

Primer: Canadian Law on Aboriginal and Treaty Rights

Introduction

Prior to European occupation of North America, Aboriginal peoples occupied what is now Canada, having established their own cultures, systems of laws and government, social organizations, languages, economies, and territories. Most importantly, Aboriginal ways of life and laws governed their interactions and use of natural resources. Despite their diversity, all Aboriginal peoples shared a fundamental emphasis on tradition, community and a connection with the natural environment. Conflict over the rights of Aboriginal peoples in British Columbia stems from the differences in philosophies and cultural systems of Aboriginal and non-Aboriginal peoples originating at the time of European settlement in Canada.¹ This conflict has focused on rights to land, sea, and resources, and on the law as it applies to Aboriginal peoples in Canada.

Initially, relations between Europeans and Aboriginal peoples were that of relatively equal trading partners. In many ways, the Europeans relied on Aboriginals for survival in the foreign land. However, the advance of colonization and the rapid spread of European diseases in Canada resulted in devastating reductions in Aboriginal populations and challenges to Aboriginal ways of life.

From early in its colonizing period, the British Crown pursued a policy set out in the *Royal Proclamation, 1763* (the "*Royal Proclamation*").² The *Royal Proclamation* purported to establish Britain's vast new North American empire and delineated relations with the Aboriginal peoples of Canada. It included the recognition of Aboriginal title.³ In effect, the Crown recognized Aboriginal land ownership and authority as continuing under British sovereignty. A significant provision of the *Royal Proclamation* was that only the Crown could acquire land in Canada from First Nations, and only by treaty.

In what is now British Columbia, the colonial government did not follow the policy set out in the *Proclamation*. This government assumed control over the management of the lands and resources. Legal concepts related to prior exclusive ownership or Aboriginal title did not inform the approach of the settlers towards prior Aboriginal occupation of the land and natural resource use. When British Columbia joined Canada in 1871, Canada assumed jurisdiction over "Indians

¹ The British Columbia Claims Task Force, *The Report of the British Columbia Claims Task Force* (1991), at 4, online: BC Treaty Commission <http://www.bctreaty.net/files/pdf_documents/bc_claims_task_force_report.pdf> (date accessed: 13 November 2008) [hereinafter *The Report*].

² *Royal Proclamation 1763 (U.K.)*, reprinted R.S.C. 1985, App. II, No.1 [hereinafter the *Royal Proclamation*]. The *Royal Proclamation* is often referred to as the "Magna Carta of Indian Rights" – see *The Crown's Fiduciary Relationship with Aboriginal peoples* at p.1, online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/prb0009-e.pdf>> (date accessed: 13 November 2008) [hereinafter *The Crown's Fiduciary Relationship*].

³ *The Report*, *supra* note 1 at 4. See also *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 (S.C.C.) [hereinafter *Calder* cited to D.L.R.], and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 (S.C.C.) [hereinafter *Delgamuukw*]. Note that, as the SCC decided in *Calder*, the *Royal Proclamation* is not the only source of Aboriginal title; this clarification is especially important, as the *Royal Proclamation* did not apply to all of what became Canada (*e.g.*, it did not apply to British Columbia) – see *Calder* at para. 26.

and lands reserved for the Indians,"⁴ and the Province considered the federal government responsible from that moment for issues concerning Aboriginal peoples and their lands.

The assertion of European sovereignty did not extinguish pre-existing Aboriginal laws, rights and interests. Instead, they were subsumed into the common law of Canada. Nevertheless, Aboriginal rights remained vulnerable until the enactment of s. 35 of the *Constitution Act, 1982*. Prior to this constitutional amendment, government could unilaterally extinguish Aboriginal rights through clear and competent federal legislation or constitutional amendment. Also, as is still the case, Aboriginal rights holders themselves could bring about the extinguishment of such rights by surrendering them to the Crown (e.g. through a treaty). Since the enactment of s. 35, non-extinguished Aboriginal rights and interests and treaty rights and interests have garnered significant protections under the Canadian Constitution – largely as developed through court cases, most of which went all the way to the Supreme Court of Canada ("SCC").

Canadian law has evolved to recognize and begin to protect rights of Aboriginal peoples based on their prior occupation and use of the lands and waters that now make up Canada. For over 35 years, beginning with the SCC decision in *Calder*,⁵ Canadian courts have considered the law regarding established and asserted Aboriginal rights and title⁶ and treaty rights. From *Calder* through the decision in *Delgamuukw*⁷ and up to the recent British Columbia Supreme Court *Tsilhqot'in*⁸ and *Wii'litswx*⁹ cases, the approach of the Canadian judiciary to Aboriginal claims has evolved and will continue to evolve into the future. In turn, the development of Canadian jurisprudence on Aboriginal rights has influenced and continues to shape Canada's political and legal landscapes. Canadian law now recognizes Aboriginal and treaty Rights and the Canadian Constitution offers significant protection for the exercise of those rights. The content of these rights and the legal duties that flow from them continue to expand and become clarified, mostly through court cases at the highest levels of Canadian courts. These decisions have empowered Aboriginal communities to more effectively assert and exercise these rights and have placed increasing pressure on federal and provincial governments (either or both, the "Crown") to acknowledge their responsibilities to Aboriginal peoples and come to the table to negotiate resolutions to this clash of cultures and the injustices that have followed.

This primer on Canadian law and Aboriginal peoples examines both substantive and procedural aspects of the constitutional protections for Aboriginal and treaty rights. Part I deals with substantive Aboriginal rights, title and treaty rights and focuses on examination of the

⁴ *Constitution Act, 1867*, s. 91(24).

⁵ *Calder*, *supra* note 3. While a small number of other earlier decisions did involve Aboriginal title and rights, most notably *St. Catharine's Milling & Lumber Co. v. The Queen* (10 O.R. 196, aff'd 13 O.A.R 148, aff'd 13 S.C.R. 577, aff'd (1888), 14 App. Cas. 46, 4 Cart. 107) (S.C.C.), from which *Calder* draws, *Calder* was the first significant case that focused on such rights.

⁶ Aboriginal title is a special type of Aboriginal right. As it arises in the first half of this compendium (regarding infringements under the *Sparrow* Test), title is distinguished from other Aboriginal rights, such as the rights to access and use natural resources. In the second half of this compendium (focused on the duty to consult), the term Aboriginal rights includes Aboriginal title.

⁷ *Delgamuukw*, *supra* note 3.

⁸ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 [hereinafter *Tsilhqot'in*].

⁹ *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 [hereinafter *Wii'litswx*].

constitutional entrenchment of Aboriginal rights under section 35 of the *Constitution Act, 1982*¹⁰ and the framework used to determine alleged violations of Aboriginal and treaty rights and justification for such violations under s. 35. Part II focuses on the scope and content of the government's largely (though not completely) procedural duty to consult Aboriginal peoples when the Crown contemplates actions that may negatively impact asserted or proven Aboriginal or treaty rights.

Part I – Section 35 of the Constitution Act, 1982

A. Entrenchment

Section 35(1) is found in Part II of the *Constitution Act, 1982*, entitled "Rights of the Aboriginal Peoples of Canada," and provides as follows:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Under s. 35(1), Aboriginal and treaty rights have constitutional status and resulting protections. Although s. 35(1) forms part of the Canadian constitution, it falls outside of the *Canadian Charter of Rights and Freedoms*¹¹ and, therefore, the legislative override provision of s. 33 of the *Constitution Act, 1982* does not appear to apply to it.¹² As a result, federal cannot extinguish Aboriginal and treaty rights (provincial or territorial laws never had the jurisdiction to extinguish these rights). This entrenchment in the constitution represents a major landmark in the evolving relationship between Aboriginal peoples and the Crown and their competing interests. The constitutional entrenchment did not create Aboriginal rights, however; such rights already existed and, as noted above, were recognized at common law.¹³

Despite s. 35(1) protections, the government does have the jurisdiction to limit or infringe Aboriginal and treaty rights for justifiable reasons.¹⁴ The objective of any limitation must be substantial and compelling and any limitation of the right must be consistent with the fiduciary relationship that the Crown has with Aboriginal peoples (see discussion below under the justification part of the *Sparrow* Test).¹⁵

¹⁰ Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Constitution Act, 1982*]. This act amended the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

¹¹ Part 1 of the *Constitution Act, 1982*, *supra* note 7.

¹² *R. v Sparrow*, [1990] 1 S.C.R. 1075 at para. 47 (S.C.C.) [hereinafter *Sparrow*]. However, see also paras. 61ff., in which the SCC clearly agrees that s.1 of the *Constitution Act, 1982* does not apply to s. 35(1) rights and yet appears to leave open the question of whether "override" legislation that relies upon s. 33 of the *Constitution Act, 1982*, could survive if justified under the *Sparrow* Test (we otherwise discuss this test below).

¹³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 28 (S.C.C.) [hereinafter *Van der Peet*] (referring to *Calder*, *supra* note 3 at 156 (para. 26)).

¹⁴ *Sparrow*, *supra* note 12 at 1109 (paras. 61ff.) and see discussion, below under "Can the infringement be justified?"

¹⁵ J. Woodward, *Native Law*, looseleaf (Calgary: Carswell, 1994) c. 5 at para. 60 [hereinafter Woodward], referencing *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.) [hereinafter *Gladstone*].

B. Purposes

The courts have articulated various purposes of s. 35(1), including the following:

- i. *R v. Van der Peet*¹⁶
 - To recognize and respect the fact that Aboriginal occupation of the land and establishment of distinct societies in Canada pre-dated European occupation;¹⁷ and
 - To reconcile this fact with the assertion by the Crown of its sovereignty over land in Canada.¹⁸
- ii. *R v. Sparrow*¹⁹ and *Haida Nation v. British Columbia*²⁰
 - "[T]o indicate its strength as a promise to the aboriginal peoples of Canada" to give real protection to Aboriginal and treaty rights.²¹
 - To require the Crown to act honourably in all its interactions with Aboriginal peoples.²²
- iii. *Delgamuukw v. British Columbia*²³ and *R. v. Van der Peet*
 - To ensure the cultural survival of Aboriginal communities and societies.

C. Interpretation

(i) General Principles

Courts must interpret section 35(1) in a manner consistent with the general principles of constitutional interpretation, principles relating to Aboriginal rights, and the constitutional purposes of the provision itself. Thus, courts must construe it purposively and give it "a generous, liberal interpretation"²⁴ in accordance with its purpose of affirming Aboriginal and treaty rights. Any ambiguity in the scope of s. 35(1) is to be resolved in favour of Aboriginals.²⁵

(ii) "Existing" Aboriginal and Treaty rights

In *Sparrow*, a member of the Musqueam Band was charged with fishing with a net longer than his food fishing licence permitted, in contravention of provisions of the federal *Fisheries Act*.²⁶ Mr. Sparrow argued that he was exercising an existing Aboriginal fishing right, which was constitutionally protected under s. 35. In rendering its decision, the SCC interpreted key words of s. 35.

¹⁶ *Van der Peet*, supra note 13.

¹⁷ *Ibid.*

¹⁸ *Ibid.* at paras. 26-43.

¹⁹ *Sparrow*, supra note 12.

²⁰ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [hereinafter *Haida*].

²¹ *Sparrow*, supra note 12 at para. 1.

²² *Haida*, supra note 20 at para. 20.

²³ *Delgamuukw*, supra note 3.

²⁴ *Sparrow*, supra note 12 at para. 56.

²⁵ *Van der Peet*, supra note 13 at para. 25.

²⁶ R.S.C. 1985, c. F-14.

The court defined "existing" Aboriginal and treaty rights as those rights that were not "extinguished" prior to the enactment of the *Constitution Act, 1982*.²⁷ Therefore, s. 35 applies only to rights that existed at the time s. 35 was enacted or that will arise pursuant to modern treaties.²⁸ Section 35(1) does not revive rights that are already extinguished; they cannot be "clawed back." However, the SCC also decided that courts must "flexibly" interpret the word "existing" in order to allow for the evolution of Aboriginal and treaty rights over time.²⁹ The words "recognized and affirmed," which engage the government's fiduciary duty to Aboriginal peoples, also make it clear that s. 35(1) did not create Aboriginal rights but, instead, acknowledge that such rights had existed prior to the assertion of Crown sovereignty.³⁰

D. Application

In *Sparrow*, the SCC also addressed the application of s. 35. It concluded that members of the Musqueam Band had an Aboriginal right to fish. The court further determined that the government was not able to prove that regulations made pursuant to the *Fisheries Act* had extinguished that right to fish. In reaching its decision, the SCC set out a framework for determining the extent to which Canadian legislation can limit existing Aboriginal rights. This framework for analyzing alleged violations of Aboriginal rights and the potential justification for such violations under s. 35 is now known as the "*Sparrow* Test" and comprises four questions:³¹

1. Is there an existing Aboriginal right?
2. Has the right been extinguished?
3. Has there been a *prima facie* infringement of the right?
4. Can the infringement be justified?

