The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery

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Introduction

1 This paper is intended to provide an overview of the aboriginal and treaty rights framework underlying the Fraser River sockeye salmon fishery. It is primarily based on a survey of cases determined by the Supreme Court of Canada (the "Court") the British Columbia Court of Appeal (the "BCCA") and the British Columbia Supreme Court (the "BCSC"). This paper is not intended to provide an exhaustive discussion of all cases that may be relevant to aboriginal and treaty rights related to the fishery.

2 Counsel for Participants will have the opportunity to express their comments on this paper at the Commission's hearings on "Perspectives on Aboriginal and Treaty Rights Underlying the Fraser River Sockeye Salmon Fishery" scheduled for October, 2010.

Constitutional Recognition and Affirmation of Aboriginal and Treaty Rights

3 The *Constitution Act, 1982*[1] recognizes and affirms the aboriginal and treaty rights of the aboriginal peoples of Canada,[2] by providing at s. 35(1) that:

> *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

4 Constitutional entrenchment of aboriginal and treaty rights affirmed and recognized that, as the first inhabitants of North America, the rights of the aboriginal peoples of Canada are to be accorded special legal and constitutional protection. Chief Justice Lamer explained this in the aboriginal fishing rights case *R. v. Van der Peet:*[3]

> *In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which*

[1] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[2] Section 35(2) of the *Constitution Act, 1981* defines the "aboriginal peoples of Canada" as including the Indian, Inuit and Métis peoples of Canada.
[3] *R v. Van der Peet,* [1996] 2 S.C.R. 507. (*"Van der Peet"*)

> *mandates their special legal, and now constitutional, status.*[4] [emphasis in the original]

5 The entrenchment of existing aboriginal and treaty rights gave constitutional status to rights that were previously vulnerable to unilateral extinguishment.[5] This entrenchment did not create new aboriginal rights, but rather, protected those rights already "existing" in 1982.[6] The effect of this protection is to "hold the Crown to a substantive promise" and to "[give] a measure of control over government conduct and a strong check on legislative power" by ensuring that the government is required to "bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1)."[7] Any law that is unjustifiably inconsistent with the Constitution is, to the extent of the inconsistency, of no force or effect.[8]

6 However, the recognition and affirmation of rights is only a starting point. In developing the law of aboriginal and treaty rights, courts must also take into account the fundamental objective that underscores such recognition and affirmation. This objective is the reconciliation of relationships among aboriginal and non-aboriginal peoples. As explained by Binnie J. in *Mikisew Cree First Nation v. Canada*,[9] the reconciliation of the claims, interests and ambitions of both groups rests at the heart of modern aboriginal and treaty rights law:

> *The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions*.[10]

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[4] *Van der Peet*, para 30.
[5] *R v. Marshall*, [1999] 3 S.C.R. 533, para 6. (*"Marshall II"*)
[6] *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, para 133. (*"Delgamuukw"*)
[7] *R v. Sparrow*, [1990] 1 S.C.R. 1075, [1990] S.C.J. No. 49, para 65. (*"Sparrow"*)
[8] *Constitution Act, 1982*, s. 52.
[9] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69. (*"Mikisew Cree"*)
[10] *Mikisew Cree*, para 1.

Aboriginal Title to Marine Areas or Rivers

Introduction to Aboriginal Title

7 The Court has acknowledged that the rights of aboriginal peoples to their traditional lands has, for many years, been virtually ignored and that it was not until after a number of judicial decisions, notably *Calder et al. v. Attorney-General of British Columbia*[11] in 1973, that the government was prompted to reassess that position.[12] In *Calder*, the Court held that prior aboriginal occupation of North America could give rise to rights that were not merely personal or usufructory in nature:

> *[T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructory right". What they are asserting in this action is that they have a right to continue to live on their lands as their forefathers had lived and this right has never been lawfully extinguished*.[13]

8 Essentially, the Court in *Calder* recognized aboriginal title as a legal right, identified the source of that right as the prior possession of tribal territories by aboriginal societies, and that therefore the existence of the right did not depend on treaty, executive order or legislative enactment.[14] However, it would take the next two decades for the Court to articulate the nature of aboriginal title and to determine whether or not it continued to exist.

9 In 1984, aboriginal title was revisited in *Guerin v. Canada*,[15] wherein the Court affirmed the concept of aboriginal title as a "unique interest in land",[16] emphasized its *sui generis* nature and articulated the fiduciary obligations that aboriginal title instills upon the Crown:

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[11] *Calder et al. v. Attorney-General of British Columbia,* [1973] S.C.R. 313. ("*Calder"*)
[12] *Sparrow,* para 50.
[13] *Calder,* p. 328.
[14] *Calder*, p. 390; also see *Guerin* para 86.
[15] *Guerin v. Canada* [1984] 2 S.C.R. 335. ("*Guerin*")
[16] *Guerin*, para 96.

> *Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the* sui generis *interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians*.[17]

10 In *Guerin*, the Court held that the concept of aboriginal title could create a fiduciary relationship between aboriginal peoples and the Crown, stemming from the fact that the aboriginal interest in land was inalienable except upon surrender to the Crown.[18] Later, in *Wewaykum Indian Band v. Canada*,[19] the Court confirmed that "the fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control gradually assumed by the Crown over the lives of aboriginal peoples."[20]

11 As for the content of aboriginal title itself, however, the *sui generis* nature of the right made it difficult to describe, as acknowledged in 1988 by the Court in *Canadian Pacific Ltd. v. Paul:*[21] "Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy although, as Dickson J. pointed out in *Guerin*, it is difficult to describe what more in traditional property law terminology."[22] In 1989, aboriginal title continued to be articulated with general terms such as "occupation and possession,"[23] as would remain the case until the Court's 1997 decision in *Delgamuukw v. British Columbia*.[24]

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[17] *Guerin,* para 97.
[18] *Guerin,* para 84.
[19] *Wewaykum Indian Band v. Canada*, 2002 SCC 79. (*"Wewaykum"*)
[20] *Wewaykum*, para 79.
[21] *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654. ("*Canadian Pacific"*)
[22] *Canadian Pacific*, p. 678.
[23] *Guerin,* para 86, citing *Calder*; See also *Roberts v. Canada*, [1989] 1 S.C.R. 322. ("*Roberts"*)
[24] *Delgamuukw*, see note 6.

12 In *Delgamuukw*, the Court confirmed that aboriginal title had not been extinguished by the creation of Crown land grants[25] and, where proven, continued as a burden on the Crown's underlying title.[26] In order to make out a claim for aboriginal title, an aboriginal group would be required to establish the following:[27]

i. The land claimed was used and occupied as traditional tribal territory, prior to the assertion of British sovereignty;[28]

ii. If present occupation is relied on as proof of occupation pre-sovereignty, then there must be a continuity between present and pre-sovereignty occupation; and

iii. At sovereignty, the occupation must have been exclusive, or perhaps jointly exclusive with one or more neighbouring First Nations in the case of joint title.[29]

13 A central and necessary criterion in any claim for aboriginal title is evidence of the aboriginal use and occupation of traditional territory prior to the assertion of Crown sovereignty.[30] This test is to be considered with reliance on "both the perspective of the common law and the aboriginal perspective, placing equal weight on each."[31] Use and occupation, therefore, will not be determined using European conceptualizations of those terms alone, and the aboriginal perspective is to be given equal deference.

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[25] *Delgamuukw,* paras 172-186.
[26] *Delgamuukw,* para 145. This confirmed an earlier finding by the Court that aboriginal rights to occupation and possession continued as a "burden on the radical or final title of the sovereign": *Roberts,* see note 23.
[27] *Delgamuukw*, para 143.
[28] In *Delgamuukw*, the parties did not dispute on appeal that British sovereignty was conclusively established in British Columbia by the Oregon Boundary Treaty of 1846: *Delgamuukw,* para 145. Note however that this date will vary between provinces or territories.
[29] The Court clarifies that the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity: *Delgamuukw,* para 158.
[30] *Delgamuukw*, para 144.
[31] *Delgamuukw*, para 156.

14 Having set out the criteria necessary to support a claim for aboriginal title, the Court then began to articulate its content. In general terms, aboriginal title is a "right to the land itself"[32] and therefore is "more than the right to engage in specific activities which may be themselves aboriginal rights"[33] or even to engage in "site-specific activities."[34] Rather, the right in land is summarized by two propositions:[35]

i. That aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and

ii. That those protected uses must not be irreconcilable with the nature of the group's attachment to that land.

15 The first proposition, that aboriginal title includes the right to exclusive use and occupation of land for a variety of purposes, encompasses the right to choose to what ends a piece of land can be put. [36] This discretion is in contrast to aboriginal rights, such as the aboriginal right to fish for food, which would not contain within it the same discretionary component.[37] When one considers the multitude of modern uses to which land held under aboriginal title can be put, and that such use is not restricted to the aboriginal practices, customs or traditions that are integral to the distinctive culture of the aboriginal group, it follows that aboriginal title will have an "inescapable economic component."[38]

16 Also, the discretionary authority held by aboriginal title holders suggests that the fiduciary relationship between the Crown and aboriginal peoples may require the

[32] *Delgamuukw*, para 138.
[33] *Delgamuukw*, para 111.
[34] *Delgamuukw*, para 138.
[35] *Delgamuukw*, para 117.
[36] *Delgamuukw,* para 166, 168.
[37] *Delgamuukw,* para 168.
[38] *Delgamuukw*, para 166 and 169.

involvement of aboriginal peoples in decisions affecting their lands.[39] This will often take the form of consultation, the content of which will vary according to the severity of any contemplated infringement of aboriginal title. For lesser infringements, this may involve a good faith discussion of the contemplated decision with the intention of addressing the aboriginal group's concerns.[40] However, "[i]n most cases, it will be significantly deeper than mere consultation" and "[s]ome cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[41] Several years later, the Court clarified that such consent "is appropriate only in cases of established rights, and then by no means in every case."[42]

17 The second proposition, that land held under aboriginal title must not be put to uses irreconcilable with the aboriginal group's attachment to that land, necessarily limits the right. The Court explains that "this inherent limit...flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple."[43] In basic terms, this "ultimate limit" means that the land cannot be put to uses that "destroy the ability of the land to sustain future generations of aboriginal peoples."[44]

18 Other limitations arising from the nature of aboriginal title itself include that lands held cannot be transferred, sold or surrendered to anyone other than the Crown (i.e. is inalienable to third parties),[45] and that title is held communally by aboriginal groups as opposed to personally by individual aboriginal persons, and therefore decisions in regards to the land must be made by the community as a whole.[46]

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[39] *Delgamuukw*, para 168.
[40] *Delgamuukw*, para 168.
[41] *Delgamuukw,* para 168.
[42] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511*,* para 48. (*"Haida"*)
[43] *Delgamuukw*, para 111.
[44] *Delgamuukw*, para 166.
[45] *Delgamuukw*, para 113.
[46] *Delgamuukw*, para 115.

19 The content of the fiduciary duty that stems from aboriginal title may also vary. For example, there will be no fiduciary duty where aboriginal title is claimed but not yet proven because, in such cases "[t]he 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."[47]

20 Also, even if there is a fiduciary relationship, this does not ensure priority will always be given to aboriginal rights or title. As explained in *Delgamuukw*, "the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first. However, the fiduciary duty does not demand that aboriginal rights always be given priority."[48] Rather, "in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interests of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting."[49]

21 Aboriginal title, like other aboriginal rights, is not absolute. Aboriginal title may be infringed and in some cases such infringement may be justified. The onus of proving that aboriginal title has been infringed will fall upon the aboriginal group holding title. This will generally not be an onerous test. After that, the Crown will have the onus of justifying the infringement. The test to be applied here is largely based on the test for the infringement of an aboriginal right, articulated by the Court in *R. v. Sparrow*[50] and discussed in greater detail later in this paper. In brief, the justification test has two parts:[51]

[47] *Haida,* para 18.
[48] *Delgamuukw*, para 162.
[49] *Wewaykum*, para 96.
[50] *Sparrow*, see note 7.
[51] *Delgamuukw*, paras 161-164.

i. Is the infringement in furtherance of a valid legislative objective that is substantial and compelling?

ii. If there is a substantial and compelling legislative objective, has the honour of the Crown been upheld in light of the Crown's fiduciary obligation? In answering this, consider:

a. Does the process by which the Crown allocates the resource and the allocation of the resource reflect the prior interest of the holders of aboriginal title?
b. Has there been as little infringement as possible to effect the desired result?
c. In a situation of expropriation, has fair compensation been paid?
d. Has the aboriginal group been consulted in good faith?

