

## CONSULTATION WITH ABORIGINAL PEOPLES: IMPACTS ON THE PETROLEUM INDUSTRY

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*The duties of consultation and accommodation with Aboriginal peoples affected by resource development were, until 2002, primarily the responsibility of the Crown. The British Columbia Court of Appeal, in two related decisions involving the Haida Nation on the one hand and the Crown and Weyerhaeuser Company Limited on the other, has placed these duties squarely onto the shoulders of industry. Where the Crown fails to discharge its duties of consultation and accommodation, resource tenures such as permits, licenses or leases may be invalid and activity conducted pursuant to the tenures may result in damages awarded against industry in favour of affected Aboriginal peoples. Appeals from both decisions will be heard by the Supreme Court of Canada. In the meantime, the law on industry's duty to consult and to accommodate Aboriginal peoples continues to lack certainty.*

*L'obligation de consultation et d'aménagement avec les peuples autochtones concernés par l'exploitation des ressources relevait, jusqu'en 2002, essentiellement de l'État. La Cour d'appel de la Colombie-Britannique, dans deux décisions connexes concernant la Nation haida d'une part et l'État et Weyerhaeuser Company Limited d'autre part, a remis cette obligation dans les mains de l'industrie. Si l'État ne respecte pas son obligation de consultation et d'aménagement, le mode d'exploitation des ressources en ce qui concerne les permis, les brevets ou les haux, peut devenir nul, et l'activité menée conformément aux modes précisés pourrait entraîner le versement, par l'industrie, de dommages intérêts aux peuples autochtones concernés. La Cour suprême du Canada entendra les appels relativement aux deux décisions. Dans l'intervalle, la loi régissant l'obligation de consultation et d'aménagement de l'industrie à l'égard des peuples autochtones manque toujours de certitude.*

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## I. INTRODUCTION

There is the hugely difficult task of fitting together two very different legal regimes. On the one hand there is the statutory scheme consisting of a highly detailed and sophisticated set of rules, and on the other hand there is the field of aboriginal law which is not yet fully developed and which contemplates a series of rights that stand above and apart from conventional legal arrangements.<sup>1</sup>

Until recently, consultation with Aboriginal peoples on resource projects, and in particular, on energy and petroleum projects that infringe or potentially infringe Aboriginal and treaty rights were viewed as the exclusive domain of the Crown, both federal and provincial. When consultation was required by law on the part of the petroleum industry, it was to fulfill certain statutory requirements involving project development. The two *Haida Nation v. British Columbia (Minister of Forests)*<sup>2</sup> decisions from the British Columbia Court of Appeal recast the scope and nature of consultation and squarely place on industry the potentially onerous duty to consult affected Aboriginal peoples.

<sup>1</sup> *Paul v. British Columbia (Forest Appeal Commission)* (2001), 89 B.C.L.R. (3d) 210 (C.A.) at para. 96, Donald J.A., rev'd (2003), 18 B.C.L.R. (4th) 207 (C.A.).

<sup>2</sup> *Haida Nation v. British Columbia (Minister of Forests)* (2002), 99 B.C.L.R. (3d) 209 (C.A.) [*Haida No. 1*]; *Haida Nation v. British Columbia (Minister of Forests)* (2002), 5 B.C.L.R. (4th) 33 (C.A.), leave to appeal to S.C.C. granted [2002] S.C.C.A. No. 417 (QL) [*Haida No. 2*]. The facts in *Haida No. 1* and *Haida No. 2* [collectively, the *Haida* decisions] are as follows: In 2000, Weyerhaeuser Company Limited (Weyerhaeuser) purchased MacMillan Bloedel Limited (MacMillan Bloedel). As part of the transaction a British Columbia timber forest licence (TFL No. 39) encompassing a portion of the Queen Charlotte Islands was transferred to Weyerhaeuser in 2000. The Haida Nation (the Aboriginal people occupying the Queen Charlotte Islands) claimed that the Crown had breached its duty to consult when it approved the licence transfer (and similarly, the licence replacements in favour of MacMillan Bloedel dating back to 1961). Such breach, the Haida Nation argued, was an infringement of their Aboriginal rights and title to the islands by the Crown. The Court in *Haida No. 1* found a breach of the duties to consult and to accommodate not only on the part of the Crown but also on the part of Weyerhaeuser, a private third party. As the issue of industry's duties to consult and to accommodate was not before the Court, Weyerhaeuser sought and was granted the right to make submissions on whether the question of its duty to consult was properly before the Court on appeal, and if so, whether the Court could find that a duty was owed by Weyerhaeuser before the claim of Aboriginal title had been proven. *Haida No. 2* confirmed and further amplified the legal basis for industry's duty to consult and to accommodate Aboriginal peoples by basing such duties on statutory, fiduciary and constitutional law principles. While the Court was unanimous in *Haida No. 1*, three separate supplemental reasons for judgment were released in *Haida No. 2*. The dissent was premised on procedural errors and misapplication of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, on the basis that the issue of Weyerhaeuser's duty to consult and to accommodate with the Haida Nation was not pleaded and thus not properly before the Court. The parties (the Crown and the Haida Nation) simply did not litigate whether Weyerhaeuser had duties of consultation and accommodation, and if so, whether those duties were breached. The majority provided a declaration, albeit in separate opinions, that Weyerhaeuser had breached its duties of consultation and accommodation with the Haida Nation.

Industry's new source of the duty of consultation is based on the law of fiduciaries and constitutional law and is in addition to acknowledged statutory and administrative law sources of the duty to consult. Applying a centuries-old principle from the law of equity, the British Columbia Court of Appeal has now indicated that industry may be placed into the shoes of the Crown where the Crown has not adequately consulted Aboriginal peoples regarding projects that may infringe Aboriginal rights or treaty rights. When breached by industry, these equitable obligations potentially carry the remedy of damages (including aggravated and punitive damages) in favour of Aboriginal peoples and of invalidation of Crown approvals and tenures, including leases, licenses or permits.

This new and expanded basis of consultation blends directly into the duty of accommodation the twin duty of consultation. While the law is only now emerging in earnest on the duty of consultation, there continues to be a dearth of law on the content of the duty of accommodation regarding not only the Crown, but also industry.

This article is divided into four parts. The first part provides an overview of Aboriginal and treaty rights. The second part reviews the Supreme Court of Canada's justification test of infringement of Aboriginal and treaty rights. The third part reviews the scope and nature of consultation and the various sources of the duty of consultation. These include sources derived from administrative law, legislation and potential new sources of the law of fiduciaries and the *Constitution Act, 1982*<sup>3</sup> as between Aboriginal peoples and industry. The fourth part of the article reviews and discusses the impact on the petroleum industry of the *Haida* decisions and the newly-minted duty of consultation with Aboriginal peoples, as formulated by the British Columbia Court of Appeal.

## II. ABORIGINAL RIGHTS

### A. OVERVIEW

Aboriginal rights form the essential backdrop to a discussion of the duty of consultation with Aboriginal peoples.<sup>4</sup> Aboriginal rights encompass a range of traditional activities that have been increasingly recognized and affirmed by Canadian courts.<sup>5</sup> A suite of Supreme Court of Canada cases have each in turn added more definition to the nature, scope and content of Aboriginal rights. Beginning with *Calder v. British Columbia (A.G.)*<sup>6</sup> and continuing with *Delgamuukw v. British Columbia*,<sup>7</sup> the recognition of Aboriginal rights has evolved and taken shape at an ever-increasing pace.

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<sup>1</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, Part II, Rights of the Aboriginal Peoples of Canada.

<sup>4</sup> Aboriginal rights are protected by the *Constitution Act, 1982*, *ibid.*, s. 35(1): "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

<sup>5</sup> Also internationally, see John Burrows, "Domesticating Doctrines: Aboriginal Peoples After the Royal Commission" (2001) 46 McGill L.J. 615.

<sup>6</sup> [1973] S.C.R. 313.

<sup>7</sup> [1997] 3 S.C.R. 1010 [*Delgamuukw*].

Much judicial gloss has been applied as to what is and what is not an Aboriginal right.<sup>8</sup> Aboriginal harvesting rights include hunting, fishing and trapping and are well established;<sup>9</sup> however, Aboriginal rights are now also acknowledged to include protection of culturally-sensitive, religious and ceremonial areas of significance,<sup>10</sup> as well as certain forms of trade.<sup>11</sup>

*R. v. Van der Peet* provides the test for the definition of Aboriginal rights. In that case, Lamer C.J.C. defined Aboriginal rights as follows: "In order to be an aboriginal right an activity must be an element of practice, custom or tradition *integral to the distinctive culture* of the aboriginal group claiming the right."<sup>12</sup> The Court in *Van der Peet* sets out a number of factors to be addressed or satisfied in application of the "integral to a distinctive culture" test.<sup>13</sup> These factors are as follows:

- Courts must take into account the perspective of aboriginal peoples themselves.
- Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right.
- In order to be integral, a practice, custom or tradition must be of central significance to the aboriginal society in question.
- The practices, customs, and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact [with European society].
- Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.
- Claims to aboriginal rights must be adjudicated on a specific rather than [a] general basis.
- For a practice, custom or tradition to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists.
- The *integral to a distinctive culture* test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom, or tradition be distinct.
- The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.

<sup>8</sup> See *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 65 [*Gladstone*], where determination of Aboriginal rights are "highly fact specific" and the "nature of aboriginal rights vary in accordance with the variety of Aboriginal cultures and traditions which exist in [Canada]."

<sup>9</sup> For hunting, see *R. v. McPherson* (1994), 90 Man. R. (2d) 290 (Q.B.); *R. v. Alphonse*, [1993] 80 B.C.L.R. (2d) 17 (C.A.). For fishing, see *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*]; *R. v. Adams*, [1996] 3 S.C.R. 101 [*Adams*].

<sup>10</sup> *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146.

<sup>11</sup> See *Gladstone*, *supra* note 8, for the right to trade herring spawn on kelp.

<sup>12</sup> [1996] 2 S.C.R. 507 at para. 46 [*Van der Peet*] [emphasis added].

<sup>13</sup> *Ibid.* at para. 48.

- Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples.<sup>14</sup>

## B. SPECTRUM OF ABORIGINAL RIGHTS

Jurisprudence further describes Aboriginal rights as a broad spectrum of rights, the cornerstone of which is the relationship of Aboriginal rights to land.<sup>15</sup> At one end of the spectrum of Aboriginal rights are practices, customs and traditions unrelated to land claims — for example, the right to speak an Aboriginal language.<sup>16</sup> Placed somewhere in the middle of the spectrum are treaty and Aboriginal “site-specific” rights dependent on use of the land,<sup>17</sup> such as fishing (whether it be for ceremonial, commercial or sustenance purposes), hunting and trapping.

Sitting prominently at the other end of the spectrum of Aboriginal rights is Aboriginal title.<sup>18</sup> Aboriginal title is an end member in the spectrum where Aboriginal peoples holding Aboriginal title hold an indefeasible-like underlying interest in land.<sup>19</sup> The character of Aboriginal title is *sui generis*, in that it is not a “normal” proprietary interest.<sup>20</sup> The existence of Aboriginal title to land arises where: (1) an Aboriginal people occupied land prior to the assertion of Crown sovereignty; (2) if present occupation is relied upon, there is continuity between present and pre-sovereignty occupation; and (3) at sovereignty, that occupation was exclusive.<sup>21</sup>

The nature of Aboriginal title is described as one that is not *fee simple* and can not be described with reference to established property law concepts or, for that matter, the rules of property found in Aboriginal legal systems.<sup>22</sup> Aboriginal title arises from pre-sovereignty occupation of lands and not from Crown grant. Aboriginal title is a collective right, inalienable except to the Crown.<sup>23</sup> Aboriginal title contemplates a wide range of activities, including those not protected by s. 35 of the *Constitution Act, 1982*,<sup>24</sup> although it is subject to inherent limitations. For example, Aboriginal peoples may not use lands to which Aboriginal title is asserted for activities that negatively impact such land.<sup>25</sup> In British Columbia, Aboriginal title does not fit within the province’s land registry system as it is not

<sup>14</sup> *Ibid.* at paras. 49-74. These factors are directly quoted from the titles that Lamer C.J.C. uses within his decision [emphasis added].

<sup>15</sup> See *Delgamuukv*, *supra* note 7 at para. 138.

<sup>16</sup> T. Campbell & M.W. Sindlinger, “Surface Access & First Nations: the Legal Perspective” (The Canadian Institute Conference, Vancouver, 6-7 December 2001).

<sup>17</sup> *Delgamuukv*, *supra* note 7 at para. 138.

<sup>18</sup> *Ibid.* See also *Adams*, *supra* note 9 at para. 30, where Aboriginal title is “one manifestation of the doctrine of Aboriginal rights.”