Appendix B sets out a graphical representation of the *Sparrow* Test and some key considerations under each of its four elements.

In more recent years, the courts have concluded that s. 35 offers some protection for Aboriginal rights that an Aboriginal group has asserted but not yet proven in court.³² In such cases, the government (federal or provincial) contemplating any action that might negatively affect a potential Aboriginal right or treaty right has a duty to meaningfully consult with the relevant Aboriginal peoples and, if necessary, to accommodate their interests. The second half of this compendium contains a more detailed exploration of this "duty to consult."

Consultation is also important in the case of established rights. As we see below, it is one factor, though not an independent duty, that courts consider when deciding whether the government can justify its infringement of rights under the *Sparrow* Test.

²⁷ *Sparrow*, *supra* note 12 at paras. 23-27.

²⁸ See *Constitution Act, 1982*, s. 35(3).

²⁹ *Sparrow*, *supra* note 12 at para. 27.

³⁰ *Ibid.* at paras. 55ff. (especially para. 62).

³¹ See the summary in *Gladstone*, *supra* note 15 at para. 20.

³² *Haida*, *supra* note 20 (as to Aboriginal rights); *Delgamuukw*, *supra* note 3 (as to Aboriginal title); see discussion below under Part II – The Duty to Consult.

E. The Sparrow Test

(i) Is there an existing Aboriginal right?

1. What is an Aboriginal right?

The *Van der Peet* case centred on the claim of an Aboriginal right to sell fish and an alleged government infringement of this right as a result of applying the *B.C. Fishery (General) Regulations*.³³ In concluding that the Aboriginal right to fish for food, ceremonial and social purposes did not include the right to sell fish, the majority of the SCC enunciated a two-part sub-framework for determining whether an Aboriginal right exists under the first element of the *Sparrow* Test:

1. characterization of the claimed right; and
2. determination of whether the activity is "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right" (prior to contact with Europeans).³⁴

In the characterization of an Aboriginal right, a court must consider three factors:

1. the nature of the activity claimed to be carried out pursuant to an Aboriginal right;
2. the nature of the impugned governmental regulation, statute, or action, that allegedly infringes the right; and
3. the practice, custom, or tradition relied upon to establish the right.³⁵

In this analysis, a court must examine all activities at a general rather than specific level and consider the claimed Aboriginal right in context.³⁶

An "integral" practice, custom, or tradition is one that holds central significance for the Aboriginal society in question. Put another way, the practice, tradition, or custom must not be merely incidental to the Aboriginal society.³⁷

In addition, the claimant must demonstrate a historical continuity. Activities that constitute elements of Aboriginal rights are those that show continuity with the traditions, customs and practices that existed *prior to the arrival of Europeans in North America*. The majority decision of the SCC in *Van der Peet* underscores the point that pre-European contact practices, customs, and traditions that have evolved into modern forms may still have constitutional protection as Aboriginal rights.³⁸ Nonetheless, a dissenting opinion in the decision³⁹ criticized the majority

³³ SOR/54-659.

³⁴ *Van der Peet*, *supra* note 13 at para. 46.

³⁵ See *Mitchell v. Minister of Natural Revenue*, [2001] 1 S.C.R. 911 at para. 15 (S.C.C.) [hereinafter *Mitchell*], referencing *Van der Peet*, *supra* note 13 at para. 53.

³⁶ *Ibid.*

³⁷ *Van der Peet*, *supra* note 13 at paras. 55-59; Woodward, *supra* note 15, c. 5 at para. 490.

³⁸ *Van der Peet*, *supra* note 13 at paras. 54 and 64ff. of the majority decision, 155 and 220 of the dissenting decision of L'Heureux-Dube J., and 238-240 of the dissenting decision of McLachlin J., as she then was (see also paras. 249-250 of her decision).

approach as upholding a "frozen rights" approach to Aboriginal rights and limiting Aboriginal rights to those defined prior to the *Constitution Act, 1982*.

More recently, in *Delgamuukw*, the SCC expanded on its explanation of Aboriginal rights set out in *Van der Peet*. Aboriginal rights, the Court elaborated, fall along a spectrum with respect to their degree of connection with the land.⁴⁰ This spectrum includes the following rights listed in order of least to greatest degree of connection with the land:

1. Aboriginal rights to engage in practices, customs and traditions integral to the distinctive Aboriginal culture of the group claiming the right but lacking in sufficient use and occupation of the land where the activity takes place to support a claim of title to the land. "...[A]boriginal rights extend broadly to rights of custom and self-government, not normally considered to be incidents of aboriginal title."⁴¹
2. Site-specific Aboriginal rights, including activities, which, of necessity, take place on land and might be intimately related to a particular piece of land.
3. Aboriginal title, which is a right in the land that confers more than the right to engage in site-specific activities that are aspects of the practices, customs, and traditions of distinctive Aboriginal cultures.

2. What is Aboriginal Title?

Aboriginal title arises from Aboriginal occupation of the land prior to Crown assertion of sovereignty and from the historic relationship between Aboriginal people and the land.⁴² It exists independently of Crown recognition of it:

...[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....⁴³

The SCC confirmed the common law theory of Aboriginal title in *R. v. Bernard* and in *R. v. Marshall*:

[A]n aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to the land, continues to enjoy title to it.⁴⁴

Delgamuukw is the leading SCC decision on the nature of Aboriginal title. Aboriginal title is "the right to the land itself."⁴⁵ It is *sui generis* in nature; *i.e.*, it is unique in character,

³⁹ That of McLachlin J. (as she then was) – see paras. 238ff.

⁴⁰ *Delgamuukw*, *supra* note 3 at para. 138.

⁴¹ Woodward, *supra* note 15, c. 5 at para. 180.

⁴² EAGLE, *Nation to Nation: The Law of Consultation and Accommodation*, looseleaf (Surrey, B.C.: EAGLE, 2005) c. 3 at 5 [hereinafter *Nation to Nation*].

⁴³ *Calder*, *supra* note 3 at 156 (para. 26).

⁴⁴ *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220 at para. 39 (majority decision) [hereinafter *Marshall*; *Bernard*].

⁴⁵ *Delgamuukw*, *supra* note 3 at para. 138.

independent of English or French law,⁴⁶ and reflects a combination of common law rules of real property and Aboriginal perspectives on property.⁴⁷ It is a communally held, exclusive right to the use and possession of the land, including the right to decide what uses can be made of the land.⁴⁸

3. *Proof of Aboriginal Title*

A person or group claiming the existence of an Aboriginal or treaty right, including the existence of Aboriginal title, has the onus of proving the existence of such a right. The court in *Delgamuukw* established three criteria that a claimant must satisfy. The claimant must show:⁴⁹

1. aboriginal occupation of the land prior to the Crown's assertion of sovereignty over the subject land;
2. if present occupation is relied on as proof of pre-sovereignty occupation, there must be continuity between present and pre-sovereignty occupation; and
3. at the time of the Crown's assertion of sovereignty, Aboriginal occupation of the land must have been exclusive.

The court in *Delgamuukw* also held that a court must consider and accord equal weight to evidence representing both the Aboriginal and European perspectives.⁵⁰

Since its decision in *Delgamuukw*, the SCC has apparently narrowed the definition of Aboriginal title. In 2005, during the course of the *Tsilhqot'in* trial, the SCC released its decisions in *Marshall* and *Bernard*. The main issue in *Marshall* and *Bernard* was whether the Mi'kmaq people of Nova Scotia and New Brunswick in Eastern Canada have treaty rights or Aboriginal title allowing them to log commercially on Crown lands.

At trial, the courts applied the *Delgamuukw* test for proof of Aboriginal title and entered convictions because the Mi'kmaq people did not establish that they held Aboriginal title to the lands they logged. The trial judges in each of *Marshall* and *Bernard* required proof of "sufficiently regular and exclusive use" of the cutting sites by the Mi'kmaq people at the time of the assertion of Crown sovereignty in order to establish Aboriginal title.⁵¹ The Court of Appeal in each case rejected this test in favour of "a less onerous standard of incidental or proximate occupancy."⁵²

On further appeal, the SCC considered the test for exclusive occupation required to prove Aboriginal title. Adopting the view of the trial judges, the SCC held that proof of "sufficiently regular and exclusive use of the cutting sites... at the time of assertion of sovereignty" was required to establish Aboriginal title⁵³ and, further, concluded:

⁴⁶ *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.) [hereinafter *Guerin*]; see also Woodward, *supra* note 15, c. 5 at 170.

⁴⁷ *Delgamuukw*, *supra* note 3 at paras. 81ff.

⁴⁸ *Delgamuukw*, *supra* note 3 at para. 115.

⁴⁹ *Ibid.* at para. 143.

⁵⁰ *Ibid.* at 148.

⁵¹ *Marshall; Bernard*, *supra* note 44 at paras. 41 and 72.

⁵² *Ibid.* at para. 41.

⁵³ *Ibid.* at para. 72. See also paras. 41ff.

To say that title flows from occasional entry and use is inconsistent with... the approach to aboriginal title which this Court has consistently maintained.⁵⁴

The British Columbia Supreme Court in the *Tsilhqot'in* case had to apply the principles set out in the *Marshall; Bernard* decisions to the semi-nomadic circumstances of the Tsilhqot'in people. Vickers J. observed that the standard set in *Marshall; Bernard* for exclusive occupation to prove of the existence of Aboriginal title was high. According to Vickers J., the claimant must demonstrate "regular use or occupancy of definite tracts of land";⁵⁵ this standard shows that "Aboriginal title is not co-extensive with any particular Aboriginal group's traditional territory."⁵⁶

The court in *Tsilhqot'in* also considered the definition and application of "definite tracts of land" and the relative merits of the different perspectives of the Province and the Tsilhqot'in Nation as to the meaning of these words. In contrast to the "postage-stamp" approach of the Province, the Tsilhqot'in Nation took a "cultural security and continuity" approach to the definition.⁵⁷ Vickers J. rejected the "postage-stamp" approach to title that Canada and British Columbia advanced because, in his view, it reflects an "impoverished view of Aboriginal title."⁵⁸ Instead, he analyzed the evidence and addressed the issue of occupation from the perspective of the Tsilhqot'in Nation, which he described as a "semi-nomadic" group.⁵⁹

The court apparently expanded the definition of "tracts of land" to encompass "land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people."⁶⁰ This definition implies that a tract of land is not an insular location, such as a "favourite fishing hole,"⁶¹ which reflects the Province's "postage-stamp" approach to proof of Aboriginal title. Instead, the *Tsilhqot'in* decision asserts that a claimant can show proof of Aboriginal title based on regular use and occupancy of a definite tract of land using evidence that demonstrates that the land has provided "cultural security and continuity" for an Aboriginal group dating back to pre-sovereignty times.⁶²

Keep in mind that *Tsilhqot'in* is a lower court decision and is mostly *obiter dicta*, and, therefore, not strictly binding. Several parties will likely bring appeals, probably through to the SCC where that court may well disagree with the trial decision. It remains to be seen whether the Vickers J. "cultural security and continuity" approach to identifying "definite tracts of land" of which

⁵⁴ *Ibid.* at para. 59.

⁵⁵ *Tsilhqot'in*, *supra* note 8 at para. 583.

⁵⁶ *Ibid.* at para. 554 (referring generally to *Marshall; Bernard*, *supra* note 44).

⁵⁷ *Ibid.* at paras. 1376 and 1378ff.; see also paras. 603 (referencing *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 33 [hereinafter *Sappier; Gray*]) and 612. The judge adopted the term "postage stamp" from the Tsilhqot'in, who used it to characterize the Crown's approach.

⁵⁸ *Ibid.* at para. 1376.

⁵⁹ *Ibid.* at paras. 363, 379-397, 436, 578ff., 582, 610ff., 624ff., 646-649, 792-794, 944, 953ff., 1242-1265 and 1376-1381.

⁶⁰ *Ibid.* at para. 1377.

⁶¹ *Ibid.* at para. 1376.

⁶² *Ibid.* at paras. 1376ff. See also 603 ff. (referencing *Sappier; Gray*, *supra* note 57 at para. 33) and 612ff.

"sufficiently regular and exclusive use" can show the existence of Aboriginal title will survive to guide future courts and Aboriginal-Crown relations.

4. Evidence

One of the difficulties encountered in cases concerning Aboriginal and treaty rights is the requirement to balance different perspectives and the interests of different cultures and to translate these perspectives into admissible evidence. In weighing the evidence, courts must take into account the perspective of Aboriginal peoples,⁶³ introduced in terms that work within the Canadian legal structure.

