CMD 27-H1-REF1
CNSC Staff Submission

Reference Package for CMD 27-H1 - Commission Request for Information Regarding a Public Hearing

Classification	UNCLASSIFIED
Type of CMD	References
CMD Number	27-H1-REF1
Original CMD	27-H1
Public hearing date	February 22, 2027 – February 26, 2027
Summary	This document contains documents referenced in CMD 27-H1 to be placed on the Record for the proceeding.
Actions required	There are no actions requested of the Commission. This CMD is in support of the actions and recommendations set out in CNSC staff CMD 27-H1

CMD 27-H1 REF1

Soumission par le personnel de la CCSN

Dossier de référence pour CMD 27-H1 - Demande d'information de la commission concernant une audience publique

Classification	NON CLASSIFIÉ
Type de CMD	Références
Numéro de CMD	27-H1-REF1
CMD Original	27-H1
Date de l'audience	22 février 2027 - 26 février 2027
Sommaire	Ce CMD supplémentaire comprend les documents mentionnés dans le CMD 27-H1 du personnel de la CCSN
Mesures requises	Aucune mesure n'est requise de la Commission. Le présent CMD appuie les mesures et les recommandations énoncées dans le CMD 27-H1 du personnel de la CCSN.

CMD 27-H1-REF1

Reference Package for CMD 27-H1

CNSC Staff Submission Renewal Application for Western Waste Management Facility Operating Licence

Signed by:

X OwenWhitred, Karen

Digitally signed by OwenWhitred, Karen
Date: 2026.11.17 09:49:25 -05'00'

Karen Owen Whitred, Director General
Directorate of Nuclear Cycle and Facilities Regulation

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[3] Supreme Court of Canada. Haida Nation v. British Columbia (Minister of Forests). November 18, 2024. 2004 SCC 73. 7

[4] Federal Court. Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General), May 3, 2012. 2012 FC 517 (CanLII). 8

[5] SON Letter. Letter from the Saugeen Ojibway Nation to the CNSC with Statement of Rights and Concerns attached. February 20, 2013. Deep Geologic Repository Project for Low and Intermediate Level Radioactive Waste comment reference number 894. 9

[1] SON Letter. Re: Draft Tailored Impact Statement Guidelines and Indigenous Engagement Partnership Plan for the NWMO DGR Project. May 7, 2026.

The Joint Chiefs and Councils
of the Saugeen Ojibway Nation

May 7, 2026

Impact Assessment Agency of Canada
160 Elgin Street, 22nd Floor
Ottawa, ON K1A 0H3

Canadian Nuclear Safety Commission
280 Slater Street, P.O. Box 1046, Station B
Ottawa, ON K1P 1C2

Re: Draft Tailored Impact Statement Guidelines and Indigenous Engagement Partnership Plan for the NWMO DGR Project

We write today to provide the Saugeen Ojibway Nation's ("SON") comments on the Draft Tailored Impact Statement Guidelines ("TISG") for the Deep Geological Repository for Canada's Used Nuclear Fuel Project ("Project") and the associated Draft Indigenous Engagement and Partnership Plan ("IEPP").

SON seeks the following changes to the Draft TISG and IEPP:

1. Require a full and meaningful assessment of transportation impacts, including risks from accidents, malfunctions, and malicious acts, on SON and SON Territory, assessed now and not deferred to later project phases;

2. Require the assessment of alternative means of carrying out the Project to include interim storage options at or near the Project site that could allow used nuclear fuel to be removed from SON Territory earlier and reduce the duration and extent of impacts on SON; and

3. Explicitly identify SON in both the TISG and IEPP as an Indigenous Nation that will be impacted by the Project and must be consulted, recognizing that Project effects extend well beyond the physical footprint of the underground repository.

Background: SON and the Nuclearization of Anishinaabekiing

SON is comprised of the Anishinaabe People of the Chippewas of Nawash Unceded First Nation and Chippewas of Saugeen First Nation. Anishinaabekiing, SON's Territory encompasses much of the Saugeen (Bruce) Peninsula, extending down south of Goderich and east of Collingwood. The waters surrounding these lands and the lakebed of Lake Huron from the shore to the international boundary with the United States and to halfway across Georgian Bay are also part of SON's Territory.

SON's ancestors have used and occupied Anishinaabekiing since time immemorial and its People continue to do so today. SON's Territory consists of everything integral to life—the lands, rivers, lakes, winds, plants, animals, and fish. Anishinaabekiing has sustained SON People physically and spiritually for countless generations and must continue to do so far into the future.

The development of the nuclear industry in SON Territory has played a major role in shaping the land and SON People's place within it.[1] Without consultation or free, prior and informed consent, SON became host to:

- Canada's first commercial-scale Canada Deuterium Uranium reactor at Douglas Point;
- The world's largest operating nuclear facility at the Bruce site;
- The vast majority of Ontario's low and intermediate level waste at the Western Waste Management Facility;
- The Western Clean-Energy Sorting and Recycling Facility; and
- Nearly 45 percent of Canada's used fuel.[2]

The nuclear industry has consistently minimized SON's rights and excluded SON's perspectives, requests, and desires throughout its history, all while heavily utilizing SON Territory to support its development. SON's free, prior and informed consent has never been obtained.

The Project and its Potential Impacts

The Project stands to have significant and direct impacts on SON. Nearly 45 percent of Canada's existing used nuclear fuel, representing roughly 1.5 million bundles, is currently stored within SON Territory.[3] In 2024, the NWMO estimated that approximately 3.1 million bundles of used nuclear fuel located within SON Territory would ultimately need to be transported to the Project site.[4] Transportation would occur gradually over at least three decades, depending on the Project site's ability to receive, repackage, and place fuel in the deep geological repository.[5] This estimate does not account for Bruce Power's proposed Bruce C Project and Project 2030, both of which would increase the volume of used nuclear fuel generated and stored within SON Territory.[6]

The Project is not limited in its effects to the site of the proposed underground repository. It is directly connected to the continued presence, handling, and movement of used nuclear fuel within and through SON Territory, and to the cumulative legacy of nuclear development imposed on SON without our free, prior, and informed consent.

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[1] The history and current reality of the nuclear industry in SON Territory has been described in previous SON submissions, including those relating to the licensing of the Western Waste Management Facility and the Joint Review Panel for Ontario Power Generation's proposed deep geological repository for low- and intermediate-level wastes.

[2] Nuclear Waste Management Organization, Nuclear Fuel Waste Projections in Canada – 2023 Update at 4.

[3] Nuclear Waste Management Organization, Nuclear Fuel Easte Projections in Canada – 2024 Update at 4 [Waste Projections].

[4] Nuclear Waste Management Organization, Waste Projections at 7.

[5] Nuclear Waste Management Organization, Preliminary Transportation Plan at 14-15 [Transportation Plan].

[6] Nuclear Waste Management Organization, Transportation Plan at 11 (the NWMO has estimated the Bruce C Project "could result in an amount of used fuel equivalent to up to 2.6 million CANDU used fuel bundles").

i. Transportation Impacts

The transportation of very large volumes of used nuclear fuel through SON Territory will impact SON's lands, waters, animals, and People, as well as SON's rights. These impacts arise not only from the physical movement of used nuclear fuel, but from the scale, frequency, duration, and risk profile of transportation activities over decades.

The Project will cause significant socio-psychological impacts to SON. The routine passage of used nuclear fuel through SON Territory creates ongoing fear, dread, and stigma, reinforcing a sense of imposed risk. These impacts are not temporary or incidental; they persist for as long as transportation continues and compound over time.

Transportation involves inherent risks, including accidents, equipment failures, and external interference, the consequences of which would be borne by the Nations whose territories are traversed. These transportation-related impacts are unavoidable for SON—there are no alternative routes that would eliminate transportation through SON Territory—and form a core component of the Project's effects.

ii. Continued Storage of Used Nuclear Fuel in SON Territory

The continued storage of used nuclear fuel within SON Territory also has ongoing impacts. While the NWMO did not generate this waste, the manner in which it sequences, schedules, and carries out the Project directly influences how long SON will be required to host large quantities of used nuclear fuel.

SON understands that under current planning assumptions, used nuclear fuel would remain stored in SON Territory for decades as transportation proceeds gradually over an extended period tied to the Project site's ability to receive, repackage, and place fuel in the deep geological repository.[7] During this time, SON would continue to bear the environmental, cultural, and rights-related impacts associated with hosting a substantial portion of Canada's nuclear waste inventory, without SON's consent. Again, these impacts must be understood as integral components of the Project as a whole.

What the TISG and IEPP Must Require

Given the nature, scale, and geographic reach of the Project and its impacts on SON, the TISG and IEPP must be revised to ensure a credible, complete, and legally defensible impact assessment as it relates to SON.

i. Transportation Impacts Must Be Specifically Assessed

The TISG must require the NWMO to conduct a detailed assessment of transportation impacts arising from the Project. This assessment must address risks associated with accidents, malfunctions, and deliberate and malicious acts, as well as the cumulative effects of repeated transport activities over a prolonged period.

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[7] Nuclear Waste Management Organization, Transportation Plan at 14-15.

These impacts cannot be assessed in abstract or generalized terms. There are no feasible transportation routes that would avoid the movement of used nuclear fuel through SON Territory. As a result, the TISG must require assessment of transportation impacts as they will actually occur in SON Territory.

The Draft TISG places undue reliance on the Project being in the "early stages of planning" to defer a more fulsome assessment of transportation impacts, stating that "more detailed transportation planning will occur as the project advances toward the operational phase".[8] The Draft TISG also unduly constrains the consideration of effects of potential accidents to those associated with human error, such as the improper operation of equipment during transportation.[9] Given the inevitability of transportation through SON Territory, these impacts are reasonably foreseeable at this stage and must be meaningfully assessed now.

ii. Alternative Means for Interim Storage Must Be Assessed

The TISG must also require NWMO to assess alternative means of carrying out the Project that would materially reduce the duration and extent of impacts on SON—specifically, an alternative involving interim storage at or near the Project site.

At present, SON understands that the NWMO's approach contemplates transportation rates constrained by the site's capacity to receive, repackage, and emplace used nuclear fuel, resulting in extended storage within SON Territory.[10] The TISG must require an assessment of whether interim storage at or near the Project site could allow used nuclear fuel to be transported out of SON Territory earlier, rather than delaying transport for decades.

This analysis is essential to understanding the full range of potential Project impacts and to identifying options that could meaningfully reduce adverse effects on SON and accord greater respect to SON's rights as recognized under the *United Nations Declaration on the Rights of Indigenous Peoples*.[11]

While SON recognizes that the Draft TISG requires NWMO to consider "timing options for components and phases of the project,"[12] this requirement is insufficient. The TISG must explicitly require consideration of interim storage at or near the Project site as a distinct and reasonable alternative for managing used nuclear fuel and reducing ongoing impacts in SON Territory.

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8 Impact Assessment Agency of Canada, Draft Integrated Tailored Impact Statement Guidelines: Deep Geological Repository (DGR) for Canada's Used Nuclear Fuel Project at 66 [Draft TISG].

9 Impact Assessment Agency of Canada, Draft TISG at 48.

10 Nuclear Waste Management Organization, Transportation Plan at 14-15.

11 Used nuclear fuel is currently being stored in SON Territory without SON's consent, in a manner inconsistent with Article 29(2) of the *United Nations Declaration on the Rights of Indigenous Peoples*, which requires States to "take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of Indigenous peoples without their free, prior and informed consent." Each day that this waste remains in SON Territory without SON's consent represents a continuing failure to respect SON's rights.

12 Impact Assessment Agency of Canada, Draft TISG at 10.

iii. SON Must Be Explicitly Included in the IEPP and TISG

The Draft IEPP identifies six Indigenous Nations and communities with a "medium to high likelihood of potential impacts on rights".[13] Notably, SON is not included in the list. SON's absence from the Draft IEPP is a fundamental omission. The IEPP must explicitly identify SON as an Indigenous Nation that will likely be impacted by the Project and must be consulted.

The Project extends well beyond the physical footprint of the underground repository. As discussed above, its effects include the long-term storage, handling, and transportation of used nuclear fuel within and through SON Territory, as well as cumulative impacts arising from those activities. Failing to explicitly include SON reflects an unduly narrow assessment of the Project and its effects. Excluding SON undermines the credibility, completeness, and legal sufficiency of the impact assessment process, and is inconsistent with the Crown's obligations under section 35 of the *Constitution Act, 1982* and with the principles reflected in the *United Nations Declaration on the Rights of Indigenous Peoples*, including the requirement for free, prior, and informed consent.

SON requests that the Impact Assessment Agency of Canada and the Canadian Nuclear Safety Commission update the TISG and the list of First Nations in the IEPP to identify SON as a Nation with a "medium to high likelihood of potential impacts on rights."

Miigwetch,

<Original signed by>

Lester Anoquot
Saugeen First Nation

<Original signed by>

Paul Jones
Chippewas of Nawash Unceded First Nation

[13] Impact Assessment Agency of Canada, Indigenous Engagement Partnership Plan: Deep Geological Repository for Canada's Used Nuclear Fuel Project at 7.

[2] SON Letter. Important Update from the Joint Chiefs and Councils to SON Members: Moratorium on nuclear intensification and importation of waste if no progress on legacy issues. January 22, 2025.

The Joint Chiefs and Councils
of the Saugeen Ojibway Nation

January 22, 2025

Dear Saugeen Ojibway Nation members,

Moratorium on nuclear intensification and importation of waste if no progress on legacy issues

We write to you to share an important development regarding the nuclear legacy issues. As you know, efforts to resolve the nuclear legacy issues has been one of the Saugeen Ojibway Nation's (SON) key priorities for years. We have heard your concerns that progress must be made on this matter and have developed a plan of action to have them addressed.

The Joint Chiefs and Councils adopted a resolution that it will issue a moratorium on the continued nuclear intensification of Anishinaabekiing, including the continued importation and storage of nuclear wastes, if substantial progress has not been made towards the resolution of nuclear legacy issues within six (6) months. We will enforce this moratorium by all legal and political means necessary until a just and satisfactory resolution is in place. Accordingly, the Nuclear Advisory Committee has been directed to pursue the resolution of legacy issues through agreements with Ontario Power Generation (OPG), the Nuclear Waste Management Organization (NWMO), other private nuclear industry operators, as well as the federal and provincial governments, and to report back to Joint Council on progress made by May 2025.

For many decades our lands have been exploited for the production of nuclear energy and storage of radioactive waste. This occurred without consultation or SON consent. Today, our Territory holds the vast majority of Canada's nuclear waste and hosts one of the largest nuclear facilities in the world. Even now, following the announcement by NWMO that it will seek to build a deep geological repository (DGR) for used fuel in the north, SON is expected to continue to host the used fuel for another 60 years without our consent and without redress while the DGR undergoes the assessment process, licensing and permitting processes, and construction.

It is unacceptable that we continue to face inaction from OPG and other members of the nuclear industry and government in addressing these injustices for the SON People. Their repeated failure to uphold commitments is an ongoing affront to SON's rights. Our Joint Chiefs and Councils have taken a strong stance: we will not allow the exploitation of Anishinaabekiing to continue without a fair and just resolution. Our rights to govern our lands, to safeguard our People, and to make critical decisions about nuclear waste within Anishinaabekiing will not be compromised.

We stand firm in our call for respect, equity, and real action. The Joint Chiefs and Councils have a deep and solemn responsibility to protect this Territory for our People and for all people that share our lands and waters. We take this responsibility seriously. We will continue to provide you with updates on this issue over the coming months.

Miigwetch,

Ogimaa Greg Nadjiwon
Chippewas of Nawash Unceded First Nation

Ogimaa Conrad Ritchie
Chippewas of Saugeen First Nation

[3] Supreme Court of Canada. Haida Nation v. British Columbia (Minister of Forests). November 18, 2024. 2004 SCC 73.

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

v.

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

and between

Weyerhaeuser Company Limited *Appellant*

v.

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

and

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

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

c.

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

et entre

Weyerhaeuser Company Limited *Appelante*

c.

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

et

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

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

Indexed as: Haida Nation *v.* British Columbia (Minister of Forests)

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

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

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

Répertorié : Nation haïda *c.* Colombie-Britannique (Ministre des Forêts)

Référence neutre : 2004 CSC 73.

N° du greffe : 29419.

2004 : 24 mars; 2004 : 18 novembre.

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

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

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

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

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

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

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

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably

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

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

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

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

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

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

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

Cases Cited

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

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

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

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

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

Jurisprudence

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

2 S.C.R. 723; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, aff'd [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

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R.C.S. 1013; *R. c. Gladstone*, [1996] 2 R.C.S. 723; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817; *TransCanada Pipelines Ltd. c. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403; *Mitchell c. M.R.N.*, [2001] 1 R.C.S. 911, 2001 CSC 33; *Halfway River First Nation c. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, conf. par [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council c. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107; *R. c. Marshall*, [1999] 3 R.C.S. 533; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *R. c. Côté*, [1996] 3 R.C.S. 139; *R. c. Adams*, [1996] 3 R.C.S. 101; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 App. Cas. 46; *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S. 585, 2003 CSC 55; *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748.

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with supplementary reasons (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587, 172 B.C.A.C. 75, 282 W.A.C. 75, 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117, [2002] B.C.J. No. 1882 (QL), 2002 BCCA 462, reversing a decision of the British Columbia Supreme Court (2000), 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83, [2000] B.C.J. No. 2427 (QL), 2000 BCSC 1280. Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

Paul J. Pearlman, *Q.C.*, and *Kathryn L. Kickbush*, for the appellants the Minister of Forests and the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia.

John J. L. Hunter, *Q.C.*, and *K. Michael Stephens*, for the appellant Weyerhaeuser Company Limited.

Louise Mandell, *Q.C.*, *Michael Jackson*, *Q.C.*, *Terri-Lynn Williams-Davidson*, *Gidfahl Gudsllaay* and *Cheryl Y. Sharvit*, for the respondents.

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

E. Ria Tzimas and *Mark Crow*, for the intervener the Attorney General of Ontario.

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

Written submissions only by *Alexander MacBain Cameron*, for the intervener the Attorney General of Nova Scotia.

Graeme G. Mitchell, *Q.C.*, and *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

Stanley H. Rutwind and *Kurt Sandstrom*, for the intervener the Attorney General of Alberta.

Gregory J. McDade, *Q.C.*, and *John R. Rich*, for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band.

Allan Donovan, for the intervener the Haisla Nation.

supplémentaires (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587, 172 B.C.A.C. 75, 282 W.A.C. 75, 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117, [2002] B.C.J. No. 1882 (QL), 2002 BCCA 462, qui a infirmé une décision de la Cour suprême de la Colombie-Britannique (2000), 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83, [2000] B.C.J. No. 2427 (QL), 2000 BCSC 1280. Pourvoi de la Couronne rejeté. Pourvoi de Weyerhaeuser Co. accueilli.

Paul J. Pearlman, *c.r.*, et *Kathryn L. Kickbush*, pour les appelants le ministre des Forêts et le procureur général de la Colombie-Britannique au nom de Sa Majesté la Reine du chef de la province de la Colombie-Britannique.

John J. L. Hunter, *c.r.*, et *K. Michael Stephens*, pour l'appelante Weyerhaeuser Company Limited.

Louise Mandell, *c.r.*, *Michael Jackson*, *c.r.*, *Terri-Lynn Williams-Davidson*, *Gidfahl Gudsllaay* et *Cheryl Y. Sharvit*, pour les intimés.

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

E. Ria Tzimas et *Mark Crow*, pour l'intervenant le procureur général de l'Ontario.

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

Argumentation écrite seulement par *Alexander MacBain Cameron*, pour l'intervenant le procureur général de la Nouvelle-Écosse.

Graeme G. Mitchell, *c.r.*, et *P. Mitch McAdam*, pour l'intervenant le procureur général de la Saskatchewan.

Stanley H. Rutwind et *Kurt Sandstrom*, pour l'intervenant le procureur général de l'Alberta.

Gregory J. McDade, *c.r.*, et *John R. Rich*, pour les intervenantes la Bande indienne de Squamish et la Bande indienne des Lax-kw'alaams.

Allan Donovan, pour l'intervenante la Nation haisla.

Hugh M. G. Braker, *Q.C.*, *Anja Brown*, *Arthur C. Pape* and *Jean Teillet*, for the intervener the First Nations Summit.

Robert C. Freedman, for the intervener the Dene Tha' First Nation.

Robert J. M. Janes and *Dominique Nouvet*, for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief.

Charles F. Willms and *Kevin O'Callaghan*, for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia.

Thomas F. Isaac, for the intervener the British Columbia Cattlemen's Association.

Stuart A. Rush, *Q.C.*, for the intervener the Village of Port Clements.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

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

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

Hugh M. G. Braker, *c.r.*, *Anja Brown*, *Arthur C. Pape* et *Jean Teillet*, pour l'intervenant le Sommet des Premières nations.

Robert C. Freedman, pour l'intervenante la Première nation Dene Tha'.

Robert J. M. Janes et *Dominique Nouvet*, pour l'intervenant Tenimgyet, aussi connu sous le nom d'Art Matthews, chef héréditaire Gitxsan.