Claims of Aboriginal Title to Marine Areas or Rivers

22 No Canadian court has yet to fully apply the concept of aboriginal title to marine areas or rivers. However, aboriginal title claims of this nature are emerging. Several First Nations, including the Ahousaht, Haida and Lax Kw'alaams First Nations have asserted aboriginal title over submerged lands or the foreshore, often in connection with claims of an aboriginal right to fish. However, aboriginal title to marine areas has only been pursued to trial in the recent *Ahousaht Indian Band v. Canada (Attorney General)*[52] decision at the BCSC. Garson J. summarized that title claim as follows:

> *The plaintiffs' claim to aboriginal title is a novel one that has not previously been considered by a Canadian court. In essence, they claim submerged lands bordered by the foreshore throughout the territory of each plaintiff and extending 100 nautical miles into the ocean; they do not claim the upland areas of their territories in this action.*[53]

[52] *Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494. (*"Ahousaht"*) Currently under appeal to BCCA. Note that the Lax Kw'alaams First Nation's claim to aboriginal title was severed prior to trial: *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2006 BCSC 1463.
[53] *Ahousaht,* para 491.

23 However, in *Ahousaht*, the claim of aboriginal title to submerged lands and the foreshore was restricted to one economic component of that title – the fishery. Garson J. was not asked by the plaintiffs to define the scope or content of the title itself, except in so far as it related to any right to fish that may flow from it, if found. Because Garson J. ultimately determined that the plaintiffs held an aboriginal right to fish and to sell fish, she declined to make a finding of aboriginal title, stating:

> *Ultimately, it is not necessary for me to decide this issue since, in my view, the infringement and justification analyses as applied to title would not yield a different result than when applied to the plaintiffs' aboriginal rights in the circumstances of this case.*[54]

24 The limited pleadings in *Ahousaht*, therefore, did not require Garson J. to fully consider the issue of aboriginal title over submerged lands in marine areas or rivers. Without definitive jurisprudence on the matter, it remains unclear as to whether such title exists, and if so, whether or how the broader set of rights that typically attaches to aboriginal title might be applied or modified. Garson J. did, however, express doubt that a title claim to submerged lands is "legally tenable."[55]

25 Nevertheless, aboriginal title to submerged lands or the foreshore has the possibility of providing for a different set of rights than those that may be obtained through successful claims to an aboriginal right to fish. For example, aboriginal title carries the right to exclusive use and occupation of land for a variety of purposes, which need not be aspects of those aboriginal practices, customs or traditions that are integral to the title holder's distinctive aboriginal culture. This may arguably encompass alternative uses of marine resources that might not constitute aboriginal rights on their own.

26 Also, aboriginal title includes the right to choose to what ends a piece of land may be put, implying a degree of discretionary authority over decisions affecting the land or its resources. This discretionary authority was specifically contrasted as between aboriginal title and the aboriginal right to fish for food, with the Court in *Delgamuukw*

[54] *Ahousaht*, para 501
[55] *Ahousaht,* para 502.

clarifying that the latter would not contain the same discretionary component.[56] In some cases, the "full consent" of the aboriginal title holder may be required with respect to decisions affecting title lands "particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[57]

27 In addition, aboriginal title carries an "inescapable economic component" which might speak to a right to fish for commercial purposes without proof that such practice was integral to the title holder's distinctive aboriginal culture, a burden that, as discussed later in this paper, has been challenging to meet.

28 However, the *sui generis* nature of aboriginal title makes it difficult to translate into property law terms. It is unknown whether aboriginal title to submerged lands in marine areas or rivers, if it exists, would translate into an ownership of the fishery. As noted by the Court in *R v. Nikal*,[58] "clearly the fishery ... can be severed from the ownership of the river bed."[59]

Interim considerations

29 At present, the lack of jurisprudence on aboriginal title to marine areas or rivers makes it impossible to discern whether such title exists, or whether or how the existence of such title would influence management of the fishery. A multitude of considerations, including but not limited to the impact on federal and provincial legislation, international obligations under the Pacific Salmon Treaty, federal management structures under the Department of Fisheries and Oceans and common law principles of access to marine and tidal areas, may apply.

30 In the interim, however, the assertion of aboriginal title to marine areas or rivers may be sufficient to place certain obligations of consultation and possibly reasonable

[56] *Delgamuukw*, para 168.
[57] *Delgamuukw*, para 168.
[58] *R v. Nikal*, [1996] 1 S.C.R. 1013. (*"Nikal"*)
[59] *Nikal*, para 80.

accommodation upon the Crown.[60] As explained in *Haida Nation v. British Columbia (Minister of Forests)*:[61]

> *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 honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim.*[62]

31 Also, although it remains possible that a future finding of aboriginal title to marine areas or rivers may influence the nature of property rights in those areas, the existing case law is relatively clear in regards to the common property nature of the fishery. As stated simply by Major J. in *Comeau's Sea Foods Ltd v. Canada (Minister of Fisheries and Oceans)*:[63]

> *Canada's fisheries are a "common property resource", belonging to all the people of Canada.*[64]

32 The Federal Court of Appeal later clarified in *Larocque v. Canada (Minister of Fisheries and Oceans)*[65] that the fisheries "do not belong to the Minister" either.[66] Therefore, the fishery continues to be the common property of all Canadians.

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[60] Note that the scope and content of such consultation and reasonable accommodation will vary on the circumstances, including on the strength of the claimed title or rights, as discussed later in this paper.
[61] *Haida,* see note 42.
[62] *Haida*, para 27.
[63] *Comeau's Sea Foods v. Canada (Minister of Fisheries and Oceans),* [1997] 1 S.C.R. 12. (*"Comeau's Sea Foods"*)
[64] *Comeau's Sea Foods*, para 37.
[65] *Larocque v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237. (*"Larocque"*)
[66] *Larocque*, para 13.

Aboriginal Right to Fish

33 Where an aboriginal group has yet to prove, or is unable to prove, a claim of aboriginal title over its traditional territories, it may nevertheless be able to demonstrate that it holds an aboriginal right to engage in certain practices, customs or traditions in that area.[67] Aboriginal rights, of course, are also protected against unjustified infringement by virtue of s. 35(1) of the *Constitution Act, 1982.*

34 The Court first considered the recognition and affirmation of aboriginal rights in its 1990 decision, *R v. Sparrow.*[68] Although developed in a criminal context, the Court articulated for the first time its four-part analytical framework for s. 35(1):

i. Has the applicant demonstrated that he or she was acting pursuant to an aboriginal right;

ii. Was the right extinguished prior to enactment of s. 35(1);

iii. Has the right been infringed; and

iv. Was the infringement justified.

35 In brief, where an individual acting pursuant to an existing aboriginal right is charged with an offence pursuant to legislation that infringes that right, and where the government is unable to prove that such infringement is justified, then the charges cannot succeed.

The first step is to determine whether an aboriginal right exists.

[67] *R. v. Adams* [1996] 3 S.C.R. 101*,* para 26 ("*Adams"*). See also the companion case, *R v. Côté,* [1996] 3 S.C.R. 139 ("*Côté"*).
[68] *Sparrow*, see note 7.

Determining whether an aboriginal right to fish exists

36 Aboriginal rights are held by individual groups of aboriginal peoples and as such, will vary amongst different aboriginal groups. As explained by the Court, "aboriginal rights are highly fact specific" and "the rights recognized and affirmed by s. 35(1) are not rights held uniformly by all aboriginal peoples in Canada; the nature and existence of aboriginal rights vary in accordance with the variety of aboriginal cultures and traditions which exist in this country."[69]

37 Therefore, "[t]he fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right."[70] Aboriginal rights must be determined with specific reference to the aboriginal group claiming the right, and in particular to the perspectives held by that group. As the Court articulated in *Sparrow*, although it is impossible to give an easy definition of rights, "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[71]

38 With that in mind, the Court set out in *Van der Peet* the test for determining an aboriginal right protected by s. 35(1):

> *[I]n order to be an aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.*[72]

39 The first step in determining whether an aboriginal right exists is to identify the nature of the right being claimed.[73] This may, in the first instance, require a clear pleading by the claimant in regards to that right because, "[i]n the aboriginal law context, where the rights sought are different from those of all other Canadians, the principle that plaintiffs

[69] *R v. Gladstone*, [1996] 2 S.C.R. 723, para 65. (*"Gladstone"*)
[70] *Van der Peet*, para 69.
[71] *Sparrow*, at para 69.
[72] *Van der Peet,* para 46.
[73] *Van der Peet*, para 51. Note however, that in *Ahousaht*, Garson J. proposes to "modify the analysis slightly to reflect the nature of the present action" and reviews and makes findings of fact with respect to the existence of and nature of ancestral fishing practices before characterizing the nature of the aboriginal right claimed (*Ahousaht,* para 54).

must be clear about what they are seeking seems particularly important."[74] In addition, the court considering the claim will be asked to define the right in light of the purposes underlying s. 35(1). As explained in *Van der Peet*:

> *The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.*[75]

40 With that underlying purpose, the requirement that an aboriginal right be "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right" raises several issues. For example, the Court has considered each of the components of this test, including the meaning of:

i. "a practice, custom or tradition";

ii. "integral to";

iii. "distinctive culture"; and

iv. "group claiming the right".

41 The Court has also been asked to determine the relevant time period at which the test for determining an aboriginal right is to be applied. Each of these issues will be discussed in turn.

A practice, custom or tradition:

42 In *R v. Sappier; R v. Gray*,[76] the Court held that aboriginal rights are founded upon activities, such as practices, customs or traditions. Aboriginal rights are not founded upon property or the importance of a particular resource to an aboriginal people. In regards to aboriginal rights, the Court explained that:

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[74] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593, para 61. Leave to appeal to SCC granted on June 10, 2010, [2010] S.C.C.A. No. 59. ("*Lax Kw'alaams"*)
[75] *Van der Peet*, para 31.
[76] *R v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54. ("*Sappier; Gray"*)

> *They are not generally founded upon the importance of a particular resource... because to do so would be to treat it as akin to a common law property right. In characterizing aboriginal rights as* sui generis*, this Court has rejected the application of traditional common law property concepts to such rights.*[77]

43 An aboriginal right to fish, for example, is a right to the practice, custom or tradition of fishing (verb) as opposed to the right to fish (noun). This interpretation is supported by the Court's finding that although an aboriginal right to fish may protect a traditional means of sustenance or a pre-contact practice that was relied upon for survival, "there is no such thing as an aboriginal right to sustenance" or a right to the fish themselves.[78]

Integral to:

44 In *Van der Peet*, the Court suggested that in order to be "integral", a practice, custom or tradition must be "a central and significant part of the society's distinctive culture."[79]

45 The precise nature of what is "integral" however, has not been easy for the Court to articulate. In *Mitchell v. M.N.R.,*[80] McLachlin C.J. explained that an aboriginal right "must have been 'integral to the distinctive culture' of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a 'defining feature' of the aboriginal society, such that the culture would be 'fundamentally altered' without it."[81]

46 Later, in *Sappier; Gray*, the Court backed away from this definition and acknowledged that McLachlin C.J's articulation of what was "integral" had unintentionally heightened the threshold for establishing an aboriginal right.[82] Rather, the Court clarified that the

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[77] *Sappier; Gray*, para 21.
[78] *Sappier; Gray*, para 37. See also *Ahousaht*, para 482 where Garson J. rejects the plaintiffs' right to fish to "sustain the community."
[79] *Van der Peet,* para 55.
[80] *Mitchell v. M.N.R.,* [2001] 1 S.C.R. 911. (*"Mitchell"*)
[81] *Mitchell*, para 12.
[82] *Sappier; Gray*, para 39-40.

pre-contact practice upon which an aboriginal right is based need not go to the "core" of a society's identity or be its single most important defining characteristic.[83]

47 What has been clear, however, is that in order for a practice, custom or tradition to be integral, it must be "independently significant", that is, it must not "exist simply as an incident to another practice, custom or tradition."[84] For example, in *R. v. N.T.C. Smokehouse Ltd.*,[85] the Court declined to find an aboriginal right to exchange fish for money or other goods where this exchange had been "few and far between" and occurred incident to potlatches or other ceremonies.[86] Even if the potlatches and ceremonies were to be recognized as aboriginal rights under s. 35(1), the incidental exchange of fish did not have the independent significance required to constitute an aboriginal right.[87]

