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Developing Case Law: The Future of Consultation and Accommodation

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DEVELOPING CASE LAW: THE FUTURE OF CONSULTATION AND ACCOMMODATION

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The duty to consult has had a relatively short gestation period—it was first mentioned in 1990 in *R. v. Sparrow*,[1] and only first achieved prominence in 1997, in *Delgamuukw v. British Columbia*.[2] After *Delgamuukw*, a body of case law built up around this duty and, to a lesser extent its offspring, the duty to accommodate.[3] While the duty to consult gained prominence throughout this period both in the contexts of litigation and negotiation, until late in 2004 the jurisprudence itself was quite anaemic, as it offered few clues as to the contours, application, and ultimate role of the duty to consult in the legal, political, and economic landscape of Canada.

The aim in this paper is twofold. First, the historical development of the case law around the duty to consult will be laid out, and an attempt will be

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[1] [1990] 1 S.C.R. 1075, 46 B.C.L.R. (2d) 1, 70 D.L.R. (4th) 385 [*Sparrow*].

[2] [1997] 3 S.C.R. 1010, 66 B.C.L.R. (3d) 285, 153 D.L.R. (4th) 193 [*Delgamuukw*].

[3] The duty to consult was the subject of judicial inquiry in, amongst others, *Chemanius First Nation v. British Columbia Assets and Lands Corp.*, [1999] 3 C.N.L.R. 8 (B.C.S.C.); *Cheslatta Carrier Nation v. British Columbia*, [1998] 3 C.N.L.R. 1, 53 B.C.L.R. (3d) 1 (S.C.); *Cheslatta Carrier Nation v. British Columbia*, [2000] 1 C.N.L.R. 10, 80 B.C.L.R. (3d) 212, 2000 BCCA 539; *Halfway River First Nation v. British Columbia (Minister of Forests)* (1999), 64 B.C.L.R. (3d) 206, 178 D.L.R. (4th) 666, 1999 BCCA 470; *Kelly Lake Cree Nation v. British Columbia (Minister of Energy and Mines)* (1998), [1999] 3 C.N.L.R. 126 (B.C.S.C.); *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* (1998), 61 B.C.L.R. (3d) 71, [1999] 7 W.W.R. 584 (S.C.), aff'd (2000) 72 B.C.L.R. (3d) 247, 183 D.L.R. (4th) 103, 2000 BCCA 42, aff'd [2002] 2 S.C.R. 146, 210 D.L.R. (4th) 577, 2002 SCC 31; *Lax Kw'alaams Indian Band v. British Columbia (Minister of Sustainable Resource Management*, (2002), 4 B.C.L.R. (4th) 104, 9 W.W.R. 173, 2002 BCSC 1075 [*Lax Kw'alaams*]; *Malahat Indian Band v. British Columbia (Minister of Environment, Lands and Parks)*, [1998] B.C.J. No. 2798 (S.C.) (QL); *Perry v. Ontario*, [1997] 33 O.R. (3d) 705, 148 D.L.R. (4th) 96 (C.A.); *R. v. Aleck*, [2001] 2 C.N.L.R. 118, 2000 BCPC 177; *Transcanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, [2000] 3 C.N.L.R. 153 (Ont. C.A.); *Treaty 8 Tribal Association v. Alliance Pipeline Ltd.*, [1999] 4 C.N.L.R. 257 (N.E.B.); *Vuntut Gwitchin First Nation v. Canada (Attorney General)*, [1997] 138 F.T.R. 103, [1997] 1 C.N.L.R. 361 (T.D.); *Westbank First Nation v. British Columbia (Minister of Forests)*, [2001] 1 C.N.L.R. 361, 191 D.L.R. (4th) 180, 2000 BCSC 1139; *Chief Apsassin v. B.C. Oil and Gas Commission*, [2004] 4 C.N.L.R. 340, 8 C.E.L.R. (3d) 161, 2004 BCCA 286; and *Husby Forest Products v. Minister of Forests et al.* (2004), 25 B.C.L.R. (4th) 289, [2004] 5 W.W.R. 662, 2004 BCSC 142.

made to make sense of this body of jurisprudence (on both doctrinal and critical levels). Second, an attempt will be made to read out of the current doctrine how future events may unfold 'on the ground' in the legal and political arena in British Columbia and elsewhere in Canada.

I. MAKING SENSE OF THE JURISPRUDENCE AROUND THE DUTIES TO CONSULT AND ACCOMMODATE

As brief as the time span may be, there are, to this point, four epochs in the history of the development of the duty to consult. The first spans the period during which the ground was being laid for the duty to emerge. To understand the emergence of the duty to consult in *Sparrow*,[4] we need to briefly canvass certain cases from 1973 to 1990. With developments in the understanding of Aboriginal title in *Calder v. British Columbia (Attorney General)*,[5] and the introduction and application of fiduciary doctrine in *Guerin v. Canada*,[6] conceptual groundwork was laid for the materialization of a duty to consult which may befall the Crown when it acts in ways that may detrimentally affect Aboriginal and treaty rights.

The second epoch spans the period from the emergence of the duty in *Sparrow* to the time during which it was given some minimal content and form—its period of adolescence. After the embryonic duty emerged it passed through an initial stage of development, marked primarily by mention of larger constitutional questions, and their role in giving form to this duty. By the time the Supreme Court added direct lines in *Delgamuukw*[7] about the duty to consult, it had taken on some initial shape, and been placed within a conceptual framework, courtesy of the jurisprudence in *Sparrow, R. v. Van der Peet*[8] and *R. v. Gladstone*[9] around section 35 of the *Constitution Act, 1982*.[10]

As these early cases only dealt marginally with this duty, naturally they invited more questions than they answered.[11] The third epoch covers the period

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[4] *Supra* note 1.

[5] [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [*Calder*].

[6] [1984] 2 S.C.R. 325, 13 D.L.R. (4th) 321 [*Guerin*].

[7] *Supra* note 2.

[8] [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet*].

[9] [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [*Gladstone*].

[10] The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35 (1) states: "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed."

[11] See Sonia Lawrence & Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Duty to Consult" (2000) 79:1 Can. Bar Rev. 252, for a discussion in part necessitated by the uncertainty around the original jurisprudence. Lawrence and Macklem

during which the jurisprudence gradually evolved in such a way as to begin addressing some of the fundamental questions swirling around this duty—in essence, this period is marked by the progress through the courts of *Haida Nation v. British Columbia (Minister of Forests)*,[12] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*[13] and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.[14] This epoch concludes with the release of these decisions at the level of the Supreme Court of Canada. In examining this period only these three Supreme Court decisions will be discussed,[15] as the intermediate jurisprudence, while occasionally offering lasting insights into the nature of the duty to consult, is by and large subsumed within the pronouncements of the high court.

Finally, the last epoch is that within which we find ourselves today. In the post-*Haida Nation/Taku River Tlingit FN/Mikisew Cree FN* world, lower courts are faced with parties grappling to digest the impact of the Supreme Court pronouncements.[16] These courts themselves simultaneously grapple with the high court directives. We are very early into this period, but it is nevertheless instructive to examine decisions released during this time, to see the early impacts *Haida Nation*, *Taku River Tlingit FN*, and *Mikisew Cree FN*

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argued that the duty to consult could be translated into a duty to negotiate. See also Richard Devlin & Ronalda Murphy, "Reconfiguration Through Consultation: A Modest (Judicial) Proposal?" in Michael Murphy, ed., *Canada, The State Of The Federation 2003: Reconfiguring Aboriginal Relations* (Montreal and Kingston: McGill-Queens University Press, 2005); Richard Devlin & Ronalda Murphy, "Recent Developments in the Duty to Consult: Clarification or Transformation" (2003) 14:2 N.J.C.L. 167; Thomas Isaac, "The Crown's Duty to Consult and Accommodate Aboriginal People" (2003) 6 The Advocate 865; and Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alb. L. Rev. 49.

[12] [2004] 3 S.C.R. 511, 245 D.L.R. (4th) 33, 2004 73 [*Haida Nation*].

[13] [2004] 3 S.C.R. 550, 36 B.C.L.R. (4th) 370, 2004 SCC 74 [*Taku River Tlingit FN*].

[14] (2005), 259 D.L.R. (4th) 610, 2005 SCC 69 [*Mikisew Cree FN*].

[15] This work focuses on the decision in *Haida Nation*, as the bulk of the substantive jurisprudence was laid out in that decision, with little added in *Taku River Tlingit FN*. Furthermore, at the time this article was being completed *Mikisew Cree FN* had just come down from the Supreme Court of Canada, and so cases had yet to emerge following this pronouncement on the relationship between *treaty rights* and the duties to consult and accommodate. Most of this paper focuses on the relationship between infringement of Aboriginal rights and the duties to consult and accommodate.

[16] Courts must also grapple with how the duties to consult and accommodate, in the context of claims to Aboriginal title, are understood after the release of *R. v. Bernard; R. v. Marshall* (2005), 3 C.N.L.R. 214, 255 D.L.R. (4th) 1, 2005 SCC 43 [*Marshall* and *Bernard*]. Some initial analysis around this question is provided in the last section of this work.

have had (if any).[17] Out of this fledgling jurisprudence can be read a sense of the direction the law will take around the duties to consult and accommodate.

II. SETTING THE STAGE: *CALDER*[18] TO *SPARROW*[19]

In *Calder* the Supreme Court overturned the accepted 'wisdom' of the time, the notion that Aboriginal land interests were merely interests created through grant by the Crown, a proposition firmly established in 1888 in *St. Catherine's Milling & Lumber Co. v. The Queen*.[20] The Court found that Aboriginal land interests were *pre-existing interests*, rooted in the occupation of traditional territories by Aboriginal peoples before the arrival of the Crown.[21] These interests were *recognized* by the Crown in the *Royal Proclamation of 1763*,[22] not created by the Crown in the issuance of that document.

It is essential to note, however, that the Court in *Calder* did not substantially alter earlier conceptualizations of the *content* of Aboriginal land interests. The Court did not take this opportunity to alter the common law notions: (i) that Aboriginal land interests exist only as 'burdens' on underlying Crown title (irrespective of the fact that they recognized that these interests pre-dated the Crown), and (ii) that these interests have *no existence* separate from their being burdens on Crown title. These odd notions manifest in the doctrine that on surrender to the Crown Aboriginal land interests simply vanish, as the underlying Crown title is 'perfected'.

This doctrine of 'perfection' remained unquestioned by the Supreme Court in *Guerin*[23]—indeed this doctrine played a crucial role in determining the jurisprudential path the Court chose to tread in handling the dispute before it.

In the 1950s the Musqueam wished to enter into a lease agreement with a golf course developer in relation to some of its reserve land. Reserve lands,

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[17] At the time of writing this paper *Mikisew Cree FN*, *supra* note 14 had just come down from the Supreme Court of Canada. Most of this paper focuses on the relationship between the duties to consult and accommodate and infringements of Aboriginal rights.

[18] *Supra* note 5.

[19] *Supra* note 1.

[20] [1888] 14 App. Cas. 46, 58 L.J.P.C. 54.

[21] *Calder*, *supra* note 5. Three of the six judges, led by Judson J., held that Aboriginal land interests tied to prior occupation were extinguished by subsequent acts of the Crown (acknowledgement of interests arising from prior occupancy at 328, conclusion that land interests were extinguished at 338-39), while three others, led by Hall J., held that the test for extinguishment should involve finding 'clear and plain intent' on the part of the Crown, which they found lacking in the circumstances (at 404).

[22] R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*].

[23] *Supra* note 6.

however, are inalienable to all but the Crown.[24] To arrange the lease the Musqueam had to surrender this land to the Crown, with the Crown then acting on their behalf in negotiations with the developer. The Crown, however, did not act in their interests, arranging a lease with terms favourable to the developer.

As in *Calder*,[25] the Court did not take this opportunity to question established jurisprudential understandings around the nature of Aboriginal land interests. Rather, it continued to operate within a general conceptual framework built around such doctrines as perfection of Crown title. Dickson J. noted that:

> [In *Smith et al. v. The Queen*[26]] the court held that the Indian right in a reserve, being personal, could not be transferred to a grantee, whether an individual or the Crown. Upon surrender the right disappeared 'in the process of release'.[27]

Recognizing the existence of debate swirling around the precise nature of Aboriginal interests in reserve land as between the notion that the interest is nothing more than a 'personal and usufructuary' right and the notion that it might actually amount to a beneficial interest, Dickson J. went on to hold that:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true ... that the interest gives rise upon surrender to a distinctive fiduciary obligation on the Crown to deal with the land for the benefit of the surrendering Indians.[28]

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[24] Inalienability has been said to be a general feature of all Aboriginal land interests (see *Delgamuukw*, *supra* note 2). This notion can be traced back at least as far as the *Royal Proclamation*, *supra* note 22, and is rooted both in notions of protection (from land speculators and the like) and nationhood (in the nation-to-nation relationship occasionally acknowledged by the Crown, that would make private sales unintelligible). The latter understanding has played a more prominent role in American jurisprudence. See *Worcester v. Georgia* 31 U.S. 515 (1832), 8 L.Ed. 483 at 545-50.