<sup>19</sup> Section 109 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, recognizes Aboriginal title, if it exists, as constituting an encumbrance on Crown title (as to timber) (*Haida Nation v. British Columbia (Minister of Forests)*, (1997) 45 B.C.I.L.R. (3d) 80 (C.A.) at para. 6).

<sup>20</sup> *Delgamuukv*, *supra* note 7 at para. 112.

<sup>21</sup> *Ibid.* at paras. 140-59.

<sup>22</sup> *Ibid.* at para. 112.

<sup>23</sup> *Ibid.* at para. 113.

<sup>24</sup> *Supra* note 3.

<sup>25</sup> *Delgamuukv*, *supra* note 7 at para. 125ff.

an interest in land.<sup>26</sup> The *sui generis* nature of Aboriginal title, rooted in use and occupancy of land by Aboriginal peoples, is incompatible with the Torrens system of priority, which is based on the date upon which land rights are registered rather than on when such rights are acquired.

Aboriginal rights and Aboriginal title are not absolute.<sup>27</sup> They are not a “veto” over resource development,<sup>28</sup> although consent of Aboriginal peoples who hold or assert Aboriginal title may be required for project development.<sup>29</sup> Development activities that could infringe Aboriginal rights may proceed where such activities are justified.<sup>30</sup>

### C. TREATY RIGHTS

Existing treaty rights, including rights in land claims agreements, are recognized and affirmed in the *Constitution Act, 1982*,<sup>31</sup> in the same manner as are existing Aboriginal rights.<sup>32</sup> Like Aboriginal rights and title, treaty rights are *sui generis*.<sup>33</sup> Many regions of Canada where resource exploration and development take place are settled by treaty between the Crown and Aboriginal peoples. In British Columbia, limited treaty rights exist in addition to Aboriginal rights. Treaty No. 8,<sup>34</sup> the Douglas treaties of Vancouver Island and the *Nisga'a Final Agreement Act*<sup>35</sup> provide rights to hunt, fish and trap, as well as rights to tax exemptions<sup>36</sup> for Aboriginal peoples. Treaty No. 8 Aboriginal peoples have surrendered all rights, title and privileges, but retain a continuing right to hunt, trap and fish, save for “settlement, mining and lumbering.”<sup>37</sup> Notwithstanding the surrender of such rights, title and privileges, fiduciary and constitutional obligations of the Crown continue to exist with Aboriginal peoples.<sup>38</sup>

<sup>26</sup> *Sketchestn v. British Columbia (Registrar of Land Titles)*, [2000] 2 C.N.L.R. 330 (B.C.S.C.), aff'd (2000), 80 B.C.L.R. (3d) 233 (C.A.), reviews the British Columbia *Land Title Act*, R.S.B.C. 1996, c. 250 and the Torrens system *vis-à-vis* Aboriginal title.

<sup>27</sup> *Sparrow*, *supra* note 9 at 1109 and 1117. See also *Delgamuukw*, *supra* note 7 at para. 160.

<sup>28</sup> *Taku River Tlingit First Nation v. Ringstad* (2002), 98 B.C.L.R. (3rd) 16 (C.A.), leave to appeal to S.C.C. granted, (2002), 101 C.R.R. (2d) 373 (S.C.C.) [*Taku River*]. It is unlikely that Aboriginal rights or title could function as a veto. For example, Southin J.A. in dissent at para. 100 stated that “the right to be consulted is not a veto.” See also *Kitkatla*, *supra* note 10 at paras. 64 and 65, where the Court recognizes the balance arising from the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187 “between preserving Aboriginal heritage on the one hand and exploitation of natural resources on the other.” While there appears to be no *de jure* veto for Aboriginal peoples to veto resource development projects, the *de facto* existence of such a veto has been flagged in the media, see J. Simpson, “A right that walks, talks and smells like a veto” *The Globe and Mail* (1 May 2002) A15.

<sup>29</sup> *Delgamuukw*, *supra* note 7 at para. 168.

<sup>30</sup> See: *Sparrow*, *supra* note 9.

<sup>31</sup> *Supra* note 3, s. 35(3).

<sup>32</sup> See generally Thomas Isaac, *Aboriginal Law, Cases, Materials, and Commentary*, 2d ed. (Saskatoon: Purich Publishing, 1999), c. 2 [Isaac, *Aboriginal Law*].

<sup>33</sup> *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 404.

<sup>34</sup> *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), B.C.L.R. (3d) 206 (C.A.) [*Halfway River*]. Treaty No. 8 is set out in full at para. 205.

<sup>35</sup> S.B.C. 1999, c. 2 [*Nisga'a Treaty*]. Part 3, s. 3 of the *Nisga'a Treaty* vests ownership of subsurface resources with the Nisga'a Nation.

<sup>36</sup> *Benoit v. Canada* (2002), 218 F.T.R. 1 (T.D.), rev'd (2003), 228 D.L.R. (4th) 1 (F.C.A.) [*Benoit*].

<sup>37</sup> *Halfway River*, *supra* note 34 at 205.

<sup>38</sup> *Burrows*, *supra* note 5 at 631.

*R. v. Badger*<sup>39</sup> sets out a suite of treaty interpretation principles<sup>40</sup> that are relevant in concluding that the Crown's obligation as a fiduciary continues, and is in no way limited by mere execution of a treaty.<sup>41</sup> Written treaty text often did not accord with the oral understandings of Aboriginal peoples. As a result, the Crown remains a continuing fiduciary of Aboriginal peoples.<sup>42</sup> The duty of consultation and the test of justification appear to apply equally to both Aboriginal rights and title and to treaty rights.<sup>43</sup>

### III. JUSTIFICATION OF INFRINGEMENTS OF ABORIGINAL AND TREATY RIGHTS

The principle of reconciliation of the rights of Aboriginal peoples with non-Aboriginal peoples' rights is an ever increasing and recurrent theme in the case law.<sup>44</sup> The concept of reconciliation is the underpinning for the Supreme Court of Canada in its 1990 *Sparrow*<sup>45</sup> decision. *Sparrow* fashions a "justificatory scheme" for Crown infringement of Aboriginal rights and title rooted in s. 35(1) of the *Constitution Act, 1982*.<sup>46</sup> The Crown (and now industry with the *Haida* decisions), depending on the size and scope of an interest granted or the impact of an activity, are permitted to infringe Aboriginal rights and title provided that certain legal tests are fulfilled. The Court attempts to strike a balance between the rights of Aboriginal peoples on the one hand and the Crown on the other. In *Delgamuukw*,<sup>47</sup> the Supreme Court of Canada is again not prepared to create or to endorse a principle that either provided absolute title to the Crown or to Aboriginal peoples. The concluding statement by Lamer C.J.C. in *Delgamuukw* encapsulates the theme of balancing Aboriginal rights and rights of the Crown: "Let's face it, we are all here to stay."<sup>48</sup>

<sup>39</sup> [1996] 1 S.C.R. 771 at para. 41 [*Badger*]. See also *Halfway River*, *supra* note 34 and *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 13 [*Marshall No. 1*].

<sup>40</sup> Such principles are applicable to pre-confederation peace and friendship treaties and post confederation numbered treaties, such as Treaty No. 8, but are less applicable to modern treaties (see Burrows, *supra* note 5).

<sup>41</sup> *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 [*Wewaykum*] where the Court, at para. 81, carves back the general application of the Crown's fiduciary responsibilities to Aboriginal peoples: "The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."

<sup>42</sup> *Benoit*, *supra* note 36.

<sup>43</sup> *Halfway River*, *supra* note 34 at para. 145, Finch J.A.

<sup>44</sup> J. Aldridge, "Case Comment: *Haida Nation v. British Columbia (Minister of Forests)*" (The Canadian Institute Conference, B.C. Energy, 9–10 December 2002). See also J. Aldridge, "The First Nations Perspective" *The Advocate* 61:2 (March 2003) at 177, and J. Howard, "The Industry Perspective" *The Advocate* 61:2 (March 2003) at 190.

<sup>45</sup> *Sparrow*, *supra* note 9 at 1109.

<sup>46</sup> In *Sparrow*, *ibid.*, a Musqueam Indian Band member was charged under the *Fisheries Act*, R.S.C. 1985, c. F-14, for fishing with a drift net longer than permitted by the Band's Indian food fishing licence. The appellant's defence was that he was exercising an existing Aboriginal right to fish and that the net length restriction in the licence was inconsistent with s. 35(1) of the *Constitution Act, 1982* and therefore was invalid.

<sup>47</sup> *Delgamuukw*, *supra* note 7 at para. 161.

<sup>48</sup> *Ibid.* at para. 186.

## A. THE *R. V. SPARROW* TEST OF JUSTIFICATION

*Sparrow* was the first Supreme Court of Canada case to consider s. 35(1) of the *Constitution Act, 1982*.<sup>49</sup> The case sets forth a number of sweeping principles, including the notion that Aboriginal rights are not absolute,<sup>50</sup> and formulated the test of justification as it pertains to legislatures enacting statutes that affect Aboriginal rights.<sup>51</sup> The *Constitution Act, 1982* has given Aboriginal and treaty rights constitutional status and authority. Implicit in the new constitutional scheme is the obligation of legislatures to satisfy the test of justification. As a general framework, the Court stated that attainment of a legislative objective must "uphold the honour of the Crown"<sup>52</sup> and be in keeping with the current relationship between the Crown and Aboriginal peoples. The Crown is required to justify legislation that has some negative effect on any Aboriginal right or treaty right<sup>53</sup> protected under s. 35(1).

Before applying the justificatory test, a preliminary determination is necessary to determine whether the impugned legislation<sup>54</sup> has the effect of interfering with an existing Aboriginal right. If an interference takes place, then it represents a *prima facie* infringement of rights protected under s. 35(1).<sup>55</sup> To determine if an interference amounts to a *prima facie* infringement, three questions must be asked: first, is the limitation on the Aboriginal right unreasonable; second, does it impose undue hardship; and third, does it deny the rights-holders their preferred means of exercising their right.<sup>56</sup>

If *prima facie* infringement of a s. 35(1) right is found, then a two-stage justification test is considered. The first stage examines if a valid legislative objective exists in the impugned legislation. In *Sparrow*, conservation and resource management were recognized as valid objectives.<sup>57</sup> Case law has added additional examples of valid legislative objectives, including the "development of agriculture, forestry, mining, and hydroelectric power and 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."<sup>58</sup> Historical reliance on a resource by non-

<sup>49</sup> *Supra* note 3. See also Tom Isaac, "The Meaning of Subsection 35(1) of the *Constitution Act, 1982*: A Comment on *Mitchell v. Minister of National Revenue*" (2002) 60:1 *The Advocate* at 853.

<sup>50</sup> *Sparrow*, *supra* note 9 at 1119.

<sup>51</sup> There is no constitutionally enshrined justification test for infringement of Aboriginal rights. Section 35 is not within the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. The *Sparrow* test of justification has the hallmarks of the *Oakes* test for justifying infringement of *Charter* rights; see D. Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests" (1999) 62 *Sask. L. Rev.* 543.

<sup>52</sup> *Sparrow*, *supra* note 9 at 1114 and *Marshall No. 1*, *supra* note 39 at para. 49 ff.

<sup>53</sup> *Badger*, *supra* note 39, applies the *Sparrow* test to both Aboriginal and treaty rights.

<sup>54</sup> Applicable to both federal and provincial laws. See *R. v. Cote*, [1996] 3 S.C.R. 139.

<sup>55</sup> *Sparrow*, *supra* note 9 at 1112.

<sup>56</sup> *Ibid.*

<sup>57</sup> See *Kruger v. The Queen*, [1978] 1 S.C.R. 104 regarding the *Wildlife Act*, R.S.B.C. 1996, c. 488.

<sup>58</sup> *Delgamuukw*, *supra* note 7 at para. 165. The objectives in the *Delgamuukw* list are described by one commentator as an "absurd extreme": see Lisa Dufraimont, "From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58 U.T. Fac. L. Rev. 1 at para. 12.