Charles F. Willms et *Kevin O'Callaghan*, pour les intervenants Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries et Mining Association of British Columbia.

Thomas F. Isaac, pour l'intervenante British Columbia Cattlemen's Association.

Stuart A. Rush, *c.r.*, pour l'intervenant le village de Port Clements.

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction

1 À l'ouest de la partie continentale de la Colombie-Britannique s'étendent les îles de la Reine-Charlotte, patrie traditionnelle des Haïda. Les îles Haïda Gwaii, comme leurs habitants les appellent, se composent de deux grandes îles et de plusieurs petites îles. Depuis plus de 100 ans, les Haïda revendiquent un titre sur les terres des îles Haïda Gwaii et les eaux les entourant. Ce titre en est toujours à l'étape de la revendication et n'a pas encore été juridiquement reconnu.

2 Les îles Haïda Gwaii sont densément boisées. L'épinette, la pruche et le cèdre y foisonnent. Le plus important de ces arbres est le cèdre, qui, depuis des temps immémoriaux, joue un rôle central dans l'économie et la culture des Haïda. C'est à partir du cèdre qu'ils fabriquaient leurs canots maritimes, leurs vêtements, leurs ustensiles et les totems qui

lodges. The cedar forest remains central to their life and their conception of themselves.

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

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.'s. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

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

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land — title which they are in the process of trying to prove — and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the

protégeaient leurs habitations. La forêt de cèdres demeure essentielle à leur vie et à la conception qu'ils se font d'eux-mêmes.

Les forêts des îles Haïda Gwaii étaient déjà exploitées avant la Première Guerre mondiale. Certaines parties du territoire ont été coupées à blanc. D'autres sont occupées par une forêt secondaire. Dans certaines régions, on peut encore trouver de vieilles forêts.

La province de la Colombie-Britannique continue de délivrer à des compagnies forestières des permis de coupe autorisant l'abattage d'arbres sur les îles Haïda Gwaii. Ce sont ces permis, maintenant appelés [TRADUCTION] « concessions de ferme forestière » (« CFF »), qui sont au cœur du présent litige. En 1961, MacMillan Bloedel Limited, une grosse compagnie forestière, a obtenu la CFF 39, qui lui permettait de récolter des arbres dans la région connue sous le nom de « Bloc 6 ». En 1981, en 1995 et en l'an 2000, le ministre a remplacé la CFF 39 conformément à la procédure prévue par la *Forest Act*, R.S.B.C. 1996, ch. 157. En 1999, il a autorisé la cession de la CFF 39 à Weyerhaeuser Company Limited (« Weyerhaeuser »). Les Haïda ont contesté ces remplacements et cette cession, qui ont été effectués sans leur consentement et, depuis 1994 au moins, en dépit de leurs objections. La CFF 39 est cependant restée en vigueur.

En janvier 2000, les Haïda ont engagé une procédure par laquelle ils s'opposent aux trois remplacements et à la cession de la CFF 39 à Weyerhaeuser, et demandent leur annulation. Invoquant l'existence d'un titre ancestral, ils ont plaidé grèvement en common law, grèvement en equity et manquement à l'obligation de fiduciaire.

Cela nous amène à la question dont la Cour est saisie. Le gouvernement détient le titre en common law sur les terres en question. Dans l'exercice des pouvoirs que lui confère ce titre, il a accordé à Weyerhaeuser le droit d'exploiter les forêts du Bloc 6. Mais les Haïda prétendent également détenir un titre sur ces terres — titre dont ils tentent actuellement d'établir l'existence — et s'opposent à l'exploitation des forêts du Bloc 6 prévue par la

Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

CFF 39. Dans ces circonstances, le gouvernement est-il tenu à une obligation envers les Haïda et, si oui, laquelle? De façon plus concrète, a-t-il l'obligation de consulter les Haïda avant de prendre des décisions concernant l'exploitation des forêts et de trouver des accommodements à leurs préoccupations quant à la question de savoir si les forêts du Bloc 6 peuvent être exploitées — et, dans l'affirmative, lesquelles — avant qu'ils aient pu établir l'existence de leur titre sur les terres et leurs droits ancestraux?

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

7 Les enjeux sont énormes. Les Haïda font valoir que, si on ne procède pas à ces consultation et accommodement, ils obtiendront leur titre mais se retrouveront privés de forêts qui sont vitales à leur économie et à leur culture. Il faut des générations aux forêts pour parvenir à maturité, soulignent-ils, et les vieilles forêts sont irremplaçables. Comme a conclu le juge en son cabinet, leur revendication du titre sur les îles Haïda Gwaii s'appuie sur des arguments solides. Mais elle est également complexe, et il faudra de nombreuses années pour l'établir. Les Haïda affirment qu'entre-temps ils auront été irrémédiablement dépouillés de leur héritage.

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

8 Le gouvernement, pour sa part, soutient qu'il a le droit et le devoir d'aménager les ressources forestières dans l'intérêt de tous les habitants de la Colombie-Britannique et que, tant que les Haïda n'auront pas formellement établi le bien-fondé de leur revendication, ils n'ont aucun droit à des consultations ou à des accommodements à leurs besoins et intérêts.

The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462.

9 Le juge en son cabinet a décidé que le gouvernement a l'obligation morale, mais non légale, de négocier avec les Haïda : [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. La Cour d'appel de la Colombie-Britannique a infirmé cette décision, déclarant que le gouvernement et Weyerhaeuser ont tous deux l'obligation de consulter les Haïda et de trouver des accommodements à leurs préoccupations en ce qui concerne la récolte de bois sur le bloc 6 : (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, avec motifs supplémentaires (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462.

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

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

II. Analysis

A. *Does the Law of Injunctions Govern This Situation?*

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be

Je conclus que le gouvernement est légalement tenu de consulter les Haïda au sujet de la récolte de bois sur le bloc 6, y compris en ce qui concerne la cession ou le remplacement des CFF. Une consultation menée de bonne foi pourrait à son tour entraîner l'obligation de trouver des accommodements aux préoccupations des Haïda à propos de la récolte de bois, mais il est impossible pour le moment de préciser le genre d'accommodement qui s'impose, à supposer qu'une telle mesure soit requise. Il faut une véritable consultation. Les intéressés n'ont aucune obligation de parvenir à une entente. Le gouvernement ne peut se décharger des obligations de consultation et d'accommodement en les déléguant à Weyerhaeuser. De son côté, cette dernière n'a pas d'obligation indépendante de consulter les Haïda ou de trouver des accommodements à leurs préoccupations, bien qu'il demeure possible qu'elle soit tenue responsable à l'égard d'obligations qu'elle aurait assumées. Je suis donc d'avis de rejeter l'appel de la Couronne et d'accueillir l'appel de Weyerhaeuser.

Il s'agit de la première affaire du genre à être soumise à la Cour. Notre tâche se limite modestement à établir le cadre général d'application, dans les cas indiqués, de l'obligation de consultation et d'accommodement avant que les revendications de titre et droits ancestraux soient tranchées. Au fur et à mesure de l'application de ce cadre, les tribunaux seront appelés, conformément à la méthode traditionnelle de la common law, à préciser l'obligation de consultation et d'accommodement.

II. Analyse

A. *Le droit en matière d'injonction s'applique-t-il en l'espèce?*

On fait valoir que le recours approprié pour les Haïda consiste à demander une injonction interlocutoire contre le gouvernement et contre Weyerhaeuser et qu'il est en conséquence inutile d'examiner la question de l'existence de l'obligation de consulter ou d'accommoder. Dans *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311, les critères à respecter pour obtenir une injonction interlocutoire ont été examinés. Le demandeur

suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

doit établir les éléments suivants : (1) il existe une question sérieuse à juger; (2) le refus de l'injonction causera un préjudice irréparable; (3) la prépondérance des inconvénients favorise l'octroi de l'injonction.

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

13 Il est loisible à des demandeurs comme les Haïda de demander une injonction interlocutoire. Cependant, cela ne signifie pas qu'il s'agit là de leur seul recours. Si des demandeurs sont en mesure d'établir l'existence d'une obligation particulière donnant naissance à l'obligation de consulter ou d'accommoder, ils sont libres de demander l'application de ces mesures. Ici, les Haïda invoquent l'obligation découlant du principe que la Couronne doit agir honorablement envers les peuples autochtones.

Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state

14 L'injonction interlocutoire n'offre parfois qu'une réparation partielle et imparfaite. Premièrement, comme nous l'avons déjà mentionné, elle peut ne pas faire apparaître toute l'obligation du gouvernement, qui, selon les Haïda, incombe au gouvernement. Deuxièmement, elle représente généralement la solution du tout ou rien. Ou le projet se poursuit, ou il s'arrête. Par contre, l'obligation de consulter et d'accommoder invoquée en l'espèce nécessite, de par sa nature même, une mise en balance des intérêts autochtones et des intérêts non autochtones et se rapproche donc de l'objectif de conciliation qui est au cœur des rapports entre la Couronne et les Autochtones et qui a été énoncé dans les arrêts *R. c. Van der Peet*, [1996] 2 R.C.S. 507, par. 31, et *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010, par. 186. Troisièmement, le critère de la balance des inconvénients fait pencher la balance du côté de la protection des emplois et des recettes de l'État, de sorte que les intérêts autochtones tendent à « être écartés » totalement jusqu'à ce que la question en litige ait été tranchée de façon définitive, au lieu d'être convenablement mis en balance avec les préoccupations opposées : J. J. L. Hunter, « Advancing Aboriginal Title Claims after *Delgamuukw* : The Role of the Injunction » (juin 2000). Quatrièmement, l'injonction interlocutoire est considérée comme une mesure corrective provisoire jusqu'à ce que le tribunal ait statué sur la question litigieuse fondamentale. Les affaires portant sur des revendications autochtones peuvent

and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

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

B. *The Source of a Duty to Consult and Accommodate*

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 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.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act

être extrêmement complexes et prendre des années, voire des décennies, avant d'être tranchées par les tribunaux. L'application d'une injonction interlocutoire pendant une si longue période pourrait causer des préjudices inutiles et pourrait inciter la partie en bénéficiant à faire moins de compromis. Même si les revendications autochtones sont et peuvent être réglées dans le cadre de litiges, il est préférable de recourir à la négociation pour concilier les intérêts de la Couronne et ceux des Autochtones. Pour toutes ces raisons, il est possible qu'une injonction interlocutoire ne tienne pas suffisamment compte des intérêts autochtones avant qu'une décision définitive soit rendue au sujet de ceux-ci.

J'estime que le recours en injonction interlocutoire ne fait pas obstacle à la revendication des Haïda. Nous devons aller plus loin et décider si les rapports particuliers avec la Couronne qu'invoquent les Haïda font naître une obligation de consulter et, s'il y a lieu, d'accommoder. Je vais maintenant analyser la source de l'obligation, le moment où elle prend naissance, sa portée et son contenu, la question de savoir si elle vise aussi les tiers et si elle s'applique au gouvernement provincial, et non exclusivement au gouvernement fédéral. J'appliquerai ensuite les conclusions de cette analyse aux faits de l'espèce.

B. *La source de l'obligation de consulter et d'accommoder*

L'obligation du gouvernement de consulter les peuples autochtones et de prendre en compte leurs intérêts découle du principe de l'honneur de la Couronne. L'honneur de la Couronne est toujours en jeu lorsque cette dernière transige avec les peuples autochtones : voir par exemple *R. c. Badger*, [1996] 1 R.C.S. 771, par. 41; *R. c. Marshall*, [1999] 3 R.C.S. 456. Il ne s'agit pas simplement d'une belle formule, mais d'un précepte fondamental qui peut s'appliquer dans des situations concrètes.

Les origines historiques du principe de l'honneur de la Couronne tendent à indiquer que ce dernier doit recevoir une interprétation généreuse afin de refléter les réalités sous-jacentes dont il découle. Dans tous ses rapports avec les peuples autochtones, qu'il s'agisse de l'affirmation de sa souveraineté, du règlement de revendications ou de la mise en œuvre

honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Van der Peet*, *supra*, at para. 31.

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

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

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

The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by

de traités, la Couronne doit agir honorablement. Il s'agit là du minimum requis pour parvenir à « concilier la préexistence des sociétés autochtones et la souveraineté de Sa Majesté » : *Delgamuukw*, précité, par. 186, citant *Van der Peet*, précité, par. 31.

18 L'honneur de la Couronne fait naître différentes obligations selon les circonstances. Lorsque la Couronne assume des pouvoirs discrétionnaires à l'égard d'intérêts autochtones particuliers, le principe de l'honneur de la Couronne donne naissance à une obligation de fiduciaire : *Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245, 2002 CSC 79, par. 79. Le contenu de l'obligation de fiduciaire peut varier en fonction des autres obligations, plus larges, de la Couronne. Cependant, pour s'acquitter de son obligation de fiduciaire, la Couronne doit agir dans le meilleur intérêt du groupe autochtone lorsqu'elle exerce des pouvoirs discrétionnaires à l'égard des intérêts autochtones en jeu. Comme il est expliqué dans *Wewaykum*, par. 81, l'expression « obligation de fiduciaire » ne dénote pas un rapport fiduciaire universel englobant tous les aspects des rapports entre la Couronne et les peuples autochtones :

> . . . [considérer l'] « obligation de fiduciaire » [. . .] comme si elle imposait à la Couronne une responsabilité totale à l'égard de tous les aspects des rapports entre la Couronne et les bandes indiennes[, c'est] aller trop loin. L'obligation de fiduciaire incombant à la Couronne n'a pas un caractère général, mais existe plutôt à l'égard de droits particuliers des Indiens.

En l'espèce, des droits et un titre ancestraux ont été revendiqués, mais n'ont pas été définis ou prouvés. L'intérêt autochtone en question n'est pas suffisamment précis pour que l'honneur de la Couronne oblige celle-ci à agir, comme fiduciaire, dans le meilleur intérêt du groupe autochtone lorsqu'elle exerce des pouvoirs discrétionnaires à l'égard de l'objet du droit ou du titre.

19 L'honneur de la Couronne imprègne également les processus de négociation et d'interprétation des traités. Lorsqu'elle conclut et applique un traité, la Couronne doit agir avec honneur et intégrité, et éviter la moindre apparence de « manœuvres malhonnêtes » (*Badger*, par. 41). Ainsi, dans *Marshall*, précité, par. 4, les juges majoritaires de la Cour ont

stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship . . .".

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

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

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

justifié leur interprétation du traité en déclarant que « rien de moins ne saurait protéger l'honneur et l'intégrité de la Couronne dans ses rapports avec les Mi'kmaq en vue d'établir la paix avec eux et de s'assurer leur amitié . . . ».

Tant qu'un traité n'a pas été conclu, l'honneur de la Couronne exige la tenue de négociations menant à un règlement équitable des revendications autochtones : *R. c. Sparrow*, [1990] 1 R.C.S. 1075, p. 1105-1106. Les traités permettent de concilier la souveraineté autochtone préexistante et la souveraineté proclamée de la Couronne, et ils servent à définir les droits ancestraux garantis par l'art. 35 de la *Loi constitutionnelle de 1982*. L'article 35 promet la reconnaissance de droits, et « [i]l faut toujours présumer que [la Couronne] entend respecter ses promesses » (*Badger*, précité, par. 41). Un processus de négociation honnête permet de concrétiser cette promesse et de concilier les revendications de souveraineté respectives. L'article 35 a pour corollaire que la Couronne doit agir honorablement lorsqu'il s'agit de définir les droits garantis par celui-ci et de les concilier avec d'autres droits et intérêts. Cette obligation emporte à son tour celle de consulter et, s'il y a lieu, d'accommoder.

Cette obligation de consulter a été reconnue et analysée dans la jurisprudence. Dans *Sparrow*, précité, p. 1119, la Cour a confirmé l'existence de l'obligation de consulter les Salish de la côte ouest qui revendiquaient un droit de pêche non encore reconnu. Le juge en chef Dickson et le juge La Forest ont écrit que, pour déterminer si les restrictions imposées au droit sont justifiées, il faut notamment se demander « si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre ».

Quelques années plus tard, la Cour a confirmé l'existence de l'obligation de consultation à l'égard des ressources visées par une revendication autochtone dans *R. c. Nikal*, [1996] 1 R.C.S. 1013, où le juge Cory a écrit que « [d]ans la mesure où tous les efforts raisonnables ont été déployés pour informer et consulter, on a alors satisfait à l'obligation de justifier » (par. 110).

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

Dans l'arrêt connexe *R. c. Gladstone*, [1996] 2 R.C.S. 723, le juge en chef Lamer a fait état de la nécessité « [des] consultations et [de] l'indemnisation », et de la nécessité d'examiner « la manière dont l'État a concilié les différents droits ancestraux visant une pêche donnée [. . .], l'importance de la pêche pour le bien-être économique et matériel de la bande en question, ainsi que les critères appliqués par l'État, par exemple, dans la répartition des permis de pêche commerciale entre les divers usagers » (par. 64). 23

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

Au paragraphe 168 de l'arrêt de principe *Delgamuukw*, précité, prononcé dans le contexte d'une revendication de titre sur des terres et des ressources, la Cour a confirmé l'existence de l'obligation de consulter et a précisé cette obligation, affirmant que son contenu variait selon les circonstances : de la simple « obligation de discuter des décisions importantes » « lorsque le manquement est moins grave ou relativement mineur », en passant par l'obligation nécessitant « beaucoup plus qu'une simple consultation » qui s'impose « [d]ans la plupart des cas », jusqu'à la nécessité d'obtenir le « consentement [de la] nation autochtone » sur les questions très importantes. Ces remarques s'appliquent autant aux revendications non réglées qu'aux revendications déjà réglées et auxquelles il est porté atteinte. 24

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

En bref, les Autochtones du Canada étaient déjà ici à l'arrivée des Européens; ils n'ont jamais été conquis. De nombreuses bandes ont concilié leurs revendications avec la souveraineté de la Couronne en négociant des traités. D'autres, notamment en Colombie-Britannique, ne l'ont pas encore fait. Les droits potentiels visés par ces revendications sont protégés par l'art. 35 de la *Loi constitutionnelle de 1982*. L'honneur de la Couronne commande que ces droits soient déterminés, reconnus et respectés. Pour ce faire, la Couronne doit agir honorablement et négocier. Au cours des négociations, l'honneur de la Couronne peut obliger celle-ci à consulter les Autochtones et, s'il y a lieu, à trouver des accommodements à leurs intérêts. 25

C. *When the Duty to Consult and Accommodate Arises*

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

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

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only

C. *Le moment où l'obligation de consulter et d'accommoder prend naissance*

L'obligation de négocier honorablement emporte celle de consulter les demandeurs autochtones et de parvenir à une entente honorable, qui tienne compte de leurs droits inhérents. Mais prouver l'existence de droits peut prendre du temps, parfois même beaucoup de temps. Comment faut-il traiter les intérêts en jeu dans l'intervalle? Pour répondre à cette question, il faut tenir compte de la nécessité de concilier l'occupation antérieure des terres par les peuples autochtones et la réalité de la souveraineté de la Couronne. Celle-ci peut-elle, en vertu de la souveraineté qu'elle a proclamée, exploiter les ressources en question comme bon lui semble en attendant que la revendication autochtone soit établie et réglée? Ou doit-elle plutôt adapter son comportement de manière à tenir compte des droits, non encore reconnus, visés par cette revendication?

La réponse à cette question découle, encore une fois, de l'honneur de la Couronne. Si cette dernière entend agir honorablement, elle ne peut traiter cavalièrement les intérêts autochtones qui font l'objet de revendications sérieuses dans le cadre du processus de négociation et d'établissement d'un traité. Elle doit respecter ces intérêts potentiels mais non encore reconnus. La Couronne n'est pas paralysée pour autant. Elle peut continuer à gérer les ressources en question en attendant le règlement des revendications. Toutefois, selon les circonstances, question examinée de façon plus approfondie plus loin, le principe de l'honneur de la Couronne peut obliger celle-ci à consulter les Autochtones et à prendre raisonnablement en compte leurs intérêts jusqu'au règlement de la revendication. Le fait d'exploiter unilatéralement une ressource faisant l'objet d'une revendication au cours du processus visant à établir et à régler cette revendication peut revenir à dépouiller les demandeurs autochtones d'une partie ou de l'ensemble des avantages liés à cette ressource. Agir ainsi n'est pas une attitude honorable.

Le gouvernement prétend qu'il n'a aucune obligation de consulter et d'accommoder tant qu'une décision définitive n'a pas été rendue quant à la portée et au contenu du droit. Avant que le droit ne soit

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

établi, affirme-t-on, il n'existe qu'une « obligation d'équité » générale en common law, fondée sur la règle générale selon laquelle une décision administrative qui touche « les droits, privilèges ou biens d'une personne » entraîne l'application de cette obligation d'équité : *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, p. 653; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 20. Le gouvernement affirme que, en dehors des obligations générales découlant du droit administratif, l'obligation de consulter et d'accommoder n'existe que dans le cas où le gouvernement s'est engagé à protéger un intérêt autochtone particulier ou cherche à restreindre un intérêt autochtone reconnu. Le gouvernement soutient donc qu'il n'existe, à ce stade-ci, aucune obligation légale de consulter les Haïda et de prendre en compte leurs intérêts, bien qu'il admette qu'il puisse exister de [TRADUCTION] « bonnes raisons sur le plan pratique et politique » de le faire.