[25] *Supra* note 5.

[26] [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237.

[27] *Guerin*, *supra* note 6 at para. 48.

[28] *Ibid.* at para. 50. In *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119 at para. 39, 147 D.L.R. (4th) 1, Major J. re-described the effect of surrender without changing the essentially colonial undertones: "When a band surrenders land, or more correctly, its *sui generis* interest in land, to the Crown, the band's interest is said to merge in the fee held by the Crown." Whether the interest disappears or merges the understanding of this interest is the same, as is the ultimate effect of surrender.

Aboriginal land interests, while grounded in the prior occupation of traditional territories by Aboriginal nations whose very existence pre-dates the Crown, continued to be seen by the highest court as being no more than burdens on underlying Crown title, burdens that dissolve into the air (or merge into Crown title) upon surrender.

What was particularly interesting in *Guerin*[29] about the maintenance of the notion of perfection of Crown title was the introduction of the suggestion that fiduciary doctrine could be the means through which the relationship between the sovereignty of the Crown and Aboriginal nations would be articulated and mediated. Fiduciary doctrine was employed in order to support the existence of *legal* obligations on the Crown, as the majority in the Court was uncomfortable finding that upon surrender of a portion of Musqueam reserve lands an actual trust was generated, which might have been the case had the Musqueam enjoyed an actual *substantial* and *independent* interest in their reserve lands.

A fiduciary relationship arises when one party finds itself in a position of control vis-à-vis the legal or practical interests of another, such that through its discretion the party in control can unilaterally act to positively or negatively affect these interests of the other.[30] In this narrow context (the surrender of reserve land for economic development) the introduction of fiduciary doctrine may seem innocuous—the end sought was attractive (the aim was to hold the Crown accountable for its less-than-honourable dealings with the golf course developer), and the tool employed achieved this end. But the underlying vision is of the Crown *in control of* the legal and practical interests of the Musqueam, and from within this position of control acting unilaterally in making decisions about how the arrangement with the golf course developer would be worked out (all, purportedly, in the best interests of the Musqueam).

III. FIDUCIARY DOCTRINE TEMPERING CROWN POWER: *SPARROW*[31]

In *Sparrow* the Supreme Court chose to advance beyond its previously narrow application of fiduciary doctrine, as it began to articulate a larger narrative, within which the Crown is charged with the mission of protecting Aboriginal 'rights'.

The Court in *Sparrow* was faced with the task of making sense of Aboriginal rights in light of their entrenchment in the *Constitution Act, 1982*,[32]

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[29] *Ibid.*

[30] See discussion in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 97 B.C.L.R. (2d) 1; and *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14. See also Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

[31] *Supra* note 1.

under section 35. These rights, the Court held, are not 'absolute', but rather function to temper the power of the 'unquestioned sovereignty' of the Crown.[33] The central role played by Crown sovereignty is clear from the context within which questions arise around Aboriginal rights—enquiry around Aboriginal rights begins with a single unifying vision, that of Aboriginal peoples' lives and lands being subject to overarching control and regulation by the Crown.[34]

It is essential that the power of the Crown be fully appreciated in this context, and it is instructive to look into how this power is 'tempered' according to the conceptual framework laid out in the jurisprudence. The basic assumption within which the application of fiduciary doctrine 'makes sense' is that the Crown is the fundamental sovereign power, free to exercise its elemental power in relation to the legal interests of Aboriginal nations (over which it has control). While Aboriginal peoples may (for example) fish, or hunt, or trade, 'unquestioned' sovereign power rests in the hands of the Crown, that entity which enjoys the power to *regulate* the fishing, hunting, or trading.

The Court has carefully arranged matters such that the tempering of Crown power called for by the constitutionalization of Aboriginal rights does not challenge the general fundamental power of the Crown to decide how Aboriginal peoples will relate to their lands. In any particular circumstance in which the power of the Crown is constrained, the constraining force is not the existence of another sovereign power (i.e., that of an affected Aboriginal nation). Rather, Crown power is constrained by legal duties, imposed by the *Constitution Act, 1982*, their application overseen by the rule of law. The language of the Court must be kept in mind—the power of the Crown is 'tempered', and not challenged, eliminated, or undercut. One might say that Crown power is 'channelled', as the existence of Aboriginal rights has the

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[32] *Supra* note 10.

[33] Dickson C.J.C. and La Forest J. held in *Sparrow*, *supra* note 1 at 1103 that:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.

[34] For a sustained critique of the Supreme Court of Canada decision in *Sparrow*, see Patricia Monture-Angus, *Journeying Forward: dreaming First Nations' independence* (Halifax: Fernwood, 1999) at 88-115. Some have seen in *Sparrow* first steps toward the construction of a framework that might have led to a 'just' solution to the problem of Crown-Aboriginal relations, a framework seriously comprised in subsequent decisions. See *e.g.* John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 56-76 [Borrows, "Frozen Rights"].

power to direct the exercise of Crown sovereignty into (somewhat) different paths.

The legal test articulated in *Sparrow*[35] spelling out how Crown power is tempered signalled the emergence of the duty to consult. Imagine an Aboriginal nation attempting to live in accord with their notions of who they are (for example, fishing on the Fraser River in southwestern British Columbia). The citizens of this nation may find, however, that in doing so they run up against the fundamental exercise of Crown power (for example, a net used may be longer than permissible under federal fisheries law). If the nation in question can establish that they are fishing under an Aboriginal 'right', and that the law dictating acceptable lengths of net seems to interfere with the exercise of this right (what the Court in *Sparrow* terms 'prima facie infringement'), then the onus falls on the Crown to justify this infringement. It is in justifying its impact on the exercise of an Aboriginal right that the duty to consult emerges.

To justify its infringement, the Crown must first demonstrate that it acted under a compelling and substantial objective[36] (for example, was the Crown directing itself, in formulating fisheries laws and regulations, toward such acceptable ends as conservation or safety, objectives which are in the interests of all parties?). Should the Crown demonstrate that it had such an objective behind its activity, it must then demonstrate that in acting under this objective it met its fiduciary obligations to the affected Aboriginal rights-holders. In relation to the second requirement, the Crown may be obliged to demonstrate that it consulted with the potentially affected Aboriginal people.[37]

In *Sparrow* the Court provided little direct exposition around the duty to consult. In finding that the Crown may fall under fiduciary obligations when infringing the exercise of Aboriginal rights, the Supreme Court noted that the *particular* fiduciary duties that arise would be highly fact-dependent, as the form the duties take on depends on both the nature of the right infringed and the manner of infringement. [38] Since the Musqueam had asserted a right to fish for both food and ceremonial purposes, and federal fisheries regulations were found to infringe upon the exercise of this right, fiduciary doctrine required

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[35] *Supra* note 1.

[36] *Sparrow*, *supra* note 1 at para. 71.

[37] *Ibid.* at para. 82.

[38] *Ibid.* at para. 66:

> We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of [A]boriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

that the Crown, when allocating the fish resource, prioritize the Aboriginal food fishery immediately after conservation and before non-Aboriginal commercial and sport-fishing concerns were addressed.[39] The Court went beyond this matter of prioritization to note that as the valid objective the Crown was pursuing through these regulations was that of conservation, and as the Musqueam were found by the Court to have a long-standing tradition of, and interest in, conservation activity, attempts by the Crown to justify these regulations (as aimed at conservation) would to some degree depend on "whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented."[40]

IV. *VAN DER PEET*[41] AND *GLADSTONE*: 'RECONCILIATION' AS A FUNDAMENTAL OBJECTIVE

Van der Peet focused on the question of the nature of those pre-existing Aboriginal interests that would be countenanced as 'Aboriginal rights'. The Supreme Court developed both a test for determining whether a claimed right is an Aboriginal right, and a general vision of the nature of section 35 of the *Constitution Act, 1982*.[42]

For a right to be recognized and affirmed as an Aboriginal right under section 35 it must protect a practice, tradition or custom integral to the distinctive culture of the people claiming the right. That certain distinctive practices, traditions and customs warrant constitutional protection flows from the fact that rights particularly '*Aboriginal*' in nature are being recognized and affirmed.[43] Section 35, the Court held, was meant to protect 'Aboriginality', the cultural core of the lives of Canada's Aboriginal peoples.

Besides drawing a boundary around those rights that would be constitutionally protected, the Court turned to the question of what section 35 was meant to accomplish. Section 35 was found to have as its underlying purpose the function of facilitating reconciliation between the fact of the prior

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[39] *Ibid.* at para. 73-82.

[40] *Ibid.* at para. 82.

[41] *Supra* note 8.

[42] *Supra* note 10.

[43] *Sparrow*, *supra* note 1 at para. 20:

> The task of this Court is to define [A]boriginal rights in a manner which recognizes that [A]boriginal rights are rights but which does so without losing sight of the fact that they are rights held by [A]boriginal people because they are [A]boriginal. .... The Court must define the scope of s. 35(1) in a way which captures both the [A]boriginal and the rights in [A]boriginal rights. [emphasis in original].

presence of Aboriginal societies within Canada and the sovereignty of the Crown.[44]

As fiduciary obligations arise in the context of the infringement of rights protected under section 35, the nature of these obligations can shift if the Court takes a different view around the nature of certain Aboriginal rights. This sort of shift occurred in *Gladstone*.[45]

In *Gladstone*, the Heiltsuk successfully argued for the existence of an Aboriginal right to harvest and sell herring spawn-on-kelp. In determining the nature and scope of the Crown's power to infringe this 'commercial' right, the Supreme Court found that as the right lacked an 'internal limit' (its exercise is only limited by market demand and the extent of the ocean resource) its exercise would potentially disrupt the activities of others with valid interests in the resource in question—in particular, recognition of this right would raise the spectre of an *exclusive* Aboriginal right to harvest herring spawn-on-kelp. This spectre of exclusivity affected both the *form* of the Crown's fiduciary obligations and the *degree of scrutiny* that would be turned on the Crown's efforts to meet its obligations.[46]

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[44] *Ibid.* at paras. 30-31:

> In my view, the doctrine of [A]boriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, [A]boriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates [A]boriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
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> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that [A]boriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the [A]boriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown. [emphasis in original].

Troubling language around this notion of reconciliation appeared in *Mikisew Cree FN*, *supra* note 14. The Supreme Court spoke of the need to reconcile Aboriginal peoples to non-Aboriginal peoples, language that further entrenches the issue within a world dominated by Crown sovereignty. In its original wording the doctrine preserved the notion that Aboriginal peoples existed outside, or on the margins of, the sphere governed by Crown sovereignty.

[45] *Supra* note 9.

[46] *Sparrow*, *supra* note 1. The distinction is drawn in para. 57, while the impact on the degree of scrutiny of Crown activities and the form of the obligations that ensue is laid out in paras. 62-64.

This worked out into duties on the Crown to 'respect' the existence of the Aboriginal right in contrast to the situation vis-à-vis the rights in *Sparrow*,[47] in which the Crown was obliged to *prioritize* in a fairly simple and protective manner. As the legislation prohibiting the sale of herring spawn was directed toward the task of allocating resources, this respect required a 'modified' form of prioritization when determining allocation.[48] The suggestion of the Court was that this 'modified' prioritization would involve fitting the Heiltsuk interest in harvesting and selling spawn-on-kelp into the overall pattern of resource allocation in a proportional manner.[49]

The Court in *Gladstone*[50] held that this did not conflict with the general vision of Aboriginal rights set out in *Van der Peet*, for fiduciary duties must harmonize with the Crown's overarching obligation to responsibly exercise its sovereign powers. Fiduciary obligations, as we noted above, 'channel' Crown power in light of the fact that Aboriginal peoples (and their legal interests) predate the assertion of Crown sovereignty.

Aboriginal interests have therefore emerged post-1982, as entitlements to engage in certain activities, *activities that are all under the control of the Crown*. These activities must all go through a process of being translated into 'rights' (the filtering and translating mechanism is provided by the test in *Van der Peet*[51]), and these rights must be merged into a political, legal and economic landscape structured around other—non-Aboriginal—rights and interests (this is the process of reconciliation, one structured by the overarching power of Crown sovereignty, where this power is tempered by the

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[47] *Supra* note 1.

[48] *Ibid.* at paras. 58-62.

[49] *Ibid.* at para. 64:

> Questions relevant to the determination of whether the government has granted priority to [A]boriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation, as well as questions such as whether the government has accommodated the exercise of the [A]boriginal right to participate in the fishery (through reduced licence fees, for example), whether the government's objectives in enacting a particular regulatory scheme reflect the need to take into account the priority of [A]boriginal rights holders, the extent of the participation in the fishery of [A]boriginal rights holders relative to their percentage of the population, how the government has accommodated different [A]boriginal rights in a particular fishery (food *versus* commercial rights, for example), how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users.