Aboriginal peoples and regional economic fairness also may be valid objectives for infringement of Aboriginal rights.<sup>59</sup>

If the objective is valid, then the “guiding interpretation principle”<sup>60</sup> of maintaining the special trust relationship and the responsibility of the Crown towards Aboriginal peoples is considered in the second stage of the justification test. The second stage is somewhat amorphous and has been elusive to define. It involves determining if the infringement is consistent with the “special trust relationship” between the Crown and Aboriginal peoples.<sup>61</sup> For this second stage, *Sparrow* sets out some questions to assist in determining whether infringement is justified in the context of the Crown’s position as a fiduciary for affected Aboriginal peoples:

- (1) whether there is as little infringement as possible in order to effect the desired result;
- (2) where expropriation occurs, fair compensation occurs; and
- (3) whether the Aboriginal people concerned have been consulted.<sup>62</sup>

This list is not exhaustive.<sup>63</sup> When considering the test of justification, sensitivity and respect for Aboriginal peoples is required by government, the courts and all Canadians.<sup>64</sup>

A key element of the *Sparrow* justificatory infringement test is consultation with affected Aboriginal peoples. This is the only element that has received substantive judicial scrutiny. The Crown may infringe an Aboriginal right, including title, if adequate consultation has occurred and the other elements of the *Sparrow* test are fulfilled. Case law after *Sparrow* has considered the nature and scope of consultation, but in an inconsistent manner.<sup>65</sup>

## B. *DELGAMUUKW V. BRITISH COLUMBIA*

*Delgamuukw*,<sup>66</sup> and in particular the reasons of Lamer C.J.C., expanded the application of the *Sparrow* justification test in the context of Aboriginal title. Reinforcing his analysis in *Gladstone*,<sup>67</sup> Lamer C.J.C. stated that for the first stage of the justification test to be satisfied, the legislative objective in question must be “compelling and substantial.”<sup>68</sup> Legislation directed at the conservation of fisheries in *Sparrow* was clearly such an objective. More importantly, on the second stage of the justification test, Lamer C.J.C. provided that the “special fiduciary relationship” between the Crown and Aboriginal peoples and the

<sup>59</sup> See *supra* note 8 and accompanying text.

<sup>60</sup> *Sparrow*, *supra* note 9 at 1114.

<sup>61</sup> *Ibid.* at 1113.

<sup>62</sup> *Ibid.* at 1119.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> Dufraimont, *supra* note 58, chronicles the relaxation of the *Sparrow* test in *Gladstone*, *supra* note 8, and *Delgamuukw*, *supra* note 7, and observes the test’s subsequent tightening in *Marshall No. 1*, *supra* note 39.

<sup>66</sup> *Supra* note 7.

<sup>67</sup> *Supra* note 8.

<sup>68</sup> *Delgamuukw*, *supra* note 7 at para. 161.

resultant fiduciary duty is a "function of the 'legal and factual' context of each appeal."<sup>69</sup> While fiduciary principles demand that Aboriginal interests be "placed first" in such a relationship, they are not always to be given priority.<sup>70</sup> Further, Lamer C.J.C. stated that the range of legislative objectives that can infringe Aboriginal title is "fairly broad."<sup>71</sup>

Chief Justice Lamer stated that there is always a duty of consultation regarding Aboriginal rights, including Aboriginal title. The nature and scope of consultation varies and is dependent on the circumstances.<sup>72</sup> Something "significantly deeper than mere consultation"<sup>73</sup> is required on the part of the Crown. In some cases, such as hunting and fishing regulations involving Aboriginal lands, "full consent"<sup>74</sup> of the Aboriginal people affected may be required.

There is a sliding scale regarding the nature and scope of the Crown's fiduciary duty to consult: the closer that infringed Aboriginal rights are to the Aboriginal title end of the rights spectrum, the more onerous the discharge of the duty of consultation and the greater the test of justification. Compensation for infringement of Aboriginal title will "ordinarily"<sup>75</sup> be required, and the amount required will vary with the nature of the infringement and the extent to which affected Aboriginal peoples were accommodated prior to infringement.

Courts have unevenly applied the *Sparrow* justification test<sup>76</sup> and commentators have criticized the Supreme Court of Canada for back-peddalling and weakening the *Sparrow* test. It is argued<sup>77</sup> that providing a broad range of permissible legislative objectives results in constitutionally protected Aboriginal rights being undermined. Fulfilling the first stage of the *Sparrow* test is now arguably automatic and perfunctory. Thus, the courts have focused their opinions on the application of the second stage of the *Sparrow* test, in particular, broadening the scope and application of the duty of consultation.

#### IV. DUTY OF CONSULTATION

Defining the scope of the duty of consultation with Aboriginal peoples requires a review of two broad topics. The first is an articulation of the essential components of consultation, namely: what is consultation; who must consult and who must be consulted; when consultation must occur; why consultation must occur; and how consultation occurs. The second is a review of the sources of the duty of consultation.

The current state of the law has resulted in enormous uncertainty as to timing of the discharge of the duty of consultation, the scope and content of consultation and the sources of consultation, which themselves may affect remedies granted by courts and defences to

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<sup>69</sup> *Ibid.* at para. 162.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.* at para. 165.

<sup>72</sup> *Ibid.* at para. 168.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.* at para. 169.

<sup>76</sup> See *Haida No. 2*, *supra* note 2 at para. 81, Lambert, J.A.; *Delgamuukw*, *supra* note 7; and *Gladstone*, *supra* note 8 at para. 54.

<sup>77</sup> See Dufraimont, *supra* note 58. See also Burrows, *supra* note 5.

infringement. The case law has created unexpected duties, scope and sources of consultation for the Crown and for third parties.

## A. COMPONENTS OF THE DUTY OF CONSULTATION

### 1. WHAT IS CONSULTATION (DEFINITION, NATURE AND SCOPE)?

The concept of consultation with Aboriginal peoples has evolved enormously since the *Sparrow*<sup>78</sup> decision was rendered in 1990. Prior to *Sparrow*, consultation was almost non-existent with minimal adherence to generalized administrative law precepts. While the duty to consult is the most judicially-considered obligation for the Crown to satisfy, there are few guideposts regarding the definition of Crown consultation, particularly as set out in the second stage of the *Sparrow* test.

#### a. Common Law

Various working definitions of consultation have been posited by the courts. They all appear to fall into the category of "I know it when I see it." The British Columbia Court of Appeal described the duty of consultation in the following manner: "[N]o useful purpose would be served ... to define ... the meaning of the word 'consulted' as expressed in *Sparrow*... [T]he determination of whether aboriginal people were consulted will depend on the facts and circumstances of each particular case."<sup>79</sup> The Supreme Court of Canada stated that "[t]he nature and scope of the duty of consultation will vary with the circumstances."<sup>80</sup> This vague definition is recast by *Haida No. 1* in equally uncertain terms, where "... the scope of consultation ... will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights."<sup>81</sup>

#### b. Statutory

Although legislation may provide that consultation with Aboriginal peoples is an obligation to be discharged, for example, in the British Columbia *Forest Act*,<sup>82</sup> the British Columbia *Heritage Conservation Act*,<sup>83</sup> or as a component of an environmental assessment,<sup>84</sup> a legislative definition of consultation typically is not provided. All that exists is a bare obligation to consult.

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<sup>78</sup> *Sparrow*, *supra* note 9.

<sup>79</sup> *R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 (C.A.) at para. 100.

<sup>80</sup> *Delgamuukw*, *supra* note 7 at para. 168.

<sup>81</sup> *Supra* note 2 at para. 51.

<sup>82</sup> R.S.B.C. 1996, c. 157, s. 35(1)(d)(vi).

<sup>83</sup> R.S.B.C. 1996, c. 197, s. 13(4).

<sup>84</sup> See *Taku River*, *supra* note 28, *Environmental Assessment Act*, R.S.B.C. 1996, c. 119, s. 7(2)(k) and (l) (repealed December 30, 2002), and *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 50(3).

c. Treaties, Agreements and Policy

(i) Treaties

A variety of modern treaties define consultation.<sup>85</sup> A recent British Columbia example is found in the Schedule to the *Nisga'a Treaty*:

"consult" and "consultation" mean provision to a party of:

- a. notice of a matter to be decided, in sufficient detail to permit the party to prepare its views on the matter,
- b. in consultations between the Parties to this Agreement, if requested by a Party, sufficient information in respect of the matter to permit the Party to prepare its views on the matter,
- c. a reasonable period of time to permit the Party to prepare its views on the matter,
- d. an opportunity for the party to present its views on the matter, and
- e. a full and fair consideration of any views on the matter so presented by the Party.<sup>86</sup>

and

When Canada and British Columbia have consulted with or provided information to the Nisga'a Nation in respect of any activity, including a resource development or extraction activity, in accordance with their obligations under this Agreement and federal and provincial legislation, Canada and British Columbia will not have any additional obligations under this Agreement to consult with or provide information to the Nisga'a Nation in respect of that activity.<sup>87</sup>

The *Sahtu Dene Agreement* contains similar language to the *Nisga'a Treaty*. In the *Sahtu Dene Agreement*, consultation means, in part, a "full and fair consideration ... of any views presented."<sup>88</sup>

A review of the scope of consultation as arising in the duty of *consideration* occurred in *Nunavut Tunngavik v. Canada (Minister of Fisheries and Oceans)*,<sup>89</sup> a dispute between the Inuit of Nunavut and the federal government regarding setting of fishing quotas for turbot. The Federal Court (Trial Division) concluded that "there must be full, careful and conscientious consideration of any advice or recommendation made by the [Inuit] ... [C]onsultation and consideration must mean more than simply hearing. It must include listening as well."<sup>90</sup> While not particularly helpful in providing substance to the definition of consultation, clearly "consideration," in an administrative law sense, provides a form of consultation beyond mere consultation. The Court in *Nunavut* stated that the provisions

<sup>85</sup> See *Sahtu Dene and Metis Comprehensive Land Claim Agreement*, s. 2.1.1 [*Sahtu Dene Agreement*]. Also see Isaac, *Aboriginal Law*, *supra* note 32 at 127.

<sup>86</sup> *Supra* note 35, s. 1.

<sup>87</sup> *Ibid.*, s. 28.

<sup>88</sup> *Supra* note 85, s. 2.1.1.

<sup>89</sup> (1997), 134 F.T.R. 246 (T.D.), aff'd [1998] 4 F.C. 405 (C.A.) [*Nunavut*], involving interpretation of *The Agreement Between the Inuit of the Nunavut Settlement Area as Represented by the Tunngavik Federation of Nunavut and Her Majesty the Queen in Right of Canada [Tungavik]* (in particular articles 15.3.4, 15.3.7 and 15.4.1), as ratified by the *Nunavut Lands Claims Agreement Act*, S.C. 1993, c. 29 [*Nunavut Agreement*].

<sup>90</sup> *Nunavut*, *ibid.* at para. 57.

regarding consultation and consideration must be “fully enforced,” particularly in light of the Inuit people who have extinguished certain Aboriginal rights under the *Nunavut Agreement*.<sup>91</sup> Article 27.2.2, for example, sets out the nature of consultation as to resource development (other than petroleum) as follows: “The consultation provided in this Part shall balance the needs of the [Designated Inuit Organization] for information, an opportunity for discussion among the Inuit, and the needs of Government and the proponent for timely and cost-effective decisions.”<sup>92</sup>

The ambit of consultation in the *Sahtu Dene Agreement*, *Nisga'a Treaty*, and the *Nunavut Agreement* is in essence procedural. The case law expansion of the definition of consultation in some respects supersedes the obligation of consultation under these treaties. *Delgamuukw*<sup>93</sup> and the *Haida* decisions<sup>94</sup> now provide a substantive component to the duty of consultation with the concomitant requirement of the duty of accommodation applicable to modern treaties.

## (ii) British Columbia Memoranda of Understanding and Agreements

In 1997, the Province of British Columbia, through its Ministry of Energy and Mines and the Oil and Gas Commission, entered into five Memorandums of Understanding (MOUs) with the Treaty No. 8 Aboriginal peoples of northeast British Columbia, setting out a rudimentary consultation process.<sup>95</sup> In late 2001 and early 2002, the MOUs were replaced by five new “Agreements” and two new MOUs outlining consultation and development protocols to be followed by the respective signatories.<sup>96</sup> The two 2001 MOUs, involving the Prophet River First Nation and the West Moberly First Nation, carefully define (and limit) consultation as meaning:

2.1. b) ... a process involving ... timely, detailed and ongoing exchange of information between the Parties to enable a First Nation to identify potential infringements ... of treaty rights ... and to identify in cooperation with government:

<sup>91</sup> *Ibid.*

<sup>92</sup> *Tungavik*, *supra* note 89 at para. 27.2.2.

<sup>93</sup> *Supra* note 7.

<sup>94</sup> *Supra* note 2.

<sup>95</sup> Murray Rankin *et al.*, “Regulatory Reform in the British Columbia Petroleum Industry: The Oil and Gas Commission” (2000) 38 *Alta. L. Rev.* 143. The Alberta Energy Utilities Board (EUB), has encouraged the petroleum industry to consult with Aboriginal peoples. For example, an EUB information letter issued to oil, gas and pipeline operators and mineral rights holders in northwest Alberta encourages energy development applicants with applications on land with Dene Tha' First Nation native trap-lines to engage in consultation with trappers: see (19 December 2000) EUB Informational Letter IL 2000-5.

