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## Duty to Consult with First Nations

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For environmental groups acting with First Nations, the government's duty to consult Aboriginals will play an important part in any litigation strategy. Recent developments of the case law with the BC Court of Appeal decisions in *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*<sup>1</sup>, (“*Taku River*”), and the two *Haida Nation v. B.C.(Ministry of Forests)* decisions, (“*Haida I*” and “*Haida II*”)<sup>2</sup>, as well as new provincial policy regarding consultation, will inform these arguments. Since the decision in *Delgamuukw v. British Columbia*,<sup>3</sup> (“*Delgamuukw*”), First Nations, government and industry have been unsure about the meaning of the duty to consult, and its role in the *R. v. Sparrow* (“*Sparrow*”) test for justification.<sup>4</sup> All sides knew something was required, but no one was clear on exactly what. However, since costs of breaching the duty could be high, and add uncertainty to business activity, government and industry want the specific requirements of the duty defined. Moreover, the duty is intended to give Aboriginal groups a role in decision-making, and without more definition, the current application of the duty fails to achieve this. Therefore, all groups should expect significant developments in this area of the law, and in its application

### **Analysis of the Law**

The duty to consult originates in the fiduciary duty imposed on the Crown under its responsibility for Aboriginal peoples, as discussed by the Supreme Court of Canada (“SCC”) in *Guerin v. The Queen* (“*Guerin*”).<sup>5</sup> In *Haida I*, Lambert, J.A., confirmed this when he wrote: “The roots of the obligation to consult lie in the trust-like relationship which exists between the Crown and the [A]boriginal people of Canada.”<sup>6</sup> The duty to consult is an enforceable legal and equitable duty.<sup>7</sup> The question of whether the duty was fulfilled arises in the context of the *Sparrow* test for justification. Assuming that an Aboriginal right and its infringement have been established, the courts look at whether the Crown can justify the infringement. One of the considerations is whether the Aboriginal group whose interests were infringed was consulted.

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<sup>1</sup> *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, [2002] 4 W.W.R. 19

<sup>2</sup> *Haida Nation v. B.C.(Ministry of Forests)* [2002] 6 W.W.R. 243, (“*Haida I*”) and *Haida Nation v. B.C.(Ministry of Forests)* (2002), 216 D.L.R. (4<sup>th</sup>) 1, (“*Haida II*”)

<sup>3</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

<sup>4</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075

<sup>5</sup> *Guerin v. The Queen*, [1984] 2 S.C.R. 335

<sup>6</sup> *Haida I*, *supra* note 2 at 256.

<sup>7</sup> *Haida I*, *supra* note 2 at 262.

“Whether the [A]boriginal group has been consulted is relevant to determining whether the infringement of [A]boriginal title is justified.”<sup>8</sup>

To justify the infringement, the Crown must demonstrate it was acting pursuant to a valid legislative objective, and that its actions are consistent with the fiduciary duty of the government towards Aboriginal peoples.<sup>9</sup> “In the wake of *Gladstone* the range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad.”<sup>10</sup> Listed objectives include the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.<sup>11</sup> It is a question of fact whether a particular measure can be explained by reference to one of those objectives.<sup>12</sup> The second aspect of the test involves examining the fiduciary duty. The duty to consult becomes important at this stage. In *Haida I*, Lambert cited *Sparrow*, *R. v. Gladstone*, (“*Gladstone*”) and *Delgamuukw* in holding that the duty, if discharged, is an element among the circumstances that would justify a *prima facie* infringement.<sup>13</sup> The Crown must satisfy all aspects of the test; thus, in *Halfway River First Nation v. B.C. (Ministry of Forests)*, (“*Halfway CA*”), even though all the other criteria were met, “[J]ustification of the infringement has not been established because the Crown failed in its duty to consult. It would be inconsistent with the honour and integrity of the Crown to find justification when that duty has not been met.”<sup>14</sup>

The duty to consult applies even before the Aboriginal interest, be it rights or title, is established conclusively by the courts. In *Haida I*, Lambert discusses the conclusion from *Westbank v. B.C.*<sup>15</sup>, (“*Westbank*”), that until the precise nature of the Aboriginal title or rights was established there could be no conclusive determination of whether they had been *prima facie*

<sup>8</sup> *Delgamuukw*, *supra* note 3 at 1113.

<sup>9</sup> *Sparrow*, *supra* note 4 at 1113

<sup>10</sup> *Delgamuukw*, *supra* note 3 at 1111

<sup>11</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723 at 768.

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

<sup>13</sup> *Haida I*, *supra* note 2 at 263

<sup>14</sup> *Halfway River First Nation v. B.C. (Ministry of Forests)*, (1999) 178 D.L.R. (4<sup>th</sup>) 666 (BCCA) at 691, *aff’d* *Halfway River First Nation v. British Columbia (Ministry of Forests)*, (1997), 39 B.C.L.R. (3d) 227 (SC) (“*Halfway SC*”).