[50] *Supra* note 9.

[51] *Supra* note 8.

peculiar constitutional status of Aboriginal rights). It is within this dynamic that the duty to consult has emerged, and must be understood.

V. *DELGAMUUKW*: THE ECONOMIC AND DECISION-MAKING COMPONENTS OF ABORIGINAL TITLE

In *Delgamuukw*[52] the Supreme Court of Canada found that *some* Aboriginal land interests could constitute *rights to land* recognized in Canadian law insofar as they are ground in exclusive use and occupation of the lands in question at the point in time that Crown sovereignty was asserted over these lands.[53] Should an Aboriginal nation be able to show exclusive use and occupation of their traditional territories at the time of the assertion of Crown sovereignty, they would possess rights to land that *transcend* mere rights to use these lands and their resources in traditional fashions (for example, hunting, fishing and gathering). Aboriginal title was found by the Supreme Court to be, quite simply, a property right.

The elevation of certain Aboriginal land interests to the status of property rights did not signal, however, a significant move away from the Court's commitment to the general conceptual framework it had worked under for so long.[54] As just noted, all Aboriginal rights, which include the subset constituting property rights, are subject to Crown power and regulation to the extent that Aboriginal rights holders' interests must be accommodated to the exercise of this power. Crown power over Aboriginal title lands remains in place, though it is potentially channelled in certain directions, if it can be shown that its exercise infringes upon the title in question.

Nowhere is this made more apparent than in the sections in *Delgamuukw* on the justification of Crown infringement of Aboriginal title, and in particular in the text that details how fiduciary obligations on the Crown (when it is acting to interfere with Aboriginal title rights) can require that the Crown consult with potentially affected Aboriginal nations.

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[52] *Supra* note 2.

[53] *Ibid.* at para. 117. The Court in *Marshall* and *Bernard*, *supra* note 16 at paras. 41-70, made it clear that showing exclusivity would, in most cases, restrict lands falling under Aboriginal title to 'core' lands, those used fairly extensively by the Aboriginal nation in question. At para. 70 McLachlin C.J.C. states:

> In summary, exclusive possession in the sense of intention and capacity to control is required to establish [A]boriginal title. Typically, this is established by showing regular occupancy or use of distinct tracts of land for hunting, fishing or exploiting resources: *Delgamuukw* [*supra* note 2], at para. 149. Less intensive uses may give rise to different rights.

[54] For a sustained critique of the Supreme Court of Canada decision in *Delgamuukw*, *supra* note 2, see Monture-Angus, *supra* note 34 at 116-34.

The Court noted three aspects of Aboriginal title that function to structure the particular sorts of fiduciary obligations that may befall the Crown:

> ... [A]boriginal title encompasses the right to exclusive use and occupation of land; ... [A]boriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of [A]boriginal peoples; and ... lands held pursuant to [A]boriginal title have an inescapable economic component.[55]

The first aspect is of central importance, for it suggests to the Court that Aboriginal title lacks an 'internal limit' to its exercise, the presence of which would otherwise have forced the Crown into a simple pattern of prioritization when confronted with the task of making decisions which involve the intersection of Aboriginal and non-Aboriginal interests. *Lacking* such an internal limit due to the 'exclusive' nature of Aboriginal title, this sort of Aboriginal right only requires that the Crown balance—in a 'respectful' manner—these sorts of interests with other valid, non-Aboriginal claims.[56]

While Aboriginal title is found to be a property right—indeed a *constitutionally protected* property right—the power of the Crown to infringe upon this right turns out to be practically unlimited.[57] Given the potentially exclusive nature of Aboriginal title, for example, the Court held that the range of legislative objectives that would be sufficiently compelling and substantial so as to justify infringement of that title was so large as to encompass practically every sort of objective the Crown might ever have in mind:

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia,

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[55] *Delgamuukw*, *supra* note 2 at para. 166.

[56] The right claimed in *Sparrow*, *supra* note 1 to fish for food and ceremonial/social purposes had such an internal limit. For the exercise of this right would only make sense up to the point where sufficient fish to satisfy food and social purposes had been obtained. Recall that the distinction between rights with and rights without internal limits was introduced in *Gladstone*, *supra* note 9, where the Court was faced with a claim for a right to fish for trading purposes. This right, the Court reasoned at paras. 57-62, had no internal limit, for its exercise would only be satisfied when either the market was satiated or there were no more fish to catch.

[57] See Lisa Dufraimont, "From Regulation to Re-colonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada" (2000) 58:1 U.T. Fac. L. Rev. 1. While it was clear in *Sparrow*, *supra* note 1 that the Court envisioned the 'unquestioned' sovereignty of the Crown ruling over the exercise of all Aboriginal rights, the further addition of a distinction between rights with and without internal limits (introduced in *Gladstone*, *supra* note 9) demonstrates the extent to which the judiciary will protect the holdings of lands and resources historically taken away from Aboriginal nations. The result, besides seeming unjust on its face, is to confuse all parties including those studying the matter from an academic standpoint. See *e.g.* Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001), and Borrows, "Frozen Rights", *supra* note 34 at 71-72.

> protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with [reconciliation] and, in principle, can justify the infringement of [A]boriginal title.[58]

The Court offered some guidance in *Delgamuukw*[59] on how general fiduciary obligations on the Crown (when it acts to infringe Aboriginal title) spell out into particular obligations—especially in regard to interference with the first and second aspects of Aboriginal title, namely the exclusivity of title, and the 'right to decide the uses to which land may be put'.

Given the exclusive nature of Aboriginal title, when the Crown infringes title it can do so justifiably when, for example:[60]

> ... governments accommodate the participation of [A]boriginal peoples in the development of the resources of British Columbia ... the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of [A]boriginal title lands, and ... economic barriers to [A]boriginal uses of their lands (e.g., licensing fees) be somewhat reduced.[61]

It is again within the milieu of meeting its fiduciary obligations that the Crown potentially falls under a duty to consult. One implication of the fact that Aboriginal title carries with it a right to choose the uses to which title lands might be put, Lamer C.J. noted, is that:

> ... the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between [A]boriginal title and the [A]boriginal right to fish for food in *Sparrow*. First, [A]boriginal title encompasses within it a right to choose to what ends a piece of land can be put. The [A]boriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of [A]boriginal title suggests that the fiduciary relationship between the Crown and [A]boriginal peoples may be satisfied by the involvement of [A]boriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the [A]boriginal group has been consulted is relevant to determining whether the infringement of [A]boriginal title is justified, in the same way that the Crown's failure to consult an [A]boriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*.[62]

Lamer C.J. went on to describe the rough contours of the duty to consult:

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[58] *Delgamuukw*, *supra* note 2 at para. 165.

[59] *Ibid.*

[60] This list is meant to be illustrative, and not exhaustive.

[61] *Delgamuukw*, *supra* note 2 at para. 167.

[62] *Ibid.* at para. 168.

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to [A]boriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the [A]boriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an [A]boriginal nation, particularly when provinces enact hunting and fishing regulations in relation to [A]boriginal lands.[63]

Here we find the first sustained judicial discourse on the nature of the duty to consult. We see that it emerges most forcefully in relation to Aboriginal rights that carry a discretionary component, that its being satisfied (or not) will play a major role in evaluating the justification of Crown infringement, that it encompasses a spectrum of possible requirements on the Crown (with the particular requirements on the Crown dependent on the particular circumstances at hand), and that the spectrum can range from a minimal requirement of 'discussion' (carried out in good faith) to a maximal requirement of obtaining consent (seemingly when the Crown is contemplating activities that would directly interfere with the heart of the Aboriginal interests in land).

VI. A PAUSE FOR CRITICAL REFLECTION

Before moving to the emergence in *Haida Nation*[64] of a more fully articulated doctrine specifically directed toward the duty to consult, we can pause for a few moments of critical reflection on the jurisprudence to this point.

In the course of tracing out the evolution of the duty to consult, other moments inviting reflection have been encountered. The conceptualization of Aboriginal land interests as 'burdens' on Crown title, the doctrine of perfection of Crown title, the introduction of fiduciary doctrine as a response to the lack of any perceived independent Aboriginal interest, the distinction between Aboriginal rights with and without internal limits, and the overarching presence of Crown sovereignty, should all give one pause for reflection. A break for critical reflection is demanded at this juncture, for in *Delgamuukw*[65] all the elements of the larger picture come into clear focus.

Several details add focus to the image. First is the list of obligations that might befall the Crown should it contemplate activities that may infringe upon Aboriginal title. This list speaks of accommodating the participation of

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[63] *Ibid.*

[64] *Supra* note 12.

[65] *Supra* note 2.

Aboriginal peoples in the development of the resources of British Columbia, the conferral of fee simples for agriculture, the conferral of leases and licences for forestry and mining, and the reduction of economic barriers to Aboriginal uses of their lands. These sorts of obligations share one central defining characteristic—they all work to push and pull Aboriginal title-holders along an assimilative path.[66]

The second is a clear articulation in *Delgamuukw*[67] of a judicial vision of Aboriginal claims being transformed into 'Aboriginal rights'. Canadian domestic law noticeably aims to (a) gather together the pre-existing interests of Aboriginal peoples,[68] so as to (b) replace these interests with 'Aboriginal rights' and 'Aboriginal title', *constructs* within this domestic and essentially alien system. This process of replacing interests defined within one normative system with 'rights' defined within another normative system reflects nothing other than an unjustifiable exercise of Crown power, itself a manifestation of non-Aboriginal identity.

It is essential that the duty to consult be understood in light of this larger background framework. When the Crown is obliged to consult with an Aboriginal nation, it is *not* about how this Aboriginal collectivity might see itself in relation to its land, and about how that vision might inform visions about how people in general will interact with the land in question—rather, the Crown is obliged to consult about how *its* visions of land use will be implemented.

There is never any question in the Court's mind that the Crown has complete power to determine the broad parameters within which questions will be answered about how Aboriginal lands are to be used. As the fundamental sovereign power the Crown decides what land 'means', to what uses lands may be put, and how people (*including* Aboriginal peoples) will live in

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[66] This suggests a return to an old colonial tactic, so eloquently expressed by Duncan Campbell Scott, Superintendent of Indian Affairs, in describing, before parliament in 1920, the aim of the policies in the early part of the 20th century: "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department" (debating amendments to the *Indian Act* (R.S.C. 1985, c. I-5) as cited in Canada, *The Historical Development of the Indian Act*, John Leslie & Ron Maguire, eds. (Ottawa: Treaties and Historical Research Centre, Research Branch, Corporate Policy, Department of Indian and Northern Affairs, 1978) at 114. The argument about the assimilative nature of recent jurisprudence is developed in Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23:1 Windsor Yearbook of Access to Justice 17.

[67] *Supra* note 2.

[68] These *pre-existing* Aboriginal interests reflect the inherent power of Aboriginal nations to arrive at their own understandings of who they are, and to apply the self-understandings thus developed to matters around how they want to live and how they wish to interact with their land.

relation to lands and resources. This state of mind was set out in *Sparrow*,[69] and the complete consequences of this were articulated in *Delgamuukw*.[70] The duty to consult fits neatly within this paradigm of overarching Crown power.

Nowhere is the overarching power of the Crown made more visible than in relation to the demand that Aboriginal interests be fit within the common law. In *Marshall* and *Bernard* McLachlin C.J. reiterated what is now a common refrain, namely that Aboriginal rights, while grounded in pre-existing interests, must be conceptualized within the common law.[71] While Aboriginal title, she held, can be demonstrated via the presentation of evidence pertaining to Aboriginal understandings of land and land use, in order to indicate the existence of a right protected under section 35 this demonstration must make sense within the common law system.

Some might think this intersects innocuously with the notion of 'reconciliation'. It is, however, a perversion of language to imagine this might be so. Think of an Aboriginal understanding of land and land use as a square peg, and think of the common law as a round hole. The Court has held that in order for the square peg to constitute a right recognized within the common law it must fit into the round hole. While this may be possible in some circumstances (especially if enough force is put into how hard the square peg is pushed into the round hole), calling this a process of reconciliation is a misuse of language. If the square peg were required to twist and reform, while the round hole were *simultaneously* twisting and reforming in an effort to meet in some middle ground, a process of reconciliation would be underway.

Imagine sitting in one's own living room, enjoying the comfort and security of a home constructed by your ancestors, a home continuously occupied through countless generations. Then imagine answering the door, and

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[69] *Supra* note 1.

[70] *Supra* note 2.

[71] *Supra* note 16 at paras. 45-51. At paras. 47-48 McLachlin C.J.C. stated:

> The difference between the common law and [A]boriginal perspectives on issues of [A]boriginal title is real. But it is important to understand what we mean when we say that in determining [A]boriginal title we must consider both the common law and the [A]boriginal perspective.
>
> The Court's task in evaluating a claim for an [A]boriginal right is to examine the pre-sovereignty [A]boriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right. ... This exercise involves both [A]boriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the [A]boriginal people. But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular [A]boriginal practice fits it. ... The question is whether the practice corresponds to the core concepts of the legal right claimed.

welcoming in visitors, people new to the area, in obvious need of some immediate assistance. Nursed back to health, their strength regained, these newcomers express their gratitude by coming to think of the home as their own. Over time it comes to pass that they begin to simply ignore your existence, as they turn to the task of stripping the wealth out of the home your family has lived in for thousands of years.