<sup>96</sup> See British Columbia Oil and Gas Commission website, online: BC Oil and Gas Commission <[www.ogc.gov.bc.ca/](http://www.ogc.gov.bc.ca/)>. Additionally, on 31 December 2002, the McLeod Lake Indian Band and the Province of British Columbia entered into an oil and gas development consultation agreement similar to the other seven consultation agreements. The Province of British Columbia also entered into an interim measures agreement in 2001, known as the Kaska Dene Agreement, with four First Nations: the Kaska Dene Council, the Dease River Band Council, the Lower Post First Nation and the Kwadcha Band, see online: Government of British Columbia <[www.gov.bc.ca/](http://www.gov.bc.ca/)>. The four First Nations are not Treaty No. 8 signatories and are engaged in negotiations towards a treaty under the British Columbia Treaty Commission process. The language and approach to consultation, reflecting in part the *Nisga'a Treaty*, *supra* note 35, in the MOUs markedly differs from the interim measures agreement.

- i. Measures to be implemented to avoid or mitigate the unjustifiable infringement of these rights, and
- ii. Opportunities to address other ... values, concerns and interests,

for the purpose of incorporating these measures and other opportunities in the decision-making process in accordance with the principles set out in this MOU.<sup>97</sup>

Each MOU sets out further detail of the “consultation process”:<sup>98</sup> the Chief and Council (or designates) are the only contact persons, weekly reports are to be supplied by the Oil and Gas Commission and a limitation period of ten working days is imposed to respond to information supplied by the Commission that identifies an activity that “potentially infringes a treaty right or could adversely impact a cultural or other value of interest.”<sup>99</sup>

### (iii) British Columbia Consultation Policy

In November 2002, the British Columbia government revised its 1998 consultation guidelines with Aboriginal peoples by publishing a policy intended to apply consistently to all government ministries, agencies and Crown corporations.<sup>100</sup> The *Consultation Policy* states that “almost all activities on Crown lands will infringe Aboriginal title,”<sup>101</sup> while most activities can co-exist with Aboriginal rights.

The *Consultation Policy* sets out five steps regarding consultation and resource use involving an initial pre-consultation assessment followed, by a four stage process of: first, consultation; second, consideration of the government decision impacting Aboriginal interests; third, determination of valid justification of infringement if Aboriginal rights or title are subsequently proven; and fourth, identification of opportunities for accommodation of Aboriginal interests “bearing in mind the potential for setting precedents that may impact other Ministries or agencies.”<sup>102</sup>

The *Consultation Policy* is a laudable effort on the part of the British Columbia government. The primary weakness is in the final stage, where the legal determination of the nature and scope of accommodation is undefined and decision-makers are instructed, where accommodation cannot be reached, to seek legal advice from the Ministry of the Attorney General. The ability of the Ministry to provide advice is limited where Aboriginal peoples may have ongoing litigation with the Province of British Columbia. The passage of time and

<sup>97</sup> Government of British Columbia, *Memorandum of Understanding between West Moberly First Nation and the Province of British Columbia*, (26 October 2002), online: British Columbia Oil and Gas Commission <[www.ogc.gov.bc.ca/documents/firstnations/mou/wmfmmou.htm](http://www.ogc.gov.bc.ca/documents/firstnations/mou/wmfmmou.htm)>. Section 2.1(c) defines “Consultation Area” and provides for a loose confidentiality covenant placed on the signatories to the MOU.

<sup>98</sup> *Ibid.* Section XII of the MOU sets out a dispute resolution procedure totalling 31 subsections.

<sup>99</sup> *Ibid.*, s. 7.5(d).

<sup>100</sup> British Columbia, Ministry of Sustainable Resource Management, *Provincial Policy for Consultation with First Nations* at 17, online: Environmental Assessment Office <[www.eao.gov.bc.ca/publicat/guide-2003/guid-sections/append2.pdf](http://www.eao.gov.bc.ca/publicat/guide-2003/guid-sections/append2.pdf)> [*Consultation Policy*]. Of note, the British Columbia government was criticized for not consulting Aboriginal peoples on the formulation of this *Consultation Policy*.

<sup>101</sup> *Ibid.* at 12.

<sup>102</sup> *Ibid.* at 22.

the evolution of consultation jurisprudence will likely date the *Consultation Policy*.<sup>103</sup> The British Columbia government, after the release of and presumably reliance upon the *Consultation Policy*, granted an *Environmental Assessment Act*<sup>104</sup> project approval certificate to a mining company in northwest British Columbia. This was in the face of objections from Aboriginal peoples and is currently under appeal.<sup>105</sup>

(iv) National Energy Board Memorandum of Guidance

The National Energy Boards' (NEB) *Consultation with Aboriginal Peoples: National Energy Board, Memorandum of Guidance*<sup>106</sup> provides guidance to NEB-regulated companies, representatives of Aboriginal peoples and federal and provincial government departments and agencies regarding the NEB's intended approach to Crown consultation with Aboriginal peoples.<sup>107</sup>

The NEB states that it has the responsibility to determine the adequacy of Crown consultation as part of its decision-making process. To discharge this responsibility, the NEB requires applicants to provide evidence of adequate Crown consultation with Aboriginal peoples. Notwithstanding Crown consultation, the NEB will examine the efforts of applicants to contact, advise and involve potentially affected Aboriginal peoples in meaningful discussions regarding mitigation of potential project impacts. Information to be filed includes identification of Aboriginal groups, provision of written documentation regarding consultations, identification of Aboriginal peoples' issues or concerns and Crown involvement in consultation.<sup>108</sup>

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<sup>103</sup> See *Gitksan First Nation v. British Columbia (Minister of Forests)*, (2002) 10 B.C.L.R. (4th) 126 (B.C.S.C.) [*Gitksan*]. In *Gitksan*, the Court amplifies the nature of the test of a *prima facie* claim of Aboriginal rights which was not addressed in the *Consultation Policy*.

<sup>104</sup> S.B.C. 2002, c. 43.

<sup>105</sup> The project approval certificate was granted with respect to the proposed Tulsequah Chief Mine to be developed by Redfern Resources Ltd. The mine permitting process and alleged inadequate consultation with Aboriginal peoples by the Crown is the subject of an appeal to the Supreme Court of Canada in *Taku River*, *supra* note 28.

<sup>106</sup> (4 March 2002) NEB Memorandum of Guidance [*Memorandum of Guidance*].

<sup>107</sup> For a summary of the application of the *Memorandum of Guidance*, see R. Neufeld & C. Wilton, "An Update on the National Energy Board's Memorandum of Guidance and the Impact of the Weyerhaeuser Decision: Assessing Impacts on Aboriginal-Industry Relations" (The Canadian Institute Conference, Calgary, 4-5 November 2002).

<sup>108</sup> *Consultation with Aboriginal Peoples: National Energy Board, Information to be Filed with Applications Where There May be an Aboriginal Interest* (3 April 2002). See also *Reasons for Decision In the Matter of Westcoast Energy Inc. Southern Mainline Expansion* (January 2003), NEB Decision GH-1-2002, online: NEB <[www.neb-one.gc.ca/newsroom/releases/nr2003/nr0306\\_e.htm](http://www.neb-one.gc.ca/newsroom/releases/nr2003/nr0306_e.htm)>, where Westcoast Energy Inc. was ordered to file final mitigative measures regarding potential impacts of pipeline looping on the traditional use of land and resources by Aboriginal peoples.

## 2. BY WHOM AND WITH WHOM MUST CONSULTATION OCCUR

### a. Who Must Consult

The federal and provincial Crown and all third parties whose activities potentially interfere with or infringe Aboriginal rights must consult affected Aboriginal peoples.<sup>109</sup>

### b. Who Must Be Consulted

All Aboriginal peoples whose Aboriginal rights may be infringed must be consulted. To determine who must be consulted, a two step process involving the identification of affected Aboriginal peoples and an assessment of their governance structure is required. Both may be difficult to resolve depending on the nature and scope of a project or development. At one extreme, a project proponent in northern British Columbia may identify and be required to consult with one Aboriginal group.<sup>110</sup> At the other extreme, a project in southwest British Columbia in the greater Vancouver area may involve consultation with a dozen or more groups of Aboriginal peoples. Where a project covers a large area or a long distance, such as in pipeline construction projects, numerous Aboriginal peoples may need to be consulted.

#### (i) Identification

Problems arise in identifying who should be consulted. One Aboriginal people may comprise only a few hundred individuals in one village, while another Aboriginal people may comprise ten (or more) villages encompassing a large traditional territory. Project proponents have relied on submissions of Aboriginal peoples participating in the British Columbia Treaty negotiations process to identify Aboriginal peoples who may be affected by a proposed project. However, only two-thirds of Aboriginal peoples are engaged in the treaty process. Thus, identification of Aboriginal peoples will require a concerted effort. In British Columbia, some Aboriginal peoples have jointly submitted treaty positions out of necessity, due to a lack of administrative capacity. Group consultations may be required where a project

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<sup>109</sup> Aboriginal peoples themselves may have reciprocal obligations of consultation with non-Aboriginal peoples. For example, consultation obligations are placed on Aboriginal peoples with non-Aboriginal peoples in the *Nisga'a Treaty*, *supra* note 35, c. 11, s. 19: "Nisga'a Government will consult with individuals who are ordinarily resident within Nisga'a Lands and who are not Nisga'a citizens about Nisga'a Government decisions that directly and significantly affect them."

<sup>110</sup> For example, an Aboriginal people that clearly sets out its territorial boundaries *vis-à-vis* neighbouring Aboriginal peoples. An example is the Haida Nation which not only has enacted an Aboriginal constitutional instrument (*Constitution of the Haida Nation*, as amended and adopted 1 March 2002), but who has also entered into a treaty securing territorial boundaries with the Tsimshian, Heiltsuk and Kwakiutl Aboriginal peoples. See "Northwest Coast Offshore Oil and Gas: Understanding the Issues of Haida Jurisdiction and Aboriginal Title" *Haida Laas* (February 2003), online: Snowchange <[www.snowchange.org/views/indigenous/edenshaw\\_en.html](http://www.snowchange.org/views/indigenous/edenshaw_en.html)> referencing the *Haida Laas*, February 2003 (*Journal of the Haida Nation*).



affects more than one Aboriginal people.<sup>111</sup> The courts have also recognized so-called “shared lands” where joint title or joint rights may exist.<sup>112</sup>

## (ii) Governance

Coupled with the accurate identification of affected Aboriginal peoples is an assessment of internal governance structure of each Aboriginal people. Determining who or what internal body is the governing authority of an Aboriginal people can be complex. The interplay of legislation, custom and culture, the status of hereditary chiefs and tribal councils and ongoing treaty negotiations all fold into the mix for determining who is the legal representative and has the right to enter into agreements on behalf of an Aboriginal people. Successfully discharging the duty of consultation may ultimately involve fulfilling the duty of accommodation with affected Aboriginal peoples.<sup>113</sup> Such accommodation may involve written agreements that require duly authorized signatories on behalf of the Aboriginal people(s) concerned. Certainty as a touchstone for all transactions may be moot where a determination of legal representatives of Aboriginal peoples cannot be made.

## 3. WHEN MUST CONSULTATION OCCUR?

There is always a duty of consultation<sup>114</sup> and the Crown’s fiduciary duty, including fulfilling its duty of consultation, is a “a continuing and ever present duty.”<sup>115</sup> Shortness of time and negative economic impacts are “not sufficient to obviate the duty of consultation.”<sup>116</sup>

Until the *Haida* and *Taku River* decisions, the central and unresolved issue was whether infringement of an unproven Aboriginal right engages the duty of consultation on the part of the Crown and industry. The traditionally-held view was that the duty of consultation did not arise where Aboriginal peoples were asserting Aboriginal rights.<sup>117</sup> In early 2002, the majority of the British Columbia Court of Appeal in *Taku River*<sup>118</sup> ruled that there was no requirement in law to prove Aboriginal rights in advance, whether by court proceedings or by treaty, or to invoke the Crown’s duty of consultation.<sup>119</sup> Interpreting *Sparrow*<sup>120</sup> and

<sup>111</sup> *Delgamuukw*, *supra* note 7 at paras. 158-59; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* (2001), 214 F.T.R. 48 at para. 161 (T.D.) [*Mikisew*]. Subsequent to the date of writing this article this decision has been appealed to the Federal Court of Appeal, [2002] 293 N.R. 185 (F.C.A.).

<sup>112</sup> *Delgamuukw*, *ibid.* at paras. 158-59. See also British Columbia Treaty Negotiations Office, *Map of Boundaries of Traditional Territories* (British Columbia Treaty Negotiations Office, June 2002), which sets out a variety of overlapping land claims by Aboriginal peoples.

<sup>113</sup> *Haida No. 2*, *supra* note 2.

<sup>114</sup> *Delgamuukw*, *supra* note 7 at para. 168.

<sup>115</sup> *Haida No. 2*, *supra* note 2 at para. 64.

<sup>116</sup> *Gitksan*, *supra* note 103 at para. 91. *Gitksan* essentially reversed an earlier denial of an injunction in the transfer of a timber forest licence through a sale of shares in a northwest British Columbia pulp mill company (*In the Matter of CCAA and Skeena Cellulose*, 2002 BCSC 1701).