In the analysis of proof of Aboriginal title issues, a court, therefore, must be "sensitive to the realities of aboriginal society... [and] take into account the context of the aboriginal society at the time of sovereignty."⁶⁴ Pursuant to *Delgamuukw*, oral histories of Aboriginal groups are admissible as evidence in the courts and "and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."⁶⁵

5. Proof of Treaty Rights

The relevant question regarding a treaty right is usually not whether the right exists, but rather the nature and scope of the right. To this end, the SCC has noted that treaties are not merely contracts. They are an "exchange of solemn promises" between the Canadian government and First Nations.⁶⁶ Therefore, the rights and obligations that the treaty represents merit special rules of construction.⁶⁷ Some of these rules are reproduced below, but the list is not intended to be exhaustive.⁶⁸

1. The goal of treaty interpretation is to reconcile the interests of both parties at the time of signing.⁶⁹
2. The Crown is presumed to have the intent to act honourably. Sharp dealing is not tolerated.⁷⁰
3. Ambiguities are usually resolved in favour of the First Nation signatories.⁷¹
4. Limitations on treaty rights are narrowly construed.⁷²

⁶³ *Van der Peet*, *supra* note 13 at paras. 49-50; see also *Delgamuukw*, *supra* note 3 at para. 156.

⁶⁴ *Delgamuukw*, *supra* note 3 at para. 156. See also paras. 105-106.

⁶⁵ *Ibid.* at para. 87. The court added:

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated.... To quote Dickson C.J., given that most aboriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on aboriginal peoples, and "render nugatory" any rights that they have (*R. v. Simon*, [1985] 2 S.C.R. 387 (S.C.C.) at p. 408).

⁶⁶ *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41 (S.C.C.) [hereinafter *Badger*].

⁶⁷ *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 24 (S.C.C.) [hereinafter *Sundown*]; *Badger*, *supra* note 66.

⁶⁸ See *Marshall v. Canada*, [1999] 3 S.C.R. 456 at para. 78, 1999 CanLII 665 (S.C.C.) [hereinafter *Marshall 1*] for a list of nine principles of treaty interpretation (per McLachlin J., dissenting in conclusion but not in law).

⁶⁹ *Ibid.* at para. 78.

⁷⁰ *Badger*, *supra* note 66 at para. 41; *Marshall 1*, *supra* note 68 at para. 78.

⁷¹ *Ibid.* See also *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at 36 (S.C.C.) [hereinafter, *Nowegijick*].

5. The interpretation should correspond to the way the Aboriginal signatories would have understood the terms at the time. Rigid or technical definitions are not appropriate.⁷³
6. Extrinsic evidence is admissible to aid in the interpretation of a treaty, even if the treaty does not appear to be ambiguous.⁷⁴ This can include cultural and linguistic contexts.⁷⁵
7. Oral promises made prior to signing are particularly relevant given the value First Nations placed on oral versus written promises.⁷⁶
8. However, the interpretation cannot exceed what is realistic or "possible on the language."⁷⁷
9. Treaty rights are not frozen in time.⁷⁸ Modern variations and new rights:
 - a. must be the "logical evolution" of the original rights, which is "essentially the same" sort of activity, "carried on in a modern economy, by modern means";⁷⁹ (e.g., the right to sell eels is a logical evolution of a clause characterized as a trading clause for peoples who traditionally engaged in fishing);⁸⁰
 - b. cannot include activities of wholly different subject matter (e.g., the right to log is not a logical evolution of a clause characterized as a trading clause for peoples who traditionally traded in occasional wood products but not logs);⁸¹
 - c. include "reasonably incidental" and related rights (e.g., the right to build a small log hunting cabin on Provincial park land is reasonably incidental to a treaty right to hunt).⁸²

(ii) *Has the Aboriginal Right Been Extinguished?*

At the second stage of the *Sparrow* Test, the courts ask whether a previously existing right has since been extinguished. Recall that section 35 of the *Constitution Act, 1982* cannot reinvigorate extinguished rights. Before the *Constitution Act, 1982*, Aboriginal and treaty rights could be extinguished by surrender, constitutional amendment, or clearly worded federal legislation. Provincial governments have never had the jurisdiction to extinguish these rights.⁸³ The fact that

⁷² *Badger*, *supra* note 66 at para. 41.

⁷³ *Ibid.* at para. 52. See also *Marshall 1*, *supra* note 68 at para. 78 (citing *Badger*, *supra* note 66 and *Nowegijick*, *supra* note 71).

⁷⁴ *Marshall 1*, *supra* note at para. 11.

⁷⁵ *Badger*, *supra* note 66 at paras. 52-55; *Marshall 1*, *supra* note 71 at para. 78.

⁷⁶ *Badger*, *supra* note 66 at para. 55.

⁷⁷ *Marshall 1*, *supra* note 68 at para. 78; *Badger*, *supra* note 69 at para. 76.

⁷⁸ *Marshall 1*, *supra* note 68 at para. 78; *Marshall*; *Bernard*, *supra* note 47 at para. 25.

⁷⁹ *Marshall*; *Bernard*, *supra* note 44 at paras. 16 and 25.

⁸⁰ *Marshall 1*, *supra* note 68.

⁸¹ *Marshall*; *Bernard*, *supra* note 44 at paras. 25 (see application at paras. 31-35, which adopt the trial judge's conclusions).

⁸² *Sundown*, *supra* note 67; *Marshall 1*, *supra* note 68 at para. 78.

⁸³ *Constitution Act, 1867*, *supra* note 7, s. 91(24) (enumerating "Indians, and Lands reserved for the Indians" as a class of subjects falling under exclusive federal jurisdiction.); *Delgamuukw*, *supra* note 3 at paras. 172-183: At para. 173, the court explained that s. 91(24) "encompasses within it the exclusive power [of the federal legislature] to extinguish aboriginal rights, including aboriginal title."

a right is "controlled in great detail by the regulations does not mean that the right is thereby extinguished;"⁸⁴ that is, courts will not see extensive or comprehensive government regulation as extinguishment of the right, only, possibly, a restriction on the exercise of that right. In the case of federal legislation:

... [T]he onus of proving that a treaty or aboriginal 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.⁸⁵

Section 35 now protects these rights from extinguishment by unilateral federal legislation. Since 1982, only surrender and constitutional amendment can result in the extinguishment of an Aboriginal or treaty rights.

(iii) *Has There Been a Prima Facie Infringement of the Aboriginal Right?*

If the Crown cannot prove that the asserted Aboriginal right has been extinguished, the court moves to an analysis under the third element of the *Sparrow* Test. At this stage, the onus is on the Aboriginal claimant to prove that government action or legislation is or has produced *prima facie* infringement of the right.⁸⁶

In determining whether there has been infringement of the Aboriginal right, a court must ask the following questions set out in *Sparrow*:

1. *Does the government action or legislation in question have the effect of interfering with an existing Aboriginal right?*

Generally speaking, Parliament is not permitted to act in a manner contrary to the rights and interests of Aboriginal peoples and the standard is quite low. On a consideration of the facts in *Sparrow*, for example, the regulations made pursuant to the *Fisheries Act* would constitute a *prima facie* interference with the Musqueam Nation's Aboriginal right to fish for food if such regulations resulted in a restriction on the Musqueam Nation's exercise of that right.

2. *Does the interference constitute a prima facie infringement of the Aboriginal right?*

Under *Sparrow*, to determine whether the interference constitutes a *prima facie* infringement, the court must look at several factors, for example:

1. Is the limitation unreasonable?
2. Does the regulation impose undue hardship?
3. Does the regulation deny to holders of the right their preferred means of exercising that right?

⁸⁴ *Gladstone*, *supra* note 15 at paras. 31 and 120 (both quoting *Sparrow*, *supra* note 12 at 1097 (para. 36)).

⁸⁵ *Badger*, *supra* note 69 at para. 41.

⁸⁶ *Sparrow*, *supra* note 12 at paras. 67-70.

These criteria "do not define" the concept of infringement.⁸⁷ Rather, they are non-exhaustive factors for consideration. When examining these factors, a court must determine whether the purpose *or* the effect of the legislation or government action infringes the exercise of the claimed right. If, for example (again with reference to the *Sparrow* facts), the Musqueam people were forced to spend undue time and money per fish caught, or if the net length reduction under the impugned regulations resulted in significant hardship for the Musqueam people in catching fish, then the requirement to show a *prima facie* infringement would be met.

(iv) *Can the infringement be justified?*

Not all government actions or legislation that infringes an Aboriginal right are impermissible. Analysis under the final element of the *Sparrow* Test answers the question of whether an established violation of the right constitutes legitimate regulation.⁸⁸ The onus is on the government to justify the government infringement of the right. The government must convince the court that it has satisfied the following two-part test developed in *Sparrow*:⁸⁹

1. Is there a valid legislative objective?
2. Were the Crown's actions consistent with its fiduciary duty toward Aboriginal peoples?

1. *Is there a valid legislative objective?*

The court will inquire into whether the objective of Parliament in enacting legislation or authorizing regulations that infringe an Aboriginal right is valid. In order to be valid, the legislative or regulatory objective must be considered "compelling and substantial."⁹⁰ Two examples of valid objectives are: (a) an objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource; and (b) an objective purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general population or to Aboriginal people themselves.⁹¹ By contrast, the SCC rejected the argued "public interest" as a valid objective⁹² as, both too vague and too broad and, therefore, unworkable as a justification for placing a limitation on a constitutionally protected Aboriginal right.

2. *Were the Crown's actions consistent with its fiduciary duty toward Aboriginal peoples?*

If a court finds a valid legislative objective, its analysis proceeds to this second part of the justification issue and applies the principle of the "honour of the Crown."⁹³ The honour of the Crown, in the context of the relationship between the Crown and Aboriginal peoples, encompasses the concept of a fiduciary duty owed by the Crown towards Aboriginal peoples.

⁸⁷ *Gladstone*, *supra* note 15 at para. 43.

⁸⁸ *Sparrow*, *supra* note 12 at paras. 62-65 and 71.

⁸⁹ *Ibid.* at para. 64.

⁹⁰ *Ibid.* at paras. 71ff.

⁹¹ *Ibid.* at para. 71.

⁹² *Ibid.* at para. 72. The B.C. Court of Appeal in *Sparrow*, accepted "the public interest" as a possible justification showing the validity of legislation.

⁹³ *Ibid.* at para. 75.

This concept is rooted in the *Royal Proclamation* and developed from the colonial British Crown's recognition that it is:

...just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.⁹⁴

"Fiduciary" is a common law legal concept. The term describes "one who holds anything in trust" or "who holds a position of trust or confidence with respect to someone else."⁹⁵ The SCC has developed and applied this concept in its determination of the nature of the relationship between Aboriginal peoples and the Crown. In *Guerin* and *Sparrow*, the SCC described this relationship and the Crown's duty to Aboriginal peoples, and underscored the importance of fiduciary responsibility in determining whether Crown infringement of an Aboriginal right can be justified:

- The relationship is *sui generis*, or one of a kind, of its own kind, unique;⁹⁶
- "...[T]he government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship";⁹⁷ and
- "...[T]he honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the [infringing] legislation or action in question can be justified."⁹⁸

Courts will determine the nature of the analysis under this second branch of the infringement justification test on a case-by-case basis; it will depend on the particular circumstances of the inquiry. To determine whether or not the Crown has acted in a manner consistent with its fiduciary duty, a court can consider additional questions. The answer to any of these questions requires sensitivity to and respect for the rights of Aboriginal peoples on the part of the government, the courts, and all Canadians. Additional questions include, but are not limited to the following.

i. Has the Aboriginal right been given adequate priority in relation to other rights?

Priority issues frequently arise as a result of conflict between Aboriginal rights and interests and the rights and interests of others in the allocation and management of valuable resources and,

⁹⁴ The *Royal Proclamation*, *supra* note 1.

⁹⁵ The Crown's Fiduciary Relationship, *supra* note 2 at 2.

⁹⁶ *Sparrow*, *supra* note 12 at para. 59; *Guerin*, *supra* note 46 at paras. 100-105.

⁹⁷ *Ibid.* at para. 59.

⁹⁸ *Ibid.* at para. 75.

particularly, natural resources. Not surprisingly, the issue of priorities has been judicially analyzed in the context of fishing rights and has focused on commercial fishing rights and the Aboriginal right to fish for food and ceremonial and social purposes. In the two leading cases on priorities, *R. v. Sparrow* and *R. v. Gladstone*, the SCC has developed a framework of guidelines that apply in determining priorities and resolving allocation problems.

In *Sparrow*, the SCC recognized and affirmed the Aboriginal right to fish for food, ceremonial, and social purposes and set out a foundational priority scheme favouring Aboriginal rights in relation to other rights. The constitutionally protected Aboriginal entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with the *Sparrow* Test allocation of priority to Aboriginal peoples. Consistent with this scheme, the government has followed a policy in fisheries allocations that accords the Aboriginal right to fish for food, ceremonial, and social purposes priority over the rights and interests of other user groups to take fish.