<sup>15</sup> *Westbank First Nation v. British Columbia (Minister of Forests)* (2000), 191 D.L.R. (4<sup>th</sup>) 180 (BCSC)

infringed and therefore whether such infringement was justified. He notes that this “does not mean that there is no fiduciary duty on the Crown to consult the [A]boriginal people in question after title is asserted and before it is proven to exist, if, were title to be proved, there would be an infringement.”<sup>16</sup> Lambert points to *Sparrow* and *Gladstone* as proof that “the major aspects of justification, including consultation, must be in place before the infringement occurs and, normally, before the Aboriginal right is proven in court.”<sup>17</sup> In *Taku River*, Rowles, J.A. took the same view: “To argue that the constitutional or fiduciary obligations to consult with Aboriginal peoples only arises after there has been a determination that the Aboriginal peoples have existing Aboriginal or treaty rights under s.35 of the *Constitution Act, 1982*, is wholly inconsistent with the passages from *Sparrow* and *Vanderpeet*”<sup>18</sup> Rowles, J.A. goes on to conclude that to accept that position “would largely negate the purpose of constitutional protection provided by s.35(1) of the *Constitution Act, 1982*.”<sup>19</sup> This approach is strengthened by reference to both the fiduciary duty and the preference expressed in *Delgamuukw* for negotiation over litigation.<sup>20</sup> Rowles, J.A., states that the contrary approach would “ignore the substance of what the Supreme Court has said, not only in *Sparrow* but in earlier decisions which have emphasized the responsibility of government to protect the rights of Indians arising from the special trust like relationship created by history, treaties and legislation”, and that “this approach would effectively end any prospect of meaningful negotiation or settlement of [A]boriginal land claims.”<sup>21</sup> The case of *TransCanada Pipelines Ltd. v. Beardmore (Township)*<sup>22</sup>, (“*TransCanada*”) is often cited as authority for the opposite position. However, Lambert addresses this in *Haida I*, and determines that *TransCanada* only stands for the proposition that when the courts assesses justification during litigation, they must first be satisfied regarding the establishment of the right. Lambert argues that this does not preclude the imposition of a consultation duty before that right is confirmed.

The duty is not limited to the government; it extends to third parties. In *Haida II*, the court extended the duty to Weyerhaeuser because they were aware of the Aboriginal claim. The court analogized Weyerhaeuser to a constructive trustee because title passed in breach of the duty, and they were in ‘knowing receipt’; Weyerhaeuser knew or ought to have known of the Crown’s

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<sup>16</sup> *Haida I*, *supra* note 2 at 259

<sup>17</sup> *Ibid.*

<sup>18</sup> *Taku River*, *supra* note 1 at 87.

<sup>19</sup> *Taku River*, *supra* note 1 at 98.

<sup>20</sup> *Delgamuukw*, *supra* note 3 at 1113.

<sup>21</sup> *Taku River*, *supra* note 1 at 93.

<sup>22</sup> *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4<sup>th</sup>) 403

fiduciary duty, the duty to consult and the Haida's strong prima facie case. Therefore they knew or ought to have known of the breach, and the fiduciary duty was imposed on them.<sup>23</sup> Although the First Nation group has the onus of establishing a preliminary case for an Aboriginal rights or title claim, this does not absolve the crown from the duty. "[t]here is always a duty of consultation."<sup>24</sup>

What, then, does the duty entail? First, the Crown must inquire into the merits of the First Nation's case to determine whether a preliminary claim exists. The duty involves consultation in good faith, and with the intention of substantially addressing Aboriginal concerns.<sup>25</sup> In a dissenting judgment, Madame Justice Southin stated that "The right to be consulted is not a veto... The right to be heard... is not a right to victory."<sup>26</sup> In *Halfway CA*, Finch JA held that "The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that Aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action."<sup>27</sup> This must be balanced with his subsequent statement that the duty to consult imposes "a reciprocal duty on Aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions."<sup>28</sup> For example, in an earlier case, *Ryan v. Schultz*, the court held that because the Gitksan had refused to participate in the consultation process, the MOF had discharged its duty to consult.<sup>29</sup> However, this case was distinguished in *Halfway* because the MOF in *Halfway* had not taken all reasonable steps to consult.<sup>30</sup>

The substantive requirements of the duty to consult are not defined.. They appear to be on a continuum, and vary according to several factors. In *Haida I*, Lambert held that increased evidence and likelihood of establishing Aboriginal title would require an increased level of

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<sup>23</sup> *Haida II*, *supra* note 2 at 26, 28-29.

<sup>24</sup> *Delgamuukw*, *supra* note 3 at 1113.

<sup>25</sup> *Delgamuukw*, *supra* note 3 at 1113.

<sup>26</sup> *Taku River*, *supra* note 1 at 69.