Finally, however, they begin to take note of your entreaties, and acknowledge that you *may* have some claims that should be 'accommodated'. They begin with the notion that you, the original owners of this home, will bear the weight of having to demonstrate ownership. You think this odd, for it would seem natural that they demonstrate a ground for the claim they make over your home,[72] but you push on to point out the obvious, that your home is entirely owned by your family, as your family has used and occupied this abode for countless generations.

The newcomers, however, generate their own rules to be used to demonstrate what they call 'title'. According to these rules you have no claim over the basement, attic, garage, and den, as you only 'seasonally' or irregularly made use of these rooms.[73] Furthermore, as they are the stronger party in this relationship, they make clear that they will continue to make all determinations about how the home is to be used, and about what your claims to 'title' will amount to (should you be able to meet the tests for showing title to the rooms over which you may have some claims).

On top of all this, the newcomers question your attempts at showing 'title' according to the rules they have created, as these attempts primarily rely on your recollections about use and occupation. The newcomers would prefer you provide written documentation[74] preferably prepared during the early stages of

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[72] See McNeil, *supra* note 57, and Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 1999).

[73] *Marshall* and *Bernard, supra* note 16 at para. 58:

> It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into [A]boriginal title to land if the activity was sufficiently regular and exclusive to comport with title at commonlaw.

[74] *Mitchell v. M.N.R.*, (2001) 1 S.C.R. 911, 199 D.L.R. (4th) 385, 2001 SCC 33. At para. 51 McLachlin C.J.C. stated:

> ... claims must be proven on the basis of cogent evidence establishing their validity on the balance of probabilities. Sparse, doubtful and equivocal evidence cannot serve as the foundation for a successful claim. ... The *Van der Peet* approach, while mandating the equal and due treatment of evidence supporting [A]boriginal claims, does not bolster or enhance the cogency of this evidence. The relevant evidence in this case—a single knife, treaties that make no reference to pre-existing trade, and the mere fact of Mohawk involvement in the fur trade—can only support the conclusion reached by

their intrusion into your house with documentation drawn from *their* initial perfunctory investigation of the premises.

As all of this is going on, the newcomers continue to strip the house of all its wealth. You continually push for the newcomers to do something about your claims during the interminable time during which they slowly and painfully make determinations about the validity of the claims, and grudgingly they agree to generate rules around 'interim' arrangements. According to these rules you cannot put a stop to the dispossession of your belongings, but you may be able to influence various aspects of the mode of exploitation. Besides having an opportunity to 'consult' with the raiders, potentially 'channelling' their exercise of power, you may also be invited to take part in the exploitation itself. This, according the rules they have generated, plays a role in 'justifying' their intrusion and the subsequent taking of your wealth.

If your home were being systematically stripped of all its furnishings (even to the extent that certain areas of your home were now becoming uninhabitable), would you rather resist, the result being that the stronger invaders force you into a corner while the pillaging is going on, or would it be preferable to have the 'newcomers' simultaneously force and cajole you into taking part in the looting? What sort of 'choice' is being offered? On the one hand the raiders continue with policies that for years have made life for you and your family exceedingly difficult, policies that seem to have been aimed at trying to force compliance through deprivation. On the other hand the raiders have now begun to whisper into your ear, 'we are going to take everything and in the process we are going to destroy this house—that is a certainty. If you help us strip this house of all its goods, we will let you share in some of the wealth we pilfer.'

One question that must lurk in the background of all discussions around the duty to consult is whether Aboriginal nations *want* to partake in the exploitation of their lands. Do Aboriginal nations want to be consulted about *how* their lands will be *exploited*?[75] If they are effectively *forced* to do so, what does this say about the jurisprudence around the duties to consult and accommodate?

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the trial judge if strained beyond the weight they can reasonably hold. Such a result is not contemplated by *Van der Peet* or s. 35(1).

With the discounting of Grand Chief Mitchell's testimony in this case, the most plausible reading of this 'clarification' of the rules around evidence in Aboriginal rights litigation would be that absent extreme cogency and clarity on the part of the oral evidence, supporting documentation is required.

[75] In John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46:3 McGill L.J. 615 at 619-20, Borrows takes note of the extensive comments made by Aboriginal peoples speaking before the Commission concerning the ongoing intrusions by the government into their lives and their lands.

VII. THE DUTY TO CONSULT AND ACCOMMODATE IN *HAIDA NATION*:[76] DEALING WITH 'UNSETTLED' CLAIMS

In *Haida Nation* the Supreme Court explained how the duty to consult would play out when the Aboriginal interests with which the Crown interferes are not yet established through litigation or by way of negotiation. In the current situation in British Columbia—and likely for quite some time to come—this encompasses most of the situations in which the duty to consult will arise, as there are very few circumstances in which the claimed rights in question are 'settled', and not merely 'asserted'.[77]

The decision has been generally understood as essential to working out a means by which Aboriginal nations could protect lands and resources in the interim on the way to reaching modern treaties or agreements. With the general demise of interlocutory injunctions in the 1990s, and the failure of provincial Crowns—especially the provincial government in British Columbia—to enter into serious interim agreements along the way to negotiating treaties or agreements, a powerfully fleshed out duty to consult has been seen as a tool Aboriginal nations could use in their stead.

The provincial Crown argued before the Court that no duty to consult fell upon it until such time as the claimed Aboriginal interests—against which it was purportedly acting—were definitively defined and proven. Until that time, the Crown argued, it could not know what rights were there to be respected.[78] The Court acknowledged this argument, but found that the *honour* of the Crown dictated that from the point at which the sovereignty of the Crown was asserted up to (and potentially beyond) the time reconciliation between this sovereignty and the pre-existence of Aboriginal societies was affected, the Crown must act 'appropriately' in regard to Aboriginal interests.[79] So, for example, the Crown must be restrained from 'running roughshod' over

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[76] *Supra* note 12.

[77] *Mikisew Cree FN*, *supra* note 14 is primarily concerned with the introduction of duties to consult and accommodate in the context of treaty rights. As these rights *are* established, one might suppose that in this context questions about consultation and accommodation would take on quite different forms, leading to quite different outcomes. The effect of holding that the Crown is the overarching sovereign power, however, is that Aboriginal treaty rights are forever frail and uncertain while Crown treaty rights are forever powerful and definitive. The Court interpreted Treaty 8 as promising to the Aboriginal signatories nothing but a minimal ability to preserve their traditional ways of living. The Crown can continue indefinitely to exercise its treaty right to 'take up' lands for certain broad purposes, only constrained by its obligations to consult with and 'accommodate' the interests of affected treaty nations. It is possible, though unlikely, that Treaty 8 nations may have known they were getting into such an unconscionable agreement during treaty making, but that does not make the outcome any less unsavoury.

[78] *Haida Nation*, *supra* note 12 at para. 8.

[79] *Ibid.* at para. 17.

Aboriginal claims simply because these claims had not yet been established in court or through negotiations.

In the context of yet-to-be-established Aboriginal rights, fiduciary doctrine drops out of the analysis of Crown-Aboriginal interaction. Aboriginal interests that are merely 'claimed', the Court held, are insufficiently specific to mandate that the Crown act in the best interests of the potentially affected Aboriginal nation (here, the Haida).[80] The honour of the Crown was introduced as a proxy for fiduciary doctrine, imposing obligations on the Crown when it cannot be said that the Crown is exercising control over legal or practical interests (as these are not, in this context, established).

The honour of the Crown is not a full surrogate, however, as the obligations on the Crown tied to its honour lie on a spectrum *shifted down* from those that might befall the Crown when it contemplates infringing an established Aboriginal right.

The array in relation to *established rights* ranges from an obligation to "discuss important decisions that will be taken with respect to lands held pursuant to [A]boriginal title" up to an obligation to obtain "full consent" before moving forward.[81] Where on the spectrum the Crown finds itself depends on the seriousness of the breach and the nature of the right in question. In relation to claims that are *not yet established* in court or through negotiations the array ranges from a bare obligation to "... give notice, disclose information, and discuss any issues raised in response to the notice ..." up to an obligation that "... may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[82] Where on the spectrum the Crown finds itself "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[83]

The upper end of the spectrum in relation to unsettled claims can lead into considerations about 'accommodation'. In *Delgamuukw* the Court had spoken of the implication of imposing a requirement of 'good faith' on both sides of a consultation situation: on the side of the Crown, there must be evidence of "the intention of substantially addressing [Aboriginal] concerns."[84] The Court in

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[80] *Ibid.* at para. 37.

[81] *Delgamuukw*, *supra* note 2 at para. 168.

[82] *Haida Nation*, *supra* note 12 at paras. 43-44.

[83] *Ibid.* at para. 39.

[84] *Supra* note 2 at para. 168.

Haida Nation translated this into the notion that at the top end of the spectrum of obligations the Crown must be engaged in activities "aimed at finding a satisfactory interim solution."[85] Directing itself toward this end may require, in some circumstances, that the Crown "make changes to its proposed action."[86] Fleshing this out, the Court held that:

> Where a strong prima facie case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.[87]

It is essential, once again, to place these remarks within the larger context sketched out earlier. 'Accommodation' *does not* entail the finding of some sort of middle ground between the interests of an Aboriginal nation and the interests of the Crown (representing, ostensibly, Canadian society). The Crown makes all fundamental decisions about how land—including Aboriginal title land—is to be used. It has sole authority, for example, in deciding to lease out large tracts to forestry operations, or to authorize the building of new roads to open up areas for mining.

The ability to make these sorts of decisions is not threatened under the doctrine of Aboriginal rights—the only impact these rights have on such decisions is in relation to *how* these decisions are put into operation 'on the ground'. The decision to build a road, for example, might have to be made through consultation with potentially affected Aboriginal rights-holders, and the road itself might have to be constructed in such a way as to 'accommodate' certain of the interests expressed during consultation—its construction might even have to be delayed until treaty arrangements are made. But almost certainly the road will be built.

VIII. UNDERSTANDING THE DUTIES TO CONSULT AND ACCOMMODATE AFTER *HAIDA NATION*

In the months since *Haida Nation* and *Taku River Tlingit*[88] were released, a number of ongoing disputes have come before lower courts, requiring both that parties to the disputes struggle to adapt their positions in light of the new jurisprudence, and that these courts attempt to correctly apply the newly-clarified law to the ongoing issues being litigated before them.

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[85] *Supra* note 12 at para. 44.

[86] *Ibid.* at para. 46.

[87] *Ibid.* at para. 47.

[88] *Supra* note 13

This section will focus on several particular disputes, and the litigation surrounding them. First, several disputes that can roughly be gathered together under the heading of 'forestry' concerns will be examined: *Gitxsan First Nation v. British Columbia (Minister of Forests)*;[89] *Hupacasath First Nation v. British Columbia (Minister of Forests)*;[90] *Lax Kw'alaams Indian Band v. British Columbia (Minister of Forests)*;[91] and *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*[92] This will be followed by some words about a fisheries dispute in *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*,[93] a few remarks in relation to urban land disputes in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management*[94] and *Musqueam Indian Band v. Richmond (City)*,[95] and finally some concluding thoughts about the context of litigation in *Stoney Band v. Canada.*[96]

A. *GITXSAN FN* AND *HUU-AY-AHT FN*: ESTABLISHING A PROCESS FOR PROCESS

The *Gitxsan FN* and *Huu-Ay-Aht FN* decisions center on provincial plans to use Forest and Range Agreements (FRA) to deal with potential disputes concerning forestry operations over lands claimed by First Nations (including questions about infringement of rights and title). A number of problems with such an approach were listed by the Aboriginal parties: the agreements were presented as the only option by the Crown; the Crown fixed upper limits in terms of revenue sharing and timber allocation; revenue sharing was to be based on registered population numbers (and not on the impact of the operations on the particular lands in question); each agreement stipulated that the Aboriginal party was to understand that the provisions were an economic 'buy-out' for any and all possible Crown infringements on Aboriginal rights

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[89] (2004), 38 B.C.L.R. (4th) 57, [2005] B.C.W.L.D. 1441, 2004 BCSC 1734 [*Gitxsan FN*].

[90] (2005), 2 C.L.N.R. 138, 12 C.E.L.R. (3d) 216, 2005 BCSC 345 [*Hupacasath FN 1*]; and (2005), B.C.L.R. (4th) 304, [2005] 7 W.W.R. 601, 2005 BCSC 1712 [*Hupacasath FN 2*].

[91] (2005), B.C.L.R. (4th) 304, [2005] 7 W.W.E. 601, 2005 BCCA 140 [*Lax Kw'alaams IB*].