Distinctive culture:

48 The next step in determining whether an aboriginal right exists is to assess whether the practice, custom or tradition is part of the aboriginal group's "distinctive culture". What constitutes an aboriginal group's "culture" is to be determined taking into account the perspective of the aboriginal peoples themselves[88] and the relationship of aboriginal peoples to the land.[89] This will be an inquiry into the "way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits."[90]

49 The qualifier "distinctive" is added to incorporate an element of "aboriginal specificity" but is not meant to reduce aboriginality to "racialized stereotypes of aboriginal

[83] *Sappier; Gray*, para 39-40.
[84] *Van der Peet,* para 70.
[85] *R v. N.T.C. Smokehouse Ltd.,* [1996] 2 S.C.R. 672. ("*NTC Smokehouse"*)
[86] *NTC Smokehouse,* para 26.
[87] *NTC Smokehouse,* para 26.
[88] *Van der Peet*, para 49.
[89] *Van der Peet*, para 74.
[90] *Sappier; Gray*, para 45.

peoples."[91] Also, distinctive does not mean "distinct" and more than one aboriginal group may hold the same aboriginal right.[92]

Group claiming the right:

50 Like aboriginal title, aboriginal rights are held communally by an aboriginal people rather than by an aboriginal person. As explained by the Court in *Sappier; Gray*, this is because s. 35(1) recognizes and affirms existing aboriginal and treaty rights in order to ensure the continued existence of aboriginal societies.[93] Therefore, the right to harvest a resource, as opposed to the right to make personal use of that resource once harvested, is not to be exercised by any member of an aboriginal community independently of the aboriginal society that the right is meant to preserve.[94]

Relevant time period:

51 In general, the test for whether an aboriginal right exists is to be applied with reference to the time period prior to contact with Europeans.[95] As explained by the Court in *Van der Peet*, this time period was identified because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the rights protected by s. 35(1).[96] The aboriginal group's practices, customs, traditions and distinctive culture are all generally to be considered with reference to this date. However, this is not to say that a "frozen rights" approach is to be taken. Rather, "[t]he evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights."[97]

52 When it comes to the Métis peoples, however, whose rights are equally recognized and affirmed by s. 35(1), the relevant time period cannot be pre-contact. Instead, the

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[91] *Sappier; Gray*, para 45.
[92] *Van der Peet*, para 71. See also *Sappier; Gray*, para 45.
[93] *Sappier; Gray*, para 26.
[94] *Sappier; Gray*, para 26.
[95] *Van der Peet,* para 60. Compare this to the relevant date in respect of a claim for aboriginal title, which as explained earlier in this paper, is the date on which the Crown asserted sovereignty over the land.
[96] *Van der Peet*, para 60.
[97] *Van der Peet*, para 64.

Court has clarified in *R v. Powley*,[98] that the relevant time period for the determination of Métis rights will be "post-contact but pre-control". This will be the "period after a particular Métis community arose and before it came under the effective control of European laws and customs."[99]

Right to fish for food, social or ceremonial purposes

53 In *Sparrow*, the Court recognized for the first time an aboriginal right to fish for food, social and ceremonial ("FSC") purposes, and it did so without the benefit of its test for determining the existence of an aboriginal right, which was not articulated until *Van der Peet* some six years later. Nevertheless, the Court acknowledged that:

> *[F]or the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished, for reasons connected to their cultural and physical survival.*[100]

54 Importantly, the Court held that not only did the Musqueam have a right to fish for FSC purposes, but that such right would be treated with priority, subject only to conservation. This concept of aboriginal priority to the fishery was not new and had been described by the Court even prior to the recognition and affirmation of aboriginal rights under the *Constitution Act, 1982.* In 1980, the concurring reasons of Dickson J. (as he then was) in *Jack et al v. The Queen*,[101] articulated the position taken by aboriginal defendants to a fishing violation and his agreement with that position, as follows:

> *They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.*
>
> *...*

[98] *R v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 (*"Powley"*)
[99] *Powley,* para 37.
[100] *Sparrow*, para 40.
[101] *Jack et al v. The Queen*, [1980] 1 S.C.R. 294 ("*Jack et al"*)

> *I agree with the general tenor of this argument ... If there are to be limitations upon the taking of salmon here, then those limitations must not bear more heavily upon the Indian fishery than the other forms of the fishery. With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery...just as such conservation measures override other taking of fish.*[102]

55 The Court in *Sparrow* adopted this prioritization of aboriginal FSC fishing rights, agreeing that "[t]he constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing."[103] As guidance, the Court offered an operational description of this priority, suggesting that in years of low abundance it may be possible for all fish caught to go to aboriginal peoples holding the right, and that in any case the brunt of conservation measures would be borne by the commercial and recreational fisheries. It stated:

> *If, in a given year, conservation needs required a reduction in the number of fish caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of the conservation measures would be borne by the practices of sport fishing and commercial fishing.*[104]

56 However, the Court acknowledged that its guidance lay at a level of generality such that "the detailed allocation of maritime resources is a task that must be left to those having expertise in the area."[105] It would take the work of other courts and cases to sort out the details.

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[102] *Jack et al*, p. 313.
[103] *Sparrow*, para 78.
[104] *Sparrow*, para 78.
[105] *Sparrow*, para 78.

57 The priority element of the right to fish, being priority subject to conservation but in advance of other fishing groups, means that where the Department of Fisheries and Oceans has "pre-season knowledge of insufficient fish" to meet the aboriginal FSC fishing needs for the season, then priority must be given to aboriginal FSC fishing licences over commercial and recreational fisheries until the aboriginal FSC fishing needs have been met.[106]

58 In addition, where the Department acquires only in-season knowledge of insufficient fish to meet aboriginal FSC fishing needs, and this in-season information requires it to immediately impose valid conservation measures, the priority will still be met, if possible, by introducing restrictions in fishing times and fishing gear.[107]

59 The priority element, however, is not without limitations. For example, the Court also stated in *Sparrow* that the priority of allocations is "not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery."[108] Considering the practical difficulties occasioned by the movement of fish, the British Columbia Court of Appeal has held that the priority afforded by an aboriginal right to fish does not mean that FSC fisheries must precede or occur contemporaneously with non-aboriginal fisheries.[109] The BCCA explained that in regards to Fraser River sockeye:

> *The Fraser River sockeye encounter numerous fisheries, including aboriginal, recreational and commercial, as they migrate from the Pacific to their spawning grounds. If a non-aboriginal fishery could never precede any of the aboriginal fisheries, the result would be an exclusive food, social and ceremonial fishery, regardless of the need and abundance of stock. That cannot be the intended result of Sparrow...*[110]

60 It should be noted however, that the issue of temporal priority appears to remain the subject of legal dispute. The BCCA very recently granted leave to appeal on the issue,

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[106] *R v. Douglas*, 2008 BCSC 1098, para 61. (*"Douglas, 2008"*)
[107] *Douglas*, *2008*, para 61.
[108] *Sparow*, para 81.
[109] *R. v. Douglas et al*, 2007 BCCA 265, para 54. Leave to appeal to SCC refused, [2007] S.C.C.A. No. 352. (*"Douglas, 2007"*)
[110] *Douglas, 2007,* para 54.

with Neilson J.A. concluding that "the interests of justice require that leave be granted on the issue of whether the priority granted to the aboriginal FSC fishery includes priority in time."[111]

61 Additional elements of the right to fish for FSC purposes, other than priority, have also been developed. For example, in *R v. Nikal*,[112] the Court held that a proven aboriginal right to fish may include (i) the right to determine who within an aboriginal group will be the recipients of the fish for ultimate consumption; (ii) the right to select the purpose for which the fish will be used, i.e. food, social or ceremonial purposes; (iii) the right to fish for a particular species; and (iv) the right to choose the period of time to fish in the river.[113]

62 In *R v. Jack, John and John*,[114] the BCCA clarified that the right to fish for ceremonial purposes includes the right to fish for salmon in preparation for a wedding.[115] This case also held that whether or not "the right to a fishery in tidal waters is a public right to be shared by members of the public, including aboriginals ... [does] not displace the clear statement in *Sparrow* that the Indian Food Fish requirements must be given top priority after conservation."[116]

63 The right to fish for FSC purposes may also be limited to a specific area. This will be tied to a court's initial characterization of that right according to the test set out in *Van der Peet*. That is, if the practice, custom or tradition that constitutes an aboriginal right is defined as the practice of fishing within a particular area, the exercise of that right will also be limited to that area. As stated by the Court in *R. v. Adams*,[117] "[a] site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right

[111] *R. v. Quipp*, 2010 BCCA 389, para 38.
[112] *Nikal,* see note 58.
[113] *Nikal*, para 104.
[114] *R v. Jack, John and John* (1995), 16 B.C.L.R. (3d) 201 (B.C.C.A.). ("*Jack, John and John"*)
[115] *Jack, John and John*, para 64.
[116] *Jack, John and John,* para 67.
[117] *Adams*, see note 67.

exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question."[118]

Right to fish for commercial purposes

64 Like other aboriginal rights, the right to fish for commercial purposes must be demonstrated using the test set out in *Van der Peet*. Although the Court has emphasized the importance of flexibility and the ability to "draw necessary inferences about the existence and integrality of a practice when direct evidence is not available,"[119] it appears that a right to fish for commercial purposes has generally been difficult to prove.

65 For example, in *R. v. Van der Peet*, a member of the Sto:lo First Nation was convicted under s. 61(1) of the *Fisheries Act* with the offence of selling ten salmon caught under the authority of a food fish license. On appeal to the Court, the accused claimed what the Court characterized as "an aboriginal right to exchange fish for money or other goods."[120] This right to sell or trade was specifically distinguished as something less than an aboriginal right to sell fish commercially, and therefore evidence of pre-contact trade on a commercial scale need not be made out.[121] Nevertheless, although the Court determined that the exchange of fish took place prior to European contact, it held that this practice was not a central, significant or defining feature of the Sto:lo society and therefore did not constitute an aboriginal right.[122]

66 In *R. v. N.T.C. Smokehouse*, a fish processor was convicted under s. 61(1) of the *Fisheries Act* for purchasing fish caught under the authority of food fish licences held by the Sheshaht and Opetchesaht First Nations. Given that in order to convict the fish processor, the sale of fish by the Sheshaht and Opetchesaht peoples must have been illegal, the fish processor was entitled to raise as a defense an aboriginal right held by

[118] *Adams,* para 30. See also the companion case, *R v. Côté*.
[119] *Sappier; Gray*, para 33.
[120] *Van der Peet*, para 76.
[121] *Van der Peet*, para 78.
[122] *Van der Peet*, para 91.

the Sheshaht and Opetchesaht to have sold the fish.[123] In this case, the transaction was much larger than the ten fish sold in *Van der Peet*, being in excess of 119,000 pounds of salmon caught by 80 people. This was closer to the act of commerce or exchange on a large scale.[124] However, for the purpose of its analysis and because the *Fisheries Act* regulations prohibited "all sale or trade"[125] of FSC fish, the Court nevertheless characterized the right claimed as a right to "exchange fish for money or other goods,"[126] as it had in *Van der Peet*. The Court went on to find that pre-contact sales of fish were "few and far between" and therefore did not have the defining status and significance necessary to support an aboriginal right to exchange fish for money or other goods.[127] Also, the incidental exchange of fish at potlatches or ceremonial occasions did not have sufficient independent significance.[128]

67 Similarly, the BCCA did not find a Coast Tsimshian right to fish for commercial purposes in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*.[129] Specifically, the right claimed in that case was "an aboriginal right to harvest and sell on a commercial scale" all species of fish and fish products found within the Lax Kw'alaams' claimed territories."[130] The BCCA held that although prestige items such as eulachon grease may have been exchanged between kin at feasts and potlatches, "other fish, especially salmon, were so plentiful that although they were harvested in great quantity and eaten for subsistence, virtually no trade or exchange in them took place."[131] Accordingly the right to harvest and sell all species of fish on a commercial scale was not made out.