<sup>27</sup> *Halfway*, *supra* note 14 at 690.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ryan v. Shultz*, [1994] B.C.J. No. 2642

<sup>30</sup> *Halfway SC*, *supra* note 14 at 258.

consultation: “the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for Aboriginal title and Aboriginal rights.”<sup>31</sup>

*R. v. Van Der Peet*, (“*Van Der Peet*”), establishes the integral to a practice, custom or tradition test for determining whether Aboriginal rights exist.<sup>32</sup> The considerations include:

- In order to be integral a practice, custom or tradition must be of central significance to the Aboriginal society in question: “To satisfy the integral to a distinctive culture test the Aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the Aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was.”<sup>33</sup>
- The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact
- Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating Aboriginal claims
- The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that that practice, custom or tradition be distinct
- The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence.

Under Lambert’s approach, the more evidence a group puts forward establishing the above criteria, the wider and stronger the duty to consult is upon the Crown. However, the *Delgamuukw* decision does not focus on the strength of the prima facie rights case as a basis for the Crown's obligation. Rather, Lamer C.J. seems to calibrate the scale based on the nature of the infringement:

“The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.”<sup>34</sup>

<sup>31</sup> *Haida I*, supra note 2 at 262.

<sup>32</sup> *R. v. Van Der Peet*, [1996] 2 S.C.R. 507

<sup>33</sup> *Van Der Peet*, at 553.

<sup>34</sup> *Delgamuukw*, supra note 3 at 1113.

This excerpt ties the degree of consultation required to both the degree of the infringement, (first emphasized section), and the nature of the right infringed (second emphasized section). Added support for the second consideration, the nature of the right, as a factor comes from *Delgamuukw* where Lamer C.J. writes that “the degree of scrutiny (required by the fiduciary duty) is a function of the nature of the [A]boriginal right at issue.”<sup>35</sup> He contrasts the internally limited sustenance fishing right in *Sparrow*, with the commercial herring on kelp harvesting right in *Gladstone*. Under Lamer’s approach, the greater the infringement and the more culturally significant the right, or perhaps the more traditional the right, the higher the scope and burden of the duty to consult.

The precise factors for determining the degree of fiduciary scrutiny, and the concomitant consultation requirements, are unclear. However, both the BCCA’s focus on the strength of the first nation’s case, and the *Delgamuukw* discussion of the scope of the infringement and the nature of the right seem relevant. Likely, the courts will follow a multi-factor approach, with all 3 considerations playing a role in determining the required substantive steps for consultation.

### **Summary of the Law:**

The duty to consult arises from the Crown’s fiduciary duty to Aboriginals. Satisfying the duty to consult is a required step in justifying an infringement of Aboriginal rights or title. However, the duty arises before the infringement occurs, and applies whether or not the First Nation has proven the existence of the rights or title in court. The duty can extend to 3<sup>rd</sup> parties. The duty involves good faith on both sides, and imposes a reciprocal duty on First Nations to participate. The substantive requirements of the duty are undefined, and will vary across a continuum depending on the strength of the evidence for establishing rights or title, the degree of infringement and the nature of the right infringed.

Considerations for establishing the strength of a rights claim include that the right be central and significant to the society’s distinctive culture, that the practice have continuity with pre-contact traditions, and that it’s centrality not be a result of European influence. In addition, the practice need not be unique, just distinctive, and courts will modify the rules of evidence in light of Aboriginal considerations and the difficulty of adjudicating such claims.

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<sup>35</sup> *Delgamuukw*, *supra* note 3 at 1109.

After the right is established, the *Sparrow* test for infringement is to ask whether the proposed government activity interferes with an existing Aboriginal right because it:

- a) is unreasonable
- b) imposes undue hardship
- c) prevents the holder of the right the preferred means of exercising it

The *Sparrow* test for justification of infringements first asks whether there is a valid legislative objective, and then considers whether:

- a) the particular regulation, after conservation measures are taken, gives priority to First Nations
- b) there is as little infringement as possible
- c) in the case of expropriation there is fair compensation; and
- d) there has been appropriate consultation

### **Environmental Appeal Board Treatment of Duty to Consult Arguments:**

Appeal No.1999PES-09(c). The Tsawataineuk Band council opposed Interfor's spraying of Vision, claiming inadequate consultation. The Deputy Administrator stated that the Ministry relies on the Permit holder to provide information whether adequate consultation has occurred. The Environmental Appeal Board, ("EAB"), examined the consultation procedures used, and noted that the band did not respond to requests for information from both the Ministry and Interfor. The EAB noted the testimony "that the Band is reluctant to give traditional use information because, in the past, anthropologists used that type of information against them." The Deputy Administrator stated that a response from the Band Council is not required, nor is it necessary to have the Band Council's consent. Interfor declined to come to a general meeting and make a presentation.