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

29 Le gouvernement invoque des précédents et des considérations d'intérêt général à l'appui de sa thèse. Il cite *Sparrow*, précité, p. 1110-1113 et 1119, où l'étendue et le contenu du droit avaient été déterminés et l'atteinte avait été établie, avant que soit examinée la question de savoir si l'atteinte était justifiée. Le gouvernement prétend que sa position est également étayée par le point de vue exprimé dans *TransCanada Pipelines Ltd. c. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, où la Cour d'appel de l'Ontario a jugé que [TRADUCTION] « ce qui déclenche l'examen de l'obligation de la Couronne de consulter, c'est la démonstration par la Première nation qu'il y a eu violation d'un droit existant, ancestral ou issu de traité, reconnu et confirmé par le par. 35(1) » (par. 120).

As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The

30 Du point de vue des considérations d'intérêt général, le gouvernement invoque les difficultés que pose sur le plan pratique l'application de l'obligation de consulter ou d'accommoder dans les cas de revendications non établies. Si, selon les circonstances, l'obligation de consulter peut aller de la « simple » obligation d'informer et d'écouter, à une extrémité de la gamme, à l'obligation d'obtenir le consentement des Autochtones, à l'autre extrémité, comment, demande le gouvernement, les parties peuvent-elles

government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation" (emphasis added).

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and

s'entendre sur le degré de consultation lorsque des revendications et des droits sont contestés? Et si elles n'arrivent pas à s'entendre, comment les tribunaux judiciaires ou administratifs sont-ils censés trancher la question? Le gouvernement affirme également qu'il est irréaliste et injuste d'imposer une consultation avant que les revendications soient réglées de façon définitive, car cela revient à accorder réparation avant que la question de l'atteinte et celle de la justification aient été tranchées.

Les arguments du gouvernement ne résistent pas à un examen minutieux. Ni les précédents ni les considérations d'ordre pratique n'appuient la thèse selon laquelle l'obligation de consulter et, s'il y a lieu, d'accommoder ne prend naissance que lorsqu'une décision définitive a été rendue quant à la portée et au contenu du droit.

La jurisprudence de la Cour étaye le point de vue selon lequel l'obligation de consulter et d'accommoder fait partie intégrante du processus de négociation honorable et de conciliation qui débute au moment de l'affirmation de la souveraineté et se poursuit au-delà du règlement formel des revendications. La conciliation ne constitue pas une réparation juridique définitive au sens usuel du terme. Il s'agit plutôt d'un processus découlant des droits garantis par le par. 35(1) de la *Loi constitutionnelle de 1982*. Ce processus de conciliation découle de l'obligation de la Couronne de se conduire honorablement envers les peuples autochtones, obligation qui, à son tour, tire son origine de l'affirmation par la Couronne de sa souveraineté sur un peuple autochtone et par l'exercice de fait de son autorité sur des terres et ressources qui étaient jusque-là sous l'autorité de ce peuple. Comme il est mentionné dans *Mitchell c. M.R.N.*, [2001] 1 R.C.S. 911, 2001 CSC 33, par. 9, « [c]ette affirmation de souveraineté a fait naître l'obligation de traiter les peuples autochtones de façon équitable et honorable, et de les protéger contre l'exploitation » (je souligne).

Limiter l'application du processus de conciliation aux revendications prouvées comporte le risque que la conciliation soit considérée comme un objectif formaliste éloigné et se voie dénuée du « sens utile » qu'elle doit avoir par suite de l'« engagement

title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

solennel » pris par la Couronne lorsqu'elle a reconnu et confirmé les droits et titres ancestraux : *Sparrow*, précité, p. 1108. Une telle attitude risque également d'avoir des conséquences fâcheuses. En effet, il est possible que, lorsque les Autochtones parviennent finalement à établir le bien-fondé de leur revendication, ils trouvent leurs terres changées et leurs ressources épuisées. Ce n'est pas de la conciliation, ni un comportement honorable.

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

34 L'existence d'une obligation légale de consulter le groupe intéressé avant qu'il ait apporté la preuve de sa revendication est nécessaire pour comprendre le langage employé dans des affaires comme *Sparrow*, *Nikal* et *Gladstone*, précitées, où la confirmation du droit et la justification de l'atteinte reprochée ont été débattues en même temps. Dans *Sparrow*, par exemple, la référence au comportement de la Couronne au cours de l'examen de la justification des atteintes s'entend du comportement avant l'établissement du droit, ce qui réfute l'argument que ce soit la preuve de l'existence du droit revendiqué qui déclenche l'obligation légale de consulter et, s'il y a lieu, d'accommoder, même dans le contexte de la justification.

But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

35 Mais à quel moment, précisément, l'obligation de consulter prend-elle naissance? L'objectif de conciliation ainsi que l'obligation de consultation, laquelle repose sur l'honneur de la Couronne, tendent à indiquer que cette obligation prend naissance lorsque la Couronne a connaissance, concrètement ou par imputation, de l'existence potentielle du droit ou titre ancestral revendiqué et envisage des mesures susceptibles d'avoir un effet préjudiciable sur celui-ci : voir *Halfway River First Nation c. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (C.S.C.-B.), p. 71, le juge Dorgan.

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

36 Il reste l'argument d'ordre pratique. On affirme que, tant qu'une revendication n'est pas réglée, la Couronne ne peut pas savoir si les droits revendiqués existent ou non et que, de ce fait, elle ne peut être tenue à une obligation de consulter ou d'accommoder. Cette difficulté ne saurait être niée ou minimisée. Comme je l'ai déclaré (dans mes motifs dissidents) dans *Marshall*, précité, par. 112, on ne peut « analyser utilement la question de la prise en

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed . . . .
>
> . . .
>
> . . . genuine consultation means a process that involves . . .:
>
> - gathering information to test policy proposals
> - putting forward proposals that are not yet finalised
> - seeking Mäori opinion on those proposals
> - informing Mäori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Mäori have to say
> - being prepared to alter the original proposal
> - providing feedback both during the consultation process and after the decision-process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. *The Province's Duty*

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

F. *L'obligation de la province*

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

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

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

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

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw*, *supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine's Milling*, *supra*. There is therefore no foundation to the Province's argument on this point.

droits ancestraux par l'art. 35 de la *Loi constitutionnelle de 1982*. La province affirme qu'agir ainsi reviendrait à [TRADUCTION] « rompre l'équilibre du fédéralisme » (mémoire de la Couronne, par. 96).

La réponse à cet argument est que les intérêts que détenait la province sur les terres sont subordonnés à « tous intérêts autres que ceux que peut y avoir la province » (art. 109). L'obligation de consulter et d'accommoder en litige dans la présente affaire est fondée sur l'affirmation de la souveraineté de la Couronne qui a précédé l'Union. Il s'ensuit que la province a acquis les terres sous réserve de cette obligation. Elle ne peut donc pas prétendre que l'art. 35 la prive de pouvoirs dont elle aurait joui autrement. Comme il est précisé dans *St. Catherine's Milling and Lumber Co. c. The Queen* (1888), 14 App. Cas. 46 (C.P.), les terres situées dans la province [TRADUCTION] « peuvent constituer une source de revenus [pour la province] dans tous les cas où les biens de la Couronne ne sont plus grevés du titre indien » (p. 59). L'argument de la Couronne sur ce point a été examiné de façon approfondie par la Cour dans *Delgamuukw*, précité, par. 175, où le juge en chef Lamer a réitéré les conclusions tirées dans *St. Catherine's Milling*, précité. Cet argument n'est en conséquence pas fondé.

G. *Administrative Review*

G. *L'examen administratif*

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

Lorsque la conduite du gouvernement est contestée au motif qu'il ne se serait pas acquitté de son obligation de consulter et d'accommoder en attendant le règlement des revendications, la question peut être soumise aux tribunaux pour examen. La province n'a pas encore établi de mécanisme à cette fin. En l'absence d'un tel mécanisme, il est impossible de déterminer quelle norme de contrôle devrait appliquer le tribunal appelé à statuer sur le caractère suffisant des efforts déployés par le gouvernement. Les principes généraux du droit administratif permettent toutefois de dégager les notions suivantes.

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or

Quant aux questions de droit, le décideur doit, en règle générale, rendre une décision correcte : voir, par exemple, *Paul c. Colombie-Britannique (Forest Appeals Commission)*, [2003] 2 R.C.S.

mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

585, 2003 CSC 55. Par contre, en ce qui a trait aux questions de fait et aux questions mixtes de fait et de droit, l'organisme de révision peut devoir faire preuve de déférence à l'égard du décideur. L'existence et l'étendue de l'obligation de consulter ou d'accommoder sont des questions de droit en ce sens qu'elles définissent une obligation légale. Cependant, la réponse à ces questions repose habituellement sur l'appréciation des faits. Il se peut donc qu'il convienne de faire preuve de déférence à l'égard des conclusions de fait du premier décideur. La question de savoir s'il y a lieu de faire montre de déférence et, si oui, le degré de déférence requis dépendent de la nature de la question dont était saisi le tribunal administratif et de la mesure dans laquelle les faits relevaient de son expertise : *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, 2003 CSC 20; *Paul*, précité. En l'absence d'erreur sur des questions de droit, il est possible que le tribunal administratif soit mieux placé que le tribunal de révision pour étudier la question, auquel cas une certaine déférence peut s'imposer. Dans ce cas, la norme de contrôle applicable est vraisemblablement la norme de la décision raisonnable. Dans la mesure où la question est une question de droit pur et peut être isolée des questions de fait, la norme applicable est celle de la décision correcte. Toutefois, lorsque les deux types de questions sont inextricablement liées entre elles, la norme de contrôle applicable est vraisemblablement celle de la décision raisonnable : *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748.

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

62 Le processus lui-même devrait vraisemblablement être examiné selon la norme de la décision raisonnable. La perfection n'est pas requise; il s'agit de se demander si, « considéré dans son ensemble, le régime de réglementation [ou la mesure gouvernementale] respecte le droit ancestral collectif en question » : *Gladstone*, précité, par. 170. Ce qui est requis, ce n'est pas une mesure parfaite mais une mesure raisonnable. Comme il est précisé dans *Nikal*, précité, par. 110, « [l]e concept du caractère raisonnable doit [. . .] entrer en jeu pour ce qui [. . .] concern[e] l'information et la consultation. [. . .] Dans la mesure où tous les efforts raisonnables ont

to inform and consult. This suffices to discharge the duty.

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

H. *Application to the Facts*

(1) Existence of the Duty

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

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

été déployés pour informer et consulter, on a alors satisfait à l'obligation de justifier. » Le gouvernement doit déployer des efforts raisonnables pour informer et consulter. Cela suffit pour satisfaire à l'obligation.

Si le gouvernement n'a pas bien saisi l'importance de la revendication ou la gravité de l'atteinte, il s'agit d'une question de droit qui devra vraisemblablement être jugée selon la norme de la décision correcte. Si le gouvernement a raison sur ces points et agit conformément à la norme applicable, la décision ne sera annulée que si le processus qu'il a suivi était déraisonnable. Comme il a été expliqué précédemment, l'élément central n'est pas le résultat, mais le processus de consultation et d'accommodement.

H. *L'application aux faits*

(1) L'existence de l'obligation

Il s'agit de savoir si la province connaissait, concrètement ou par imputation, l'existence potentielle d'un droit ou titre ancestral et envisageait des mesures susceptibles d'avoir un effet préjudiciable sur ce droit ou titre. Compte tenu de la preuve présentée à la Cour en l'espèce, il ne fait aucun doute qu'il faut répondre « oui » à cette question.

Les Haïda revendiquent depuis au moins 100 ans le titre sur l'ensemble des îles Haida Gwaii. Le juge de première instance a conclu que les Haïda se plaignaient depuis plusieurs années auprès de la province du rythme d'exploitation des vieilles forêts, des méthodes d'exploitation et des répercussions de l'exploitation forestière sur l'environnement. De plus, la province savait, depuis au moins 1994, que les Haïda s'opposaient à ce qu'on remplace la CFF 39 sans leur consentement et sans que leurs revendications aient fait l'objet de mesures d'accommodement. Comme l'a constaté le juge en son cabinet, la province disposait, [TRADUCTION] « [d]epuis 1994, et peut-être bien avant », d'éléments de preuve établissant que les Haïda utilisaient et occupaient à titre exclusif certaines régions du Bloc 6. Depuis au moins 1846 (affirmation de la souveraineté britannique), elle possède des preuves témoignant de l'importance du cèdre rouge dans la culture haïda.

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

66 La province se dit inquiète de l'ampleur des revendications des Haïda, faisant observer que, [TRADUCTION] « [d]ans une action distincte, les Haïda revendiquent un titre ancestral sur l'ensemble des îles de la Reine-Charlotte, sur les eaux les entourant et sur l'espace aérien. [. . .] La revendication des Haïda vise le droit à l'utilisation, à l'occupation et au bénéfice exclusifs des terres, des eaux intérieures, du fond marin, des eaux pélagiques et de l'espace aérien » (mémoire de la Couronne, par. 35). Cependant, se demander si l'obligation de consulter et d'accommoder s'applique avant que la preuve de l'existence d'un droit n'ait été apportée n'équivaut pas à préjuger de l'affaire sur le fond. D'ailleurs, il convient de souligner que, avant que le juge en son cabinet ait rendu sa décision en l'espèce, la province avait obtenu que la question de l'existence du titre et des droits des Haïda et de l'atteinte portée à ceux-ci soit examinée séparément des questions se rapportant à l'obligation de consulter et d'accommoder. Les questions ont été clairement séparées dans l'instance, à l'instigation de la province.

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

67 Le juge en son cabinet a estimé que la province savait que les droits et titre ancestraux potentiels en question visaient le Bloc 6 et qu'ils pouvaient être touchés par la décision de remplacer la CFF 39. Pour ce motif, l'honneur de la Couronne commandait que celle-ci procède à une consultation avant de prendre une décision susceptible d'avoir un effet préjudiciable sur les droits et titre ancestraux revendiqués.

(2) Scope of the Duty

(2) L'étendue de l'obligation

As discussed above, the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

68 Comme il a été expliqué plus tôt, l'ampleur de la consultation requise dépend de l'évaluation préliminaire de la solidité de la preuve étayant l'existence du droit ou du titre, ainsi que de la gravité de l'effet préjudiciable potentiel sur le droit ou titre revendiqué.

(i) *Strength of the Case*

(i) *Solidité de la preuve*

On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their

69 Après avoir examiné une preuve qu'il a qualifiée d'[TRADUCTION] « abondante », le juge en son cabinet a, au par. 25 de sa décision, tiré un certain nombre de conclusions [TRADUCTION] « incontournables » relativement aux revendications des Haïda. Il a conclu que les Haïda habitaient les îles Haïda Gwaii depuis au moins 1774, qu'ils n'avaient jamais

rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

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

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

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it "fair to say that the Haida claim goes far beyond the mere 'assertion' of Aboriginal title" (para. 50).

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

été conquis, qu'ils n'avaient jamais cédé leurs droits dans un traité et qu'aucune loi fédérale n'avait éteint leurs droits. Depuis au moins 1846, l'utilisation du cèdre rouge provenant des vieilles forêts des régions côtières et intérieures de la zone maintenant connue comme étant le Bloc 6 de la CFF 39 fait partie de leur culture.

Le juge en son cabinet a rigoureusement évalué la preuve et établi une distinction entre les différentes revendications des Haïda visant le Bloc 6. Au terme d'un examen approfondi de la preuve, il a tiré les conclusions suivantes au par. 47 :

> (1) il existe une [TRADUCTION] « probabilité raisonnable » que les Haïda réussissent à établir l'existence d'un titre sur [TRADUCTION] « au moins quelques parties » des régions côtières et intérieures des îles Haïda Gwaii, notamment les régions côtières du Bloc 6; il semble exister une [TRADUCTION] « possibilité raisonnable » que ces régions comprennent les régions intérieures du Bloc 6;
>
> (2) il existe une [TRADUCTION] « forte probabilité » que les Haïda réussissent à établir l'existence d'un droit ancestral de récolter le cèdre rouge provenant des vieilles forêts des régions côtières et intérieures du Bloc 6.

Le juge en son cabinet a reconnu qu'un règlement définitif nécessiterait beaucoup plus d'éléments de preuve, mais, selon lui, [TRADUCTION] « il est juste de dire que la revendication des Haïda est beaucoup plus qu'une simple "affirmation" de titre ancestral » (par. 50).

La Cour d'appel s'est fondée sur les constatations du juge en son cabinet pour conclure que les revendications par les Haïda du titre et de droits ancestraux étaient [TRADUCTION] « étayées par une preuve à première vue valable » (par. 49). La solidité de la preuve influe sur l'étendue de l'obligation que doit satisfaire la province. En l'espèce, le dossier permet clairement de conclure, en attendant le règlement définitif, qu'il existe une preuve *prima facie* de l'existence d'un titre ancestral et une solide preuve *prima facie* de l'existence d'un droit ancestral de récolter le cèdre rouge.

(ii) *Seriousness of the Potential Impact*

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

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

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

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

(ii) *Gravité des conséquences potentielles*

72 La preuve présentée au juge en son cabinet indiquait que l'utilisation du cèdre rouge fait depuis longtemps partie intégrante de la culture haïda. Le juge a considéré qu'il existait une [TRADUCTION] « probabilité raisonnable » que les Haïda réussissent à démontrer une atteinte à un droit ancestral de récolter le cèdre rouge [TRADUCTION] « en prouvant que le cèdre des vieilles forêts a été et continuera d'être exploité dans le Bloc 6, et que cette ressource est limitée » (par. 48). La perspective de l'exploitation continue d'une ressource par ailleurs limitée laisse entrevoir les répercussions que la décision de remplacer la CFF 39 pourrait avoir sur un droit ancestral.

73 Les CFF ont un caractère exclusif et sont accordées pour de longues périodes. La CFF 39 confère à Weyerhaeuser le droit exclusif de récolter le bois dans une région qui représente près du quart de la superficie totale des îles Haïda Gwaii. Le juge en son cabinet a fait observer qu'[TRADUCTION] « il [est] manifeste que de vastes étendues du Bloc 6 ont été coupées à blanc » (par. 59). Ce fait illustre les conséquences potentielles que la décision de remplacer la CFF 39 a sur les droits ancestraux.

74 Il faut reconnaître à la province d'avoir imposé à Weyerhaeuser, dans la CFF 39, des conditions à l'égard des peuples autochtones. Mais la province devait faire davantage. Lorsque le gouvernement sait qu'un droit ou un titre ancestral est revendiqué, il doit consulter les Autochtones sur la façon dont les terres visées devraient être exploitées.

75 Il faut maintenant se demander à quel moment prend naissance l'obligation de consulter. Est-ce à l'étape de l'octroi d'une CFF, ou seulement à l'étape de la délivrance des permis de coupe? Le remplacement d'une CFF n'autorise pas en soi la récolte de bois, qui ne peut se faire qu'en vertu des permis de coupe. Les CFF sont périodiquement remplacées, et la décision de remplacer une CFF en particulier n'a pas nécessairement pour effet de détruire l'essence même du droit revendiqué. La province fait valoir que, bien qu'elle ne les ait pas consultés avant de remplacer la CFF, elle [TRADUCTION]

prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

« a consulté et continue de consulter les Haïda avant d'autoriser les permis de coupe ou autres plans d'aménagement » (mémoire de la Couronne, par. 64).

J'estime que, lorsqu'elle prend des décisions concernant les CFF, la province est tenue à une obligation de consultation, et peut-être à une obligation d'accommodement. La décision rendue à l'égard d'une CFF reflète la planification stratégique touchant l'utilisation de la ressource en cause. Les décisions prises durant la planification stratégique risquent d'avoir des conséquences graves sur un droit ou titre ancestral. Tous les cinq ans, le titulaire de la CFF 39 doit présenter au chef des services forestiers un plan d'aménagement comprenant l'inventaire des ressources du secteur visé par la concession, une analyse des approvisionnements en bois d'œuvre et un « plan de 20 ans » présentant une séquence hypothétique de blocs de coupe. C'est à partir de l'inventaire et de l'analyse des approvisionnements en bois d'œuvre qu'est fixée la possibilité annuelle de coupe (« PAC ») pour la concession. Ainsi, le titulaire de la concession établit les renseignements techniques servant à calculer la PAC. La tenue de consultations au niveau de l'exploitation a donc peu d'incidence sur le volume fixé dans la PAC, qui, à son tour, détermine les modalités du permis de coupe. Pour que les consultations soient utiles, elles doivent avoir lieu à l'étape de l'octroi ou du renouvellement de la CFF.

