. 110). They allege that the NEB's process did not "apprehend or address the seriousness" of the potential infringement of their treaty rights and title, nor did it "afford a genuine opportunity for accommodation by the Crown" (A.F., at para. 113). By minimizing the rights of the affected Indigenous groups and relying upon the proponent to mitigate potential impacts, they allege the process undertaken by the NEB allowed for nothing more than "blowing off steam" (*ibid.*).

50 **Enbridge**, on the other hand, argues not only that the NEB was capable of satisfying the Crown's duty to consult but that, in fact, it did so here. In support of its position, **Enbridge** points to the **Chippewas** of the **Thames**' early notice of, and participation in, the NEB's formal hearing process as well as the NEB's provision of written reasons. Moreover, **Enbridge** submits that far from failing to afford a genuine opportunity for accommodation by the Crown, the NEB's process provided "effective accommodation" through the imposition of conditions on **Enbridge** to mitigate the risk and effect of potential spills arising from the project (R.F., at para. 107).

51 In our view, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, we find that the NEB provided the **Chippewas** of the **Thames** with an adequate opportunity to participate in the decision-making process. Second, we find that the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, we agree with **Enbridge** that, in order to mitigate potential risks to the rights of Indigenous groups,

the NEB provided appropriate accommodation through the imposition of conditions on **Enbridge**.

52 First, unlike the Inuit in the companion case of *Clyde River (Hamlet)*, the **Chippewas** of the **Thames** were given a sufficient opportunity to make submissions to the NEB as part of its independent decision-making process (consistent with *Haida Nation*, at para. 44). Here, the NEB held an oral hearing. It provided early notice of the hearing process to affected Indigenous groups and sought their formal participation. As mentioned above, the **Chippewas** of the **Thames** participated as an intervener. The NEB provided the **Chippewas** of the **Thames** with participant funding which allowed them to prepare and tender evidence including an expertly prepared "preliminary" traditional land use study (C.A. reasons, at para. 14). Additionally, as an intervener, the **Chippewas** of the **Thames** were able to pose formal information requests to **Enbridge**, to which they received written responses, and to make closing oral submissions to the NEB.

53 Contrary to the submissions of the **Chippewas** of the **Thames**, we do not find that the NEB minimized or failed to apprehend the importance of their asserted Aboriginal and treaty rights. Before the NEB, the **Chippewas** of the **Thames** asserted rights that had the potential to be impacted by the project: (a) Aboriginal harvesting and hunting rights; (b) the right to access and preserve sacred sites; (c) Aboriginal title to the bed of the **Thames** River and its related airspace or, in the alternative, an Aboriginal right to use the water, resources and airspace in the bed of the **Thames** River; and (d) the treaty right to the exclusive use of their reserve lands. In its written reasons, the NEB expressly recognized these rights. Moreover, in light of the rights asserted, the NEB went on to consider whether affected Indigenous groups had received adequate information regarding the project and a proper opportunity to express their concerns to **Enbridge**. It noted that the project was to occur within **Enbridge's** existing right of way on previously disturbed land. No additional Crown land was required. Given the scope of the project and its location, the NEB was satisfied that all Indigenous groups had been adequately consulted.

54 Second, the NEB considered the potential for negative impacts on the rights and interests of the **Chippewas** of the **Thames**. It identified potential consequences that could arise from either the construction required for the completion of the project or the increased risk of spill brought about by the continued operation of Line 9.

55 The NEB found that any potential negative impacts on the rights and interests of the **Chippewas** of the **Thames** from the modification of Line 9 were minimal and could be reasonably mitigated. The NEB found that it was unlikely that the completion of the project would have any impact on the traditional land use rights of Indigenous groups. Given the location of the project and its limited scope, as well as the conditions that the NEB imposed on **Enbridge**, the NEB was satisfied that the risk of negative impact through the completion of the project was negligible.

56 Similarly, the NEB assessed the increased risk of a spill or leak from Line 9 as a result of the project. It recognized the potential negative impacts that a spill could have on traditional land use, but found that the risk was low and could be adequately mitigated. Given **Enbridge's** commitment to safety and the conditions imposed upon it by the NEB, the NEB was confident that Line 9 would be operated in a safe manner throughout the term of the project. The risk to the rights asserted by the **Chippewas** of the **Thames** resulting from a potential spill or leak was therefore minimal.