The Board held that without the benefits of argument on the meaning of adequate consultation they could not decide that point. The Board did express concern about the process used and the amount of communication that occurred between the parties prior to the issuance of the Permit. The EAB pointed to the remote location of the band as a consideration in the level of consultation. Hearing concluded Feb 11, 2001, Judgment

Appeal No. 2000PES-025(b) to 042(b); 044(b) to 049(b) 052(b); 053(b). This appeal dealt only with the procedural fairness issue of the consultation duty, not the fiduciary duty discussed in

this paper. However, the case did raise the interesting issue of whether a non First Nation appellant could raise the consultation argument on their behalf. The EAB concluded that to argue this point required a First Nation appellant. Hearing concluded October 9, 2001, Judgment December 4, 2001

Appeal No. 2001PES-009(b). This appeal involved three First Nation groups, the Kwicksutaineuk/Ah-kwa-mish, Gwawaenuk and Tsawataineuk Tribes, all claiming traditional uses within the area covered by the Permit. The EAB discussed the actual consultation that took place, and then decided the case on the same basis as APPEAL NO. 1999PES-09(c): without adequate argument on the meaning of the duty to consult, the board cannot decide the issue. – Heard, March 4, 2002, Judgment May 8, 2002.

### **The Provincial Government's Policy:**

The Provincial Government recently distributed a "Provincial Policy for Consultation with First Nations".<sup>36</sup> The purpose of this document was to describe an approach for provincial consultation with Aboriginal rights and title claimants that conforms with the case law on this issue. The document applies to all ministries, agencies and crown corporations. The policy outlines a 3-step consultation process that must be followed unless a pre-consultation assessment clearly indicates that no consultation is required. The policy is intended to impart general guidelines to be implemented in conjunction with agency specific provisions. An online copy of the policy is available at <<http://wlapwww.gov.bc.ca/vir/pp/ipmweb/index.htm>>

As a general principle, the policy recognizes the need to consult not only with those groups whose rights have been established in court, but also groups with claims that are not yet proved. Any dealings with groups with established claims must involve the Legal Services Branch of the Ministry of the Attorney General. The general goals of the consultation include ensuring that the consideration of Aboriginal interests is incorporated in decision-making, and that good faith attempts have been made to address and/or accommodate Aboriginal concerns to an appropriate extent, and in a manner that is proportionate to the soundness of those interests. The policy also outlines general principles to be followed throughout the process. These include:

- consultation should be diligent, meaningful, and with the intention of fully considering Aboriginal interests.
- consultation efforts must attempt to address and/or accommodate a First Nation's concerns relating Aboriginal interests that it identifies or of which the Crown is otherwise aware.
- the onus to prove Aboriginal rights or title lies with the First Nation claiming the existence of those rights or title.
- consultation must consider Aboriginal interests prior to making land or resource decisions concerning Crown land activities that are likely to affect those interests and attempt to address and/or accommodate concerns that are raised
- consultation should be carried out as early as possible in the decision-making process;
- the Crown must ensure the adequacy of any consultation activities it undertakes or that are undertaken on its behalf;
- consultation should involve representatives from all potentially affected First Nations;
- consultation processes need to be effective and timely, carried out in good faith, and wherever possible meet applicable legislative timelines;

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<sup>36</sup> Provincial Policy for Consultation with First Nations, October 22<sup>nd</sup>, British Columbia. Available at Ministry of Sustainable Resource Management website: [www.gov.bc.ca/srm/](http://www.gov.bc.ca/srm/); link "First Nations Consultation Policy"

- decision makers should consider whether infringement appears likely and whether efforts to attempt to address and/or reach workable accommodations of Aboriginal interests are likely to be adequate to justify any such infringement;
- consultation on activities that involve a number of agencies should be integrated wherever possible to ensure maximum clarity and efficiency;
- consultation processes should be clearly defined to the First Nations in question;
- consultation processes should illustrate how information provided by a First Nation is or is to be considered in decision making processes and planning;
- consultation processes can be carried out in a variety of ways, depending on the circumstances and nature of the proposed activity. Methods for meaningful consultation should be selected in relation to the nature of the proposed activity, the requests of the First Nation in question (where those are reasonable), the soundness of the Aboriginal interests that are at issue, and other relevant factors. Though the policy does not set out substantive content for consultation, it does propose some available methods. These include meetings and correspondence with First Nations; exchanges of information related to proposed activities; the development and negotiation of consultation protocols; site visits to explain the nature of proposed activities in relation to Aboriginal interests; researching existing studies or carrying out new ones, if appropriate; and participation in local advisory bodies;
- the consultation process will inform the First Nation(s) in question of the potential effect of a proposed activity in a manageable and understandable format, with adequate time for review, wherever possible within the context of time limits imposed for the making of statutory decisions.
- all letters, meetings, telephone calls, site visits, and other efforts by the Crown to obtain information about Aboriginal interests prior to making land and resource use decisions, are elements of the consultation process and records of them should be kept.