Il s'agit enfin de décider si la Couronne avait l'obligation non seulement de consulter les Haïda au sujet des décisions relatives aux CFF mais aussi de trouver des accommodements à leurs préoccupations. Les faits de l'espèce ne permettent pas de dire si la consultation aurait entraîné la nécessité de telles mesures. Cependant, la solidité de la preuve étayant l'existence et d'un titre haïda et d'un droit haïda autorisant la récolte du cèdre rouge, conjuguée aux répercussions sérieuses sur ces intérêts des décisions stratégiques successives, indique que l'honneur de la Couronne pourrait bien commander des mesures d'accommodement substantielles pour protéger les intérêts des Haïda en attendant que leurs revendications soient réglées.

(3) Did the Crown Fulfill its Duty?

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

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

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

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

III. Conclusion

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

(3) La Couronne s'est-elle acquittée de son obligation?

78 La province n'a pas consulté les Haïda au sujet du remplacement de la CFF 39. Le juge en son cabinet a tiré la conclusion suivante (par. 42) :

> [TRADUCTION] [S]elon la preuve présentée, il est manifeste que le ministre a refusé de consulter les Haïda au sujet du remplacement de la CFF 39 en 1995 et en l'an 2000, au motif que la loi ne l'obligeait pas à le faire et qu'une telle consultation ne pouvait avoir d'incidence sur son obligation, prévue par la loi, de remplacer la CFF 39.

La province a attiré l'attention de la Cour et des tribunaux d'instance inférieure sur les nombreuses mesures et politiques qu'elle a adoptées pour tenir compte des intérêts autochtones. Devant la Cour, elle a affirmé que [TRADUCTION] « [l]es Haïda ont été et sont consultés au sujet des plans d'aménagement forestier et des permis de coupe. [. . .] À la suite de consultations antérieures auprès des Haïda, la province a pris plusieurs mesures pour atténuer les effets de l'exploitation forestière [. . .] » (mémoire de la Couronne, par. 75). Cependant, ces mesures et politiques n'équivalent pas à une consultation au sujet de la décision de remplacer la CFF 39 et de l'établissement de ses modalités, et ne peuvent la remplacer.

79 Par conséquent, la province ne s'est pas acquittée de son obligation de procéder à davantage qu'une simple consultation. Elle n'a procédé à absolument aucune consultation utile.

III. Conclusion

80 Le pourvoi de la Couronne est rejeté et celui de Weyerhaeuser est accueilli. L'ordonnance de la Cour d'appel de la Colombie-Britannique est modifiée de manière que l'obligation de consultation de la Couronne ne s'étende pas à Weyerhaeuser. La Couronne a accepté de payer les dépens des intimés pour la demande d'autorisation de pourvoi et pour le pourvoi. Weyerhaeuser est dispensée de toute obligation de payer les dépens des Haïda devant les instances inférieures. Il n'est pas nécessaire de répondre à la question constitutionnelle dans le présent pourvoi.

Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

Solicitors for the appellant the Minister of Forests: Fuller Pearlman & McNeil, Victoria.

Solicitor for the appellant the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the appellant Weyerhaeuser Company Limited: Hunter Voith, Vancouver.

Solicitors for the respondents: EAGLE, Surrey.

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

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

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: Department of Justice, Halifax.

Solicitor for the intervener the Attorney General for Saskatchewan: Deputy Attorney General for Saskatchewan, Regina.

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

Solicitors for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band: Ratcliff & Company, North Vancouver.

Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the intervener the First Nations Summit: Braker & Company, West Vancouver.

Pourvoi de la Couronne rejeté. Pourvoi de Weyerhaeuser Co. accueilli.

Procureurs de l'appelant le ministre des Forêts : Fuller Pearlman & McNeil, Victoria.

Procureur de l'appelant le procureur général de la Colombie-Britannique au nom de Sa Majesté la Reine du chef de la province de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'appelante Weyerhaeuser Company Limited : Hunter Voith, Vancouver.

Procureurs des intimés : EAGLE, Surrey.

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

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

Procureur de l'intervenant le procureur général du Québec : Ministère de la Justice, Sainte-Foy.

Procureur de l'intervenant le procureur général de la Nouvelle-Écosse : Ministère de la Justice, Halifax.

Procureur de l'intervenant le procureur général de la Saskatchewan : Sous-procureur général de la Saskatchewan, Regina.

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

Procureurs des intervenantes la Bande indienne de Squamish et la Bande indienne des Lax-kw'alaams : Ratcliff & Company, North Vancouver.

Procureurs de l'intervenante la Nation haisla : Donovan & Company, Vancouver.

Procureurs de l'intervenant le Sommet des Premières nations : Braker & Company, West Vancouver.

Solicitors for the intervener the Dene Tha' First Nation: Cook Roberts, Victoria.

Solicitors for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief: Cook Roberts, Victoria.

Solicitors for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the British Columbia Cattlemen's Association: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Village of Port Clements: Rush Crane Guenther & Adams, Vancouver.

Procureurs de l'intervenante la Première nation Dene Tha' : Cook Roberts, Victoria.

Procureurs de l'intervenant Tenimgyet, aussi connu sous le nom d'Art Matthews, chef héréditaire Gitxsan : Cook Roberts, Victoria.

Procureurs des intervenants Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries et Mining Association of British Columbia : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intervenante British Columbia Cattlemen's Association : McCarthy Tétrault, Vancouver.

Procureurs de l'intervenant le village de Port Clements : Rush Crane Guenther & Adams, Vancouver.

[4] Federal Court. Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General), May 3, 2012. 2012 FC 517 (CanLII).

Federal Court  Cour fédérale

Date: 20120503

Docket: T-70-11

Citation: 2012 FC 517

2012 FC 517 (CanLII)

Ottawa, Ontario, May 3, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

KWICKSUTAINEUK AH-KWA-MISH FIRST NATION

Applicant

and

ATTORNEY GENERAL OF CANADA, MINISTER OF FISHERIES AND OCEANS, MARINE HARVEST CANADA INC. AND EWOS CANADA LTD., DBA MAINSTREAM CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review is a direct consequence of the decision reached by the British Columbia Supreme Court on February 9, 2009 in *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136, 174 ACWS (3d) 103 [*Morton*], wherein it was held that the provincial regulatory regime for aquaculture was constitutionally invalid, and that the activity of finfish

farming is a matter of exclusive federal jurisdiction. The Court struck down the provincial regulatory regime as *ultra vires* the provincial legislature but suspended its decision for 12 months. It was then extended to December 18, 2010 (*Morton v British Columbia (Agriculture and Lands)*, 2010 BCSC 100, 2 BCLR (5th) 306), to allow the federal government time to consider and put into place federal regulatory legislation.

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[2] That decision meant that approximately 680 BC provincial aquaculture licences would expire on December 18, 2010 and could not be renewed by the Province. In these circumstances, Canada had 22 months to consult on and implement an entirely new regulatory and licensing regime for aquaculture and take the steps necessary to make decisions on the issuance of federal aquaculture licences effective December 19, 2010.

[3] Following consultation regarding the new regulatory regime and the common terms and conditions that would apply to each new licence, the Department of Fisheries and Oceans' ("DFO") new regulations came into force on December 9, 2010 and most licences were issued effective December 19, 2010.

[4] Pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the Kwicksutaineuk Ah-Kwa-Mish First Nation (the "KAFN" or the "Applicant") has brought this application for judicial review of the decision of DFO to issue finfish aquaculture licences to the two corporate Respondents, Ewos Canada Ltd., dba Mainstream Canada ("Mainstream Canada") and Marine Harvest Canada Inc. ("Marine Harvest").

1. Facts

[5] This application relates to aquaculture in British Columbia, and in particular to salmon aquaculture. The term "aquaculture" refers to the aquatic form of agriculture where stocks are cared for, raised to marketable size, and then harvested for processing, sale and consumption. Finfish are a grouping of vertebrate species that have been successfully domesticated through aquaculture practice. Atlantic salmon are the predominant species grown by Canadian aquaculture.

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[6] Salmon aquaculture is a significant contributor to the economy. Salmon farming generates over $50 million in wages annually. In 2007, for example, salmon farming contributed $370 million to the provincial economy (Thomson Affidavit, paras 9-16; Respondent's Record, pp. 359-361).

[7] There appears to be some 28 fish farms in the Broughton Archipelago, which primarily cultivate Atlantic salmon. This Archipelago is located on the West coast of British Columbia, between Kingcome Inlet and Knight Inlet, at the southern extremity of Queen Charlotte Strait, on the South-Central coast of British Columbia, and covers an area of approximately 5,000 square kilometres.

[8] The Burdwood farm site is located in Raleigh Passage, off the Burdwood Group Islands. This operation has a tenure area of 34.33 hectares. The first aquaculture licence was issued by the Province on February 17, 1992. Burdwood was acquired by Mainstream Canada, along with several other sites, from Heritage Salmon Limited in July 2005. It continues to be a producing

aquaculture site and, according to Mainstream Canada, is an integral site for its operations on the East coast of Vancouver Island. The Province had licensed this site for the production of Atlantic salmon to a total maximum production per cycle of 3000 metric tonnes and a maximum net cage area of 12,600 m^2 (Thomson Affidavit, paras 111-112; Jensen Affidavit, paras 10, 17-22, 24 and 81, Ewos Canada Ltd.'s Record).

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[9] The Blunden Pass site is located in Blunden Passage off Baker Island. The operation has a tenure area of 16.1 hectares. An aquaculture licence was first issued by the Province on or about February 24, 1993. It was licensed by the Province for the production of Atlantic salmon and black cod to a total maximum production per cycle of 1840 metric tonnes and a maximum net cage area of 7200 m^2. It appears that this site has been fallow since 2003, but is a back-up site and is to be used in order to allow fallowing of other sites.

[10] The Applicant is an Aboriginal group, and an Indian Band within the meaning of the *Indian Act*, RSC 1985, c I-5, whose traditional territory is within the Broughton Archipelago near Johnstone Strait between mainland British Columbia and Vancouver Island. The KAFN is a member of the Musgamagw Tsawataineuk Tribal Council ("MTTC"), along with the following three First Nations: the Gwawaenuk Tribe, the Namgis First Nation and the Tsawataineuk.

[11] The KAFN has ten Indian reserves within the meaning of the *Indian Act* which are located within the Broughton Archipelago and which are associated with their traditional fishing stations. The KAFN claim that the marine waters within the Broughton Archipelago are their fishing grounds, and that the harvesting of seafood for food, social and ceremonial purposes in this area is

integral to their distinctive culture as an Aboriginal group. Fishing has been the primary occupation of the members of the KAFN since time immemorial. Both before and after contact with Europeans, fishing has been the primary means of sustenance for the KAFN and also of great cultural importance, according to Chief Robert Chamberlin (Applicant's Record, pp. 575-576, at paras 11-14).

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[12] The KAFN claim that the abundance and quality of their fishery is in decline, and attribute the decline in part to the presence of salmon farms in their territory. This has been a recurrent theme in the consultation with various Aboriginal groups both by provincial and federal authorities since the introduction of farm fishing. It is argued that at least some of the fish farms, including the Burdwood site, are located on the juvenile out-migration routes of pink and coho salmon stocks traditionally harvested by the KAFN, and which are presently in a depressed state.

[13] The fish farms are floating nets that are secured to the sea floor in deep marine water by anchors and occupy the column of water above their anchors up to the surface of the water. These nets contain hundreds of thousands of fish which are raised from cultivated eggs in a hatchery and are then moved to the nets, where they remain until they are harvested.

[14] The scientific evidence with respect to the environmental and health hazards created by fish farms is obviously the subject of much debate. The Applicant, like many other Aboriginal groups and environmental non-governmental organizations, contend that a large number of Atlantic salmon harvested in these fish farms escape in the Broughton Archipelago and then compete with the wild salmon in the area for wild food. It is also argued that a large amount of waste and floating material

generated by the antibiotics and other drugs that are fed to farm fish leave the nets and have a detrimental effect on the wild salmon. Some scientists are also of the view that aquaculture exacerbates the proliferation of sea lice, which threaten the wild salmon, and that the presence of fish farms interferes with the migratory routes of the wild salmon.

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[15] From 1988 (the advent of aquaculture in BC) through February 2009, the Province was generally responsible for overseeing the aquaculture industry's operations pursuant to provincial laws and regulations. Canada had a relatively limited role in regard to aquaculture. DFO, the lead federal agency for aquaculture, was responsible for administering, monitoring and enforcing compliance with federal laws and regulations relating to conservation and protection, environmental and habitat protection, and aquatic animal health. DFO conducted scientific research related to aquaculture policy and carried out initiatives to improve the business climate for aquaculture. Environment Canada, Transport Canada, Health Canada and the Canadian Food Inspection Agency were also involved in various aspects of the regulation of the industry. The respective responsibilities of the Province and Canada were addressed in a 1988 Memorandum of Understanding (Thomson Affidavit, paras 18-24; Respondent's Record, pp. 361-363).

[16] As previously mentioned, the BC Supreme Court held in February 2009 that the regulation of aquaculture was within the federal government's jurisdiction and, as a result, that the provincial regulatory regime was invalid. Following that decision, it was then left to the federal government to establish a new regulatory regime and take the steps necessary to make decisions on the issuance of federal aquaculture licences. The Province retained some authority in regard to the issuance of land

tenures within provincial jurisdiction for the purposes of aquaculture, to set labour safety requirements and to take certain measures respecting business practices.

[17] Counsel for the Respondent DFO claimed that the impact of the *Morton* decision on DFO's involvement with aquaculture was "monumental", and there is no doubt that the development of a new regulatory regime required an extensive amount of work. Not only did it involve the drafting of new aquaculture regulations and three sets of new general aquaculture licence conditions for the main commercial aquaculture categories (marine finfish, shellfish and freshwater), but it also necessitated the negotiation of a new memorandum of understanding with the Province, the creation of an entire regulatory apparatus to administer the new regulations, and the issuance of approximately 680 aquaculture licences.

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[18] Concurrently with the development of the new regulations, in 2009 through early 2010, DFO led an extensive consultation process, gathering input from governments and interested parties, including First Nations and other Aboriginal groups, regarding the future development of sustainable aquaculture. DFO held approximately 30 workshops across the country and consulted with over 500 representatives which led to the November 2010 *Strategic Action Plan Initiative 2011-2015 Overarching Document* and five strategic action plans including the *2011-2015 West Coast Marine Finfish Sector Strategic Action Plan.*

[19] These various tasks clearly put DFO and, more generally, the federal government under enormous pressure. The issue to be decided, however, is whether the Crown fulfilled its duty to consult and, if necessary, the duty to accommodate as a result of the consultation undertaken by DFO with the affected First Nations. The following account of the consultation that took place from

the beginning of 2009 until the issuance of the two impugned licences is based on the affidavits filed by Chief Robert Chamberlin, on behalf of the Applicant, and by Andrew Thomson, Director of the Aquaculture Management Division of the Pacific Region for DFO, on behalf of the Minister of Fisheries and Oceans.

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[20] DFO's first step in implementing the *Morton* decision was to draft new regulations under the federal *Fisheries* Act, RSC 1985, c F-14. These eventually became the *Pacific Aquaculture Regulations*, SOR/2010-270 [*Regulations*]. According to the Regulatory Impact Analysis Statement (RIAS) published in July 2010 (Thomson Affidavit, Exhibit "C"), meetings were held with all interested and affected parties in developing the new regulatory regime, including BC provincial and municipal governments, First Nations and other stakeholder groups including industry, environmental groups and the general public.

[21] On March 10, 2009, Chief Chamberlin wrote to Paul Sprout, Regional Director General of DFO, notifying DFO that the KAFN had Aboriginal fishing rights that would be impacted by the licensing of aquaculture sites in the Broughton Archipelago, and requesting consultation on that issue. On April 1, 2009, Mr. Sprout responded to Chief Chamberlin's letter and explained that DFO was considering the implications of the *Morton* decision, that DFO recognized any regulatory transition would require consultation, and that it intended to engage in meaningful consultation with First Nations, industry and stakeholders during the transition. The letter specifically stated that DFO intended to provide the KAFN with the opportunity to discuss the management and regulation of aquaculture with DFO representatives.

[22] In order to facilitate consultation with a large number of First Nations, DFO contracted with both the Aboriginal Aquaculture Association and the First Nations Fisheries Council to host meetings with First Nation groups in BC. These meetings were intended to provide information and to elicit First Nations' views on what elements a new regulatory regime for aquaculture should include. The Aboriginal Aquaculture Association was established in 2003 to assist, support and facilitate the meaningful participation of First Nations in sustainable aquaculture development. The First Nations Fisheries Council was appointed by the BC First Nations Leadership Council to address common fisheries issues, priorities and concerns.

[23] In April 2009, DFO entered into an Aboriginal Aquatic Resource and Oceans Management Program Collaborative Management Contribution Agreement with the Aboriginal Aquaculture Association, to support the carrying out of consultations with First Nations regarding aquaculture. DFO also entered into a similar agreement with the Fisheries Council to facilitate the engagement of Aboriginal groups in dialogue around the use of management of aquatic resources and ocean spaces, by way of capacity building and encouraging inter-community dialogue and collaboration. In total, DFO provided $2,143,830 of capacity funding for Aboriginal fisheries programs, including workshops, meetings and consultation on the *Regulations*.

[24] On May 14, 2009, DFO representatives met with the Fisheries Council to discuss the proposed approach for the initial consultation on the *Regulations* and the tight timelines. The Fisheries Council expressed an interest in contributing to the overall process, reviewing the materials for consultation and providing advice.

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[25] On June 16 and 17, 2009, DFO hosted meetings in Vancouver and Campbell River to seek First Nations' views on the *Morton* decision. They were looking to obtain advice pertaining to the development of specific consultation protocols and plans for addressing regulatory management proposals and to focus on the options for structuring the aquaculture management regime. Over 32 First Nations, Tribal Councils and First Nation organizations attended these meetings, including Chief Chamberlin and Sandy Johnson of the KAFN, and Brian Wadhams of the MTTC.

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[26] On December 10 and 11, 2009, DFO met with BC First Nations and stakeholder groups in Campbell River, BC to gather their input and recommendations on the development of a new regulatory regime for finfish aquaculture. Chief Chamberlin attended both of these meetings. During the meeting, DFO explained the regulatory development process, the principles behind the *Regulations*, the scope of the *Regulations*, licensing and licence conditions, pollution measures, notification and reporting requirements, enforcement, inspections, audits and fees, and operational policies and guidelines.

[27] Additionally, DFO funded a workshop held on December 14, 2009 in Nanaimo by the Aboriginal Aquaculture Association to discuss, among other things, the development of the *Regulations* and to gather input with respect to sustainable aquaculture development. A second workshop was held at the same location on March 30, 2010 to discuss these issues. These workshops were attended by 25 First Nations and four First Nations organizations, and Chief Chamberlin attended both of these meetings.

[28] In February and March 2010, DFO funded the First Nations Fisheries Council to conduct a series of community meetings/dialogue sessions with First Nations, across British Columbia. The purpose of the meetings was to share information and to seek input and guidance from First Nations on the development of a new regulatory regime for aquaculture, on the basis of a Discussion Paper released in November 2009 by DFO, entitled *Federal BC Aquaculture Regulation & Strategic Action Plan Initiative Discussion Document*. Chief Chamberlin attended six of these meetings.

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[29] The First Nations Fisheries Council produced a summary report of the March 2, 2010 meeting in Alert Bay. After stating that the Council is not a consultative body and does not act as a consultation body for DFO, and therefore that "…meetings with DFO did not in any legal way constitute consultation", the Report states, among other things:

> The attendees were unanimous that fish farms in their present form are not acceptable within the traditional territories of the First Nations in attendance, regardless of how they are managed. Closed containment fish farms are the only acceptable forms of finfish aquaculture in the First Nations' territories of the Broughton Archipelago. Furthermore, it is disturbing that foreign companies are permitted to operate in First Nation territorial waters without First Nations consent. These are fundamental issues that need to be addressed before there can be meaningful involvement from First Nations in creating an aquaculture regulation. Yet DFO's presentation was limited to the content of the regulation. Later discussion will be held with First Nations on the National Aquaculture Strategy Action Plan Initiative (NASAPI), but DFO's unwillingness to discuss specific issues or how they will be managed on an ongoing basis creates an artificial separation. First Nations want to be involved in the creation of a new aquaculture regulation, but they are not fully confident that their concerns will be taken into account.
>
> Record of the Respondent, Attorney General of Canada and Minister of Fisheries and Oceans, vol 3, Affidavit of Andrew Thomson, Exh. V, p 623

[30] The Report goes on to mention the short time frame set by DFO:

> First Nations are not all fully knowledgeable about the subject or the issues. They need time to speak to others, to learn, to build capacity, etc. The timeline proposed by DFO feel [sic] rushed and will not permit First Nations to engage meaningfully. As First Nations have such a high interest in the outcome of the process, DFO should be held to addressing First Nations concerns adequately. In this regard, First Nations need to work together to assemble a set of expectations.
>
> *Ibid*

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[31] On May 26, 2010, a joint First Nations Fisheries Council/DFO working group was formed, to work on areas of joint interests regarding aquaculture. Andrew Thomson of DFO and Chief Chamberlin were co-chairs of the Aquaculture Working Group. The Working Group met on five occasions between June and December, 2010, to discuss DFO's plans to develop and implement the new regulatory and licensing regime for aquaculture in BC.