<sup>117</sup> *British Columbia (Minister of Forests) v. Westbank First Nation* (2000), 191 D.L.R. (4th) 180 (B.C.S.C.) [*Westbank*]. One Court did hold that there was a moral duty to consult Aboriginal peoples where a claim to Aboriginal title was known to exist: *Haida Nation v. British Columbia (Ministry of Forests)* (2000), 36 C.N.L.R. 85 (B.C.S.C.) at para. 61.

<sup>118</sup> *Supra* note 28.

<sup>119</sup> *Taku River*, *ibid.* at paras. 153-94 and 204.

<sup>120</sup> *Supra* note 9.

*Delgamuukw*,<sup>121</sup> the majority in *Taku River* and the Court in *Haida No. 1*<sup>122</sup> agreed that assertion of Aboriginal rights was sufficient to invoke the duty of consultation on behalf of the Crown.<sup>123</sup> *Haida No. 1*, in hindsight, came to what seems to be the obvious conclusion regarding the invocation of the duty to consult. If an activity did take place that was ultimately found to be an infringement of a later, proven Aboriginal right, the duty of consultation would be a hollow obligation. Denying Aboriginal peoples consultation based on the lack of legal proof of an Aboriginal right is coined as a “timing fallacy” by the Court.<sup>124</sup>

With the interpretation by the Court in *Taku River* of *Sparrow* and *Delgamuukw*, the threshold for assertion of an Aboriginal right to crystallise the Crown’s duty of consultation is low (assuming a *prima facie* infringement or interference of an Aboriginal right exists). The Court in *Gitxsan*<sup>125</sup> described three levels of asserted Aboriginal rights: first, a *prima facie* case (that is, a reasonable possibility); second, a good *prima facie* case (that is, a reasonable probability); and third, a strong *prima facie* case (that is, a substantial probability). Good and strong *prima facie* claims asserting Aboriginal rights would invoke the duty of consultation. However, even a *prima facie* case *simpliciter* would suffice so long as some portion of the area in question were established as having a good or strong claim to Aboriginal rights.<sup>126</sup> The Court in *Lax Kw’alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management)*<sup>127</sup> went further in *obiter* and stated that a *prima facie* case of a right or title *simpliciter* obligates the Crown to accommodate Aboriginal peoples. This appears to complete the three-level classification of *Haida No. 1* and *Gitxsan*. Where evidence indicates a bare *prima facie* claim of an Aboriginal right or title (that is, there is a “reasonable possibility” that an Aboriginal right or title exists), the court then applies the duties of consultation and accommodation.<sup>128</sup> The test then, to be in a position not to have the duties to consult and accommodate, is something less than a *prima facie* claim.<sup>129</sup>

For Aboriginal peoples involved in the ongoing British Columbia treaty negotiations process,<sup>130</sup> the filing of statements of intent (SOIs), the first step in the six-stage provincial treaty-making process, may be sufficient to ground a claim for Aboriginal title that would then result in the duty of consultation arising. SOIs filed by First Nations include maps of traditional territories that cover all areas of British Columbia, whether settled by treaty or not, both onshore and offshore. If the law does evolve to this point then possibly, in British

<sup>121</sup> *Supra* note 7.

<sup>122</sup> *Supra* note 2.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Haida No. 1*, *supra* note 2 at para. 41ff.

<sup>125</sup> *Supra* note 103.

<sup>126</sup> *Ibid.* at paras. 68 (quoting *Haida No. 2*) and 75.

<sup>127</sup> (2002), 4 B.C.L.R. (4th) 104 (S.C.) at para. 38 [*Lax Kw’alaams*].

<sup>128</sup> *Haida No. 1* and *Haida No. 2*, *supra* note 2.

<sup>129</sup> *Pictou v. Canada (C.A.)*, [2003] 2 F.C. 737 (F.C.A.) application for leave to S.C.C. dismissed [2003] S.C.C.A. No. 107 (Q.L.), where the Court held that a strong or good *prima facie* claim to an Aboriginal right was required, implying that a *prima facie* claim was insufficient. Also, the Court viewed the lack of any assertion of an Aboriginal right as a factor militating against the Aboriginal person asserting such right.

<sup>130</sup> For up-to-date information on the groups involved in the negotiation process, see online: BC Treaty Negotiation Office <[www.gov.bc.ca/tno](http://www.gov.bc.ca/tno)>.

Columbia, all decisions and activities by the Crown would trigger obligations of consultation and accommodation.

#### 4. WHY MUST CONSULTATION OCCUR?

The purpose of consultation with Aboriginal peoples is to discharge legal and equitable duties imposed by the courts or legislation. Adequate consultation permits the Crown and industry to utilize the defence of justification of infringement of Aboriginal rights.<sup>131</sup> The extension of the application of the defence of justification by Lambert J.A. in *Haida No. 2*, from the Crown to industry, implicates industry (in this case Weyerhaeuser Co. (Weyerhaeuser)) in a constitutional breach of s. 35. Justice Lambert did not elaborate on the placement of a constitutional breach on Weyerhaeuser and this “defence” and ground for infringement remains to be settled by the Supreme Court of Canada.

Pragmatically, consultation is also an effective communication tool. Industry which partners, and is seen to partner, effectively with Aboriginal peoples is viewed favourably by the Crown and potentially by other Aboriginal peoples and the media.

#### 5. HOW MUST CONSULTATION OCCUR?

With each case on the duty of consultation, courts are providing more guideposts as to the process or mechanics of consultation. For example, the Federal Court in *Mikisew*<sup>132</sup> articulated the *sui generis* nature of consultation with Aboriginal peoples and stated that the “Mikisew [are] entitled to a distinct process [of consultation] if not a more extensive one [than the public consultation process].”<sup>133</sup> The Court in *Mikisew* also stated that “consultation must be undertaken with the genuine intention of substantially addressing First Nation concerns.”<sup>134</sup>

Conversely, the British Columbia Court of Appeal recognized that a reciprocal duty exists on the part of Aboriginal peoples to participate and consult in good faith with the Crown, and not to “frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.”<sup>135</sup> Consultation by the Crown must be “adequate and meaningful,”<sup>136</sup> “in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples”<sup>137</sup> and generally “will be significantly deeper than mere consultation.”<sup>138</sup> *Kelly Lake*<sup>139</sup> is one example of adequate consultation on the part of the Crown where the Court stated, quoting from *Delgamuukw*, that the duty of consultation was

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<sup>131</sup> See Lambert J.A. in *Haida No. 2*, *supra* note 2 at para. 77: “The only exception to the principle of paying fully compensatory and possibly aggravated and punitive damages lies in the law with respect to justification for infringement.”

<sup>132</sup> *Supra* note 111.

<sup>133</sup> *Ibid.* at para. 153.

<sup>134</sup> *Ibid.* at para. 154.

<sup>135</sup> *Halfway River*, *supra* note 34 at para. 161. See also *Kelly Lake Cree Nation v. Canada (Minister of Energy and Mines)*, [1999] 3 C.N.L.R. 126 (B.C.S.C.) [*Kelly Lake*].

<sup>136</sup> *Halfway River*, *supra* note 34 at para. 191.

<sup>137</sup> *Delgamuukw*, *supra* note 7 at para. 168.

<sup>138</sup> *Ibid.* at para. 168.

<sup>139</sup> *Kelly Lake*, *supra* note 135.

met, as it consulted "in good faith and with the intention of substantially addressing the concerns of the [A]boriginal people whose lands are at issue."<sup>140</sup>

The duty of the Crown and industry alike to provide information to Aboriginal peoples as part of the consultation process has recently extended to information that includes business plans.<sup>141</sup> The scope and content of the emerging sub-duty to inform on the part of industry will likely be contentious for obvious reasons relating to the confidential nature of petroleum exploration and development.

## B. SOURCES OF THE DUTY OF CONSULTATION

Commentators<sup>142</sup> and the case law set out four primary sources of the duty to consult: administrative law; statute; constitutional law; and equity. A contractual source of the duty to consult is found in impact and benefits agreements and land claim agreements.<sup>143</sup> These sources, however, on occasion appear to be folded into one another or, alternatively, separated depending on the factual matrix — resulting in confusion. The struggle to compartmentalize the various sources of the duty to consult and their application to the Crown or third parties is the focal point of the Weyerhaeuser argument in its application for leave to appeal to the Supreme Court of Canada in *Haida No. 2*.<sup>144</sup>

An understanding of the sources of the duty of consultation with Aboriginal peoples is essential, particularly as the common law expands the basis of the duty of consultation to industry.

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<sup>140</sup> *Ibid.* at para. 249.

<sup>141</sup> *Gitsan*, *supra* note 103 at paras. 88 and 115.

<sup>142</sup> M. Ross, "The Dene Tha' Consultation Pilot Project: An 'Appropriate Consultation Process' with First Nations?" (2001) 76 *The Newsletter of the Canadian Institute of Resources Law* 1.

<sup>143</sup> *Sahtu Dene Agreement*, *supra* note 85. One commentator suggests ministerial discretion derived from legislation exists as a source to impose consultation obligations: see T.F. Isaac, "Achieving Certainty and the Crown's Duty to Consult Aboriginal People" (Pacific Business and Law Institute Conference, Vancouver, 1 May 2002) at 10.13 and 10.18.

<sup>144</sup> *Haida No. 2*, *supra* note 2 and Weyerhaeuser's argument submitted to the S.C.C. in *Haida No. 2*. Leave Application, *supra* note 2 at para. 32ff sets out the two conflicting bases for grounding the duty to consult on third parties: the independent obligation theory and derivative obligation theory. The independent obligation theory, arising from the general law, is reflected in the three sources of the duty to consult Lambert J.A. as arising from: statutory licence itself; constructive trust; and the constitutional defense of justification as applied to a breach of s. 35 of the *Constitution Act, 1982*. Justice Lambert stated at para. 103 that "the Crown and Weyerhaeuser do not share a single duty but they have separate duties." Chief Justice Finch characterized the Crown timber forest licence as suffering from a "fundamental legal defect" resulting from the Crown's breach of its fiduciary and constitutional duties of consultation. Thus, under the derivative (or independent) obligation theory, the Crown licence received (or derived) by Weyerhaeuser carries with it fiduciary and constitutional consultation obligations where such obligations exist but are not fulfilled by the Crown.

## 1. ADMINISTRATIVE LAW<sup>145</sup>

Procedural fairness and the duty to act fairly are long-held common law principles, the application of which varies depending on the particular circumstances and context of each case.<sup>146</sup> Factors in procedural fairness include: the nature of the decision under consideration; its process (whether judicial or not); and the importance of the decision to affected parties.<sup>147</sup> The duty of procedural fairness exists as an independent obligation on the part of the Crown in the context of consultation.<sup>148</sup> The ubiquitous principle of the duty to be fair is reflected in the other sources of the duty to consult. Litigants routinely plead a breach of procedural fairness in the context of the failure to consult, in addition to pleadings based on breaches of constitutional, statutory and fiduciary sources.<sup>149</sup>

## 2. STATUTORY

A variety of legislation requires the fulfillment of the duty to consult Aboriginal peoples on the part of the Crown and, by extension, on industry upon the failure of the Crown to consult adequately.<sup>150</sup> The *Forest Act*,<sup>151</sup> the *Heritage Conservation Act*,<sup>152</sup> the federal *Environmental Assessment Act*<sup>153</sup> and the recently repealed British Columbia *Environmental Assessment Act*<sup>154</sup> all contain provisions on consultation with Aboriginal peoples.

Perhaps a reflection of the increasing confusion as to the basis and timing of the duty to consult arising from the case law is that the British Columbia government expressly did not include Aboriginal peoples' consultation in its recent replacement of the provincial *Environmental Assessment Act*.<sup>155</sup>

<sup>145</sup> See generally Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal Peoples" (2003) 41 Alta. L. Rev. 49.

<sup>146</sup> See *Cardinal v. Director of Kent Information*, [1985] 2 S.C.R. 643 at 653; and *Knight v. Indian Head School Div. No. 19*, [1990] 1 S.C.R. 653 at 682.

<sup>147</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. See also *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] S.C.R. 202 at 224.

<sup>148</sup> *Westbank*, *supra* note 117 at para. 86.

<sup>149</sup> See e.g., *Lax Kw'alaams*, *supra* note 127 at paras. 5-8 and *Kelly Lake*, *supra* note 135. See also *Union of Nova Scotia Indians v. Maritimes and Northeast Pipeline Management Ltd.* (1999), 249 N.R. 76 (F.C.A.), where the NEB breached the applicant union's procedural rights without receiving submissions from the applicant.

<sup>150</sup> *Haida No. 1* and *Haida No. 2*, *supra* note 2.

<sup>151</sup> R.S.B.C. 1996, c. 157, s. 35(1)(d)(vi).