The policy process starts with a Pre-Consultation Assessment to determine whether consultation is required. The policy outlines four situations where a Crown decision or authorization may not require consultation.

- if there is no evidence of historical Aboriginal presence in the area.
- if the potentially affected First Nation groups have either indicated in prior consultations that they have no particular interests with respect to the affected area, or have canvassed their interests in another context, for example legal proceedings, and these interests do not relate to the area in question.
- if the land in question is currently alienated to a third party in fee simple, and cannot be used for the exercise of Aboriginal rights or title. Similarly, if the land has been developed in a manner, or is surrounded by lands developed in a manner that precludes the exercise of Aboriginal rights or title.
- if the First Nation and the Crown have negotiated a protocol or agreement that identifies certain types of decisions that do not require consultation.

Despite outlining the four situations above, the policy warns employees that situations not requiring consultation are unlikely, and they should err on the side of following the consultation procedure. This section concludes that “if there is evidence of historical Aboriginal presence in

the area in question, or previous consultation has determined that Aboriginal interests may be at issue in that area, and the nature of other existing interests in the land or the level of surrounding development do not preclude the ability to exercise Aboriginal rights or enjoy Aboriginal title as a right of present possession, then consultation is necessary and decision-makers should ensure that the consultation process is carried out.”

## **The Consultation Process**

### **Stage 1**

Initiating consultation is the first stage in the process. The policy divides this stage into two parts.

#### Part I

This part involves starting consultation activities. The policy explains that consultation methods will vary between situations, depending upon ways in which the particular Ministry has consulted with First Nations in the past, the preferences of the First Nation in question (where these are reasonable), the type of information needed and other specific factors. The policy requires that decision-makers select the means most appropriate for gathering information needed to consider Aboriginal interests in their decision. When consultation does not produce adequate information to enable an evaluation of the soundness of Aboriginal interests, decision-makers must turn to other sources to make an initial determination of whether Aboriginal interests in the area give rise to the possibility that Aboriginal rights and/or title may be proven subsequently. The listed sources include archaeological studies, local knowledge, archival studies, existing traditional use studies, and legal advice.

#### Part II

The second part of stage 1 is to consider the Aboriginal interests. This involves a consideration of the factors listed in the policy:

- Title to the land has been continuously held in the name of the Crown.
- Indicators of Aboriginal interests in the land that result from consultation and/or other evidence of First Nation use or occupation, such as:
  - (a) land near or adjacent to a reserve or former settlement or village sites;
  - (b) land in areas of traditional use or archaeological sites;
  - (c) land used for Aboriginal activities;

(d) notice of an Aboriginal interest/Aboriginal rights and/or title from an First Nation, even where made to another Ministry or agency of the Crown; and  
 (e) land subject to a specific claim.

- Undeveloped land such as parcels outside an urban area and close to known fishing, hunting, trapping, gathering or cultural sites.

The presence of one or more of these factors means the decision maker must consider Aboriginal interests in their decision.

Similarly, the policy lists a number of indicators from which the decision maker infer a relatively low possibility that Aboriginal interests may be proven subsequently to be existing Aboriginal rights and/or title. This would indicate that lower levels of consultation are appropriate in the particular circumstances. The policy lists the following factors:

- Little indication of historical Aboriginal presence in the area (e.g. land distant from reserves or settlement areas with no known Aboriginal interests).
- Land presently alienated in fee simple to third parties (length of occupation and the continuation of that interest will be important).
- Land presently alienated on a long-term lease to third parties.
- Land within an area where the Aboriginal interests of the First Nation in question have been exchanged for, or modified to be, treaty rights. Note: This does not lessen the need to consult, but will likely alter the focus of the consultation from Aboriginal interests to treaty rights.
- Land developed in a manner that precludes the exercise of Aboriginal rights or the enjoyment of Aboriginal title as a right of present possession.
- Land within an urban area, or surrounded by lands that have been developed in a manner that precludes the exercise of Aboriginal rights or the enjoyment of Aboriginal title as a right of present possession.
- No indication that a First Nation has maintained, or continued to assert, despite any interference resulting from European settlement, a substantial connection or special bond with the land since 1846.
- Land that was abandoned by the First Nation in question prior to 1846.
- In the case of claimed Aboriginal title, competing or conflicting Aboriginal title claims to the same area by distinct First Nations (e.g. mutually exclusive overlapping claims). Such overlapping claims may point, however to a higher possibility that Aboriginal rights may be at issue in respect of those lands.

After weighing these factors, the decision maker decides whether there is a reasonable probability of the Aboriginal interest subsequently being proven, and proceeds to Stage 2, or that little possibility exists, and therefore ends the consultation process.