Priority for Aboriginal fishing rights under the *Sparrow* scheme cannot ignore the finite character of the fisheries resource. The government must demonstrate an allocation of priorities consistent with not only the *Sparrow* scheme but also the SCC's decision in *Jack v. The Queen*.⁹⁹ In that case, the Court determined that the correct order of priority for fisheries is as follows: "(i) conservation; (ii) Indian fishing; (iii) non-Indian commercial fishing; [and] (iv) non-Indian sports fishing."¹⁰⁰ As the SCC explained, the objective of the *Sparrow* priority scheme is not to undermine the government's policy of giving priority to the conservation of natural resources. Rather, in according first priority to fisheries conservation, the government must be mindful of the constitutional nature of the Aboriginal fishing right.

The *Sparrow* priority scheme may change where the Aboriginal right is not "internally limited." In its 1996 decision in *R. v. Gladstone*, the SCC discussed the distinction between "internally limited" Aboriginal rights and those Aboriginal rights having no internal limitation. The SCC described the meaning of "internally limited," as it relates to Aboriginal fishing rights as follows:

The food, social and ceremonial needs for fish of any given band of aboriginal people are internally limited – at a certain point the band will have sufficient fish to meet these needs.¹⁰¹

By contrast, the Aboriginal right to sell or trade commercially in herring spawn on kelp, which was at issue in the *Gladstone* case, does not contain an internal limitation. The only limits on commercial trading or sale of herring spawn on kelp are "the external constraints of the demand of the market and the availability of the resource."¹⁰² In light of the potentially large scope of Aboriginal rights lacking internal limitation, priority for such rights requires consideration of factors not addressed under the *Sparrow* approach.

⁹⁹ *Jack v. The Queen*, [1980] 1 S.C.R. 294 at 313 (S.C.C.).

¹⁰⁰ *Ibid.* The court added: "[T]he burden of conservation measures should not fall primarily upon the Indian fishery."

¹⁰¹ *Gladstone*, *supra* note 15 at para. 57.

¹⁰² *Ibid.*

In *R v. Gladstone*, the SCC refined its priority scheme set out in *Sparrow*. Based on *Sparrow*, once an Aboriginal right without internal limitation is recognized and affirmed, that right would, in effect, constitute an exclusive right. Priority effectively becomes *de facto* exclusivity. As the SCC has explained:

Because the right to sell herring spawn on kelp to the commercial market can never be said to be satisfied while the resource is still available and the market is not sated, to give priority to that right... would be to give the right-holder exclusivity over any person not having an aboriginal right to participate in the herring spawn on kelp fishery.¹⁰³

Therefore, on any government allocation involving Aboriginal rights that are not internally limited, the government need not accord complete priority; though it still must demonstrate consideration of and respect for the affected Aboriginal right. In determining whether the government has given adequate priority to non-internally limited Aboriginal rights in relation to other rights, the courts may consider, but are not limited to, the following questions (in addition to the consultation and compensation questions set out in *Sparrow*):

- Has the government accommodated exercise of the Aboriginal right?
- Does the government's objective in enacting a particular regulatory scheme reflect the need to take into account the priority of Aboriginal rights holders?
- What is the extent of participation in the activity by Aboriginal rights holders relative to their percentage of the population?
- How has the government accommodated different Aboriginal rights?
- How important is the activity to the economic and material well-being of the Aboriginal community in question?
- What criteria did the government consider in allocating the resource among different users?¹⁰⁴

ii. Has the infringement required to achieve a desired result been minimized to the extent possible?

The onus is on the Crown to demonstrate that any government action taken to achieve the desired legislative objective has affected the Aboriginal right in question as little as is reasonably possible.¹⁰⁵

iii. If the situation involves expropriation, is fair compensation available?¹⁰⁶

Delgamuukw, the leading SCC decision on the nature of Aboriginal title, addressed the issue of compensation as it applies to situations involving expropriation. Since "lands held pursuant to

¹⁰³ *Ibid.* at para. 59.

¹⁰⁴ *Ibid.* at para. 64.

¹⁰⁵ Woodward, *supra* note 15, c. 5 at paras. 1060-1070. See also *R. v. Nikal*, [1996] 1 S.C.R. 1013 at para. 110 (S.C.C.).

¹⁰⁶ *Sparrow*, *supra* note 12 at para. 82.

aboriginal title have an inescapable *economic component*,"¹⁰⁷ holders of Aboriginal title have the right to compensation when the Aboriginal title is infringed. In order to uphold the honour of the Crown, the nature and amount of compensation provided by the government "will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated."¹⁰⁸

*iv. Has the affected Aboriginal group been consulted?*¹⁰⁹

In its analysis of the relative priorities of conservation and Aboriginal rights to fisheries under the *Sparrow* priority scheme, the SCC discussed the Aboriginal right to consultation. In the event of a conflict between the Aboriginal right to fish and the first-ranked government objective of conservation, Aboriginal peoples should be informed with respect to the determination of an appropriate method of regulation of the resource.¹¹⁰ This requirement is consistent with the understanding that Aboriginal peoples, as a result of their history, have a deeply rooted interdependence with natural resources. While the courts developed the test for justification of an infringement under the *Sparrow* Test to examine justification for infringement of Aboriginal rights, courts will follow a similar process in assessing justification for treaty right infringements.¹¹¹

Of course, the requirement that government consult an Aboriginal group about actions that could infringe their Aboriginal or treaty rights is not limited to situations involving conservation objectives. The Crown must inform such groups of these actions as part of its fiduciary duty and a court will not favourably consider an absence of such consultation. Without consultation, the Crown may not be able to justify its infringement of the rights. The next section of this compendium, which focuses on the constitutional duty to consult, will explore in further detail the nature and scope of the duty to consult, particularly with respect to rights that the Aboriginal group has asserted but not yet proven in court.

F. Remedies for unjustified infringement of rights

Often Aboriginal and treaty rights are raised as a defence against charges for violation of legislative provisions, *e.g.*, fishing without a licence contrary to the federal *Fisheries Act* or logging without a permit contrary to provincial forestry legislation. In such cases, the remedy in response to a conclusion of unjustified infringement of existing Aboriginal or treaty rights is usually that the person(s) charged is found innocent. If a finding of unjustified infringement occurs as a result of an appeal of a conviction, an overturning of the conviction will be the remedy. Additionally, courts will usually provide a declaration of the existence of the right(s), preventing future government prosecution for the exercise of the right(s).

¹⁰⁷ *Delgamuukw*, *supra* note 3 at para. 166 [emphasis in original].

¹⁰⁸ *Ibid.* at para. 169.

¹⁰⁹ *Sparrow*, *supra* note 12 at para. 82.

¹¹⁰ *Ibid.* Note that although the *Sparrow* case involved a consideration of conservation measures and consultation with respect to those measures, consultation should occur whatever the government objectives and measures to achieve those objectives.

¹¹¹ *Badger*, *supra* note 66.

Alternatively, an Aboriginal group may bring an action seeking any or all of the following for:

- declarations of the existence of specified rights;
- declarations regarding the validity of legislation or its application to specified circumstances;
- declarations regarding the validity of approvals, tenures or other decision;
- declarations that the government has unjustifiably infringed rights;
- damages for unjustified infringement of rights; and
- permanent injunctions enjoining the government from taking actions or decisions that infringe those rights.

Although a court is unlikely to hear an Aboriginal or treaty rights case as a judicial review because the evidentiary issues would require a trial, the resulting remedies from such a trial would be similar to those available in a judicial review. Unjustified infringement of the Aboriginal or treaty right(s) will usually lead to a quashing, overturning or declaration of invalidity of the government decision/approval/action (like *certiorari*) that will accompany a declaration of the existence of the right(s). Alternatively, a court could set aside a government decision/action and require it to retake the decision or action in light of the established right(s) (like *mandamus*) – but only if the government is obligated to take the decision or action, *i.e.*, it is not a discretionary decision/action.

A court may also prohibit government from taking actions or decisions that would unjustifiably infringe the Aboriginal or treaty right(s). Further, interim injunctions are a potential temporary relief to prevent government from acting or making decisions or approvals that would unjustifiably interfere with the established right(s).

Part II – the Duty to Consult

A. General

The need for the Crown to consult Aboriginal peoples about actions that affect their rights is a factor in the *Sparrow* Test to justify government infringement on those rights, but it also exists independently as a constitutional duty to Aboriginal peoples.¹¹² The SCC enunciated the backbone of our current understanding of the duty to consult in two companion cases: *Haida Nation v. British Columbia (Minister of Forests)* [*Haida*],¹¹³ and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [*Taku River*].¹¹⁴ A later case, *Mikisew Cree First Nation v. Canada (Minister of Heritage)* [*Mikisew*],¹¹⁵ applied the duty to consult to circumstances involving treaty rights.

¹¹² *Guerin*, *supra* note 46.

¹¹³ *Haida*, *supra* note 20.

¹¹⁴ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 [hereinafter *Taku River*].

¹¹⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 [hereinafter *Mikisew*].

The duty to consult requires the Crown to engage in meaningful and good faith consultation with Aboriginal peoples regarding a proposed activity that might negatively impact their interests. The Crown must fully inform Aboriginal peoples about the proposed action and learn of their Aboriginal interests and concerns, but the duty to consult requires more than just an exchange of information. The Crown must approach the consultation table with a degree of responsiveness to Aboriginal interests. The Crown, therefore, must maintain an open mind and display "the intention of substantially addressing [Aboriginal] concerns."¹¹⁶

The goal of consultation is always to reconcile Aboriginal and treaty rights¹¹⁷ with the interests of the Crown. A further duty to accommodate Aboriginal interests may arise out of this process in situations where consultation has revealed a need to adjust government actions and accommodate Aboriginal interests.¹¹⁸

(i) Honour of the Crown

Before *Haida* and *Taku River*, courts adopted a piecemeal approach to Crown obligations toward First Nations, pairing particular situations with certain government duties. In *Haida*, however, the SCC held that all government interactions with Aboriginal peoples engage the "honour of the Crown" and require that it be upheld. The duty to consult is grounded in this honour of the Crown. Significantly, the duty to consult can arise in the case of either proven or asserted Aboriginal or treaty rights. For the court, McLachlin C.J.C. reasoned, "[t]he Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued..."¹¹⁹

(ii) Reconciliation

Reconciliation is the ultimate goal of consultation.¹²⁰ In terms of Aboriginal and treaty rights, "reconciliation" refers to reconciling the assertion of Crown sovereignty on one hand and pre-existing Aboriginal sovereignty, occupation and *de facto* control over the land on the other.¹²¹ The need for reconciliation flows from s. 35 of the *Constitution Act, 1982* and from the duty of the Crown to act honourably toward Aboriginal peoples. Reconciliation is not an event that occurs at a fixed moment in time. It is a long and ongoing process.¹²² The duty to consult flows from the need for reconciliation.

(iii) The Process of Consultation

Like reconciliation, fulfilling the duty to consult is a continual process. All stages of the process remain open for review, and adequate consultation at one stage does not release the government from all future duties to consult. Even where the government has satisfied its duty to consult and

¹¹⁶ *Haida*, *supra* note 20 at paras. 42 and 46 (para. 42 quoting *Delgamuukw*, *supra* note 3 at para. 168).

¹¹⁷ Throughout this portion on the duty to consult, "Aboriginal rights" is used in its larger sense, including Aboriginal title to land.

¹¹⁸ *Haida*, *supra* note 20 at para. 47.

¹¹⁹ *Ibid.* at para. 27.

¹²⁰ *Ibid.* at paras. 32-33.

¹²¹ *Ibid.* at paras. 20, 25, 26 and 32.

¹²² *Mikisew*, *supra* note 118 at para. 54.

accommodate to date, "it is expected that...the Crown will continue to fulfil its honourable duty to consult and, if indicated, accommodate [affected First Nations]."¹²³

(iv) Parties

Either the provincial or federal government may owe a duty to consult, depending under which constitutional head of power the governmental action occurs. The duty extends to all representatives and agents of the Crown. One narrow exception appears to exist in the case of lower orders of government.¹²⁴ Determining whether a duty to consult exists is a constitutional question and a question of law. Therefore, lower orders of government, such as local boards, that are legally incapable of deciding questions of law may have no duty to consult.¹²⁵

While the *duty* to consult remains squarely on the shoulders of the Crown and does not extend to third parties, the SCC in *Haida* explained that the Crown can delegate some procedural matters of consultation to others, including private parties, such as industry stakeholders.¹²⁶ Courts also express a practical desire that third parties remain committed to and involved in the process, regardless of their lack of constitutional obligations.

Courts recognize that the duty to consult is reciprocal. In other words, First Nations have a reciprocal duty to consult in good faith whenever Crown activity triggers its duty to consult.¹²⁷ Aboriginal peoples cannot frustrate government attempts to consult by refusing to participate, "nor should they take unreasonable positions to thwart government from making decisions."¹²⁸ A First Nation's refusal to participate will have "direct implications on the assertion the consultation efforts of government are flawed."¹²⁹

B. Is there a Duty to Consult?

Canadian courts ask a series of questions relating to the duty to consult:

1. Has the Crown's conduct triggered a duty to consult?
2. If so, what is the scope and content of the duty?
3. Was the duty fulfilled?
4. If not, what remedy will be most appropriate?