[92] [2005] 3 C.N.L.R. 74, 33 Admin. L.R. (4th) 123, 2005 BCSC 697 [*Huu-Ay-Aht FN*].

[93] (2005), 39 B.C.L.R. (4th) 265, [2005] 2 C.N.L.R. 75, 2005 BCSC 283 [*Homalco IB 1*]; and (2004), [2005] 2 C.N.L.R. 63, [2005] B.C.W.L.D. 2046, 2004 BCSC 1764 [*Homalco IB 2*].

[94] (2005), 37 B.C.L.R. (4th) 309, 251 D.L.R. (4th) 717, 2005 BCCA 128 [*Musqueam IB v. BC*].

[95] (2005), 44 B.C.L.R. (4th) 326, [2005] C.N.L.R. 228, 2005 BCSC 1069 [*Musqueam IB v. Richmond*].

[96] (2005), 249 D.L.R. (4th) 274, 329 N.R. 402, 2005 FCA 15 [*Stoney Band*].

that might take place during the tenure of the agreement, the agreements did not account in any way for the unique situations of each Aboriginal nation, the timeline for negotiations around these agreements was unreasonable; generally the Crown treated the FRA process as if it would count as adequate consultation and accommodation for a wide range of situations.

In *Gitxsan FN,* Tysoe J. stated that he could understand the Crown position when looked it at as a 'business decision'.[97] It would be 'efficient' to try to deal with many First Nations with one process, under one model, and from that standpoint it was not unreasonable. Tysoe J. pointed out, however, that these matters must not be approached from either the Crown's or a generic standpoint of 'reasonableness'—rather, the reasonableness of the Crown actions must be assessed from the standpoint of *both* the Crown and the Aboriginal claimants. Here, the Gitanyow (the particular First Nation challenging the Crown) argued that the FRA process was unreasonable from *their* perspective, as it asked them to accept *known* quantities of revenue and timber in exchange for an *unknown* amount of possible infringements of their rights.[98] 'Business decisions' that must be made in the context of consultation and accommodation, as Tysoe J. pointed out, do not all lie in the hands of the Crown as the affected First Nation must also weigh the advantages and disadvantages of accepting offers made by the Crown, and their decisions must come into the measure of the over-all reasonableness of the attempts at consultation and accommodation.

Furthermore, Tysoe J. found that it seemed apparent that the FRA, to which the Crown was trying to get the Gitanyow to agree, was not directly tied to the issue with which the Gitanyow were directly concerned, namely the transfer of control over Skeena Cellulose to NWBC Timber. Consultation and accommodation, he found, must be tied to the rights at issue, and to the particular government action complained of in relation to these rights.

In *Huu-Ay-Aht FN* Madame Justice Dillon found that the use of the FRA process failed to meet both the Province's and the Ministry of Forest's own guidelines concerning consultation,[99] and she went so far as to suggest that the Crown's use of this approach to dealing with the Huu-Ay-Aht's concerns was beyond 'hard bargaining' (in being intransigent and obscurant throughout the process the province was, essentially, acting in bad faith).[100] Dillon J. found

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[97] *Supra* note 89 at para. 52.

[98] *Ibid.* at para. 54.

[99] *Huu-Ay-Aht FN, supra* note 92 at paras. 87-92.

[100] In *Haida Nation, supra* note 12, McLachlin C.J.C. imposed a requirement of good faith negotiations, but allowed that this was consistent with 'hard bargaining'.

that the fundamental obligation on the Crown was to design an appropriate process of consultation, one which met their own guidelines, in the least, and which would respect the individuality of challenges brought before it. Highlighting the distinction between process (the duty to consult) and outcome (the duty to accommodate), Dillon J. did not feel the need to consider arguments about accommodation, as the process the Crown attempted to put in place to deal with a prima facie case of Aboriginal rights and title was flawed at a fundamental level.

What is particularly fascinating and important about the emerging jurisprudence around the matter of process, is the suggestion that, as tied to the notion of *reconciliation*, structures for process are best designed not by Ministry officials working by themselves in Ministry offices, but by Ministry officials working in concert with potentially affected Aboriginal nations.

The notion that there might be a requirement of 'consultation about consultation' may seem to run counter to the jurisprudence in *Taku River Tlingit*.[101] In *Taku River Tlingit* the Court held that separate consultation processes do not need to be established in all cases of potential infringement—the process of environmental review was found to be sufficient, if properly adjusted to take into appropriate consideration the asserted Aboriginal rights.[102] Furthermore, in both *Taku River Tlingit* and *Haida Nation*[103] the Court did not entertain the notion that Aboriginal nations should have a say in designing processes of consultation. As Tysoe J. noted in *Gitxsan*,[104] the emphasis of the Court was clearly on notions of 'reasonableness'. While measuring consultation processes by the measure of reasonableness prevents the Crown from freely designing whatever process it might deem adequate, this does not seem to entail a requirement that the Crown consult with potentially affected Aboriginal nations about how to properly effect such consultation.

While Madame Justice Dillon does not suggest otherwise, her repeated criticisms of the processes by which the Crown purportedly attempted to consult with the Huu-Ay-Aht indicate that while the Crown may design its own consultation processes, it has to do so with an eye to the potentially affected Aboriginal interests. Tysoe J, as well, in questioning the attempt of the Crown to displace its obligations through unilaterally designed and implemented FRAs, pointed to the need of the Crown to work out processes of

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[101] *Supra* note 13.

[102] *Ibid.* at paras. 33-46.

[103] *Supra* note 12.

[104] *Supra* note 89.

consultation which focus on the particular concerns of the potentially affected Aboriginal nation.[105]

This need to design consultation processes in light of the claimed rights, in turn, would seem to require that in the very least the Crown consult with the potentially affected First Nation to determine what these interests might be. As a *practical* matter, it would seem necessary that the Crown engage Aboriginal nations in consultation about the process of consulting when contemplating actions that may infringe upon Aboriginal rights or title. While strictly speaking the Crown is free to design consultation processes (constrained by 'reasonableness'), in many cases it will simply be impossible to do so in a manner that will, after the fact, satisfy a court that the Crown had put in place a reasonable process for consulting about, and possibly accommodating, potentially affected Aboriginal rights and title without consulting with the potentially affected Aboriginal nation(s) beforehand.[106]

B. *HUPACASATH FN 1*[107] *AND HUPACASATH FN 2*:[108] INTERLOCUTORY INJUNCTIONS AND THE DANGER OF TRANSPOSING DOCTRINE

Hupacasath FN 1 and *Hupacasath FN 2* clearly highlight, by way of contrast, the continuing difficulty in trying to use interlocutory injunctions to protect Aboriginal interests. Less obviously, these cases also highlight how difficult it will be for Aboriginal nations to make substantive use of the duties to consult

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[105] In *Hupacasath FN 2*, *supra* note 90, Madame Justice Smith imposed an imaginative list of conditions on Brascan in relation to its newly acquired private forestry lands lying within the Hupascath's traditional territory, conditions overseen by the Crown. These would be in place for the two years during which the Crown would work toward an acceptable process with the Hupacasath First Nation, an attempt which, interestingly, she described in this fashion at para. 326:

> As well, the Crown and the petitioners will attempt to agree on a consultation process and if they are unable to agree on a process, they will go to mediation. If mediation fails, they may seek further directions from the Court.

[106] Interestingly, in *Musqueam IB v. Richmond*, *supra* note 95 at para. 119, Brown J. held that:

> Because the Crown did not recognize a duty to consult, the parties have not attempted to determine appropriate consultation and accommodation. In Haida, the court suggested that the parties can assess the strength of the claim and the appropriate scope and content of the duty to consult and accommodate. If they cannot agree, the courts can assist. That seems to me appropriate in this case: the parties can assess the strength of the claim and determine the scope and content of the duty to consult and accommodate. If they are not able to agree, they may return to court for additional relief.

[107] *Supra* note 90.

[108] *Supra* note 90.

and accommodate in face of Crown efforts to 'manage' forestry operations. On a positive note, the second case suggests that Crown efforts at privatization of resource lands and industries will run into significant problems vis-à-vis Aboriginal claims.

Both cases rest on a single set of facts: Brascan Corporation was interested in purchasing a swath of forestry concerns,[109] with a major part of the attractiveness of this package being the possibility of removing from Tree Farm Licence 44 ('TFL 44') 70,000 hectares of private lands, so they might be subject to the much less stringent management rules governing non-TFL private lands. In *Hupacasath FN 1* the Hupacasath were trying to stop Weyerhauser Company from completing the sale to Brascan. In *Hupacasath FN 2*, in contrast, the Hupacasath were concerned about the lack of consultation in relation to the removal of the private forestry lands from TFL 44.

In its first quest, one of Hupacasath's tools was a motion for judicial review of Ministerial decisions to remove these lands from TFL 44 and to alter the 'Annual Allowable Cut' for this TFL. The review of these decisions would call for various interim measures, some of which would operate to prevent the transfer of title until these matters were settled.

This brought into play the test from *RJR-MacDonald Inc. v. Canada (Attorney-General)*,[110] which sets out the criteria for an interlocutory injunction. Weyerhauser argued, amongst other things, that at the balance of convenience stage of this test, the court must consider the loss of sale that would ensue, given conditions on the purchase. Ross J. found that as the loss of sale would cause significant hardship to Weyerhauser (and the public), and the injury to the Hupacasath would not be such that they would lack future possible remedies, the balance of convenience favoured not issuing the injunction. The sale could go ahead.

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[109] *Ibid.* at para. 68: "The sale to Brascan for the total purchase price of $1.4 billion closed on May 30, 2005. The purchase included 258,000 hectares of privately owned timberlands, the annual harvesting rights to 3.6 million cubic metres of Crown timberlands, five coastal sawmills and two remanufacturing facilities."

[110] [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [*RJR-Macdonald*]. In *RJR-Macdonald* the Supreme Court accepted and explicated the three stage test employed by Beetz J. in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321. At page 334 of *RJR-Macdonald* Sopinka and Cory JJ. laid out the framework of the test:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

There are two points of interest that emerge from this decision. On the one hand, there is a remark made about the lack of a veto on the part of the Hupacasath,[111] while on the other there is a problem around transposing doctrine related to infringement of asserted Aboriginal rights into situations wherein the Aboriginal nation is seeking an interlocutory injunction, and vice versa. The question of the veto-power of potentially affected Aboriginal nations will be addressed when *Musqueam IB v. BC*[112] is discussed.

The second point of interest concerns the transposing of doctrine related to infringement of Aboriginal rights to situations involving interlocutory injunctions. Particularly problematic, for the purposes of discussing the duties to consult and accommodate, are remarks made about the nature of the harm that the actions of the Crown may inflict on First Nations with lands covered by TFL's tied to 'private' interests.

It should be noted that it was already problematic: (1) that Weyerhauser had fee simple title to these lands, and (2) that some might see this as an important factor in determining questions around Aboriginal title and rights. While some might see good reason in taking fee simple title lands off the table at treaty negotiations, or when considering questions of accommodation, it makes little sense to protect 'private' lands held by multi-national corporations in the context of situations involving asserted Aboriginal rights especially when there is the strong suspicion that continuing efforts at privatizing these lands through various transfers of control and ownership to these corporations is intended by the Crown to circumvent its obligations to First Nations. Without deciding the matter, in *Hupacasath FN 2*[113] Madame Justice Smith found that the private nature of these lands did not preclude the Hupacasath from attempting to forward claims to Aboriginal title and rights.

In this situation we see a generally problematic approach in dealing with corporations, as the Crown attempts to 'decrease Crown control' over forest lands, while increasing private control, with the suspicion lurking in the background that this is being done in order to circumvent fiduciary obligations (or obligations tied to Crown honour). In the context of an action for an interlocutory injunction it *may* make some sense to see this shift in control as not constituting a harm sufficiently large to outweigh the harm to the other party, but if this situation were viewed through the lens of possible infringement of Aboriginal and treaty rights, one can only hope that challenging this shift in the seat of control over lands will be seen for what it is, a *serious* infringement, triggering 'deep consultation' that must lead to accommodation of the interests of the affected Aboriginal nations.

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[111] *Hupacasath FN 1*, *supra* note 90 at para. 72.

[112] *Supra* note 94.

[113] *Supra* note 90.

Part of this view was validated in *Hupacasath FN 2*. While this case illustrates how much more can be accomplished by invoking the duties to consult and accommodate, it also highlights the hurdles Aboriginal nations will face in attempting to put substantial pressure on governments and corporations.

In *Hupacasath FN 2*, Madame Justice Smith found that the attempt to remove private lands from TFL 44 had potentially serious repercussions for the Hupacasath, as the weaker management regime governing private forestry lands would allow Brascan to move much more aggressively in its forestry operations. Since she did not dismiss the possibility that the Hupacasath could make claims to title and rights over private lands, she found that duties of consultation and accommodation could arise.