## Stage 2

At stage 2, the decision-maker must consider the impact of the decision on the Aboriginal interests and whether it will infringe them. The policy lists the following considerations:

- Does the proposed activity potentially interfere with Aboriginal activities on the land?
- Where Aboriginal title appears to be a strong possibility, will the proposed activity provide for involvement of, or direct economic benefit to, the First Nation?
- Will the activity change or damage the nature of the land or the availability of resources (e.g. fish or wildlife), and to what extent?
- In the case of asserted Aboriginal rights, if there is proposed resource extraction, is the resource renewable or nonrenewable and what effect will that have on the ability to continue to exercise rights?
- Will any of the land be sold to third parties as part of this activity?
- Will long term leases or tenures be provided to third parties?
- Are the leases or tenures renewable, and does the renewal involve further changes to the land or further extraction of resources?

Ultimately, the decision makers are asked to consider the infringement part of the *Sparrow* test. If the decision will not impose any of the three *Sparrow* infringements (i.e. it is unreasonable, it imposes undue hardship, or it prevents the holder of the right the preferred means of exercising it), then the decision is unlikely to infringe an Aboriginal right and consultation regarding infringement and justification will likely not be required. If, on the other hand, there appears to be a likelihood that the decision may result in an infringement of those interests should they subsequently be proven as existing Aboriginal rights and/or title then the decision maker should proceed to stage three. In making the decision, the policy warns the decision-maker that if the presence of Aboriginal title is a strong possibility, then the possibility of infringement will be significant.

## Stage 3

This stage involves a consideration of whether such infringement could be justified. Unless the infringement is very minor the policy mandates consulting the Legal Services Branch of the Ministry of the Attorney General. The principles set out at this stage parallel the *Sparrow* and *Delgamuukw* requirements. For infringement of Aboriginal rights, the policy recognizes conservation, public safety, historical reliance on a resource by non-Aboriginal people and regional economic fairness as valid objectives for infringing Aboriginal rights. In circumstances

of infringement of Aboriginal title, the policy reproduces the list of valid objectives from *Gladstone*.

Two key factors are identified in making the Stage 3 decision. First, the extent of the infringement. The policy notes that a range of impacts may occur on Aboriginal interests (e.g., development with no chance of reclaiming land to its natural state v. development of renewable resources). Types and levels of possible infringement may depend on the Aboriginal connection to the land (e.g. an impact on Aboriginal interests in relation to a historical village site or other site of historical exclusive occupation may have greater ramifications than an impact on Aboriginal interests in respect of traditional hunting grounds). Second, the decision-maker should consider the extent to which attempts have been made to address Aboriginal interests, and whether sufficient consultation has occurred. The policy directs the decision-maker to inquire whether there has been a genuine effort to attempt to reach workable accommodations of identified Aboriginal interests. The policy notes that efforts to minimize possible infringement are required.

If the likely infringement appears justifiable, the decision-maker can end the process. However, if the infringement is likely not justifiable, the decision-maker should go on to stage 4.

#### **Stage 4**

The decision-maker should try and address the concerns of the First Nation and negotiate an agreement. The policy notes that the range of activities that can be carried out in terms of coming to a negotiated resolution vary greatly from situation to situation, and according to agency statutory mandates, policies, programs, appropriations, and available statutory discretion. It warns decision-makers to be cognizant of the potential precedent-setting nature of negotiated solutions, and mandates that any negotiated solution likely to set precedents, must involve the Deputy Ministers Committee on Natural Resources and the Economy.

If the accommodation negotiation process is successful, the decision maker may proceed. If, however, no agreement is reached, the decision-maker should re-evaluate the project or seek legal advice from the Legal Services Branch, Ministry of Attorney General.

### Arguments at EAB

Both Appeal NO. 2001 PES-009(b) and Appeal No. 1999 PES-09(c) at the EAB avoided the consultation argument by noting that neither side made arguments regarding the content of the duty to consult. However, *Taku River* and *Haida I* clearly impose the duty to consult upon the Crown, and frame it as a positive obligation. As such, one could argue the onus is on the Crown to prove that the duty was met. Thus, if the Crown cannot show they fulfilled that duty, then the EAB should conclude they have not. This complies not only with *Taku River* and *Haida I* views on the duty, but also with the general approach in Aboriginal issues to resolve ambiguities in the favour of the Aboriginals. Moreover, the honour and integrity of the Crown are at stake in their dealings with Aboriginals, and this approach would uphold them. Placing the burden on the Crown requires it to adduce evidence showing how it attempted to accommodate First Nation concerns. The government's own consultation policy, under the general principles, supports this argument, as does the BCCA in *Haida I*.<sup>37</sup> Moreover, the burden during the justification stage of the *Sparrow* test is usually the Crown, and the duty to consult is part of that stage. Therefore it is up to the Crown to establish that the duty to consult has been fulfilled. Although First Nations have an onus to establish a prima facie case, this burden is a small one, and consultation may be required even in its absence.<sup>38</sup> Though the First Nations must likely establish some foundation for the claim of rights or title, the onus is on the Crown to establish that the duty to consult was fulfilled. Lack of adequate argument, as the EAB has pointed to in the past, will mandate a finding that the Crown breached this duty. Strategically, shifting the burden to the Crown is a crucial step. In addition to the evidentiary requirements outlined above, it will push the Crown into meaningful consultation, and force it to find ways to actually address Aboriginal concerns. This way, the role in the decision-making process intended by the duty to consult will be fulfilled. When these Aboriginal concerns mesh with environmental groups' concerns, the duty to consult can become a powerful tool to force government and industry to respond.