[123] *NTC Smokehouse*, para 15.
[124] *NTC Smokehouse*, para 18.
[125] *NTC Smokehouse*, para 19.
[126] *NTC Smokehouse*, para 21.
[127] *NTC Smokehouse*, para 26.
[128] *NTC Smokehouse,* para 26.
[129] *Lax Kw'alaams,* see note 74.
[130] *Lax Kw'alaams*, para 15.
[131] *Lax Kw'alaams*, para 2, 43.

68 However, there are at least two cases in which a right to fish for commercial purposes has been found. The first is *R v. Gladstone*,[132] in which the Court considered both whether the Heiltsuk Band has an aboriginal right to exchange herring spawn on kelp for money or other goods and also, whether the Heiltsuk Band has an aboriginal right to sell herring spawn on kelp to the commercial market.[133] The evidence in that case indicated that the exchange and trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk.[134] Ultimately the Court held that the Heiltsuk held both an aboriginal right to exchange herring spawn on kelp for money or other goods and also to trade herring spawn on kelp on a commercial basis.[135]

69 In the second case, *Ahousaht Indian Band v. Canada (Attorney General)*,[136] Garson J. of the BCSC concluded that five aboriginal bands whose territories are located on the west coast of Vancouver Island hold an aboriginal right to "fish for any species of fish within the environs of their territories and to sell that fish."[137] This right to fish and to sell fish is broader than what is captured by the expression "exchange for money or other goods" [138] but is less than a right to "a modern industrial fishery or to unrestricted rights of commercial sale."[139] Also, the right would not be limited to any particular species[140] but its exercise would be limited to specified traditional fishing areas.[141]

70 As evident by the cases above, the right to fish for commercial purposes may take a variety of forms. This may range from the right to "exchange fish for money or other goods" to, at least, a right to fish "on a commercial basis." However, having confirmed that a right to fish for commercial purposes may exist, on whatever scale that may be, it is then necessary to assess how that right may affect the management of the fishery. For example, what form of priority will a commercial right to fish enjoy?

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[132] *Gladstone*, see note 69.
[133] *Gladstone*, para 24.
[134] *Gladstone*, para 27.
[135] *Gladstone,* para 26-27, 30.
[136] *Ahousaht,* see note 52.
[137] *Ahousaht*, para 489.
[138] *Ahousaht*, para 486.
[139] *Ahousaht*, para 487.
[140] *Ahousaht,* para 383.
[141] *Ahousaht*, para 394.

71 The Court discussed the issue of priority in a commercial context in *Gladstone,* in which it held that a more refined articulation of priority than that described in *Sparrow* would be required. Unlike FSC fishing rights, which are internally limited by the food, social and ceremonial needs of the aboriginal group holding the right, commercial rights, it said, have no internal limitation. Rather, the only limits are the "external constraints of the demand of the market and the availability of the resource."[142]

72 Therefore, the priority afforded in such cases could not require that commercial rights holders be granted an exclusive fishery after conservation. Rather, priority in this context requires that the government allocate the resource in a manner respectful of the fact that rights holders have priority over the exploitation of the fishery by other users:

> *Where the aboriginal right is one that has no internal limitation, then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users. This right is at once both procedural and substantive; at the stage of justification the government must demonstrate both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest of aboriginal rights holders in the fishery.*[143]

73 However, the Court also noted in *Gladstone* that the public's common law right of access to the fishery is not extinguished by virtue of a finding of an aboriginal right to fish for a commercial purpose. Rather, the Court clarified that:

> *[I]t was not contemplated by Sparrow that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. As a common law, not constitutional,*

[142] *Gladstone,* para 57.
[143] *Gladstone,* para 62.

> *right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.*[144]

Extinguishment

74 Once an aboriginal group has established that a practice, custom or tradition integral to the distinctive culture of that group constitutes an aboriginal right, the next step in the analytical framework set out in *Sparrow* is to determine whether that right has been extinguished.

75 Section 35(1) recognizes and affirms "existing aboriginal and treaty rights", that is the rights in existence when the *Constitution Act, 1982* came into effect. Aboriginal rights need not have been formally recognized by French colonial or common law to have continued in an unextinguished manner following the arrival of Europeans.[145] However, s. 35(1) does not revive extinguished rights.[146]

76 The onus rests with the Crown to prove that an aboriginal right has been extinguished. This is a high burden, requiring "strict proof of the fact of extinguishment" and "evidence of a clear and plain intention on the part of the government to extinguish."[147]

77 That an aboriginal right has been controlled in great detail by regulations is not, on its own, enough to constitute a plain intention to extinguish that right. For example, in regards to the control of aboriginal fishing under the *Fisheries Act*, the Court in *Sparrow* held that neither detailed regulations nor discretionary permitting of aboriginal fisheries extinguished an underlying fishing right:

> *There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were*

[144] *Gladstone,* para 67.
[145] *Côté*, para 52.
[146] *Sparrow*, para 23.
[147] *R v. Badger*, [1996] 1 S.C.R. 771, para 41 ("*Badger"*) citing *Simon v. The Queen*, [1985] 2 S.C.R. 387, p. 406 ("*Simon"*) and *Calder,* p. 404

> *discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.*[148]

Infringement

78 In the next stage of analysis, the onus shifts to the rights claimant to establish a *prima facie* infringement of the aboriginal right. The purpose of this stage is to "ensure that only meritorious claims are considered" and the burden will not generally be difficult to meet.[149]

79 In Sparrow, the Court set out a test to determine whether fishing rights had been interfered with such as to constitute a *prima facie* infringement of s. 35(1).[150] This test involves three questions:

i. Was the limitation on the right unreasonable?

ii. Does the regulation impose undue hardship?

iii. Does the regulation deny to the holders of the right their preferred means of exercising that right?

Was the limitation on the right unreasonable?

80 An unreasonable limitation on the exercise of an aboriginal right will amount to *prima facie* infringement of that right. However, not all limitations will be unreasonable and this must be determined on a case-by-case basis. For example, in *Nikal*, the Court held that "the simple requirement of a license is not in itself unreasonable; rather it is necessary for the exercise of the right itself."[151]

[148] *Sparrow*, para 38.
[149] *R. v. Sampson*, (1995) 16 B.C.L.R. (3d) 226 (B.C.C.A.), para 43. ("*Sampson"*)
[150] *Sparrow*, para 70.
[151] *Nikal*, para 99. See also *Sampson*, para 54.

81 Similarly, in *R v. Badger*,[152] the Court held that, in some cases "reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food."[153] This reasonableness will still be applied on a case-by-case basis. Ten years later, the Court found that "[p]rotected methods of hunting cannot, without more, be wholly prohibited simply because in some circumstances they could be dangerous."[154] That is, a limitation based on safety concerns may not always be reasonable where alternative safety precautions will allow the right to be exercised in the face of some potential danger.

Does the regulation impose undue hardship?

82 Regulations may also infringe an aboriginal right if they cause undue hardship to the aboriginal group in exercising that right. Undue hardship can take a variety of forms but will generally involve a situation that "imposes something more than mere inconvenience."[155] For example, requiring "a license which is freely and readily available cannot be considered an undue hardship." [156] However, "[t]he situation might be different if, for example, the license could only be obtained at locations many kilometres away from the reserves and accessible only at great inconvenience or expense."[157]

83 Similarly, in *Sparrow*, the Court stated that "[i]f, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish" then a *prima facie* infringement would have been made out.[158]

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[152] *Badger*, see note 147.
[153] *Badger*, para 88-89. See also *Myran v. The Queen*, [1976] 2 S.C.R. 137, p. 142 where Dickson J. (as he then was) states for the Court that "there is no irreconcilable conflict or inconsistency in principle between the right to hunt for food... and the requirement... that such right be exercised in a manner so as not to endanger the lives of others." Note that the right to fish as set out in modern treaties is often limited by measures necessary for "public safety" in addition to conservation and public health. See for example the *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, s. 2.
[154] *R v. Morris*, 2006 SCC 59, para 39. ("*Morris"*)
[155] *Nikal*, para 100.
[156] *Nikal*, para 100.
[157] *Nikal*, para 100.
[158] *Sparrow*, para 70.

84 There may also be undue hardship where no explicit guidance is provided in respect of the exercise of discretion that may, as a result of the discretionary decision, lead to the infringement of an aboriginal right. For example, in *Adams,* the Minister's licensing powers "in the absence of some explicit guidance," were found to be an "unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications"[159] and, as such, imposed undue hardship on exercise of an aboriginal right.[160]

85 The imposition of a user fee or license fee may or may not cause undue hardship, depending on the facts. For example, in *R v. Côté*, the imposition of a modest "motor vehicle access fee" that applied to a portion of road leading to an area where an aboriginal right to fish was being exercised, did not constitute an undue hardship on that right because the financial burden was low and the revenues generated were directly applied to maintain access to the area.[161] In contrast, where as in *Ahousaht*, it is "impossible for the plaintiffs to pay the large amounts the market sets for licences" in a commercial fishery, such regulation may be found to impose an undue hardship on the right to fish and sell fish.[162]

86 It should also be noted that the enquiry of undue hardship is focused on the collective rights of the aboriginal group, and not whether an individual band member suffers undue hardship. In *R v. Sampson*, the BCCA held that although the prohibition against fishing in a particular area caused inconvenience to the appellants, the band to which they belonged obtained "an adequate number of salmon to satisfy their food fish requirements" and therefore there was no undue hardship to the group.[163]

[159] *Adams*, para 54.
[160] *Côté*, para 76.
[161] *Côté*, para 78-79.
[162] *Ahousaht*, para 788.
[163] *Sampson*, para 63-64.

Does the regulation deny to the holders of the right their preferred means of exercising that right?

87 Where the preferred means of exercising an aboriginal right are denied, an infringement of that right may be made out. However, this enquiry will also focus on the collective nature of the right and not on an individual's specific preference. For example, in *Sampson*, the BCCA held that "evidence of the appellants that they wished to exercise the aboriginal right to fish in Ladysmith Harbour, by means of a net, is not determinative of the issue."[164] Rather, that court looked to the band's preferred method of fishing instead.[165]

88 Generally, fishing closures,[166] restrictions on gear type,[167] or prohibitions against fishing in a traditional fishing territory[168] could all constitute an infringement on an aboriginal right to fish by denying the preferred means of exercising that right.

89 Restrictive licensing conditions may also deny a preferred means of exercising an aboriginal right to fish by placing restrictions on incidental rights, such as (i) the right to determine who within an aboriginal group will be the recipients of the fish for ultimate consumption; (ii) the right to select the purpose for which the fish will be used, i.e. food, social or ceremonial purposes; (iii) the right to fish for a particular species; and (iv) the right to choose the period of time to fish.[169]

90 Note that if a regulation or condition is found to infringe an aboriginal right, that regulation or condition will not be made valid simply by not being enforced. As explained in *Nikal,* "[t]he holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of that right."[170]

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[164] *Sampson*, para 64.
[165] *Sampson*, para 69. On the facts, the appellants were restricted to trolling, which was not the band's preferred means of fishing and so the appellants were able to establish a *prima facie* infringement of their aboriginal right to fish, para 69-70.
[166] For example*,* as in *Douglas 2007*.
[167] For example, as in *Sparrow*.
[168] For example*,* as in *Jack, John and John*, para 54.
[169] *Nikal*, para 104.
[170] *Nikal*, para 108.

Justification

91 After it is shown that an aboriginal right exists and has been infringed, it will then fall upon the Crown to demonstrate that such infringement is justified. This analysis must be performed on a case-by-case basis, keeping in mind the context at play. As explained in *Sparrow*:

> *Given the generality of the text of the constitutional provision [s.35(1)], and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context in each case.*[171]

92 Section 35(1) does not form part of the *Canadian Charter of Rights and Freedoms*, and therefore will not be subject to the justificatory analysis developed under s. 1 of the *Constitution Act*, *1982.* However, this does not mean that any law, regulation or licensing condition affecting aboriginal rights will automatically be of no force or effect by virtue of s. 52 of the *Constitution Act, 1982.*

93 Rather, in *Sparrow,* the Court established a two-part test to determine whether an infringement is justified:[172]

i. Was the government acting pursuant to a valid legislative objective?

ii. Given the Crown's trust relationship and responsibility towards aboriginal peoples, does the legislation obtain the objective in a manner that upholds the honour of the Crown?

   a. Has the allocation of priorities after valid conservation measures given top priority to the aboriginal right?

   b. Has there been as little infringement as possible?