<sup>152</sup> R.S.B.C. 1996, c. 187, s. 13(4).

<sup>153</sup> S.C. 1992, c. 37. Section 2(1) defines "environmental effect" as a change in the environment that affects the health, physical and cultural heritage and current uses of lands and resources by Aboriginal peoples.

<sup>154</sup> R.S.B.C. 1996, c. 119, repealed by the *Environmental Assessment Act*, S.B.C. 2002, c. 43, s. 58, effective 30 December 2002. See ss. 7(2)(k) and (l), *Cheslatta Carrier Nation v. British Columbia* (2000), 80 B.C.L.R. (3rd) 212 (C.A.) and *Taku River*, *supra* note 28, dealing with consultation under the repealed British Columbia *Environmental Assessment Act*.

<sup>155</sup> S.B.C. 2002, c. 43. B.C. Reg. 373/2002 sets out a public consultation policy but without express mention of Aboriginal peoples (save for the *Nisga'a Treaty*), thus potentially exposing the legislation to challenge based on application of *Mikisev*, *supra* note 111, and the principle of distinct and separate consultations required for Aboriginal peoples. The exclusion reflects the British Columbia government's use of its Aboriginal peoples *Consultation Policy*, *supra* note 100. The British Columbia Environmental Assessment Office (EAO) published the "*Guide to the British Columbia Environmental Assessment Process*" (Province of British Columbia: Ministry of Sustainable Resource Management, 2002), online:

### 3. CONSTITUTIONAL

The constitutional source of the duty of consultation with Aboriginal peoples emerges from s. 35 of the *Constitution Act, 1982*.<sup>156</sup> *Sparrow* provided the first constitutional analysis of the Crown's duty of consultation with Aboriginal peoples.<sup>157</sup> While the requirement of consultation to fulfill the second stage of the justification test is only briefly mentioned in *Sparrow*, the scope and nature of the duty of consultation based on the *Constitution Act, 1982*, has been subsequently considered and expanded by the Supreme Court of Canada.<sup>158</sup>

The constitution-based protection afforded Aboriginal peoples provides a powerful basis on which to assert the duty of consultation and breaches of such duty by the Crown.<sup>159</sup> Much of the discussion on the constitutional nature of the duty of consultation revolves around the discussion of the fiduciary and trust-like responsibilities of the Crown regarding Aboriginal peoples. The second stage of the *Sparrow* justification test requires that any interference with or infringement of Aboriginal rights "is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples."<sup>160</sup>

The case law has focused almost exclusively on the parameters of this trust relationship and has, in effect, transformed the constitution-based justification test into an analysis based on equitable principles of trust, fiduciary and unjust enrichment law. The merger of fiduciary law into the constitution-based test of *Sparrow* served the purposes of the jurisprudence when there was failure by the Crown to discharge the duty of consultation. The *Sparrow* test was developed as a standard for use by the Crown and is very much a public law concept. The application of the test to private parties, as in the *Haida* decisions,<sup>161</sup> results in a separation or division of fiduciary obligations from constitutional obligations of consultation. The line demarcating the two is blurred. Even if the law develops at the Supreme Court of Canada with the acceptance of the imposition of equitable obligations on private third parties for failures of the Crown, imposing constitutional obligations may be more difficult, in part due to the problematic application of constitutional law duties to private parties.

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Environmental Assessment Office <[www.eao.gov.bc.ca/](http://www.eao.gov.bc.ca/)> [*EA Guide*]. Section 3.3 of the *EA Guide* outlines the legal and policy context of Aboriginal peoples consultation and accommodation. Appendix 2 of the *EA Guide* amplifies the principles and stages of Crown consultation. Appendix 2 lists a suite of consultation principles which states consultation on activities that involve other agencies should be integrated wherever possible; presumably integration with petroleum and energy projects would fall within this principle. Appendix 2 in turn references a further document in the *EA Guide* entitled "*Supplementary Guide to First Nations: The British Columbia Environmental Assessment Process*" [*Supplementary EA Guide*]. The *Supplementary EA Guide* is the first British Columbia branch-level document that builds upon the province-wide *Consultation Policy*. The *Supplementary EA Guide* provides information regarding First Nations' consultation and participation opportunities in a typical environmental assessment.

<sup>156</sup> *Supra* note 3.

<sup>157</sup> *Supra* note 9 at 1119.

<sup>158</sup> See e.g., *Delgamuukw*, *supra* note 7, and *Gladstone*, *supra* note 8.

<sup>159</sup> *Haida No. 2*, *supra* note 2, stands for the proposition that a third party's duty to consult Aboriginal peoples is derived "from its opportunity to put up a defence of justification to any claim against it for violation of Aboriginal title or Aboriginal rights," (Lambert J.A. at para. 101). This, in essence, applies s. 35 of the *Constitution Act, 1982*, to third parties.

<sup>160</sup> *Delgamuukw*, *supra* note 7 at para. 162.

<sup>161</sup> *Supra* note 2.

## 4. EQUITY — FIDUCIARY/TRUST

Reflected in the *Royal Proclamation of 1763*,<sup>162</sup> the existence of a fiduciary, or trust-like, relationship as between the federal Crown and Aboriginal peoples is well known.<sup>163</sup> Similarly, the existence of a fiduciary relationship between the provincial Crown and Aboriginal peoples is generally,<sup>164</sup> although not always,<sup>165</sup> accepted. While the courts consistently agree that the Crown owes a fiduciary duty to Aboriginal peoples, they have been less consistent in their views on the scope of that duty, in part due to the filtered nature of facts presented in a dispute and the absence of coherent and unifying principles to assist in adjudication.

In *Van der Peet*, the Court stated that the duty must be given “generous and liberal interpretation”<sup>166</sup> and “where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1),”<sup>167</sup> it must be resolved in favour of Aboriginal peoples. In a similar vein, in *Blueberry River Indian Band v. Canada (Department of Indian Affairs & Northern Development)*<sup>168</sup> and later in *Haida No. 1*,<sup>169</sup> the Courts described the relationship between the Crown and Aboriginal peoples as “trust-like.” As noted earlier, the Court in *Haida No. 1* stated that the fiduciary duty owed by the Crown to Aboriginal peoples “is a continuing and ever present duty.”<sup>170</sup> In *Haida No. 2*, Lambert J.A. expanded on this, stating that:

The fiduciary duty of the Crown, federal or provincial, is a duty to behave towards the Indian people with utmost good faith and to put the interests of the Indian people under the protection of the Crown so that, in cases of conflicting rights, the interests of the Indian people, to whom the fiduciary duty is owed, must not be

<sup>162</sup> R.S.C. 1985, Appendix II, No. 1., which states in part,

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.

<sup>163</sup> *Haida No. 1*, *supra* note 2 at paras. 33-34.

<sup>164</sup> See e.g. *Halfway River*, *supra* note 34 and *R. v. Perry* (1997), 33 O.R. (3d) 705 (C.A.), that recognized the provincial Crown has a fiduciary duty to Aboriginal peoples. See also: Leonard I. Rotman, “Conceptualizing Crown-Aboriginal Fiduciary Relations” in Law Commission of Canada, *In Whom We Trust: A Forum on Crown-Aboriginal Fiduciary Relationships* (Toronto: Irwin Law, 2002) [*Crown-Aboriginal Fiduciary Relationships*]; M.L. Stevenson & A. Peeling, “Probing the Parameters of Canada’s Crown-Aboriginal Fiduciary Relationship” in *Crown-Aboriginal Fiduciary Relationships*, *ibid.*; and Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

<sup>165</sup> See e.g. *Bear Island Foundation v. Ontario* (1999), 126 O.A.C. 385 (C.A.), where the Court cited *Mitchell v. Sandy Bay Indian Band*, (1993) 86 Man. R. (2d) 208 (Q.B.), *aff’d*, (1993) 92 Man. R. (2d) 67 (C.A.), and stated that the fiduciary duty of the Crown to Aboriginal people is primarily a duty of the federal Crown.

<sup>166</sup> *Supra* note 12 at para. 24.

<sup>167</sup> *Ibid.* at para. 25.

<sup>168</sup> [1995] 4 S.C.R. 344 at para. 13.

<sup>169</sup> *Haida No. 1*, *supra* note 2 at paras. 33-34.

<sup>170</sup> *Haida No. 2*, *supra* note 2 at para. 64. Note that the Supreme Court of Canada more recently stated in *Wewaykum*, *supra* note 41 at para. 81, that “the fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.” The Court is signaling that the application of fiduciary principles as between the Crown and Aboriginal peoples may be too broad.

subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty.<sup>171</sup>

This appears to be at odds with the recent decision of the Supreme Court of Canada in *Wewaykum*,<sup>172</sup> where Binnie J., for the Court, stated that prior to reserve creation, the Crown's fiduciary duty "is limited to the basic obligations of loyalty, good faith in the discharge of its mandate, providing full disclosure appropriate to the subject matter, and acting with a view to the best interest of the beneficiaries."<sup>173</sup> Justice Binnie continued:

When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting ... The Indians were "vulnerable" to the adverse exercise of the government's discretion, but so too were the other settlers, and each looked to the Crown for a fair resolution of their dispute. At that stage, prior to reserve creation, the Court cannot ignore the reality of the conflicting demands confronting the government.<sup>174</sup>

In *Quebec (A.G.) v. Canada (National Energy Board)*,<sup>175</sup> the Court determined that the imposition of a trust or a fiduciary relationship on the NEB as a creation of the federal government was inherently inconsistent with the quasi-judicial role of the NEB in determining whether export licences should be granted. Justice Iacobucci, for the Court, cited *Lac Minerals Ltd. v. International Corona Resources Ltd.*<sup>176</sup> as support for the proposition that not every aspect of the relationship between a fiduciary and a beneficiary is a fiduciary obligation.<sup>177</sup> Similarly, in *Wewaykum*, the Court noted that this principle applies to the relationship between the Crown and Aboriginal peoples and stated that the creation of a fiduciary relationship "depends on [the] identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility 'in the nature of a private law duty.'<sup>178</sup>

The fiduciary relationship between the Crown and Aboriginal peoples has been viewed recently by the courts through the unfocused lens of reconciliation.<sup>179</sup> One could argue that the notion of "reconciliation" itself, and its recognition of the co-existence of Aboriginal and non-Aboriginal peoples in Canada, is a source of the duty to consult.

<sup>171</sup> *Supra* note 2 at para. 62.

<sup>172</sup> *Supra* note 41.

<sup>173</sup> *Ibid.* at para. 93.

<sup>174</sup> *Ibid.* at para. 96.

<sup>175</sup> [1994] 1 S.C.R. 159.

<sup>176</sup> [1989] 2 S.C.R. 574.

<sup>177</sup> *Supra* note 175 at para. 34.

<sup>178</sup> *Supra* note 41 at para. 85.

<sup>179</sup> See *Van der Peet*, *supra* note 12 at paras. 31, 36 and 43; and *Delgamuikw*, *supra* note 7 at paras. 148-86.



Commentators have criticized judicial use of fiduciary law principles<sup>180</sup> and the uneven application of the law to a wide topology of Crown and Aboriginal peoples' issues. One of the stronger criticisms comes from Professor Gordon Christie, who views the use of a fiduciary doctrine in the Crown-Aboriginal context as inappropriate and states that:

It is not a matter of courts misunderstanding fiduciary doctrine, so that, if they better understood the doctrine, they could appropriately apply it to the Crown-Aboriginal dynamic. Similarly, it is not a matter of courts misapplying the fiduciary doctrine, so that, if they better understood how to do this, fiduciary doctrine could have a role to play in the Crown-Aboriginal context ... Rather, no matter how twisted, tweaked, or perfected, fiduciary doctrine cannot meaningfully be applied to Crown-Aboriginal relationships.<sup>181</sup>

Notwithstanding such criticism, the courts appear content (subject to the occasional exception)<sup>182</sup> to apply trust law and the law of fiduciaries without attempting to develop overarching equitable principles applicable to Aboriginal peoples and the Crown. With the absence of coherent articulation of equitable and fiduciary principles to the Crown, extension and application to industry may be even more problematic.

a. Application of the Law of Equity and Principle of Knowing Receipt to Industry

The Court in *Haida No. 1*,<sup>183</sup> however, saddled equitable duties of consultation and accommodation upon both the provincial Crown and Weyerhaeuser. While this is a novel determination by the Court, there is no analysis of the basis for foisting such equitable obligations on Weyerhaeuser. Weyerhaeuser specifically struggled with the notion of being imputed with equitable duties and sought and received a reconsideration by the same bench in *Haida No. 2*.<sup>184</sup> In that case, Lambert J.A. provided the requisite analysis, relying on principles of equity and the "knowing receipt" line of case law to impute fiduciary obligations on Weyerhaeuser. Where a breach of fiduciary duty is known or ought to have been known by a third party, or where a third party "should have made an inquiry about whether the Crown had complied with the Crown's fiduciary duty,"<sup>185</sup> any title passed to such third party by the Crown is "clogged" by the fiduciary's breach of duty. As a result, a constructive trust is imposed upon the third party, and the third party transformed into a constructive trustee *vis-à-vis* the beneficiary of the Crown's fiduciary obligation.<sup>186</sup>

In contrast, the British Columbia Supreme Court in *Gitksan*<sup>187</sup> distinguished the reasons of Lambert J.A. in *Haida No. 2* by finding that there was no evidence that (at least initially)

<sup>180</sup> See, for example, J. Keeping, "Local Benefits from Mineral Development: The Law Applicable in the Northwest Territories" (1999) *Canadian Institute of Resources Law* at 67ff, and Michael Bryant, "Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law" (1993) 27 *U.B.C.L. Rev.* 19.