A graphical representation of the test and its key considerations is in Appendix A.

¹²³ *Taku River*, *supra* note 114 at 46.

¹²⁴ We say "appears" because the SCC has not considered this issue.

¹²⁵ *Paul First Nation v. Parkland (County)*, 2006 ABCA 128, [2006] 384 A.R. 366 at para. 12 [hereinafter *Paul*] (applying *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585).

¹²⁶ *Haida*, *supra* note 20 at para. 53.

¹²⁷ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para. 161, 178 D.L.R. (4th) 666 [hereinafter *Halfway River*].

¹²⁸ *Haida*, *supra* note 20 at para. 42; in *R. v. Douglas et al.*, 2007 BCCA 265 at para. 39, 278 D.L.R. (4th) 653 [hereinafter *Douglas*] the court required good faith consultation efforts from Aboriginal groups. The court in *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212 [hereinafter *Ahousaht*] adopted this principle. *Haida* and *Douglas* cited *Halfway River First Nation*, *supra* note 130 at paras. 160-161.

¹²⁹ *Douglas*, *supra* note 128 at para. 45 (citing the decision of the trial judge, *R. v. Douglas*, 2006 BCSC 284 at para. 73).

(i) *Standard of Review*

General principles of administrative law dictate that on questions of law, the appropriate standard of review by a court is correctness, whereas on questions of fact, or when questions of law and fact cannot be separated, the standard of review is usually reasonableness. In *Haida*, the SCC applied these principles to the Crown's decisions regarding its duty to consult.¹³⁰ The question of whether the duty has arisen is a question of law, and should be reviewed on a standard of correctness.¹³¹

(ii) *Triggering the Crown's Duty to Consult: The Haida Test*

The SCC in *Haida* set out the definitive test for whether Crown's activity engages its duty to consult:

But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has *knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it...*¹³²

The burden of proof is on the party claiming the Crown has a duty to consult; clearly, though, the threshold is low. Because the duty to consult is founded on the goal of reconciliation and the honour of the Crown, the test applies equally to both established and "credible but unproven claim[s]" of Aboriginal rights.¹³³ The test also applies to treaty rights.¹³⁴ In *Mikisew*, Binnie J. for the court observed that in the case of the Mikisew Cree and other Treaty 8 First Nations, "it is not as though [they] did not pay dearly for their entitlement to honourable conduct on the part of the Crown; surrender of the aboriginal interest in an area larger than France is a hefty purchase price."¹³⁵

¹³⁰ *Haida*, *supra* note 20 at para. 60ff.

¹³¹ *Ibid.* at para. 63. On the other hand, the duty to consult with the appropriate scope and content is a mixed question of fact and law, reviewable on a standard of reasonableness (see *infra* note 154 and accompanying text, below: "What is the Scope and Content of the Duty").

¹³² *Ibid.* at para. 35 [emphasis added].

¹³³ *Ibid.* at para. 37. Applied in *Chicot v. Canada (Attorney General)*, 2007 FC 763, 315 F.T.R. 178 (F.C.T.D.) [hereinafter *Ka'a'gee Tu*] in which Chief Lloyd Chicot sued on behalf of all members of the Ka'a'gee Tu First Nation.

¹³⁴ *Mikisew*, *supra* note 115 at paras. 33-34.

¹³⁵ *Ibid.* at para. 52.

The *Haida* test can be broken down into three main components:¹³⁶

1. There is an established or asserted Aboriginal or treaty right;
2. the Crown has real or constructive knowledge of the right; and
3. the Crown contemplates action that might adversely affect the right.

Regarding the third question, note that the adverse effects need to be only a *possibility*, not a certainty. Despite this low threshold, in at least one recent decision, *Ahousaht First Nation v. Canada (Fisheries and Oceans) [Ahousaht]*, the court was not convinced that harm was a possibility.¹³⁷ In that case, the Federal Court of Appeal found that, due to a lack of evidence, the claimants had not shown that the Aboriginal right to fish for food, social, and ceremonial purposes "might" be adversely impacted.¹³⁸

(iii) *Potential Limits to Applying the Haida Test*

1. *Treaty Rights*

What about situations in which the terms of a treaty explicitly allow (in fact, almost envisage) action that the Crown contemplates? In *Mikisew*, the SCC confirmed that a duty to consult may still arise in such situations.¹³⁹ It also noted that the Crown's knowledge of treaty rights is presumed since "the Crown, as a party [to the treaty], will always have notice of its contents."¹⁴⁰

Under a treaty, a proposed Crown action can still trigger the duty to consult under the *Haida* test, even if it does not trigger the justified infringement test under *Sparrow*.¹⁴¹ The court in *Mikisew* reasoned that the *Sparrow* Test applies to the *substantive* treaty rights of the First Nation claimants. The duty to consult, by contrast, has both a substantive and a *procedural* component. Whether the Crown has a procedural duty to consult is therefore a distinct question from whether the Crown has infringed Aboriginal peoples' substantive rights and can justify such infringement.¹⁴²

2. *Legislation and Regulations*

Because the duty to consult flows from s. 35 of the *Constitution Act, 1982*, even explicit legislation and regulations cannot modify the existence, scope and content of the duty to consult. The Crown can, of course, create such legislation and regulation as a way to help ensure that it

¹³⁶ *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at para. 84, 303 F.T.R. 106 [hereinafter *Dene Tha'*]. In this decision, Phelan J., for the court, lists only two aspects: "First, there must be either an existing or potentially existing Aboriginal right or title that might be affected adversely by Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and contemplate conduct [that] might adversely affect it." We separate Phelan J.'s second aspects into two aspects for clarity.

¹³⁷ *Ahousaht*, *supra* note 128.

¹³⁸ *Ibid.* at para. 37. However, the court did find a duty to consult in relation to the Ahousaht's asserted Aboriginal right to fish *commercially*, and went on to find the Crown had satisfied its duty.

¹³⁹ *Mikisew*, *supra* note 115 at para. 55.

¹⁴⁰ *Ibid.* at para. 34.

¹⁴¹ *Ibid.* at paras. 48 and 59.

¹⁴² *Ibid.* at para. 57.

identifies and fulfils its duty to consult. However, in *Chicot v. Canada (Attorney General)* [*Ka'a'gee Tu*], the Federal Court confirmed that "the Crown's duty to consult cannot be boxed in by legislation," and that the courts will look beyond mere compliance to see whether the Crown has fulfilled its duty to consult.¹⁴³

3. *Private Lands*

Whether the Crown has a duty to consult when it approves activities on private lands is a point of law that remains unsettled. The SCC in *Haida* did not relieve the Crown from consulting in regard to private lands, but neither did it specifically require the Crown to do so. Lower courts have subsequently generated potentially conflicting decisions.

In *Hupacasath First Nation v. British Columbia (Minister of Forests)* [*Hupacasath*],¹⁴⁴ the British Columbia Supreme Court held that the decision of the provincial Minister of Forests to modify the regulatory status of private lands triggered a duty to consult with the Hupacasath, who had asserted Aboriginal rights over parts of the land in question.¹⁴⁵ Four months later, in *Paul First Nation v. Parkland (County)*,¹⁴⁶ the Alberta Court of Appeal came to what could be read as an opposite conclusion, finding "[t]here is no duty of consultation on the Crown or landowners regarding privately owned lands."¹⁴⁷ The court went on to distinguish its judgment from other cases. It distinguished *Haida* and *Mikisew* on the basis that in both cases the government actions were limited to Crown lands.¹⁴⁸ The court then limited the relevance of *Hupacasath*, which, like *Paul*, concerned private lands. It distinguished *Hupacasath* because, unlike *Paul*, there was "extensive" government involvement.¹⁴⁹

If the SCC were to clarify the Crown's duty to consult Aboriginal peoples regarding private lands, the clarification could have major impacts on the potency of s. 35 and on relations with First Nations in general. If the court adopts a broader interpretation of *Hupacasath*, the amount of land that could involve the Crown's duty to consult is vast. This could potentially result in major strains on government and private resources, although the scope and content of the consultation required would still vary from case to case.

¹⁴³ *Ka'a'gee Tu*, *supra* note 133 at 121.

¹⁴⁴ *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.*, 2005 BCSC 1712, 51 B.C.L.R. (4th) 133 [hereinafter *Hupacasath*].

¹⁴⁵ The lands were subject to a Tree Farm License (TFL), which restricted use to forestry activities. According to Chief Judith Sayers, the Hupacasath First Nation and Weyerhaeuser, a private forestry and forest products company, "met almost monthly to consult on forestry-related issues and by 2001 had developed an efficient process for considering and integrating aboriginal interests into the operational-level planning of forestry operations" (*ibid.* at para. 35). In 2004, the defendant Minister consented to Weyerhaeuser's request to remove the lands from the TFL, opening the land to uses beyond forestry. Weyerhaeuser informed Hupacasath that it no longer had an obligation to consult with Hupacasath with respect to activities on the removed lands.

¹⁴⁶ *Paul*, *supra* note 125.

¹⁴⁷ *Ibid.* at para. 14. The county's appeal board refused the Paul First Nation's request to be consulted before it issued a gravel extraction and processing permit to a private company. Paul claimed that although the gravel activities occurred on private lands, the process would use a road adjacent to lands that were subject to Paul's hunting and gathering rights. As noted above, the Alberta Court of Appeal first found that since the board could not decide questions of law including whether or not a duty to consult existed, it could not have a duty to consult. It then addressed the duty to consult on private lands.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

On the other hand, if the court adopted the clear and absolute law from *Paul*, it might give the Crown a perverse incentive to quickly privatize as much land as possible, washing its hands of future duties to consult. Although the *Mikisew* decision held that the Crown must consult when it contemplates action that privatizes or "takes up"¹⁵⁰ lands subject to Aboriginal and treaty rights, once the Crown has fulfilled its duty to consult and privatized the lands, the Crown may owe no future duty to consult regarding those lands. It seems very likely that any debate about adopting *Paul* will include a discussion about the current and future honour of the Crown.

C. What is the Scope and Content of the Duty?

(i) *Standard of Review*

The appropriate scope and content of consultation depends on considerations of fact mixed with law. Therefore, as administrative law principles suggest, the standard of review is reasonableness.¹⁵¹ Courts sometimes blend their review of the scope of consultation with the next, related question: has the Crown fulfilled its duty to consult?

(ii) *Spectrum of Consultation*

The SCC describes the possible levels of consultation as falling along a spectrum:¹⁵²

...At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.... [para. 43]

At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases, deep consultation, aimed at finding a satisfactory interim solution, may be required.... [para. 44]

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually.... *The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation....* [para. 45]

At a minimum, the duty to consult requires that the Crown provide notice and information to potentially affected Aboriginal groups. These groups must have a reasonable opportunity to reply to the notice with their interests and concerns. A reasonable opportunity to voice concerns must be timely. For example, a 24-hour deadline to respond to notice of a process months or

¹⁵⁰ That is, when the government, pursuant to a treaty, takes over land for development.

¹⁵¹ *Haida*, *supra* note 20 at paras. 60 and 62-63. In contrast, the standard of review for whether the duty to consult exists at all is correctness (see *supra* note 134 and accompanying text, above, under: "Is There a Duty to Consult?").

¹⁵² *Haida*, *supra* note 20 at paras. 43-45 [emphasis added].

years in the making is not sufficient.¹⁵³ Further, the opportunity to be heard *as Aboriginal peoples* must occur separately from their right to be heard as members of the general public.¹⁵⁴ Even at this "lower" end of the spectrum, the duty to consult requires Crown responsiveness.

At the other end of the spectrum lies the need for deep consultation, accommodation of Aboriginal interests, and, possibly, acquiring the consent of the affected Aboriginal group.¹⁵⁵ The need to obtain consent equates to a virtual veto power over Crown affairs; courts have shied away from recognizing that Aboriginal groups hold such a veto power, except in narrow circumstances regarding established rights.¹⁵⁶

The SCC's comments suggest that the scope and content of the duty to consult will rarely be at either extreme, and most cases will require consultation somewhere between the two.¹⁵⁷

(iii) Factors Defining the Content and Scope of the Duty to Consult

The courts consider three factors to determine the appropriate level of consultation:

1. the strength of the claim for the Aboriginal or treaty rights;¹⁵⁸
2. the seriousness of the potential effect on the Aboriginal or treaty rights;¹⁵⁹ and
3. in the case of treaty rights, the specificity of the treaty promise.¹⁶⁰

(iv) Timing and Meaningfulness of Crown Assessments

To be meaningful, the consultation must occur at the planning and decision-making stages of the proposed action, not at the operational stages.¹⁶¹ The Crown must "ensure that [Aboriginal peoples'] representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action."¹⁶² Moreover, [c]onsultation that excludes from the outset any form of accommodation would be meaningless.¹⁶³

¹⁵³ *Dene Tha'*, *supra* note 136 at para. 116.