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<sup>37</sup> *Haida I*, *supra* note 2 at 261: "...and then the onus shifts to the Crown to establish that there was justification for the infringement at and before the time when the infringement occurred."

<sup>38</sup> *Haida I*, *supra* note 2 at 262 "I am not saying that if there is something less than a good prima facie case then there is no obligation to consult."

All the EAB decisions came down before the implementation of the provincial government's new policy, so no arguments were heard regarding it. The Crown will likely point to its policy, and the Deputy Administrator's compliance with it, as evidence of adequate consultation. In response to this, First Nations can argue that the Crown did not comply with that policy, and so did not even meet their definition of adequate consultation. Though the policy does not have the force of law, evidence that the Crown failed to comply with its own standards is evidence it acted inconsistently with the fiduciary duty underlying the duty to consult. Several parts of the policy provide seeds for these arguments. The general principles make it clear that consultation must occur prior to the decision-making. The Crown must establish this. Moreover, the policy requires that consultation take place as early as possible. In the silviculture pesticide use context, the use of pesticides was foreseeable from the moment the TFL was granted. How long after this was consultation carried out? Depending on the facts, this requirement may provide room for arguing the policy was not implemented. In addition, the Crown must point to evidence of how it accommodated or addressed first Nation concerns. If it cannot, then the Crown has breached its own policy. Other fertile sources, depending on the particular facts of each case, include the requirement of consulting all potentially affected First Nations; 'potentially affected' is a low standard, and likely incorporates any First Nation group near or using the area. Also the requirement of good faith may provide further sources of argument in this regard. The Crown cannot hide behind third parties, because the policy requires the government to ensure the adequacy of any consultation carried out on its behalf. As such, the arguments about depending on the forest company to carry out the consultation, as outlined by the deputy Administrator in Appeal No.1999PES-09(c), must be rejected.

Even if the Crown did comply with its policy, this policy is not law, and the First Nations can argue they were owed a higher level of consultation. Arguments regarding the level of required consultation should focus on a multifactor approach: the strength of the claim, the nature of the right, and the degree of infringement. *Haida I* focuses on the strength of the claim as the basis for determining the requisite degree of consultation. For the appellants, this involves collecting evidence relating to the *Vanderpeet* criteria. Evidence should focus on the central significance of the claimed right to the First Nation culture. It must establish the continuity of the right, and its importance pre-contact. For example, evidence that links the gathering of traditional plants in the area to important cultural practices or traditions would increase the consultation burden on the Crown.

A corollary of the evidence of the centrality of the practice is an examination of the nature of the right. Some rights are so integral that even minor infringements cannot be justified. Moreover, the nature of certain types of rights may make specific types of infringement even more intrusive. For example, the gathering of medicinal plants and other medicines may be completely incompatible with the introduction of even small amounts of pesticides. Similarly, evidence regarding the degree to which the decision would infringe these interests should strengthen the duty to consult argument. Certainly the scientific evidence on the impact of pesticides on the area would be helpful here as evidence of the environmental harm and its impacts on the right in question. Strategically, the appellant should adduce evidence of the existence of the right, as per the Vanderpeet factors, the significance of the right, and the degree of infringement. The issue is not whether Aboriginal rights will in fact be ultimately established or infringed, but rather whether there is a likelihood the courts will find such an infringement. For environmental groups, the gathering of this type of evidence can be daunting, if not impossible.

However, the rules of evidence will be modified in light of the evidentiary difficulties of this endeavour. As indicated by the quoted testimony in Appeal No. 1999PES-09(c), many First Nation groups will not negotiate or disclose such information for fear of compromising their treaty negotiations, or for other reasons. If this is a concern for the First Nation groups involved, it may be possible to provide information in general terms. For example, the policy only requires notice of an interest in an area to mandate consultation. Moreover, many of the factors are independently provable: whether title to the land has been held by Crown, the presence of reserve lands, specific claims, or the absence of urban areas. In addition, the Ministry of Water, Land, Air Protection advises pesticide use applicants to consult alternative sources of information to determine Aboriginal rights when insufficient information is available. Their list of alternative sources includes: information provided in Forest Development Plan consultation processes, Archaeological Overview Studies, Archaeological Impact Assessments, Cultural Heritage Overviews, Local knowledge, Ministry contacts (Native Program Officer, Aboriginal Forestry Advisor), Traditional Use Studies, Statements of Intent, MWLAP's Aboriginal Affairs Branch or Legal Counsel, Company Native Liaison Officers, treaties, research papers/theses, LRMPs, FDPs. It may also be possible to submit evidence 'without prejudice'. First Nation legal counsel should be contacted to make this determination. Although specific information may not be required to establish a breach of the duty, it is preferable since it would strengthen the claim

to a higher level of consultation. Many Aboriginal groups, particularly those already engaged in any litigation or treaty negotiation, have already gathered much of this information. They are certainly in the best position to gather more. For this reason, in addition to ensuring the group's continued participation in the appeal, it is essential to cultivate a strong working relationship with the affected First Nations, and to be aware of their evidentiary concerns.