[32] In addition to the foregoing consultations, DFO sent a letter to approximately 70 coastal First Nations on July 13, 2010, advising that the new draft aquaculture regulations had been published in the *Canada Gazette Part I*, and inviting comments during the 60-day public review period. This letter outlined, generally, DFO's intended approach to regulating aquaculture. The letter also noted that for any new federal licences to be issued in December 2010, DFO did not intend to make changes to previous approvals, i.e., increases in production, size of existing facilities or permissible species. Rather, the letter noted, such changes would be individually reviewed in future years.

[33] DFO received direct responses to the July 13, 2010 letters from 12 Aboriginal groups representing 28 First Nations. In addition, DFO received over 900 email, letter and fax submissions

during the 60-day comment period. From August through November 2010, the submissions were reviewed and necessary amendments were made. In his affidavit, Andrew Thomson claims that the comments and recommendations received, assisted in the refinement of a number of provisions of the *Regulations*. However, Chief Chamberlin states in his affidavit that none of the feedback offered by the KAFN was incorporated into the final text of the *Regulations*, as published on December 8, 2010 in Part II of the *Canada Gazette*.

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[34] The main management tool under the new regulations is the issuance of licences dictating the conditions to which an operator must adhere. The licence conditions set out specific management requirements such as fish health management plans, escape prevention requirements, measures to minimize impacts on fish and fish habitat, and measures for environmental monitoring record keeping, notification and reporting.

[35] The DFO announcement that all expiring provincial aquaculture licences would be replaced with federal licences was unanimously opposed by the three principal First Nations organizations in British Columbia. On August 10, 2010, the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations wrote a joint letter to the DFO Minister, expressing concern about the Department's plan to roll over existing aquaculture licences. This letter also expressed the view that such a roll over without consultation and accommodation of the infringements caused by these licences "would be unconstitutional" (Applicant's Record, vol II, Affidavit of Robert Chamberlin, p 632).

[36] On August 24, 2010, the KAFN responded to the DFO letter dated July 13, 2010, requesting a meeting to discuss the KAFN's preliminary response to the draft *Regulations* and the accompanying RIAS. The meeting occurred in Nanaimo on September 2, 2010. During the meeting, Mr. Thomson informed Chief Chamberlin that DFO was planning to develop different classes of licences and conditions for aquaculture, and that it would be sharing the draft licences with First Nations as they became available. Chief Chamberlin expressed interest in reviewing the licences and participating in developing conditions, but did not raise any issues pertaining to the two facilities which are the subject of this application for judicial review.

[37] During that same meeting, Chief Chamberlin expressed interest in area-based planning for the Broughton area, and Mr. Thomson agreed to continue to engage the KAFN and MTTC on these issues. DFO also provided an update on its plans to develop Integrated Management of Aquaculture Plans ("IMAP") for aquaculture in BC. This update explained that IMAPs will be the mechanism for setting, consulting on and generally communicating policy development and conditions for future licence issuance and will take a geographic, ecosystem-based approach to aquaculture management. DFO had not determined how it would define the management areas, although it anticipated that each area would likely incorporate the claimed traditional territories of multiple First Nations. Consultation would therefore be required on an aggregate basis and through multiple forums, with bilateral consultations on an as-requested and as-needed basis. At the meeting and in a follow-up letter, the KAFN expressly informed DFO of the potential for the issuance of aquaculture licences to impact its Aboriginal rights, and of the need for direct consultation in respect of any proposed licence replacements in the KAFN fishing grounds.

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[38] On September 24, 2010, DFO responded to that letter requesting a further meeting with the KAFN to continue discussing the KAFN's interests and concerns with DFO's proposed regulatory regime for aquaculture. In particular, they were looking to discuss DFO's proposed approach to licensing aquaculture facilities and the use of IMAPs. The letter did not address the KAFN's request for consultation on specific licences in KAFN territory. The letter once again emphasized that the new federal licences would not involve increases in production or changes to the size of existing facilities or permissible species, and advised that DFO was in the process of developing licence conditions that would set out specific management requirements. Finally, the letter stated that examples of draft licences with applicable conditions were expected to be completed by mid-October, and that DFO would be interested in a follow-up meeting to hear the KAFN's views on these conditions.

[39] On October 4, 2010, DFO wrote to BC First Nations to provide additional information on its plans to establish a new federal licensing regime. The letter explained that DFO was in the process of establishing the new *Regulations* and would ensure that any existing aquaculture operations are able to obtain a federal licence to operate lawfully under the *Fisheries Act*. It further explained that DFO's intention with respect to the new licensing regime was to develop four classes of licence for marine finfish operations, freshwater finfish operations, shellfish operations, and enhancement facilities. This would allow for the setting of specific management requirements as conditions to the licence. The letter again reiterated that the new federal licences would not involve increases in production or changes to the size of existing facilities or permissible species.

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[40] On October 21, 2010, DFO representatives again met with the KAFN and the KAFN provided an agenda to highlight the focus of this meeting. There was a general discussion on IMAPs, and DFO provided an update on the proposed *Regulations* and its plans for licensing existing facilities, including those in the Broughton Archipelago. With the exception of a request for maps of the licences in their traditional territories, there were no further discussions about licences following the update. The KAFN did not raise any concerns regarding specific farms, such as the Burdwood and Blunden Pass farms.

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[41] The requested maps were provided to the KAFN on November 2, 2010. When asked for comments on the maps, counsel for the KAFN responded in an email dated November 9, 2010: "The maps look good, there is the matter of far field effects and to what extent that requires consultation on farms near, but outside the KAFN boundary. But I'll give you a more formal response on that shortly" (Record of the Respondent, Attorney General of Canada and Minister of Fisheries and Oceans, vol 4, Affidavit of Andrew Thomson, p 1000). No further comments or requests were received from the KAFN until November 19, 2010. Moreover, the MTTC cancelled a meeting with DFO that was to be held on October 26, 2010. The meeting was tentatively rescheduled for the latter half of November, 2010. Despite three DFO requests for an agenda for the meeting, one was never provided by the MTTC.

[42] On October 27, 2010, DFO sent a letter to all BC First Nations, including the KAFN, enclosing three draft licence templates for the three main commercial aquaculture categories (marine finfish, shellfish and fresh water). The letter explained that the templates set out the generic contents of the licences that DFO intended to issue and included the full range of conditions that it

foresaw being included in the actual licences. DFO's intent was that the licences would include specific information to the individual operations, but that they would closely follow the template. The letter also asked for comments or questions on the draft licence templates by November 12, 2010. The deadline was subsequently extended to November 19, 2010, at the request of counsel for the Applicant.

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[43] On November 19, 2010, counsel for the MTTC/KAFN submitted comments to DFO regarding the draft licences. The letter acknowledged from the outset that "the licence conditions set out in the draft template are nearly identical to the licence conditions under existing provincial regulation". Counsel then stated her clients traditional concerns with salmon farms and aquaculture in general, in the following terms:

> Our traditional territory in the Broughton Archipelago has had the highest concentration of salmon farms in the province for nearly two decades. For this entire period, we have engaged in consultations with the province about the licensing of salmon farms and their impacts on our Aboriginal right to the wild fishery. During this time, we have experienced significant sea lice infestations in our territory, several disease outbreaks, numerous escapes of exotic Atlantic salmon into our wild salmon habitat areas, visible pollution of our shellfish food beaches, and an overall decline of our local wild salmon, herring, eulachon and ground fish stocks. We have very serious concerns about the heavy use and buildup of pesticides, disease antibiotics and antifoulants in our marine ecosystem – the system that has been the primary source of our food since time immemorial. The use of night lights and net pen by-catch are also areas of significant concern for us as a cause of depletion of our wild fishery. To date, these problems and concerns have not been resolved, and we do not see any progress in DFO's adoption of the previous provincial regime.
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> Applicant's Record, vol II, Affidavit of Robert Chamberlin, p 649

[44] Instead of spending time and resources on a detailed technical review of a draft template of generic licence conditions, which raised questions they felt they were not well-positioned to answer,

counsel indicated for the first time that they wished to turn their focus to consultations on concerns with impacts and risks of the specific finfish licences in their traditional territory. In their view, the draft licence template conditions did not address their concerns.

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[45] In that same letter, the MTTC/KAFN also stated for the first time, a position that system-wide matters in regard to all the salmon farms in the Broughton Archipelago had to be addressed prior to issuance of federal licences:

> In a letter to you dated September 8, 2010, one of our member nations emphasized its strong interest in engaging in a Broughton Archipelago area based management plan. This is an approach that will allow us to exchange basic and fundamental information such as how many farms are operating in our collective territory and at what volumes and production cycles, whether there will be a fallow strategy to accommodate the outgoing migration of our local wild stocks, and whether there are any adequate processes in place to assess the cumulative effects of a large number of farms in the Broughton Archipelago ecosystem. In our view, these are fundamental concepts that must be addressed prior to DFO's issuance of aquaculture licences in our territory, and prior to detailed discussions on licence conditions.
>
> Applicant's Record, vol II, Affidavit of Robert Chamberlin, p 649

[46] On the face of it, this new position taken by the MTTC/KAFN would have required the completion of a multilateral consultation with all interested First Nations in the Broughton Archipelago ecosystem, in regard to an area management plan for the Broughton Archipelago. Finalization of that plan (including any necessary fallowing strategy for the entire region) prior to issuance of licences effective December 19, 2010, would also be required.

[47] In response to a request by the MTTC/KAFN in their letter dated November 19, 2010, a meeting was held on December 10, 2010. What was said at that meeting is not entirely clear, as it

was not explicitly recorded. It appears that the MTTC/KAFN somewhat altered its position. They did not ask that DFO complete consultations and institute an area management plan and a fallowing strategy for the Broughton Archipelago region, over the eight days before expiry of the provincial licences. Instead, the MTTC/KAFN acknowledged it was reasonable in the circumstances that consultations on the salmon farms in the Broughton Archipelago region, and their impacts on the MTTC/KAFN's asserted Aboriginal rights, would have to continue over a transitional period after issuance of the federal licences. During the one year transitional period, consultations on an area-based management approach, as well as on non-regional site-specific matters raised, would be ongoing.

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[48] Chief Chamberlin recognized further that a regulatory vacuum for farms stocked with fish was undesirable, and acknowledged that the expiration of provincial licences was imminent. The MTTC/KAFN requested that no licences be issued for the following selection of salmon farms:

a) the farms that were not currently stocked with fish, as there was no immediate need for DFO to authorize dormant fish farms to operate (one of which is the Blunden site);

b) the two farms – Upper Retreat and Blunden Pass – which are in shallow areas and have soft bottoms that in the past have caused a build-up of deleterious substances harmful to fish habitat, and which are near clam beaches and crab areas that have had a significant increase in sediment pollution; and

c) the six key farms in MTTC territory – Burdwood, Sargent's Pass, Humphrey Rock, Glacier Falls, Cliff Bay and Sir Edmund – which are on the primary migratory route of juvenile salmon stocks that are presently in significant distress (alternatively, the KAFN requested that these farms be phased out as soon as practicable).

[49] This was the first time over the course of the consultations that the MTTC/KAFN had communicated to DFO, site-specific concerns and requests for changes relating to specific farms (such as the Burdwood and Blunden Pass farms, which are the subject of this application). In the follow-up letter to that meeting dated December 17, 2010, counsel for the MTTC/KAFN stated that they "hope to see their interim input reflected in those [licensing] decisions, [for the selection of sites identified at the meeting]" and that they "look forward to ongoing dialogue in the new year". They requested that DFO provide written notice of the licensing decisions for those sites at its earliest convenience. Accordingly, one of the DFO officials who attended the December 10, 2010 meeting provided the MTTC/KAFN input to Mr. Thomson on Monday, December 13, 2010.

[50] In making his decision on behalf of the DFO, Mr Thomson stated in his affidavit that he had knowledge of and did consider the following information:

i) the information contained in the provincial licences;

ii) all information provided by First Nations during the course of DFO's consultations, and through correspondence with those First Nations;

iii) information from the licence applicants/proponents as put forward in their applications;

iv) scientific information pertaining to aquaculture environmental impacts, including that prepared by DFO, and various peer-reviewed research articles in scientific journals;

v) knowledge of finfish aquaculture generally, acquired during the course of his education and professional experience;

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vi) knowledge that there were no changes to the existing operations (e.g. increases in production, change of species) allowed in the federal licences;

vii) knowledge that the federal licences were of limited duration (in the case of finfish licences – 12 months) which would allow for a careful review of the licences and conditions and provide an opportunity to make any necessary changes to individual licence conditions during this period; and

viii) knowledge of the measures, described in his affidavit, that address fish health and environmental concerns such as those expressed by the KAFN.

Respondent Record of the Attorney General of Canada and Minister of Fisheries and Oceans, Vol 2, Affidavit of Andrew Thomson, para 135

[51] On December 18, 2010, DFO issued approximately 680 aquaculture licences for finfish, shellfish, freshwater and enhancement operations, including the 22 licences in the Broughton Planning Area (17 of which, according to the Applicant, are within KAFN territory). Since the issuance of the *Regulations* and of the licences, there is evidence that DFO has been consulting with First Nations regarding the development of IMAPs. These IMAPs are intended to take a geographic, ecosystem approach to aquaculture management and will be the mechanism for setting, consulting on and generally communicating policy development and conditions for the issuance of future licences.

[52] Prior to the hearing of this application, counsel for the Respondent Attorney General of Canada, brought a motion to strike the affidavit of Michael Price, submitted on behalf of the Applicant, on the grounds that it is inadmissible as expert evidence and not in compliance with Rule 52.2 of the *Federal Courts Rules*, SOR/98-106 and the *Code of Conduct for Expert Witnesses*, as set

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out in the schedule to the Rules. Ewos Canada Ltd., doing business as Mainstream Canada, also brought a similar motion, not only to strike the affidavit of Michael Price but also to strike out some paragraphs of the affidavit sworn on behalf of the Applicant by Robert Mountain, Local Fisheries Outreach Coordinator for the MTTC. In a letter dated October 19, 2011, Marine Harvest voiced its support for these motions. They were heard at the beginning of the hearing on November 7, 2011, and I indicated that I would rule on them as part of my decision on the merit.

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2. Issues

[53] This application for judicial review raises the following issues:

1) Does the KAFN have the requisite standing to bring this application for judicial review?

2) Did Canada, as represented by DFO, have a duty to consult with the KAFN about the issuance of the aquaculture licences, and more specifically the Burdwood and Blunden licences? If so, what was the extent of the Crown's duty?

3) Were DFO's efforts at consultation reasonable under the circumstances?

[54] Before dealing with these issues, however, I will first address the two motions to strike brought by the Respondents.

3. Analysis

- The Motions to Strike

[55] As previously mentioned, counsel for the Attorney General of Canada filed an objection to the admissibility of the Expert Affidavit of Michael Price and brought a motion to have it struck in its entirety. Counsel submitted that the affidavit is deficient in a number of areas as it failed to set

out: 1) the proposed expert evidence of Mr. Price and merely sets out the conclusions; 2) Mr. Price's qualifications in relation to the issues addressed in his evidence; and 3) the particulars of matters that might affect Mr. Price's duty to the Court.

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[56] Counsel for Mainstream Canada filed a similar objection and also brought a motion to strike, on the same grounds as the Attorney General, as well as on the grounds that Mr. Price is not an independent and impartial expert witness as he has been a critic of aquaculture.

[57] The Applicant asserts Aboriginal rights to harvest marine resources within its claimed traditional territory in the Broughton Archipelago. The Applicant claims that the two farms are in its traditional territory and interfere with its Aboriginal rights through pollution of the marine environment and the transmission of parasites and diseases from farmed to wild salmon.

[58] In support of its claim that fish farming is detrimental to the health and environment of the First Nations living in the claimed territory, the Applicant has filed the affidavit of Mr. Michael Price, an MSc candidate in biology at the University of Victoria, whose thesis deals with the early marine ecology of Pacific juvenile salmon. His study areas include British Columbia's central coast and the Discovery Islands region south of the Broughton Archipelago. According to his affidavit, his opening thesis chapter "compares levels of sea lice on juvenile pink and chum salmon migrating through each of the above regions (near and far from salmon farms) to those within the Broughton Archipelago", while the rest of his thesis "focuses on human stressors influencing the early marine ecology of wild juvenile Fraser River sockeye salmon, with a specific focus on marine salmon farms and farm salmon processing facilities" (Applicant's Record, vol I, p 110).

[59] The Attorney General's contention that Mr. Price fails to set out his qualifications that permit him to reach his overall conclusion can be easily disposed of. In his first affidavit, Mr. Price sets out his qualifications in detail, and attaches his *curriculum vitae*. The Attorney General's argument that Mr. Price is not qualified on the particular question that is the subject of this application because his study area does not include the area in dispute, is totally without merit. One does not need to be an expert on the minute subject of the controversy, to offer meaningful help to the Court. As a biologist with an interest in understanding marine host-parasite systems and the potential stressors facing wild juvenile salmon as a consequence of open net pen fish farming, Mr. Price is *prima facie* well suited to form general opinions as to the state of the science and its application to the Burdwood farm.

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[60] As the Attorney General relies heavily on Rule 52.2 of the *Federal Courts Rules* and on section 3 of the *Code of Conduct for Expert Witnesses* set out in the schedule to the *Rules*, for ease of reference they have been reproduced:

Federal Courts Rules, SOR/98-106	*Règles des Cours fédérales*, DORS/98-106
Expert's affidavit or statement	Affidavit ou déclaration d'un expert
52.2 (1) An affidavit or statement of an expert witness shall	52.2 (1) L'affidavit ou la déclaration du témoin expert doit :
(a) set out in full the proposed evidence of the expert;	a) reproduire entièrement sa déposition;
(b) set out the expert's qualifications and the areas in	b) indiquer ses titres de compétence et les domaines

respect of which it is proposed that he or she be qualified as an expert;

d'expertise sur lesquels il entend être reconnu comme expert;

(c) be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it; and

c) être accompagné d'un certificat, selon la formule 52.2, signé par lui, reconnaissant qu'il a lu le Code de déontologie régissant les témoins experts établi à l'annexe et qu'il accepte de s'y conformer;

(d) in the case of a statement, be in writing, signed by the expert and accompanied by a solicitor's certificate.

d) s'agissant de la déclaration, être présentée par écrit, signée par l'expert et certifiée par un avocat.

Failure to comply

Inobservation du Code de déontologie

(2) If an expert fails to comply with the Code of Conduct for Expert Witnesses, the Court may exclude some or all of the expert's affidavit or statement.

(2) La Cour peut exclure tout ou partie de l'affidavit ou de la déclaration du témoin expert si ce dernier ne se conforme pas au Code de déontologie.

Federal Courts Rules, SOR/98-106, sched Code of Conduct for Expert Witnesses

Règles des Cours fédérales, DORS/98-106, ann Code de déontologie régissant les témoins experts

Experts' Reports

Les rapports d'expert

3. An expert's report submitted as an affidavit or statement referred to in rule 52.2 of the *Federal Courts Rules* shall include

3. Le rapport d'expert, déposé sous forme d'un affidavit ou d'une déclaration visé à la règle 52.2 des *Règles des Cours fédérales*, comprend :

(a) a statement of the issues addressed in the report;

a) un énoncé des questions traitées;

(b) a description of the qualifications of the expert on

b) une description des compétences de l'expert quant

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the issues addressed in the report;	aux questions traitées;
(c) the expert's current *curriculum vitae* attached to the report as a schedule;	c) un *curriculum vitae* récent du témoin expert en annexe;
(d) the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule;	d) les faits et les hypothèses sur lesquels les opinions sont fondées, et à cet égard, une lettre d'instruction peut être annexée;
(e) a summary of the opinions expressed;	e) un résumé des opinions exprimées;
(f) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;	f) dans le cas du rapport qui est produit en réponse au rapport d'un autre expert, une mention des points sur lesquels les deux experts sont en accord et en désaccord;
(g) the reasons for each opinion expressed;	g) les motifs de chacune des opinions exprimées;
(h) any literature or other materials specifically relied on in support of the opinions;	h) les ouvrages ou les documents expressément invoqués à l'appui des opinions;
i) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;	i) un résumé de la méthode utilisée, notamment des examens, des vérifications ou autres enquêtes sur lesquels l'expert se fonde, des détails sur les qualifications de la personne qui les a effectués et une mention quant à savoir si un représentant des autres parties était présent;
(j) any caveats or qualifications necessary to render the report complete and accurate,	j) les mises en garde ou réserves nécessaires pour rendre le rapport complet et précis,

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including those relating to any insufficiency of data or research and an indication of any matters that fall outside the expert's field of expertise; and	notamment celles qui ont trait à une insuffisance de données ou de recherches et la mention des questions qui ne relèvent pas du domaine de compétence de l'expert;
(k) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.	k) tout élément portant sur la relation de l'expert avec les parties à l'instance ou le domaine de son expertise qui pourrait influencer sur son devoir envers la Cour.

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[61] The Attorney General's main complaint with respect to Mr. Price's affidavit, is that it falls short of the requirement found at paragraph 52(2)(1)(a) of the *Federal Courts Rules*, as further clarified in paragraphs 3(d), (g), (i) and (j) of the *Code of Conduct for Expert Witnesses*.