¹⁵⁴ *Mikisew*, *supra* note 115 at para. 64. "The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation...)."

¹⁵⁵ *Delgamuukw*, *supra* note 3 at para. 164.

¹⁵⁶ *Haida*, *supra* note 20 at paras. 45-48. Full consent from the affected Aboriginal group is limited to cases of established rights, "and then by no means in every case" (para. 48). This restriction is grounded in part in the idea that the Crown may need to balance larger societal interests against Aboriginal interests.

¹⁵⁷ *Ibid.* at paras. 40 and 46-48. While the requirement of full consent will be rare, most cases will require "significantly deeper than mere consultation" (para. 40, quoting *Delgamuukw*, *supra* note 3 at para. 168; see also paras. 24 and 79), and the Crown may have to accommodate Aboriginal interests by changing its proposed actions.

¹⁵⁸ *Ibid.* at para. 39.

¹⁵⁹ *Delgamuukw*, *supra* note 3 at para. 168. *Haida*, *supra* note 20 at para. 39.

¹⁶⁰ *Mikisew*, *supra* note 115 at para. 63.

¹⁶¹ *Haida*, *supra* note 20 at para. 76.

¹⁶² *Mikisew*, *supra* note 115 at para. 64, quoting Finch J.A. in *Halfway River* at paras. 159-160.

¹⁶³ *Ibid.* at para. 54. The SCC continued: "The contemplated process [of consultation] is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along."

In a recent B.C. case, *Wii'litswx v. British Columbia (Minister of Forests)* [*Wii'litswx*],¹⁶⁴ Justice Neilson explained that the government's assessment of the strength of claim and the seriousness of the potential impacts must occur "at the outset of the proposed consultation, if it is to inform the scope and extent of that process."¹⁶⁵ If, as in that case, it appears that the Crown began consultation *before* making such a preliminary assessment, the Crown may fail in its bid to show it reasonably made those assessments. The court looked for evidence that the Crown decision-maker "addressed the nature of [the First Nation's] interests and the potential adverse impact of the [Crown decision] in a manner that produced a considered determination of the scope of the Crown's duty to consult and accommodate at the outset of that process."¹⁶⁶

Further, the court rejected the Crown argument that it could rely on "later operational decisions" and "other processes"¹⁶⁷ to minimize, prevent or address impacts on Aboriginal interests instead of identifying and assessing those potential impacts independently at the outset.¹⁶⁸ The court specifically noted that these later decisions and processes were out of the control of the initial decision-maker and were "largely discretionary, or may be supplanted by competing interests."¹⁶⁹ The judge disagreed that "these later operational steps significantly reduce the potential impact on [the First Nation's] interests of the strategic decision," reiterating the principle from *Haida*, that "decisions made during strategic planning may have potentially serious impacts on aboriginal interests."¹⁷⁰

(v) *Strength of the Claim*

A strong *prima facie* case for Aboriginal or treaty rights will increase the scope and content of the duty to consult, while a weaker claim will likely reduce it.¹⁷¹ Courts will examine the surrounding circumstances to evaluate the strength of the case. *Ka'a'gee Tu* is a good example of this process.

The government and the Ka'a'gee Tu First Nation had been negotiating a resolution to the Ka'a'gee Tu's outstanding land claim for almost ten years prior to the case. The Federal Court found that this fact supported the strength of Ka'a'gee Tu's claim.¹⁷² It also found that the Crown's breach of key terms of the treaty between the Crown and the Ka'a'gee Tu further

¹⁶⁴ *Wii'litswx*, *supra* note 9. Note that this is a lower court decision and an appeal court (or the SCC) may not uphold its reasoning.

¹⁶⁵ *Ibid.* at para. 147.

¹⁶⁶ *Ibid.* at para. 148.

¹⁶⁷ In this case, the judge referred to a non-binding land-use plan, later consultation regarding operational decisions (such as issuing cutting permits), a Joint Resource Council (made up of First Nation and government representatives), a Forest Benefit Sharing Working Group (also comprising First Nation and government representatives), a silviculture program and offers made as part of a previous forestry agreement that did not cover the Crown decisions at issue.

¹⁶⁸ *Wii'litswx*, *supra* note 9 at paras. 158-161.

¹⁶⁹ *Ibid.* at para. 161.

¹⁷⁰ *Ibid.* at para. 160.

¹⁷¹ *Haida*, *supra* note 20 at paras. 43-44 and 68.

¹⁷² *Ka'a'gee Tu*, *supra* note 136 at para. 104. See also *Taku River*, *supra* note 114 at para. 30.

supported the strength of the land claim.¹⁷³ The Court eventually concluded that the Crown had not fulfilled its duty to consult.

It appears that a court also may re-evaluate the strength of the claim over time. The series of *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation* decisions shows how such re-evaluation might arise.¹⁷⁴ The Kitchenuhmaykoosib Inninuwug First Nation ("KI") filed a Treaty Land Entitlement ("TLE") claim with the government, in which KI claimed that it was entitled to a larger reserve area under the terms of Treaty 9, potentially including lands to which Platinex, a private mining exploration company, had exploration rights.

At the time of the first decision, KI was still waiting for a government response regarding the TLE claim, and Smith J. granted an interim, interim injunction (similar to an interlocutory injunction) preventing Platinex from conducting further activity on those lands.¹⁷⁵ By the time of the second decision, the government had rejected the TLE claim. Smith J. found that this rejection weakened KI's *prima facie* assertion of rights involving the lands that Platinex wanted to explore.¹⁷⁶ Based partly on the reduced strength of KI's claim, he declined to grant KI a further injunction against the mining company.

(vi) *Seriousness of Adverse Effect*

Courts will consider the context of the case in order to forecast the seriousness of the impact that the Crown's action might have on the rights of Aboriginal peoples. The duration, area, and general severity of the impact can increase or decrease the scope and content of consultation.¹⁷⁷

¹⁷³ *Ka'a'gee Tu*, *supra* note 136 at paras. 105-106. The Crown conceded it had not fulfilled the terms of the treaty requiring it to set aside reserve lands. Blanchard J., for the Federal Court, acknowledged that the Crown's obligation to do so was "arguably a fundamental aspect of treaty." On these grounds, he concluded that Ka'a'gee Tu's claim to Aboriginal rights in the land at issue raised a "reasonably arguable case."

¹⁷⁴ The decisions are:

1. *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation* (2006), 272 D.L.R. (4th) 727, [2006] 4 C.N.L.R. 152 (ON S.C.) [hereinafter *KI 1*];
2. *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation & A.G. Ontario* (2007), 29 C.E.L.R. (3d) 116, [2007] 3 C.N.L.R. 181 (ON S.C.) [hereinafter *KI 2*];
3. *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2007), 29 C.E.L.R. (3d) 191, [2007] 3 C.N.L.R. 221 (ON S.C.) [hereinafter *KI 3*];
4. *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 CanLII 11049 (ON S.C.). In this decision, the court found six KI leaders, the "KI 6," in contempt and sentenced them to six months in prison. See also *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 533 [hereinafter *KI 4*], in which the Court of Appeal for Ontario reduced or dismissed the fines and released the KI 6. Refer also to the companion case, *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534 for elaboration.

¹⁷⁵ *KI 1*, *supra* note 174 at para. 79.

¹⁷⁶ *KI 2*, *supra* note 174 at paras. 115, 135 and 162-165.

¹⁷⁷ See, e.g., *Mikisew*, *supra* note 115 at para. 64. "[G]iven that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum." See also, e.g., *Ka'a'gee Tu*, *supra* note 133 at paras. 113-114, in which Blanchard J., for the Federal Court, distinguished the case from *Mikisew* on the basis of the seriousness of the impact. At para. 117, he commented: "In my view, the contextual factors in this case, particularly the seriousness of the impact on the Aboriginal people... militate in favour of a more important role of consultation. The duty must in these circumstances involve formal participation in the decision-making process".

The proximity of the Crown's conduct to the places where the Aboriginal group exercises the right, as well as the importance of the right to the group, may also be important. For example, the impact of a new road on treaty rights to hunt and trap in the area "may not seem very dramatic...but, in the context of a remote northern community of relatively few families, it is significant,"¹⁷⁸ especially if the road would track the borders of the reserve where the community is most likely to exercise its rights.¹⁷⁹

(vii) Specificity of Promises

As we mentioned earlier, the fact that a treaty's provisions already contemplate Crown action does not automatically negate or discharge the Crown's duty to consult. Instead, the treaty provides a framework within which consultation and the Crown's conduct occurs.¹⁸⁰ In *Mikisew*, the SCC found an inverse relationship between treaty specificity and the role of the duty to consult, stating:

Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance.¹⁸¹

Treaties created in the late 19th and early 20th centuries are typically broadly worded and often establish very general rights and obligations. Therefore, the scope and content of the duty to consult is unlikely to decrease at this stage. Modern treaties, on the other hand, are quite specific, and in future cases this factor may decrease the scope and content of the duty to consult, as per the *Mikisew* decision.

(viii) Justified Infringement Not Relevant

In at least one case, a court attempted to use language from the *Sparrow* justification test to diminish the scope of the duty to consult. When the Federal Court decided *Ahousaht*, it found that the adverse effects on the right of First Nations to commercially fish were limited, "particularly in light of the fact that the [Crown] was pursuing a compelling and substantial objective of conservation."¹⁸²

The Federal Court of Appeal ultimately upheld the Federal Court's conclusion that the Crown had fulfilled its duty to consult. However, it criticized the lower court's use of the *Sparrow* Test. Citing *Mikisew*, it recognized that the existence and scope of the duty to consult is a separate question from whether the Crown justified its infringement of established Aboriginal rights.¹⁸³ Therefore, although the occurrence or absence of consultation can be a relevant factor in the test

¹⁷⁸ *Mikisew*, *supra* note 115 at para. 3.

¹⁷⁹ *Ibid.* at para. 47.

¹⁸⁰ *Ibid.* at para. 63.

¹⁸¹ *Ibid.*

¹⁸² *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2007 FC 567 at para. 46 (F.C.T.D.).

¹⁸³ *Ahousaht*, *supra* note 128 at para. 44.

for justified infringement (see above under "The *Sparrow* Test"), justification is not relevant to the test for the duty to consult.

D. Was the Duty Fulfilled?

(i) *Standard of Review*

As suggested above, courts will apply a reasonableness standard when it considers whether the Crown has fulfilled the duty to consult and, if necessary, accommodate.¹⁸⁴

(ii) *What is Adequate?*

Although the Crown cannot fulfil its duty to consult through a "fundamentally flawed" process,¹⁸⁵ it must show that, at least, it made "reasonable efforts to inform and consult" in light of the required scope and content of consultation.¹⁸⁶ An isolated failure to consult in a larger context of multiple opportunities requiring consultation may or may not conclusively tip the scales in favour of the Aboriginal group claiming inadequate consultation, depending on the facts.¹⁸⁷ Because courts evaluate the reasonableness of the Crown's conduct on a case-by-case basis, we do not have a clear picture of how much consultation is enough for government to meet its duty to consult.

The SCC has provided some guidance, in *Haida* for example, where the court determined that consultation must begin early, at the strategic planning stages of the proposed Crown action, and not at a later operational level.¹⁸⁸ However, it at least one lower court case appears to have failed to apply this aspect of *Haida*.¹⁸⁹

¹⁸⁴ *Haida*, *supra* note 20 at para. 62.

¹⁸⁵ *Mikisew*, *supra* note 118 at paras. 57 and 68.

¹⁸⁶ *Haida*, *supra* note 20 at para. 62.

¹⁸⁷ See, e.g., *Ka'a'gee Tu*, *supra* note 136. The Crown failed to adequately consult at the last stage of the process, even though it had sufficiently discharged its duty up until that point. The court found that the Crown had not fulfilled its duty to consult. See also, e.g., *Ahousaht*, *supra* note 128. The court found that the Crown had fulfilled its duty to consult. The Crown's flawed consultation process had been overwhelmed by the circumstances of the case, including (see further discussion below under "Reciprocal Aboriginal Duty to Consult"):

1. A sense of urgency regarding the protection of endangered and at risk fish surrounding the government action;
2. The multitude of First Nations involved and their lack of unanimity and;
3. The perception that the Aboriginal group was engaged in something less than full good faith participation.

¹⁸⁸ *Haida*, *supra* note 20 at para. 76.