<sup>181</sup> "Considering the Future of the Crown-Aboriginal Fiduciary Relationship" in *Crown-Aboriginal Fiduciary Relationships*, *supra* note 164 at 289.

<sup>182</sup> *Supra* note 175.

<sup>183</sup> *Supra* note 2.

<sup>184</sup> *Haida No. 2*, *supra* note 2.

<sup>185</sup> *Ibid.* at para. 65.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Supra* note 103 at para. 112.

an industry recipient (Skeena Cellulose) knowingly received timber licenses that suffered from a breach of the fiduciary duty to consult by the Crown. Whether this would also relieve Skeena Cellulose of constitutional obligations is unknown.

The conclusion by Lambert J.A. that Weyerhaeuser is a constructive trustee for the beneficiary, the Haida Nation, may be defeated by Weyerhaeuser establishing the defence that it is a *bona fide* purchaser without notice. As this defence was not argued by Weyerhaeuser (as it did not argue the concept of a fiduciary-based obligation in *Haida No. 1* or *Haida No. 2*), the appeal to the Supreme Court of Canada for *Haida No. 2* will likely focus on this argument. This defence, however, may be weakened by the requirement that the transferor of the right (the Crown with TFL No. 39) transfers *intra vires* such right. Where the Crown has breached its duty of consultation, it may not have the power to transfer the right in the first place.<sup>188</sup>

#### b. Principle of Unjust Enrichment

The continued expansion of the application of equity and the law of fiduciaries may include the principles of unjust enrichment:<sup>189</sup> the enrichment of the defendant; the corresponding deprivation of the plaintiff; and the absence of juristic reasons for the unjust enrichment.<sup>190</sup> The principle of unjust enrichment and the corresponding remedy of a constructive trust was applied successfully in *Semiahmoo Indian Band v. Canada*,<sup>191</sup> where the Crown was found to have breached its fiduciary duty to an Aboriginal people in its dealings with reserve land.

Justice Lambert, in *Haida No. 2*, raised in *obiter* the possibility of unjust enrichment in addition to the principle of knowing receipt as a basis for restitution for unjustifiable infringement of Aboriginal rights.<sup>192</sup> Though argued by the Squamish Nation as an intervenor,

<sup>188</sup> See C. Harpum, "The Stranger as Constructive Trustee" (1986) 102 *The Law Quarterly Rev.* 267.

<sup>189</sup> *Haida No. 2*, *supra* note 2 at para. 73.

<sup>190</sup> *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

<sup>191</sup> [1998] 1 F.C. 3 (C.A.) [*Semiahmoo*]. The facts in *Semiahmoo* were as follows: In 1989, the Crown designated approximately 382 acres of land in British Columbia as reserve land for the use and benefit of the Semiahmoo Indian Band (Semiahmoo Band). In 1951, the Crown obtained an absolute surrender of approximately 22 acres of the reserve for the purpose of using the land to build an expanded customs facility at the Douglas Border Crossing, which was adjacent to the reserve. The Semiahmoo Band was paid \$550 per acre for their surrender. Since then, the Crown retained title to the surrendered land, but most of it remained unused for customs facilities or other public purpose. Despite the Semiahmoo Band's inquiries throughout the 1960s as to whether some or all of the land could be returned to it since the land did not appear to be required for a public purpose, the Crown refused to return the land. In 1969, the Semiahmoo Band passed a formal council resolution recommending immediate action to reacquire on its behalf the reserve land surrendered to the Crown. Subsequently, the Crown responded to the Semiahmoo Band's inquiries by stating that either the surrendered land was needed for foreseeable expansion of the customs facilities or that a study was being prepared regarding its development. In 1990, the Semiahmoo Band filed a statement of claim alleging that the Crown had breached its fiduciary duty to the Band in the 1951 surrender. The Court held that the Crown had breached its fiduciary duty to the Semiahmoo Band when it consented to the 1951 surrender, and orders that a constructive trust be put into place in order to redress the Crown's breach of its fiduciary duty, as the three elements for unjust enrichment were met. The Court finds that the imposition of a constructive trust is appropriate, since it would give back to the Semiahmoo Band an interest in the surrendered land.

<sup>192</sup> *Haida No. 2*, *supra* note 2 at para. 73.

the Court in *Haida No. 2* refused to apply the principle of unjust enrichment. The authors argue that the principle, however, appears to be suited to provide an additional basis to found a remedy of a constructive trust for a breach of an equitable duty to consult by the Crown or by industry. Where industry does not have knowledge of a Crown breach of fiduciary duty regarding an authorization or permit, industry may well still be accountable as a constructive trustee under the law of unjust enrichment.<sup>193</sup>

### C. DUTY OF ACCOMMODATION

Lost in an analysis of the duty of consultation is the complementary duty of accommodation.<sup>194</sup> While there has been much judicial and academic discourse on consultation, the scope of the duty of accommodation by the Crown and industry have not yet been meaningfully articulated by the courts.<sup>195</sup> The duty of accommodation appears, on the one hand, to be a free-standing duty, while on the other, it is a necessary part of the duty of consultation.<sup>196</sup> Is the duty of accommodation a factor in or subset of the duty to consult, or is it a stand-alone duty, separate and distinct? The Court in *Haida No. 2* stated that consultation carries “with it an obligation to seek accommodation.”<sup>197</sup>

Like the duty to consult, the duty to accommodate arises before an infringement occurs. As with the duty to consult, the duty of accommodation of Aboriginal peoples rests with the Crown and third parties.<sup>198</sup> From a timing perspective, it appears that discharging accommodation obligations parallels fulfilling consultation duties.

The duty of accommodation is not a substitute for compensation. Compensation arises as a remedy to unjustifiable infringement of Aboriginal rights.<sup>199</sup> Compensation for infringement of an Aboriginal right is based on the nature of the right, the nature of the infringement and the extent of accommodation of Aboriginal peoples’ interests.<sup>200</sup>

The Court in *Haida No. 2* stated that “above all, there must be effective consultation and *bona fide* efforts to seek accommodation.”<sup>201</sup> *Haida No. 2* provides a skeletal view on

<sup>193</sup> In the case of logging on the Queen Charlotte Islands, damages awarded under the heading of unjust enrichment could exceed \$30 billion, which reflects the value of timber logged and removed from the islands.

<sup>194</sup> *Haida No. 2*, *supra* note 2 at paras. 49 and 55. See also *Delgamuukw*, *supra* note 7 at para. 169, where accommodation of Aboriginal interests is first described in a Supreme Court of Canada judgment, but with no elaboration.

<sup>195</sup> See *Lax Kw’alaams*, *supra* note 127 at para. 9, where the Court stated, “In this context ‘accommodation’ means that the Crown has a positive obligation to make a sincere good faith attempt to negotiate with the [affected Aboriginal peoples] and to make an accommodation which will protect the [affected Aboriginal peoples].”

<sup>196</sup> *Haida No. 2*, *supra* note 2 at para. 40. The heading that the Court in *Haida No. 1* used at para. 37, “6. The Content of the Duty to Consult” implies that the duty to accommodate may be a subordinate duty to the duty to consult.

<sup>197</sup> *Haida No. 2*, *ibid.* at para. 60.

<sup>198</sup> *Ibid.* at paras. 48, 52. See also para. 104, Lambert J.A. and para. 129, Finch C.J.A.

<sup>199</sup> *Delgamuukw*, *supra* note 7 at para. 169.

<sup>200</sup> *Ibid.*, where the Court stated, “The amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.” See also *Haida No. 1*, *supra* note 2 at para. 44.

<sup>201</sup> *Haida No. 2*, *supra* note 2 at para. 101.

industry accommodation and raises the spectre of various heads of damage for breaches of the duties of consultation and accommodation where third parties (industry) do not fulfill fiduciary, statutory, or other obligations of consultation and accommodation.<sup>202</sup> This begs the following questions: What is the substance of accommodation? What is its content? How much "accommodation" is needed? How does one determine with any degree of confidence if the duty to accommodate has been discharged? *Haida No. 1* posited a proportionality test based on Aboriginal rights: "the scope of consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for Aboriginal title and Aboriginal rights."<sup>203</sup>

The *Haida* decisions use a suite of phrases interchangeably in discussing and applying the duty of accommodation, creating further uncertainty. Three forms of expression of the duty to accommodate are witnessed in the *Haida* decisions: the duty "to seek an accommodation";<sup>204</sup> the duty to "reach accommodations";<sup>205</sup> and the duty "to endeavour to seek workable accommodations."<sup>206</sup> This last form of expression occurs in the Declaration in *Haida No. 2*.<sup>207</sup>

On review of the wording of the Declaration in *Haida No. 2*, important questions arise as to the definition and application of the duty, particularly as it applies to third parties. The four components of this key and repeated phrase — first, "to endeavour"; second, "to seek"; third, "workable"; and fourth, "accommodations" — are each uncertain. The phrase also juxtaposes Aboriginal (*Haida*) interests on the one hand with public (Aboriginal and non-Aboriginal) on the other, resulting in further difficulties in interpretation and application.

We know that accommodation is integral to any infringement analysis and for determining a remedy; however, the fact remains that there are no legal guideposts to assist the Crown or industry to determine, without recourse to litigation, whether the duties of consultation and accommodation have been discharged.<sup>208</sup> The judgments of *Delgamuukw*,<sup>209</sup> *Haida No. 1*<sup>210</sup> and *Haida No. 2*<sup>211</sup> clearly focus on developing broad principles, but they lack the substance

<sup>202</sup> *Ibid.* at para. 102. Justice Lambert chose not to provide some clarity on his sweeping statements by asserting "I don't think that any attempt at describing Weyerhaeuser's obligations in greater detail would benefit any of the parties."

<sup>203</sup> *Haida No. 1*, *supra* note 2 at para. 51.

<sup>204</sup> *Ibid.* at para. 58.

<sup>205</sup> *Ibid.* at para. 61.

<sup>206</sup> *Ibid.* at para. 60. See also *Haida No. 2*, *supra* note 2 at para. 104, Lambert J.A. and para. 129, Finch C.J.A., stating: "The Crown ... and Weyerhaeuser have ... legally enforceable duties to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the Aboriginal interests of the Haida people, on the one hand, and the short and long term objectives of the Crown and Weyerhaeuser to manage TFL # 39 ... in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand."

<sup>207</sup> *Haida No. 2*, *supra* note 2 at para. 104.

<sup>208</sup> *Supra* note 27, where it appears that the British Columbia government believes it has discharged its consultation and accommodation obligations by issuing requisite approvals to develop a mine notwithstanding that the issue of consultation and its adequacy is under appeal to the Supreme Court of Canada.

<sup>209</sup> *Supra* note 7.

<sup>210</sup> *Supra* note 2.

<sup>211</sup> *Ibid.*

necessary to assist the Crown and industry to answer these crucial questions with any degree of certainty.

## V. DUTY OF CONSULTATION AND THE PETROLEUM INDUSTRY

The law has evolved to such an extent that almost any impact or impairment due to the activities of the Crown or third parties regarding any possible or probable Aboriginal right, no matter how evidenced, will require consultation with and accommodation of Aboriginal peoples.<sup>212</sup> The pendulum has swung to the extreme where it will be a rare instance in which consultation will not be required where a Crown decision or authorization is involved.

With the *Haida* decisions,<sup>213</sup> the ever-increasing uncertainty in the scope, nature and content of the duty of consultation now appears to apply to industry.<sup>214</sup> The economic implications for industry were recognized well before the *Haida* decisions in *Halfway River*,<sup>215</sup> where Southin J.A. (in dissent) stated that third parties acquiring rights in British Columbia under the *Forest Act*,<sup>216</sup> the *Petroleum and Natural Gas Act*,<sup>217</sup> the *Mineral Tenure Act*<sup>218</sup> and the *Land Act*<sup>219</sup> (and their predecessor statutes) would seriously be impacted where the Crown inadequately consulted Aboriginal peoples. Weyerhaeuser itself, in its application for leave to appeal to the Supreme Court of Canada in *Haida No. 2*, has described the duty of consultation and accommodation imposed on industry as one which “would have profound and unquantifiable implications for anyone operating on Crown lands,” and “would throw into doubt the legal effect of unknown numbers of Crown permits, licenses and other authorities ... in all areas of land use concerning Crown land.”<sup>220</sup>

### A. HAIDA DECISIONS AND RECONCILIATION

The *Haida* decisions<sup>221</sup> stand for a variety of legal propositions, the most important of which is the recognition of new sources for the duties of consultation and accommodation

<sup>212</sup> *Supra* note 100 at 23-24.