[62] Mr. Price sets out his overall conclusion at paragraph 7 of his affidavit, where he states:

> The scientific evidence for the transmission of parasites and diseases from farm salmon to wild salmon is not conclusive, nor complete. However, there are a number of peer-reviewed scientific studies that indicate there are significant, ongoing, and unaddressed risks to wild juvenile salmon exposed to salmon farms located along migration routes in the Broughton Archipelago.

[63] Mr. Price then elaborates further on this conclusion and explains the reasons for this conclusion. By way of example, he states that the farms at issue use open net pens to grow salmon; thus, there is no physical barrier to restrict the transfer of pathogens from farmed salmon to wild salmon. He further goes on to say that wild salmon are more susceptible to pathogen infection as

juveniles, and the Burdwood farm is located immediately seaward of salmon rivers, from which wild juvenile salmon migrate (para 7 of his affidavit).

[64] Mr. Price then ties these general statements to the particular situation of the Burdwood farm at issue in the within application for judicial review. In this respect, he states the following (para 8 of his affidavit):

> The Burdwood farm is located in Tribune Channel. The Burdwood farm poses a real and significant risk to salmon, for several reasons. First, Burdwood is located immediately seaward of salmon rivers, which poses a very high risk of impact of farm pathogens on the most delicate, juvenile phase of wild pink and chum salmon. There are several studies that show juvenile salmon sampled near Burdwood have consistently hosted elevated levels of sea lice. Second, five depressed pink salmon populations in the Broughton Archipelago likely migrate past Burdwood en route to the open ocean, and their decline is considered to be in response to salmon farm exposure. Third, the close proximity of Burdwood to other farms (i.e., <10 km) may enhance farm-to-farm disease transmission and amplification (and transmission to migrating wild salmon), as has been shown in the past for Burdwood and other farms in the Broughton Archipelago. Disease amplification on salmon farms such as Burdwood, and transmission to wild salmon, is one of the most serious concerns because quarantine of infected populations rearing in farm net-pens is not possible.

[65] The only problem with his affidavit is that his opinion is based entirely on 24 peer-reviewed scientific articles, only one of which he was involved in authoring. This, in itself, may not have been critical if he had provided his own analysis and review of the literature. Instead, he merely attaches the articles as exhibits and purports to summarize them with one or two sentence conclusions which he says arise from the articles. He then adopts these conclusions as his own, in support of his overall opinion.

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[66] This method is highly problematic. Of course, as a biologist himself, Mr. Price is qualified to capture the gist of the reviewed articles. The problem, however, is that he does not give much of an explanation as to how he arrives at his own summary of these articles. Nor can he comment on the methodology used or the qualifications of the person who carried these studies. Mr. Price does not explain how the conclusions he draws for the articles, supports his own overall opinion that the Burdwood farm poses a real and significant risk to salmon. This would indeed have been helpful, as none of the studies referenced in his affidavit specifically relate to the Burdwood farm, nor its impact on juvenile wild pink and chum salmon. In fact, only two studies relate to the interaction between wild salmon and farmed salmon.

[67] The problems identified above are compounded by the fact that Mr. Price has publicly spoken out on the serious risks posed by aquaculture and has voiced his opposition to fish farms, on more than one occasion. For example, the evidence shows that the Raincoast Conservation Society, Mr. Price's employer, is to use "informed advocacy" to further its conservation objectives. Mr. Price also acknowledged in his second affidavit of June 17, 2011, that in 2006 he made statements expressing his opposition to aquaculture as it is now practiced, in a presentation to the Special Committee on Sustainable Aquaculture struck by the British Columbia Legislative Assembly. These views were also expressed in multiple letters to the editor of the Times Colonist, as well as in a letter to King Herald V of Norway, dated August 17, 2009. He has recommended that migration routes and rearing areas for juvenile wild salmon be freed of salmon farms immediately, and at bare minimum, farms located on migration routes and/or rearing areas should be emptied during the period when juvenile salmon are entering the sea from their natal rivers. He has also stated that

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there must be a transition of the entire industry to closed containment systems within a reasonable time period.

[68] Of course, these views should not disqualify him as an expert. Mr. Price has signed the required certificate certifying that he read the *Code of Conduct for Expert Witnesses*, which explicitly mentions at section 1 that an expert witness, "has an overriding duty to assist the Court impartially", and has agreed to be bound by it. Moreover, Mr. Price has sworn in a third affidavit dated October 18, 2011, that he does not have a personal or professional relationship with the parties to this proceeding. Finally, impartiality does not mean that scientists are not entitled to have their own particular views within the scientific debates of their field. As long as an expert does not become an advocate and does not camouflage an argument under the guise of an expert opinion, his or her testimony will be admissible.

[69] That being said, I find it disturbing that Mr. Price failed to disclose the details of his relationship with the Raincoast Conservation Society. This is contrary to paragraph 3(k) of the *Code of Conduct for Expert Witnesses*, which requires the expert affidavit to set out particulars of any aspect of his relationship with the Applicant in this proceeding, or the subject matter of his proposed evidence, that might affect his duty to the Court. He may also have been well-advised to be more transparent and to disclose to the Court his previous statements in relation to aquaculture on the BC coast.

[70] These deficiencies are not sufficient to render the affidavit of Mr. Price inadmissible. They are, however, important factors that have an effect on the weight to be given to his evidence. His

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strong views with respect to fish farming, cannot but cast some lingering doubts on his choice of reviewed articles, as well as on the conclusions that he draws from these articles. From a methodological perspective, an expert opinion based entirely on studies done by other experts is obviously less compelling than an opinion derived from the expertise of the author himself or herself, and is subject to all the pitfalls of a second-hand opinion.

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[71] As a result of the above considerations, I am inclined to give little weight to the affidavit of Mr. Price. I accept that there is a body of scientific evidence that shows the potential for impact of the Burdwood farm on wild salmon. Indeed, Mr. Price himself confesses that the scientific evidence is neither conclusive nor complete. The affidavit of Mr. Price is therefore held to be admissible, for this limited purpose only. There is no need to go any further. It is clearly not for this Court, in the context of this application for judicial review, to determine whether or not the health and environmental hazards put forward by the Applicant have been substantiated.

[72] Counsel for Mainstream Canada also brought a motion to strike out paragraphs 8 to 12, 15 to 25, 27 to 31, 34 and 35 and Exhibits D to G of the affidavit sworn March 9, 2011 by Chief Robert Mountain, on the grounds that it contains inadmissible hearsay, opinion and argument.

[73] As set out in paragraphs 4, 5 and 6 in his affidavit, Chief Mountain was born and raised in Broughton Archipelago (where the Burdwood and Blunden sites are located). He was taught to fish in that area by his grandfather from the age of 5, and has been fishing both commercially and for subsistence in the area for the past 48 years. At the time of swearing the affidavit, Chief Mountain had served for twelve years as an Aboriginal Fisheries Guardian in the area, a program funded and

supervised by DFO. Subsequently, he served six years as the Local Fisheries Outreach Coordinator for the local Tribal Council (of which the KAFN is a member), with the primary responsibility of gathering "information related to the wild fishery and aquaculture operations in the Broughton Archipelago" (Applicant's Record, vol II, p 357, para 5). He states that in the course of this work he has spent many days on the water, monitoring the wild and farmed fisheries in the area.

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[74] Rule 81 of the *Federal Courts Rules* requires that, except on motions, affidavits be confined to facts within the personal knowledge of the deponent. The rule excluding hearsay is a well-established principle. The Court has stated that "the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation. The Court may strike affidavits, or portions of them, where they are abusive or clearly irrelevant, where they contain opinion, argument or legal conclusions..." (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18, 399 NR 33; see also: *Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 (available on CanLII); *McConnell v Canadian Human Rights Commission*, 2004 FC 817, aff'd 2005 FCA 389).

[75] Hearsay evidence is therefore presumptively inadmissible. Unless the proponent of the hearsay evidence can demonstrate that it meets the twin criteria of necessity and reliability, the general exclusionary rule of hearsay evidence applies (*R v Khelawon*, 2006 SCC 57 at paras 2 and 3, [2006] 2 SCR 787).

[76] I agree with counsel for the Applicant that paragraphs 10, 17, 18, 22, 23 and 28 cannot be regarded as hearsay, as they are within Chief Mountain's knowledge on the basis of his office and experience (see: *Smith Kline & French Laboratories Ltd v Novopharm Ltd*, 25 ACWS (2d) 470, 53

NR 68 (FCA); *Philip Morris Inc v Imperial Tobacco Ltd*, 8 FTR 310, 3 ACWS (3d) 109 (FC)). Chief Mountain's position as Aboriginal Fisheries Guardian and Local Fisheries Outreach Coordinator for many years clearly places him in a position to have personal knowledge of the facts deposed in these paragraphs. It is also of some relevance that Marine Harvest has not challenged the evidence of Chief Mountain with contradictory evidence or by way of cross-examination.

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[77] Paragraphs 15 and 16 contain excerpts of an Advisory Report by the Pacific Fisheries Resource Conservation Council to the Minister of Fisheries and Oceans Canada and the Minister of Agriculture, Food and Fisheries of BC (Applicant's Record, vol II, Affidavit of Robert Mountain, exhibit "D", "2002 Advisory: The Protection of Broughton Archipelago Pink Salmon Stocks", p 372). The reliability of this Report poses no serious concerns because Chief Mountain has provided a copy of the Report and a communiqué summarizing it (see Exhibit "E"). As for the excerpts from that document found in the affidavit, they are exact quotations and can easily be verified. It would be unreasonable to view this report as hearsay and to require its first-hand submission by the Pacific Fisheries Resource Conservation Council, in these circumstances. The same reasoning applies to paragraphs 19 to 21 of the affidavit, which refer to the Final Report of the Special Committee on Sustainable Aquaculture to the BC Legislature dated May 2007; to paragraphs 27, 28, 30 and 31, which similarly refer to the Final Report of a survey carried out by Coastal & Ocean Resources Inc. and funded by the Province (*Ibid,* exhibit "G", "Broughton Archipelago Clam Terrace Survey", p 466); and to a similar survey carried out by DFO (*Ibid*, exhibit "H", "An Exploratory Survey for Littleneck Clams (*Protothaca staminea*) in the Broughton Archipelago, British Columbia – 2006", p 505). It is no doubt true that Chief Mountain could not be cross-examined on these various reports, as he is not the author of such reports. However, counsel for the Respondent Mainstream

did not claim to be prejudiced by the introduction of these reports *per se*. It was also open to counsel to introduce countervailing documents in a similar fashion.

[78] That being said, Chief Mountain does cross the line when he quotes selectively from these reports and offers his own interpretation of these reports. This is clearly the realm of expert witnesses. Such an exercise is also fraught with risks and pitfalls. By way of example, Chief Mountain relies on the final paragraph of the last referred Report from DFO (Exhibit "H") to state that "[t]he report concluded that reports from First Nations and commercial harvesters made to DFO managers indicate littleneck clam stocks in the Broughton Archipelago are in decline" (Applicant's Record, vol II, p 533). He fails to signal, however, that the same paragraph goes on to state: "Most of the littleneck clams examined were healthy, so a disease outbreak is not likely the reason why stocks are depressed. More focused research is needed on the impacts of harvesting and other human activities on littleneck clam populations". In my view, this is not sufficient to exclude these paragraphs, but these commentaries on the reports are to be given very limited weight.

[79] Mainstream Canada also argues that paragraphs 8, 9, 11, 12, 24, 25, 31, 34 and 35 should be struck out on the basis that they contain opinion evidence and/or are argumentative. It is of course well-established that ordinary witnesses should confine themselves to those facts that are within their personal knowledge, and should not offer opinion or draw conclusions. Having carefully reviewed the impugned paragraphs of Chief Mountain's affidavit, I am of the view that they are by and large admissible. Summarizing the modern approach to opinion evidence established by the Supreme Court of Canada in *R v Graat*, [1982] 2 SCR 819 (available on CanLII), John Sopinka,

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Sidney N. Lederman and Alan W. Bryant, *The Law of Evidence in* Canada, 2nd ed, Markham (ON) & Vancouver (BC), Butterworths Canada Ltd, 1999 at p 609:

> Courts now have greater freedom to receive lay witnesses' opinion if: (1) the witness has personal knowledge; (2) the witness is in a better position than the trier of fact to form the opinion; (3) the witness has the necessary experiential capacity to make the conclusion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts he or she is testifying about.

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[80] For the most part, the statements found in the above-mentioned paragraphs are largely factual in nature and provide helpful context to this application for judicial review. It is true that some portions of those paragraphs stray from fact to opinion and purport to go much beyond what Chief Mountain could personally observe. Instead of stating events in a matter-of-fact fashion, the affiant is sometimes tendentious and geared at demonstrating a correlation between the presence of aquaculture sites and the onset of diseases, and a decline in salmon stocks in the Broughton Archipelago. To the extent that Chief Mountain offers his own opinion and professes to draw conclusions on the basis of evidence either scientific in nature or of which he has no personal knowledge, his statements should be accorded little weight. I would refrain, however, from trying to excise and strike out those portions of his affidavit that do not appear to be in conformity with Rule 81 of the *Federal Courts* Rules. To some extent, this is because the line between fact and opinion or argument is not always clear, and also because the relatively minor offending portions of Chief Mountain's affidavit are so intertwined with his otherwise admissible statements, that it would make his affidavit incomprehensible. For those reasons, I think it preferable to dismiss the motion of the Respondent Mainstream Canada, and to consider Chief Mountain's affidavit with the appropriate *caveat* as to the weight to be given to those portions of his testimony that do not derive from his personal knowledge.

1) Does the KAFN have the requisite standing to bring this application for judicial review?

[81] Counsel for the Respondent Attorney General of Canada contends that this application could only be brought as a representative proceeding pursuant to Rule 114(1) of the *Federal Courts Rules*, by an individual member on behalf of the Aboriginal collective claiming to hold the Aboriginal right. Since the application has been brought by the KAFN itself, an *Indian Act* band consisting of two distinct but closely associated tribes that were amalgamated for the purposes of the *Indian Act* in 1947, it is argued that the Applicant lacks proper standing.

[82] There is very little jurisprudence interpreting Rule 114. However, a paper prepared by Chief Justice Allan Lutfy and Emily McCarthy, "Rule-Making in a Mixed Jurisdiction: the Federal Court (Canada)" (2010) 49 S.C.L.R. (2d) 313, provides an interesting and helpful summary of the genesis of that Rule.

[83] The predecessor to Rule 114 was repealed in 2002, when the *Federal Courts Rules* were amended to allow for the certification of class actions. It was thought at the time that proceedings that would have formerly been brought as representative actions would now be brought as class actions. However, some time after the repeal of Rule 114, members of the Aboriginal litigation bar requested that the Rules Committee consider its reinstatement. This request was based on the fact that representative proceedings are more appropriate for bringing claims relating to Aboriginal and treaty rights than class proceedings, since there is no need to certify an Indian band, as it is a recognized entity in Canadian law. Aboriginal and treaty rights are *sui generis* rights that are held

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by a community and must be asserted communally. Such rights are not held individually and membership in the group is essential for exercising or enforcing the right. The communal nature of the right is particularly problematic for class proceedings because the opt-out provisions, a critical feature of class proceedings, simply do not work in that context (see: *Gill v Canada*, 2005 FC 192 at para 13, 271 FTR 139).

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[84] A subcommittee reviewed the reasons for the repeal of Rule 114 and the concerns of the Aboriginal litigation bar. They decided that a representative proceeding rule should be reinstated, and moreover, that it should be more comprehensive than its predecessor. This led to the enactment of Rule 114, which applies to applications in addition to actions, and sets out a number of requirements the representative must meet. The safeguards of Rule 114(1) apply to protect the individual members of a First Nation on an application, just as they do on an action; the Court may therefore require that notice be given, conditions be imposed on any settlement process, and the representative plaintiff be replaced.

[85] Counsel for the Respondent Attorney General of Canada argues that applications claiming in regard to Aboriginal rights, similar to actions so claiming, can only properly be brought as representative proceedings. Yet, no authority is provided in support of that proposition.

[86] Counsel for the Respondent Attorney General of Canada referred to a few cases where a claim of Aboriginal rights has been brought by a representative acting on behalf of the members of the First Nation which holds or asserts these rights (see: *Pasco (Oregon Jack Creek Indian Band) v Canadian National Railway Co* (1989), 56 DLR (4th) 404 (BCCA)(available on CanLII), aff'd

[1989] 2 SCR 1069; *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139, 171 ACWS (3d) 501). Not only are these cases not binding on this Court, but they have been decided in the context of a differently worded rule and they do not explicitly state that a representative proceeding is the only way to bring a claim of Aboriginal right.

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[87] In any event, the language of Rule 114 leaves no doubt as to its intent. It is framed as permissive, not as mandatory. The opening words of the Rule clearly state that "…a proceeding (…) may be brought by or against a person acting as a representative on behalf of one or more other persons…" (Emphasis added). Had it been the intention to require all such proceedings be brought pursuant to that Rule, the wording would have been different. Of course, it is always open to the Court to ensure that the Band or the Aboriginal collective do not act in contravention to the will of its members or without lawful authorization. In the case at bar, no such concern has been raised by any of the Respondents.

[88] I recognize that in many cases involving claimed Aboriginal rights and the duty to consult, the applicant is an individual member of the First Nation or its chief on behalf of the First Nation (see, for example, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 , [2004] 3 SCR 511 [*Haida*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763, 315 FTR 178). That does not detract from the fact, however, that Indian Bands are a legal and political entity that can themselves be sued and become the subject of a legal pronouncement (see *Wewayakum Indian Band v Wewayakai Indian Band*, [1991] 3 FC 420 (available on CanLII). While it is true that this case related to a right of occupancy and use of a

reserve and did not involve Aboriginal rights, as submitted by the Respondent Attorney General, it does not detract from the fact that the Band itself was the applicant, as opposed to a representative acting on its behalf. Similarly, a number of Indian Bands brought an application for judicial review of a decision of the Minister of Fisheries and Oceans, on the basis that the Minister had failed to uphold the honour of the Crown and to meet his constitutional duty to consult and accommodate; nowhere did the Court object to the standing of these bands because no representative was involved (*Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212, 379 NR 297).

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[89] For all of the above reasons, I am of the view that the application is not fatally flawed because it was not brought by a representative acting on behalf of the members of the KAFN.

[90] There is an additional, related issue that needs to be addressed before turning to the merits of this application. Counsel for Marine Harvest submits that the Applicant is not owed any duty to consult since there is no correlation between this Indian Band and the Aboriginal group that is entitled to claim Aboriginal rights pursuant to section 35 of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[91] There is no dispute that the KAFN's claim rests ultimately on an assertion of Aboriginal rights. Section 35 of the *Constitution Act, 1982* does not define the "aboriginal peoples of Canada" to whom such rights are recognized, but subsequent jurisprudence has defined the holders of Aboriginal rights as collectives of peoples with distinctive attributes, which may include a common language, culture and social organization. In addition to the identification of the indigenous Aboriginal collective whose pre-contact practices are said to establish the right (in the present case,

the right to harvest wild salmon in the environs of the Broughton Archipelago), the Applicants must also establish a current connection with the pre-sovereign group. To that extent, band membership may not necessarily establish an ancestral connection with the members of the same indigenous Aboriginal collective for which fishing was an integral aspect of a distinctive culture at contact. An *Indian Act* band is a creature of statute that post-dates contact with European settlers, and it cannot be assumed that the membership of a First Nation holding an Aboriginal right is coincidental with the membership of an *Indian Act* band. Indeed, a First Nation holding or asserting Aboriginal rights may have members who belong to several different *Indian Act* bands.

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[92] At paragraph 5 of his affidavit, Chief Chamberlin states as follows:

> The members of the KAFN are the descendants of two distinct but closely associated tribes of the Kwakwaka'wakw people who, at the time of European contact, were known as the Kwicksutaineuk and the Ah-Kwa-Mish. The two tribes were amalgamated for the purposes of the *Indian Act* in 1947 and are now collectively referred to as the KAFN, or the Kwicksutaineuk Ah-Kwa-Mish Indian Band.
>
> Applicant's Record, vol II, p 574

[93] In an affidavit sworn on behalf of the Respondent Marine Harvest, Daisy May Sewid-Smith challenges Chief Chamberlin's assertion that the Kwicksutaineuk/Ah-Kwa-Mish First Nation has Aboriginal fishing rights in the Broughton Archipelago. She deposes that her great-grandfather was a member of one of the three clans of the Qwe'Qwa'Sot'Enox Nation (an alternate spelling of which is Kwicksutaineuk) that lived in the village of Gwayasdums on Guilford Island. She also swears that her great-grandfather moved form Gwayasdums to Village Island, the village site of another First Nation, in 1855, and never returned to Gwayasdums, but never relinquished his ownership of Gwayasdums and the surrounding area. She deposes that the members of the KAFN

presently occupying Gwayasdums are a mixed group of the original three clans and members of neighbouring clans. Through a series of administrative errors by reserve commissioners in the late 1880's, reserves were assigned to the wrong groups; reserves were established within the traditional territory of the Qwe'Qwa'Sot'Enox for the benefit of related tribal groups with no ancestral connection to the land, including the group now comprising the Kwicksutaineuk/Ah-Kwa-Mish First Nation. Thus, she claims that the present membership of the KAFN are not the "true" Kwicksutaineuk people entitled to speak for the ten reserves allocated to the KAFN, or the surrounding lands and waters claimed by the KAFN as their traditional territory.