Smith J. noted, though, that the law clearly throws into doubt the strength of the claims the Hupacasath might pursue. First, indications are that granting of fee simple title will quite likely be found to have extinguished any claims to Aboriginal title (and seriously weakened claims to other rights). Since Aboriginal title is exclusive in nature, and fee simple is similarly powerful, the two will quite likely be found to be mutually exclusive. In addition, as the duties to consult and accommodate have been said to be essentially interim devices leading into negotiated agreements, and such agreements to this point do not include discussions about private lands, the duties would not seem to engage in relation to private lands.[114]

This plays out into a generally weak situation for the Hupacasath: on the one hand, while they may be able to advance strong claims to the non-private lands, the impact on their claims would be 'modest' (as the stricter forestry management regime would prevail); whereas on the other hand, though the impact on their interests over the private lands may be serious, the claims they could advance would be weak. The result would be that the duties befalling the Crown in relation to the non-private lands would be 'moderate', and at a 'lower level' than 'moderate' in relation to the private lands.[115]

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[114] *Ibid.* at para. 249:

> On the existing state of the law, the petitioners' [A]boriginal rights with respect to the Removed Lands are at best highly attenuated. Prior to the removal decision, the owners of the lands could have decided to exclude the Hupacasath from access to the lands at any time, subject to possible intervention by the Crown through its power to control activities on the land under the TFL. Their claimed [A]boriginal title, if it has not been extinguished, seems very unlikely to result in the Hupacasath obtaining exclusive possession of the Removed Lands in the future. The authorities indicate that the possible availability of the land to satisfy future land claims or treaty settlements is an important consideration in determining the extent of the Crown's duty.

[115] *Ibid.* at para. 254:

As problematic as this may be for Aboriginal nations whose traditional territories now lie burdened by private interests, the impact of privatization is laid bare so as to call into question the ability of the Crown to continue with efforts at privatizing lands and the general resource extraction industry.[116] In effect, the stronger the private interest the Crown may wish to transfer, the stronger the associated obligations on the Crown will be in relation to any such transfer. This relationship will be canvassed in more detail when the urban land use cases are discussed.

C. *LAX KW'ALAAMS IB*:[117] ORIGINAL AND CONSEQUENT DECISIONS

In *Lax Kw'Alaams IB* two permits issued by the Ministry of Forests were challenged—a site alteration permit permitting the cutting of up to 1327 culturally modified trees (out of an identified 1800), and a cutting permit. The cutting permit allowed for the taking of trees at this location, while the site alteration permit was required in order to take culturally modified trees found at this location.

At a lower court level Maczko J. found that the site alteration permit was not subject to claims of infringement of Aboriginal rights, as it was merely a decision that amounted to a refusal to protect all the trees.[118] The real threat to Aboriginal rights, Maczko J. held, was the original cutting permit, which was not directly challenged in the action before him. Meanwhile, in an action challenging the cutting permit, Mr. Justice Shabbits found that the asserted claim was not well grounded, which led to the result that the efforts of the Crown at justifying its actions were found to be reasonable.

While the Court of Appeal agreed with these two results, this does not fit well with comments made by Madame Justice Dillon in *Huu-Ay-Aht IB*[119]

> Taking both the strength of the HFN claim and the seriousness of the potential adverse effects into account, I find that the duty to consult was at a moderate level with respect to the Crown lands, and at a lower level with respect to the Removed Lands.

[116] In 2003, the provincial government announced a plan (the 'Working Forest') that would have seen a form of corporate privatization of large areas of hitherto public lands. The full force of this initiative was left in limbo the next year, but has not been repudiated. While this measure would not have granted fee simple title to forest companies, to the extent it extended quasi-property rights it would have unquestionably seriously impacted asserted Aboriginal rights and title claims. Online: Working Forest Policy <http://srmwww.gov.bc.ca/rmd/workingforest>. It remains to be seen how these sorts of initiatives will be affected by the 'new relationship' between the Crown and the provinces First Nations announced in late 2005. Online: The New Relationship With Aboriginal People <http://www.gov.bc.ca/arr/popt/the_new_relationship.htm>.

[117] *Supra* note 91.

[118] *Ibid.* at para. 12.

[119] *Supra* note 92.

(comments which seem supported by the jurisprudence in *Haida Nation*[120] and *Mikisew Cree FN*[121]). In *Huu-Ay-Aht IB*, the Crown had argued that their actions lacked the specificity to attract a duty to consult. Dillon J. remarked:

> The question posed by the Crown is how specific the infringement has to be before a duty is triggered. With respect, that is not the question. The obligation arises upon knowledge of a claim and when infringement is contemplated. It is an ongoing obligation once the knowledge component is established.[122]

This implies both that the initial task of establishing a duty is remarkably easy, and that a certain 'atmosphere' is established once a well-supported claim is set out. The atmosphere does not entail the automatic imposition of duties on the Crown (once it is aware of a well-supported claim), but rather speaks to the fact that once a well-supported claim is before the Crown it is 'on notice' that any actions it might contemplate need to be measured against the possibility of their being infringements of the asserted right, such that duties of consultation (and accommodation) may exist.

The generality Dillon J. envisions makes sense given the purpose behind the imposition of duties to consult and accommodate—the need to provide protection for Aboriginal rights in danger of being over-run by Crown initiated or backed activities.[123] Likewise, the Supreme Court supports the notion that the task of establishing a duty is remarkably easy. In *Mikisew Cree FN* Mr. Justice Binnie stated clearly what *Haida Nation*[124] and *Taku River Tlingit*[125] were meant to establish:

> *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ('might adversely affect it') but in the variable content of the duty once triggered.[126]

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[120] *Supra* note 12.

[121] *Supra* note 14.

[122] *Huu-Ay-Aht IB*, *supra* note 92 at para. 112.

[123] *Haida Nation*, *supra* note 12 at para. 33:

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

[124] *Supra* note 12.

[125] *Supra* note 13.

[126] *Mikisew Cree FN*, *supra* note 14 at para. 34.

This reasoning must, then, carry over to the sort of situation under consideration in *Lax Kw'Alaams*.[127] The simple question before both trial judges should have been, 'was the Crown aware of an asserted claim of Aboriginal rights over the lands in question when issuing the cutting permit?' If this knowledge component were established, both inquiries should then have moved into questions about the strength of the asserted claim. Maczko J. found a 'strong' claim, while Shabbits J. found only a 'good' claim.[128] Should a duty to consult be established, it would constitute an ongoing obligation, pulling into its sphere subsequent government action.

In numerous recent cases there has been a failure to adequately acknowledge the original action of the Crown (for example, in issuing an original licence[129]). Likewise, there seems to be confusion about challenging consequent actions (for example, the transfer of this licence). Sometimes both these problems are well founded as the original action may fall before the knowledge requirement was met, and the consequent action may be too inconsequential for anyone to say it actually infringes on the claimed Aboriginal right. Further, sometimes failures to challenge original actions may rest on strategic concerns.

But all this together does not change the fact that it is not a sound position for the Crown to argue that *all* such decisions are independent from each other, with original decisions pushed off into the too-distant past (and said to be so 'policy' oriented as to be unchallengeable), and consequent actions deemed inconsequential or trivial. As Madame Justice Dillon points out, the general pattern to be established is fairly straightforward—the Aboriginal claimant makes clear to the Crown that they have a case (building up a prima facie case around their asserted rights), the Crown contemplates action which will impair the exercise of these claimed rights, and consequently the Crown (bound to its honour in *all dealings* with Aboriginal peoples[130]) falls under a duty to consult about the interests tied to these asserted rights (and may have to act to accommodate these interests when making its decisions). The original/consequent distinction should be seen as essentially irrelevant, unless the original decision was so long ago as be seen as clearly falling before the

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[127] *Supra* note 3.

[128] *Ibid.* and *Lax Kw'alaams Indian Band et al. v. Minister of Forests & West Fraser Mills Ltd. et al.* (2004), 39 B.C.L.R. (4th) 304, 2004 BCSC 420. It should be noted that Mr. Justice Shabbits found that even if the evidence for the asserted claim had been 'strong', the consultation and accommodation had been reasonable. This decision was under appeal before the Court of Appeal, but they found that as the trees had all been cut, the issue was moot.

[129] See *e.g.* the Crown's position vis-à-vis the original licensing of Marine Harvest in *Homalco IB 1*, *supra* note 93 at para. 47.

[130] *Haida Nation*, *supra* note 12.

Crown had notice—real or constructive—of a prima facie claim for rights or title.

D. *HOMALCO IB*:[131] CROWN RESISTANCE TO ITS LEGAL OBLIGATIONS

In *Homalco IB* the Xwèmahlkwu First Nation challenged the application of Marine Harvest Canada to amend its fish-farming licence so as to raise Atlantic salmon in its facility close to the Homalco First Nation. Up to the approval of the amendment by the Ministry (on December 8, 2004) there were numerous communications between the Ministry and the First Nation, but no actual meeting on the issue. Clearly the Ministry had knowledge of the asserted claims of the Homalco First Nation, and the question then was whether a duty to consult arose. The Ministry argued that if there were a duty, it would fall on the low end of the spectrum, and it had, therefore, met its obligations in relation to any such duty.

Powers J. found, though, that the Homalco First Nation had numerous concerns that needed to be addressed (and information it required to formulate its concerns), and even though some of these may seem tied to the original licensing of Marine Harvest (which the Crown argued is now not capable of being challenged), they required more by way of response by the Crown.

Powers J. was not willing to find 'bad faith' on the part of the Crown, as he found that Crown officials saw themselves as giving 'provisional' approval on the 8th of December, pending consultation.[132] A detailed response to the Homalco First Nations's concerns, sent in mid-January, demonstrated this commitment to consult properly. Nevertheless, Powers J. went on to say that the Crown had failed to properly consult before the amendment was approved, and so the duty continued not to be met, with the requirement that the Crown continue its efforts to do so appropriately. In laying out his orders, Powers J. specified further consultation between the Crown and Homalco First Nation, with the participation of Marine Harvest. Interestingly, and appropriately, Powers J. specified that:

> The Ministry is to approach this consultation with an open mind and be prepared to withdraw its approval of the amendment if, after reasonable consultation, it determines that it is necessary to do so, or add whatever conditions appear to be necessary for reasonable accommodation of the concerns of the Homalco.[133]

This illustrates what may be the major current impediment to the smooth functioning of the law around the duties to consult and accommodate 'on the ground'. Unquestionably the Crown is not comfortable with the notion that its

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[131] *Supra* note 93.

[132] *Ibid.* at para. 107.

[133] *Ibid.* at para. 127 (order no. 7).

power is 'tempered' or channelled by the presence of Aboriginal rights or title. The Crown seems to consistently approach disputes over Aboriginal concerns as if these are moral or political affairs, situations in which it may have obligations, but not *legal* obligations. This mindset can perhaps best be seen in how the Crown makes what are clearly 'token' or superficial responses to challenges by First Nations asserting rights for which they clearly have strong 'prima facie' cases.[134]

The Crown appears to be concerned with *appearing* to respond to challenges, thinking that it must satisfy political (or moral) imperatives. In the context of asserted Aboriginal rights or title, however, appearances simply will not suffice. In these circumstances, the Crown is bound by its honour to work toward substantive measures that actually address the concerns raised. As Powers J. points out, the jurisprudence in *Haida Nation*[135] (which clearly articulates points made in *Delgamuukw*[136] about 'substantially addressing' Aboriginal concerns) points to *legal obligations* on the Crown to work toward accommodation of Aboriginal concerns. This may *require* of the Crown, for example, that it rescind the amendment of Marine Harvest's licence.

The Crown seems to be strongly resistant to this line of thought. It seems to be strongly wedded to the notion that when told it must have the intent of substantially addressing Aboriginal concerns, this language only requires that it put on a show about addressing Aboriginal concerns. This is clearly, however, not what the Supreme Court has made of the Crown's obligations. It has placed on the Crown the obligation to move beyond putting on appearances—it speaks of the Crown having to actually *move* in relation to Aboriginal concerns, if this is the reasonable response to these concerns.

Some of the resistance on the part of the Crown may be understandable, based on confusion it might suffer as a result of somewhat unfortunate language used by the Supreme Court. The Court has identified Crown 'honour' as the source of the legal obligations befalling the Crown when it interacts with asserted Aboriginal rights and title. This can be a slippery notion, one that carries with it any number of possible connotations. It would not be entirely unreasonable for Crown officials and lawyers to imagine, for example, that the Court has indicated that Crown obligations are tied to *subjective assessments* of what is 'honourable'. For example, I may have a

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[134] One might suggest that until the Supreme Court of Canada decisions in *Haida Nation*, *supra* note 12 and *Taku River Tlingit*, *supra* note 2 were released the Crown did not know that it had obligations prior to the establishment of Aboriginal rights or title. But the Court of Appeal in these two decisions set the law until that point in British Columbia, and if anything these courts imposed more onerous obligations, pre-establishment, on the Crown.

[135] *Supra* note 12.