[171] *Sparrow*, para 66.
[172] *Sparrow*, para 71-83.

c. In a situation of expropriation, has fair compensation been made available?

d. Has the aboriginal group been consulted?

Each part of the justification test and its sub-parts will be considered in turn:

Was the government acting pursuant to a valid legislative objective?

94 In this first part of the justification test, a court must inquire into whether the objective of Parliament in authorizing a department to enact regulations, such as fishing regulations, is valid. The objective of the department in setting out the particular regulations will also be scrutinized.[173] The Court raised this as an important consideration because "government objectives that may be superficially neutral" may nevertheless "constitute *de facto* threats to the existence of aboriginal rights and interests."[174]

95 In general, a valid objective must be informed by the purposes underlying s. 35(1), which include the recognition of the prior occupation of North America by aboriginal peoples, and the reconciliation of this prior occupation with the assertion of Crown sovereignty.[175]

96 Objectives that fail this test may include those that are vague or imprecise. For example, in *Sparrow*, the Court held that the objective of the "public interest" was so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on a constitutional right.[176] In addition, objectives that the court considers to be less compelling or substantial may not qualify as valid. For example, in *Adams*, the Court held that "while sports fishing is an important economic activity in some parts of the country," the objective of enhancing a

[173] *Sparrow,* para 71.
[174] *Sparrow,* para 64.
[175] *Adams,* para 57. See also *Gladstone,* para 72.
[176] *Sparrow,* para 72. Note that it was on this point that the SCC fundamentally differed from the BCCA.

sports fishery that, on the facts, had no "meaningful economic dimension" could not justify the infringement of aboriginal rights.[177]

97 With respect to the justified infringement of both FSC and commercial fishing rights, the objective of conservation, however, will generally be considered valid.[178] This will be true even if the need for conservation measures may, in retrospect, be questioned. According to the BCSC, conservation concerns need not have been totally accurate in hindsight and "in the absence of *mala fides*, it is not the role of the courts to second-guess management decisions that fall within the range of what are objectively 'reasonable and necessary'."[179]

98 Other valid objectives may include those "purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial."[180] In other words, the list of possible valid objectives is not closed and will vary on the facts of each case.

99 In the context of a right to fish for commercial purposes, where the right itself has no internal limitation, other objectives may come into play. For example, in *Gladstone*, Lamer C.J.'s majority reasons added "the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups" as valid objectives in the interest of all Canadians and that may be necessary for the reconciliation of aboriginal societies with the rest of Canadian society.[181]

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[177] *Adams*, para 58. See also, *Delgamuukw*, para 161.
[178] *Sparrow*, para 71 and *Gladstone*, para 74.
[179] *Douglas 2008*, para 31.
[180] *Sparrow*, para 71.
[181] *Gladstone*, para 75. Note however that McLachlin J. (as she then was) articulated a rather strong dissent on this issue in the companion case *Van der Peet*. She wrote at para 306: "The extension of the concept of compelling objective to matters like economic and regional fairness and the interests of non-aboriginal fishers, by contrast, would negate the very aboriginal right to fish itself, on the ground that this is required for the reconciliation of aboriginal rights and other interests and the consequent good of the community as a whole. This is not limitation required for the responsible exercise of the right, but rather limitation on the basis of the economic demands of non-aboriginals. It is limitation of a different order than the conservation, harm prevention type of limitation sanctioned in *Sparrow*."

100 In *Ahousaht*, Garson J. appears to have extended the list of possibly valid objectives. In addition to objectives previously described, she adds: protection of endangered species, health and safety of the fishers and consumers, adherence to international treaties, facilitation of aboriginal participation in the fisheries, achievement of the full economic and social potential of fisheries resources, and safe and accessible waterways.[182]

Given the Crown's trust relationship and responsibility towards aboriginal peoples, does the legislation obtain the objective in a manner that upholds the honour of the Crown?

101 In order to assess whether legislation, regulations or a condition of license obtains the objective in a manner that upholds the honour of the Crown, several sub-parts may be considered:

a. *Has the allocation of priorities after valid conservation measures given top priority to the aboriginal right?*

102 In order to answer the question of whether the allocation of priorities after conservation gave top priority to the aboriginal right, one must first consider the meaning of "conservation". In *Nikal*,[183] the Court held that the management of a stock goes farther than preventing its elimination. Rather management imports a duty to maintain and increase reasonably the fishery resource.[184] In *R v. Douglas* (2008),[185] the BCSC applied this management duty to the definition of conservation, saying that "conservation is more than preservation of a stock and includes enhancement of that stock for the future benefit of all user groups."[186] However, a precise definition for "conservation" was not considered "possible or even desirable."[187]

[182] *Ahousaht*, para 881-883.
[183] *Nikal*, see note 58.
[184] *Nikal*, para 102.
[185] *Douglas, 2008,* see note 106.
[186] *Douglas, 2008*, para 29.
[187] *Douglas, 2008,* para 33.

103 With that in mind, this sub-part has generally been considered in respect of the priority afforded to the aboriginal right to fish for FSC purposes. In such cases, a court will determine whether the brunt of conservation measures has been borne by the sports and commercial fisheries and not by the aboriginal FSC fishery.[188] For example, when recreational and commercial fishers were allowed to harvest a limited number of fall Nanaimo River chinook in the Strait of Georgia, but aboriginal food fishers were completely prohibited from fishing that same run once it arrived at the Nanaimo River, the priorities set out in *Sparrow* had not been met.[189]

104 However, the priority of aboriginal fisheries in terminal areas does not mean that all commercial and sports fishing in approach or "interception" fisheries must be prohibited. Rather, as explained by the BCCA in *Sampson*:[190]

> *We do not suggest that the DFO should prohibit all commercial and sport fishing in the area of the interception fishery in Johnstone Strait. However, it is the responsibility of the DFO to implement a system which will conform to the priorities set forth in Sparrow. After conservation requirements have been met, the Indian food fish requirements must receive first priority.*[191]

105 In the context of an aboriginal right to fish for commercial purposes, the Court in *Gladstone* articulated a non-exhaustive list of factors that may be taken into account in determining whether the government can be said to have given priority to aboriginal rights holders. These factors include, *inter alia*, whether the government has accommodated the exercise of the aboriginal right to participate in the fishery (through reduced license fees, for example), the extent of the participation in the fishery of aboriginal rights holders relative to their percentage of the population, how important the fishery is to the economic and material well-being of the band in question, and the

[188] *Jack, John and John*, para 9, citing *Sparrow*, para 78.
[189] *R v. Little*, (1995) 16 B.C.L.R. (3d) 253 (B.C.C.A.) paras 11, 75 ("*Little"*) See also *Jack, John and John*, at para 65.
[190] *Sampson*, see note 149.
[191] *Sampson*, para 92.

criteria taken into account by the government in allocating commercial licenses amongst different users.[192]

106 The assessment of whether a constitutionally protected allocation priority has been respected may also be complicated by the need to balance priorities not only between aboriginal and non-aboriginal groups, but also between different aboriginal groups that may hold varying rights.[193]

b. Has there been as little infringement as possible?

107 The requirement that there be "as little infringement as possible" imports a degree of reasonableness and contextualization. As explained by the Court in *Nikal:*

> *[W]hen considering whether there has been as little infringement as possible, the infringement must be looked at in the context of the situation presented. So long as the infringement was one which in the context of the circumstances could reasonably be considered to be as minimal as possible, then it will meet the test. The mere fact that there could possibly be other solutions that might be considered to be a lesser infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement.*[194]

108 Similarly, in the context of a right to fish for commercial purposes, it is the reasonableness of the government's decisions that must be considered, and not "whether the government took the least rights-impairing action possible."[195]

109 Generally, however, where the allocation of priorities does not accord with the constitutional analysis set out in *Sparrow*, it will not be found that there was as little infringement as possible.[196]

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[192] *Gladstone*, para 64.
[193] *Gladstone*, para 65.
[194] *Nikal*, para 110.
[195] *Gladstone*, para 63.
[196] *Little*, para 84.

c. In a situation of expropriation, has fair compensation been made available?

110 The case law has not demonstrated that compensation is typically awarded for an infringement of the aboriginal right to fish.

d. Has the aboriginal group been consulted?

111 As will be discussed later in this paper, a duty to consult will arise when the Crown has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect that right or title.[197] This part of the justification test requires the Crown to make every "reasonable effort" to inform and to consult an aboriginal group in advance of the infringement of their rights.[198]

112 In considering the justification test, it should also be noted that in *Sparrow* the Court clarified that its articulation of the test did not set out an exhaustive list of all the factors to be considered and new factors may arise for different cases.[199]

113 Also, although the issue of justification was raised in both *Gladstone* and *Ahousaht*, no justification analysis has actually been applied to a case in which an aboriginal right to fish for a commercial purpose was found. In *Gladstone,* the Court remitted the case to trial on the issue of justification – a trial which never occurred because the Crown entered a stay on the charges.

114 In *Ahousaht*, Garson J. of the BCSC similarly declined to apply the justification analysis, explaining that "not having taken into account the existence of the plaintiffs' aboriginal right to fish and to sell fish, Canada is not in a position to justify the infringements of that right."[200] Instead, Garson J. gave Canada and the plaintiffs two years to reconcile their various interests through consultation and negotiation after which they may apply for a determination on whether the *prima facie* infringement of

[197] *Haida*, para 35.
[198] *Nikal*, para 110.
[199] *Sparrow*, para 83.
[200] *Ahousaht*, para 869.

the plaintiffs' aboriginal rights was justified.[201] It remains to be seen then, what additional guidance will be gained when a court eventually applies the justification analysis in the context of a commercial right to fish.

Interim Considerations

115 As described earlier, the aboriginal right to fish, like other aboriginal rights, is held by an individual aboriginal group. The fact that one aboriginal group has a right to do a particular thing will not be, without something more, sufficient to demonstrate that any other aboriginal group holds the same right.[202] Although there have been a number of high profile aboriginal right to fish cases in British Columbia, the vast majority of right to fish claims asserted in respect of Fraser River sockeye have yet to be determined by the courts.

116 The Department of Fisheries and Oceans may therefore be required to apply tentatively the principles and tests set out in the cases discussed above, in discharging its management duties over Fraser River sockeye. In some cases, its knowledge of asserted claims of aboriginal rights, together with contemplated conduct that may adversely affect such rights, will give rise to a duty to consult and possibly, to accommodate.[203]

117 In the interim, however, the Minister of Fisheries and Oceans need not await judicial confirmation of rights before providing to aboriginal fishers those opportunities that they might otherwise seek in a rights context. For example, in *R v. Huovinen*,[204] the BCCA held that there was nothing to prevent the Minister from authorizing the sale of fish caught under aboriginal communal fishing licences, even in the absence of a proven aboriginal commercial fishing right.[205]

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[201] *Ahousaht*, para 909.
[202] *Van der Peet*, para 69. See also *Gladstone*, para 65.
[203] See the "Duty to Consult" chapter of this paper.
[204] *R. v. Huovinen*, 2000 BCCA 427. Leave to appeal to SCC refused, [2000] S.C.C.A. No. 478. (*"Huovinen"*)
[205] *Huovinen*, para 30.

118 Similarly, in *R. v. Kapp*,[206] the Court held that the Department of Fisheries and Ocean's pilot sales program, which provided certain exclusive commercial fishing opportunities to aboriginal fishers but not to other commercial or non-aboriginal fishers, did not violate the equality provision set out in the *Canadian Charter of Rights and Freedoms.*[207] On the facts, the program made a distinction based on race - one of the enumerated grounds in s. 15(1).[208] However, the objective of the pilot sales program was to ameliorate the disadvantaged position of the participating aboriginal peoples, and therefore the program was protected by operation of s. 15(2) of the *Charter*. [209]

119 However, in managing the fishery, the Department of Fisheries and Oceans is not required to treat unproven claims as if they are proven rights. As discussed later in this paper, some situations may give rise to a duty to consult with aboriginal peoples and to reasonably accommodate their concerns. However, this duty does not require agreement. A duty to consult, if found, will not amount to a right of veto over management decisions made.[210]

120 If an aboriginal group fails in establishing its claim to an aboriginal right, then, in respect of what was claimed, there will be no other right, fiduciary duty, or private law duty owed to that aboriginal group which could give rise to rights that are different from the rights of other Canadians.[211]

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[206] *R v. Kapp*, 2008 SCC 41. ("*Kapp"*)
[207] *Canadian Charter of Rights and Freedoms*, Part I, *The Constitution Act, 1982,* s.15.
[208] *Kapp,* para 29, 56.
[209] *Kapp*, para 61.
[210] *Haida,* para 48.
[211] *Lax Kw'alaams*, para 77.