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[94] There is no need for this Court to settle these competing claims, for at least three reasons. First, a nearly identical affidavit was tendered as evidence by the Crown in the case of *Kwicksutaineuk/Ah-Kwa-Mish First Nation v British Columbia (Minister of Agriculture and Lands)*, 2010 BCSC 1699, 15 BCLR (5th) 322 [*KAFN*]. In that case, the plaintiffs alleged that the Province had licensed fish farms, resulting in sea lice infestations in wild salmon stocks, which infringed upon their fishing rights. One of the issues to be decided for the purposes of certifying the proceeding as a class action, was whether the proposed class (the KAFN and the other First Nations which asserted Aboriginal fishing rights in the Broughton Archipelago and rivers that drain into the Archipelago) comprised Aboriginal collectives or members of these collectives who could assert section 35 fishing rights.

[95] In dealing with this issue, Justice Slade not only considered the affidavit of Daisy Sewid-Smith, but also historical and ethnographic writings. He came to the conclusion that the KAFN,

along with eleven other Aboriginal collectives, were members of a language group that is today referred to as Kwakiutl. He went on to state (at paras 89-90):

> Each are present within a geographical area, largely co-extensive with the Broughton Archipelago, used and occupied at contact by the Kwakiutl. At contact, each had territorial interests within the larger geographical area, and enjoyed access to some resources, in common, within the larger territory with which the Kwakiutl, as a linguistic group (i.e. speakers of Kwak'wala), were associated.
>
> Each of the collectives referred to in the above paragraph is a band with antecedents in the tribal divisions among the Kwakiutl. Each, as a band, occupies one or more *Indian Act* reserves. The reserves front on the waters of the Broughton Archipelago. It would be most unusual to suppose that, as fishing peoples, they do not use their reserves for staging their fishing activities.

[96] Of course, this does not dispose of the competing claims that are asserted with respect to the Broughton Archipelago and the right to fish in that area. Such claims, however, are not to be decided in the conduct of a judicial review application. They are better left to the BC Treaty Commission and, eventually to a trial where oral evidence can be given and the ethnographic, historical and traditional evidence can be comprehensively reviewed and considered. I note, moreover, that the Attorney General of Canada does not dispute that they have a duty to consult with the KAFN and therefore acknowledges, at least implicitly, that the KAFN can credibly claim an Aboriginal right to fish in the area where the two aquaculture licences being considered in this application have been issued.

[97] For all of the foregoing reasons, I am of the view that the KAFN does have standing to bring this application for judicial review.

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2) Did Canada, as represented by DFO, have a duty to consult with the KAFN about the issuance of the aquaculture licences, and more specifically the Burdwood and Blunden licences? If so, what was the extent of the Crown's duty?

[98] It is well-settled law that the appropriate standard of review with respect to the existence and extent of the duty to consult and accommodate is correctness, as this is a pure question of law. On the other hand, the applicable standard for assessing whether the Crown discharged its duty to consult in making a decision is that of reasonableness (see: Haida, above at paras 61-63; *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 174, 333 DLR (4th) 31).

[99] The Crown's duty to consult First Nations arises when the Crown has knowledge, (either real or constructive), of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it (*Haida*, above at para 35). The Supreme Court has restated that test quite succinctly in its recent decision in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31, [2010] 2 SCR 650 [*Rio Tinto*]:

> The Court in *Haida Nation* answered this question as follows: the duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. (Emphasis in original)

[100] The first two requirements are clearly met in the case at bar. When the KAFN became aware of the decision in *Morton* and of the fact that DFO was assuming jurisdiction over aquaculture, it was proactive in notifying DFO in writing that the KAFN had fishing rights in the

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Broughton Archipelago, that it had significant concerns about the impact of salmon aquaculture farms on these rights, and that consultation was required. The letter indicated that the KAFN had previously notified DFO of these concerns. In a letter dated April 1, 2009, DFO acknowledged receipt of the KAFN's letter and acknowledged that "any regulatory transition would require consultation". More specifically, DFO indicated its intention "to engage in meaningful consultation with First Nations", among others, during that period of transition (Respondent Record of the Attorney General of Canada and Minister of Fisheries and Oceans, vol 4, Affidavit of Andrew Thomson, Exhibit "NNN", p 1022). In the course of the following months, DFO also recognized the authority of the KAFN Chief and Council to engage in consultations on behalf of the KAFN. As a result, there is no doubt that the Crown had knowledge of the KAFN's claim to Aboriginal fishing rights.

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[101] There can similarly be no question that DFO proposed to, and did in fact, replace aquaculture licences in the KAFN's territory. DFO's decision to issue replacement licences is a "decision" that triggers the Crown's duty to consult. Indeed, the seminal case of *Haida* arose from the Crown's decision to replace and transfer a tree farm licence from one forestry firm to another in Haida Nation territory.

[102] It is the third requirement that is more contentious. This step reflects the purpose of the duty to consult, which is to try to prevent infringements of Aboriginal rights wherever possible. On this topic, it is worth remembering what the Supreme Court stated in *Rio Tinto*, above at paras 45-46:

> The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts

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

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[103] The KAFN submit that the decision to issue aquaculture licences has the potential to impact their fishing rights in two ways. Relying on *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*, 2011 BCSC 266, 20 BCLR (5th) 356 [*Adams Lake*] and *Gitxsan v British Columbia (Minister of Forests)*, 2002 BCSC 1701, 10 BCLR (4th) 126 [*Gitxsan*], they argued that a change in governance necessarily has an impact on their rights**.** In the first of these two cases, the Court found that the creation of a municipality wherein a ski resort was located, did have a significant potential impact on a band which claimed rights and title to these lands, if only because the resort corporation could more easily influence and control the policies of the municipality than it could have done before at the Regional District level. In the second case, the Court agreed with the applicant First Nations that the government had not fulfilled its duty to consult when it consented to the change of control of a forestry company, holding tree farm licences on lands claimed by the First Nations.

[104] I agree with counsel for the Respondent Mainstream Canada that these cases can be distinguished with the case at bar. In *Gitxsan*, above, the change in the decision-maker concerned

not the regulator but the actual corporation. In *Adams Lake*, above, part of the explanation for the Court's decision was the fact that municipalities are not subject to the duty to consult.

[105] There is, however, a common thread in these two decisions that is equally applicable in the present context. A careful reading of these decisions shows that it is the indeterminacy of the principles by which the new governing entity intends to operate, that triggers the Crown's duty to consult. In *Adams Lake*, at para 127, for example, the Court wrote:

> […] Moreover, a change in governance necessarily has an impact on the lands claimed by the Band because it is the Municipality that will now exercise jurisdiction over Sun Peaks in a manner that may or may not adversely affect the aboriginal rights and title claimed by the Band. (Emphasis added)

[106] In the same vein, the Court wrote in *Gitxsan*, at para 82:

> I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly. (Emphasis added)

[107] Admittedly, the Crown was involved in the change of decision-maker in these two cases, whereas the transfer of jurisdiction from the provincial to the federal government in the present case came as a result of a judicial decision interpreting the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3. Strictly speaking, therefore, the Crown did not initiate that change and it cannot be said to derive from Crown conduct. However, this is inconsequential. If the change in control from

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one company to another may lead to adverse consequences with respect to claimed Aboriginal rights because of differing philosophies, it is more likely to be the case when the transfer of decision-making involves two levels of government, however that may happen. While this may yet be indiscernible, only time will tell whether the regulation of aquaculture will dramatically be impacted as a result of the *Morton* decision. In recognition of this fundamental shift in the management of the aquaculture industry, I believe the federal government had an obligation to consult the Applicant and all of the other First Nations present in the region.

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[108] The second way in which the decision to issue aquaculture licences has the potential to impact the Applicant's fishing rights, is more substantive. The KAFN claim that the licences authorizing aquaculture at the Burdwood and Blunden farm sites pose significant risks to the health and abundance of the wild fisheries, upon which the exercise of their Aboriginal fishing rights depend. This view is grounded in the KAFN's experience of salmon farming in its traditional territory, as found in the evidence of Chief Robert Mountain, and its understanding of the current scientific information about the potential impacts of salmon aquaculture.

[109] Mainstream Canada counters that the transfer of regulatory jurisdiction from BC to Canada that arises from the *Morton* decision does not in and of itself give rise to any adverse impacts on KAFN Aboriginal rights or title. Although the Burdwood licence issued to Mainstream Canada on December 18, 2010 was the first aquaculture licence issued by DFO, it did not allow for any operational changes and it was no different than if the Province had again renewed the annual licence for the Burdwood site in the same form, as had continuously been done since 2003.

[110] It is true that the purpose of consultation is to address concerns regarding new potential adverse impacts. As stated by the Supreme Court in *Rio Tinto*, above at para 49: "Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right". In other words, the scope of the duty to consult does not include past infringements or existing and ongoing impacts of past actions. For the duty to be triggered, there must be a new decision or conduct that may affect Aboriginal rights. The re-issuance of a licence, even if it is similar to the one it is replacing, is certainly sufficient to meet the third requirement underlying the duty to consult (see, for example, *Upper Nicola Indian Band v British Columbia (Minister of Environment)*, 2011 BCSC 388 at paras 103-114, 21 BCLR (5th) 81). It is a fresh action, so much so that in the absence of the renewed licence, the commercial activity authorized by that licence would have to come to a halt. In my view, the duty to consult arises each time a licence is renewed, because each new licence may potentially affect the claim right or title, if only incrementally. Otherwise, the duty to consult would be spent once the initial licence has been granted, for however long a period it is renewed and irrespective of the impacts the renewed licences may have down the road. Such a reasoning would make a mockery of the duty to consult and of the honour of the Crown.

[111] That being said, the extent of the changes brought about by the renewal of a licence will be a crucial factor to be considered when assessing the extent of the duty to consult. The Supreme Court recognized in *Haida* that what is required of the government will vary with the strength of the claim and the impact of the contemplated government conduct on the rights at issue. When the Aboriginal right is limited and the potential for infringement minor, the duty to consult will be minimal and the

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Crown may only have to give notice, disclose information and discuss any issues raised in response to the notice. When, at the other end of the spectrum, there is a strong *prima facie* case for the claim and the right and potential infringement is of high significance to the Aboriginal people, "deep" consultation aimed at finding a satisfactory interim solution may be required. As the Chief Justice stated, on behalf of a unanimous Court in *Rio Tinto*, above at para 36, "[t]he richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right…".

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[112] In the case at bar, the Attorney General has acknowledged a duty to consult and made no submissions with respect to the strength of the claim asserted by the Applicant. The Applicant itself was silent on that score. In those circumstances, it would be most inappropriate for the Court to speculate on that first branch of the equation, and I shall therefore refrain from any comment except to note that there seems to be competing claims from many other First Nations on the same territory where the KAFN asserts fishing rights. In his decision, Justice Slade points out that there are several other Aboriginal collectives (many of which are part of the MTTC) that have extensive overlapping territorial claims within the Broughton Archipelago (*KAFN*, above at paras 79-85).

[113] There is more evidence with respect to the second variable of the equation, i.e. the impact of the licences on the Aboriginal fishing right claimed by the Applicant. As previously mentioned, the KAFN relies on the affidavits of Robert Mountain and Michael Price in support of their argument that the authorization of open net salmon aquaculture operations in the Broughton Archipelago has a high potential to adversely impact the KAFN's salmon fishing and shellfish harvesting rights,

particularly in areas identified by the KAFN as sensitive fish habitat such as the Blunden and Burdwood sites.

[114] In response to that assertion, the Attorney General of Canada has submitted an affidavit of Pieter Van Will, employed by DFO as the Program Head of North Island Salmon Stock Assessment, wherein he refers to affidavits that he filed in the BC Supreme Court in a related case opposing the Applicant and the Attorney General. At issue in that claim for damages are the wild salmon populations in the same area defined as the Broughton Archipelago.

[115] While the Van Will affidavits do not come to any definitive conclusion, they provide for a much more nuanced and thorough assessment of the scientific evidence with respect to the status of the salmon stocks within the disputed area. It is obviously not for the Court to come to a definitive finding on these complex scientific issues, especially in the context of an application for judicial review. All that can safely be said, on the basis of the uncontradicted evidence of Mr. Van Will, and bearing in mind the serious deficiencies plaguing the Price and Mountain affidavits, is that there is still a lot to be learned as to the causes of the decline of some salmon stocks in some rivers of the Broughton Archipelago. In light of this evidence, I am of the view that the seriousness of the impact caused by the issuance of the impugned licences on the KAFN's asserted Aboriginal right remains an open question; far from being firmly established, the adverse effect of the licences as issued on December 18, 2010 is, at least for now, speculative. I find myself in much the same situation as Powers J. in *Homalco Indian Band v British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283 at para 34, 39 BCLR (4th) 263, where he could only notice that there are serious gaps and differences in scientific opinion about the effects and risks involved with

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salmon aquaculture. While seven years have gone by since he made these comments, there does not seem to be any more certainty as a result of the further studies that have been conducted in the meantime.

[116] In the result, I come to the conclusion that the consultation required is clearly not at the upper end of the spectrum as advocated by the Applicant. I would also be inclined to think that it does not lie at the lower end of the spectrum either, considering the seriousness of the potential impact caused by fish farming on the Aboriginal fishing right claimed by the Applicant. At the end of the day, however, it does not matter where this case falls on the spectrum, as I find that the Government of Canada has done what was required in the circumstances, to maintain the honour of the Crown and to effect reconciliation with respect to the interests at stake.

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3) Were DFO's efforts at consultation reasonable under the circumstances?

[117] The KAFN submit that DFO never consulted them in the decision to replace the aquaculture licences. In fact, DFO demonstrated a genuine unwillingness to consult with the KAFN on this matter. The limited consultations DFO undertook with the KAFN, dealt with the general regulatory framework. These do not fulfill the Crown's duty to consult on the licences – which are the operations that cause the negative impacts on KAFN's Aboriginal fishing rights.

[118] Alternatively, the KAFN argues that if DFO is found to have consulted on the decision to issue the licences, this consultation was inadequate and meaningless. First, DFO neither assessed the strength of the KAFN's Aboriginal right nor the potential impacts of the issuance of the licences. Second, there is no evidence that DFO considered the KAFN's concerns regarding the *Regulations*, the issuance of the licences and the licensing conditions. DFO did not respond to the

KAFN's concerns as presented in various correspondences, and did not conduct an environmental assessment or indicate the importance of doing so. Moreover, DFO merely informed the KAFN of the issuance of the licences almost a month after the facts, and did not provide reasons for its decision.

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[119] Having carefully reviewed the record and considered the arguments made by the parties, I find that the KAFN's assertions are not borne out by the evidence that is before the Court. First of all, it must be acknowledged that DFO was put in a very difficult position as a result of the *Morton* decision. Since it was obviously not a viable option to let the 680 licences lapse without renewing them, DFO had to simultaneously put in place an entire regulatory and licensing regime for a very complex industry in a very short time frame. The KAFN is correct in stating that the Crown cannot sacrifice its constitutional obligation to consult, in the name of efficiency. The evidence shows, however, that DFO consulted extensively over the course of the 22 months between the release of *Morton* and the deadline set by the Court to allow the federal government time to consider and put in place its own regulatory regime. During that period, DFO (1) provided more than $2 million of capacity funding collectively to the Fisheries Council and the Aboriginal Aquaculture Association over 2009 and 2010 to facilitate consultation with a large number of First Nations; (2) provided information regarding the change in regulatory regime and DFO's approach to its regulation of aquaculture throughout 2009 and 2010; (3) hosted bilateral meetings or participated in bilateral workshops on June 16-17, December 10, 11, and 14, 2009 and on March 30, 2010; (4) provided the draft *Regulations* for review and comment; (5) provided a draft DFO licence for review and comment; (6) met directly, either in person or by phone, with the KAFN and MTTC on September 2, October 21, November 17 and December 10, 2010; and (7) provided information regarding how

DFO intended to address consultation within its new regulatory regime in the future, including the use of IMAPs, to provide for area-based management.

[120] DFO ultimately decided to issue licences for the 22 salmon farms in the Broughton region, effective December 19, 2010, on a transitional basis. While it is true that provincial licences were typically issued annually as well, salmon are raised at the facilities for 16 to 22 months, meaning that one year licences are of limited utility. DFO intends to eventually issue longer term licences, but decided to issue one year licences in order to allow for further review of licence conditions and an opportunity for further consultations prior to decisions on renewal. DFO also maintained existing provincial restrictions on maximum production and permissible species.

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[121] In arriving at its decision to issue the licences, DFO considered the information contained in the provincial licences, the information provided by First Nations during the course of DFO's consultations, the information from the licence applicants/proponents as put forward in their applications, and the scientific information pertaining to aquaculture environmental impacts. As part of the context for this decision, heed was also paid to the improvements of the federal regulatory regime over the provincial one, including the new federal requirements and measures to address fish health and environmental concerns relating to the farms (see Thomson Affidavit, paras 87 and 135).

[122] I agree with the Attorney General that the proposal put forward by the MTTC/KAFN in their letter of December 17, 2010, and in particular their request that no licences be issued to six key farms in MTTC territory (including Burdwood) amounts, in essence, to a fallowing strategy for the entire Broughton region. Such a position is unreasonable, as a fallowing strategy for the Broughton

Archipelago region, if necessary, would have to come out of a broad multilateral consultation involving all First Nations potentially impacted by salmon farms in the region, as well as other interested parties.

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[123] Moreover, and contrary to the Applicant's assertion, the MTTC/KAFN raised these interim accommodation measures for the first time one day before the expiry of the provincial licences, in that letter of their counsel dated December 17, 2010. In her letter dated September 8, 2010, counsel for the MTTC/KAFN merely stated the need for direct consultation in respect of "any proposed licences, or licence replacements, in their territory". Then, in a November 19, 2010 letter, the MTTC/KAFN asserted for the first time that system-wide matters in regard to all of the salmon farms in the Broughton Archipelago had to be addressed prior to issuance of federal licences. Then again, the MTTC/KAFN altered its position at the meeting held on December 10, 2010, as previously mentioned in paragraphs 47 to 49 of these reasons. It is at that meeting that the KAFN apparently communicated to DFO its concerns with specific sites and requested the closing, or at the very least the phasing out, of six farms in their territory. Not only did this request come only a week before the expiry of the provincial licence, but more importantly, it would have been impractical and unwarranted to take a decision on these farms in isolation, without consultation on an area management plan. DFO's intention to continue the consultation in respect of area management in the Broughton Archipelago ecosystem as well as in regard to non-regional, site specific matters was also a factor taken into account in deciding to issue transitional, one year licences.

[124] When viewed as a whole, DFO's consultation regarding the regulatory framework and the issuance of licences was reasonable and was certainly not meaningless. Inherent in the concept of

the honour of the Crown in consultation cases is the issue of balance and compromise. As the Supreme Court stated in *Haida*, above at para 45:

> …Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

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[125] In short, I have not been convinced that the consultations were not genuine and were only meant to give Aboriginal groups the opportunity to blow off steam. Quite to the contrary, the evidence demonstrates that the Crown, through DFO, approached the consultations with an open mind. Extensive consultation took place both on the regulatory and on the licensing regime, despite the very short time frame within which the transfer of jurisdiction from the provincial to the federal government had to take place. The consultations were not meaningless, and Mr. Thomson testified in his affidavit that the comments and recommendations received on the draft *Regulations* assisted in the refinement of a number of their provisions. That DFO did not agree with the last minute interim measures proposed by the KAFN is no indication that the consultation was not genuine, for all the reasons already given.

[126] In light of all the above, I am therefore of the view that this application for judicial review ought to be dismissed, with costs to all three Respondents.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with costs to all three Respondents.

"Yves de Montigny"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-70-11
STYLE OF CAUSE:	KWICKSUTAINEUK AH-KWA-MISH FIRST NATION v ATTORNEY GENERAL OF CANADA ET AL
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	November 7, 8, 9 and 10, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	May 3, 2012

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[5] SON Letter. Letter from the Saugeen Ojibway Nation to the CNSC with Statement of Rights and Concerns attached. February 20, 2013. Deep Geologic Repository Project for Low and Intermediate Level Radioactive Waste comment reference number 894.

From: Francis, Kiza
Sent: February 20, 2013 12:29 PM
To: McGee, Kelly; Myles,Debra [CEAA]
Cc: 'jakelinklater '; 'amonem; 'nframe; 'e.cameron; 'd.jacobs; DGR Review / Examen DFGP [CEAA]
Subject: Letter from SON to CNSC with Statement of Rights and Concerns attached

Ms. McGee / Ms. Myles,

In the January 29, 2013 Crown Consultation summary update to the Joint Review Panel, CNSC staff committed to providing the attachment to the December 5th, 2012 letter from the SON to the CNSC which includes the 2008 Statement of Rights and Concerns. CNSC staff have confirmed with the SON that this letter can be submitted to the JRP. The SON has requested that the full letter be submitted to ensure context is provided for the 2008 document.