[136] *Supra* note 2.

notion of what is 'honourable', a notion that I am responsible for fleshing out. If someone asks me to act honourably, I might suppose that they are asking that I live up to my standard of what counts as honourable conduct. Alternatively, 'honour' might be considered to be an essentially moral notion, imposing moral responsibilities tied down to virtuous behaviour of a particular variety.

The Court, however, is clearly not envisioning a concept with subjective or purely moralistic undertones. It has already indicated objectively fixed parameters within which this notion (in this context) is supposed to function. The honour of the Crown in the context of its interactions with Aboriginal peoples, it has pointed out, demands an absence of 'sharp dealings'. The Crown must avoid operating in bad faith when engaged in forms of negotiations. The Crown must be directing its mind toward substantially addressing valid Aboriginal concerns when contemplating action that might negatively impact on these concerns. These are legally binding directives, flowing out of the constitutionalization of Aboriginal rights, and the Crown is not free to act as though it may satisfy requirements imposed by 'honour' by replacing these with its own notions of what counts as 'honourable' activity.

E. *MUSQUEAM IB V. BC*;[137] *MUSQUEAM IB V. RICHMOND*:[138] THE DUTY TO ACCOMMODATE AND THE LACK OF A VETO-POWER

In *Musqueam IB v. BC* the court was faced with a challenge to the sale of the University Golf Course to the University of British Columbia. Hall J.A. found that the Musqueam had clearly demonstrated a strong prima facie case to the lands in question, and that sale of the golf course would be "of significance to the Musqueam in light of their concerns about their land base."[139] As such, he found that "[t]he Musqueam were therefore entitled to a meaningful consultation process in order that avenues of accommodation could be explored."[140] This duty was not met, however, for the "consultation was left until a too advanced stage in the proposed sale transaction."[141]

While the outcome is as it should be, given the jurisprudence, this case illustrates difficulties both counsel and judges are having with the intricacies woven around the duties to consult and accommodate. Both counsel and the learned judge stumble in relation to the question of veto-power in the hands of

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[137] *Supra* note 94

[138] *Supra* note 95.

[139] *Supra* note 94 at para. 94.

[140] *Ibid.* at para. 94.

[141] *Ibid.* at para. 95.

Aboriginal parties, while Hall J.A. makes awkward remarks toward the end of the decision in relation to the duty to accommodate. These two problematic areas are intertwined in *Musqueam IB v. BC*, with the question of a veto-power emerging out of a careful reading of the second matter, that of the proper approach to the duty to accommodate.

After making his determination about a lack of appropriate process (a failure to engage in timely meaningful consultation), Hall J.A. turned to consider the question of accommodation. Hall J.A. ruminates about what might be accommodation in more remote areas of the province:

> In relatively undeveloped areas of the province, I should think accommodation might take a multiplicity of forms such as a sharing of mineral and timber resources. One could also envisage employment agreements or land transfers and the like.[142]

These solutions, he went on to say, "have to work not only for First Nations people but for all of the populace having a broad regard to public interest."[143]

The next set of remarks is essentially obiter, as Hall J.A. had already found that consultation was not carried out appropriately.[144] Questions about the *outcome* of the process, about accommodation that is, can only be speculatively considered at this point. Nevertheless, he went on to speculate that "... some species of economic compensation would be likely found to be appropriate for a claim involving infringement of [A]boriginal title relating to land of the type of this long-established public golf course located in the built up area of a large metropolis."[145]

There are several concerns that should be raised about these remarks. Hall J.A. goes on to reinforce the notion that the process of consultation, carried out in an open, transparent and timely fashion, should lead to thoughts about what might be appropriate accommodation.[146] Still, he—a judge of the Court of Appeal—has signalled to the Crown that the highest court in the province

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[142] *Ibid.* at para. 97.

[143] *Ibid.*

[144] Note that Lowry J.A. issued concurring reasons, departing from Hall J.A. specifically on the point of these remarks. Lowry J.A. states at para. 104 that

> [t]he disposition of this appeal does not require that any comment be made [in regard to sorts of interim measures which may be acceptable] and, in my respectful view, what my colleague says in paragraphs 98-100 of his judgement might better be put to one side for now.

[145] *Ibid.* at para. 98.

[146] *Ibid.* at para. 100. Hall J.A. also remarks about the interest of the Musqueam in enhancing their land base. But he seems to do so with an eye to *other* lands held by the province that might be discussed within a process of 'deep consultation' leading to accommodation.

might find it reasonable to limit accommodation to economic compensation in urban contexts.

Why, however, are urban First Nations restricted to economic compensation? On what basis is discrimination between rural and urban nations to be founded? Will it be the case that for all First Nations situated in urban settings there are never any public or Crown lands left on their traditional territories? Furthermore, economic compensation is a separate matter in the context of established Aboriginal rights, and should be treated as such in the context of asserted rights.[147] Finally, in this specific context it is odd that such remarks were warranted, as Hall J.A. was not faced with a matter that could not be easily resolved with a simple arrangement between the Musqueam and the province. As Hall J.A. himself noted, the Musqueam had offered to be the purchasers of the golf course, with the understanding that they would continue to operate a public golf course.[148]

Musqueam IB v. Richmond[149] is illustrative in this context. The Musqueam challenged the transfer of lease lands lying dormant on the northern edge of the city (the Bridgeport lands) for the establishment of the River Rock Casino. While Brown J. found a failure on the part of the province to consult about the transfer, the call of the Musqueam to declare the Lottery Corporation's decision invalid fell on deaf ears, as it would be inappropriate at this late date to "shut down the casino and impair the entire development."[150] Once again the court found that "... practically speaking ... accommodation could only be economic accommodation."[151]

The Musqueam, however, have repeatedly asked the Crown to preserve land options for future negotiations, the lease over these lands runs out in 2041, and the Musqueam have actively pursued gaming options for many years (even in relation to the Bridgeport lands through the 1990's).[152]

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[147] In both *Sparrow*, *supra* note 1, and *Delgamuukw*, *supra* note 2, the Supreme Court of Canada distinguished within the context of fiduciary obligations between those that are tied to economic compensation and those tied to matters of consultation. There was no suggestion that consultation could itself be satisfied by an economic buy-out. While there is nothing intrinsically problematic about a First Nation accepting such a buy-out, if the offer is made, there is certainly no basis on which a First Nation should be forced to accept money in lieu of its constitutionally guaranteed entitlements to consultation about, and accommodation of, their interests.

[148] *Musqueam IB v. BC*, *supra* note 94 at para. 90.

[149] *Supra* note 95.

[150] *Ibid.* at para. 117.

[151] *Ibid.* at para. 118.

[152] *Ibid.* at paras. 7-9.

Predetermining that only economic accommodation will be available seems premature and unduly limiting.

The court's reasoning in the two Musqueam decisions also illustrates problems around the court's understanding of the question of any sort of veto-power resting in the hands of Aboriginal nations.

Recall that in *Haida Nation* McLachlin C.J.C. stated that:

> Where a strong prima facie case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim ... This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal 'consent' spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.[153]

We noted above that the Musqueam have repeatedly asked that Crown land be set aside pending resolution of its land claims. In *Musqueam IB v. BC*, however, Hall J.A. rejected the possibility that a court make such an order, stating that it made sense that such an arrangement is worked out as part of the treaty process itself.[154] In suggesting that the requirement of accommodation might be satisfied by compensation, however, Hall J.A. implied that it might not be necessary that land be put aside. As McLachlin C.J.C. noted in the above quotation, accommodation is a matter of give and take, which would seem to suggest that the Musqueam might have to accept compensation, given the circumstances of being an urban band, with little by way of 'free' Crown land available for the expansion of their land base.

This, in turn, would seem to go hand-in-hand with the assertion in *Haida Nation* that Aboriginal claimants do not enjoy a veto power in relation to government decisions. If it should happen that compensation is placed before them as the outcome of a reasonable process of consultation, the suggestion would seem to be that the Musqueam would have to accept the offer, as it is not open to them to simply reject this, thereby essentially attempting to veto the decision to sell the golf course.

Lower courts and both Crown and Aboriginal counsel will have to be careful, however, in untangling the jurisprudence around the duties to consult and accommodate in relation to the question of an Aboriginal veto-power.

It must be noted that the preceding quote from McLachlin C.J.C.'s judgement in *Haida Nation*[155] also speaks of the purpose behind the imposition

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[153] *Supra* note 12 at paras. 47-48.

[154] *Supra* note 94 at para. 99.

[155] *Supra* note 12.

of duties on the Crown prior to the establishment of Aboriginal rights or title—where a strong prima facie case for the asserted rights has been made out, and Crown activity seriously threatens the asserted rights, "... steps to avoid irreparable harm or to minimize the effects of infringement [may be required], pending final resolution of the underlying claim." These steps may be required as part of the process of "finding a satisfactory interim solution."[156]

Accommodation's raison d'etre is the creation of an interim space within which claimed rights are temporarily protected, pending a final resolution. The Crown must be directing its mind toward avoiding irreparable harm, and toward minimizing the effects of infringement. While Aboriginal nations must clearly understand that they cannot simply reject a decision made by the Crown, when it comes to the matter of justifying any infringing decision made, the Crown will have to demonstrate that it structured the outcome of its decision (for example, *how* it will go about laying out some road project, or whether it will preserve Crown land for future inclusion in a final agreement) in accordance with the principles set out in *Haida Nation* and *Taku River Tlingit*.[157] At the most fundamental level this requires that the Crown be concerned with *preserving* the Aboriginal interests at stake, pending a final agreement about the nature and scope of these rights in the modern context.

Contrary to Hall J.A.'s ruminations, then, it would seem unlikely that the Musqueam would simply have to accept, as a matter of accommodation of their claimed rights, compensation in lieu of land protection. Perhaps, as a matter of *final determination* (by way of a final agreement), they will not be able to expand their land base. But *along the way to this final determination*, in the time leading up to a resolution of their claims either through litigation or negotiation, it would seem that they should never be faced with a situation in which the Crown could legitimately remove all possible Crown lands from the negotiating table (for example, by selling the University Golf Club lands), thinking it could satisfy its honourable obligations through compensation.

While the Musqueam would not be able to react to Crown decisions to remove lands by attempting to 'veto' any such decisions, the structure of the duties to consult and accommodate are such that it will be out of the hands of the Crown to attempt such moves. There is a very simple and powerful limit placed on Crown decision-making activity in the interim period, leading up to the final reconciliation of Aboriginal claims and the sovereignty of the Crown—the Crown must *preserve* the heart of the Aboriginal interests, so they may serve as the basis on which the reconciliation can be worked out.

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[156] *Ibid.* at para. 44.

[157] *Supra* note 13.

To illustrate the confusion that can accompany this point, consider a comment on this point in *Hupacasath FN 1*.[158] In examining the balance of convenience between protecting the asserted rights of the Hupacasath and the interests of Weyerhauser in making its sale, Ross J. stated:

> It is also important to remember, as the Court stated in *Haida*, the Crown's duty is to consult and accommodate. The petitioners do not have a veto. They cannot dictate the outcome.[159]

Ross J. is correct insofar as he means to point out that the Hupacasath cannot simply reject the Crown's decision to authorize the sale of these forestlands. On the other hand, however, if the Hupacasath have a strong *prima facie* case for title over these lands, and if the Crown's decisions pose serious threats to these interests, this sale should not go forth. In the interim period, before the Hupacasath's interests are reconciled with the sovereignty of the Crown, the honour of the Crown dictates that the Crown not run roughshod over these interests. It must act to preserve the interests, so that they can serve as grounds for a negotiated arrangement.

The simple fact is that while the jurisprudence has rejected the notion of a veto in the hands of Aboriginal claimants, this very same jurisprudence dictates that the Crown is *seriously and powerfully constrained* in how it acts vis-à-vis the Aboriginal interests at stake. While it may appear to the observer that Aboriginal nations are exercising veto-powers, what is actually transpiring is the restraint of Crown power, until such time as the Crown honourably deals with unresolved Aboriginal issues.

F. *STONEY BAND*:[160] THE FULL REACH OF THE HONOUR OF THE CROWN

Finally, *Stoney Band* is interesting in that it introduced a broader context within which the principles in *Haida Nation*[161] may play a role. The Federal Court of Appeal failed to find that the honour of the Crown reached out so far as to encompass litigation contexts. It would not make sense, it found, given the adversarial nature of litigation, to impose on one party (the Crown) obligations to the other (an Aboriginal nation).[162] In the litigation context,

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[158] *Supra* note 90.

[159] *Ibid.* at para. 72.

[160] *Supra* note 96.

[161] *Supra* note 12.

[162] *Stoney Band*, *supra* note 96 at para. 22:

> In litigation, the Crown does not exercise discretionary control over its Aboriginal adversary. It is therefore difficult to identify a fiduciary duty owed by the Crown to its adversary in the conduct of litigation. It is true that an aspect of the claim against the Crown by the Stoney Band is based on an allegation of breach of fiduciary duty with

Rothstein J.A. held, the Crown is freed of its obligations flowing from its historic interaction with Aboriginal nations.