Treaty Rights in the Fishery

121 Several historic and modern treaties negotiated between the Crown and First Nations refer to aboriginal access and participation in fisheries and therefore, such treaties must be considered as part of the legal framework underlying the management of Fraser River sockeye.

122 As explained by the Court in *R v. Sundown*,[212] "[t]reaties may appear to be no more than contracts. Yet they are far more. They are a solemn exchange of promises made by the Crown and various First Nations."[213] These promises 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*."[214] Modern treaties are also negotiated to "create economic certainty over Crown land and resources and to improve the lives of First Nations."[215]

General Principles

123 Many of the principles that apply to aboriginal rights will also apply to treaty rights. For example, "both aboriginal and treaty rights possess a common *sui generis* nature"[216] and neither can be "interpreted as if they were common law rights."[217] In addition, both aboriginal and treaty rights will be subject to the constitutional analysis set out in *Sparrow* for rights recognized and affirmed by s. 35(1) of the *Constitution Act, 1982.*[218] Treaty rights, like aboriginal rights, will also be specific and may be exercised exclusively by members of the aboriginal group holding the right (i.e. the group that signed the treaty).[219]

[212] *R v. Sundown*, [1999] 1 S.C.R. 393. ("*Sundown"*)
[213] *Sundown*, para 24.
[214] *Haida,* para 20.
[215] Web: Ministry of Aboriginal Relations and Reconciliation, "Treaties and other Negotiations", available at http://www.gov.bc.ca/arr/atreaty/default.html (accessed September 5, 2010).
[216] *Badger*, para 78.
[217] *Sundown,* para 35.
[218] *Little*, para 50.
[219] *Sundown,* para 25.

124 As written documents, however, treaties will also be subject to specific rules of interpretation. Four main principles are set out by the Court in *Badger*:

i. A treaty represents a solemn exchange of promises between the Crown and various aboriginal peoples. It is an agreement whose nature is sacred.[220]

ii. The honour of the Crown is always at stake in its dealings with aboriginal peoples. Interpretations of treaties that may have an impact on treaty rights must be approached in a manner that maintains the integrity of the Crown. It is assumed that the Crown intends to fulfil its promises and no appearance of "sharp dealing" will be sanctioned.[221]

iii. Any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the aboriginal group. A corollary to this principle is that any limitations which restrict the rights of an aboriginal group must be narrowly construed.[222]

iv. The onus of proving that a treaty right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.[223]

125 In addition, when interpreting treaties "a court must take into account the context in which the treaties were negotiated, concluded and committed to writing," keeping in mind that the written document "did not always record the full extent of the oral agreement."[224]

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[220] *Badger*, para 41, citing *R. v. Sioui*, [1990] 1 S.C.R. 1025, p. 1063 ("*Sioui*").
[221] *Badger*, para 41, citing *Sparrow*, para 58. See also *Little*, para 56, in which the Court held that a restrictive interpretation of the appellant's treaty rights would not accord with the *Sparrow* analysis of the meaning to be given to the words "recognized and affirmed" used in s. 35(1) of the *Constitution Act, 1982*.
[222] *Badger*, para 41, citing *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, p. 36.
[223] *Badger*, para 41, citing *Simon* p. 406 and *Calder,* p. 404.
[224] *Badger*, para 52.

126 However, treaty interpretation will not always favour the rights and interests of the aboriginal group. "'Generous' rules of interpretation should not to be confused with a vague sense of after-the-fact largesse."[225] Rather, treaty interpretation must be realistic, and must "reflect the intention[s] of both parties" not just that of the aboriginal group.[226]

Historic Treaties[227]

127 Compared to the rest of Canada, only a relatively small number of historic treaties were entered into in British Columbia. Those that were fall into two main categories: the Douglas Treaties, and Treaty No. 8.

128 The Douglas Treaties, signed between 1850 and 1854, are a set of 14 treaties entered into between various First Nations on southern Vancouver Island and Governor James Douglas.[228] These treaties provide that their First Nation signatories will have the right to carry on their "fisheries as formerly."

129 Treaty No. 8, signed in 1899, covers approximately 840,000 square kilometres of land in northern Alberta, north-western Saskatchewan, southern Northwest Territories and the north-eastern quarter of British Columbia. This treaty promised reserves and benefits to First Nation signatories, including the right to hunt, trap and fish throughout the surrendered lands except over "such tracts as may be required or taken up from time to time" by the Crown.[229]

130 Treaty No. 8 has been considered by the Court in a leading duty to consult case, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,[230] which is discussed later in this paper. That case makes it clear that the Crown may hold a duty

[225] *Marshall I,* para 14.
[226] *Mikisew Cree*, para 28, citing *Sioui,* p. 1069.
[227] It is anticipated that historic treaties will be discussed in greater detail in a subsequent paper prepared by, or for, the Commission. This section offers an introduction only.
[228] The Douglas Treaties were first recognized as treaties in *R v. White and Bob,* (1964) 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd (1965), 52 D.L.R. (2d) 481 (S.C.C.).
[229] *Mikisew Cree,* para 2, citing Report of Commissioners for Treaty No. 8 (1899), p. 12.
[230] *Mikisew Cree*, see note 9.

to consult with signatory First Nations where its contemplated conduct may adversely affect the rights contained within the treaty, including the right to fish in areas surrendered to the Crown. Although it is possible that other fishing rights may derive from this treaty, their determination will require additional judicial guidance.

131 The various Douglas Treaties have received greater judicial consideration, particularly regarding the "fisheries as formerly" provision they share. For example, in considering the Douglas Treaty at Nanaimo, 1854, the BCCA explained that this provision affords a source of protection against infringements of the fishing rights held by signatory bands.[231] In an earlier case, *Tsawout Indian Band v. Saanichton Marina Ltd.,*[232] the BCCA had applied this protection not only to the right to catch fish, but also to a right of access to the fishing area and of preventing the destruction of the fishing area itself. The Court stated that the treaty right protected the Tsawout Indian Band "against infringement of their right to carry on the fishery, as they have done for centuries, in the shelter of Saanichton Bay."[233]

132 The "fisheries as formerly" provision has also been considered by the BCSC in *R v. Ellsworth.*[234] The right was held to encompass "fishing, conservation and the use of the fish by Indian people for whatever purpose the fish were used by the signatories to the treaty" and that one of these purposes was obviously for food. However, the BCSC noted that the treaty itself did not preclude other uses of fish.

133 More recently, in *Snuneymuxw First Nation v. British Columbia,*[235] the BCSC held that the effect of the "fisheries as formerly" provision was "at the very least, to entitle the First Nation to priority over the fish stocks that exist."[236] Further it "places responsibilities on the Crown and vests the First Nation with powers to manage the fishery in such a manner as not to jeopardize the constitutionally protected rights of the

[231] *Little,* para 46.
[232] *Tsawout Indian Band v. Saanichton Marina Ltd.,* (1989), 36 B.C.L.R. (2d) 79 (B.C.C.A.). ("*Saanichton Marina"*)
[233] *Saanichton Marina,* para 34.
[234] *R v. Ellsworth*, [1992] 4 C.N.L.R. 89 (B.C.S.C.).
[235] *Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205. ("*Snuneymuxw"*)
[236] *Snuneymuxw*, para 20.

Douglas Treaty First Nations."[237] It is unclear from this decision, however, what the practical application of a Douglas Treaty First Nation's "powers to manage the fishery" will be.

134 Outside of British Columbia, historic treaties have also been considered for their effect on fisheries management. Most notable is the case *R v. Marshall,*[238] in which the Court addressed the "promise of access to 'necessaries' through trade in wildlife"[239] contained in the 1760-1761 treaties entered into with, among others, the Mi'kmaq Indian Band in Eastern Canada. The Court held that the treaty protected a right of trade for access to "necessaries", and that such "necessaries" should be construed in the modern context as equivalent to a "moderate livelihood." In turn, "moderate livelihood" would include such basics as "food, clothing and housing, supplemented by a few amenities, but not the accumulation of wealth."[240] In practical terms, this right to trade could be accommodated through catch limits that "could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards" but that could nevertheless be regulated and enforced without violation of the treaty right.[241]

Modern Treaties

135 In recent decades, the provincial and federal governments have renewed a process of treaty negotiation with First Nations in British Columbia. On May 11, 2000, the *Nisga'a First Nation Final Agreement* came into effect.[242] This treaty, however, was negotiated using a singular process. To create a more uniform structure for treaty negotiations, British Columbia, Canada and the First Nations Summit (a consortium of British Columbia First Nations), entered into the British Columbia Treaty Commission Agreement on September 21, 1992. This Agreement authorized the creation of the BC

[237] *Snuneymuxw,* para 20.
[238] *R v. Marshall*, [1999] 3 S.C.R. 456 ("*Marshall I"*); For another example, see *R. v. Jones* (1993), 14 O.R. (3d) 421 (Ont. Crt. Prov. Div.) in which it was held that the Saugeen Ojibway Nation had an aboriginal and treaty right to fish for commercial purposes.
[239] *Marshall I,* para 54.
[240] *Marshall I,* para 59, citing *Gladstone*, para 165.
[241] *Marshall I*, para 61.
[242] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/firstnation/nisgaa/default.html (accessed September 5, 2010).

Treaty Commission, pursuant to the *Treaty Commission Act*,[243] to facilitate the negotiation of treaties among BC First Nations, Canada and British Columbia.

136 Currently, there are between 42[244] and 49[245] treaty tables operating in the BC treaty process. Each table includes one or more First Nations, such that approximately 116 First Nations are participating in negotiations.[246] However, there are approximately 198 First Nations in British Columbia[247] and as many as 143 of those are located along the migration routes of Fraser River sockeye.[248]

137 The modern treaty right to fish may include a percentage[249] allocation of a given species, for example Fraser River sockeye, to be caught for "domestic purposes" (defined as food, social and ceremonial purposes). This percentage allocation is translated into fish numbers by reference to the Canadian Total Allowable Catch for that species in a given year, and in some cases may be capped at a maximum number of fish.[250] Commercial fishing opportunities may be provided in a separate Harvest Agreement that accompanies, but does not form a part of, the treaty and is therefore not protected by s. 35 of the *Constitution Act, 1982*.

138 At the time of writing this paper, the only modern agreement in force involving Fraser River salmon stocks is the *Tsawwassen First Nation Final Agreement*. A final agreement involving the L'heidli T'enneh Indian Band, situated near Prince George, was signed after 14 years of negotiation. However, this agreement failed to pass the ratification stage when it was turned down by a vote of Lheidli T'enneh members on

[243] *Treaty Commission Act*, R.S.B.C. 1996, c. 461.
[244] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/treaty/negotiating/participants.html (accessed September 5, 2010)
[245] Web: BC Treaty Commission, available at http://www.bctreaty.net/files/updates.php; See also Web: First Nations Summit, available at http://www.fns.bc.ca/treaty/t_facts.htm
[246] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/treaty/faq.html
[247] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/treaty/faq.html. Note however that the First Nations Summit lists the number of BC First Nations at 197: First Nations Summit, available at http://www.fns.bc.ca/treaty/t_facts.htm
[248] *Ahousaht,* para 886.
[249] Note that this percentage may be a static number or it may be a number that varies according to the size of the Canadian Total Allowable Catch; i.e. an abundance based formula.
[250] For an example allocation, see the *Tsawwassen First Nation Final Agreement,* Appendix J-2.

March 30, 2007.[251] A final agreement made with several First Nations situated on the west coast of Vancouver Island, the *Maa-Nulth Final Agreement*, has been signed and ratified and will become effective on April 1, 2011. In addition, the *Yale First Nation Final Agreement* was initialled by negotiators on February 5, 2010 and is entering the ratification stage. The Lheidli T'enneh, Maa-Nulth and Yale final agreements all involve Fraser River sockeye.