¹⁸⁹ See *KI 2*, *supra* note 174: Government efforts to consult arose almost entirely *after* the government had granted and legally enforceable mining rights to lands that were subject to treaty rights and an outstanding land claim. Justice Smith, for the court, found that government's "reasonable and responsible" efforts to engage in consultation at the operational stage of mining exploration activity fulfilled its duty to consult with KI (*KI 2*, at para. 160). By doing so, he seems to have implicitly forgiven the almost complete absence of consultation at the strategic planning stages. It seems difficult to reconcile *KI 2* with the SCC's mandate in *Haida* except perhaps by noting that in *KI 2*, the scope of the duty to consult was probably lower on the spectrum than in *Haida*. However, *Haida* doesn't necessarily link *when* consultation should occur with *what* consultation should occur. It is also worth observing that government's subsequent good faith efforts to consult seem to have played an extremely important role in the outcome of *KI 2*.

A court may also consider the potential impact on Aboriginal or treaty interests of an isolated failure to consult in a series of government actions as a determining factor. In, *Ka'a'gee Tu*, for instance, the Court found that the Crown failed to adequately consult at the last stage of the regulatory process, even though it had sufficiently discharged its duty up until that point. Therefore the Crown had not met its overall duty to consult.¹⁹⁰ However, other cases show courts permitting flawed consultation in light of particularly important circumstances, such as: a sense of urgency surrounding the government action¹⁹¹ and the multitude of First Nations involved and their lack of unanimity.¹⁹² Although this may seem to be a relaxing of the obligation, a strong counter view would assert that such contextual factors modify what a court will consider as "reasonable" Crown attempts at consultation.

(iii) Process and Outcome

In the recent *Wii'litswx* case,¹⁹³ the judge used a two-part test to judge whether the Crown had reasonably fulfilled its duty to consult and accommodate when approving forest licence replacements in the traditional territory of the Gitanyow people. This case involved Aboriginal rights (including Aboriginal title) and was a situation requiring "'deep consultation aimed at finding a satisfactory interim solution' to avoid irreparable harm and to minimize the impact of the decision to replace [forest licences] on [the First Nation's] interests until its claims were finally resolved."¹⁹⁴

Drawing on a B.C. Court of Appeal decision, *Gitxsan First Nation v. British Columbia (Minister of Forests)* [*Gitxsan*],¹⁹⁵ that involved the same parties and many of the same issues, Neilson J. presented the overall test for assessing the Crown's efforts in the following way:¹⁹⁶

1. Did the Crown correctly or reasonably assess the extent of its duty to consult and accommodate [the First Nation's] interests in the course of the [forest licence] replacements by:
 - a. correctly or reasonably assessing the strength of [the First Nation's] claim to aboriginal title and rights; and

¹⁹⁰ The crown met its duties to consult until the last stage of the regulatory approval process, which left no room for consultation. The last stage resulted in significant changes to the proposed project regulations. The Federal Court found the changes would severely impact the rights and interests of the Ka'a'gee Tu. Therefore, the duty of consult included a right to consultation at all stages of the process, including the last stage. The court concluded the government had breached its duty to consult.

¹⁹¹ *Ahousaht*, *supra* note 128. Although the sense of urgency is not directly mentioned in the conclusion, it is mentioned numerous times earlier in the judgment: "[The Lead Director for Pacific Fisheries Reform] stressed the urgency of the groundfish initiative, as one of the major groundfish fisheries would be opening in [less than three months], and thus that it was imperative that the consultations be undertaken on an urgent basis" (*ibid.* at para. 10, quoting paras. 15 and 17 of the Federal Court's reasons).

¹⁹² *Douglas*, *supra* note 128; *Ahousaht*, *supra* note 128 at para. 51 (citing and perhaps adopting *Douglas*).

¹⁹³ *Wii'litswx*, *supra* note 9. Note that this is a lower court decision and an appeal court (or the SCC) may not uphold its reasoning.

¹⁹⁴ *Ibid.* at para. 169.

¹⁹⁵ *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734, 38 B.C.L.R. (4th) 57 [hereinafter *Gitxsan*].

¹⁹⁶ *Wii'litswx*, *supra* note 9 at para. 18.

- b. correctly or reasonably assessing the potential seriousness of the impact of the [forest licence] replacements on [the First Nation's] aboriginal title and rights?
2. Was the consultation process reasonable?
3. Did the Crown reasonably accommodate [the First Nation's] aboriginal interests?

Note that this judge (and the decision from which she drew) apparently adds an assessment of any accommodation offered as part of the test whether the Crown fulfilled its duty. She quoted the following from *Gitxsan*:¹⁹⁷

In assessing the adequacy of the Crown's efforts to fulfil its duty to consult and accommodate, the court will usually look at the overall offer of accommodation made by the Crown and weigh it against the potential impact of the infringement on the asserted Aboriginal interests having regard to the strength of those asserted interests. The court will not normally focus on one aspect of the negotiations because the process of give and take requires giving in some areas and taking in other areas. It is the overall result which must be assessed.

The judge in *Wii'litswx* acknowledged that the focus of this approach on the *results* of consultation appeared to be in opposition to the *Haida*-mandated focus on the *process* of consultation and accommodation. She decided, though that it was in line with *Taku River* (which *Gitxsan* had also applied) where the SCC:¹⁹⁸

followed a two stage analysis, each stage being governed by a standard of reasonableness. First, [the court] addressed the adequacy of the process of consultation. Second, having found it to be reasonable, it examined the end result by considering whether that consultation had identified a duty to accommodate aboriginal concerns, and the adequacy of any resulting accommodations.

She later reiterated this stage of the test as an assessment of the reasonableness of the consultation process that involves two parts:

1. procedural adequacy, and
2. "an examination of whether the consultation was meaningful, in the sense that the Crown made genuine efforts to understand [the First Nation's] position, and to attempt to address it, with the ultimate goal of reconciliation in mind."¹⁹⁹

Further in the decision, the judge characterized these parts as the procedural and substantive aspects of the consultation process.²⁰⁰ She emphasized that just providing the procedural aspect is insufficient to meet the Crown's obligations. Instead, "[a]n assessment of whether consultation was meaningful inevitably leads to an examination of what accommodations were reached,"²⁰¹ adding:

¹⁹⁷ *Ibid.* at para. 16. The original quote is from *Gitxsan*, *supra* note 195 at para. 63.

¹⁹⁸ *Wii'litswx*, *supra* note 9 at para. 17, referring to *Taku River*, *supra* note 114 at paras. 39-44.

¹⁹⁹ *Ibid.* at paras. 144-145.

²⁰⁰ *Ibid.* at para. 170.

²⁰¹ *Ibid.* at para. 179.

Ultimately, the adequacy of the Crown's approach will be judged by whether its actions, viewed as a whole, provided reasonable interim accommodation for the asserted aboriginal interests, given the context of balance and compromise that is required.²⁰²

The judge examined the accommodation that the Crown offered in light of each of the First Nation's concerns and found that the Crown had not modified its position to accommodate the Aboriginal interests.²⁰³ She considered "the overall offer of accommodation, and [weighed] it against the potential impact of the infringement on the asserted aboriginal interests, having regard to the strength of the aboriginal claims," which potential impact was significant and which claims were strong.²⁰⁴ Moreover, "the strength of the [First Nation's] position suggested that if the Crown did not make reasonable concessions, it is open to infer that it did not conduct meaningful consultation."²⁰⁵

The judge summarized that the Crown failed in two main respects:²⁰⁶

The Crown failed to make a proper preliminary assessment of the scope and extent of its duty to consult and accommodate. There is nothing to indicate that it attempted to make that assessment at the outset of the consultation, so that it could inform the process. Further, [the decision-maker's] assessment at the end of the process unreasonably minimized both the strength of [the First Nation's] claim and the potential adverse impact of the [forest licence] replacement decision on its interests. The inevitable conclusion is that this led the Crown to underestimate its obligation to understand and address [the First Nation's] concerns in the course of the consultation.... [para. 245]

Second, the Crown chose to rely on inappropriate measures as accommodation.... As a result, the Crown conducted the consultation process under the mistaken impression that adequate accommodation for the decision to replace the [forest licences] was already in place. The result was the premature foreclosure of meaningful discussion of [the First Nation's] concerns related to that decision. [para. 246]

(iv) Reciprocal Aboriginal Duty to Consult

Where the Crown's contemplated conduct has triggered its duty to consult, First Nations have a reciprocal duty to engage in good faith consultation with the Crown. Depending on the

²⁰² *Ibid.* at para. 178. The judge referred to several decisions, including *Haida*, *Taku River*, *Mikisew* and *Gitksan*.

²⁰³ *Ibid.* at para. 194 (and the relevant previous paragraphs). At para. 220, the judge added:

Nevertheless, the Crown must demonstrate that, in balancing the competing interests at work in the decision to replace the [forest licences], it listened to [the First Nation's] concerns with an open mind, and made a good faith effort to understand and address them, with a view to minimizing the adverse effect of that decision on [the First Nation's] interests and providing reasonable interim accommodation.

²⁰⁴ *Ibid.* at para. 221.

²⁰⁵ *Ibid.* at para. 243, referencing *Gitksan*, *supra* note 195 at para. 50.

²⁰⁶ *Ibid.* at paras. 245-246.

circumstances, failing to do so can affect a First Nation's claim that the government has not fulfilled its duty to consult.²⁰⁷

Whether the First Nation is acting unreasonably is a highly subjective and context-specific question, and no clear set of guidelines has yet emerged from the case law. In *Ahousaht*, for example, the court found that the conduct of the First Nation was fatal to its claim for consultation.

In that case, the Minister of Fisheries and Oceans approached a group of First Nations to consult on an urgent and relatively important fisheries management plan. The group requested that the Minister agree to a protocol that outlined the stages of consultation. The Minister remained uncommitted to the last step of the protocol, which required accommodation. The First Nations refused to consult until the Minister agreed to all steps in the consultation protocol, and so the government chose to continue with its plan without further consultation.

The Federal Court of Appeal extensively quoted the British Columbia Court of Appeal in *Douglas*, recalling that First Nations are barred from "[placing] unnecessary obstacles in the way of the consultation process."²⁰⁸ The Federal Court of Appeal went on to cite the efforts of the Minister to accommodate Aboriginal interests, and found that these efforts, "while not perfect, were reasonable and appropriate in the circumstances."²⁰⁹

The reciprocal duty to consult gives rise to specific positive duties on First Nations. In *Haida*, the SCC noted that Aboriginal claimants should "outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements."²¹⁰ Additionally, in *Ka'a'gee Tu*, the Federal Court found that in order to achieve meaningful consultation, the Ka'a'gee Tu First nation had a duty to provide information regarding the location of traplines or burial sites.²¹¹ The Ka'a'gee Tu expressed a concern about the risk that the privacy of this sort of culturally sensitive information could be compromised. However, the court held that, unless it also proves that there is no way to protect the information from misuse, an Aboriginal group that refuses to provide necessary information "cannot... complain that their concerns were not considered."²¹²

²⁰⁷ *Douglas*, *supra* note 128 at para. 45 (citing the decision of the trial judge (BCSC), *R. v. Douglas*, 2006 BCSC 284 at para. 73). Also see above, under: "General – Parties". See, e.g., *Taku River*, *supra* note 117: The SCC concluded that the government fulfilled its duty to consult through its environmental assessment procedure. In addressing the question of whether the Crown fulfilled its duty, the court noted the responsiveness and sensitivity of the Crown to Aboriginal concerns and two instances where the Taku River Tlingit First Nation opted out of the opportunity to participate in the decision-making process. On the other hand, courts also note when First Nations appear willing to participate and engage government consultation. See, e.g., *Dene Tha'*, *supra* note 139, where the Dene Tha' First Nation specifically requested consultation and the Crown ministries refused. See, e.g., *KI 1*, *supra* note 177, where the court listed numerous attempts by the KI First Nation to engage the Ontario government in consultation.

²⁰⁸ *Ahousaht*, *supra* note 128 at para. 52. See also *Douglas*, *supra* note 128 at para. 39 (quoting *Halfway River*, *supra* note 130 at para. 161): "[Aboriginal Peoples] cannot frustrate the consultation process by refusing to meet or participate or by imposing unreasonable conditions...".

²⁰⁹ *Ahousaht*, *supra* note 128 at para. 55.

²¹⁰ *Haida*, *supra* note 20 at para. 36.

²¹¹ *Ka'a'gee Tu*, *supra* note 133 at paras. 129-130.

²¹² *Ibid.* at para. 130.

E. What is the Appropriate Remedy?

If the Crown has breached its duty to consult with potentially affected Aboriginal communities, the court must decide what remedy is most appropriate in the circumstances. The *Haida* decision makes clear that the ultimate goal of consultation and accommodation must be to reconcile the assertion of Crown sovereignty with the fact that, "put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered."²¹³ The SCC does not imagine that agreement will always flow out of the process,²¹⁴ but it does mandate that consultation be meaningful.²¹⁵

Providing meaningful consultation that fulfils the goals of reconciliation can be incredibly difficult and perhaps impossible in some cases.²¹⁶ Sometimes the proposed conduct has already begun and the rights or interests have already been infringed or are facing imminent harm.