This finding makes a certain amount of logical sense, given the structure of the judicial process in Canada. Parties are expected to adopt adversarial positions, with the court charged with the task of objectively measuring the battle that plays out before it, picking 'a winner'. Rarely is there a 'win-win' situation in the context of litigation.

It is questionable, however, whether the Federal Court of Appeal has sufficiently digested the evolving jurisprudence around Aboriginal rights and title. McLachlin C.J.C. said clearly and forcefully in *Haida Nation*[163] that the honour of the Crown is engaged in *all its dealings* with Aboriginal nations. She did not say that the honour of the Crown is engaged in all its dealings *except* when it is squared off against an Aboriginal nation in the context of litigation. Indeed, one might argue that given the principles that lie behind the need to invoke the notion of honour (the Crown's assumption of control over the legal and practical interests of Aboriginal peoples, its assertion of sovereignty over pre-existing Aboriginal nations) it would seem that it is precisely in the context of litigation that the honour of the Crown is most properly brought to the fore.

Clearly the Crown has grown comfortable using the threat of litigation, and the adversarial atmosphere it brings with it, in the context of its general dealings with Aboriginal peoples. Unquestionably this speaks to a fundamental tension between a Canadian institution (built on the model of the adversarial judicial process) and the relationship between the Crown and Aboriginal peoples. But resolution of this tension will not be achieved—with the honour of the Crown ever present in the background—if the answer is to simply allow the Crown to act dishonourably whenever negotiations fail to materialize or breakdown (which is when the prospect of litigation typically arises).

IX. SOME CONCLUDING THOUGHTS: THE DUTIES TO CONSULT AND ACCOMMODATE IN THE LARGER PICTURE

Examination of the jurisprudence around the duties to consult and accommodate reveals an odd juxtaposition of forces that push and pull in different directions. What seems particularly odd about this juxtaposition is that two of the forces could easily come together, under the rubric of 'reconciliation', to move disputes around Aboriginal rights and title toward a resolution amenable to the Crown and a subset of the Aboriginal population.

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respect to the surrender and disposition of reserve land. But even if such a fiduciary duty existed, that duty does not connote a trust relationship between the Crown and the Stoney Band in the conduct of litigation.

[163] *Supra* note 12.

Before explaining how this resolution could be brought about, it is essential that the division within the Aboriginal side of the equation be acknowledged, and respected. Some Aboriginal nations would be content to be consulted about their interests, with the understanding that the Crown would have the intent of substantially addressing these concerns when required, all on the way to reaching modern agreements and treaties that spell out how these nations will fit within the legal, constitutional, social, and economic framework of Canada. Other Aboriginal nations, however, will continue to resist (with complete justification) attempts at pushing and pulling them into the fold of the Canadian state (at least until the Canadian state is willing to start talking about much more far-reaching and visionary arrangements, according these nations a true measure of self-determination).

The rest of these concluding thoughts are directed toward the dynamic between the Crown and those Aboriginal nations willing to consider moving toward a form of reconciliation with Crown sovereignty that takes place entirely within the Canadian state. The two forces pushing and pulling in different directions are: (1) the assimilative forces latent within the doctrine of Aboriginal rights and title (and especially powerful within the jurisprudence around the duties to consult and accommodate); and (2) the political forces that drive the Crown to resist working with those Aboriginal nations willing, at this point, to be pushed and pulled into the Canadian state in line with the forces operating through the law.

First, consider the assimilative forces at play within the doctrine of the duties to consult and accommodate. A general assimilative force can be discerned simply by thinking about the general framework within which the duties arise and 'make sense'. A second form of assimilative pressure is revealed when some of the detailed aspects of the duties are examined.

The fundamental and general assimilative pressure was noted earlier; as much as the language of the Court may say otherwise,[164] the duties to consult

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[164] *Haida Nation*, *supra* note 12 at paras. 16-17. In discussing the source of a duty to consult and accommodate, McLachlin C.J.C. stated that:

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at paragraph 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.
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> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown": *Delgamuukw*,

and accommodate do not operate to merge or reconcile Aboriginal visions of land use (rooted in Aboriginal self-understandings) with Crown visions of land use. Rather, the Crown is imagined as working within and through nothing but *its* vision, with the duty to consult operating to potentially modify the activities which fall under this vision (in order to accommodate *some* of the interests an Aboriginal nation might express in *some* feature(s) of the land).[165] In seeking to trigger the duty to consult, an Aboriginal nation must acknowledge its lack of alternative recourse, and seek to bring to bear this inadequate—and assimilative—tool upon problems generated by the larger political and legal context within which they have lived for many generations.

Generally speaking, Crown sovereignty rules the landscape, and so it is the Crown that ultimately decides how the land is to be thought of, and—following from this conceptualization—how the land is to be 'used' (i.e., exploited). The duty to consult enters the scene in a broad sense to do no more than potentially shift the exploitation into a slightly different form (this is the true underlying nature and extent of 'accommodation').

The second form of assimilative pressure is drawn into the light when analysis turns to certain aspects of the jurisprudence around the duties to consult and accommodate.

First, consider a distinction noted earlier, a distinction the Supreme Court draws between settled and unsettled claims. This division plays out in terms of two separate spectrums along which lie obligations that befall the Crown, depending on whether it faces an established or non-established claim. While it is questionable whether there is a significant difference between the bottom ends of the two spectrums, unquestionably there is an enormous difference between the top ends. In relation to unsettled rights, accommodation of these interests is the most that can be expected of the Crown, while in relation to established title or rights claims full consent may be necessary in some circumstances. *Haida Nation*[166] stands for the notion that 'unsettled claims', due to their natures as pre-existing interests, are to be treated as of lesser effect in the larger Canadian legal/political landscape: at most, these pre-existing interests can push the Crown toward (a) seriously 'discussing issues' that might arise around their diminishment through continual encroachment, and occasionally (b) succumbing to the necessity of modifying its actions in accommodating these interests.

[*supra* note 2], at paragraph 186, quoting *Van der Peet* [*supra* note 8], at paragraph 31.

[165] To be 'accommodated' these would have to be interests the Aboriginal nation can manage to persuade the Crown could inform their Aboriginal rights, and interests that could manage to be deemed by the Crown to be sufficiently important to warrant modification of the activities licensed by the Crown.

[166] *Supra* note 12.

Second, the intensity of the duty befalling the Crown in relation to not-yet-established claims depends on the strength *of the claim* the Aboriginal nation is able to muster, while in relation to settled rights or title the force of the obligations befalling the Crown depend on the right itself.

The Court finds the grounds for these discrepancies between settled and unsettled rights in nothing other than the settled versus unsettled nature of the claims made. This is hardly, however, a justification for the distinctions created. Regardless, whatever justificatory ground might exist, unquestionably the division functions to exert pressure on Aboriginal nations to move from unsettled claims to established claims—this legal tool exerts a significant assimilative pressure.

The jurisprudence in *Haida Nation*[167] exerts, then, a second form of assimilative pressure, through realizations on the part of Aboriginal nations that only when affected Aboriginal nations are willing to transform their 'unsettled claims' into 'rights' and 'title' are these interests accorded a measure of protection that *might* require the Crown to seek their consent before infringement. The duty to consult is revealed then as doubly assimilative, for while its general nature speaks of the domination of non-Aboriginal visions of land use, its operation in relation to 'unsettled claims' speaks of the artificially induced need to transform these into 'rights' and 'title' existing within the dominant system.[168]

With the Crown enjoying fundamental sovereign authority, Aboriginal nations are faced with the prospect of never-ending Crown interference with their interests (whether they are established as rights or remain 'insufficiently specific'). 'Establishing' Aboriginal rights or title creates a somewhat stronger

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[167] *Supra* note 12.

[168] Pre-existing Aboriginal interests, the Court maintains, are essentially simple interests in using the land in various ways, and it is on this level of 'interests' that the Court goes on to say that they must be, at most, 'accommodated' by the Crown when it goes about acting against them. For example, when the Crown moves to remove timber resources from Aboriginal title land it may be required to endeavour to work the affected Aboriginal nation into the exploitation of the land, pulling them into a world structured around a non-Aboriginal vision of land and its use. Furthermore, the Crown may have to consult with the affected Aboriginal nation in relation to this forestry operation, perhaps even having to 'substantially address' concerns voiced by the Aboriginal nation. The colonial *understanding* the Court lays over this situation, however, entails that it is not the Crown's vision of land and land use that must be reconciled with whatever vision the affected Aboriginal nation may voice. In concert with this, the colonial understanding of the Court entails that it is not the Crown's *power* to construct and maintain visions of land and land use that must be reconciled with the power Aboriginal nations have to construct and maintain their distinct visions of land and land use. Rather, the accommodation is on the level of *activities*, with the activity of the Crown going ahead, potentially modified to allow for the ability of the affected Aboriginal nation to continue *using* the land to be worked over.

check on Crown power.[169] However, the check promises to be not a barrier to the deployment of Crown power, but more of a braking system. *Haida Nation*[170] illustrates how the Supreme Court means to think about the pre-existing interests upon which purportedly rest these established rights—they lack even the legal status that established rights or title enjoy, existing instead in some nebulous form as potential rights, capable only of calling upon the 'honour' of the Crown. They fail to even trigger fiduciary obligations—the fact these pre-existing interests are not yet 'cognizable' and established within the dominant system spells out into a shadowy existence. This is a most telling outcome, given that these interests are what remain after generations marked by the taking of Aboriginal lands and the undercutting of Aboriginal sovereignty.

Consider now the second force that underlies the dynamic at play between the Crown and Aboriginal nations attempting to protect their vital interests. This force is that of Crown resistance to working within the framework of reconciliation set out by the Supreme Court.

When told it has legal obligations to consult in good faith, with the objective of substantially addressing the valid concerns of Aboriginal nations, the Crown drags its collective feet, and generally continues to make life difficult for Aboriginal peoples. This makes some sense on a 'human' or 'institutional' level. People working within various ministries, and higher level government officials, are used to working a certain way: they are used to being able to treat some peoples' concerns superficially (knowing that political repercussions will be slight); and they are used to being able to make decisions dealing with resource allocations and economic development relatively unfettered (they would not think such things typically attract constitutional concerns, at least not from the direction of the public[171]). Insofar as government institutions function through the day-to-day functioning of the people within, we can understand inertia, egoism, complacency and confusion all coming together to prevent the ship of the government from changing its direction vis-à-vis Aboriginal nations.

The Court has (cleverly one might suggest) infused into the jurisprudence around the duties to consult and accommodate elements that should work to overcome this inertia. Primary amongst these is the language that spells out what the general purpose is behind requiring consultation and

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[169] How strong the check might be is an open question. One might have thought that treaty nations could rely upon their treaty rights, but *Mikisew Cree*, *supra* note 14, shows how much weaker Aboriginal treaty rights are in relation to Crown treaty rights.

[170] *Supra* note 12.

[171] They would imagine that the Constitution enters the picture when, for example, concerns over division of powers arise.

accommodation—that is, the *preservation*, in the interim, of the matters contained within the asserted claims. While Aboriginal nations will not be able to use the duties to consult and accommodate as veto-powers over government decisions, the requirement that the Crown have its mind directed toward maintaining the core of the interests being asserted (so that future negotiations have things to serve as the subject matter of negotiations) should have the effect of turning the Crown into a more eager collaborator in negotiations.

This brings us, then, to the alignment of two forces at play within the ongoing relationship between the Crown and (certain) Aboriginal nations. Efforts by the Court to turn the Crown's mind to its obligations to preserve Aboriginal interests in the interim through a process of consultation and accommodation have been balanced by a jurisprudence that preserves ultimate Crown power over decision-making (that furthers the old aim of assimilation).

Given the Court's efforts at preserving Crown power, this should not be upsetting to the government. The governments of Canada are essentially being offered all they should want in this context. Recall that in looking at the general nature of Aboriginal law, and more particularly the operation of the duties to consult and accommodate, we have seen that powerful assimilative forces are at work, forces that are merely contemporary links in a long historical chain of efforts at 'removing the Indian problem' through assimilation. The Crown has struggled mightily for many generations to assimilate Aboriginal nations into the general Canadian society.

Here the door has opened, and in a way that preserves the Crown's power to continue to manage lands and resources in the context of a capitalist democracy (hardly surprising, given that the third arm of the state, the judiciary, has opened the door). The Crown continues to have its sovereignty unquestioned, it continues to be able to make all fundamental decisions about how lands will be used (whether TFLs will be issued, whether roads will be built to open up areas for mining, and so on). It simply has to become comfortable with the notion that once a decision is made to engage in some manner of resource development, it must think of those people who have lived for countless generations on the lands about to be further exploited, it must discuss the form of exploitation about to be undertaken, and it may have to adjust this form to take into consideration valid concerns of these Aboriginal nations. It is unlikely the Crown in British Columbia will have any other nor a better opportunity to reach arrangements that meet the interests of both society and those First Nations willing to be folded within its structure.