<sup>213</sup> *Supra* note 2.

<sup>214</sup> The most recent example is a breach of the duty of consultation claimed by the Heiltsuk First Nation of the British Columbia central coast. A pulp mill, now closed, displaced a Heiltsuk village in 1911. A tenure to operate fish farm was granted by the Crown without consultation with the Heiltsuk. The Heiltsuk have commenced an action against the fish farm licensee and the Crown: see *Vancouver Sun* (25 February 2003) at B5.

<sup>215</sup> *Supra* note 34 at para. 233.

<sup>216</sup> R.S.B.C. 1996, c. 157.

<sup>217</sup> *Ibid.*, c. 361.

<sup>218</sup> *Ibid.*, c. 292.

<sup>219</sup> *Ibid.*, c. 245.

<sup>220</sup> *Haida No. 2*, *supra* note 2. Application for leave to appeal to the Supreme Court of Canada, Weyerhaeuser argument dated October 15, 2002 at para. 50 [document on file with authors].

<sup>221</sup> *Supra* note 2.

to third parties.<sup>222</sup> The recurring theme of reconciliation<sup>223</sup> between the Crown and Aboriginal peoples arises in the *Haida* decisions in an indirect manner. Perhaps the Crown will listen more readily to industry statements demanding certainty, particularly on ownership and jurisdiction of natural resources. There are signs that the judiciary (most notably in British Columbia) may view industry, and not the Crown, as the driver of consultation and accommodation. Perhaps foreshadowing the strategy of the courts to come, the Court in *Gitsan* stated:

I do not consider it necessary at this stage to impose a formal obligation on Skeena [Cellulose Limited] to participate in the process of consultation/accommodation between the petitioning First Nations and the Crown. If the licenses do have a legal defect, Skeena will be *practically motivated to participate* in the process in order to facilitate the removal of the defect.<sup>224</sup>

The Supreme Court of Canada has attempted to strike a balance between Aboriginal peoples on the one hand and non-Aboriginal peoples on the other. Chief Justice Lamer in *Gladstone* wrote:

Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.<sup>225</sup>

The authors submit that Lambert J.A. and, to a lesser degree, Finch C.J.A. are attempting to force the Crown's hand regarding reconciliation by including industry into the mix to spur the Crown to settle Aboriginal peoples' rights and title claims. Where industry stands to lose or have its asset base seriously impaired, such as by the invalidation of Crown authorizations in the form of permits, leases or licenses and other forms of tenure for petroleum exploration or development, it may be industry that provides the impetus to the Crown to conduct complete reconciliation with Aboriginal peoples on a timely basis. Industry is no longer a passive grantee of Crown resource rights. Industry historically did not need, in Canada, to look beyond the words of a Crown grant, lease or license conveying rights to resources. With

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<sup>222</sup> *Haida No. 2*, *supra* note 2, application for leave to appeal to the Supreme Court of Canada, British Columbia (Ministry of Forests) argument dated October 15, 2002, at para. 4 [document on file with the authors]: "The case is about the management and control of all those aspects of natural resource development in British Columbia where statutory decision makers exercise powers, or companies proceed with activities, which may affect interests claimed by First Nations."

<sup>223</sup> *Van der Peet*, *supra* note 12 at paras. 31, 36 and 43, setting out the purpose of s. 35(1) of the *Constitution Act, 1982*, as reconciliation of prior Aboriginal peoples occupation with Crown sovereignty. See also Sonia Lawrence & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar. Rev. 253 and Aldridge, *supra* note 46. See also, British Columbia Legislative Assembly, *Speech from the Throne, Opening of the Fourth Session, Thirty-Seventh Parliament of the Province of British Columbia*, (11 February 2003), online: Legislative Assembly of British Columbia <[www.legis.gov.bc.ca/37th4th/4-8-37-4.htm](http://www.legis.gov.bc.ca/37th4th/4-8-37-4.htm)> at 15ff [*Throne Speech*]. The Throne Speech is a significant political milestone for Aboriginal peoples as the Province of British Columbia apologized to First Nations and, with the *Throne Speech*, has formally commenced reconciliation with Aboriginal peoples.

<sup>224</sup> *Supra* note 103 at para. 112 [emphasis added].

<sup>225</sup> *Supra* note 8 at para. 73.

the law of consultation and accommodation rapidly developing, industry is inexorably linked both to the Crown and to its acts and decisions regarding Aboriginal peoples.

While the new duties of consultation and accommodation imposed on industry pursuant to the *Haida* decisions are broad, the writers submit that the Supreme Court of Canada will indeed have to strike some form of balance between Aboriginal and non-Aboriginal interests that is concrete and provides a modicum of certainty. The need to reconcile the competing interests of Aboriginal peoples, as protected by the *Constitution Act, 1982*<sup>226</sup> and the law of fiduciaries, with those interests of the Crown to grant tenures for natural resources development, is paramount. As stated in *Kelly Lake*, continued consultation delays “would also impact in a broader sense upon investment by a loss of confidence in industry in the ‘ability of the Province to resolve First Nation issues.’”<sup>227</sup>

## B. PRAGMATISM IN CONSULTATION AND ACCOMMODATION

Notwithstanding the potentially onerous duties on industry to consult arising from judicial attempts to achieve reconciliation between the Crown and Aboriginal peoples, consultation and accommodation is integral to any petroleum industry project, particularly where lands are not settled by treaty or where a treaty preserves Aboriginal rights. Pragmatic approaches to consultation are essential, especially where the Crown has not adequately conducted consultation.<sup>228</sup> The Court in *Kelly Lake* stated:

There is no question that there is a duty on government to consult with First Nation people before making decisions that will affect [their] rights ... a consideration of the question of consultation must be taken into account not only the aspects of direct consultation between First Nations people and the provincial government ... but also the consultations between First Nations people and Amoco ... The process of consultation cannot be viewed in a vacuum and must take into account the general process by which government deals with First Nations people, including any discussions between resource developers such as Amoco and First Nations people.<sup>229</sup>

Industry consultations with Aboriginal peoples may have to commence very early in the life cycle of an exploration program or project.<sup>230</sup> Larger resource companies of all stripes have created senior management positions to reflect the importance of addressing and discharging obligations of consultation and to foster strong relationships with Aboriginal peoples. Clearly, companies with larger budgets for consultation and accommodation will be better positioned than small exploration and sporadically-capitalized junior resource

<sup>226</sup> *Supra* note 3.

<sup>227</sup> *Supra* note 135 at para. 182.

<sup>228</sup> Due in part to government cutbacks as stated in *Gitksan*, *supra* note 103 at para. 27.

<sup>229</sup> *Supra* note 135 at para. 154.

<sup>230</sup> Consultation can be a lengthy process. Building goodwill with Aboriginal peoples affected by a project is vital. Aboriginal peoples routinely have expressed the view that industry simply does not take the time to foster strong ties and linkages and to attempt to absorb and understand, in a *bona fide* manner, the culture, history and unique qualities of Aboriginal peoples. The more that a company can articulate a desire to *want* to build ties with an Aboriginal people and the less it shows that it *needs* to build ties can be critical. See the *Nunavut Agreement*, *supra* note 89 at art. 27.1.2 and 27.2.1, where project proponents have obligations of consultations, albeit perfunctory, as outlined in art. 27.2.2.

companies.<sup>231</sup> This inherent (and unavoidable) inequity *vis-à-vis* Aboriginal peoples will itself dampen the enthusiasm of investors and hence exploration and development opportunities in all natural resource sectors.

Aboriginal peoples routinely lack the capacity to engage in the consultation process. Legal, business, scientific and staff resources are often minimal for Aboriginal peoples and result in delay and frustration for all concerned. Enabling Aboriginal peoples to participate fully, and on a timely basis, in the consultation process must be a priority for industry proponents. The law requires it. Pragmatic approaches include, for example, industry assurances to Aboriginal peoples regarding confidentiality of traditional knowledge. For example, burial sites are susceptible to looting and fishing and hunting sites may be plundered if traditional knowledge is not held in confidence.

At a minimum, industry with business operations in British Columbia that may intersect Aboriginal rights should review in detail the British Columbia government's *Consultation Policy*.<sup>232</sup> The *Consultation Policy* provides a roadmap to assist industry in Aboriginal law due diligence and to assess the discharge of the Crown of its consultation obligations. Where Aboriginal claims affect exploration or development, industry should be mindful of the statements by Lamer C.J.C. in *Delgamuukw* that accommodation by the Crown includes "participation by Aboriginal peoples in the development of resources of British Columbia."<sup>233</sup> At law, Aboriginal peoples are very much potential partners in current and future resource development.<sup>234</sup>

### C. GUIDELINES TO CONSULTATION

In the writers' experience the most-often asked question by clients in resource development projects is how much and to what extent must industry consult and accommodate Aboriginal peoples? There is no definitive legal response to this question. We can only respond to our industry clients with a review of the current and evolving case law, enactments and applicable government consultation policies all of which provide precious

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<sup>231</sup> The U.S. *Foreign Corrupt Practices Act*, 15 U.S.C. 78m(b)(2)-(3), 78dd-1, 2, 78ff (a), (c) (1988), should be reviewed to ensure that if necessary, a compliance program is created. See also A.T. Martin, "Corruption and Improper Payments: Global trends and Applicable Laws" (1998) 36 *Alta. L. Rev.* 416 and other papers in vol. 36. In British Columbia, the spectre of improper payments is reflected, for example, in the Province of British Columbia and Doig River First Nation Agreement, s. 9.1, which states "... DRFN will not request any fees, levies, compensation or other charges from companies."

<sup>232</sup> *Supra* note 100.

<sup>233</sup> *Supra* note 7 at para. 167.

<sup>234</sup> Various authors have published materials as to approaching consultation with the Crown and with Aboriginal peoples. See T. Gouge, Q.C., "Aboriginal Consultation in the Regulation of Resource Development Projects: An Industry Perspective" (Pacific Business & Law Institute Conference on Consultation, Vancouver, 1 May 2002); A. Donovan & J. Griffith, "Duty of Business to Consult with First Nations" (The Continuing Legal Education Society Practice Desk, British Columbia, November 1, 2002); J. Olynyk, "Aboriginal Consultation and Resource Development: The New Legal Landscape" (The Canadian Institute Conference on BC Energy, Vancouver, 9-10 December 2002); A.C. Laing, "The Practice of Consultation: Working Definitions and Some Examples that have Succeeded" (Pacific Business & Law Institute Conference on Consultation, Vancouver, 1 May 2002); Tony Fogarassy, "Aboriginal Consultation and Business Law Checklist: Business and Aboriginal Interests in British Columbia's Resource Sector," online: Clark, Wilson <[www.cwilson.com/energy/pubs.htm](http://www.cwilson.com/energy/pubs.htm)>.



little legal direction. Ultimately, the most practical route to successful consultation is to build a working relationship with affected Aboriginal peoples. This requires spadework, time and trust. Trust is the coin of the realm. The greater the trust that is fostered the more likely a petroleum development project is acceptable for an Aboriginal people and the industry proponent alike.

Certainly Aboriginal peoples who are involved in petroleum development projects through employment and training or as business partners involved in revenue sharing are less likely to oppose projects. Economic sharing, principally by means of joint ventures, has long been popularized as a means of building goodwill between Aboriginal peoples and industry. An Aboriginal people is more likely to enter into business arrangements with a project proponent with whom it is familiar, and of whom it has a positive view, than proponents who are either unfamiliar or have a reputation of unfair dealings with Aboriginal peoples.

## VI. CONCLUSION

The duty of consultation with Aboriginal peoples — once an obligation of the Crown — is now extended to third parties, including the petroleum industry. The *Haida* decisions have created new law by extending the duty of consultation and also the duty of accommodation to industry. In doing so, the courts have based industry's duty to consult and to accommodate, in part, on equitable principles, on the law of fiduciaries and on the *Constitution Act, 1982*.<sup>235</sup> Where the Crown and industry fail in discharging their duties, the courts appear willing to award remedies, including punitive and aggravated damages, and to declare invalid Crown licenses, leases, permits and other proprietary rights. Reasons for judgment by the Supreme Court of Canada in the *Haida* decisions are likely to reshape duties of consultation and accommodation with Aboriginal peoples and natural resources development for the Crown and for industry alike.

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<sup>235</sup> *Supra* note 3.