139 This paper does not offer an in-depth analysis of modern treaties. Nevertheless, it may be important to note that the Government of Canada has deferred fisheries discussions at all treaty tables involving salmon, pending the findings and recommendations to be made by the Commissioner following this Inquiry. This deferral, however, will not affect the final agreements being entered into with the Yale First Nation, Sliammon First Nation and In-SHUCK-ch Nation, which have reached late stage negotiations.[252]

Infringement

140 The Court has recognized that treaty rights are not absolute. The criteria used to assess infringement, as set out in *Sparrow*, are to "apply equally to the infringement of treaty rights."[253] However, regulations or conditions such as catch limits that "do no more than reasonably define" a treaty right in terms that are required for administrative purposes and for confirming an understanding of the right with the group holding it, will not be seen as infringing.[254]

141 In addition, treaties themselves may contain conditions that limit rights and the expression of such limits in regulations or licenses will not be an infringement. For example, in the *Tsawwassen First Nation Final Agreement*, the treaty fishing right is limited to "harvest for domestic purposes" (food, social and ceremonial purposes)

[251] Web: Ministry of Aboriginal Relations and Reconciliation, available at http://www.gov.bc.ca/arr/firstnation/lheidli/default.html
[252] Web: Ministerial Statement of Honourable Gail Shea, 2 March 2010, available at http://www.dfo-mpo.gc.ca/media/statement-declarations/2010/20100302-eng.htm
[253] *Badger,* para 74-54.
[254] *Marshall II,* para 37.

and also by measures not only required for conservation, but for public health and public safety.[255]

Justification

142 In some cases, the infringement of treaty rights will also be justifiable. The burden of justifying such infringement will fall upon the Crown.[256] However, "[t]reaty rights must not be lightly infringed. Clear evidence of justification would be required before that infringement could be accepted."[257]

143 In *Badger*, the Court extended to treaties the justificatory standard developed for aboriginal rights in *Sparrow,* as discussed earlier in this paper.[258] However, in doing so, a court must also consider the context of the treaty itself and be open to other justificatory factors that may arise on the facts of each case.[259]

144 For example, as with aboriginal fishing rights, infringements to treaty fishing rights may be justified not only on the basis of conservation concerns, but also for other "compelling and substantial public objectives."[260] This may include, without limitation, the objectives of public safety[261] and, as in a case regarding a treaty right to fish for a "moderate livelihood", the objectives of "economic and regional fairness, and recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups."[262]

[255] *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, s. 1 and s. 2. See also *Maa-Nulth First Nations Final Agreement,* Fisheries, Chapter 10, s. 10.1.1 and 10.1.2.
[256] *Marshall II*, para 41.
[257] *Sundown*, para 46.
[258] *Badger*, para 77 and 85.
[259] *Badger*, para 85.
[260] *Marshall II*, para 19.
[261] *Morris,* para 35.
[262] *Marshall II*, para 41.

Interim Considerations

145 With relatively few historic treaties and even fewer concluded modern treaties, it appears that, in many cases, fisheries management decisions will require consideration of proven or unproven aboriginal rights and title as opposed to negotiated treaty rights.

146 Also, although treaties may be an important source of information in assessing the rights held by aboriginal peoples, they nevertheless cannot be taken as comprehensive. As articulated by the Court in *Mikisew Cree*, "[t]reaty making is an important stage in the long process of reconciliation, but it is only a stage" and as such, a treaty is "not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it."[263]

Management of the Fishery

Aboriginal Management of the Fishery

147 The Court has recognized the "history of conservation-consciousness and interdependence with natural resources" held by aboriginal peoples.[264] This recognition, together with the existence of aboriginal and treaty rights in relation to the fishery, may give rise to a duty of consultation and reasonable accommodation regarding decisions that may adversely impact upon such rights. The content and scope of this duty will be discussed later in this paper. However, participation in consultative processes may be differentiated from the decision-making authority associated with aboriginal management.

148 A claim to aboriginal self-governance regarding the fishery has yet to reach the Court. Therefore, it remains uncertain whether or how such a right, if found, would impact the management of the fishery. This paper does not explore the complex issue of aboriginal self governance. It also does not provide a comprehensive review of the

[263] *Mikisew Cree,* para 54.
[264] *Sparrow*, para 82.

various means by which aboriginal peoples may or may not participate in fishery management decisions. Rather, it simply sets out some of the decision-making authority conferred upon aboriginal peoples through legislation or treaty.

149 For example, modern treaties may recognize the authority of a First Nation to enact certain laws in relation to the fishery that prevail to the extent of conflict with federal or provincial law. This exclusive law-making power may be limited in scope, however, covering subjects such as the designation of fishers and vessels authorized to fish under the First Nation's communal fishing right, or the distribution of catch amongst members of the First Nation.[265] The First Nation may also enact laws in respect of other matters, such as the documentation held by fishers and vessels designated by the First Nation to fish and the trade and barter of fish harvested under the communal fishing right.[266] However, such laws will be subordinate to federal or provincial laws to the extent of any conflict.

150 Note that a First Nation's management role in the fishery may also be set out in other ways under a treaty. A First Nation may be asked to propose an annual fishing plan that will then be presented to a Joint Fisheries Committee comprised of representatives from the First Nation, federal and provincial governments. The Joint Fisheries Committee may review the annual fishing plan and provide recommendations to the Minister of Fisheries and Oceans as to whether the fishing plan ought to be implemented.[267]

151 A band council operating under the *Indian Act*[268] may also have the authority to make band by-laws in respect of fishing on reserve lands. Section 81(1)(o) of the *Indian Act* provides that:

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[265] See for example, *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, s. 51. See also *Maa-Nulth First Nations Final Agreement*, Fisheries, Chapter 10, s. 10.1.39.
[266] See for example, *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9, s. 53. See also *Maa-Nulth First Nations Final Agreement*, Fisheries, Chapter 10, s. 10.1.41.
[267] See for example, *Tsawwassen First Nation Final Agreement*, Fisheries, Chapter 9 (throughout), particularly ss. 68ff. See also *Maa-Nulth First Nations Final Agreement*, Fisheries, Chapter 10 (throughout).
[268] *Indian Act*, R.S. 1985, c. I-5.

> *The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely... the preservation, protection and management of fur-bearing animals, fish and other game on the reserve.*

152 In *R v. Jimmy,*[269] Hinkson J.A. for the BCCA held that a band by-law provision that was validly enacted pursuant to s. 81(1)(o) of the *Indian Act* could afford a complete defence to a charge under the *Fisheries Act*.[270] As explained later by the Court, Parliament's intention in enacting s. 81(1) as a whole and in particular paragraph (o) was to "provide a mechanism by which Band Councils could assume management over certain activities within the territorial limits of their constituencies."[271]

153 However, the band by-laws contemplated in s. 81(1)(o) of the *Indian Act* apply only to "management of ... fish...on the reserve." In *R v. Lewis*, the Court restricted what was considered to be "on the reserve" by finding that the common law *ad medium filum aquae* presumption did not apply to navigable waters.[272] That is, a reserve bordering a navigable river will not extend to the mid-point of that river, unless such area is expressly included in the reserve grant. Rather the reserve territory will end at the natural boundary, or high water mark of the river.[273] Similarly, in *Nikal*[274] the Court held that a reserve would not include in its territory any part of a navigable river which ran through its centre.

154 Considering the navigability of the domestic migratory path of Fraser sockeye, including the Fraser River, the *Lewis* and *Nikal* cases may assist in determining whether this fishery is subject to the *Fisheries Act* and its regulations or the by-laws of reserves which may adjoin this area.

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[269] *R v. Jimmy* (1987), 15 B.C.L.R. (2d) 145 (C.A.). ("*Jimmy"*)
[270] *Jimmy*, para 28. Decision referred to by the SCC in *R v. Lewis* [1996] 1 S.C.R. 921, para 2. ("*Lewis*")
[271] *Lewis*, para 80.
[272] *Lewis,* para 62.
[273] *Lewis,* para 45.
[274] *Nikal*, see note 58.

Canada's Obligation to Manage the Fishery

155 In contrast, the Court has been clear in expressing that a central authority is required to manage the salmon fishery and that this authority rests with the federal government. In *Nikal*, the Court stated:

> *If the salmon fishery is to survive, there must be some control exercised by a central authority. It is the federal government which will be required to manage the fishery and see to the improvement and the increase of the stock of that fishery.*[275]

156 Conservation, in particular, is a responsibility that the Court has stated is shouldered by the federal government alone and not by other participants to the fishery:

> *The paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource.*[276]

157 This may be so because the federal government holds a "duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest"[277] and therefore the rights or interests of all participants to the fishery are to be considered. At times, the government will not only be required to make decisions that will affect harvest allocations and fishery access between aboriginal peoples and non-aboriginal peoples, but also as between different groups of aboriginal peoples that may hold different rights in the fishery.[278]

158 Also, even where aboriginal rights in the fishery are found to exist and the government is required to ensure that its management plans take those rights seriously, it remains that "the constitutional entitlement embodied in s. 35(1) ... is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery."[279]

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[275] *Nikal*, para 102.
[276] *Marshall II,* para 40.
[277] *Comeau's Sea Foods*, para 37.
[278] *Gladstone,* para 65.
[279] *Sparrow*, para 81.

The Duty to Consult

The Duty to Consult and its Source

159 The "Crown's assertion of sovereignty over an aboriginal people and the *de facto* control of land and resources that were formerly in the control of that people" is the foundation for the Crown's duty of honourable conduct.[280] The honour of the Crown is always at stake in its dealings with aboriginal peoples[281] and it is this honour that may give rise to a duty to consult aboriginal peoples in a process of fair dealing and reconciliation.[282]

160 Because the duty to consult stems from the honour of the Crown, the "Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect aboriginal interests."[283] Although certain procedural aspects of consultation may be delegated by the Crown to third parties, it is not possible for the honour of the Crown to be delegated and therefore, the Crown retains its responsibility over consultation in such cases.[284] Third parties, such as businesses or non-governmental agencies, may also choose to consult with First Nations, but they will not be held to a constitutional duty to do so.

Whether a Duty to Consult Arises

161 The duty to consult does not exist for every decision or action taken by the Crown. Rather, 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."[285] That is, there are two elements that will give rise to a duty to consult:

i. That the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title; and

[280] *Haida,* para 32.
[281] *Haida*, para 16.
[282] *Haida*, para 32.
[283] *Haida,* para 53.
[284] *Haida,* para 53.
[285] *Haida*, para 35.

ii. The Crown contemplates conduct that might adversely affect that aboriginal right or title.

162 In regards to the first element, the Court has been clear that asserted but unproven claims of aboriginal rights or title may also give rise to a duty to consult pending the resolution of such claims.[286] As explained in *Haida*, limiting reconciliation to the "post-proof sphere" runs the risk that "[w]hen 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."[287]

163 There are two sub-components required in regards to the second element: "contemplated conduct" and "adverse effect".

164 In regards to "adverse effect", the BCCA has held that not all fishery management decisions will adversely affect the aboriginal right to fish and there may be a *de minimus* level of adverse effect before a duty to consult will arise. For example, in *Douglas, 2007*,[288] the BCCA held that the decision to allow marine recreational fishers to retain some 200 Early Stuart sockeye incidentally caught in a Chinook-directed fishery would have no appreciable effect on the aboriginal right to fish for food, social and ceremonial purposes, and therefore did not give rise to a duty to consult.[289]

165 In regards to "contemplated conduct", there may also be a *de minimus* level of decision that gives rise to the duty, or a differentiation between strategic decisions and individual fishery openings and closures. In *Douglas, 2007*, the BCCA also held that "having conducted appropriate consultations in developing and implementing its fishing strategy, DFO is not required to consult with each First Nation on all openings and closures throughout the salmon fishing season, where those actions were consistent with the overall strategy."[290]

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[286] *Haida,* para 27.
[287] *Haida,* para 33.
[288] *Douglas, 2007,* see note 109.
[289] *Douglas, 2007*, para 44.
[290] *Douglas, 2007*, para 42.