Larger policy issues also compound the challenge of rectifying inadequate consultation after the fact. Ordering an actual or *de facto* halt to further activities can have serious financial, political and other implications on the Crown and third parties that are invested in the proposed activities. In *KI 2*, for example, the impending financial ruin of the mining company was one central reason why the court denied KI's request for an injunction against it.²¹⁷

While recognizing third party interests appears to be pragmatic, this approach is legally problematic. Unlike the legal protections that most third party interests can receive, the Canadian Constitution itself mandates the duty to consult with affected Aboriginal peoples.

An additional challenge is that common law prohibitory remedies, such as injunctions, may be poorly suited to addressing the special nature of duty to consult cases. The duty to consult is a positive duty requiring action on the Crown's part as well as on the First Nations. By their

²¹³ *Haida*, *supra* note 20 at paras. 25-26.

²¹⁴ *Ibid.* at para. 49: "A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them."

²¹⁵ *Ibid.* at paras. 10, 33 and 41-42.

²¹⁶ See, e.g., *Dene Tha'*, *supra* note 136 at para. 130: After noting that the Crown engaged in virtually no consultation with the Dene Tha', Justice Phelan explained:

[T]o some extent "the ship has left the dock". How does one consult with respect to a process which is already operating? The prospect of starting afresh is daunting and could be ordered if necessary. The necessity of doing so in order to fashion a just remedy is not immediately obvious. However, it is also not immediately obvious how consultation could lead to a meaningful result.

The Mackenzie Valley Gas Pipeline process had been underway for sometime.

²¹⁷ This decision was a continuation of *KI 1*, *supra* note 174, which granted an interim, interim injunction against the mining company Platinex. Interestingly, in *KI 1*, the same judge found that the impending financial ruin of Platinex had little bearing on the case. At paras. 71-72, he noted that Platinex, by choosing to court investors and proceed with its activity despite clear requests by KI to desist until consultation with the government had occurred, was "to a large degree, the author of its own misfortune." In *KI 2*, *supra* note 174, Smith J. does not address his apparently inconsistent comments in *KI 1*, and seems to have overturned them. Even if his analysis in this regard is flawed, in the end he may have been justified in doing so, since he also found the strength of KI's land claim had diminished since *KII*, which probably reduced the scope and content of the duty to consult. Either way, he did not fully develop other aspects of his conclusion, such as the imminent harm and the balance of convenience as it applied to the KI side of the equation. Courts may find it difficult to apply *KI 2* to future cases.

nature, prohibitory remedies can only stop actions from occurring. They cannot force meaningful consultation to occur without additional orders.²¹⁸ Also, as the court noted in *Haida*, common law remedies usually create winners and losers, and often require the court to pit Aboriginal interests against other public or private interests.²¹⁹ Both of these results run contrary to the ultimate goal of reconciliation.

While common law remedies might not be perfect, some academics and courts have noted that, if the courts are too uncomfortable with ordering sufficiently strong remedies, they could undermine the justiciability of Aboriginal and treaty rights and the protection afforded them under s. 35 of the *Constitution Act, 1982*.²²⁰ There is a concern that ordering consultation without the teeth of an injunction to protect Aboriginal interests might be too little, too late to affect meaningful reconciliation.²²¹

(i) **Funding**

Many First Nations communities are economically impoverished. They often lack sufficient funds for consultation on equal footing with the government.²²² At this time, court decisions have not formally required the Crown to fund Aboriginal participation, but courts may address funding issues at both the analysis and remedy stages.²²³ For example, in *KI 3*, the judge recognized that "the issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a 'level playing field'."²²⁴

Although courts may recognize the importance of funding, they are sometimes loath to order or set guidelines for adequate funding. In *Ka'a'gee Tu*, the court was willing to consider the question of adequate funding, but found that Ka'a'gee Tu First Nation had failed to establish that the funds they had received from the government to participate in consultation were inadequate. The Court placed significant weight on the fact that although Ka'a'gee Tu had not received as much money as it requested, it had nevertheless ended up with a surplus.²²⁵ The Court then found that, based on the evidence, it was unable to determine the most important question: whether the amount received actually allowed for meaningful participation in the consultation process.²²⁶

²¹⁸ *Haida*, *supra* note 20 at para. 14; *KI 1*, *supra* note 174 at para. 56.

²¹⁹ *Haida*, *supra* note 20 at para. 14.

²²⁰ *KI 1*, *supra* note 174 at para. 59 (citing Kent Roach, "Aboriginal Peoples and the Law: Remedies for Violations of Aboriginal Rights," (1992) 21 Man. L.J. 498 at para. 2).

²²¹ *Dene Tha'*, *supra* note 139. The Federal Court expressed doubt that consultation "could lead to a meaningful result" if the multi-billion dollar Mackenzie Gas Pipeline were already operating (*ibid.* at para. 130), and halted the project approval process until consultation had been achieved. Not all courts have adopted this perspective. In the series of *KI* cases, Smith J. for the Ontario Superior Court allowed a private mining company to continue activities that were potentially adverse to Aboriginal interests, subject to the creation of and agreement to a protocol for future consultation and memorandum of understanding between the affected First Nation (*KI*), the Crown, and the mining company. He did so despite *KI*'s assertion that, as noted in *Dene Tha'*, *supra* note 139, consultation that *must* allow the proposed action to continue would ring hollow.

²²² See, e.g., *Ka'a'gee Tu*, *supra* note 133, and *KI 2* and *KI 3*, *supra* note 174.

²²³ See, e.g., *KI 3*, *supra* note 174 and *Ka'a'gee Tu*, *supra* note 174.

²²⁴ *KI 3*, *supra* note 174 at para. 27.

²²⁵ *Ka'a'gee Tu*, *supra* note 174 at para. 128.

²²⁶ *Ibid.*

A court delaying or avoiding questions of funding can pose a serious financial dilemma to First Nations. In *KI 3*, for instance, while the judge reserved his decision on funding, he also imposed a protocol and timetable for consultation, which required meetings to begin within one week of the judgment. Samuel McKay, a KI band councillor, expressed serious doubts about whether meaningful consultation could occur under these and other circumstances, noting that First Nations often find themselves simultaneously responsible for paying litigation fees.²²⁷ In the case of the KI, its financial situation forced them to abandon further litigation and further pursue court protection of their interests.

Conclusion

The SCC has clearly identified reconciliation between First Nations and the government as the ultimate goal of s. 35 of the *Constitution Act, 1982*. If reconciliation is the goal, how do we get there? We have seen that litigation can offer only limited help in this regard. Some fundamental points of law that carry potentially massive social political and economic implications, such as the Crown's duty to consult regarding private lands, remain unsettled. Other issues, notably the challenge of finding an appropriate remedy and the question of funding, are perhaps not as high profile, but equally determinative to the future of reconciliation. In addition, the adversarial nature of the legal system is in many ways incompatible with the larger ideas of reconciliation.

The limitations inherent in litigation have caused some First Nations, either by choice or necessity, to take their battles out of the courts and into the political and economic arenas.²²⁸ Environmental groups and private landowners have also developed ways to affect the process of Canada's resource development and can have either a positive or a negative impact on lands subject to Aboriginal interests from an Aboriginal perspective.

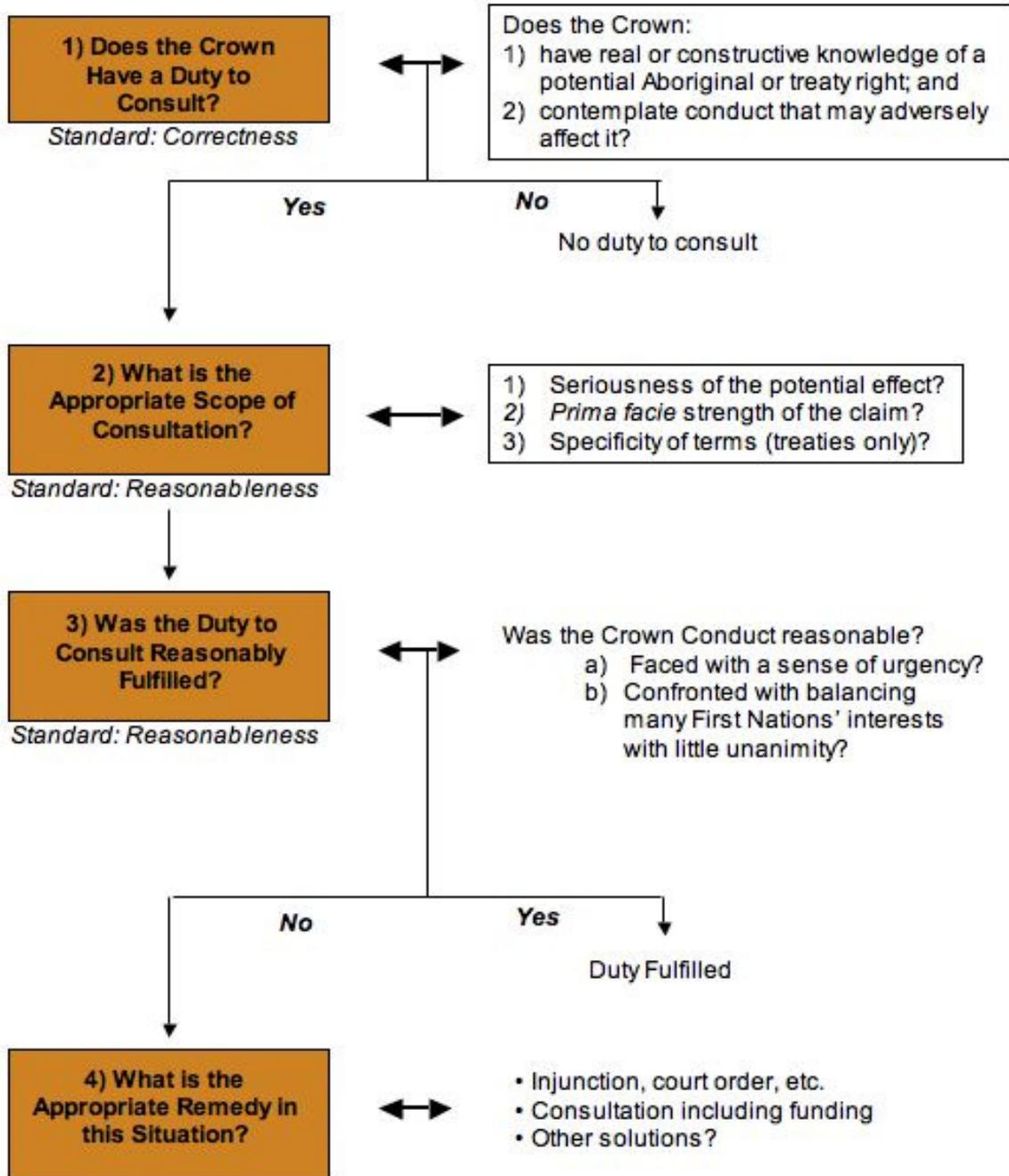
Despite its internal limitations and the role of other mechanisms for change, the duty to consult remains significant in its potential to shape virtually every land-based or resource-based relationship between the Crown and Aboriginal peoples. As natural resources claim a higher price in the world market, lands subject to Aboriginal interests are in the centre of the economic spotlight. The political and economic pressure to develop traditional lands in B.C. and the rest of Canada grows, and First Nation challengers play a significant role in checking government action. In other words, the duty to consult and the forum of the court will remain integral facets of future First Nations relations on the land.

²²⁷ S. McKay, "Criminalization of Indigenous Human Rights and Environmental Activists" (Panel discussion to The Shock Doctrine: Indigenous Peoples' Experience in Canada: Symposium of Indigenous Human Rights and Environmental Activists, 19 June 2008) [unpublished] [hereinafter McKay, 2008]. According to McKay, KI owes \$700,000 in legal fees as a result of the *KI* cases and surrounding circumstances.

²²⁸ After an unfavourable result in *KI3*, *supra* note 174, KI First Nation, facing financial hardship, withdrew from the costly appeals process. Shortly afterwards, six community leaders, the "KI 6", disobeyed a court order not to interfere with Platinex's mining operation, leading to contempt proceedings in court. The KI 6 chose not to defend the charges, and the Ontario Superior Court of Justice sentenced each person to six months imprisonment (see *KI 4*, *supra* note 174). McKay characterized the actions of the KI 6 as a conscious choice by the KI community to abandon the litigation process and begin a political one. He explained that, overall, he felt that the switch was positive, noting that after two years of litigation without support from other First Nations and outside groups, there was a swell of publicity and support for the KI community (McKay, *supra* note 227, 2008).

Appendix A – The Duty to Consult

Has the Crown Breached its Duty to Consult?



Appendix B – the *Sparrow* Test

Sparrow Test [Applies to Treaties Through *Badger*]