CNSC staff would like to note that the 2008 Statement of Rights and Concerns, although originally submitted to CNSC in June 2008, was not retained by CNSC staff, as per SON's request. The submission of the document, attached to the December 5th, 2012 letter is the first time CNSC staff have been able to review the document.

Sincerely,
Kiza Francis

Kiza Francis
Environmental Assessment Specialist /
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BY EMAIL

December 5, 2012

Dear Dr. Thompson,

Re: CNSC and SON Meeting on OPG's DGR Project and NWMO's HLW Project, Response to your Letter of November 16, 2012

We have reviewed your letter of November 16, 2012. Your letter was not a full response to our letter of November 9, 2012 and failed to address key issues we raised. Quite frankly, your letter appears primarily intended to stake out CNSC positions on the record. This is unhelpful and will not lead to a productive or honourable consultation relationship between SON and the Crown. It is, therefore, critical that we meet now to arrive at common understandings about the scope, subjects and processes of our ongoing consultations. Accordingly, we write this letter to provide context for our next meeting.

The Consultation Relationship between SON and CNSC

In our letter of November 9, 2012 we proposed as an agenda item "[a] full discussion, including implementation plan, respecting a renewed consultation relationship between SON and the Crown." You ignored this item when you reframed the proposed meeting agenda in your letter of November 16, 2012. We must reiterate that this is a critical issue that must be addressed at the outset of our next meeting.

In your letter you state that we "suggest[] that there has not been real and substantive engagement of [SON] by [CNCS] as a representative of the Crown." That is incorrect.

There have been—in the past—instances of real substantive engagement between SON and CNSC, as demonstrated by the pattern of engagement we had established leading up to the development of the JRP Agreements for OPG's project as well as the Bruce New Build project. Unfortunately, that pattern of engagement and consultation has not been maintained by the Crown.

Leading up to the review of the Bruce Power New Build project, SON and CNSC representatives were in close and direct communication and SON and a CNSC led federal review team for that project met in a full day workshop to coordinate, discuss and share information on our respective review processes. We have not been invited to participate in CNSC processes at this level with respect to the DGR review. Also during that time, we had an agreement that SON would have an opportunity to vet the list of candidates for the Bruce Power New Build and the OPG DGR panels. As you know, at our meetings in December 2010 and January 2011, CEAA representatives reneged on this commitment and indicated they would not even inform us of their recommendations for the panel.

Our members are very troubled by reports of comments made by CNSC representatives at a recent presentation in Port Elgin ("CNSC 101"). We understand that comments were made suggesting Aboriginal people do not have a veto and that SON was opposed to the DGR project. These sorts of comments are inaccurate, irresponsible and demonstrate an antagonism to SON that is antithetical to real consultation. SON, in its many public statements, accepts the responsibility to be part of nuclear waste management decisions in our territory and will consider all projects that respect and accommodate SON rights and are undertaken responsibly. Comments that misrepresent SON positions prejudice us and harm our ability to enter into constructive dialogue with other decision makers. We would ask that you be prepared to clarify the statements and positions expressed by your representatives at the Port Elgin meeting.

The Connection Between OPG's DGR Project and the High Level Waste DGR Project

A foundation of our concerns has always been that OPG's DGR project would pave the way for a high level waste repository in our Territory. We have made this concern known to you since our very first meetings. SON restated this fear on the record in other CNSC processes, including at the hearings for the Darlington NNPP JRP in March 2011. We made submissions to the JRP in early August 2012, asking for a determination that the HLW DGR project be considered as part of the cumulative effects analysis in the DGR review. Recent events dramatically increase the likelihood that our fears will be borne out and that NWMO will settle on a site within our Territory for its HLW DGR.

In our November 9 letter, We asked that you be prepared to discuss our long-standing concerns respecting the connection between the two projects, as well as CNSC's position on whether the HLW DGR should be considered as part of the DGR review. You have not responded to this. Instead, you suggest an alternative agenda item: "Discussion of CNSC regulatory role in the two separate initiatives...."

We do not wish to read too much into your phrasing, but your letter appears to maintain what we feel is a fictitious and inappropriate separation between these two projects. As we have said, this approach will undermine the current JRP review of OPG's DGR project. More importantly, if CNSC, as Crown representative, accepts this distinction and refuses to consult with us on the connection between these two projects and their

impacts on SON rights and interests, it will fundamentally undermine any meaningful consultation process between SON and the Crown. The Crown does not owe SON a duty of consultation limited to the scope of the review of OPG's DGR project. The Crown owes SON a duty to consult on a much broader scope of projects and decisions relating to nuclear projects within SON territory, including the increasing certainty that repositories for both used nuclear fuel and low and intermediate nuclear waste will be built here.

SON Rights and Potential Impacts

We are fully prepared to discuss with you the nature of our concerns, including the kinds of impacts on our rights that we fear will occur if these projects are carried out. We have talked to you about these in the past, and we sent to you an outline of our concerns in a letter dated June 18, 2008, which we attach again here for your consideration. At that time, and before recent events respecting the development of a high level repository in our territory, we noted that the rights we feared would be impacted included the right to be sustained by our lands, waters and resources, the right to continue to harvest for sustenance, cultural and livelihood purposes and the right to be meaningfully involved in decisions that affect our territory so that we could exercise our roles as stewards and protect our territory for future generations. We specifically identified important commercial fishing rights and valuable recreational properties. We outlined our concerns that these rights and interests were threatened by the many projects, including nuclear projects, existing or planned for the territory.

SON will need to provide information on these and other matters to the Panel in the context of the current review. We remain, however, deeply concerned that this review is not yet properly scoped to fully address all impacts that these project will have on our rights. It is for this reason that we made our submissions to the Panel and that we have asked you to clarify CNSC's position in this regard. Again, these are issues that we expect to be fully addressed in our ongoing discussions with CNSC as representatives of the Crown.

Next Steps

We understand that a potential date of December 18 has been proposed for our next meeting. In our November 9 letter, we asked you ensure that CNSC representatives attending our next meeting will be authorized to discuss and commit to positions on the broad matters we have outlined above. We ask again that you confirm this.

Miigwetch

<original signed by>

Chief Scott Lee
Chippewas of Nawash Unceded First Nation

<original signed by>

Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc: Alex Monem, Pape Salter Teillet
Encl.

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Directorate of Environmental and Radiation Protection and Assessment,
Canadian Nuclear Safety Commission
280 Slater Street
P.O. Box 1046, Station B
Ottawa, ON K1P 5S9

BY EMAIL: Patsy.Thompson@cnsc-ccsn.gc.ca

June 18, 2008

Dear Dr. Thompson,

Re: SON Statement of Rights and Concerns

In our meetings earlier this year, we committed to you that we would provide CNSC-CEAA with a statement outlining our rights and concerns with respect to both Bruce Power's New Nuclear Power Plant Project and Ontario Power Generation's Deep Geological Repository. We are attaching to this letter a confidential working draft of SON's Statement of Rights and Concerns.

This draft has been developed through many meetings with our Consultation Committee, however, it has not yet been finalized or ratified by our Joint Council. Over the next month or so, and before CNSC – CEAA conclude their process of finalizing the JRP Agreements and draft EIS Guidelines respecting these two projects, we will have ratified the Statement and it will then be available for public release and release to the proponents.

In the meantime, we send this draft to you in confidence and ask that you not release it publicly or post it on your website. We understand that you will share it with your colleagues at CNSC and CEAA. We hope that it will be of value to you in your work and it will help inform our future consultations.

Miigwetch

<original signed by>
Chief Ralph Akiwenzie
Chippewas of Nawash Unceded First Nation

<original signed by>
Chief Randall Kahgee
Chippewas of Saugeen First Nation

cc: Pape Salter Teillet, SON Consultation Committee

CHIEFS AND COUNCILS
SAUGEEN OJIBWAY NATION

Statement of Rights and Concerns

(June 18, 2008)

Purpose and Scope

1. We are the Saugeen Ojibway Nations, consisting of the Chippewas of Saugeen First Nation and the Chippewas of Nawash Unceded First Nation. Our ancestors have lived in this part of the Great Lakes region since time immemorial, and we will continue to live here long after others have gone. Our territory, the Anishinaabe-aki, defines and sustains us as Aboriginal people, and must continue to do so for countless generations to come.

2. We present this Statement as an expression of our rights and concerns with respect to projects that others have planned for our territory. Those projects would provide electrical energy and benefits to others, but threaten significant harm to our People and our future. We are deeply concerned about proposals for more nuclear reactors, an underground repository for nuclear wastes, hundreds of windmills and new transmission lines, all within in our territory.

3. The concerns we express in this Statement must be acknowledged by governments and the proponents of these projects. The issues we raise must be resolved through effective consultations and accommodation agreements with the Crown before SON could consent to these projects going ahead in our territory.

4. This Statement of Rights and Concerns is an evolving document, intended to provide a basis for consultations. It does not exhaustively define our rights and territory, or the ultimate positions SON may take with respect to the projects.

The Saugeen Ojibway Nations and our Territory

5. We are the Anishnabek people of the Great Lakes region. Our creation story tells us that our People originate here, from an island called Michilimackinac in the strait between Lake Huron and Lake Michigan. The grave sites of our ancestors are here, and still now, our dead are brought back to this land to be buried. Our identity as an Aboriginal people grows out of our relationship and connection to our territory.

6. Our ancestors used and occupied the Anishinaabe-aki historically, and we continue to do so today. Our territory consists of everything integral to life - the lands, rivers, lake, winds, grass, people, animals and fish. The Anishinaabe-aki has sustained our People physically and spiritually for countless generations, and must continue to do so far into the future.

7. Our territory extends east from what we now call Lake Huron to the Nottawasaga River and south from the tip of the Bruce Peninsula to the Maitland River system, 11 miles south of Goderich. Our Traditional waters around these lands include the lakebed of Lake Huron from the shore to the international boundary with the United States and the lakebed of Georgian Bay to the halfway point.

8. We use and occupy the Anishinaabe-aki now as our ancestors did, in a variety of ways and for many purposes, including hunting, fishing and gathering for sustenance, healing, cultural and trade purposes. It is the source of our identity as Aboriginal peoples, and the base for our cultural activities and spiritual ceremonies. We rely on its resources to support ourselves economically. We continue to exercise governance functions and stewardship, in order to protect the territory and ensure its ongoing ability to sustain our People.

9. Within our territory, the Saugeen Ojibway Nations occupy large, unceded Communal lands bordering Lake Huron and Georgian Bay, resulting from our Treaties with the Crown. We enjoy exclusive use and occupation of those lands, and they are critical to sustaining our future in many ways. They house our residential communities and

places of high cultural and spiritual importance. They are grounds for our subsistence fishing, as well as for our hunting and our gathering. They are the base for many current and future economic opportunities, including a commercial fishery and valuable recreational properties.

10. SON also enjoy the exclusive use of a large hunting reserve in the northern part of the Saugeen Peninsula.

SON Treaties with the Crown

11. SON continue to have and exercise Aboriginal and Treaty rights throughout our territory. Our Aboriginal and Treaty rights reflect our unique historical, cultural and spiritual relationship to the territory and our special relationship with the Crown.

12. Our relationship with the Crown is based on our Treaties, which are solemn agreements between our People and the Governments of the time to share access to the land and preserve peace, and protect our way of life as Aboriginal people within our territory.

13. The Royal Proclamation of 1763 constituted a promise by the British government to protect Aboriginal lands, including our territory, from encroachment by non-Aboriginal settlers. The Proclamation was issued at a time when Aboriginal people held the balance of power in the Great Lakes region, and was a recognition of Aboriginal ownership of our territory as a pre-existing interest that co-existed with any assertion of Crown "Sovereignty".

14. In 1764, Crown representatives met with more than 1,500 of our Anishnabek Chiefs and Warriors at Niagara Falls. Here, the Royal Proclamation was explained as a fundamental commitment to treat Aboriginal peoples with honour and justice. It was explained that the Crown would only require the "eastern corner" of the Great Lakes, and that the Anishnabek would flourish with the British as their allies. After days of meetings, the first Treaty between our People and the Crown was entered into as an

agreement between equals and for mutual benefit. The Treaty of Niagara was sealed by the delivery of two wampum belts, and became sacred and inviolable.

15. After the Treaty of Niagara, SON ancestors signed other Treaties with the Crown respecting our territory. Two major Treaties signed in 1836 and 1854 recognize our rights throughout our territory and set aside large unceded communal lands for our exclusive use and occupation.

16. Treaty 45½ was signed in 1836 under the threat of ever increasing encroachment by non-Aboriginal settlers and the Government's professed inability to prevent it. SON ancestors agreed to a surrender of 1.5 million acres of our lands south of the Saugeen Peninsula, in return for, among other things, a promise by the Crown that it would protect the Saugeen Peninsula and surrounding islands and fisheries from further encroachment.

17. In 1854, Treaty 72 was signed under similar circumstances and with the same promises by the Crown. By Treaty 72, the majority of land on the Saugeen Peninsula was surrendered with the exception of our Communal lands.

18. By signing Treaties, our ancestors never intended to become subjects of the Crown, or to surrender their authority over the land. Our Treaties were not intended to, and did not, sever our connection to our territory, or give up our right to be sustained by our lands, waters and resources.

19. Despite the context of duress under which we signed our Treaties, or the Crown's continuing failure to honour the promises and obligations they contain, our Treaties fundamentally recognize our special relationship with the Crown and our Aboriginal and Treaty rights throughout our territory.

20. We agree with the essential conclusions of the Royal Commission on Aboriginal Peoples that our Treaties with the Crown were entered into as agreements between nations, and that treaty making was an exercise of the governing and diplomatic

powers of the nations involved, intended to recognize and respect one another and to make commitments to a joint future.

21. Our Treaties create enduring relationships between SON and the Crown. Their words, and the understandings on which they were based, are recognized and affirmed by Canada's Constitution and continue to have the full force of law in Ontario and Canada.

22. The rights recognized in our Treaties are not frozen or predetermined, but evolve to allow us to exercise our essential rights and practice our way of life as Aboriginal Peoples in a modern context.

SON Aboriginal and Treaty Rights

23. We assert that our Aboriginal and Treaty rights fundamentally entitle us to be sustained as Aboriginal Peoples by the lands, waters and resources of our territory, and to protect our territory to ensure that it will be able to sustain us far into the future.

24. SON asserts that, at a minimum, our Aboriginal and Treaty rights include the following:
    a. The right to continue to be a distinct people living within our territory.
    b. The right to maintain our culture, language and way of life.
    c. The right to be sustained by our lands, waters and resources.
    d. The right to the exclusive use and occupation of our Communal lands.
    e. The right to continued use of all of our territory.
    f. The right to harvest for sustenance, cultural, and livelihood purposes.
    g. The right to be meaningfully involved in decisions that will affect our territory so that we can protect our way of life for many generations to come.
    h. The right to be the stewards of our territory.

25. SON rights specifically include valuable commercial fishing rights in Lake Huron and Georgian Bay. These rights were recognized and confirmed in *R. v. Jones and Nadjiwan*. Our commercial fishing rights are an interest of growing economic and social importance in light of the increasing settlement in the region.

26. Further, SON has asserted claims to some lands and lakebeds in our territory, in two separate legal actions currently before the Courts. The first claim is for a return of certain lands still owned by the Crown within the Saugeen Peninsula, that were surrendered under Treaty 72. The claim is based on the Crown's failed promise in Treaty 45½, and breach of its fiduciary duty to protect our lands from encroachment by non-Aboriginal settlers.

27. The second claim is for a declaration of our Aboriginal title to the lakebeds of Lake Huron and Georgian Bay within our territory. These lakebeds were never identified or negotiated as part of our historical Treaties with the Crown, and consequently, were not subject to surrender.

The Impact of Industrial-scale Energy Production in our Territory

28. In the past 50 years, our territory has been exploited by others for industrial-scale energy production. The Bruce nuclear complex consists of 8 nuclear reactors producing over 6000 MW of power, making it among the largest nuclear facilities in the world. The Western Waste Management Facility within the Bruce site houses an ever growing amount of fuel wastes, and non-fuel nuclear wastes collected from other regions in Ontario. Large scale wind farms have already been constructed in our territory, and much more wind generation potential has been identified. Transmission facilities, including the existing Bruce to Milton 500 kV line, transect the territory. These were authorized and developed without our consent, participation, or consultation.

29. There are still many unresolved issues and grievances resulting from that history of energy development, that should be addressed before further developments are considered.

30. However, our territory has now been targeted for a dramatic increase in energy production. The projects others have proposed for our territory include:

    a. Refurbishment of existing nuclear reactors at the Bruce complex extending operation for 30 years.
    b. Construction of 4 additional, higher output reactors, at the Bruce Complex.
    c. Construction of Canada's first Deep Geological Repository for low and intermediate level nuclear wastes.
    d. Construction of a new 500 kV double circuit transmission line from the Bruce Complex to Milton, cutting 80 kilometres through our lands
    e. Development of over 2000 MW of wind generation throughout our lands through the installation of hundreds of wind mills.
    f. The construction of new collector and enabler transmission lines to service generation, including a 230 kV line running the entire length of the Saugeen Peninsula.

31. SON has a significant and unique interest in all of these proposed projects, as their construction, operation and possible malfunction would affect our Aboriginal and Treaty rights, and threaten serious consequences for our People and our territory. These projects would fundamentally change our relationship to our territory, and threaten the ability of the territory to sustain us as Aboriginal people.

32. For SON, all of the proposed projects are interrelated and must be considered together. These projects would have cumulative effects on our territory and our rights. Such potential impacts can only be determined through a comprehensive approach.

33. SON also has specific concern respecting the projects.

34. The proposals respecting development at the Bruce complex would continue and significantly increase nuclear energy production in our territory. The proposal calls for the use of new higher output reactors of unproven design. If completed, it will be the largest nuclear generation facility in the world. The waste storage facilities at the site will continue to house high level fuel wastes that will accumulate at an accelerated rate, and for which no long term storage solution is planned. The Bruce complex will also be the site for Canada's first underground repository for low and intermediate nuclear wastes.

35. The Bruce complex is directly on Lake Huron and in an area of significant environmental, cultural, spiritual and economic important for SON. The construction, operation and potential malfunction of these facilities threaten significant, widespread and irreversible harm to the lake and surrounding land areas.

36. Throughout our history, and continuing today, we have used these places to harvest animals, plants and medicines. Our sustenance fishing and our commercial fishery depend on the health of Lake Huron. We have culturally and spiritually significant areas in the vicinity of the proposed project, including the gravesites of our ancestors.

37. The proposed transmission facilities required to support increased generation capabilities at the Bruce complex would cut approximately 80 kilometres through our territory, crossing many rivers leading to Lake Huron. The line will transect and impinge on bird and animal migration routes that are connected to our many hunting grounds.

38. A large number of wind farms have been proposed for sites throughout our territory, as identified in Ontario's Integrated Power Supply Plan. Two large wind farms, constituting more than 400 MW of generation, are targeted for the northern part of the peninsula near our hunting reserve. The transmission lines required to service these generators would run through the heart of our territory, and along our communal lands that house our residential communities.

39. Although these projects, would individually and cumulatively affect our Aboriginal and Treaty rights in profound ways, we have not been consulted, impacts have not been properly studied, and no accommodations have been developed.

40. These developments would also threaten our Communal lands. We currently use and rely on our lands at Saugeen and Nawash as valuable recreational properties. The potential of our lands for tourism, recreation and service industries is central to the development of healthy economies for our communities. However, this potential is jeopardized by much of the proposed industrial-scale energy production.

41. SON is concerned that the nuclear projects will exacerbate an existing nuclear waste problem for which there is no solution, and that the problem will fall to our future generations. These projects will continue to be a threat to the health and safety of our territory and our People for many hundreds of generations. They will require an unprecedented level of management, monitoring and regulation far into the future. We are deeply troubled that the very long term safety of these projects would depend critically on the stability and continued independence of regulatory institutions which have recently been subjected to political interference.

Consultation and Accommodation

42. The recent history of our territory has been that major developments are planned and carried out in a way that exploits our land and resources, subject our people to significant risks without our consent, and interfere with our rights and relationship to our territory. Further, we have been completely excluded from the economic benefits derived from our lands and resources. We have consistently been asked to bear the costs and risks of major developments and energy production without an equitable sharing in their benefits. The projects now planned for our territory continue this history of inequity.

43. SON will only consider projects in our territory acceptable if we have confidence that projects can be carried out in a way that:

(1) does not subject our territory or our People to undue risks or harms;

(2) contributes to the long term sustainability of the territory by improving the environmental, social, cultural and economic well-being of our People and the region; and

(3) ensures that they will be managed, monitored and regulated effectively and with our appropriate participation.

44. SON was not consulted when the first wave of major energy developments where planned and implemented in our territory over the last 50 years. We were merely expected to accept the plans of others, and the consequences they had on our rights and our lands. We should not be considered a willing host community for those existing energy-related projects in our territory. We cannot accept another such wave of development, before meaningful consultations have taken place and appropriate accommodation measures are agreed to.