The final point of argument is regarding the actual consultation that took place. Once the extent of the duty has been established, appellants must be able to rebut the Crown's arguments, and point out areas where the Crown failed to meet its duty to consult. Specifically, appellants should gather evidence and make arguments about failure to provide the necessary information in a timely fashion, failure to provide adequate opportunities for the First Nation to express its views and concerns, and failure to address these concerns in the resultant activity. These are the broad requirements of the duty to consult outlined in the case law. The First Nation group involved must keep a chronology of phone calls, correspondence and meetings. Opportunities for discussion, and missed opportunities, should be noted, as well as what concerns were expressed. As the Crown seeks to prove it met its burden, this evidence can be produced to show the deficiencies in the consultation, and to argue for what steps should have been taken.

Another source of argument may arise from the SCC's treatment of *Paul v. British Columbia (Forest Appeals Commission)*, ("*Paul*").<sup>39</sup> In *Paul*, the issues concern the constitutionality of conferring power to the Forest Appeals Commission to determine issues relating to a Federal head of power, Indians and land reserved for Indians. The provincial consultation policy does the same thing, and arguments before the EAB require similar considerations. Moreover, the policy requires provincial civil servants to make determinations about the existence, infringement and justification of Aboriginal rights. The case should be heard this winter.

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<sup>39</sup> *Paul v. British Columbia (Forest Appeals Commission)*, [2001] 7 W.W.R. 105

## **Transition Memo**

### Summary of Work

The work was for Raincoast Conservation Society. The project involved researching the current status of the law around the duty to consult, the provincial policy on it, and the treatment of these arguments by the Environmental Appeal Board (“EAB”). The focus of the research was on recent BCCA case law, and the SCC cases those judgments relied on. In addition, the online governmental policies were reviewed, as well as EAB decisions on the issue. The final product takes the form of a memo, with an analysis and summary of the law, a review of the government policy and EAB decisions, and recommendations for future treatment of this argument before the EAB.

### Contacts

In addition to Chris Genovali and Ian McAllister at Raincoast, I contacted Roberta Patterson at WLAP: Roberta.Patterson@gems5.gov.bc.ca.

### Disbursements

None.

### Future of the Project

This project took place in a factual vacuum without specific facts as to what consultation has occurred to this point. The state of the coalition is always flexible, and the PMP has not yet been approved. As such, there is the potential for a lot of interesting work with Raincoast in the future. Specifically, arguments could be drawn up for a potential EAB application. These should focus not only on the duty to consult, which would require also representing the First Nations involved, but on other issues relevant to Raincoast’s concerns. Hopefully the project could include representing these clients at the EAB. By having the ELC represent Raincoast, and potentially others, on this matter, the money these groups have available for legal counsel can be saved for formal judicial review. In addition, the experience for the students of working with these clients and preparing for submissions would be excellent.

### Deadlines

The PMP will likely receive approval sometime in the spring, and some way of monitoring these approvals must be established. Once approved, there are statutory deadlines for filing notices to appeal to the EAB. As well, the evidential concerns in this case require early intervention with the groups involved in any challenge at the EAB.

### Contact Information

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December 14<sup>th</sup>, 2002

Chris Genovali  
Raincoast Conservation Society  
PO Box 8663  
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V8W 3S2

RE: Pesticide Appeals and the Duty to Consult

Dear Chris,

Here is the report on my work regarding the duty to consult and appeals to the EAB. I believe the report will provide Raincoast with a good summary of the law and government policy around the duty to consult, and should help in developing a plan with the Heiltsuk First Nation and the Nuxalk Nation House of Smayusta, as well as other members of the coalition, to challenge future pesticide plans and permits in the central coast area. The law around this issue is developing as we speak, and some of the findings outlined in the report may be clarified or modified in future decisions. However, the evidentiary requirements and the potential strategy ideas should remain relevant.

I know that your fight against pesticides on the central coast will be a long one, and the process regarding PMP No. 215-229-02/07 is just beginning. I enjoyed working on this part of the project, and I hope that the Environmental Law Centre can work more closely on this issue in the future. We also hope, with your approval, to put some form of this work on our website. I have sent a copy electronically to both you and Ian, but can also provide a hard copy if you desire. I hope you find the result helpful.

All the best,

Paul Brackstone