57 Third, we do not agree with the **Chippewas** of the **Thames** that the NEB's process failed to provide an opportunity for adequate accommodation. Having enumerated the rights asserted by the **Chippewas** of the **Thames** and other Indigenous groups, the adequacy of information provided to the Indigenous groups from **Enbridge** in light of those rights, and the risks to those rights posed by the construction and ongoing operation of Line 9, the NEB imposed a number of accommodation measures that were designed to minimize risks and respond directly to the concerns posed by affected Indigenous groups. To facilitate ongoing communication between **Enbridge** and affected Indigenous groups regarding the project, the NEB imposed Condition 24. This accommodation measure required **Enbridge** to continue to consult with Indigenous groups and produce Ongoing Engagement Reports which were to be provided to the NEB. Similarly, Condition 29 required **Enbridge** to file a plan for continued engagement with persons and groups during the operation of Line 9. Therefore, we find that the NEB carried out a meaningful process of consultation including the imposition of appropriate accommodation measures where necessary.

58 Nonetheless, the **Chippewas** of the **Thames** argue that any putative consultation that occurred in this case was inadequate as the NEB "focused on balancing multiple interests" which resulted in the **Chippewas** of the **Thames**' "Aboriginal and treaty rights [being] weighed by the Board against a number of economic and public interest factors" (A.F., at paras. 95 and 104). This, the **Chippewas** of the **Thames** assert, is an inadequate means by which to assess Aboriginal and treaty rights that are constitutionally guaranteed by s. 35 of the *Constitution Act, 1982*.

59 In *Carrier Sekani Tribal Council*, this Court recognized that "[t]he constitutional dimension of the duty to consult gives rise to a special public interest" which surpasses economic concerns (para. 70). A decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met (*Clyde River (Hamlet)*, at para. 40; *Carrier Sekani Tribal Council*, at para. 70). Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions (*Haida Nation*, at para. 48). Rather, proper accommodation "stress[es] the need to balance competing societal interests with Aboriginal and treaty rights" (*Haida Nation*, at para. 50).

60 Here, the NEB recognized that the impact of the project on the rights and interests of the **Chippewas** of the **Thames** was likely to be minimal. Nonetheless, it imposed conditions on **Enbridge** to accommodate the interests of the **Chippewas** of the **Thames** and to ensure ongoing consultation between the proponent and Indigenous groups. The **Chippewas** of the **Thames** are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process (*Haida Nation*, at para. 50).

G. Were the NEB's Reasons Sufficient?

61 Finally, in the hearing before us, the **Chippewas** of the **Thames** raised the issue of the adequacy of the NEB's reasons regarding consultation with Indigenous groups. The **Chippewas** of the **Thames** asserted that the NEB's process could not have constituted consultation in part because of the NEB's failure to engage in a *Haida*-style analysis. In particular, the NEB did not identify the strength of the asserted Aboriginal and treaty rights, nor did it identify the depth of consultation required in relation to each Indigenous group. As a consequence, the **Chippewas** of the **Thames** submit that the NEB could not have fulfilled the Crown's duty to consult.

62 In *Haida Nation*, this Court found that where deep consultation is required, written reasons will often be necessary to permit Indigenous groups to determine whether their concerns were adequately considered and addressed (*Haida Nation*, at para. 44). In *Clyde River (Hamlet)*, we note that written reasons foster reconciliation (para. 41). Where Aboriginal and treaty rights are asserted, the provision of reasons denotes respect (*Kainaiwa/Blood Tribe v. Alberta*, 2017 ABQB 107 (Alta. Q.B.), at para. 117 (CanLII)) and encourages proper decision making (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 39).

63 We agree with the **Chippewas** of the **Thames** that this case required the NEB to provide written reasons. Additionally, as we recognized in the companion case *Clyde River (Hamlet)*, where affected Indigenous peoples have squarely raised concerns about Crown consultation with the NEB, the NEB must usually provide written reasons (*Clyde River*, at para. 41). However, this requirement does not necessitate a formulaic "*Haida* analysis" in all circumstances (para. 42). Instead, where deep consultation is required and the issue of Crown consultation is raised with the NEB, the NEB will be obliged to "explain how it considered and addressed" Indigenous concerns (*ibid.*). What is necessary is an indication that the NEB took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate.

64 In our view, the NEB's written reasons are sufficient to satisfy the Crown's obligation. It is notable that, unlike the NEB's reasons in the companion case *Clyde River (Hamlet)*, the discussion of Aboriginal consultation in this case was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous interveners and identified, in writing, the rights and interests at stake. It assessed the risks that

the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.

65 For these reasons, we reject the **Chippewas** of the **Thames**' assertion that the NEB's reasons were insufficient to satisfy the Crown's duty to consult.

V. Conclusion

66 We are of the view that the Crown's duty to consult was met. Accordingly, we would dismiss this appeal with costs to **Enbridge**.

Appeal dismissed.
Pourvoi rejeté.