166 Also, according to the Alberta Court of Appeal, "contemplated conduct" giving rise to a duty to consult is unlikely to include the passage of legislation. Although not in the context of aboriginal rights, the Court has stated that "[l]ong-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent."[291] In *R v. Lefthand,*[292] the Alberta Court of Appeal took this to mean that there can be no duty to consult prior to the passage of legislation, even where aboriginal rights may be affected, explaining that:

> *Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them. Once enactments are in place, consultation only becomes an issue if a prima facie breach of an aboriginal right is sought to be justified.*[293]

167 Further, "contemplated conduct" is unlikely to include emergency management actions that must be urgently taken by the Crown. According to the BCSC, the duty to consult in regards to fishery management decisions may not arise, or may cease, where immediate actions must be taken that do not allow time for meaningful consultation. For example, in *Douglas, 2008,* that court stated that:

> *The duty to consult is ongoing where accommodation of the aboriginal interests is a realistic possibility. However, where exigent circumstances require the imposition of conservation measures that must be shared by all fisheries, accommodation may not be possible and thus ongoing consultation becomes meaningless.*[294]

[291] *Authorson v. Canada (Attorney General)*, 2003 SCC 39, para 37.
[292] *R v. Lefthand*, 2007 ABCA 206. Leave to appeal to SCC refused, [2007] S.C.C.A. No. 468. ("*Lefthand"*)
[293] *Lefthand*, para 38.
[294] *Douglas, 2008,* para 53.

Scope and Content of the Duty to Consult

168 The Court has clearly articulated that when it comes to determining the scope and content of the duty to consult "every case must be approached individually"[295] and "it is impossible to provide a prospective checklist of the level of consultation required."[296] Similarly, the British Columbia Court of Appeal has agreed that the content of the duty to consult will "depend on the facts and circumstances of each particular case,"[297] and "no useful purpose would be served by attempting to define for general application the meaning of the word 'consulted.'"[298]

169 However, general principles will apply. The scope and content of consultation "must be consistent with the honour of the Crown"[299] and "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."[300] As explained by the Court in *Haida*, this analysis gives rise to a spectrum of consultation that varies according to the strength of the claim to aboriginal rights or title and the severity of the potential adverse effect on that right or title:

> *[T]he 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.*[301]

170 Where the claim to aboriginal right or title is weak, the aboriginal right limited or the potential for infringement minor, "the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in response to the notice."[302] Notice and information, it appears, is the minimum requirement in such cases as aboriginal

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[295] *Haida,* para 45.
[296] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550, para 32. (*"Taku River"*)
[297] *Sampson,* para 100.
[298] *Sampson,* para 100.
[299] *Haida,* para 38.
[300] *Haida,* para 45.
[301] *Haida*, para 39.
[302] *Haida,* para 43.

peoples “would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.”[303]

171 In contrast, 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, “deep consultation, aimed at finding a satisfactory interim solution, may be required.”[304] The precise requirements for the duty to consult will continue to vary with the circumstances and the Court does not offer an exhaustive or mandatory list. However, “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.”[305]

172 In general, the Crown will be expected to take a proactive and comprehensive approach to consultations. For example, in regards to management of the fishery, the requirement for consultation “is not fulfilled by DFO merely waiting for a Band to raise the question of its Indian food fish requirements” but rather, DFO is expected to proactively engage aboriginal groups to inform them of conservation measures being taken.[306] In addition, the information that is provided should “cover all of the conservation measures which were implemented” including how such measures affect other users of the resource, and not just the aboriginal group being consulted.[307]

173 In order for consultation to be meaningful, it must also occur in a timely manner in advance of any interference of aboriginal rights. Consultation in advance “goes to the heart of the relationship”[308] between aboriginal and non-aboriginal people and is required in order for the aboriginal peoples being consulted to have an opportunity to express their concerns and interests, for the Crown to take those representations

[303] *Sparrow*, para 82.
[304] *Haida,* para 44.
[305] *Haida,* para 44.
[306] *Sampson*, para 109.
[307] *Jack, John and John,* para 77.
[308] *Mikisew Cree*, para 3.

seriously and, if possible, to address those concerns. As stated by the BCCA in *Halfway River:*

> *The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.*[309]

174 When it comes to management of the fishery, this timeliness requirement means that the Department of Fisheries and Oceans' duty to consult requires it to inform an aboriginal group of the conservation measures being implemented *before* they are implemented.[310]

175 However, although the Crown is required to "engage directly"[311] with aboriginal peoples, consultations need not occur with each aboriginal group individually. Individual consultations are "impractical and unnecessary for the DFO to satisfy its duty to consult."[312] This is especially so in the case of consultations regarding the Fraser River salmon fishery, where a large number of aboriginal groups may hold rights and interests and many issues will become the subject of consultations:

> *Given the nature of the Fraser River salmon fishery, the number of First Nations involved, and the lack of unanimity between them on important issues, DFO's emphasis on joint consultations was reasonable and appropriate*.[313]

[309] *Halfway River First Nation v. British Columbia*, 1999 BCCA 470, para 160. (*"Halfway River"*)
[310] *Jack, John and John*, para 79.
[311] *Mikisew Cree*, para 64.
[312] *Douglas, 2008*, para 53.
[313] *Douglas, 2007*, para 40. See also *Douglas, 2008*, para 53.

Effect of the duty to consult

176 The effect of good faith consultation may be to reveal a duty to accommodate.[314] As stated by the Court in *Haida:*

> *Where a strong prima facie case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.*[315]

177 Accommodation can take a variety of forms, including changing government plans or policies in order to address aboriginal concerns.[316] The key requirement to any consultative process is responsiveness and willingness on the part of the Crown to make changes based on information that emerges during the consultative process.[317] Simply put, "[c]onsultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the [aboriginal group] an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along."[318]

178 However, accommodation of the kind desired by an aboriginal group may not occur in every case. Accommodation does not amount to a "veto" over what can be done and "a balancing of interests, of give and take" will be required.[319] That is, meaningful consultation does not carry a duty to reach an agreement with the aboriginal peoples whose rights or title may be adversely affected.[320] Instead, compromise and a balancing of societal concerns may be necessary:

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[314] *Haida,* para 47.
[315] *Haida,* para 47.
[316] *Taku River*, para 25.
[317] *Taku River*, para 29.
[318] *Mikisew Cree*, para 54.
[319] *Haida,* para 48.
[320] *Haida,* para 10.

> *[A]ccommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.*[321]

179 The Crown is "bound by its honour to balance societal and Aboriginal interests in making decisions that affect Aboriginal claims" and this may require the Crown to make decisions in the face of disagreement with aboriginal peoples as to the adequacy of its response to their concerns.[322]

180 For example, in regards to the management of the fishery, the BCCA has held that consultations between the Department of Fisheries and Oceans and an aboriginal group do not require agreement on all conservation measures, the consent of the aboriginal group is not required for any plan proposed by the Department, and the aboriginal group is not entitled to veto any conservation measures that the Department wishes to implement.[323]

181 Similarly, the BCSC has held that the consent of an aboriginal group is not required before the Department may impose closures on aboriginal fisheries, or effect in-season changes to the annual fishing plan that result in commercial and recreational fisheries having access to the fish before the aboriginal fishing needs have been met.[324]

Obligations of Aboriginal Peoples regarding Consultation

182 Although the duty to consult is held by the Crown, the Court has added that "there is some reciprocal onus on the [aboriginal group] to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution."[325]

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[321] *Taku River*, para 2.
[322] *Haida,* para 45. Compare this to the right of consent that may arise in regards to infringement on aboriginal title, where "some cases may require the full consent of an aboriginal nation": *Delgamuukw*, para 168.
[323] *Jack, John and John,* para 81.
[324] *Douglas, 2008,* para 56-57.
[325] *Mikisew Cree*, para 65.

As the Alberta Court of Appeal explains, the Crown will not be prevented from taking action if an aboriginal group refuses to participate in consultative processes:

> *The obligation to consult does not include an obligation to repeatedly request input from the aboriginal group, nor to inquire as to why no response has been received to the invitation to consult. Likewise, no aboriginal group can effectively stall the development of public policy by delaying the provision of input, or by refusing to participate.*[326]

183 Similarly, the BCCA has stated that the Crown's duty to consult "does not mean that the First Nation is absolved of any responsibility",[327] but rather, it holds a reciprocal duty and cannot frustrate the process by imposing unreasonable conditions:

> *There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions.*[328]

184 An example of "unreasonable conditions" may be an aboriginal group insisting as its only position that it is entitled to continue fishing until its fishing needs are met, regardless of the conservation concerns for the stock.[329] "This was not a reasonable position from which to engage in meaningful consultation."[330]

Example Case Law

185 Given the case by case analysis that must be applied to the duty to consult, it may be useful to consider briefly the facts presented in two of the leading duty-to-consult cases, one in which the duty to consult was met, and one in which it was not.

186 In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,[331] a mining company sought permission from the BC government to re-open an old mine.

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[326] *Lefthand,* para 43.
[327] *Halfway River*, para 182.
[328] *Halfway River*, para 161.
[329] *Douglas,2008,* para 51.
[330] *Douglas, 2008,* para 51.
[331] *Taku River,* see note 296.

The Taku River Tlingit First Nation (the "TRTFN") objected to the company's plan to build a road through a portion of their traditional territory. This road would pass through an area "critical to the TRTFN's domestic economy"[332] and the TRTFN held *prima facie* aboriginal rights and title over the area.[333] On the facts, the Province had a duty to consult, but it met that duty. Specifically, the TRTFN was part of a project committee that fully participated in the environmental review process for the project; its views were put before the Minister, and the final project approval contained measures designed to address both the TRTFN's immediate and long term-concerns.[334] The Province consulted and made accommodations. However, it was not under a duty to reach an agreement with the TRTFN and its failure to do so did not breach its obligation to consult in good faith.[335]

187 In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),*[336] a different result was reached. The Mikisew Cree First Nation ("MCFN") is a signatory to Treaty 8, in which several First Nations surrendered some 840,000 square kilometres of land. In exchange for this surrender, the First Nations were promised reserves and benefits including the rights to hunt, trap and fish throughout the land surrendered except for "such tracts as may be required or taken up from time to time."[337] In 2000, without consultation, the federal government approved a winter road that was to run through the MCFN's reserve. The government later amended the road plan so that it would track along the boundary of the reserve rather than run through it. However, neither of these "unilateral" actions met the Crown's duty to consult, which would have required at least providing notice to the MCFN and to engage directly with them. This engagement ought to have included provision of information about the project, anticipating its adverse impact on the rights and interests of the MCFN and attempting to minimize those adverse impacts.[338] Had the consultation process gone ahead, it

[332] *Taku River*, para 31.
[333] *Taku River,* para 30.
[334] *Taku River*, para 22.
[335] *Taku River*, para 22.
[336] *Mikisew Cree*, see note 9.
[337] *Mikisew Cree*, para 2.
[338] *Mikisew Cree*, para 64.

would not have given the MCFN a veto over the alignment of the road.[339] However, they were at least entitled to be consulted about the decision so that their concerns would be heard and accommodations could be considered in good faith.[340]

Upcoming Developments

188 It should be noted that two cases regarding the duty to consult were recently heard by the Court. In the first, *David Beckman, in his capacity as Director, Agricultural Branch, Department of Energy, Mines and Resources, et al. v. Little Salmon/Carmacks First Nation, et al*,[341] heard on November 12, 2009, the Court was asked to consider whether there is a duty to consult and, where necessary, accommodate First Nations' concerns and interests in the context of a modern comprehensive land claims agreement.

189 In the second, *Rio Tinto Alcan Inc., et al. v. Carrier Sekani Tribal Council*,[342] heard May 21, 2010, the Court was asked to consider a range of consultation issues, including but not limited to whether BC Hydro had a duty to consult and, if necessary, accommodate, a First Nation in regards to another Crown actor's conduct, whether a tribunal such as the BC Utilities Commission possesses a "duty to decide" consultation questions and whether BC Hydro had a duty to consult and, if necessary, accommodate in respect of an Energy Purchase Agreement.

190 The Court reserved judgment on both of these cases and reasons were not available at the time of writing this paper. It is anticipated that the Court may render its reasons within the duration of this Inquiry.

[339] *Mikisew Cree,* para 66.
[340] *Mikisew Cree*, para 66.
[341] SCC Docket 32850.
[342] SCC Docket 33132.

Conclusion

191 As this paper has set out, aboriginal peoples have both proven and unproven claims to aboriginal rights and title, and to treaty rights, that affect the management of the Fraser River sockeye salmon fishery. In practical terms, uncertainties may remain as to exactly how such rights and titles ought to inform the detailed decision-making inherent to managing a complex fishery. However, the Crown, with its duty of honourable conduct in all its interactions with aboriginal peoples, will be required to consider those rights and titles in a process of good faith dealings and reconciliation. In some cases, the honour of the Crown will require consultation and possibly accommodation.